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Overview of North Carolina's Speedy-Trial Law

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This memorandum discusses North Carolina's speedy-trial law (G.S. 15A-701 through -703) and appellate cases that have interpreted it. The law is reproduced at the end.

The memorandum has four sections: (1) the general time limits, (2) exclusionary periods, (3) counties with limited court sessions, and (4) dismissal sanctions.

I. GENERAL TIME LIMITS

Before discussing the speedy-trial law's general time limits, it is important to understand which cases are subject to dismissal if they are not timely tried. The dismissal sanctions for violations of the speedy-trial law apply only to felonies and misdemeanors that are tried in superior court in counties that have eight or more criminal or mixed weekly sessions of superior court scheduled each year (see the later discussion of counties with limited court sessions). The dismissal sanctions do not apply to district court misdemeanor trials, although the law states that the 120-day time limit in G.S. 15A-701 is the State policy in district court.[1] The speedy-trial law does not apply at all to juvenile proceedings[2] or infraction hearings.[3]

A. Felonies

1. **When the speedy-trial clock begins.** G.S. 15A-701(a1)(1) requires that a criminal defendant be brought to trial "[w]ithin 120 days from the date [he] is arrested, served with criminal process,[4] waives an indictment, or is indicted, whichever occurs *last*" (emphasis added). Although an indictment in a felony case often is the last of these events, the speedy-trial clock sometimes begins with the postindictment service of an order for arrest on a defendant.[5] For example, in *State v. Koberlein*,[6] the defendant was first arrested on February 24, 1981, for robbery and assault. The charges were dismissed when the State

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1. N.C. GEN. STAT. § 15A-703(b).

2. *Id. See also In re* Beddingfield, 42 N.C. App. 712, 257 S.E.2d 643 (1979), which ruled that juvenile cases were not covered by the speedy-trial law.

3. For example, G.S. 15A-701(a1)(2) refers only to "misdemeanors." An infraction is not a misdemeanor; it is a noncriminal violation of law. N.C. GEN STAT. § 14-3.1(a).

4. Criminal process is described in Article 17 (G.S. 15A-301 through -305) of G.S. Chapter 15A to include an order for arrest, a warrant for arrest, criminal summons, or a citation. An indictment is not criminal process; it is only a criminal pleading. Although the Court in State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983), consulted dictionaries as it sought to define the term criminal process as it appears in the Fair Sentencing Act, our view is (at least as the term appears in the speedy-trial law) that the General Assembly intended that criminal process include only what is described in Article 17.

5. When a defendant is arrested, a district court judge finds probable cause for the felony charge, and an indictment is returned, no order for arrest need be issued, since the defendant is still under the court's jurisdiction for the charge. In such a case, the speedy-trial clock begins with the date that the grand jury returns a true bill of indictment.

6. 309 N.C. 601, 308 S.E.2d 442 (1983). *See also* State v. Lyszaj, 314 N.C. 256, 333 S.E.2d 288 (1985); State v. Washington, 71 N.C. App. 767, 323 S.E.2d 420 (1984), *cert. denied*, 315 N.C. 396, 339 S.E.2d 412 (1986); State v. Piccolo, 72 N.C. App. 455, 325 S.E.2d 507 (1985).

failed to proceed with a probable cause hearing because a prosecuting witness was unavailable, but the defendant was indicted on March 30, 1981, for the same offenses. He was arrested and served with the postindictment order for arrest on September 23, 1981, and brought to trial on December 7, 1981. The North Carolina Supreme Court ruled that the speedy-trial clock began on September 23, 1981, the date of the postindictment arrest, *not* the date of the March 30, 1981, indictments. Since only 74 days elapsed from postindictment arrest to the beginning of the trial, no speedy-trial violation occurred.

