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Motions for Appropriate Relief

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I. Introduction

A motion for appropriate relief (MAR) is a statutorily created vehicle for defendants to challenge their convictions and sentences. The MAR statutes are in North Carolina General Statutes (G.S.) Chapter 15A, Article 89 (Motion for Appropriate Relief and Other Post-Trial Relief) and are reproduced in the Appendix. A MAR may be filed before, during, or after direct appeal, although some restrictions apply to the types of claims that can be raised after a certain date. The statute also authorizes the state to file a MAR in certain circumstances. However, the overwhelming number of MARs that a trial judge will see will be motions by the defendant, and many will be *pro se*. The statute also authorizes a judge to act *sua sponte* and grant relief on his or her own MAR.

Unlike an appeal, in which the reviewing court is bound by the record, in a MAR proceeding, the court may hold an evidentiary hearing. Thus, the procedure often is used when the claim is one that depends on facts outside of the record, such as a claim of ineffective assistance of counsel.[1] However, MARs are not limited to claims that require factual findings and can assert errors of law. This bulletin discusses the major procedural issues that arise in connection with MARs filed in the trial division.

II. Types of Claims That Can Be Raised

A. Motions by the Defendant

As illustrated in Figure 1 and discussed in the text below, the types of claims that a defendant may assert in a MAR depend on when the motion is filed.

1. Made within Ten Days of Judgment

a. **Claims That May Be Asserted.** Pursuant to G.S. 15A-1414, if the MAR is made within ten days of entry of judgment, it may assert "any error committed during or prior to the trial." This provision reflects a notion that the most efficient way to obtain review of a trial error warranting reversal is to bring it to the attention of the trial judge.[2] Such a procedure allows the trial judge to correct the error while avoiding the time and expense of an appeal.

b. **Claims That Must Be Asserted.** G.S. 15A-1414(b) provides that unless the claim can be framed to fall within the list of claims in G.S. 15A-1415 that can be asserted more than ten

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1. *See* State v. Fair, 354 N.C. 131, 167 (2001) ("[B]ecause of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [such] claims on direct appeal."); *see also* State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (May 4, 2010) (dismissing the defendant's ineffective assistance claim without prejudice to file a MAR in superior court where factual issues could be resolved).

2. *See* Leon H. Corbett, *Post-Trial Motions and Appeals*, 14 Wake Forest L. Rev. 977, 998, 1003 (1978) [hereinafter Corbett].

days after entry of judgment,[3] a nonexclusive list of claims that *must* be asserted within the ten-day period includes:

- Any error of law, including that
  - the court erroneously failed to dismiss the charge before trial pursuant to G.S. 15A-954 (setting out ten grounds that the defendant may assert to support dismissal of the charge);
  - the court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence;
  - the evidence was insufficient to justify submission to the jury; and
  - the court erred in its jury instructions.
- The verdict is contrary to the weight of the evidence.
- For any other cause the defendant did not receive a fair and impartial trial.
- The sentence is not supported by evidence introduced at the trial and sentencing hearing.

2. Made More Than Ten Days after Judgment

Once the ten-day period expires, G.S. 15A-1415 contains an exclusive list of claims that may be asserted by the defendant. Of course, all of these claims may be asserted before the expiration of the ten-day period.[4] G.S. 15A-1415 reflects legislative recognition of the fact that some errors are so egregious that the law should afford an extended or even unlimited time for raising them.[5] Thus, this provision includes claims that are "so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief."[6]

a. Exclusive List of Claims That May Be Asserted after Ten Days. If the MAR is filed more than ten days after entry of judgment, the only claims that may be asserted are the nine claims discussed below.

i. Acts Not a Violation of Law. G.S. 15A-1415(b)(1) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the acts charged in the criminal pleading did not, at the time they were committed, constitute a violation of criminal law. This provision allows a defendant to argue that he or she was convicted for something that was not a crime. For example, this provision would apply when the statute proscribing the crime for which the defendant was convicted was repealed before he or she committed the offense at issue.[7] Another example is when the defendant was convicted of sale of a controlled substance in violation of G.S. 90-95(a)(1), but the substance that the defendant sold was not a controlled substance.

ii. Trial Court Lacked Jurisdiction. G.S. 15A-1415(b)(2) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the trial court

3. *See* Section II.A.2 (discussing the types of claims that can be raised by a defendant in a MAR made more than ten days after entry of judgment).

4. *See* G.S. 15A-1414; Official Commentary to G.S. 15A-1415 ("Of course these grounds may be asserted prior to the expiration of the 10-day period as well as after."); Official Commentary to G.S. 15A-1414 (same).

5. *See* Corbett, *supr*a n.2 at 1006.

