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THE SPEEDY-TRIAL LAW

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In 1977 the General Assembly rewrote[1] the speedy-trial provisions of G.S. Ch. 15A, Art. 35 to require the trial of criminal cases within 120 days, effective on October 1, 1978, and within 90 days, effective on October 1, 1980. In 1978 the General Assembly made other changes.[2] This memorandum discusses the new law and how the 120-day limitation will work; except for the time factor, the law's provisions are identical for the 90-day limitation. The entire law, including the 1978 amendments, appears at the end of this memorandum.

I. BACKGROUND

In 1974 the General Assembly passed the Pretrial Criminal Procedure Act,[3] which included speedy-trial provisions in G.S. Ch. 15A, Art. 35. Article 35 gave a defendant the right to petition a judge for an order requiring a prompt trial; it authorized but did not require a judge to order a trial within not less than 30 days. A judge also had the right to order a prompt trial on his own motion. But the law did not require that criminal cases be tried within specified time limitations without the action of the defendant or the judge.

The 1975 General Assembly passed a joint resolution[4] that directed the Legislative Research Commission to study the issue of speedy trials.

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1. N.C. Sess. Laws 1977, Ch. 787.
2. N.C. Sess. Laws 1977 (2d Sess. 1978), Ch. 1147.
3. N.C. Sess. Laws 1973 (2d Sess. 1974), Ch. 1286, as amended N.C. Sess. Laws 1975, Ch. 573. The act became effective on September 1, 1975.
4. N.C. Sess. Laws 1975, Res. 91.

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The resolution recommended that a defendant be tried within three months after arrest and stated that "[t]his would eliminate the lack of timely trials and provide certainty of immediate punishment."[5]

A committee[6] of the Research Commission held meetings and took testimony, and then published its findings and a proposed bill in a report[7] to the 1977 General Assembly. Among its findings were:

> Finding 2. The people of North Carolina as well as the criminal defendant have a valid interest in and right to a procedure by which guilt or innocence of the criminal defendant is determined promptly.
>
> Finding 3. Although Article 35 of Chapter 15A of the North Carolina General Statutes provides in most cases sufficient safeguards to protect a criminal defendant's right to a speedy trial, it does not assure the public's right to a speedy adjudication of the accused's guilt or innocence.[8]

The committee recommended that Article 35 be rewritten to provide trials within specific time periods. The committee's proposed bill, which was patterned after the federal Speedy Trial Act of 1974,[9] was introduced in the 1977 session[10] and enacted with only two major amendments. One amendment changed the law's effective date from January 1, 1980, to October 1, 1978. The other required that a trial begin from the date of whichever specified event (arrest, service of criminal process, indictment, information) occurred last--not first, as in the original bill. This amendment significantly weakened the bill, since it provided the prosecutor with more time before he must try a case.

The 1978 amendments were mostly technical. The most important change was the substitution throughout the act of "indicted" for notification of indictment under G.S. 15A-630. The reason for the substitution was that some indicted defendants are not required to be notified under G.S. 15A-630; the change eliminated the possibility of confusion and differing treatment of defendants.

II. HIGHLIGHTS OF THE SPEEDY-TRIAL LAW

Effective date. The law applies to any person who is arrested,[11] served with criminal process (citation, warrant for arrest, criminal summons, order for arrest),[12] waives indictment, or is indicted on or after October

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5. Id.

6. Committee on Females in the Department of Correction and Speedy Trials.

7. Legislative Research Commission, Report to the 1977 General Assembly of North Carolina--Speedy Trials (1977) (hereinafter cited as Report).

8. Report, at 20-22.

9. 18 U.S.C. § 3161 et seq.

10. House Bill 718.

11. Arrest is defined in G.S. 15A-401(c)(1).

12. A magistrate's order is issued when a defendant is arrested without a warrant; it is not criminal process. See N.C. Gen. Stat. § 15A-511(c).

1, 1978. From October 1, 1978, to October 1, 1980, a defendant must be tried within 120 days of the arrest, service of criminal process, information, or indictment--whichever occurs last.[13] On or after October 1, 1980, he must be tried within 90 days (60 days after a mistrial or an action granting a new trial).[14]

The law provides eleven periods of delay[15] that are excluded from the time limitations. Some of these exclusions are discussed on pages 5-10.

What criminal offenses are covered? The law applies to all criminal offenses--violations of state statutes and regulations, county and city ordinances, common law offenses, etc.

