

**CONFIDENTIAL INFORMANTS, DEFECTIVE PROCESS,
AND POST-TRIAL MOTIONS**

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I. INTRODUCTION

The purpose of this paper is to address two specific types of motions and then the general area of post-trial motions. The first area to be addressed is motions to compel the disclosure of the identity of confidential informants. This is an often-overlooked motion that usually results in a dismissal of the charges. Next this paper will examine motions challenging defective process. While this is frequently more applicable to District Court proceedings than Superior Court proceedings, successful litigation of this type of motion can often stymie prosecutors. Finally, this paper will examine a variety of post-trial motions in both state and federal courts.

II. COMPELLING THE DISCLOSURE OF THE IDENTITY OF A CONFIDENTIAL INFORMANT

A. Introduction

A defendant's ability to challenge a search warrant was greatly impeded with the adoption of the "totality of the circumstances" approach to analyzing probable cause determinations adopted by the United States Supreme Court in 1983 in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). An often overlooked method of challenging a search warrant comes from the defendant's ability to seek the disclosure of the identity of the confidential informant under certain circumstances. Litigants who have been successful in obtaining a court order requiring the State to identify the confidential informant have found that in most cases the State, having previously agreed to protect the identity of the confidential informant, will take a dismissal in the prosecution rather than comply with the court order. Accordingly, this method of attacking a search warrant can prove invaluable. The purpose of this section is to explore the rationale behind the rule for revealing the identity of a confidential informant and to discuss situations for and methods of obtaining such a court order.

B. Roviaro

The lead case requiring the State to provide the identity of a confidential informant to the defendant is the 1957 United States Supreme Court decision of *Roviaro v. United States*, 353 U.S.

53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Roviario was prosecuted in federal court in Chicago on narcotics violations. He had been the subject of a sting operation in which federal and local agents had used a confidential informant to set up a narcotics transaction. While agents attempted to survey the transaction, the transaction itself took place between Roviario and a confidential informant described as John Doe. Throughout his trial, the defendant continuously attempted to learn the identity of the confidential informant, but the trial court refused to require the government to identify him. The United States Supreme Court ruled that the government's ability to protect the confidentiality of an informant is limited by the requirements of the due process clause.

Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the government withholds the information, dismiss the action.

Id. at 628. The Supreme Court went on to find that the circumstances of Roviario's case demonstrated that the confidential informant's "possible testimony was highly relevant and might have been helpful to the defense." *Id.* at 629. (emphasis supplied) Of significant importance in the *Roviario* decision is the Court's emphasis on the potential for helpfulness of the confidential informant's testimony.

Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine police officer Bryson and federal narcotics agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he "transported" from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide.

Id. at 629. (emphasis added)

C. North Carolina Cases

While there exists a laundry list of North Carolina Supreme Court and Court of Appeals decisions affirming the trial court's denial of a defendant's motion to disclose the identity of a confidential informant, there are a few notable exceptions.

1. *State v. Johnson*, 81 N.C.App. 454, 344 S.E.2d 318 (1986).

Defendant was convicted of multiple narcotics offenses out of Cumberland County and appealed to the North Carolina Court of Appeals. The evidence demonstrated that a confidential informant introduced an undercover detective to a person the informant referred to as "Snag." After introducing the two, the informant then drove the three to a nearby trailer where "Snag" entered a trailer and returned with a small plastic bag containing 20 units of LSD. The three then returned to where they had originally met and "Snag" provided the other two with additional controlled substances. At trial, defendant contended he did not live in the duplex where the confidential informant initially took Detective Johnson, that he was not known by the nickname "Snag" and he did not sell drugs to Detective Johnson or anyone else.

The Court of Appeals agreed with the defendant's contention the confidential informant was not a tipster but an actual participant in the commission of the offense. The Court specifically noted the Detective had wavered in his pre-trial identification of the defendant, thereby making the confidential informant's identity necessary to Johnson's defense.

2. *State v. McLawhorn*, 16 N.C.App. 153, 191 S.E.2d 410 (1972), appeal dismissed, 282 N.C. 306, 192 S.E.2d 194.