6. Official Commentary to G.S. 15A-1415.

7. *See* Corbett, *supra* n.2 at 1006.

lacked jurisdiction over the defendant or over the subject matter. An assertion that an indictment was fatally defective is an example of a claim that would be properly raised under this provision.[8] Another example is an allegation that an unreasonable period of time had elapsed between entry of prayer for judgment continued (PJC) and entry of judgment.[9]

iii. **Unconstitutional Conviction.** G.S. 15A-1415(b)(3) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conviction was obtained in violation of the United States or North Carolina constitutions. An ineffective assistance of counsel claim is an example of a claim that would be properly asserted under this provision.[10] Another example is a claim asserting that a guilty plea was not knowingly, voluntarily, and intelligently entered.[11]

iv. **Unconstitutional Statute.** G.S. 15A-1415(b)(4) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant was convicted or sentenced under a statute that violated the United States or North Carolina constitutions. An example of such a claim is one asserting that the habitual felon statute violates the double jeopardy clause.[12]

v. **Constitutionally Protected Conduct.** G.S. 15A-1415(b)(5) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conduct for which the defendant was prosecuted was protected by the United States or North Carolina constitutions. This provision would apply, for example, when the defendant argues that the conduct leading to a disorderly conduct conviction was protected by the Free Speech Clause of the First Amendment. Another example would be when a defendant convicted of crime against nature for private consensual homosexual sex between adults alleges a violation of due process rights.[13]

vi. **Retroactive Change in Law.** G.S. 15A-1415(b)(7) provides that a MAR filed more than ten days after entry of judgment may assert a claim that there has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. The change in law could result from an appellate case or from new legislation.[14] In both cases, G.S.15A-1415(b)(7) does not apply unless the change in law has retroactive application. Retroactive application refers to a new law that applies

8. *See* State v. Sturdivant, 304 N.C. 293, 308 (1981) ("It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2) . . . " (citations omitted)). For more information about indictment defects, see Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment,* Admin. of Justice Bulletin No. 2008/03 (July 2008) (online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf).

9. *See* State v. Degree, 110 N.C. App. 638, 641 (1993) (unreasonable time between entry of prayer for judgment continued (PJC) and entry of judgment leads to a loss of jurisdiction).

10. *See* State v. House, 340 N.C. 187, 196–97 (1995) (noting that claim of ineffective assistance of counsel would be properly raised under G.S. 15A-1415(b)(3)).

11. *See* State v. Fennell, 51 N.C. App. 460, 462–63 (1981).

12. Note, however, that this claim has been rejected by the North Carolina courts. *See* Jeffrey Welty, *North Carolina's Habitual Felon and Violent Habitual Felon Laws*, Admin. of Justice Bulletin No. 2008/04 at 20–21 (June 2008) (online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0804.pdf).

13. *Cf.* Lawrence v. Texas, 539 U.S. 558 (2003).

14. *See* Corbett, *supra* n.2 at 1009.

backward in time to cases decided before the new rule came about. When the change is brought about by legislation, determining whether the new law applies retroactively is usually a simple matter of examining the statute's effective date. This is done by examining the session law's effective date provision, usually the last section of the session law.[15]

When the new rule derives from the case law, retroactivity analysis becomes more complicated. Because appellate courts generally do not indicate whether their rulings have retroactive application, it is necessary to determine after the fact whether a new court-made rule operates retroactively.

A defendant who alleges that his or her claim depends on a new federal criminal rule faces the difficult burden of establishing that the rule retroactively applies to his or her case under the test set forth in *Teague v. Lane*[16] and its progeny.[17] If the change is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*.[18] For a detailed discussion of both of these tests, see Jessica Smith, *Retroactivity of Judge-Made Rules,* Admin. of Justice Bulletin No. 2004/10 (Dec. 2004).[19]

vii. **Sentence Was Unauthorized, Illegal, or Invalid.** G.S. 15A-1415(b)(8) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the sentence imposed

- was unauthorized at the time imposed,
- contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level,
- was illegally imposed, or
- is otherwise invalid as a matter of law.

A motion only can be granted pursuant to this section if an error of law exists in the sentence.[20] An example of an error of law with regard to sentence would be when the trial judge sentences the defendant under the Fair Sentencing Act but the applicable law is the Structured Sentencing Act. Note that a claim that the sentence is not supported by the evidence must be asserted within ten days of entry of judgment.[21]

viii. **Sentence Fully Served.** G.S. 15A-1415(b)(9) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant is in confinement and is entitled to release because the sentence has been fully served. This ground could

15. Session laws are available on the North Carolina General Assembly's Web page (www.ncga.state.nc.us). One question that arises with some frequency is the retroactivity of North Carolina's Structured Sentencing laws. For a discussion of that issue, see Jamie Markham, *Relief from (Un?)Fair Sentencing* (blog post April 18, 2009) (online at sogweb.sog.unc.edu/blogs/ncclaw/?p=231).

16. 489 U.S. 288 (1989).

