CRIMINAL JURISDICTION OF SUPERIOR COURT

Robert Farb, UNC School of Government (September 2015)

Contents

I. Related Materials. The North Carolina Defender Manual, Ch. 10, Jurisdiction (2d ed. 2013), available online at http://defendermanuals.sog.unc.edu/pretrial/10-jurisdiction provides a comprehensive resource on jurisdiction.

II. Felonies.

A. Superior Court Jurisdiction Over Felonies—Generally. G.S. 7A-271(a) provides that the superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court, except the superior court has jurisdiction over misdemeanors as set out in G.S. 7A-271(a)(1) through (5). *See* Section III below. Thus, the superior court has jurisdiction over felonies that are pending in superior court and over some preliminary matters involving felonies pending in district court that are not otherwise assigned to district court. *See* Sections II.B. (superior court jurisdiction over felonies in district court) and II.C. (district court jurisdiction over felonies in district court), both below.

Note that certain defects in a felony (or misdemeanor) pleading divest a court of jurisdiction over the felony (or misdemeanor). *See* Section VII below.

B. Superior Court Jurisdiction Over Felonies in District Court. The court in *State v. Jackson,* 77 N.C. App. 491, 496 (1985), concluded that a superior court judge under G.S. 7A-271(a) has the authority over a felony case pending in district court (for the usual felony processing in that court for first appearance and setting of probable cause hearing) to grant a party's motion questioning a defendant's capacity to proceed by issuing an order committing a defendant to a hospital for an examination. Presumably, North Carolina's appellate courts would authorize a superior court judge to act in other preliminary matters in felony cases in district court that are not otherwise assigned to the district court. These matters may include discovery and counsel issues and a motion to modify a pretrial release order under G.S. 15A-538 (defendant's motion) or G.S. 15A-539 (prosecutor's motion).

C. District Court Jurisdiction Over Felonies in District Court. A district court has exclusive, original jurisdiction over criminal actions below the grade of felony. G.S. 7A-272(a). The district court also has jurisdiction over felonies as discussed below.

1. Preliminary Matters in Felony Cases. A district court judge has the authority to conduct a first appearance for a felony, set conditions of pretrial release, and conduct a probable cause hearing. G.S. 15A-601; G.S. 15A-611.

A district court also has the authority to handle some other preliminary matters in a felony case while it is pending there. State v. Jones, 133 N.C. App. 448, 463 (1999), *rev'd in part on other grounds,* 353 N.C. 159 (2000). The *Jones* court interpreted G.S. 7A-272(b) to provide that until a case had been bound over to superior court or an indictment has been returned, the district court retains jurisdiction over preliminary matters, such as the orders entered by the district court in *Jones* for the production of medical records to the State. The *Jones* rationale clearly would authorize a district court judge in a felony case pending in district court—in response to a motion to determine a defendant's capacity to proceed under G.S. 15A-1002—to issue an order to require an examination of a defendant for that purpose.

The scope of other authorized preliminary matters in felony cases is unclear because there are few appellate cases addressing the issue. And based on *State v. Jackson*, discussed in Section II.B. above, district and superior court judges may have overlapping jurisdiction concerning preliminary matters in felony cases pending in district court.

2. Class H or I Felonies.

a. Pleas. With the consent of a district court judge, a prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to Class H or I felonies if:

- The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or
- The defendant has been indicted for a criminal offense but the defendant's case is transferred from superior court to district court pursuant to G.S. 15A-1029.1.

G.S. 7A-272(c).

Note that if a defendant wishes to challenge the entry of his or her guilty plea to a Class H or I felony in district court, any authorized appeal goes to the appellate division, not to superior court. G.S. 7A-272(d).

b. Probation Revocation Following Conviction. At a probation revocation hearing based on a probationary judgment imposed after a conviction for a plea in district court to a Class H or I felony, the superior court has exclusive jurisdiction over the hearing, except the district court has jurisdiction when the prosecutor and defendant consent to have the hearing in district court. G.S. 7A-271(e).