Who may make a motion to dismiss? Only the defendant may move to dismiss a case if it is not tried within the time limits; a judge has no authority to dismiss a case on his own motion.[16] A defendant loses his right to move for a dismissal if he fails to make his motion before trial[17] or before he enters a guilty or no-contest plea.[18]

The defendant has the burden of proof in supporting the motion for dismissal, but the prosecutor has the burden of producing evidence concerning periods of delay that are excluded from the time limitations.

May a case be re-prosecuted after dismissal? If a case is not tried within the time limits, a judge must dismiss the case either with or without prejudice. In deciding whether to dismiss with or without prejudice, a judge must consider factors specified in G.S. 15A-703 (seriousness of the offense; facts and circumstances that lead to dismissal; impact of re-prosecution on the administration of the speedy-trial law and on the administration of justice) and any other appropriate factors.

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13. An order for arrest must be issued after indictment when a defendant is not in custody and has not been released from custody under Article 26 (Bail), Chapter 15A. See N.C. Gen. Stat. § 15A-305(b)(1). In such a case, the time limitation would not begin until the order for arrest was served on the defendant. This procedure occurs most frequently when prosecution is initiated by indictment.

Clearly the time limitation will not begin again simply because an order for arrest was issued for the defendant when he failed to appear for trial. An order for arrest may reasonably be interpreted to be the last event that starts the time limitation only when prosecution is initiated by indictment.

14. From October 1, 1978, to October 1, 1980, within 120 days after a mistrial or action granting a new trial.

15. N.C. Gen. Stat. § 15A-701(b)(1)-(11).

16. N.C. Gen. Stat. § 15A-703 does not authorize a judge to dismiss a case on his own motion.

17. "[T]rial" in the context of G.S. 15A-703 apparently means before arraignment, if arraignment occurs on the day of trial; if there is no arraignment on the day of trial [see N.C. Gen. Stat. § 15A-1221(1)], then before jury selection.

18. N.C. Gen. Stat. § 15A-703.

A dismissal with prejudice bars further prosecution for the same offense or an offense based on the same act or transaction.[19] For example, if an armed-robbery charge is dismissed with prejudice, the state may not prosecute the defendant for either the armed robbery or the felonious assault that occurred during the robbery.

A dismissal without prejudice does not prevent a new prosecution. If the defendant is charged again, the prosecutor will have 120 days from the latest of the specified events (arrest, service of criminal process, indictment, information) for the new charge. This result occurs because the subdivision dealing with dismissals [G.S. 15A-701(a1)(3)] excludes dismissals under G.S. 15A-703 from its provisions. Thus G.S. 15A-701(a1)(1) governs, and a new charge is treated as though nothing had occurred before it was brought.

Who may appeal a dismissal with or without prejudice? The state may appeal a district court dismissal to superior court and a superior court dismissal to the appellate division.[20]

A defendant may appeal the denial of a dismissal motion in district court before trial de novo in superior court. The denial of a dismissal motion in superior court may be appealed after conviction to the appellate division.

What happens with trial de novo? G.S. 15A-701(a1)(2) requires a superior court trial within 120 days of the "giving of notice of appeal" for trial de novo. Since defendants may give notice of appeal any time within ten days of a district court judgment,[21] it is important that court officials note the appeal date in the case file.

If the time limits are not met and a case in superior court for trial de novo is dismissed without prejudice, a new charge must be brought in district court in order to re-prosecute. The reason is that the charge is a new case within the original jurisdiction of the district court.[22] As mentioned earlier, the 120-day period starts all over for the new charge when the original charge is dismissed without prejudice.

Effect of plea withdrawal. If a defendant withdraws a plea of guilty or no contest, G.S. 15A-701(c) provides that the full 120-day limitation must begin from the date of the order permitting withdrawal. Note that this subsection applies only when pleas have been entered in the case--not when plea negotiations have simply failed.

When does an action granting a new trial become final? G.S. 15A-701(a1)(5) requires trial within 120 days from the date that an action

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19. The actual language is identical to that found in joinder of offenses in G.S. 15A-926(a).

20. See N.C. Gen. Stat. § 15A-1432(a)(1) (district court appeal) and N.C. Gen. Stat. § 15A-1445(a)(1) (superior court appeal).

21. N.C. Gen. Stat. § 15A-1431(c). A defendant may appeal within ten days even if he has complied with the district court judgment. See N.C. Gen. Stat. § 15A-1431(d).

