

## Chapter 7: Speedy Trial and Related Issues

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This chapter covers four related issues concerning trial delay:

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

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

The Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, as well as analogous provisions in North Carolina's Constitution, are the primary source of law guaranteeing a defendant charged with a felony the right to a timely prosecution and a speedy trial. North Carolina has no statute of limitations for felonies, and our speedy trial statute, G.S.15A-701 to -710, was repealed effective October 1, 1989.

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

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

## **7.1 Statutory Protections against Delayed Prosecution**

### **A. Statute of Limitations for Misdemeanors**

G.S. 15-1 requires that prosecutions for misdemeanors be initiated by either indictment or presentment (discussed further in the next section) within *two years* after the commission of the offense. Although the statute refers only to prosecutions initiated by grand jury action, it applies equally to offenses prosecuted on a warrant or other criminal process, such as a criminal summons. For those prosecutions initiated by warrant or other criminal process, the process must issue within the statute of limitations period. *See State v. Hundley*, 272 N.C. 491 (1968); *State v. Underwood*, 244 N.C. 68 (1956).

This statute further states that if a prosecutor obtains a timely but defective indictment, the State has one year to re-indict the defendant. This additional period applies to indictments only. *See infra* § 7.1B (issuance of void warrant or invalid indictment).

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

*Jacksonville*, 405 U.S. 156 (1972) (Florida vagrancy statute held void for vagueness where it failed to give a person of ordinary intelligence fair notice that certain conduct was forbidden by the statute); *United States v. Habig*, 390 U.S. 222, 227 (1968) (courts urged to construe statutes of limitation in favor of repose).

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

## **B. Compliance with Statute of Limitations**

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

**Issuance of arrest warrant.** For cases initiated by an arrest warrant or other criminal process, the process must likewise be issued before the statute of limitations expires. Thus a prosecution is timely if a warrant issues before the two-year statute of limitations runs, even if the case does not reach superior court on appeal for more than two years. *See State v. Underwood*, 244 N.C. 68 (1956).

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

**Issuance of void warrant or invalid indictment.** An invalid warrant does *not* toll or arrest the statute of limitations—that is, it does not stop the clock from running. *See State v. Hundley*, 272 N.C. 491 (1968). Thus, even though it is permissible as a matter of pleading practice for a prosecutor to issue a statement of charges to modify a void warrant, such a statement of charges is nevertheless barred if it is issued after the statute of limitations has expired (in most misdemeanor cases, two years from the offense date). *See State v. Madry*, 140 N.C. App. 600 (2000).

In contrast, G.S. 15-1 provides that if an indictment obtained within the statute of limitations period is found to be defective, the State has one year from the time it abandons the indictment to correct the error and re-indict the defendant. The above cases

recognize that this provision applies only to defective indictments; it does not apply to defective warrants.

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

On the other hand, the statute of limitations is *not* tolled when the prosecutor takes a voluntary dismissal pursuant to G.S. 15A-931(b). *See State v. Lamb*, 84 N.C. App. 569 (1987), *aff'd*, 321 N.C. 633 (1988). Because a voluntary dismissal completely terminates the charges, the prosecution would need to refile the charges within two years of the offense date to satisfy the statute of limitations for most misdemeanors. *Compare* N.C. R. Civ. P. 41(a) (unlike in criminal case, plaintiff in civil case may refile action within one year after taking voluntary dismissal as long as action was originally commenced within statute of limitations). For a further discussion of dismissals by the State, *see infra* § 7.3C.

### **C. Waiver of Statute of Limitations**

G.S. 15A-954(a)(2) requires the court to dismiss charges against a defendant if the statute of limitations has run. However, the defendant must affirmatively raise the statute of limitations at or before trial to preserve the right to dismissal. *See State v. Brinkley*, 193 N.C. 747 (1927) (plea of guilty waived statute of limitations defense); *State v. Holder*, 133 N.C. 709 (1903) (statute of limitations defense could not be raised for first time on appeal). The failure to raise the statute of limitations in district court probably does not waive the right to raise it in superior court on appeal for trial de novo. *See* G.S. 15A-953 ("except as provided in G.S. 15A-135 [stipulations to or express waivers of improper venue], no motion in superior court is prejudiced by any ruling upon, or a failure to make timely motion on, the subject in district court").

### **D. Statutory Limitations on Jurisdiction of Juvenile Court**

**Based on juvenile's age.** The juvenile court has exclusive, original jurisdiction over all offenses committed by a person who is less than sixteen years of age at the time of the offense. *See* G.S. 7B-1501(7). In most cases, the jurisdiction of the juvenile court over any cause of action automatically terminates when a person reaches the age of eighteen.