If the district court judge presides over the revocation hearing, revokes probation, and imposes an active sentence or special probation, a defendant has the right to appeal to superior court for a de novo revocation hearing. G.S. 15A-1347(a). However, if a defendant waives a district court probation revocation hearing, the judge's finding of a probation violation, activation of sentence, or imposition of special probation may not be appealed to superior court. G.S. 15A-1347(b).

III. Superior Court Jurisdiction Over Misdemeanors. The superior court has jurisdiction over:

- a misdemeanor conviction that is appealed for trial de novo;
- to accept a guilty plea to a lesser-included or related charge to a misdemeanor after trial de novo appeal;
- a misdemeanor joined for trial with a felony under G.S. 15A-926;
- a misdemeanor to which a plea of guilty or no contest is made in lieu of a felony charge;
- a misdemeanor initiated by a presentment; or
- a lesser-included misdemeanor of a felony charged in an indictment or information.

G.S. 7A-271(a)(1) through (5). The superior court's jurisdiction over these misdemeanors is discussed in the sections below.

A. Misdemeanor Appeals from District Court. The superior court has jurisdiction to hear misdemeanor cases on appeal for trial de novo from the district court. *See* G.S. 7A-271(b). Generally, the superior court is authorized to impose judgment only for the same misdemeanor or its lesser-included offense(s), for which there was a conviction in the district court below. *See* State v. Hardy, 298 N.C. 191, 199 (1979) (defendant was charged with and convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for resisting arrest); State v. Reeves, 218 N.C. App. 570, 574 (2012) (superior court lacked jurisdiction on appeal to try defendant on reckless driving charge that was voluntarily dismissed by the State, without a plea agreement, in district court); State v. Phillips, 127 N.C. App. 391, 392 (1997) (defendant was tried and convicted of impaired driving in district court, but State took voluntary dismissal of speeding charge; superior court lacked jurisdiction to try speeding charge on appeal of impaired driving conviction); State v. Caldwell, 21 N.C. App. 723, 725-26 (1974) (defendant was convicted of assault on officer in district court; on appeal, superior court did not have jurisdiction to try defendant for assault by pointing gun).

Except in limited circumstances, discussed below, if the State wants to prosecute a different misdemeanor than one appealed for trial de novo or its lesser-included offense(s), it must start again in district court or initiate a misdemeanor prosecution in superior court by presentment (see discussion of presentments in Section III.D., below). A common situation requiring the State to start again in district court occurs when a superior court judge dismisses an appealed misdemeanor offense because there is a fatal defect in the pleading.

1. **District court plea agreement concerning misdemeanor to which the defendant pled guilty or no contest, and then defendant appealed for trial de novo.** If the defendant appeals a district court judgment imposed pursuant to a plea agreement, the superior court has jurisdiction over any misdemeanor that was dismissed, reduced, or modified pursuant to that agreement. G.S. 15A-1431(b); G.S. 7A-271(b). For example, the State and the defendant agree that if the State dismisses a misdemeanor speeding case, the defendant will pled guilty to DWI. If the defendant pleads guilty to the DWI but then appeals for trial de novo, the superior court has jurisdiction over both the DWI and the misdemeanor speeding charge.
2. **District court plea agreement reduced felony to misdemeanor, to which defendant pled guilty or no contest, and then defendant appealed for trial de novo.** If a defendant appeals for trial de novo misdemeanor conviction(s) resulting from a plea agreement in district court that had reduced felonies to misdemeanors in return for guilty pleas, the agreement is not binding on the State and it may indict the defendant for the felonies. This result is not based on a statute, but instead on the ruling in *State v. Fox*, 34 N.C. App. 576, 579 (1977) (State may indict defendant on felony breaking and entering and felony larceny when defendant was initially charged with those offenses but pled guilty to misdemeanor breaking and entering pursuant to a plea agreement in district court, and then appealed to superior court for trial de novo; the misdemeanor convictions appealed for trial de novo also remain on the superior court docket).
3. **Guilty plea in superior court to related misdemeanor charge after trial de novo appeal.** On trial de novo appeal of a misdemeanor conviction, the superior court has jurisdiction to accept a guilty plea to a lesser-included offense or a "related" misdemeanor. G.S. 7A-271(a)(5). For the State to offer and the judge to accept a guilty plea to a related charge, the State must file an information in superior court charging the related misdemeanor, to which the defendant then may enter a guilty plea. G.S. 15A-922(g) (when misdemeanor is initiated in superior court, it must be charged in information or indictment). *See* State v. Craig, 21 N.C. App. 51, 54 (1974) (on appeal of impaired driving conviction, superior court accepted plea to reckless driving without State filing information charging that offense; court may not accept such a plea unless prosecution filed an information).

