CERTIORARI REVIEW IN CRIMINAL CASES: WHEN AND HOW

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I. WHAT IS CERTIORARI REVIEW?

A petition for writ of certiorari is a procedural mechanism for obtaining appellate review of certain kinds of lower court rulings when there is no right of direct appeal. Cert. review is a broad and flexible type of relief, but it is not an all-purpose way to obtain appellate review. The North Carolina Rules of Appellate Procedure place important limits on the scope of cert. review.

II. SOURCES OF LAW

N.C. R. App. P. 21
N.C. R. App. P. 15(a)
N.C. R. App. P., Appendix D - Forms, Sec. (4) - Petition for Writ of Certiorari
N.C. Gen. Stat. §7A-32(b), (c)
N.C. Gen. Stat. §15A-1422(c)(3)
N.C. Gen. Stat. §15A-1444(a1), (e) - (g)
N.C. Const. Art. IV, §12(1)

Important: The N.C. Supreme Court and the Court of Appeals have repeatedly held that when a statute that governs appellate procedure conflicts with the Rules of Appellate Procedure, the Rules of Appellate Procedure prevail. But compare: N.C. Const. Article IV, section 13(2): "[t]he Supreme Court shall make rules of procedure and practice for the appellate division" with N.C. Const. Article IV, section 12(2): "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." Whether the Court of Appeals has the authority to review a trial court ruling through certiorari should be a question of jurisdiction (which only the General Assembly may determine) rather than a rule of procedure or practice (which only the Supreme Court may determine), but the Supreme Court and the Court of Appeals have ruled that the Supreme Court has the ultimate power to resolve that issue through the Rules of Appellate Procedure.

III. WHEN CAN A DEFENDANT OBTAIN CERT. REVIEW?

A. CERT. REVIEW OF TRIAL COURT RULINGS UNDER RULE 21

Rule 21(a) lists 3 situations in which an appellate court has authority to issue a writ of certiorari to review trial court rulings:
1. When the right to direct appeal has been lost by the failure to take timely action. Example: If a defendant-appellant's attorney has missed a deadline in the direct appeal process, such as serving notice of appeal, serving the proposed record on appeal, filing the settled record on appeal, or filing the brief. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

(a) Also, this provision should be used to reinstate an appeal dismissed by the trial court or the Court of Appeals due to a rules violation or to preserve an appeal that you think might be dismissed by the Court of Appeals due to a rules violation. The argument for using a cert. petition in this situation is that “timely action” means not only that a document has been filed on time, but also that the document complies with the Rules of Appellate Procedure and the relevant statutes. A common example of this situation is when a trial lawyer gives an inadequate notice of appeal for a conditional guilty plea under N.C. Gen. Stat. §15A-979(b) after losing a suppression motion. For example, a trial lawyer might correctly remember to tell the prosecutor and the trial judge before the guilty plea is entered about the defendant’s intent to appeal the suppression motion denial, but then forget to enter notice of appeal after the judge enters judgment. A cert. petition filed in State v. Jonte Rousen is attached to this outline as an example of a petition filed in this situation. Or the attorney might incorrectly purport to enter notice of appeal just to the order denying the suppression motion instead of to the actual judgment that declares the defendant guilty and imposes a sentence. In these situations, you should file a cert. petition to ask the Court of Appeals to allow your client to appeal.

2. When there is no right to appeal an interlocutory order by a trial judge.

(a) Examples:

(1) Denial of a motion to continue a trial.
(2) A trial court’s refusal to order production of transcript of a certain portion of a trial for appeal.

(b) Possible examples:

(1) Review of a Superior Court discovery order (e.g., denying defense request for open-file discovery, granting state’s request for discovery of privileged information).
(2) Denial of trial counsel’s motion to withdraw due to conflict of interest.
3. Under N.C. Gen. §15A-1422(e)(3), to review a decision by a trial court to deny an MAR. This provision applies when a Superior Court judge denies an MAR at a time when there is no pending appeal of a judgment or when the time to appeal a judgment has expired.