17. *Teague* was a plurality decision that later became a holding of the Court. *See, e.g.,* Gray v. Netherland, 518 U.S. 152 (1996); Caspari v. Bohlen, 510 U.S. 383 (1994).

18. 299 N.C. 385 (1980); *see* State v. Zuniga, 336 N.C. 508, 513 (1994) (noting that *Rivens* "correctly states the retroactivity standard applicable to new state rules").

19. Online at shopping.netsuite.com/s.nl/c.433425/it.I/id.81/.f?sc=7&category=42 [hereinafter *Retroactivity of Judge-Made Rules*].

20. *See* State v. Morgan, 108 N.C. App. 673, 678 (1993).

21. G.S. 15A-1414(b)(4); *see also* State v. Espinoza-Valenzuela, ___ N.C. App. ___, ___ S.E.2d ___ (April 20, 2010).

be asserted when, for example, the Department of Correction (DOC) has not complied with a judge's ruling ordering credit for time served,[22] and if such credit was given, the defendant would be entitled to release.

ix. Newly Discovered Evidence. G.S. 15A-1415(c) provides that a MAR filed more than ten days after entry of judgment may assert a claim of newly discovered evidence. However, a motion asserting such a claim "must be filed within a reasonable time of its discovery."[23]

To assert this claim, the statute requires a defendant to allege the discovery of new evidence that was unknown or unavailable at the time of trial and could not with due diligence have been discovered or made available at that time, including recanted testimony.[24] The defendant also must show that the evidence has a direct and material bearing upon his or her eligibility for the death penalty or guilt or innocence.[25] This language codifies the case law regarding newly discovered evidence.[26] That case law establishes that in order to obtain a new trial on grounds of newly discovered evidence, the defendant must establish that:

- the witness or witnesses will give newly discovered evidence;
- the newly discovered evidence is probably true;
- the newly discovered evidence is competent, material, and relevant;
- due diligence and proper means were employed to procure the testimony at the trial;
- the newly discovered evidence is not merely cumulative;
- the newly discovered evidence does not tend only to contradict a former witness or to impeach or discredit the witness; and
- the newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.[27]

If the defendant seeks a new trial because of new evidence in the form of recanted testimony, the courts apply a different test. A defendant can obtain a new trial on the basis of recanted testimony if:

- the court is reasonably well satisfied that the testimony given by a material witness is false and
- there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.[28]

A number of published North Carolina cases apply these tests to claims of newly discovered evidence.[29]

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22. *See* G.S. 15-196.1 to 196.4 (provisions on credit for time served).

23. G.S. 15A-1415(c).

24. *Id.*

25. *Id.*

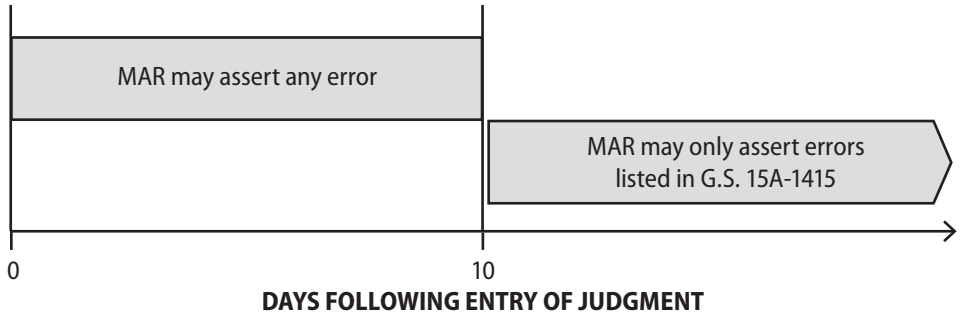
26. *See* State v. Powell, 321 N.C. 364, 371 (1988) (addressing a provision in earlier MAR law pertaining to newly discovered evidence).

27. *See* State v. Britt, 320 N.C. 705, 712–13 (1987).

28. *See id.* at 715.

29. Cases rejecting claims of newly discovered evidence include: State v. Hall, 194 N.C. App. 42 (2008) (evidence was cumulative, pertained only to impeachment, and it was improbable that it would cause a