   If the defendant pleads guilty or is found guilty in superior court, the defendant also may request permission to enter a guilty plea to a misdemeanor pending in the same or other prosecutorial districts, even if the case may be in the exclusive original jurisdiction of district court—provided an indictment or information charges the misdemeanor and other procedural requirements are met. *See* G.S. 15A-1011(c). This statute also applies to felonies.
4. **Misdemeanor conviction in district court, appeal for trial de novo, and then State brings felony charge in superior court based on same acts.** If a defendant is found guilty after a trial for a misdemeanor in district court and then appeals for trial de novo, the State may be barred on due process grounds from proceeding on a greater or related felony in superior court based on the same facts. *See* Blackledge v. Perry, 417

U.S. 21, 28-29 (1974) (when defendant is convicted of misdemeanor assault in district court and appeals for trial de novo in superior court, State's later indictment for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause); Thigpen v. Roberts, 468 U.S. 27, 30 (1984) (similar ruling; traffic convictions appealed for trial de novo and then indictment for manslaughter arising from same conduct); State v. Bisette, 142 N.C. App. 669, 673 (2001) (similar ruling; misdemeanor larceny conviction appealed for trial de novo and then indictment for felony larceny based on same conduct); State v. Mayes, 31 N.C. App. 694, 697 (1976) (similar ruling; assault on a child conviction appealed for trial de novo and then indictment for felonious assault based on same conduct).

The State may bring a felony charge after a misdemeanor (or felony) conviction when events occur after the conviction that justify the felony charge. For example, if a defendant is convicted of a misdemeanor or felony assault and the victim later dies as a result of the assault, a homicide charge may be brought. *See* Diaz v. United States, 223 U.S. 442, 448-49 (1912); State v. Meadows, 272 N.C. 327, 332-33 (1968). See generally Double Jeopardy in this Benchbook.

B. Misdemeanor Joined For Trial With Felony. The superior court has original jurisdiction over a misdemeanor when it is properly joined with a felony under G.S. 15A-926 (two or more offenses joined for trial when based on same act or transaction connected together or constituting parts of single scheme or plan). G.S. 7A-271(a)(3). The superior court retains jurisdiction over the misdemeanor even if the felony is dismissed by the trial court at the close of the State's evidence. *See* State v. Pergerson, 73 N.C. App. 286, 289 (1985) (superior court retained jurisdiction over unauthorized use of automobile even after felony charge of larceny of same automobile was dismissed at the close of the State's evidence for insufficient evidence; court rejects as unsupported on the facts in the record defendant's argument that felony charge was "sham," manufactured to create superior court jurisdiction).

Under G.S. 15A-922(g), when a misdemeanor is initially tried in superior court under the joinder provision, the misdemeanor must be charged by indictment or information. *See* State v. Price, 170 N.C. App. 57, 60-62 (2005) (superior court lacked jurisdiction over misdemeanors that, although joinable with felony charge, were not included in the indictment or charged by information; instead, the misdemeanors had been charged in arrest warrants and had been docketed in superior court without having been tried in district court and appealed for trial de novo); *see also* State v. Bowden, 177 N.C. App. 718, 724-25 (2006) (habitual impaired driving is a substantive felony offense, and superior court had jurisdiction to try transactionally-related misdemeanors set out in the indictment charging habitual impaired driving).