Defendant was found guilty in Guilford County of several counts of possession, sale and transportation of narcotics. The North Carolina Court of Appeals affirmed his conviction finding facts of defendant's case distinguishable from *Roviaro*, holding the defendant did not make a sufficient showing require the disclosure of the identity of the confidential informant. Defendant's appeal to the North Carolina Supreme Court was dismissed for lack of a substantial constitutional question. Defendant then brought his contention to federal court where he was denied a writ of habeas corpus in the District Court Division, but was granted relief by the Fourth Circuit Court of Appeals. In *McLawhorn v. State of North Carolina*, 484 F.2d 1 (4th Cir. 1973), the Fourth Circuit Court of Appeals reversed the District Court and granted habeas relief. The Court found the defendant was entitled to know the identity of the confidential informant.

The facts in the case at bar clearly indicate that the informant was a participant in the incident which resulted in the arrest and conviction of petitioner. The unidentified informant initially suggested that petitioner dealt in drugs. There is evidence that he made confidential telephone calls to petitioner in an attempt to arrange a sale. He made the initial face-to-face contact with the petitioner, conversed with him several moments in private and then introduced him to Daughtry. The informant, riding in the front seat with petitioner while Daughtry rode in the back seat, observed and engaged in the negotiations for the sale. He actually took delivery of the drug, passed the package back to Daughtry, and paid at least a part of the purchase price with

money he had on his person. It is apparent that the informant engineered the events leading up to the criminal occurrence and was a material witness who could testify directly from personal knowledge concerning the transportation, possession, and sale of cocaine. Indeed his testimony was mandated in order to accomplish the purpose of a criminal trial - finding the truth. It is our view that participation by the informant is the essential distinction and we conclude that the prosecution's claim of the nondisclosure privilege should have been denied by the trial court.

Id. at page 5. (footnotes omitted)

3. *State v. McEachern*, 111 N.C.App. 218, 441 S.E.2d 574 (1994).

In *McEachern*, a police detective received information from a confidential informant that a black man named "Toney" was in the business of selling cocaine. The detective gave the informant some money and took him to the defendant's trailer during the day of March 8, 1991. The informant went inside the trailer and returned shortly with some crack cocaine advising the detective that he had purchased it from "Toney" and that there was more cocaine inside the trailer. The officer then obtained a John Doe search warrant issued by a Magistrate. At approximately 6:00 p.m. on the same day, the officer returned to the defendant's trailer where they saw the defendant backing his truck out of the front yard. The defendant was stopped and returned to his home where the officers entered the trailer and found marijuana and cocaine.

The defendant, whose name was Toney, testified that on March 7, 1991 he allowed his nephew, Charles Jackson, to use his trailer for a party whereupon he left and went to his uncle's house in Lumber Bridge. He did not return to his residence until approximately 6:00 p.m. on the 8th when he entered in the company of police officers. He further testified there were no controlled substances in his residence when he departed at 2:30 p.m. on March 7 and had no knowledge of who was inside his residence during his absence.

At the conclusion of the hearing, the trial court found "the defendant's testimony... established the informant as a material and necessary witness to the defense to corroborate the defendant's alibi, point toward third party guilt, and show nonexclusivity of defendant's premises." *McEachern* at 575. The trial court granted defendant's motion to require the disclosure of the informant's identity, and upon the prosecution's refusal dismissed all charges with prejudice against defendant. The State appealed the trial court's ruling and the North Carolina Court of Appeals affirmed the dismissal.

An informant should be disclosed "[i]f the informant can testify as to the details surrounding the actual crime..." *State v. Parks*, 28 N.C.App. 20, 25, 220 S.E.2d 382, 386 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E.2d 701

(1976). Here, three of the charges were possession offenses under N.C.Gen.Stat. § 90-95(a)(1), and one was for knowingly maintaining or keeping a dwelling place resorted to by others for the unlawful use or buying of a controlled substance, N.C.Gen.Stat. § 90-108(a)(7). ... Defendant argued that if called as a witness, the informant could testify that defendant was not in fact the person who was selling drugs and who sold him drugs. The informant could also testify that the drugs belonged instead to a third party. Both of these statements would help to show that defendant did not possess the drugs.

Id. at 576. The court concluded that because the defendant's testimony established the informant as a material and necessary witness to the defense to corroborate defendant's alibi, point toward third party guilt and show nonexclusivity of defendant's premises, the court's decision to order disclosure was proper.