Figure 1. Defendants' MARs—Claims and Timing Rules



jury to reach a different result on another trial); State v. Rhue, 150 N.C. App. 280 (2002) (new evidence was witness testimony that the murder victim had a gun on the night of the shooting; because the defendant testified that he never saw a weapon on the victim, the fact that the victim was armed was irrelevant to the defendant's assertion of self-defense; to the extent the defendant sought to discredit a trial witness's testimony that the victim was unarmed, this is not a proper basis for granting a MAR asserting newly discovered evidence); State v. Bishop, 346 N.C. 365, 401–04 (1997) (evidence consisting of eyewitness testimony that the defendant was not responsible for the crime; the State's cross-examination of the witness and the testimony of other witnesses "tended to substantially question his character for truthfulness and veracity" and support the trial court's conclusions that the witness's testimony was not true and that the defendant had not shown that a different result would probably be reached at another trial); State v. Wiggins, 334 N.C. 18, 37–39 (1993) (evidence was known to the defendant and available to him at the time of trial); State v. Eason, 328 N.C. 409, 432–35 (1991) (post-trial confession by a third party that was later recanted where the witness stood by his disavowal and confession was uncorroborated; also confession was not credible because the individual was drunk and depressed at the time, was confused about the murder victim's name, had limited knowledge of the details of the crime, and the alleged murder weapon was not even being manufactured when the individual said it was acquired); State v. Riggs, 100 N.C. App. 149, 156–57 (1990) (accomplice's testimony at the accomplice's trial that a third person was solely responsible for the crime; the testimony was cumulative of that offered at the defendant's trial, and it could not be said, given the testimony of another witness, that the accomplice's testimony was probably true; the defendant failed to show due diligence because he did not attempt to call the accomplice to testify at his trial); *Powell,* 321 N.C. at 370–71 (the defendant did not act with due diligence where the defendant learned of the witness's statement during the trial).

Cases finding merit in such claims include: State v. Stukes, 153 N.C. App. 770 (2002) (affirming the trial court's granting of a new trial in a first-degree murder case on grounds of newly discovered evidence; newly discovered evidence consisted of a co-defendant's testimony offered at the co-defendant's trial, which tended to exculpate the defendant); *see also* State v. Monroe, 330 N.C. 433, 434–35 (1991) (recounting the procedural history of the case and noting that the defendant was granted a new trial on the basis of newly discovered evidence; the defendant had contended that ballistic tests conducted by the Federal Bureau of Investigation after the trial showed that the gun the State presented at trial was not used in the crime).

Cases involving claims of recanted testimony include: *Britt,* 320 N.C. at 711–17 (the defendant failed to establish that a recanting witness's trial testimony was false); State v. Doisey, 138 N.C. App. 620, 628 (2000) (trial court did not err in denying the defendant's MAR on the basis that a child victim in a sex offense case had recanted her testimony; although the victim recanted, she later reaffirmed that her trial testimony was correct, and the trial court found that the recantation was made after the victim was

b. **No Outer Limit on Time.** Except for capital cases,[30] if the claim is listed in G.S. 15A-1415 it may be asserted at any time—one year, five years, or twenty years after judgment. Put another way, no statute of limitations applies to MARs.
c. **Calculating the Ten-Day Period.** The ten-day period begins to run with entry of judgment, which is when the sentence is pronounced.[31] For entry of judgment to occur, the judge must announce the ruling in open court or sign the judgment and file it with the clerk.[32] In capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment.[33] When computing the ten-day period, Saturdays and Sundays are excluded.[34] Presumably, legal holidays when the courthouse is closed would be excluded as well. In civil matters, when computing the time periods prescribed by the rules of civil procedure, the day of the event after which a designated time period begins to run is not included.[35] It is not clear whether this rule applies to the ten-day MAR provision.

B. Motions by the State

G.S. 15A-1416 sets out the claims that may be asserted by the State in a MAR.

1. Made within Ten Days of Judgment

G.S. 15A-1416(a) provides that in a MAR filed within ten days of entry of judgment, the state may raise "any error which it may assert on appeal." G.S. 15A-1432(a) governs appeals by the State from district court and provides that unless the rule against double jeopardy prohibits further prosecution, the state may appeal from district to superior court:

1. when there has been a decision or judgment dismissing criminal charges as to one or more counts (e.g., a claim that the district court judge erroneously dismissed an impaired driving charge due to the state's failure to produce the chemical analyst in court[36]); or
2. upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence, but only on questions of law (e.g., a claim that the district court judge erroneously granted a motion for a new trial on grounds of newly discovered evidence when the defense conceded that the evidence was known to it at the time of trial[37]).

G.S. 15A-1445(a) governs the state's appeals from superior court to the appellate division. It is identical to G.S. 15A-1432(a) except that it also allows the state to appeal when it alleges that the sentence imposed:

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repeatedly questioned by the defendant's friends and family and that she was embarrassed about the events at issue).

30. *See* Section III.B.

31. *See* G.S. 15A-101(4a); *see also* State v. Handy, 326 N.C. 532, 535 (1990).

32. *See* Dep't of Corr. v. Brunson, 152 N.C. App. 430, 437 (2002) (*citing* State v. Boone, 310 N.C. 284 (1984)), *overruled on other grounds by,* N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649 (2004).

33. *See Handy*, 326 N.C. at 536 n.1 (in context of motion to withdraw a guilty plea).

34. *See* State v. Craver, 70 N.C. App. 555, 560 (1984).