The fact that the "last" event in a felony case, whether the indictment or postindictment arrest, is the date that the speedy-trial clock begins generally makes irrelevant the time spent processing the case in district court (except perhaps if there is a dismissal in district court; see the discussion below). For example, the time from an officer's preindictment felony arrest and later district court proceedings until the date an indictment is returned is not subject to the speedy-trial law's 120-day time limit, since the speedy-trial clock has not yet begun.[7]

2. **Dismissal in district court and bringing of a new felony charge.** G.S. 15A-701(a1)(3) provides that if a case is dismissed and the defendant is later[8] charged with the same offense or an offense based on the same act or transaction,[9] the trial must begin "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" (emphasis added), unless the case is dismissed for a violation of the speedy-trial law or a judge's finding of no probable cause in district court.

The appellate cases[10] interpreting this subdivision have ruled that when a judge dismisses a case at a probable cause hearing (whether because he found no probable cause or, as recognized in *State v. Koberlein*,[11] because the State failed to proceed with the probable cause hearing when a witness was unavailable), the speedy-trial clock begins for a new charge (based on the same or a related offense) from the date of the indictment or service of criminal process, whichever occurs last, for the *new* charge. Thus if (a) a district court judge dismissed an armed-robbery charge on September 20, 1985, because he found no probable cause, (b) an armed-robbery indictment was returned on October 15, 1985, and (c) the defendant was arrested on December 25, 1985, with an order for arrest issued with that indictment, the speedy-trial clock began on December 25, 1985.[12]

Although the explicit statutory language in G.S. 15A-701(a1)(3) excepts from its coverage only a dismissal by a judge at a probable cause hearing (or a speedy-trial dismissal), some appellate cases have also excepted a prosecutor's dismissal in district court. For example, in *State v. Gross*[13] the prosecutor took a voluntary dismissal of felony charges in district court because "no report from investigating officer—three Grand Juries have passed," and the defendant was later indicted for the same offenses. The Court of Appeals ruled that the speedy-trial clock began from the date of the indictments, not from the last event for the dismissed charges. The court recognized that a prosecutor's voluntary dismissal—unlike a judge's dismissal at a probable cause hearing—was not explicitly excepted in G.S. 15A-701(a1)(3), but it reasoned that a prosecutor's dismissal based on an officer's failure to file an investigative report was, in substance, no different from a judge's dismissal because the State failed to proceed, as recognized in *Koberlein*. The Court of Appeals ruled in *State v. Simpson*[14] that when a prosecutor took a voluntary dismissal on the date of the probable cause hearing and the defendant was later indicted for the same offenses, the speedy-trial clock began on the date of the indictments. On the other hand, in its analysis of G.S. 15A-701(a1)(3) in *State v. Sturgis*[15] the Court of Appeals implied that a

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7. State v. Charles, 53 N.C. App. 567, 281 S.E.2d 438 (1981).

8. The Court in State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983), ruled that G.S. 15A-701(a1)(3) is *not* triggered when new indictments are brought and the older indictments are then dismissed. But the Court also discussed whether the State had obtained the new indictments in good faith; it ruled that it had done so. Thus the speedy-trial clock for the new indictments began on the date the new indictments were returned.

9. The actual statutory language ("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") parallels the joinder-of-offense test in G.S. 15A-926(a). Appellate cases that have interpreted this subdivision include State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983) (criminal acts cannot be considered as a single scheme or plan if they occurred in different prosecutorial districts); State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982) (assaults on same child on two consecutive days were not part of single scheme or plan); State v. Norwood, 57 N.C. App. 584, 291 S.E.2d 835 (1982) (embezzlement and subsequent larceny charges were based on the same act or transaction).

10. State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983); State v. Lefever, 67 N.C. App. 419, 313 S.E.2d 599 (1984) [Court's ruling is correct, but it incorrectly implies that service of "criminal process" includes service of a bill of indictment; a bill of indictment is not "criminal process." But an order for arrest served on a defendant after he is indicted *is* criminal process; *see* G.S. 15A-305 and *see generally* G.S. Ch. 15A, Art. 17).].