D. Procedure

In *State v. Moctezuma*, 141 N.C. App. 90, 539 S.E.2d 52 (2000), the defendant filed a motion for disclosure of the identity of a confidential informant. The trial court responded by holding an *ex parte* in-camera hearing over the defendant's objections and out of the presence of defendant, defense counsel and all other people except prosecutors, policemen, and the court reporter. After the hearing, the trial court stated in open court that it found confidential informant's testimony would not be relevant to any issue to the defendant and denied defendant's motion

The Court of Appeals took the trial court to task for closing the courtroom without making any findings as to the necessity of its actions. The Court noted that North Carolina case law indicated that defendants and their counsel are regularly allowed to be present at hearings on motions to reveal confidential informant identities. The Court of Appeals went on to set forth the following procedure for such a motion.

...the trial court should first hold a hearing outside the presence of the jury to consider the question. Defendant must present evidence supporting the necessity of having the identity of the confidential informant revealed, following which the State may present evidence in opposition to defendant's motion. Upon reviewing the evidence and arguments by defendant and the State, the trial court may then either grant or deny defendant's motion, make the necessary findings of fact and conclusions of law in support of its decision. If the trial court determines that it needs to know the identity of the confidential informant in order to properly rule on a defendant's motion it may then exclude defendant from the courtroom in order to protect the identity of the confidential informant, *provided* that the trial court first makes appropriate findings of fact and conclusions of law as to the necessity for defendant's exclusion. In taking such action, the trial court must consider that exclusion of a defendant or his counsel from a courtroom raises serious due process questions. If the exigencies of the

situation require exclusion, the trial court should take any action necessary to protect defendant's rights to a fair trial.

Id. at 97, 57.

E. Application

The earlier cases in which defendants sought to obtain the identity of a confidential informant were usually sale cases. However, as the *McEachern* holding demonstrates, the application of this doctrine may have even more significance to search warrant cases. In search warrant cases, defendants are primarily charged with possessory offenses, and, depending on the quantity, trafficking. In the appropriate case, an affidavit in support of search warrant, or the defendant's own testimony can make the confidential informant a potential witness to corroborate a defendant's alibi, point to third-party guilt, or to demonstrate non-exclusivity of the premises searched.

While each case must be analyzed on a case by case basis, potentially in each circumstance where the search warrant is issued in the name of a person other than the defendant, there is a strong likelihood that the identity of the confidential informant may be ordered disclosed to assist the defendant in demonstrating third party guilt or non-exclusivity of the premises searched. Other evidence, including a defendant's own testimony, can likewise yield the same result.

III. DEFECTIVE PROCESS

A. Introduction

The vast majority of criminal defense representations begin when the client comes to your office and brings you his "papers." A close examination of the charging instruments should be one of the first steps in formulating a defense for your client. While there are many technical requirements to the proper drawing of a charging instrument, many can be overcome by the process of amendment and are therefore of little substantive value. However, many defects in criminal process are considered fatal, and therefore not subject to amendment, thereby allowing the defendant to avail himself of a dismissal.

B. Failure to charge an element

It is a longstanding and well-recognized rule of law that in all criminal process, whether by citation, warrant, or indictment, the allegation must allege facts descriptive of all essential elements of the offense charged. *State v. Cole*, 202 N.C. 592, 163 S.E. 594 (1932). This rule has been codified in our statutes at N.C.G.S. § 15A-924(a)(5).

- (a) A criminal pleading must contain:
 - (5) a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of

a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

The failure of a criminal process to allege each element of the criminal offense renders the instrument fatally defective requiring its dismissal. *State v. Brunson*, 51 N.C.App. 413, 276 S.E.2d 455 (1981); *State v. Williams*, 1 N.C.App. 312, 161 S.E.2d 198 (1968). Criminal process is defective by a failure to allege an essential element is not cured by reference in the warrant to the statute. *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968). Counsel should attack criminal process that fails to make a factual statement of each and every element of the criminal offense charged. In the appendix is an example of a Motion to Dismiss for Failure to Comply with N.C.G.S. §15A-924(a)(5). The Motion to Dismiss is supported by a Memorandum of Law.