35. *See* G.S. 1A-1 R. 6(a).

36. G.S. 20-139.1(e1) (criminal case may not be dismissed for failure of the analyst to appear, subject to specified exceptions).

37. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).

1. results from an incorrect determination of the defendant's prior record level or prior conviction level (e.g., a claim alleging that the trial judge incorrectly added the defendant's prior record points and categorized the defendant as a prior record level III offender when a correct tabulation would have put the defendant in prior record level IV);
2. contains a type of sentence disposition that is not authorized for the defendant's class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to intermediate punishment when only active punishment is authorized for the offense of conviction);
3. contains a term of imprisonment that is for a duration not authorized for the defendant's class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to a term of imprisonment not authorized for the offense of conviction); or
4. imposes an intermediate punishment based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation (e.g., a claim alleging that the judge imposed an intermediate punishment based on findings of extraordinary mitigating circumstances for a Class B1 felony).[38]

As noted above, G.S. 15A-1416(a) provides that a MAR filed by the state within ten days of judgment may raise any error that it "may assert upon appeal." G.S. 15A-1445(b) allows the state to appeal a superior court judge's pre-trial ruling granting a motion to suppress, as provided in G.S. 15A-979. The latter statute provides for immediate appeal by the state of a pre-trial ruling on a motion to suppress. However, it is not clear that the state could use a MAR to challenge an adverse superior court ruling on a suppression motion. If the appellate court affirms the superior court's pre-trial ruling, the procedural bar rules would prevent the State from re-asserting the issue in a MAR.[39] Additionally, the state would not be able to use a MAR in lieu of an appeal to challenge a trial judge's pre-trial ruling because a MAR can be made only after the verdict has been rendered.[40] Finally, because the statute does not provide a right of appeal by the state of an adverse ruling on a motion to suppress made and granted during trial,[41] the issue is not one that the state "may assert upon appeal."

2. Made More Than Ten Days after Judgment

Once the ten-day period has expired,[42] the state's right to file a MAR is very limited, and it is not clear that the MAR statute provides for anything that is not already provided for by law. Under G.S. 15A-1416(b), the state may file a MAR more than ten days after entry of judgment for

- imposition of sentence when a PJC has been entered or
- initiation of a proceeding authorized under Article 82 (probation), Article 83 (imprisonment), and Article 84 (fines), with regard to the modification of sentences.

38. Extraordinary mitigation may not be used for a Class B1 felony. G.S. 15A-1340.13(h).

39. *See* Section XI.B.3 (discussing the procedural bar rule that applies when an issue has been ruled on in a prior proceeding).

40. *See* Section III.A.

41. *See* Official Commentary to G.S. 15A-976 (when a trial judge waits until after the trial has begun to rule on a motion to suppress, "this would have the effect of denying the State's right to appeal and adverse ruling").

42. See Section II.A.2.c for the rule regarding calculating the ten-day period.

If the claim falls within the second category, the procedural provisions of those Articles control.[43]

Although the Official Commentary to G.S. 15A-1416 says that the State is authorized "without limitation as to time" to seek imposition of a sentence after a PJC, the court lacks jurisdiction to enter the judgment if a PJC extends for an unreasonable period of time.[44]

There is no statutory authority for the State to make a motion to set aside the judgment on the basis of newly discovered evidence.[45]

C. Motions by the Judge

Under G.S. 15A-1420(d), a judge has the authority to consider a MAR *sua sponte*. Specifically, the statute provides that "[a]t any time that a defendant would be entitled to relief by [MAR], the court may grant such relief upon its own motion." If the court acts *sua sponte* under this provision, it must provide appropriate notice to the parties.[46]

1. When the Defendant Would Benefit

The court has authority to act under G.S. 15A-1420(d) only when "the defendant would be entitled to relief." Thus, for example, if after the session has ended, the DOC notifies the trial court that it sentenced the defendant to a term of imprisonment in excess of the statutory maximum, the court need not await a MAR from the defendant to correct its sentencing error.[47] Because the defendant would be entitled to relief,[48] the trial court may exercise its authority under G.S. 15A-1420(d) and move, *sua sponte*, to correct the error. Of course, a defendant must be present for any resentencing that is held.[49] See Section XII below for a discussion of when a hearing is necessary.

2. When the State Would Benefit

Because G.S. 15A-1420(d) only authorizes the court to act *sua sponte* when the defendant would be entitled to relief, it does not authorize action when the error works to the defendant's advantage and any relief would benefit only the state. In *State v. Oakley*,[50] the defendant pleaded guilty to assault with a deadly weapon inflicting serious injury. The trial judge accepted the plea and at sentencing ordered the defendant, among other things, to pay $10,380.06 in restitution to the victim for her medical bills. The victim was not present for the plea or during sentencing. The

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43. G.S. 15A-1416(b)(2).

