

Review after the Court of Appeals
Appellate Foundations Training 2023

C O N T E N T S

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Overview of Options after the Court of Appeals Opinion

A. If the COA granted relief

If the COA grants relief, appellate counsel's responsibility continues until the client is appointed counsel by the trial court on remand. Jurisdiction is ordinarily returned to the trial division 20 days after the opinion is filed. On that day, the Clerk issues the "mandate" to the trial court. The mandate consists of certified copies of the COA opinion. "Issuance of the mandate" and "certification of the opinion by the Court of Appeals" in this context are often used synonymously, and the "closed" date on the COA docket sheet corresponds to the date the mandate issued.

More often than not, the State petitions for further review if it loses in the COA. SCONC will almost always grant the State's application for a temporary stay pending the Court's review of its PDR and will further issue a writ of supersedeas in the event it allows a PDR or the State files a Notice of Appeal based on a dissent. It is appellate counsel's responsibility to respond to the State's PDR and to continue representing the client through the completion of direct review. For tips on responding to the State's PDR, see the "Getting Discretionary Review" memo.

Because the State may seek further review, counsel should keep the file (and fee application) open until the State's 35-day deadline for filing a PDR has expired. If the State does not seek further review, counsel should contact the trial court and make sure trial counsel has been appointed. The IDS policy on appellate counsel's duty following a favorable decision is included in the materials.

In the rare event the Court of Appeals' mandate gives your client an immediate right to release, contact OAD to strategize how to get your client released as quickly as possible.

B. If the COA denied relief

After an unfavorable opinion, the main options are:

- **Motion to Stay Issuance of the Mandate and Withdraw Opinion:** Directed to the COA panel that issued the opinion. The rules expressly preclude petitions for rehearing in criminal cases, so this kind of motion is only to be used to correct readily apparent mistakes or oversights in the opinion. The theoretical deadline is 20 days after the opinion (when the mandate issues), but the effective deadline is probably 15 days or less. You must cite Rule 2 as the basis for your motion.

• **Motion for *En Banc* Rehearing [MEBR]:** Directed to all sitting COA judges. Deadline: 15 days after opinion filed. Grounds for *en banc* review are not defined, but a MEBR should show it is “necessary to secure or maintain uniformity of the [COA]’s decisions,” or the case “involves a question of exceptional importance.” N.C. R. App. P. 31.1(a).

• **Petition for Discretionary Review [PDR]:** Directed to SCONC. Deadline: 15 days after issuance of the mandate (*i.e.*, usually 35 days after filing of the opinion), or 15 days after entry of an order denying a MEBR. Statutory grounds for discretionary review are that “the subject matter . . . has significant public interest,” the case presents “legal principles of major significance to the jurisprudence of the state” or the COA opinion “likely . . . conflict[s] with a decision of the Supreme Court.” N.C.G.S. § 7A-31(c).

• **Notice of Appeal [NOA]:** Filed in both the COA and SCONC. Deadline: 15 days after issuance of mandate (~35 days after opinion). An appeal of right lies from the COA to SCONC regarding issues as to which there was a dissent in the COA, and substantial constitutional questions. Note: for the reasons explained below, a NOA based on a substantial constitutional issue should ***always*** be combined with a PDR in the alternative.

• **Close File and Advise Client of *Pro Se* Options:** If appointed appellate counsel concludes there is no reasonable chance of obtaining further review, the representation may be concluded. Counsel must provide the client basic information on filing a MEBR and PDR *pro se*. The relevant IDS policies are included in the materials. Counsel may also refer the client to NCPLS, or proactively contact NCPLS if counsel has identified a promising post-conviction issue:

N.C. Prisoner Legal Services
PO Box 25397
Raleigh, NC 27611
919.856.2200
ncpls@ncpls.org

Post-Decision Pleadings and Considerations

A. Motion to Stay Issuance of the Mandate and Withdraw/Amend Opinion

Even though the Appellate Rules prohibit motions for panel rehearing of criminal cases, N.C. R. App. P. 31(g), it is occasionally appropriate to ask the panel to correct a manifest error before certifying its opinion to the trial court. Such a motion should be filed as soon as possible since jurisdiction reverts to the trial court upon issuance of the mandate 20 days after filing of the opinion. N.C. R. App. P. 32(b). Motions of this type are typically styled “Motion to Stay Mandate and Withdraw and Amend Opinion,” and cite Rule 2 (allowing suspension of rules), since there is no express provision for such relief.