C. Plea of Guilty or No Contest to Misdemeanor in Lieu of Felony. The superior court has jurisdiction to accept pleas of guilty to misdemeanors that are "tendered in lieu of a felony charge." G.S. 7A-271(a)(4). In other words, if a defendant charged with a felony is offered a misdemeanor plea, the plea may be taken in superior court even when the misdemeanor is not a lesser included offense of the felony. The prosecutor will dismiss the felony indictment and file an information charging the related misdemeanor, to which the defendant then

enters a guilty plea. *See* State v. Snipes, 16 N.C. App. 416, 418 (1972) (superior court had jurisdiction to accept guilty plea to information charging misdemeanor assault with a deadly weapon in lieu of felony charge of discharging a firearm into a vehicle).

D. Misdemeanor Initiated in Superior Court By Presentment and Subsequent Indictment. The presentment has a long history in North Carolina, having been used since statehood. It was originally a method by which a grand jury could bring a criminal charge on its own without an indictment and without a prosecutor's involvement. However, as early as 1797, the North Carolina General Assembly enacted legislation to prohibit trial by presentment alone. Instead, the grand jury's return of a presentment requires a prosecutor to investigate the presentment's allegations and submit an indictment if appropriate. G.S. 15A-641(c). For additional history on presentments, see *State v. Thomas*, 236 N.C. 454 (1952).

Although a grand jury could investigate an offense on its own and decide whether to issue a presentment, a presentment almost always will be returned after a prosecutor previously had submitted a draft presentment to the grand jury with a testifying witness or witnesses. That occurred in *State v. Gunter*, 111 N.C. App. 621 (1993), a DWI case. G.S. 15A-628(a)(4) recognizes a prosecutor's role in such a procedure.

A presentment alleging a misdemeanor allows a prosecutor to submit an indictment for that misdemeanor, *State v. Birdsong*, 325 N.C. 418, 421 (1989), or related misdemeanor if based on the same facts alleged in the presentment, *State v. Cole*, 294 N.C. 304, 308-09 (1978). If the grand jury issues an indictment, the State tries the misdemeanor in superior court without any proceeding having occurred in district court—although a presentment also may be returned for a misdemeanor that is currently pending in district court but has not been tried yet. In such a case, the superior court supplants the district court's jurisdiction over the misdemeanor. *Gunter*, 111 N.C. App. at 625.

IV. Superior Court Jurisdiction Over Infractions. The superior court has jurisdiction to dispose of infractions only under two circumstances:

- If the infraction is a lesser-included violation of a criminal charge properly before the court, the court must submit the infraction to the jury in factually appropriate circumstances.
- If the infraction is a lesser-included violation of a criminal charge properly before the court or it is a related charge, the court may accept an admission of responsibility for the infraction.

G.S. 7A-271(d).

V. Territorial Jurisdiction to Try Criminal Cases. The State of North Carolina has territorial jurisdiction to try a criminal offense only if it is committed within its borders, although some of the acts constituting the offense occurred outside its borders. See, for example, *State v. Darroch*, 305 N.C. 196 (1982), in which the court held that the State of North Carolina constitutionally asserted jurisdiction over a defendant who was convicted of accessory before the fact to a murder that took place in North Carolina even though the counselling and procuring of the murder occurred in Virginia.