44. Jessica Smith, *Prayer for Judgment Continued*, in The Survival Guide: Superior Court Judges' Trial Notebook (UNC School of Government, May 2009) (online at www.sog.unc.edu/faculty/smithjess/survival_guide.html).

45. *See* State v. Oakley, 75 N.C. App. 99, 102 (1985) (State learned that victim's medical bills were substantially greater than amount provided in restitution).

46. G.S. 15A-1420(d).

47. DOC has no authority to modify a judgment, even when the modification conforms the judgment to applicable law. *See* Hamilton v. Freeman, 147 N.C. App. 195 (2001). Rather, the DOC should notify the court and the parties of the sentencing error. *See id.*

48. *See* G.S. 15A-1415(b)(8) (a defendant may file a motion more than ten days after entry of judgment when the sentence is unauthorized at the time imposed).

49. *See* Jessica Smith, *Criminal Trial in a Defendant's Absence*, in The Survival Guide: A Bench Book for N.C. Superior Court Judges (online at www.sog.unc.edu/faculty/smithjess/documents/CriminalTrialinDefendantsAbsence_June2009_001.pdf).

50. 75 N.C. App. 99 (1985).

following day, the victim appeared in court and expressed dissatisfaction with the proceedings and indicated that her medical bills totaled over $40,000. When the State made a MAR to set aside the judgment, the trial court responded by setting aside the judgment, striking the guilty plea, and setting the case for trial. The defendant appealed. The court of appeals held that the trial court erred by hearing the State's motion because the State had no authority under the MAR statute to move to set aside the judgment based on the victim's new evidence.[51] The court also held that the trial judge's action of striking the plea and setting the case for trial was unauthorized under G.S. 15A-1420(d). It reasoned that G.S. 15A-1420(d) authorizes the trial court to grant relief on its own motion "only if the defendant would be entitled to such relief by motion for appropriate relief."[52] The court continued: "It follows that the trial court does not have the authority to grant appropriate relief which benefits the State. In this case, striking the guilty plea . . . and setting the case for trial on the original charge benefited the State exclusively."[53] However, a judge may have inherent authority to correct such an error.[54]

D. "Consent" MARs

Occasionally defense counsel and the prosecutor will come to the judge stating that both sides agree that relief requested in a MAR should be granted. A judge should review such a motion carefully, keeping in mind that he or she is not authorized to grant a MAR unless a valid ground for relief exists.[55]

III. Time for Filing

As discussed in Section II, when the MAR is filed affects the types of claims that may be raised. Other timing issues are discussed in this section.

A. Post-Verdict Motion

A MAR may not be filed until after the verdict is rendered.[56] A verdict is "the answer of the *jury* concerning any matter of fact submitted to [it] for trial."[57] When there is no verdict by the jury—such as when the defendant pleads guilty—a MAR may not be filed until after sentencing.[58] A mistrial is not a "verdict" within the meaning of the MAR statute.[59]

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51. It went on to note, however, that because the session had not ended and the judgment was *in fieri*, the court had authority to set it aside.

52. *Id.* at 103–04.

53. *Id.* at 104.

54. *See* Jessica Smith, *Trial Judge's Authority to* Sua Sponte *Correct Errors after Entry of Judgment in a Criminal Case,* Admin. of Justice Bulletin No. 2003/02 (UNC School of Government, May 2003) (online at shopping.netsuite.com/s.nl/c.433425/it.I/id.77/.f).

55. G.S. 15A-1420(c)(6) (defendant must show the existence of the asserted ground for relief); *see* Section XII.I (discussing burdens and standards for granting relief on a MAR).

56. *See* State v. Handy, 326 N.C. 532, 535 (1990) ("A [MAR] is a post-verdict motion"); G.S. 15A-1414(a) ("After the verdict"); G.S. 15A-1415(a) ("At any time after verdict"); G.S. 15A-1415(c) ("at any time after verdict"); G.S. 15A-1416(a) ("After the verdict"); G.S. 15A-1416(b) ("At any time after verdict").

57. *Handy*, 326 N.C. at 535 (quotation omitted) (emphasis in original).

58. *See id.* at 535–36.