See G.S. 7B-1601(b). Where a juvenile is committed to the custody of the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center for a serious felony, the juvenile court may retain extended jurisdiction until the juvenile reaches the age of nineteen, or twenty-one, depending on the felony. See G.S. 7B-1602; see also NORTH CAROLINA JUVENILE DEFENDER MANUAL § 3.3, at 23–24 (Aug. 2008) (discussing jurisdictional age limits, termination of jurisdiction, and extended jurisdiction), online at [www.ncids.org](http://www.ncids.org) (Reference Manuals).

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

Our current juvenile code states that the juvenile court may assert jurisdiction over a person 18 years of age or older, an adult, for the limited purpose of determining whether to dismiss or bind over to superior court any felony charges alleged to have been committed by the adult defendant when he or she was between the ages of thirteen and sixteen. See G.S. 7B-1601(d). Likewise, when a delinquency proceeding has been initiated but is not concluded before the juvenile’s 18th birthday, the juvenile court retains limited jurisdiction to determine whether the juvenile petition will be dismissed or the case will be transferred to superior court for trial as an adult. See G.S. 7B-1601(c).

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

**Based on time of filing of petition.** In the case of *In re M.C.*, 183 N.C. App. 152 (2007), the court held that under G.S. 7B-1703(b) a juvenile petition must be filed within 15 days after the complaint is received by the juvenile court counselor, and an extension of an additional 15 days may be granted at the chief court counselor’s discretion. Thus, the trial court lacks jurisdiction to hear the matter if the petition is filed more than fifteen days after the juvenile court counselor receives the complaint and there is no proof that the court counselor granted an extension. See *In re K.W.*, \_\_\_ N.C. App. \_\_\_, 664 S.E.2d 66 (2008) (court lacked subject matter jurisdiction where petition filed sixteen days after juvenile court counselor received complaint and no proof of extension). Where there is proof that the court counselor has granted an extension, the juvenile petition must be filed within 30 days after the complaint is received by the juvenile court counselor. In *In re M.C.*, the Court stated that the only indication when the juvenile court counselor received the complaint was the date (November 1, 2005) that the petition was verified by a

detective. The juvenile petition was filed with the trial court on December 2, 2005, which was more than 30 days from November 1, 2005. Therefore, the trial court was without jurisdiction to hear the matter. Although the juvenile did not raise the issue before the trial court, it could be raised for the first time on appeal. The court vacated the trial court's adjudication and disposition orders and ordered that the case be dismissed. *Accord In re J.B.*, 186 N.C. App. 301 (2007); *see also* NORTH CAROLINA JUVENILE DEFENDER MANUAL § 6.3C, at 79–80 (Aug. 2008) (discussing time limit on juvenile petitions), online at [www.ncids.org](http://www.ncids.org) (Reference Manuals).

### **E. Rights of Prisoners**

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

**In-state prisoners.** G.S. 15A-711 sets two deadlines for proceeding on pending in-state charges against a defendant incarcerated in North Carolina. First, a defendant who is incarcerated in North Carolina pursuant to a criminal proceeding and who has other state charges pending against him or her can require the prosecutor to “proceed” in the pending case by filing a written request with the clerk where the charges are pending and serving a copy of it on the prosecutor. *See* G.S. 15A-711(c). This provision protects defendants who are already serving a sentence of imprisonment on other charges or who are in pretrial custody awaiting trial. It allows defendants to request that the State proceed on pending charges whether or not the State has lodged a detainer against them. Within six months of a properly-filed request, the prosecutor must “proceed” by requesting that the defendant be returned to the custody of local law enforcement so that he or she can stand trial on the pending charges. *See* G.S. 15A-711(a). If the State fails to make a written request for temporary release within the six-month period, the charges must be dismissed. *See* G.S. 15A-711(c).

Second, G.S. 15A-711 sets a deadline of eight months for trial of a defendant following a properly-filed request, although that deadline is flexible and may be unenforceable under recent court opinions. The State has up to six months under G.S. 15A-711(c) to request custody of the defendant, plus a period of temporary release of up to 60 days under G.S. 15A-711(a), to try the defendant. The cases initially interpreting G.S. 15A-711 recognized that these provisions established an eight-month time limit for trying the defendant, although the State had some leeway in completing the trial. *See State v. Dammons*, 293 N.C. 263 (1977) (State made request for custody of defendant within six

months, and case was scheduled to begin within eight months of defendant's request but was continued because of absence of key State's witness; G.S. 15A-711 not violated); *see also* G.S. 15A-711(b) (trial court has authority to decide precedence of trials). More recently, the Court of Appeals has held that the State complies with G.S. 15A-711 by making a written request to secure the defendant's presence at trial within six months of the defendant's request, whether or not the trial takes place within the eight-month statutory period. *See State v. Doisey*, 162 N.C. App. 447, 450 (2004). Even under *Doisey*, G.S. 15A-711 continues to require dismissal if the State fails to request custody of the defendant within the six-month deadline. In *Doisey*, the Court of Appeals remanded the case for the trial court to determine whether the State had met that deadline.