11. 309 N.C. 601, 308 S.E.2d 442 (1983).

12. *See, e.g.*, State v. Koberlein, 309 N.C. 601, 308 S.E.2d 442 (1983); State v. Lefever, 67 N.C. App. 419, 313 S.E.2d 599 (1984).

13. 66 N.C. App. 364, 311 S.E.2d 41, *disc. review denied*, 310 N.C. 746, 315 S.E.2d 706 (1984).

14. 60 N.C. App. 436, 299 S.E.2d 257, *disc. review denied*, 308 N.C. 194, 302 S.E.2d 247 (1983).

15. 74 N.C. App. 188, 328 S.E.2d 456 (1985). *See also* State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982). In *Walden*, the prosecutor took a voluntary dismissal of a misdemeanor child-abuse charge in district court, and then an indictment charging felonious assault was brought. The court ruled that G.S. 15A-701(a1)(3) did not apply because the two charges did not arise from the same transaction or occurrence.

prosecutor's dismissal in district court is not excepted from G.S. 15A-701(a1)(1) and therefore the speedy-trial clock begins with the last event for the original charge, as provided in that subsection. In *Sturgis*, the prosecutor took a voluntary dismissal of a felony indecent-liberties charge in district court and eventually (after other charges and dismissals) an indictment charging indecent liberties was brought. The court stated that the speedy-trial clock began with the original charge under G.S. 15A-701(a1)(3), but it ruled that the State had tried the case within 120 days because periods of delay were properly excluded. It may be difficult to reconcile the analysis in *Sturgis* with the rulings in *Gross* and *Simpson*.[16]

3. **Superseding indictments.** When a second indictment is returned that charges the defendant with the same offense charged in the first indictment, the second indictment supersedes the first.[17] The Supreme Court ruled in *State v. Mills*[18] that the speedy-trial clock begins from the date of the last event for the superseding indictment, if the prosecutor sought the superseding indictment in good faith (for example, to correct an error in the stated date of the offense).

4. **Voluntary dismissal in superior court.** If a prosecutor takes a voluntary dismissal[19] of a felony indictment in superior court and then brings a new indictment based on the same or related offense, then under G.S. 15A-701(a1)(3) the speedy-trial clock for the original charge becomes the speedy-trial clock for the new charge, but the time between the voluntary dismissal and the new indictment is excluded by G.S. 15A-701(b)(5). For example, say that a defendant was indicted for armed robbery on August 1, 1985; that indictment was the last event for the charge (assume the case had been bound over after a district court judge's finding of probable cause, so an order for arrest was not issued). A prosecutor took a voluntary dismissal on September 5, 1985. Then a new indictment for the same armed-robbery charge was returned on October 5, 1985, and the defendant was arrested and served with an order for arrest on October 7, 1985. The speedy-trial clock began on August 1 for the original charge. Under G.S. 15A-701(a1)(3), the speedy-trial clock began for the new armed-robbery indictment on August 1, the date it began for the original indictment. But, under G.S. 15A-701(b)(5), the time from the voluntary dismissal on September 5 to October 7, the date on which the speedy-trial clock would have begun for the new charge, was excluded from the 120-day time limitation.[20] Thus the speedy-trial clock ran 67 days from August 1 to October 7 (the rule[21] is to exclude the first day and include the last day), but the 32-day period from September 5 to October 7 was excluded. The result was that 35 days (67 minus 32) count against the 120-day time limit; thus the State had 85 days from October 7 in which to try the defendant.

5. **Dismissal with leave in superior court.** When a prosecutor dismisses a case with leave under G.S. 15A-932, the speedy-trial clock stops until he reinstates the case.[22]

B. Misdemeanor Trial de Novo

When a defendant is convicted of a misdemeanor in district court and appeals for trial de novo, the superior court trial must begin within 120 days from the day after the last day[23] of the first regularly scheduled criminal session[24] (for which a calendar has not been published at the time he gave notice of appeal) held after the defendant gave notice of appeal.