Cases on the sufficiency of evidence of jurisdiction include: State v. Bright, 131 N.C. App. 57, 62 (1998) (new trial on sex offenses because trial court failed to submit jurisdiction issue when evidence indicated that offenses may have occurred in Virginia); State v. Rick, 342 N.C. 91, 100-01 (1995) (sufficient evidence that killing occurred in North Carolina to support jurisdiction even though victim's body was found in South Carolina, but trial court erred in failing to submit issue to jury); State v. Drakeford, 104 N.C. App. 298, 301 (sufficient evidence supported jurisdiction to prosecute Maryland defendant for drug conspiracy when coconspirator set up drug deal in Raleigh by making phone calls to defendant in Maryland, and coconspirator and defendant went to New York to get the drugs so coconspirator could sell them in North Carolina); State v. Williams, 74 N.C. App. 131, 132 (1995) (insufficient evidence of jurisdiction for possessing stolen vehicle when evidence only showed that vehicle was stolen in North Carolina and defendant possessed it in District of Columbia); State v. First Resort Properties, 81 N.C. App. 499, 501 (1986) (sufficient evidence of jurisdiction when defendant's officer issued worthless check in North Carolina and physically delivered check to payee in Florida, where payee deposited check); State v. Tucker, 227 N.C. App. 627 (2013) (sufficient evidence of jurisdiction for embezzlement when defendant, employed as long distance truck driver for moving company headquartered in North Carolina, failed to remit to employer the proceeds from a customer in Nevada; defendant had duty to account for the proceeds).

A. Special Statutes Governing Jurisdiction. If an offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in North Carolina if he or she had not been placed in jeopardy for the identical offense in another state. G.S. 15A-134. This statutory bar to a prosecution under these circumstances provides greater protection to a defendant than the federal constitution, which allows a defendant to be tried by two different states for the same conduct. Heath v. Alabama, 474 U.S. 82, 93 (1985) (no double jeopardy violation when Alabama prosecuted defendant after Georgia had prosecuted him for same murder).

North Carolina has jurisdiction to try a felony homicide when the assault occurred in North Carolina and the victim dies outside the state. The defendant is prosecuted in the county where the offense occurred. G.S. 15-131.

North Carolina has jurisdiction to try a homicide when the victim is assaulted outside the state and dies within the state. The defendant is prosecuted in the county where the death occurs. G.S. 15-133.

When a person within North Carolina unlawfully and willfully puts in motion a force by which a victim is injured in another state, the person may be prosecuted in North Carolina. G.S. 15-132.

For drug offenses, G.S. 90-97 provides a statutory bar to prosecuting an offense that had resulted in a conviction or acquittal under federal law or the law of another state for the same act.

B. Judge's Duty in Submitting Jurisdictional Issue to Jury. If a defendant has raised the issue of the State's jurisdiction to try the defendant (that is, whether an offense was committed in North Carolina), and there is some evidence to show that the offense may have been committed in another state, the State must prove to the jury beyond a reasonable doubt that the offense occurred in North Carolina. State v. Batdorf, 293 N.C. 486, 494 (1977); *see also Bright*, 131 N.C. App. at 62 (new trial on sex offenses because trial court failed to submit jurisdiction issue when evidence indicated that offenses may have occurred in

Virginia); *Rick*, 342 N.C. at 100-01 (trial court erred in failing to submit issue to jury). If no evidence is offered, the jurisdiction issue is not submitted to the jury. State v. Callahan, 77 N.C. App. 164, 169 (1985) (defendant was not entitled to jury instruction on jurisdiction when he denied participating in offense but did not contest location of drug possession and delivery offenses occurred in North Carolina, although non-charged offense of sale had occurred in South Carolina).

A motion that challenges the jurisdiction of the court may be made at any time, so the motion could be made at trial even though it had not been made before trial. G.S. 15A-952(d).

C. Special Verdict on Jurisdiction Issue. The trial judge should instruct the jury to issue a special verdict on the jurisdiction issue. *Batdorf*, 293 N.C. at 494. A judge should use the jury instruction and special verdict form in N.C.P.I. Crim.—311.10. The instruction is given just before the mandate of the instruction on the charged offense or offenses.

If the jury finds that jurisdiction exists, it completes the special verdict form and then determines guilt or innocence of the substantive offense(s) before reporting to the courtroom. If the jury finds that jurisdiction does not exist, it then must return to the courtroom with its special verdict without determining the defendant's guilt/innocence. *See* N.C.P.I. Crim.—311.10.