Another statute, G.S. 15-10.2, provides a similar mechanism for a prisoner to require the State to proceed to trial on pending criminal charges. A prisoner may proceed under both G.S. 15A-711 and G.S. 15-10.2, if applicable. G.S. 15-10.2 applies to persons who are already serving a sentence in North Carolina and who have had a detainer lodged against them. *See State v. Wright*, 290 N.C. 45 (1976) (noting adverse consequences on prisoner of having detainer lodged against him or her). The statute explicitly provides that a prisoner must be brought to trial on pending charges within eight months of a properly-filed request by the prisoner. The time limit in G.S. 15-10.2 was not addressed in *Doisey*, so this provision may provide some relief for a prisoner subject to a detainer who is not tried within eight months. Note, however, that G.S. 15-10.2 allows the court to grant "any necessary and reasonable continuance." Thus, while the time frame of G.S. 15-10.2 may be firmer than that of G.S. 15A-711, neither provision guarantees the right to a trial within a particular time frame. The two statutes provide a useful mechanism for making the State move forward on pending charges when the defendant is imprisoned on other matters, but a defendant seeking relief for delay in trial of the case may need to look more to constitutional speedy trial authority and pertinent calendaring requirements, discussed further below.

A prisoner who is requesting trial under G.S. 15A-711 or G.S. 15-10.2 must comply with the notice and service requirements described therein. The two statutes' provisions are similar but not identical. If the defendant fails to comply with the requirements, the request may be considered invalid and dismissal may be barred. *See State v. Pickens*, 346 N.C. 628 (1997) (request did not comply with G.S. 15A-711); *State v. Doisey*, 162 N.C. App. 447 (2004) (request complied with G.S. 15A-711); *State v. Hege*, 78 N.C. App. 435 (1985) (request did not comply with G.S. 15A-711); *State v. McKoy*, 294 N.C. 134 (1978) (request did not comply with G.S. 15-10.2).

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

First, when a person is serving a term of imprisonment outside of North Carolina, and North Carolina issues a detainer against him or her for untried offenses, the person is entitled to a trial within *180 days* of requesting disposition of the North Carolina charges. *See* G.S. 15A-761 (Article III(a)); *see also State v. Prentice*, 170 N.C. App. 593 (2005) (time begins to run only when “detainer” is lodged; case discusses meaning of “detainer”).

A prisoner seeking disposition of his or her charges must notify both the prosecutor and the court in the district where the charges are pending of: (i) his or her place of imprisonment; and (ii) his or her request for final disposition of the charges. *See* G.S. 15A-761 (Article III(a)); *State v. Schirmer*, 104 N.C. App. 472 (1991). The statutory period begins to run on the date the prosecutor receives the demand, not on the date the prisoner sends it. *See State v. Treece*, 129 N.C. App. 93 (1998). If the defendant is not tried within the prescribed time period, the charges against him or her must be dismissed with prejudice. G.S. 15A-761 (Article III). However, the trial court may grant continuances where reasonable or necessary, thereby extending the 180 day period. G.S. 15A-761 (Article III(a)); *State v. Capps*, 61 N.C. App. 225 (1983).

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

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

## **F. Pretrial Release**

Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pre-trial incarceration. If a defendant is incarcerated in jail on a felony warrant and demands a speedy trial in open court, the defendant must either be indicted during the next term of court or released from custody, unless the State’s witnesses are not available. Similarly, if an incarcerated person accused of a felony demands a speedy trial and is not tried within a statutorily set period (two terms of court provided the two terms are more than four months apart), the person is entitled to release from incarceration. *See* G.S. 15-10; *State v. Wilburn*, 21 N.C. App. 140 (1975).

## G. Other Statutory Deadlines

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

**DWI trials involving motor vehicle forfeitures.** G.S. 20-28.3(m) provides that “[d]istrict court trials of impaired driving offenses involving forfeitures of motor vehicles pursuant to G.S. 20-28.2 shall be scheduled on the arresting officer’s next court date or within 30 days of the offense, whichever comes first.”