For example, (a) if a defendant gives notice of appeal on January 5 for a misdemeanor conviction in district court, (b) if January 20 is the first date thereafter on which a calendar for a regularly scheduled criminal session is published (prosecutors should make sure a calendar carries a publication date), and (c) if the session for which that calendar is published begins February 9 and ends on

16. The opinions in State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), and State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985), did not describe the reasons why the prosecutors took dismissals in those cases (of course, it was not necessary to do so in light of the rulings in both cases). One way to reconcile the analyses in *Walden* and *Sturgis* and the rulings in *Gross* and *Simpson* is to note that the cases did not directly address whether the prosecutors' dismissals in *Walden* and *Sturgis* would be excepted from G.S. 15A-703(a1)(3).

17. N.C. GEN. STAT. § 15A-646.

18. 307 N.C. 504, 299 S.E.2d 203 (1983). *See also* State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983) (Court also applies new clock to later indictments alleging new charges that resulted from additional information); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

19. A new charge must be brought if a prosecutor wants to try the defendant after he takes a voluntary dismissal. This situation differs from the one that exists in a dismissal with leave.

20. *See, e.g.*, State v. Lefever, 67 N.C. App. 419, 313 S.E.2d 599 (1984); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), *disc. review denied*, 315 N.C. 396, 338 S.E.2d 886 (1986) [Court applies G.S. 15A-701(b)(5) to exclude delay from date that indictments were quashed until date that new indictments were brought].

21. The rule that is applied in calculating exclusionary periods [see State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981)] should also apply to calculating the time limits.

22. N.C. GEN. STAT. § 15A-701(b)(11); State v. Reekes, 59 N.C. App. 672, 297 S.E.2d 763, *disc. review denied*, 307 N.C. 472, 298 S.E.2d 693 (1982).

23. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, *disc. review denied*, 300 N.C. 201, 269 S.E.2d 615 (1980). Although G.S. 15A-701(a1)(2) has been amended since the *Morehead* decision, the ruling discussed in the text still applies.

24. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, *disc. review denied*, 300 N.C. 201, 269 S.E.2d 615 (1980). The court ruled that a mixed (criminal and civil) session of superior court does not constitute a "regularly scheduled criminal session" as provided in G.S. 15A-701(a1)(2).

February 12, then the 120-day speedy-trial clock begins on February 13.

As discussed earlier, the speedy-trial law does not apply to infraction hearings, even those tried de novo in superior court.

C. New Trials

A new trial required after an appeal or collateral attack must begin within 120 days from the date the appellate court's opinion is certified to superior court.[25] A new trial required after a mistrial must begin within 120 days of the declaration of the mistrial.[26]

D. Withdrawal of Plea

If a defendant withdraws a plea of guilty or no contest, the 120-day time limit begins to run on the day the court order permitting the withdrawal becomes final.[27]

II. EXCLUDING PERIODS OF DELAY FROM THE TIME LIMITS

G.S. 15A-701(b) sets out periods of delay that may be excluded from the running of the speedy-trial clock. (The Supreme Court has ruled[28] that when the period of delay is calculated, the first day of any period is excluded while the last day is included.) Some provisions are discussed below.

A. Delay from Other Proceedings Concerning Defendant: G.S. 15A-701(b)(1)

This subdivision, as amended in 1981, provides a broad exclusionary period resulting from any proceedings concerning the defendant that may delay the beginning of a trial; the period of delay must include all delay from the time the delay begins (whether by motion or by some other event) until either a judge makes a final ruling on the motion or the event that causes the delay is finally resolved.[29] And periods of delay are not limited to the proceedings specifically set out in the subdivision.[30] For example, the Supreme Court in *State v. Marlow*[31] ruled that a defendant's preindictment request for voluntary discovery tolled the speedy-trial clock from the date of the indictment (the beginning of the speedy-trial clock) until one of the following events first occurred: (1) completion of the requested discovery; (2) defendant's filing of a confirmation of voluntary compliance with the discovery request; or (3) the court's determination under G.S. 15A-909 that discovery would be completed. The Court noted, however, that the State must make a good-faith effort to complete discovery in a reasonable time—which it did in this case. The Court ruled that the period of delay from the indictment until the defendant received the discovery material was properly excluded from the 120-day time limit.