22. See N.C. Gen. Stat. § 7A-272.

granting a new trial becomes "final" after an appeal or collateral attack.[23] The most reasonable interpretation of "final" in regard to appeals is that the term refers to the date that the case is certified to the clerk of superior court--not the date of the appellate court decision.

III. DISMISSAL OTHER THAN FOR NONCOMPLIANCE WITH THE TIME LIMIT

A dismissal other than for noncompliance with the time limit is governed by G.S. 15A-701(a1)(3), which provides:

> When a charge is dismissed, other than under G.S. 15A-703 [dismissal with or without prejudice], and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge. . . .

The effect of this subdivision is that a dismissal of a case other than under G.S. 15A-703 does not stop the clock from running for the 120-day time limitation. Thus the time limitation for the new charge that is based on the same offense or on the same act or transaction runs from the latest of the specified events (arrest, service of criminal process, indictment, information) for the original charge that was dismissed.

However, a dismissal taken by a prosecutor is affected by two exclusionary periods that stop the clock from running for certain periods of delay after the dismissal. Thus these two provisions--G.S. 15A-701(b)(5) (voluntary dismissal) and -701(b)(11) (voluntary dismissal with leave)--must be read in conjunction with G.S. 15A-701(a1)(3).

Prosecutor Dismissals

A voluntary dismissal under G.S. 15A-931 is a final dismissal of a criminal pleading. If the prosecutor wants to charge the defendant again, he must institute a new criminal pleading.

A voluntary dismissal with leave under G.S. 15A-932 is not a final dismissal of the criminal pleading; the prosecutor may reinstitute the criminal pleading by filing written notice with the clerk. Although a voluntary dismissal may be taken for any reason, a voluntary dismissal with leave may be taken only if the defendant fails to appear at a criminal proceeding at which his attendance is required and the prosecutor believes that he cannot be readily found.

Voluntary dismissal. G.S. 15A-701(b)(5) excludes the following period of delay from the time limitation after a prosecutor takes a voluntary dismissal:

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23. Collateral attack would include relief under N.C. Gen. Stat. Ch. 15A, Art. 89.

> When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge. . . .

When a prosecutor takes a voluntary dismissal under G.S. 15A-931, the effect of G.S. 15A-701(a1)(3) and G.S. 15A-701(b)(5) is to stop the clock from running from the time of dismissal until the last of the specified events (arrest, service of criminal process, indictment, information) occurs for a new charge based on the same offense or the same act or transaction. The accrued time for the original charge that was dismissed must be applied to the new charge:[24] the new limit is 120 days from the last event minus the number of days accrued before the original charge was dismissed.

For example, if a prosecutor takes a voluntary dismissal of an armed-robbery indictment after 105 days have elapsed, the counting against the time limit stops at day 105. If the prosecutor institutes a new armed-robbery charge or another charge based on the same act or transaction, the clock will begin again at day 105 when the last of the specified events occurs for the new charge: arrest, service of criminal process, information, or indictment. Thus, if the same defendant is arrested pursuant to an arrest warrant and then indicted for the same armed robbery, the clock begins with day 105 on the date of the new indictment. The prosecutor must try the defendant within fifteen (120 - 105 = 15) days of indictment or risk dismissal.[25]

Voluntary dismissal with leave. G.S. 15A-701(b)(11) excludes the following period of delay from the time limitation when a prosecutor takes a voluntary dismissal with leave:

> A period of delay from the time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932. . . .

When the prosecutor takes a voluntary dismissal with leave under G.S. 15A-932, the effect of G.S. 15A-701(a1)(3) and G.S. 15A-701(b)(11) is to stop the clock from running from the date of the dismissal with leave until the date the prosecutor reinstitutes the charge by filing written notice with the clerk. The number of days accrued before the dismissal with

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24. The exclusionary provision in G.S. 15A-701(b)(5) does not erase the accrued time before dismissal that must be counted pursuant to G.S. 15A-701(a1)(3). There would be no deterrence from taking a dismissal if accrued time were not counted toward the new charge.