**Probable cause hearings.** See G.S. 15A-606(d) (deadline for probable cause hearing). For a further discussion of probable cause hearings, see *supra* Chapter 2.

**Probation violations.** There are various deadlines for proceedings in cases involving alleged probation violations. For example, while the court may hold a hearing on an alleged violation of probation at any time during the period of probation under G.S. 15A-1344(d), once the period of probation has ended the court has no jurisdiction to hold a probation violation hearing unless the State filed a written violation report with the clerk before the period of probation expired, indicating its intent to hold a hearing. See G.S. 15A-1344(f); *State v. Hicks*, 148 N.C. App. 203 (2001); see also forthcoming chapter on probation in Volume 2 of this manual.

## 7.2 Pre-Accusation Delay

### A. Constitutional Basis of Right

The Sixth Amendment right to speedy trial does not attach prior to arrest, indictment, or other official accusation, but a defendant is protected from unfair or excessive pre-accusation delay by the due process clause of the Fifth and Fourteenth Amendments. See *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Finding that sometimes pre-accusation delay is necessary to prevent post-accusation delay and that generally post-accusation delay is more harmful to a defendant, *Lovasco* emphasized that the due process right to timely prosecution is limited. Due process is violated only where the defendant’s ability to defend against the charge is impaired by the delay and the reason for the delay is improper. However, even relatively short delays may result in a due process violation in some circumstances. See *infra* § 7.2D.

### B. Proving Prejudice

To establish a due process violation a defendant must demonstrate prejudice—that is, the defendant must show that the pre-indictment delay impaired his or her ability to defend against the charge. See *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971); *State v. McCoy*, 303 N.C. 1 (1981). General allegations

that the passage of time has caused memories to fade are insufficient. *See State v. Goldman*, 311 N.C. 338 (1984) (prejudice not established by showing that defendant did not recall date in question or could not account for his whereabouts on that date); *State v. Jones*, 98 N.C. App. 342 (1990). Instead, the defendant must establish that pre-accusation delay caused the loss of significant and helpful testimony or evidence. *See State v. Dietz*, 289 N.C. 488 (1976). Counsel also may have an obligation to ameliorate prejudice if possible. *See State v. Hackett*, 26 N.C. App. 239 (1975) (defense motion denied in part because defendant who alleged pre-accusation delay had not tried to remedy memory loss regarding underlying incident by moving for a bill of particulars or moving for discovery of the information).

### C. Reason for Delay

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

**Delay in violation of due process.** North Carolina cases have recognized intentional delay by the State as a basis for a due process violation. *See State v. McCoy*, 303 N.C. 1 (1981) (describing showing required for due process violation and suggesting but not resolving that intentional delay may be required to establish violation).

Proof of intentional delay is not necessarily required, however. The government in *Lovasco* conceded that recklessness on the part of the State in failing to prosecute may give rise to a due process violation. *Lovasco*, 431 U.S. at 796, n.17. Justice Stevens, in dissent in *Lovasco*, suggested further that where the government had no reason for the delay a constitutional violation may arise. *Id.* at 799. The Fourth Circuit, interpreting *Lovasco*, has held that the proper approach to determining whether due process is violated is to balance the prejudice to the defendant against the reasons for the delay. *See Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990) (defendant need not demonstrate an improper motive on the part of the prosecutor); *Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996) (following *Howell*, but noting that most other circuits do not use balancing approach); *see also State v. Dietz*, 289 N.C. 488 (1976) (applying balancing approach).

**Excusable delay.** Courts have found no violation of due process where a delay in prosecuting a case is attributable to the exigencies of investigation. *See United States v. Lovasco*, 431 U.S. 783 (1977) (investigative delay acceptable; investigation prior to indictment should be encouraged); *accord State v. Goldman*, 311 N.C. 338 (1984); *State v. Netcliff*, 116 N.C. App. 396 (1994) (holding that pre-indictment delay was acceptable, based in part on end date of undercover drug operation in relation to date of indictment); *State v. Holmes*, 59 N.C. App. 79 (1982) (delay excusable where necessary to protect identity of undercover officer). Also, courts have found no constitutional violation where the delay in prosecution is the result of procrastination in reporting crimes to law

enforcement. *See State v. Everhardt*, 96 N.C. App. 1 (1989), *aff'd*, 326 N.C. 777 (1990) (offense reported three years after commission); *State v. Hoover*, 89 N.C. App. 199 (1988) (sexual offense against child not reported for six years, then prosecuted promptly); *State v. Stanford*, 169 N.C. App. 214 (2005) (fifteen year delay in report of sexual offense against child).