The principles of res judicata and collateral estoppel bar a defendant at a second trial from relitigating a special verdict finding jurisdiction at the first trial as long as there was sufficient evidence to support the special verdict. State v. Dial, 122 N.C. App. 298, 305 (1996) (jury at first trial found by special verdict that jurisdiction existed, but there was hung jury on guilt/innocence verdict; trial court properly denied relitigation of jurisdiction issue at second trial). These principles would likewise bar the State from relitigating a special verdict finding no jurisdiction.

D. Prosecution for Offense Committed on Federal Land in North Carolina. If an offense occurs on land within North Carolina where the federal government has exclusive jurisdiction to prosecute an offense committed on that land, the State of North Carolina has no jurisdiction to prosecute the offense. This situation rarely occurs because most federal government land in North Carolina is subject to concurrent or propriety jurisdiction (not exclusive jurisdiction), which allows the State to prosecute an offense committed there. This is a complex legal issue that will not be discussed here. If the issue arises, see the discussion in ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA 20-22 (UNC School of Government, 4th ed., 2011).

E. Distinction Between Venue and Jurisdiction. Venue is distinct from jurisdiction. Venue is only concerned with the place of pretrial and trial proceedings within the State of North Carolina for an offense for which the State has territorial jurisdiction. *See* State v. Carter, 96 N.C. App. 611, 613 (1989) (discussing distinction between jurisdiction and venue).

Improper venue does not deprive a court of jurisdiction. *See id*. (trial court has jurisdiction despite technically improper venue); *accord* State v. Pulley, 180 N.C. App. 54, 69 (2006). Improper venue is a waivable error, while jurisdiction is not. Thus, if an indictment or other pleading fails to identify, or incorrectly alleges the county where an offense was committed, a defendant must file a timely pretrial motion to dismiss on the ground of improper venue or else the right to do

so is waived. G.S. 15A-135; G.S. 15A-952(e) (failure to make timely pretrial motion to dismiss for improper venue constitutes waiver of motion, from which the court may not grant relief).

The county that is alleged in an indictment establishes prima facie evidence of proper venue in that county absent defendant presenting contrary evidence. State v. Batdorf, 293 N.C. 486, 496 (1977). If the defendant presents contrary evidence, the State must prove before the judge at the pretrial hearing by a preponderance of evidence that venue in the alleged county is proper. *Id.* If the judge finds proper venue, the judge denies the motion. If the judge finds improper venue, the judge grants the motion and dismisses the indictment, and the State must seek a new indictment alleging venue in the proper county.

VI. Probation Jurisdictional Issues.

A. Jurisdiction to Extend, Modify, or Revoke Probation After Expiration of Probation Period. A court generally only has jurisdiction to act on a probation case until the period of probation expires. G.S. 15A-1344(d). There is a limited exception to that rule. A court may act on the case after it expires if the State files a probation violation report with the clerk before expiration. G.S. 15A-1344(f)(1). This statutory provision is essential when a hearing cannot be held before a supervision period ends because, for example, the alleged violation happened near the end of the supervision period or the probationer has absconded. The filing of a violation report does not actually keep a person on probation, it just preserves the court's authority to respond to a violation alleged to have been committed during the term of supervision.

The standard way to establish that the report was timely filed is to show that the report was file stamped by the clerk before expiration. Under a series of cases decided over the past decade or so, the black-letter rule is clear: in the absence of a file-stamped motion or any other evidence of the motion's timely filling, the trial court is without subject matter jurisdiction to act after the case expires. State v. Moore, 148 N.C. App. 568, 570 (2002) (probation report signed and dated by probation officer was insufficient when the report was not filed stamped); State v. High, ___ N.C. App. ___, 750 S.E.2d 9, 13 (2013) (similar ruling involving reports signed and dated by both probation officer and Deputy Clerk of Superior Court).