A motion to stay, withdraw, and amend can be a useful tool when the panel makes an obvious legal or factual mistake which, if corrected, could potentially change the result. However, this happens fairly infrequently. Use the motion sparingly. It is not a license to re-argue your case.

It may make sense to couple your Motion to Stay with a Motion for *En Banc* Rehearing.

B. Motion for *En Banc* Rehearing (MEBR)

Hearing *en banc* was first authorized in December 2016. A majority of all the COA judges is required to grant a MEBR, but only a quorum (defined as a majority of the judges) is necessary to constitute the COA sitting *en banc*. N.C.G.S. § 7A-16. The form and content of a MEBR is not defined, except that it “shall explain with particularity why *en banc* consideration is necessary,” N.C. R. App. P. 31.1(b), and that *en banc* review “ordinarily will not be ordered unless . . . necessary to secure or maintain uniformity of the court’s decisions[,] or the case involves a question of exceptional importance that must be concisely stated.” N.C. R. App. P. 31.1(a)

A MEBR must be filed within 15 days of the panel opinion. The opposing party may file a response within 10 days of service, and the COA must grant or deny *en banc* review within 30 days of the MEBR’s filing. N.C. R. App. P. 31.1(d). If the MEBR is granted, the *en banc* COA will reconsider the case based upon the existing appellate record, the MEBR, and any response to the MEBR. New briefs and oral argument may be requested by the Court, but are not automatic. N.C. R. App. P. 31.1(d).

Filing a MEBR does not automatically stay issuance of the mandate to the trial court. Such a stay must be requested. N.C. R. App. P. 31.1(e) (“[T]he movant may obtain a stay of the mandate from the Court”). A motion to stay mandate must

be filed where the client would otherwise face immediate consequences (*e.g.*, activation of probation conditions, termination of an appeal bond, etc.). Best practice is to seek a stay every time you file a MEBR, if for no other reason than to avoid future deadline uncertainty in the event the COA grants *en banc* rehearing.

Whether or not to file a MEBR is “committed to appellate counsel’s reasonable professional judgment,” with a maximum of 10 hours compensable. Prior client authorization is not required due to the short deadline. A copy of the IDS Policy on MEBR is included in the accompanying materials.

C. Petition for Discretionary Review (PDR)

The usual mechanism for asking SCONC to review a COA decision is a PDR. It must be filed in SCONC within 15 days of the mandate (*i.e.*, usually 35 days from the panel opinion), or 15 days from an order denying a MEBR. There is a 10-hour compensable time limit, and the client’s prior authorization is required. Copies of the IDS Policy on PDRs and OAD’s PDR authorization form are included in the materials.

The statutory grounds for a PDR are limited to cases in which:

- (1) The subject matter of the appeal has significant public interest; or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State; or
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C.G.S. § 7A-31(c).

These grounds are taken seriously by SCONC, at least when the defendant is seeking review. Therefore, a PDR is not a reprise of your COA brief or a preview of your SCONC brief. It must be about the grounds in § 7A-31(c) – public interest, significant legal principles, conflicting precedent. A persuasive PDR must show why your case is important to the broader law. For tips on preparing a persuasive PDR, see the “Getting Discretionary Review” memo included in the materials.

PDRs are typically decided within a few months of filing, although there is no definite timetable — occasionally it can take the better part of year to get a decision. If a PDR is granted, the COA record is transmitted to SCONC, and the petitioner’s new brief is due within 30 days. N.C. R. App. P. 15(g)(2). Review is limited to issues set forth in the PDR and response. N.C. R. App. P. 16(a).

1. Temporary Stays and Supersedeas

In conjunction with a PDR, it is occasionally necessary to petition SCONC for a temporary stay and writ of supersedeas to protect the client during pendency of the PDR, as when the COA opinion will remand the case back to the trial court for imposition of probation that had been stayed under N.C.G.S. § 15A-1451. A similar situation can arise in a juvenile delinquency appeal when the client has been released pending disposition of the appeal pursuant to N.C.G.S. § 7B-2605.

If you need to maintain the status quo for your client, file a dual Application for Temporary Stay and Petition for Writ of Supersedeas. Generally, SCONC will issue a temporary stay as a matter of course while it considers your PDR. If it allows the PDR, it will grant a writ of supersedeas.