#### **D. Case Summaries on Pre-Accusation Delay**

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

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

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

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

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

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

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

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

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

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

### **E. Investigating Pre-Accusation Delay**

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

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

### **F. Motions to Dismiss**

A motion to dismiss for untimely prosecution may be brought under G.S. 15A-954(a)(4), which provides that the court must dismiss the charges in a criminal pleading if violation of the defendant's constitutional rights has caused irreparable prejudice. *See State v. Parker*, 66 N.C. App. 293 (1984). G.S. 15A-954(c) permits such a motion to be made "at any time." However, to avoid the risk of waiver, such motions should be made at or before trial. *See generally State v. Brinkley*, 193 N.C. 747 (1927) (plea of guilty waived statute of limitations defense); *State v. Holder*, 133 N.C. 709 (1903) (statute of limitations defense could not be raised for first time on appeal).

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

## 7.3 Post-Accusation Delay

### A. Constitutional Basis of Right

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

### B. Test for Speedy Trial Violation

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

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

*Barker* emphasized that there is no bright line test for determining whether the speedy trial right has been violated; the nature of the right "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Barker v. Wingo*, 407 U.S. at 530. "No single [*Barker*] factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140 (1978). All the factors must be weighed and balanced against each other. *See State v. Groves*, 324 N.C. 360 (1989); *State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (court conducted an analysis of four *Barker* factors and found constitutional violation).

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

Second, the length of delay is one of the factors that must be weighed. The longer the delay, the more heavily this factor weighs against the State. *See Doggett v. United States*,

505 U.S. 647 (1992) (delay of eight years required dismissal); *State v. Chaplin*, 122 N.C. App. 659 (1996) (constitutional violation found where case was calendared for trial every month for three years but was never called for trial and defendant had to travel from New York to North Carolina for each court date); *State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (four years and nine months between arrest and trial found to be unconstitutional delay in conjunction with other *Barker* factors); *State v. McBride*, \_\_\_ N.C. App. \_\_\_, 653 S.E.2d 218 (2007) (delay of three years and seven months did not violate right to speedy trial where the record did not show the reason for the delay and defendant did not assert the right until trial and did not show prejudice).

**Practice note:** In misdemeanor cases tried in district court, which the State is generally capable of disposing of in well less than a year, a shorter time period may be considered prejudicial for speedy trial purposes. Additionally, in the exercise of its authority over cases called for trial, a district court may deny a request for continuance by the State, compelling the State to go forward or take a voluntary dismissal of the case. In some instances, the district court may decide to dismiss the charges with prejudice if the State is not ready to proceed. *See infra* § 7.4E (discussing court’s authority over docket); *see also infra* § 7.3C (if State takes voluntary dismissal and later recharges offense, delay that occurred during first proceeding must be considered on motion to dismiss second proceeding).

**Reason for delay.** The length of delay must be considered together with the reason for delay. The court in *Barker* held that different weights should be assigned to various reasons for delay. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.” *Barker v. Wingo*, 407 U.S. at 531; *see also State v. Pippin*, 72 N.C. App. 387 (1985) (negligence by State may support claim; right to speedy trial violated where State issued three defective indictments before getting it right). North Carolina courts have held generally that the defendant has the burden of showing that trial delay is due either to neglect or willfulness on the part of the prosecution. *See State v. McKoy*, 294 N.C. 134 (1978); *State v. Chaplin*, 122 N.C. App. 659 (1996). However, an exception to the general rule lies where the delay is exceptionally long. Then the burden shifts to the State to explain the delay. *See State v. Branch*, 41 N.C. App. 80 (1979); *State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (constitutional violation found where reason for delay was not a neutral factor but instead resulted from the prosecutor’s failure to submit evidence to SBI lab for analysis).

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

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

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

If the defendant causes the delay, the defendant is unlikely to succeed in claiming a violation of speedy trial rights. *See State v. Groves*, 324 N.C. 360 (1989) (no speedy trial violation where defendant repeatedly asked for continuances); *State v. Tindall*, 294 N.C. 689 (1978) (delay caused largely by defendant’s fleeing the state and living under an assumed name); *State v. Pippin*, 72 N.C. App. 387 (1985) (speedy trial claim does not arise from delay attributable to defense counsel’s requested plea negotiations; State has burden of establishing delay attributable to that purpose).