Appellate cases[32] have considered many other kinds of delay under this subdivision.

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25. N.C. GEN. STAT. § 15A-701(a1)(5); State v. Bean, 66 N.C. App. 86, 310 S.E.2d 421 (1984).

26. N.C. GEN. STAT. § 15A-701(a1)(4).

27. *Id.* § 15A-701(c).

28. State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981).

29. Courts have applied this method of calculation in State v. Lyszaj, 314 N.C. 256, 333 S.E.2d 288 (1985); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), *disc. review denied*, 315 N.C. 396, 338 S.E.2d 886 (1986); State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, *disc. review denied*, 310 N.C. 747, 315 S.E.2d 708 (1984); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983).

30. N.C. GEN. STAT. § 15A-701(b); State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

31. 310 N.C. 507, 313 S.E.2d 532 (1984). *See also* State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), *disc. review denied*, 315 N.C. 396, 338 S.E.2d 886 (1986).

32. *Change of venue motions:* State v. Dellinger, 308 N.C. 288, 302 S.E.2d 194 (1983) (time from motion for change of venue to ruling on motion properly excluded); State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981) [Court's dictum that the only pretrial motions included within paragraph d. of (b)(1) are those that must be determined before the case can be scheduled for trial is no longer supportable because a 1981 legislative amendment inserted "any" before "pretrial motions"].

Mental examination of defendant: State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985). In two cases decided before the 1981 legislative amendment specified how to calculate exclusionary periods—State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981), and State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981)—the Supreme Court ruled that the excluded period for a mental examination runs from the date of the commitment order to the date the examination report becomes available to the defendant and the prosecutor. The amended statutory language would exclude a longer period of delay: from the date a motion is filed questioning the defendant's capacity to proceed until the date (after the defendant is returned from his examination) when a judge makes a final ruling on the defendant's capacity to proceed. This method of calculation should be adjusted, however, if a prosecutor deliberately delays a hearing to thwart the speedy-trial time limits.

Obtaining lawyer: State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, *disc. review denied*, 310 N.C. 747, 315 S.E.2d 708 (1984) (delay in appointing counsel attributable to defendant since he did not initially demonstrate his financial inability to obtain counsel; delay therefore properly excluded from time limits); State v. Edwards, 49 N.C. App. 426, 271 S.E.2d 533 (1980), *cert. denied and appeal dismissed*, 301 N.C. 724, 276 S.E.2d 289 (1981) (State did not present any evidence to show that defendant caused 100-day delay from indictment until appointment of counsel; delay improperly excluded from time limits); State v. Rogers, 49 N.C. App. 337, 271 S.E.2d 535, *cert. denied*, 301 N.C. 530, 273 S.E.2d 464 (1980) (delay properly excluded from date of defendant's indictment until stipulation of readiness for trial because State reasonably believed that she was attempting to obtain counsel during that period); State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980) (delay properly excluded from date of withdrawal of appointed counsel until appointment of new counsel, who then moved for a continuance); State v. Herbin, App. 64 N.C. 711, 308 S.E.2d 338 (1983) (delay properly excluded from time defendant appeared for arraignment without counsel until time he and his court-appointed counsel filed waiver of arraignment).

Motion and appointment of expert: State v. Waller, 77 N.C. App. 184, 334 S.E.2d 796 (1985), *disc. review denied*, 315 N.C. 396, 338 S.E.2d 886 (1986).