C. Amendment

Where the allegation omits elements of the offense, the admission is fatal and the court has no power to make an amendment. *State v. Williams*, supra. In *Williams*, defendant had been charged with the offense of public drunkenness. The instrument charged the defendant had appeared in a drunken condition "off his premises" The court found the allegation did not satisfy the necessary element of appearing in a public place. The court reversed the defendant's conviction, and in doing so held the warrant was not subject to amendment.

In order to constitute a valid charge under a statute, the essential elements of the offense must be set forth in the warrant. "Where a warrant or indictment is fatally defective in failing to charge an essential element of the offense, the defect cannot be cured by amendment."

Id. at 315, 200, citing 4 Strong, N.C. Index 2d, Indictment and Warrant, § 12, page 357.

Additionally, N.C.G.S. §15A-922(f) limits amendments to those which do "not change the nature of the offense charged."

D. Constitutional dimension

Recent United States Supreme Court decisions suggest that the failure to include an element of the offense in criminal process may violate the due process clause and the Sixth Amendment notice and jury trial guarantees. *United States v. Jones* at 526 U.S. 227, 119 S.Ct. 1215 (1999); *Apprendi v. New Jersey* at ___ U.S. ___, 120 S.Ct. 2348 (2000). However, the North Carolina Supreme Court has already rejected this argument as it applies to short form murder indictments, holding that *Jones* involved and was limited to the application of the Fifth Amendment due process clause as it applies to the federal government and federal prosecutions and not to state prosecution of a state offense. *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000).

E. Names

Where the criminal offense involves another person, such as an assault, it is necessary that the third party be named in the criminal process. The need is founded upon double jeopardy principles so the defendant may have the benefit of acquittal or conviction upon a second accusation. *State v. Scott*, 237 N.C. 432, 75 S.E.2d 154 (1953). In some instances, attempts to provide anonymity to third parties and victims will result in a defective warrant. The standard citation form used by alcohol law enforcement officers will violate this provision with regard to certain offenses to be charged on the form citation. Unless "a person" is specifically identified by the charging officer, charges brought under one of these citations for certain offenses would arguably violate this requirement.

F. Entities capable of ownership

A common mistake in the drafting of warrants and indictments is to allege a larceny or an embezzlement from a store or company without indicating the proper name of the store. A typical example is where the defendant is charged with stealing merchandise from "Belks." These property crimes offend the ownership rights of another and the State is required to prove ownership. A proper indictment must identify the victim as a legal entity capable of owning property. An allegation of corporate ownership should contain one of the following four words: corporation, incorporated, limited, or company, or an abbreviation of one of these words. In prior court decisions, the following names have all been held to be insufficient to allege an entity capable of ownership: "The Chuck Wagon", "Granville County Law Enforcement Association", "Metropolitan YMCA t/d/b/a/Hayes-Taylor YMCA Branch", "Ken's Quickie Mart", "Belks Department Store." This longstanding rule has recently been reaffirmed by the Court of Appeals in *State v. Woody*, 132 N.C.App. 788, 513 S.E.2d 801 (1999), where the court vacated judgment against a defendant convicted of conversion by bailee where the indictment alleged the victim to be "P & R Unlimited."

- (1) Shoplifting cases. An exception to the rule applies in shoplifting cases where the victim's corporate status is not necessary. *State v. Wooten*, 18 N.C.App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).
 - (2) Amendment. If the process is defective by failing to specify an entity capable of ownership, the defect is correctable by amendment. *State v. Young*, 13 N.C.App. 237, 185 S.E.2d 4 (1971). However, any change in the allegation which alters the name of the third party in a manner that changes the third party results in a substantial alteration of the charge and is prohibited. *State v. Hughes*, 118 N.C.App. 573, 455 S.E.2d 912 (1995).
- ☞ Practice Pointer. Amendment made? If the State has moved to amend criminal process and the court has allowed the amendment, make sure the document has actually been amended. In *State v. Jenkins*, 238 N.C. 396, 77 S.E.2d 796 (1953), the Supreme Court considered a case where the State moved to amend a warrant to

charge the offense in the words of the statute. While the court allowed the amendment, the amendment was never actually made on the warrant. On appeal, defendant raised the issue regarding deficiencies in the process. The Supreme Court agreed with the defendant and arrested judgment in the case.

The legal standing of the State has not improved an iota by the order granting the solicitor permission to amend the warrant so as to charge the violation in the words of the statute... The amendment was not actually made. Inasmuch as neither the motion nor the order stated the contemplated language of the proposed amendment, the order allowing the motion to amend was not self-executing.