25. The same result occurs when an indictment follows a voluntary dismissal of the same or a similar felony charge in district court. The accrued time in district court must be applied to the later indictment. Under this subdivision, the indictment is a "subsequent charge" that occurs after the "initial charge" was dismissed.

leave must be subtracted from the 120-day time limitation that begins again when the prosecutor reinstitutes the charge.[26]

For example, a defendant is arrested pursuant to an arrest warrant for DUI on October 2, 1978; a prosecutor takes a voluntary dismissal with leave on October 16, 1978, because the defendant failed to appear at trial and cannot be readily found. On January 15, 1979, the prosecutor reinstitutes the charge by filing a written notice with the clerk. The time between October 16, 1978, and January 15, 1979, is excluded from the time limitation; the fourteen days from October 2 to October 16 are applied to the time limitation so that the prosecutor must try the case within 106 (120-14 = 106) days from January 15.

Dismissals by a Judge Other Than Under G.S. 15A-703

As discussed above, G.S. 15A-701(a1) (3) applies to all dismissals other than under G.S. 15A-703.

What dismissals other than prosecutor dismissals are covered? Some examples are a finding of no probable cause at a district court hearing,[27] failure of a pleading to charge an offense,[28] improper venue,[29] etc. But unlike dismissals taken by prosecutors, these judge-ordered dismissals do not have any exclusionary periods of delay that stop the clock from running. Therefore, if after a dismissal a new charge based on the same offense or the same action or transaction is brought, the time limitation for the new charge begins from the latest specified event (arrest, service of criminal process, indictment, information) for the initial charge that was dismissed.

For example, a defendant is arrested for armed robbery on October 2, 1978, and no probable cause is found on October 16, 1978. If a new armed-robbery charge is brought, the time limit for the new charge is counted from October 2, 1978.[30]

Perhaps by the time a new charge is brought after a dismissal, 120 days have elapsed or there is insufficient time to try the case within 120 days. A dismissal with prejudice would be a harsh result, particularly if the case was dismissed for failing to state a charge. Of course, a dismissal without prejudice under G.S. 15A-703 would give a prosecutor a new 120 days in which to try the charge, as discussed earlier.

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26. The exclusionary provision in G.S. 15A-701(b) (11) does not erase the accrued time before dismissal that must be counted pursuant to G.S. 15A-701(a1) (3).

27. N.C. Gen. Stat. § 15A-612(a) (3).

28. N.C. Gen. Stat. § 15A-924(e).

29. N.C. Gen. Stat. § 15A-952(b) (5).

30. This example assumes that the arrest was the latest of the specified events (arrest, service of criminal process, indictment, information) for the original armed-robbery charge. See N.C. Gen. Stat. § 15A-701(a1) (3).

IV. OTHER EXCLUSIONARY PERIODS

There are eleven exclusionary periods of time that must be excluded from the 120-day time limitation. Exclusionary periods for dismissals taken by prosecutors have already been discussed. The following discussion deals with some others.

Continuances

G.S. 15A-701(b)(7) excludes:

> any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.
>
> The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:
> a. whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
> b. whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation with time limits established by this section. . . .

Five important points must be made about this subdivision:

1. Only a judge may make the decision about granting a continuance--not a clerk, magistrate, prosecutor, defense lawyer, or anyone else.

2. The judge must state his reasons for granting a continuance in writing, and it must be placed in the case file. He must write it himself or direct the clerk to do so.[31]

3. Since this law applies to all criminal cases, a judge must make written findings for all continuances.[32]

4. Prosecutors should remind judges to make written findings, since they have the burden of producing evidence concerning exclusionary periods. A delay that results from a continuance should not be excluded from the time limitation when a judge fails to make written findings because the failure is a substantial deviation from the subdivision's provisions. The public's interest in a speedy trial cannot be protected when the record does not reflect the reason why a judge granted a continuance.

5. The subdivision sets broad guidelines[33] for granting continuances.

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31. In superior court, a judge may also direct the court reporter to transcribe the reasons he gave for the continuance. He may then sign the transcription and have it placed in the case file.

32. A judge should not avoid making written findings for a continuance because he is sure the case will be tried within the time limitations. Obviously, it is impossible to predict definitely when a case will be tried.

33. See Report, at 23.

But a judge should keep in mind this law's legislative history, which clearly shows that the law was intended to satisfy the public's interest--not the defendant's--in a speedy trial. A judge should require a clear and convincing justification for a continuance. He should require some evidentiary support for a motion to continue and not merely rely on a statement from the prosecutor or defense counsel that he is "not prepared" for trial. Nonpayment of counsel fees should not be a ground for a continuance, particularly when a defense lawyer enters a case without limiting the extent of his representation under G.S. 15A-141.[34]

Proceedings Concerning the Defendant

G.S. 15A-701(b)(1) excludes:

any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

a. a mental or physical examination of the defendant, or a hearing on his mental or physical capacity;
b. trials with respect to other charges against the defendant;
c. interlocutory appeals; or
d. hearings on pretrial motions or the granting or denial of such motions. . . .