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

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

The strongest prejudice claims are those in which a defendant can show that his or her ability to defend against the charges was impaired by the delay. *See, e.g., State v. Chaplin* 122 N.C. App. 659 (1996) (loss of critical defense witness); *State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (witnesses’ memories of key events had faded, interfering with defendant’s ability to challenge their reliability; witnesses also were allowed to make in-court identifications of defendant nearly five years after the date of offense, which increased the possibility of misidentification). However, courts have found prejudice where a defendant was subjected to oppressive pretrial incarceration or where delay resulted in financial loss or damage to the defendant’s reputation in the community. *See United States v. Marion*, 404 U.S. 307, 320 (1971) (formal accusation may “interfere with defendant’s liberty, disrupt his employment, drain his financial resources, curtail his associations, . . . and create anxiety in him, his family and friends”); *State v. Pippin*, 72 N.C. App. 387 (1985) (dismissal of charges upheld despite no real

prejudice to defense where negligent delay in prosecuting case caused drain on defendant's financial resources and interference with social and community associations); *State v. Washington, supra* (that defendant was incarcerated for 366 days as a result of pretrial delay was an "important consideration"). In some cases, courts have found delay to be so long, or so inexplicable, that prejudice is presumed. *See Doggett v. United States*, 505 U.S. 647 (1992) (prejudice assumed where trial delayed for over eight years); *State v. McKoy*, 294 N.C. 134 (1978) (willful delay of ten months outweighed lack of real prejudice to defendant; speedy trial violation found).

**Assertion of right.** *Barker v. Wingo* rejected a demand-waiver rule for speedy trial claims—that is, the court rejected a rule whereby a defendant who failed to demand a speedy trial would waive his or her right to one. Instead, *Barker* held that the defendant's assertion of or failure to assert his or her right to a speedy trial is one factor to be weighed in the inquiry into the deprivation of the right. 407 U.S. at 528. This factor will be weighed most heavily in favor of defendants who have repeatedly asked for a trial and who have objected to State motions for continuances. *See State v. McKoy*, 294 N.C. 134 (1978) (defendant asked eight or nine times for trial date and moved to dismiss for lack of speedy trial); *State v. Raynor*, 45 N.C. App. 181 (1980) (stressing importance of objecting to State's continuance motions). Conversely, the failure to assert the right to a speedy trial will weigh against a defendant. *See State v. Webster*, 337 N.C. 674 (1994); *State v. McCollum*, 334 N.C. 208 (1993) (defendant made no attempt to assert right to speedy trial for thirty-two months; factor weighed against defendant); *compare State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (this factor weighed in favor of defendant, although defendant did not formally assert right until two years and ten months after indictment; assertion was still one year and eight months before trial began, and defendant complained about delay in examination of physical evidence prior to formal assertion). Therefore, if a speedy trial is to a defendant's advantage, he or she should assert the right whenever possible.

### C. When Right Attaches

**Defendant must be charged with crime.** The Sixth Amendment right to a speedy trial attaches at arrest, indictment, or other official accusation, whichever occurs first. *See Doggett v. United States*, 505 U.S. 647 (1992); *Dillingham v. United States*, 423 U.S. 64 (1975); *State v. McKoy*, 294 N.C. 134 (1978). Even where the defendant is unaware that he or she has been charged with a crime, the defendant's speedy trial right attaches and the clock begins to run upon issuance of the indictment or other official accusation. *See Doggett* (defendant unaware of indictment until arrest eight years later); *see also State v. Kelly*, 656 N.E.2d 419 (Ohio Ct. App. 1995) (citing both *Doggett* and an earlier North Carolina case, *State v. Johnson*, 275 N.C. 264 (1969), for the proposition that delay in arresting defendant following indictment was subject to speedy trial protection).<sup>1</sup>

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1. *Doggett* makes it clear that speedy trial rather than due process protections apply once a person has been indicted or arrested. In *State v. McKoy*, 303 N.C. 1 (1981), issued before *Doggett*, the North Carolina Supreme Court left open the question of whether speedy trial protections attached when an arrest warrant has been issued but the defendant has not yet been arrested. Although the language in *Doggett* suggests that speedy trial protections apply after any formal accusation is issued, jurisdictions have reached differing results on this question. *See*

However, lack of knowledge can affect the prejudice analysis in a speedy trial claim. A defendant who does not know of an indictment or arrest warrant cannot claim anxiety or disruption of social relationships as a source of prejudice. On the other hand, since the defendant cannot make a demand for a speedy trial in this situation, the lack of a demand does not hurt the defendant in the speedy trial analysis.