Jenkins at 797 (citations omitted).

G. Recharging

In each situation, whether the process is defective by failing to charge an element of the offense, to identify the victim, or to allege an entity capable of ownership in a property crime, upon dismissal the State is free to recharge defendant upon a sufficient charging instrument. *State v. Ingram*, 271 N.C. 538, 157 S.E.2d 119 (1967); *State v. Banks*, 263 N.C. 784, 140 S.E.2d 318 (1965); *State v. Blackmon*, 6 N.C.App. 66, 169 S.E.2d 472 (1969). In many District Court cases, obtaining a dismissal is sufficient to win the case. Although in more serious cases, the State would no doubt be motivated to recharge.

IV. POST TRIAL MOTIONS

A. State post trial motions

Article 89 of Chapter 15A of the North Carolina General Statutes recharacterizes motions formerly seeking arrest of judgment, to set aside a verdict, a new trial, or other post-conviction remedies as one type of motion referred to as a motion for appropriate relief. While the current motion for appropriate relief encompasses all previous forms of post-conviction remedy, it does not act as a bar to a petition for writ of habeas corpus nor toward the regular course of appeal.

1. Who hears the motion?

Motions under N.C.G.S. §15A-1414, which are motions for appropriate relief sought within ten (10) days of the entry of judgment, must be heard by the Judge who presided at trial. The Judge may act pursuant to N.C.G.S. §15A-1414 even if he is in another district, or his commission has expired.

Motions for appropriate relief under N.C.G.S. §15A-1415 may be heard and

determined by any Judge “who is empowered to act in criminal defense matters” in the District Court Division if it is a District Court matter, or the Superior Court Division if it is a Superior Court case. A Judge who is presented with a motion for appropriate relief may, “if it is practical to do so”, refer all or part of the matter to the original trial Judge.

2. N.C.G.S. §15A-1414 - Motions for Appropriate Relief (10-day motions)
 - a. Defendant can raise any error committed during or prior to the trial as a basis for a motion for appropriate relief within ten (10) days after the entry of judgment. Such a motion can be made whether or not notice of appeal has been given.
 - b. While defendant can raise any error within ten (10) days, certain errors must be raised as a 10-day motion for appropriate relief if they are to be made in the trial division at all. They are as follows:
 - (1) motions addressing any error of law including all motions to dismiss under N.C.G.S. §15A-954, any evidentiary ruling made before or during the trial, motions directed to the sufficiency of the evidence, and motions directed toward jury instructions;
 - (2) that the verdict is contrary to the weight of the evidence;
 - (3) for any other reason the defendant did not receive a fair and impartial trial; and
 - (4) the sentence imposed is not supported by the evidence introduced at trial and at sentencing (motions directed toward sentencing must be ruled on by the sentencing Judge).

3. N.C.G.S. §15A-1415 - Motions for Appropriate Relief

a. Time limitations

(1) Non-capital defendants

There is no time limitation placed upon the filing of a motion for appropriate relief for non-capital defendants.

(2) Capital defendants

Motions for appropriate relief in capital cases must be filed within

120 days from the latest of the following:

- (a) the Court's judgment was filed but the defendant failed to perfect a timely appeal;
- (b) the mandate issued by the North Carolina Supreme Court on direct appeal and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without such a petition being filed;
- (c) the United States Supreme Court's denial of a timely petition for certiorari on the decision on direct appeal by the Supreme Court of North Carolina;
- (d) the denial by the United States Supreme Court of a petition for writ of certiorari following the denial of discretionary review by the Supreme Court of North Carolina from the direct appeal of a North Carolina Court of Appeals' decision;
- (e) the subsequent leaving of defendant's conviction and sentence undisturbed following the United States Supreme Court's granting of either the State's or the defendant's timely petition for writ of certiorari to review a Supreme Court or North Carolina Court of Appeal's decision;
- (f) finally the appointment of post-conviction counsel for indigent capital defendants.