Do the words "period of delay" mean only the time it takes to hear the motion or do they mean the total time from the filing of the motion to the judge's ruling? The most reasonable interpretation seems to be that the phrase refers to the total time needed to dispose of the motion, since the motion delays a case until a judge rules on it.

For example, a defendant files a motion for discovery on October 16, 1978; the hearing is held on October 31, 1978; and the judge makes his ruling on November 3, 1978. The excluded period is from October 16 to November 3.

Note that this subdivision is "not limited to" the specified events in (a) through (d). Probation and parole hearings, among others, are also included.

Interlocutory appeals in subparagraph c include a prosecutor's appeal from an adverse ruling on a pretrial motion to suppress.

Absence or Unavailability of Defendant or Essential Witness

G.S. 15A-701(b)(3) excludes:

any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

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34. See also N.C. Gen. Stat. § 15A-143 (attorney making general entry obligated to represent defendant at all subsequent stages). A clerk should make a notation in the case file when an attorney enters a case.

a. absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and
b. unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial. . . .

This subdivision excludes delay resulting from the absence or unavailability of the defendant or an essential witness for the state or defendant. Although "essential" is not defined, the term would clearly apply to a witness whose testimony establishes or rebuts an element of a crime or is necessary to present important physical evidence. Corroborative or cumulative witnesses would not ordinarily be considered essential.

The exclusionary period for an "absent" defendant in the routine case would begin from the date he failed to appear at a trial or hearing.[35] The absence of an essential witness could be demonstrated by the inability to serve a subpoena; the exclusionary period would apparently begin from the date a law enforcement officer received the subpoena, because that was when he began his efforts to find the witness in order to serve it.

The "due diligence" required to obtain an "unavailable" witness or defendant should include an attempt to obtain him under the various provisions of Chapter 15A: Article 36 (defendant in-state prisoner); Article 37 (extradition); Article 38 (interstate detainers); G.S. 15A-771 (defendant federal prisoner); G.S. 15A-772 (defendant outside the United States); G.S. 15A-773 (organizations); G.S. 15A-801 (witness); G.S. 15A-803 (material witness); G.S. 15A-805 (witness in a North Carolina prison); Article 43 (out-of-state witness); Article 44 (imprisoned out-of-state witness).

The exclusionary period in G.S. 15A-701(b)(9) somewhat overlaps this provision, since it excludes a period of delay when a defendant is in a penal or other institution[36] of another jurisdiction.[37] It does not require a diligent effort to obtain the defendant, as G.S. 15A-701(b)(3)(b) does. To avoid a conflict between the two provisions and to prevent an open-ended exclusionary period in -701(b)(9), a diligent effort to secure the defendant should be required in order for -701(b)(9) to apply.

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35. The date could be earlier if the prosecutor presents evidence showing that the defendant was "absent" even before the scheduled trial or hearing. A prosecutor may also stop the time limitation from running by taking a voluntary dismissal with leave under G.S. 15A-932.

36. "[O]ther institution" includes a mental institution.

37. Another "jurisdiction" includes only another state, the United States, the District of Columbia, a foreign country, etc. The plain meaning of "jurisdiction" should overrride a reference in the Report, Appendix J at page 6, to Article 36 (securing defendant in in-state institutions) that erroneously indicates that "jurisdiction" includes any place other than the county of trial.

V. COUNTIES WITH LIMITED COURT SESSIONS

G.S. 15A-702[38] excludes a defendant's case from the time limitation if "due to the limited number of court sessions scheduled for the county, the applicable time limits specified by G.S. 15A-701 has not been met." This section is intended only for rural counties--not for urban counties with congested court dockets.[39]

This section provides no guidelines for determining what cases in what counties fit within its provisions. Therefore, a judge must make a case-by-case determination whether the reason why the case was not tried within the time limitation was the limited number of scheduled court sessions; if that was not the reason, the case must be dismissed with or without prejudice under G.S. 15A-703.