B. CERT. REVIEW UNDER THE COMMON LAW


2. Review of procedures followed in accepting a guilty plea. This is an important use of cert. review. The N.C. Supreme Court and the Court of Appeals have repeatedly held that cert. review is proper for this purpose, though the state continues to challenge it. *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987); *State v. Demajo*, N.C. App. ____, 716 S.E.2d 863 (2011); *State v. Flint*, 199 N.C. App. 709, 724-27, 682 S.E.2d 442, 451-53 (2009); *State v. Keller*, 198 N.C. App. 639, 641-42, 680 S.E.2d 212, 214 (2009); *State v. Carter*, 167 N.C. App. 582, 605 S.E.2d 676 (2004); *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004). In the recent cases of *State v. Demajo* and *State v. Keller*, the Court of Appeals expressly rejected the state’s argument that the court lacked the authority to grant cert. review of this issue. Cert. petitions filed in *State v. Francis Louis Demajo* and *State v. Jonte Rouson* are attached to this outline as examples of petitions filed in this situation.

C. CERT. REVIEW UNDER N.C. GEN. STAT. §15A-1444(a1), (e)

1. Review of guilty plea issues when there is no right of direct appeal. **BUT:** These statutory provisions generally are still limited by Rule 21(a) and common law. That is, the scope of cert. review generally is still limited to the three situations listed in Rule 21(a) plus the review of procedures followed in accepting a guilty plea. *State v. Jamerson*, 161 N.C. App. 527, 588 S.E.2d 545 (2003); *State v. Smith*, 160 N.C. App. 107, 584 S.E.2d 830 (2003); *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002).

D. SUPREME COURT REVIEW OF COA DECISIONS

Rule 21(a)(2) lists 2 situations in which the Supreme Court may use cert. review to review decisions by the Court of Appeals:

1. When the right to direct appeal or to file a PDR has been lost by the failure to take timely action.

2. To review a decision by Court of Appeals when there is no right of direct appeal to the Supreme Court. **Possible examples:** Court of Appeals denial of a motion to amend the record; Court of Appeals order imposing sanctions.

IV. WHEN CERT. REVIEW IS NOT AVAILABLE


V. PROCEDURE

A. WHICH COURT?

1. Rule 21(b): File the cert. petition in the court that would have direct appeal jurisdiction from a Superior Court final judgment. For review of an MAR denial: In a noncapital case, file the petition in the Court of Appeals; in a capital case, file the petition in Supreme Court.

B. WHEN?

1. There is no specific deadline. Under Rule 21(c), a cert. petition must be filed “without unreasonable delay.”

2. If the purpose of a cert. petition in a particular case is to ask the Court of Appeals to allow an appeal in a case in which no notice of appeal was ever entered, or to reinstate a dismissed appeal, the petition must be filed before taking any other steps in the appeal. Here’s the good news about this situation: the cert. petition will already have been filed by the Appellate Defender’s Office and granted by the COA before the case is even assigned to you.

3. However, if, after the Appellate Defender’s Office appoints you to an appeal, you are concerned that the appeal might be dismissed due to a rules violation (e.g., a defective notice of appeal), you must file the cert. petition. In this situation, the Court of Appeals prefers that you file the cert. petition after the settled record on appeal is docketed. Recently, the Court of Appeals has been fine about filing the cert. petition in such situations at the same time you file the brief.
As an example of a cert. petition filed in this situation, see the petition attached to this outline in State v. Jonie Rouson.

4. **BUT:** In a capital case, a cert. petition to review a Superior Court denial of an MAR must be filed in the Supreme Court within 60 days after the delivery of the MAR hearing transcript.

C. CONTENTS

1. Under Rule 21(c), a cert. petition must contain a statement of relevant facts, a statement of reasons to issue writ, a certified copy of the order to be reviewed and other relevant portions of record, and a verification.


3. Copies of recent cert. petitions are attached to this outline to use as go-bys.