**Effect of dismissal.** G.S. 15A-931 permits the State to take a voluntary dismissal of charges. Reindictment on the same or a different offense is permitted following dismissal as long as jeopardy has not attached.<sup>2</sup> *See State v. Muncy*, 79 N.C. App. 356 (1986).

After charges are dismissed pursuant to G.S. 15A-931, the defendant's Sixth Amendment speedy trial rights are in abeyance until the State brings subsequent charges. *See generally State v. Lamb*, 321 N.C. 633 (1988) (under repealed statutory speedy trial act, time between dismissal under G.S. 15A-931 and reindictment did not count toward calculation of trial delay); *accord State v. Herald*, 65 N.C. App. 692 (1983). The rationale is that after dismissal the defendant is not subject to the restraints on liberty or other disruptions of his or her life that invoke speedy trial protections. *See United States v. Loud Hawk*, 474 U.S. 302 (1986) (no Sixth Amendment right to speedy trial after dismissal, even if government is appealing the dismissal); *United States v. MacDonald*, 456 U.S. 1 (1982) (Sixth Amendment right to speedy trial right not implicated during four years between dismissal and reinstatement of charges).<sup>3</sup>

However, if the State rearrests or reindicts the defendant for the same offense, he or she can add together the pretrial periods following each arrest or indictment for speedy trial purposes. *See State v. Pippin*, 72 N.C. App. 387 (1985); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 111–12 (3d ed. 2007) (date of original arrest or charge is usually controlling for speedy trial purposes, although time between dismissal and recharging are not counted).

**Dismissal with leave under G.S. 15A-932.** G.S. 15A-932 permits the prosecutor to take a dismissal with leave when a defendant has failed to appear in court (or pursuant to a deferred prosecution agreement). *See also* G.S. 15A-1009 (permitting dismissal with

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*Williams v. Darr*, 603 P.2d 1021 (Kan. App. 1979) (speedy trial right attaches upon issuance of arrest warrant, which commences prosecution); *see also generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 18.1(c), at 111 (3d ed. 2007) (at the least, if a charging document short of an indictment is sufficient to give a court jurisdiction to proceed to trial, such as an arrest warrant for a misdemeanor to be tried in district court, speedy trial right attaches when charging document is issued regardless of whether defendant is aware of charge).

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

3. Undue delay in prosecuting the charge could result in a due process violation, however. *See supra* § 7.2.

leave after finding of incapacity to stand trial). A case dismissed with leave is removed from the trial calendar. However, the criminal prosecution is not terminated; the indictment remains valid, and charges may be reinitiated without a new indictment. *See State v. Lamb*, 321 N.C. 633 (1988).

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

**Prisoners' right to a speedy trial.** Defendants who have been convicted of an unrelated crime do not lose the Sixth Amendment right to a speedy trial while in prison. *See Smith v. Hooey*, 393 U.S. 374 (1969); *State v. Wright*, 290 N.C. 45 (1976); *State v. Johnson*, 275 N.C. 264 (1969). However, courts have held that prisoners cannot claim prejudice based solely on pretrial incarceration, reasoning that they would have been incarcerated in any event. *See State v. Vaughn*, 296 N.C. 167 (1978); *State v. McQueen*, 295 N.C. 96 (1978). A prisoner may also have a statutory right to a speedy trial. *See supra* § 7.1E.

#### **D. Cases Summaries on Post-Accusation Delay**

**Speedy trial violation found.** In the following cases, the courts found a speedy trial violation.

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

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

*State v. Washington*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 799 (2008) (speedy trial violation where trial was delayed nearly five years, reason for delay was repeated neglect and underutilization of court resources on part of prosecutor's office, much of delay was caused by State's failure to submit physical evidence to SBI lab to be examined, there was no indication that delay was caused by factors outside of prosecution's control, delay

resulted in actual particularized prejudice to defendant, and defendant asserted his right to speedy trial)

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

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

**No speedy trial violation found.** In the following cases, the courts found no speedy trial violation.

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

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

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

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

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

## **E. Remedy for Speedy Trial Violation**

Dismissal is the only remedy for violation of a defendant's constitutional right to a speedy trial. *See Barker v. Wingo*, 407 U.S. at 522; G.S. 15A-954(a)(3) (court must

dismiss charges if defendant has been denied constitutional right to speedy trial); *see also Strunk v. United States*, 412 U.S. 434 (1973) (court cannot remedy violation of right to speedy trial by reducing defendant's sentence); *State v. Wilburn*, 21 N.C. App. 140 (1974) (recognizing that dismissal is only remedy after determination that constitutional right to speedy trial has been violated).