B. Challenge to Original Conviction or Sentence at Later Probation Revocation Hearing. Sometimes a defense to a probation revocation hearing is not based on the alleged probation violation, but rather the underlying conviction or sentence. For example, if a violation occurred in the 38th month of a probation period that should have been no longer than 36 months without a judicial finding required under G.S. 15A-1343.2(d), the defendant may argue that the violation cannot support a revocation because it occurred after a lawful probation period would have ended. A defendant also may argue that the condition allegedly violated was improper. Statutory law expressly provides for this defense by stating that a defendant's failure to object to a condition when imposed does not constitute a waiver of the right to object to it "at a later time." G.S. 15A-1342(g). But this does not mean forever. Rather, the defendant must object to the condition no later than the hearing at which the violation is alleged. State v. Cooper, 304 N.C. 180, 183 (1981) (court rejects defendant's argument about improper probation condition when it was raised for the first time on appeal).

Another issue may arise at a revocation hearing when a defendant asserts as a defense to a probation violation that the indictment resulting in the conviction and resulting probation was fatally defective; thus, the court was without jurisdiction to adjudicate the case and the probationary judgment was void. Although there is no case directly on point, it appears that a defendant may properly raise this issue under these circumstances. *See* Jamie Markham, *Collateral Attacks on Probationary Sentences*, N.C. CRIMINAL L., UNC SCH. OF GOV'T BLOG (Oct. 23, 2014), http://nccriminallaw.sog.unc.edu/collateral-attacks-on-probationary-sentences/. However, this issue may not be raised for the first time on appeal, *State v. Pennell*, 367 N.C. 466, 471 (2014)—although *Pennell* clearly indicated that a defendant could raise the issue by filing a motion for appropriate relief or a writ of habeas corpus. 367 N.C. at 472.

VII. No Jurisdiction If Fatal Defect in Indictment Or Other Criminal Pleading. Fatal defects in indictments and other criminal pleadings (information, arrest warrant, magistrate's order, etc.) are jurisdictional and may be raised at any time. *See* State v. Snyder, 343 N.C. 61, 65 (1996); State v. Sturdivant, 304 N.C. 293, 308 (1981); G.S. 15A-952(d). For an extensive discussion of fatal and non-fatal defects, see Indictments in this Benchbook.

A dismissal based on a fatal defect or based on a fatal variance between an indictment and proof at trial does not create a double jeopardy bar to a subsequent prosecution. *See* State v. Stinson, 263 N.C. 283, 286-92 (1965) (prior indictment suffered from fatal variance); State v. Whitley, 264 N.C. 742, 745 (1965) (prior indictment was fatally defective). *See also* State v. Abraham, 338 N.C. 315, 339-41 (1994) (noting that proper procedure when faced with a fatal variance is to dismiss the charge and grant the State leave to secure a proper bill of indictment); State v. Blakney, 156 N.C. App. 671, 674 (2003) (noting that although the indictment was fatally defective, the State could re-indict); *see generally* Double Jeopardy in this Benchbook.

VIII. Jurisdiction and Venue Involving Bring-Back Hearing on Satellite-Based Monitoring. If a hearing determining enrollment in satellite-based monitoring is not held at sentencing, the Division of Adult Correction is required to bring the person back for a determination hearing. Based on G.S. 14-208.40B(b), only a superior court judge has subject matter jurisdiction to hold this hearing. State v. Miller 209 N.C. App. 466, 468 (2011). A district court judge does not have jurisdiction. *Id.*

The district attorney represents the Division of Adult Correction at the hearing and must schedule the hearing in the superior court of the county in which the person resides. There is no statutory requirement that the superior court judge who presided at the person's trial also must preside at this hearing.

The place of the hearing is a matter of venue, not jurisdiction. Thus, a person who fails to object to the venue of the hearing at the trial court level waives the right to raise the issue in the appellate division. State v. Mills, ___ N.C. App. ___, 754 S.E.2d 674, 677-78 (2014).