A defendant may file a motion for a prompt trial only after the 120-day time limitation has been passed; a judge then may order a trial within not less than 30 days. If a prosecutor does not try the case within the time set in the judge's order, the case must be dismissed either with or without prejudice.

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38. The exclusionary provision in G.S. 15A-701(b)(8) also deals with counties with limited court sessions, but it is superfluous because G.S. 15A-702 completely covers the subject matter.

39. See Report, Appendix J at 5-6.

Note: The Speedy Trial Act was enacted by Chapter 787 of the 1977 Session Laws. Chapter 1147, enacted in the 1978 session, made changes in Chapter 787. In the material below, matter in italics *(italics)* is added; matter struck through (~~struck through~~) is deleted; and matter in regular type (regular type) is unchanged.

ARTICLE 35.

Speedy Trial

§ 15A-701. Time limits and exclusions. -- (a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or *is indicted* ~~is notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him~~, whichever occurs last;

(2) Within 90 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or *was indicted* ~~was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him~~, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 60 days of that declaration; or

(5) Within 60 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of G.S. 15A-701(a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or *is indicted* ~~is notified pursuant to G.S. 15A-630 that an indictment has been filed against him~~, on or after October 1, 1978, and before October 1, 1980, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or *is indicted* ~~is notified pursuant to G.S. 15A-630 that an indictment has been filed against him~~, whichever occurs last;

(2) Within 120 days of the giving of notice of appeal in a misdemeanor case for a trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, and the defendant is afterwards charged with the same offense or an offense based on the same act or

transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or *was indicted* ~~was notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him~~, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from

a. A mental or physical examination of the defendant, or a hearing on his mental or physical incapacity;

b. Trials with respect to other charges against the defendant;

c. Interlocutory appeals; or

d. Hearings on pretrial motions or the granting or denial of such motions;

(2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;

(4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;

(5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the

initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; *and*

b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section; ~~and~~

~~c. Whether delay after the grand jury proceedings have begun, in a case where arrest precludes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court of the court or the State~~;

(8) Any period of delay occasioned by the venue of the defendant's case being within a county where due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;

(9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;

(10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States Government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation; *and*

(11) *A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932.*

(c) If trial does not begin within the time limitations specified in this section because the defendant entered a plea of guilty or no contest which was subsequently withdrawn to any or all charges, the applicable period of time limits as specified in this section shall begin to run on the day the order permitting withdrawal of the plea of guilty or no contest becomes final.

§ 15A-702. Counties with limited court sessions.--(a) If the venue of the defendant's case lies within a county where, due to the limited number of court sessions scheduled for the county, the applicable time

limits specified by G.S. 15A-701 has not been met, the defendant may file a motion for prompt trial with (i) a superior court judge presiding over a mixed or criminal session within the same judicial district where the defendant is charged with an offense within the original jurisdiction of the superior court or with a misdemeanor docketed in the superior court for trial de novo; or (ii) a district court judge presiding in the county in which the venue of the case lies, or in the event that there is no district court judge presiding in that county, in the judicial district embracing the county in which the venue lies where the defendant is charged with a misdemeanor pending in district court.

(b) The judge with whom the petition for prompt trial is filed may order the defendant's case be brought to trial within not less than 30 days.

(c) A defendant who files a petition for prompt trial under this section accepts venue anywhere within the judicial district and may not continue or delay his case except on the basis of matters which arise after he files the petition and which he or his counsel could not have reasonably anticipated. The defendant may withdraw the petition for prompt trial only on order of the court, for good cause shown or with the consent of the prosecutor.

§ 15A-703. Sanctions.--If a defendant is not brought to trial within the time limits required by G.S. 15A-701 or within the time prescribed by the judge in his order for prompt trial under G.S. 15A-702(b), the charge shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting that motion but the State shall have the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations under this Article has been complied with. In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of the plea of guilty or no contest shall constitute a waiver of the right to dismissal under this section. A dismissal with prejudice shall bar further prosecution of the defendant for the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan; a dismissal without prejudice shall not bar further prosecution.

§ 15A-704. No bar to claim of denial of speedy trial.--No provision of this Article shall be interpreted as a bar to any claim of denial of a speedy trial as required by the Sixth Amendment to the Constitution of the United States.

Effective Date: Section 2 of Chapter 787, as amended by Chapter 1147, provides:

"This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or *is indicted* ~~notified pursuant to G.S. 15A-630 that an indictment has been filed with the superior court against him~~, on or after October 1, 1978."