59. State v. Allen, 144 N.C. App. 386 (2001).

B. Capital Cases

Special timing rules apply to MARs in capital cases. For capital cases in which the trial court judgment was entered after October 1, 1996, there is an outer time limit for the filing of MARs. Specifically, unless an extension has been granted[60] or an exception applies, motions in such cases must be filed within 120 days from the latest of the following events:

- The court's judgment has been filed, but the defendant failed to perfect a timely appeal;
- The mandate issued by a court of the appellate division on direct appeal pursuant to North Carolina Rule of Appellate Procedure 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
- The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;
- Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;
- The United States Supreme Court granted a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals but subsequently left the conviction and sentence undisturbed; or
- The appointment of post-conviction counsel for an indigent capital defendant.[61]

A claim of newly discovered evidence[62] is not subject to the 120-day time limit imposed on capital MARs.[63] But as discussed above, such a claim must be filed within a reasonable time of its discovery.[64]

C. Extensions

"For good cause shown," a defendant may be granted an extension of time to file a MAR.[65] It seems clear that this provision applies to the 120-day filing period for capital cases. It is not clear whether it applies to the ten-day period for a defendant's MAR under G.S. 15A-1414. As noted above,[66] once the ten-day period expires, G.S. 15A-1415 sets out an exclusive list of nine claims that a defendant can raise in a MAR. However, if a trial judge is aware of a defendant's desire to file a G.S. 15A-1414 MAR and wishes to extend the filing period while avoiding a potential issue later about the court's authority to grant such an extension, the judge could simply enter a PJC. Judgment then could be entered when the MAR is ready to be filed, ensuring that the MAR will be filed within ten days of entry of judgment.[67]

60. *See* Section III.C (discussing extensions).
61. *See* G.S. 15A-1415(a); 1995 N.C. Sess. Laws. 719 sec. 8 (effective date).
62. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
63. G.S. 15A-1415(c).
64. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
65. G.S. 15A-1415(d).
66. *See* Section II.A.2.
67. For more information about PJCs, see Jessica Smith, *Prayer for Judgment Continued*, in The Survival Guide: A Bench Book for N.C. Superior Court Judges (online at www.sog.unc.edu/faculty/smithjess/documents/PrayerforJudgmentContinued_May2009_001.pdf).

The presumptive length of an extension is up to thirty days, but the extension can be longer if the court finds "extraordinary circumstances."[68] No statutory guidance is provided on the meaning of this term.

IV. Pre-Filing Issues

Discovery issues are discussed in Section VIII, below. An indigent defendant's right to counsel for a MAR is discussed in Section IX.A. Other pre-filing issues are discussed in this section.

A. Capital Cases

The General Rules of Practice for the Superior and District Courts provide that all requests for appointment of experts made before the filing of a MAR and after a denial by the Office of Indigent Defense Services (IDS) must be ruled on by the senior resident superior court judge or his or her designee, in accordance with IDS rules.[69] Those rules also provide that all requests for ex parte and similar matters arising before a MAR is filed in a capital case must be ruled on by the senior resident superior court judge, or his or her designee, in accordance with rules adopted by IDS.[70]

B. Requests for Transcripts

Occasionally, an indigent defendant will make a pre-filing request for the transcript of the trial or plea proceeding to help prepare a MAR filing. The Unites States Supreme Court has held that the state must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when the transcript is needed for an effective defense or appeal.[71] The effect of this rule "is to make available to an indigent defendant those tools available to a solvent defendant which are necessary for preparing an equally effective defense [or appeal]."[72] The Court has identified two factors relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices that would fulfill the same functions as a transcript.[73] However, an indigent defendant's broad right to a transcript for purposes of a trial or direct appeal does not apply with equal force in post-conviction proceedings, such as MAR proceedings. In *United States v. MacCollum,*[74] the Court upheld the constitutionality of a federal habeas statute that allowed trial judges to deny free transcripts to indigent petitioners who raise frivolous claims. In that case, the defendant, who had not appealed his conviction, asked for the transcript in connection with a collateral attack. The Court found the procedural posture of the case significant:

> Respondent chose to forgo his opportunity for direct appeal with its attendant unconditional free transcript. This choice affects his . . . claim. Equal protection does not require the Government to furnish to the indigent a delayed duplicate

68. G.S. 15A-1415(d).
69. Gen. R. Prac. Sup. & Dist. Ct. R. 25(2).
70. *Id.* at R. 25(3). The IDS rules are posted on the IDS website (www.aoc.state.nc.us/www/ids/).
71. Britt v. North Carolina, 404 U.S. 226, 227 (1971); *see also* State v. Rankin, 306 N.C. 712, 715 (1982).
72. *Rankin,* 306 N.C. at 715.
73. *Britt,* 404 U.S. at 227.
74. 426 U.S. 317 (1976).

> of a right of appeal with attendant free transcript which it offered in the first instance, even though a criminal defendant of means might well decide to purchase such a transcript in pursuit of [post-conviction] relief. . . . We think it enough at the collateral-relief stage that [the government] has provided that the transcript be paid for with public funds if one demonstrates to a [trial] court judge that his . . . claim is not frivolous, and that the transcript is needed to decide the issue presented.[75]

To the extent that the new attorney certification requirement, discussed in Section VI.A.2, is interpreted as requiring production of the transcript as a condition of filing a MAR, this could raise new issues with regard to an indigent defendant's right to a transcript at state expense for purposes of preparing a MAR.