B. Joinder of Trial with Co-Defendant

G.S. 15A-701(b)(6) excludes the period of delay when (a) the defendant's case is joined for trial with a co-defendant for whom the time limit has not run, and (b) a severance motion has not been granted. Appellate cases[33] have ruled, however, that this subdivision does not exclude a period of delay until the cases have been formally joined (unless made at a hearing or trial, a joinder motion must be in writing).[34] Once the cases are formally joined, a period of delay for one co-defendant also applies as a period of delay thereafter for the other co-defendant.[35]

C. Continuances

G.S. 15A-701(b)(7) excludes the period of delay resulting from a continuance granted on a party's written motion to continue. A judge may specify in his order granting a continuance the time that will be excluded from the speedy-trial clock. An AOC form (AOC-CR-203) contains both the motion and order. (The party that makes the motion to continue should be sure to serve a copy of the motion on the opposing counsel.)[36] Appellate cases[37] have uniformly upheld exclusionary periods for continuances when a judge has made the proper findings.

III. COUNTIES WITH LIMITED COURT SESSIONS

G.S. 15A-702(a1) conclusively presumes (a conclusive presumption is the same as a rule of law) that the applicable time limits of G.S. 15A-701 (the 120-day time limit and the like) cannot be met because of the limited court sessions scheduled for the county, if the county has scheduled each year[38] fewer than eight regularly scheduled criminal or mixed weekly sessions of superior court. Thus the speedy-trial law's time limits do not apply at all in these counties.[39] The defendant, of course, may still file a motion for a prompt trial under G.S. 15A-702,[40] assert that his constitutional right to a speedy-trial[41] has been violated, or (if he is an out-of-state prisoner) assert his right to a speedy trial under the Interstate Agreement on Detainers.[42]

In all other counties, the State must offer evidence that the limited number of court sessions prevented the case from being tried in order (a) to exclude delay under G.S. 15A-701(b)(8), or (b) to support a continuance under G.S. 15A-701(b)(7) because of the limited number of sessions.[43]

IV. DISMISSAL SANCTIONS

If a defendant proves[44] that the case was not brought to trial within the applicable time limits, the judge must determine whether to dismiss the case with prejudice (which prevents reprosecution) or without prejudice (which permits reprosecution)[45] by considering the factors set out in G.S. 15A-703: seriousness of the offense, facts and circumstances of the case that lead to the dismissal, and the impact of reprosecution on the administration of justice and the speedy-trial law. The judge must[46] make appropriate findings to support his ruling.

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33. State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819, *disc. review denied*, 308 N.C. 545, 304 S.E.2d 239 (1983).

34. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); N.C. GEN. STAT. § 15A-951(a).

35. *See, e.g.*, State v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), *disc. review denied and appeal dismissed*, 305 N.C. 306, 290 S.E.2d 707 (1982).

36. See the discussion in State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986).

37. *See, e.g., id.*; State v. Jones, 310 N.C. 716, 314 S.E.2d 529 (1984); State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986); State v. Washington, 71 N.C. App. 767, 323 S.E.2d 420 (1984), *cert. denied*, 315 N.C. 396, 339 S.E.2d 412 (1986).

38. Since the Administrative Office of the Courts publishes a fiscal-year calendar of court sessions, the fiscal year probably should be considered as the "year" rather than the calendar year.

39. This provision was noted in State v. Piccolo, 72 N.C. App. 455, 325 S.E.2d 507 (1985), although the court also ruled that the case was tried within the time limits.

40. *See generally* State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981); N.C. GEN. STAT. § 15A-702.

41. For a discussion of the constitutional right to a speedy trial, *see, e.g.*, State v. Jones, 310 N.C. 716, 314 S.E.2d 529 (1984); State v. Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986).

42. N.C. GEN. STAT. § 15A-761. *See, e.g.*, State v. Lyszaj, 314 N.C. 256, 333 S.E.2d 288 (1985); State v. Capps, 61 N.C. App. 225, 300 S.E.2d 819, *disc. review denied*, 308 N.C. 545, 304 S.E.2d 239 (1983).