## **F. Motions for Speedy Trial**

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

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

**Content of speedy trial motion.** The motion to dismiss should articulate the effect of pretrial delay on each of the factors enumerated in *Barker v. Wingo*. *See State v. Groves*, 324 N.C. 360 (1989) (defendant has burden of showing prejudice, history of assertions of right, and negligence or willfulness of State; in this case defense motion failed to establish prejudice to preparation of defense); *State v. Lyszaj*, 314 N.C. 256 (1985) ("bald contentions" of prejudice and improper reasons for delay not sufficient to support speedy trial claim).

**Hearing on motion.** If the defendant's motion presents questions of fact, the court is required to conduct a hearing and make findings of fact and conclusions of law. *See State v. Dietz*, 289 N.C. 488 (1976); *State v. Chaplin*, 122 N.C. App. 659 (1996). If there is no objection, the evidence may consist of statements of counsel; however, the North Carolina courts have clearly expressed that the better practice is to present evidence and develop the record through affidavits or testimony. *See State v. Pippin*, 72 N.C. App. 387 (1985).

## 7.4 Prosecutor's Calendaring Authority

### A. Generally

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

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

Calendaring abuses of the first type may violate a defendant's right to a speedy trial. *See State v. Chaplin*, 122 N.C. App. 659 (1996) (basing finding of speedy trial violation in part on calendaring abuses). However, even in situations where a speedy trial violation cannot be shown, a defendant who has been prejudiced by the State's strategic use of its calendaring authority may be able to obtain relief by arguing that the State has failed to comply with its statutory calendaring duties. This section discusses the scope and limits of the prosecutor's calendaring authority and suggests ways in which a defendant may challenge abuses of this power. *See generally* Paul Green and Shannon Tucker, *Abuses of Calendaring Authority* (Nov. 6, 2008) (2008 Fall Public Defender Seminar), online at [www.ncids.org/Defender%20Training/2008%20Fall%20Conference/AbusesofCalendarin g.pdf](http://www.ncids.org/Defender%20Training/2008%20Fall%20Conference/AbusesofCalendarin g.pdf).

### B. *Simeon v. Hardin*

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

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

The superior court in Durham County dismissed the plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim. On appeal our Supreme Court reversed the

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

### C. Calendaring Statute

After *Simeon*, the North Carolina General Assembly rewrote the statute governing superior court criminal case docketing. G.S. 7A-49.3 was repealed and replaced with G.S. 7A-49.4, effective January 1, 2000. The statute requires the district attorney in each superior court district to create a criminal case docketing plan, in consultation with the resident superior court judges and the defense bar. *See* G.S. 7A-49.4(a). It also imposes specific limitations on calendaring, discussed below, with which the local plan must comply. *See generally* John Rubin, *1999 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 99/05, at 9–11 (Oct. 1999) (summarizing calendaring provisions), online at [www.sog.unc.edu/programs/crimlaw/aoj9905crimlegislation.pdf](http://www.sog.unc.edu/programs/crimlaw/aoj9905crimlegislation.pdf).

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

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

Cases that have been placed on the trial calendar may be continued only with the consent of the prosecutor and defendant or by order of the judge. If all of the cases on the

calendar are not reached before the end of the session of court, the prosecutor must schedule a new trial date in consultation with the defendant. *See* G.S. 7A-49.4(f).

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

#### **D. Other Limits**

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

The court’s calendaring authority remains subject to the time limits on trial after arraignment. *See* G.S. 15A-943 (in counties in which there are twenty or more weeks of superior court criminal sessions a year, defendant may not be tried in same week of arraignment without his or her consent); *State v. Cates*, 140 N.C. App. 548 (2000) (violation of statutory requirement of one-week period between defendant’s arraignment and trial constitutes automatic reversible error).

#### **E. District Court Proceedings**

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

finding that the previous calendaring statute was not unconstitutional on its face, the court stated:

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

Likewise, once a case is on the district court docket, the trial judge has "wide discretion" over the case, including determining when the case will be heard and compelling compliance with its orders. Thus, a trial judge may refuse to grant a request for a continuance by the State, compelling the State to proceed or take a voluntary dismissal. *See* G.S. 15A-952(g) (factors in determining whether to allow continuance). Further, the court may have grounds to dismiss the case with prejudice if the State is not ready or willing to proceed. *See Simeon*, 339 N.C. at 377-78 (delay in proceeding with case may violate Due Process, exact punishment prior to adjudication of guilt, impair quality of representation for defendant, and result in unnecessary expense and other harms).

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