2. Petition for Writ of Certiorari in lieu of PDR

If the PDR deadline has lapsed, it is still possible to file a petition for writ of certiorari (PWC). Rumor is that granting cert takes the votes of four justices, whereas discretionary review only takes three. There is no concise legal standard for granting a PWC, but when a PWC essentially serves as a PDR filed out of time, it should focus on the PDR grounds. *See* N.C. R. App. P. 21(a); N.C.G.S. § 7A-32.

3. SCONC review of COA decisions on Motions for Appropriate Relief

Statutes and rules prohibit SCONC review of non-capital MARs. *See* N.C.G.S. § 7A-28(a); § 7A-31(a); N.C. R. App. P. 15(a). However, SCONC may review MAR decisions pursuant to its “general supervisory authority” under the constitutional grant of “jurisdiction to review upon appeal any decision of the courts below.” *State v. Todd*, 369 N.C. 707, 710 (2017) (citing N.C. Const. art. IV, § 12(1), and allowing State’s appeal of right based on COA dissent in an MAR case).

Because N.C. R. App. P. 15(a) expressly prohibits PDRs from decisions on post-conviction MARs, invoking SCONC’s constitutional jurisdiction should be by PWC, combined if possible with an NOA based on a substantial constitutional question and/or panel dissent.

4. Response in Opposition to State’s PDR

If the State files a PDR, a response is due within 10 days of filing (+3 days if served by mail or email), and by rule that deadline cannot be extended. The response must identify any additional issues the defendant wants to present, otherwise the scope of review by SCONC will be limited to the issues listed in the

State’s PDR. N.C. R. App. P. 15(d) and 16(a). There is no limit on compensable hours preparing a response. For tips on preparing persuasive PDR responses, see the “Getting Discretionary Review” memo.

5. A Note on Federal Habeas

Irrespective of statutory criteria, a PDR should be filed if a promising federal constitutional claim was raised in the COA, in order to exhaust state remedies and preserve the client’s right to federal habeas corpus review.

D. Notice of Appeal Based on a Dissent¹

If there was a dissent in the COA, the losing party has an appeal of right to SCONC, but only as to issues specifically stated in the dissenting opinion. The NOA must set forth those issues and must be filed in both SCONC and COA within 15 days of the mandate (*i.e.*, usually 35 days from the panel opinion), or 15 days from an order denying a MEBR.

An accompanying PDR is necessary if issues not addressed in the dissent are to be raised. A new brief is due in SCONC within 30 days after filing the NOA, unless the NOA was combined with a PDR on additional issues, in which event the brief is due 30 days after an SCONC order granting or denying the PDR. *See* N.C.G.S. § 7A-30(2); N.C. R. App. P. 14(b)(1) & (d)(1), 16(b) and 31.1(d). Appointed counsel must get the client’s written consent before filing a NOA based on a dissent. The IDS policy on appeals of right is included in the materials.

E. Notice of Appeal Based on a Substantial Constitutional Question

The statutes and rules provide a right to appeal to SCONC if the COA’s opinion involves a “substantial constitutional question.” N.C.G.S. § 7A-30(1); N.C. R. App. P. 14(b)(2), 16(a). A new brief is not due in SCONC until 30 days after SCONC enters an order determining that the appeal does indeed present a *substantial* constitutional question. N.C. R. App. P. 14(d)(1). As this determination is within SCONC’s discretion, a NOA based on a constitutional issue should ***always*** be combined with a PDR in the alternative.

F. Remand from SCONC to the COA

Occasionally SCONC will remand a case back to the COA after its decision. Most often, this is so the COA can address any remaining issues in the original appeal. In some circumstances, SCONC will remand to the COA for re-consideration

¹ Note: As of June 2023, legislation is pending in the 2024-25 Senate budget which would eliminate dissent-based appeals of right to the Supreme Court.

in light of an intervening precedent. If your case is remanded to the COA, consider whether it makes sense to move for supplemental briefing, particularly if remand is based on the latter circumstance.

G. Petition for a Writ of Certiorari (SCOTUS)

On rare occasion, it may be appropriate to petition SCOTUS for certiorari review when the case presents a well-preserved federal constitutional question decided on the merits. Cert petitions are strongest when the issue is the subject of a multi-jurisdiction split. To be compensated for work on a cert petition, appointed appellate counsel must obtain authorization from the Appellate Defender before filing a petition or responding to a petition filed by the State. The Appellate Defender retains authority to appoint other counsel at this stage of the appeal.

If you believe you have a case which might be appropriate for a cert petition, contact OAD. We have relationships with several Supreme Court Clinics around the country. These clinics routinely practice before the Court and are the experts. Soliciting their help is usually the best thing you can do for your client.