IX. Jurisdiction Involving Hearing on Petition to Terminate Sex Offender Registration. A person who files a petition to terminate his or her sex offender registration must file the petition in the district where the person was convicted of the offense requiring registration. G.S. 14-208.12A. If the reportable conviction is for an offense that occurred in another state, the petition must be filed in the district where the person resides. *Id*.

The statute is silent where to file a petition if the conviction occurred in a federal court, and there is no case law on the issue. The most plausible reading of the statute

would treat a conviction that occurred in a North Carolina federal court as equivalent to a conviction in a North Carolina state court, and thus the petition must be filed in the state court district where the federal court conviction occurred. A conviction in a federal court that is located in another state would require the petition to be filed in the North Carolina district where the person resides.

If the person filed his or her petition in another district, the court lacks jurisdiction to enter an order on the petition. In re Dunn, 225 N.C. App. 43, 45 (2013). The entire proceeding is null and void, and the jurisdictional issue may be raised for the first time on appeal. *Id.*

There is no statutory requirement that the judge who presided at the person's trial also must preside at the petition hearing.

X. Functus Officio: Loss of Jurisdiction When Notice of Appeal is Given. Functus officio is the rule that once an appeal has been filed the trial court no longer has jurisdiction over the case, at least as to the issues being appealed, and may not enter any further orders concerning those matters. See Functus Officio in this Benchbook.

Below are situations in which a trial court may act even though a defendant has entered an appeal.

A. Pretrial Release Authority While Case Is on Appeal. The trial court in which the defendant was convicted retains the authority to determine the conditions of release during an appeal. G.S. 15A-1453(a).

B. Motions for Appropriate Relief Made By Defendant in Trial Court. A motion for appropriate relief (MAR) that is required to be made within ten days of entry of judgment may be heard in the trial division even if notice of appeal has been given. G.S. 15A-1414(c). When the MAR has been appropriately filed in the trial court, the deadline for giving notice of appeal does not start to run until the MAR is decided. G.S. 15A-1448(a)(2).

A motion for appropriate relief made by a defendant more than ten days after judgment under G.S. 15A-1415 may be heard in the trial court as provided in G.S. 15A-1413 if there is no appeal pending, but G.S. 15A-1418(a) requires the such a motion be made in the appellate court "[w]hen [the] case is in the appellate division for review," which presumably means that the appeal has been perfected. The appellate court then decides whether to remand the MAR to the trial court.

For more information about MAR procedure, see Motions for Appropriate Relief in this Benchbook.

C. Trial Court Actions Authorized by Appellate Court. An appellate court may direct the trial court to take the following actions, among others, while an appeal is pending: (1) appointment of counsel; (2) hearings related to the appeal; and (3) taking evidence or conducting other proceedings concerning motions for appropriate relief made in the appellate court. G.S. 15A-1453(b).

XI. Defendant Gives Notice of Appeal When No Right to Appeal. How should a judge respond when a defendant gives notice of appeal when the judge is convinced that the defendant has no right to appeal? There is no case law on this issue. A judge could handle it at least two different ways. The judge could advise the defendant that he or she has no right to appeal and handle the case as though the defendant had not given a

legitimate notice of appeal. The other approach is to allow the defendant to file the appeal and go forward with it to the appellate division.

XII. Jurisdiction to Issue Writ of Certiorari to Review District Court Case. The superior court has jurisdiction to issue a writ of certiorari to review district court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. The authority of a superior court to grant this writ under Rule 19 is analogous to the power of an appellate court to issue a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. State v. Hamrick, 110 N.C. App. 60, 65 (1993) (although State's notice of appeal from district court to superior court was deficient for failure to specify basis for appeal of district court's dismissal of charge based on double jeopardy, superior court had authority to grant writ of certiorari under Rule 19 to allow review of district court's double jeopardy ruling).

XIII. Jurisdiction of Individual Judges Out of Session or Out of Term. For a judge's jurisdiction to act on criminal or civil matter out of session or out of term, see Out-of-Term, Out-of-Session, Out-of-County in this Benchbook.