A defendant may be granted an extension of time to file a motion for appropriate relief. While a Court may grant a longer period of time, the presumptive length of time for an extension is thirty (30) days.

b. Grounds to be raised

15A-1415 enumerates eight grounds which may be raised more than ten (10) days after entry of judgment. They are as follows:

- (1) the acts charged in the criminal pleading at the time they were committed did not constitute a violation of criminal law;
- (2) the trial court lacked jurisdiction over either the person of the defendant or the subject matter;

- (3) the conviction was obtained in violation of either the state or federal constitutions;
- (4) the defendant was convicted or sentenced under a statute that was in violation of either the state or federal constitutions;
- (5) the conduct for which the defendant was prosecuted was protected by either the state or federal constitutions;
- (6) there has been a significant change in either substantive or procedural law where a retroactive application is required which would change the status of defendant's conviction or sentence;
- (7) the sentence imposed was unauthorized at the time it was imposed, contained a type of sentence or term of imprisonment not authorized for the class of offense of the prior record level calculation, or the sentence was otherwise invalid as a matter of law (motions under this subsection must be made before the sentencing Judge); and
- (8) the defendant is in confinement and is entitled to release because he has fully served his sentence.

c. Newly discovered evidence

Both capital and non-capital defendants may raise the issue of newly discovered evidence by a motion for appropriate relief at any time. The evidence must have been unknown to the defendant or unavailable to him at trial and could not have been, with due diligence, discovered and made available at that time. This includes recanted testimony which has a direct and material bearing upon defendant's eligibility for the death penalty or on the defendant's guilt or innocence. Motions based upon newly discovered evidence must be filed within a reasonable time of their discovery.

d. Waiver of attorney-client privilege

When a defendant files a motion for appropriate relief alleging ineffective assistance of trial or appellate counsel as a ground for the illegality of his conviction, the defendant has deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and defendant to the extent that the defendant's prior counsel reasonably believes that such communications are necessary to defend against the

allegations of ineffectiveness. This waiver is automatic and does not require the entry of any order by a Superior Court Judge.

e. Discovery in capital cases

In capital cases, the defendant's prior trial and appellate counsel shall make available to the capital defendant's post-conviction counsel their complete files relating to the defendant's case. The state shall also make available to the capital defendant's counsel complete files of all law enforcement and prosecutorial agencies involving the investigation of the crimes committed or the prosecution of the defendant. The state may seek a protective order if it believes that certain disclosure would not be in the interests of justice.

4. Relief available

Article 89 provides that when a trial court grants a motion for appropriate relief it may grant a new trial on all or any charges, the dismissal of all or any charges, or any other appropriate relief. The statute specifically authorizes the trial court to enter judgment on lesser included offenses and, with the consent of the state, accept guilty pleas to lesser included offenses. The court is also authorized to proceed to resentencing if that is required.

5. Procedure

a. Written motion required

Unless the motion is a 10-day motion made in open court before the Judge who presided at trial and before the end of the Superior Court session where the matter was tried, all motions for appropriate relief must be made in writing, state the grounds for the motion and the relief sought and be timely filed. Written motions must be filed and served in accordance with N.C.G.S. §15A-951.

b. Supporting affidavits

If a motion for appropriate relief is based upon the existence or occurrence of facts which are not ascertainable from the record or any transcript of the case, it must be supported by affidavits or other documentary evidence.

c. Preliminary actions

Once filed, the Clerk shall promptly bring the motion to the attention of the Resident Judge or any Judge holding court in the county or district. In non-

capital cases, the Judge shall review the motion and enter an order holding whether defendant should, be allowed to proceed without the payment of costs, is entitled to appointment of counsel and directing the state, if necessary, to file an answer. In capital cases, the Judge shall direct the state to file an answer within sixty (60) days of the order. If a hearing is necessary, the court shall calendar the case for hearing “without unnecessary delay”.

d. Evidentiary hearings

The court will determine whether or not any party is entitled to an evidentiary hearing to resolve questions of fact. The court must determine the motion without an evidentiary hearing if it determines that only questions of law are presented. The court is not required to hold evidentiary hearings under 10-day motions, but it may hold an evidentiary hearing if it deems that appropriate. If an evidentiary hearing is held, a defendant can only waive his appearance in writing.

At such an evidentiary hearing, the moving party has the burden of proof by a preponderance of the evidence on every fact essential to support the motion. The moving party must show the existence of the asserted ground for relief and, in addition, must also demonstrate prejudice under N.C.G.S. §15A-1443.