43. *See, e.g.*, State v. Washington, 71 N.C. App. 767, 323 S.E.2d 420 (1984), *cert. denied*, 315 N.C. 396, 339 S.E.2d 412 (1986); State v. Jones, 70 N.C. App. 467, 320 S.E.2d 26 (1984); State v. Parnell, 53 N.C. App. 793, 281 S.E.2d 732 (1981).

44. G.S. 15A-703(a) gives the State the burden of producing evidence to justify excluding a period of delay. *See, e.g.*, State v. Jones, 70 N.C. App. 467, 320 S.E.2d 26 (1984). The Court of Appeals in State v. Rogers, 49 N.C. App. 337, 271 S.E.2d 535, *cert. denied*, 301 N.C. 530, 273 S.E.2d 464 (1980), stated that a judge should make findings of fact and conclusions of law when he determines exclusionary periods.

45. The Court of Appeals in State v. Ward, 46 N.C. App. 200, 264 S.E.2d 737 (1980), ruled that when a case is dismissed without prejudice, the State has 120 days from the date of the dismissal to try it. However, it would appear that the State should have 120 days from the last event for the new charge, since dismissals for speedy-trial law violations are excepted from G.S. 15A-701(a1)(3). Such was the case in State v. Boltinhouse, 49 N.C. App. 665, 272 S.E.2d 148 (1980), concerning probable cause hearing dismissals that are also excepted from G.S. 15A-701(a1)(3).

46. *See, e.g.*, State v. Smith, 70 N.C. App. 293, 319 S.E.2d 647 (1984); State v. Moore, 51 N.C. App. 26, 275 S.E.2d 257 (1981).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

(a) Repealed by Session Laws 1983, c. 571, s. 1, effective October 1, 1983.

(a1) The trial of the defendant charged with a criminal offense 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, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court, for which a calendar has not been published at the time of notice of appeal, held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, 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;

(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, including all time when he is awaiting or undergoing treatment or examination, or a hearing on his mental or phsycial capacity; or

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

c. Interlocutory appeals; or

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

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved;

(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. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.

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;

c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;

d. Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly.

When a judge grants a continuance pursuant to this subsection, he may specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

(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. A county is conclusively presumed to be a county where, due to the limited number of court sessions scheduled for the county, the applicable time limit specified by this section cannot reasonably be met, if the county has scheduled each year fewer than eight regularly scheduled criminal or mixed weekly sessions of superior court. In any other county, a determination shall be made in each case whether the applicable time limit specified by this section cannot reasonably be met due to the limited number of court sessions scheduled for that county;

(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 ju-

risdiction 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;

(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;

(12) When a charge is dismissed by a judge other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, 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 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;

(13) Any period of delay from the time criminal process is served on a defendant who has previously been called and failed until the time that the district attorney receives notice that the criminal process has been served;

(14) Any period of delay from the time the defendant has been called and failed in open court until the time that the district attorney receives notice that the criminal process was stricken or was never issued; and

(15) Any period of delay from the time that a defendant has been returned from court-ordered or -approved hospitalization, treatment, or examination until the time that the district attorney receives notice that the defendant has returned.

(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 limit 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.

(a1) A county is conclusively presumed to be a county where, due to the limited number of court sessions scheduled for the county, the applicable time limit specified by G.S. 15A-701 has not been met, if the county has scheduled each year fewer than eight regularly scheduled criminal or mixed weekly sessions of superior court. In any other county, a determination shall be made in each case whether the applicable time limit specified by G.S. 15A-701 has not been met due to the limited number of court sessions scheduled for that county.

(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.

(a) 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 have 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.

(b) The 120-day limitation as provided in G.S. 15A-701 is the State policy in the district court division of the General Court of Justice, but none of the sanctions provided in this section shall apply to the proceedings in the district court division.

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