When the motion asserts a violation of the United States Constitution, or laws or treaties of the United States, the Court must make conclusions of law and a statement of the reasons for its determination to the extent required indicating whether defendant had a full and fair hearing on the merits of the grounds so asserted. A court is also allowed to grant a defendant relief acting on its own motion at any time when it determines that a defendant would be entitled to relief had defendant filed a motion for appropriate relief.

e. Amendment

A defendant may file an amendment to the motion for appropriate relief at least thirty (30) days prior to the commencement of a hearing on the merits of a claim asserted, or at any time before the date for a hearing has been set. When a defendant files an amendment to a motion for appropriate relief, the State, upon request, shall be granted a continuance of thirty (30) days before the date of a hearing. Once a hearing has begun the defendant may file amendments only to conform the motion to the evidence introduced at hearing, or to raise claims based on such evidence.

6. Grounds for denial

N.C.G.S. §15A-1419 sets forth several grounds for the denial of a motion for

appropriate relief in both capital and non-capital cases. These enumerated grounds generally fall under the heading of what is known as procedural default. Due to the complexity of this issue, it will not be addressed in this manuscript. Litigants facing a procedural default issue may well wish to consult an Institute of Government publication from January 2001. The publication entitled “Procedural Default in State and Federal Post-Conviction Proceedings” can be found at <http://ncinfo.iog.unc.edu/programs/crimlaw/aoj200101smithmar.pdf>.

B. Federal post-trial motions

Most post-trial motions in federal court are set forth in Rules 33-35 of the Federal Rules of Criminal Procedure.

1. Rule 33. New Trial

(a) Timing

Motions for a new trial based on any reason other than newly discovered evidence must be filed within seven (7) days of the verdict unless the court has set a different time period.

(b) Grounds

Defendant’s motion for a new trial may be based on any grounds and allows the trial court to grant such a motion “if the interests of justice so requires.” If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(c) Newly discovered evidence

Motions for a new trial based on newly discovered evidence must be filed within three years after the verdict or the finding of guilty. If the case is on appeal, the court may not grant such a motion until the appellate court has remanded the case.

2. Rule 34, Arresting Judgment

(a) Time limitations

Again the defendant must file such a motion within seven (7) days of a verdict, a finding of guilty, a plea of guilty, or a plea of *nolo contendere* unless the court has set a different time for such filing.

(b) Grounds for arresting judgment

Rule 34 sets two grounds for resting judgment. They are (1) the indictment or information does not charge an offense, and (2) the court does not have jurisdiction of the charged offense.

3. Rule 35, Correcting or reducing a sentence

Rule 35 has two sections, one which simply allows the court to correct a sentence that results from an arithmetical, technical or other clear error. The court may do this within seven (7) days of sentencing. The more commonly used provision of Rule 35 is under (b) which allows a court to reduce a sentence for substantial assistance.

- a. Substantial assistance
 - (1) Government motion only

Rule 35(b) only authorizes the government to file a motion for a sentence reduction based on substantial assistance. While defendant has no ability to force the government to file such a motion, it can seek court review of a prosecutor's refusal to file a substantial assistance motion if the court finds the refusal was based on an unconstitutional reason such as race, sex, national origin, or if the denial is not rationally related to a legitimate government interest. *United States v. Copeland*, 122 F. 3d 1063 (4th Cir. 1997) (unpublished opinion)

- (2) Motions made within one year of sentencing

Under one provision of Rule 35, the government may make a motion within one year of sentencing to reduce a sentence if the defendant "after sentencing" provided substantial assistance in the investigation or prosecution of another person. The Fourth Circuit has interpreted this provision as limiting the defendant's ability to receive credit for substantial assistance to his assistance after sentencing. The defendant cannot be given credit in a Rule 35 motion for conduct which occurred prior to sentencing. *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994)

- (3) Later motion

The government may also file a motion more than one year after sentencing seeking a reduction of a defendant's sentence where it is based on (i) information not known to the defendant until one year or more after sentencing, (ii) information provided by the defendant to the government within one year of sentencing but which did not become useful to the government until more than one year after

sentencing, or (iii) information the usefulness of which could not reasonably have been anticipated by defendant until more than one year after sentencing and which was promptly provided the government after its usefulness was reasonably apparent to the defendant.