V. Judges Empowered to Act

A. Motions Made More Than Ten Days after Judgment

MARs made by defendants pursuant to G.S. 15A-1415 may be heard and determined by any judge who is empowered to act in criminal matters in the district where judgment was entered.[76] The statute does not address who may hear a MAR made by the state outside of the ten-day window.

B. Motions Made within Ten Days of Judgment

The trial judge may act on a MAR made by a defendant pursuant to G.S. 15A-1414, even if the judge is in another district and even if the judge's commission has expired.[77] If that judge is unavailable to hear the matter because of, for example, retirement or recusal, presumably the matter may be heard by any judge empowered to act in the district where judgment was entered. The statute does not address who may act on MARs filed by the state within the ten-day window.

C. Referral to Trial Judge

When a MAR is made before a judge who did not hear the case, the judge may, if practicable, refer all or a part of the matter to the judge who heard the case.[78]

D. MARs Asserting Certain Sentencing Errors

A MAR asserting that the sentence is not supported by evidence must be made before (and presumably heard by) the sentencing judge.[79]

75. *Id.* at 325–26.
76. G.S. 15A-1413(a).
77. G.S. 15A-1413(b).
78. G.S. 15A-1413(c).
79. G.S. 15A-1415(b)(8).

E. Capital MARs

Capital MARs must be referred to the senior resident superior court judge or his or her designee "for review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order, for subsequent events in the case, or other appropriate action."[80]

F. MARs Filed during Appeal

1. Motions Asserting Claims under G.S. 15A-1415

When a case is in the appellate division for review, a MAR asserting a ground set out in G.S. 15A-1415 must be made in the appellate division.[81] A case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448 or when a petition for a writ of certiorari has been granted.[82] When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.[83]

2. Motions Made within Ten Days of Judgment

Defendants' MARs made under G.S. 15A-1414 within ten days of entry of judgment may be heard and acted upon in the trial division regardless of whether notice of appeal has been given.[84]

VI. Form of the Motion, Service, Filing, and Related Issues

A. Form of the Motion

A MAR must

- be in writing,
- state the grounds for the motion,
- set forth the relief sought,
- be timely filed, and
- if made in superior court by a lawyer, contain a required certification.[85]

1. Oral Motions

The MAR need not be in writing if it is made in open court, before the judge who presided at trial, before the end of the session (if made in superior court), and within ten days after entry of judgment.[86]

80. Gen. R. Prac. Sup. & Dist. Ct. R. 25(4).
81. G.S. 15A-1418(a); *see* Section II.A.2 (discussing claims that can be asserted in a MAR filed under G.S. 15A-1415).
82. G.S. 15A-1418(a).
83. *Id.*
84. G.S. 15A-1414(c); *see* Section II.A.1 (discussing MARs made within ten days of entry of judgment).
85. G.S. 15A-1420(a).
86. *Id.*

2. Certification

As noted above, if made in superior court by a lawyer, the MAR must contain a required certification. The statute specifies that the attorney must certify, in writing, that

- there is a sound legal basis for the motion and that it is being made in good faith,
- the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion, and
- the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought does not require that the trial transcript be read in its entirety.[87]

In the event that the trial transcript is unavailable, instead of certifying that he or she has read the trial transcript, the attorney must set forth in writing what efforts were undertaken to locate the transcript.[88] A motion may not be granted if the lawyer fails to provide the required certification.[89]

3. Supporting Affidavits

G.S. 15A-1420(b) provides that a MAR must be supported by affidavit or other documentary evidence if based on facts that are not ascertainable from the record and transcript of the case or that are not within the knowledge of the judge who hears the motion.[90] One open issue is whether, to be sufficient, the affidavit must contain admissible evidence.

B. Service and Filing

G.S. 15A-1420(b1)(1) sets out the rules for filing and service of a MAR. It provides that the motion should be filed with the clerk of superior court of the district where the defendant was indicted. In non-capital cases, service must be made on the district attorney. In capital cases, service must be made on both the district attorney and the attorney general. As written, the statute seems to speak only to MARs by defendants. Presumably, MARs by the state are filed in the same way. It is unclear who receives service of a MAR by the state, as the defendant may no longer be represented by trial counsel. Also, by referencing when the defendant was indicted, the statute restricts its application to superior court convictions and does not address MARs challenging district court convictions. A separate provision in the MAR statute suggests that service for MARs filed in district court must be done pursuant to G.S. 15A-951(c).[91]

87. G.S. 15A-1419(a)(1)c1.

88. *Id.*

89. G.S. 15A-1420(a)(5).

90. State v. Payne, 312 N.C. 647 (1985) (denying the defendant's MAR because the defendant failed to submit supporting affidavits).

91. *See* G.S. 15A-1420(a)(4) (providing that a MAR may not be granted in district court without the signature of the district attorney indicating that the state has had an opportunity to consent or object to the motion but that a district court judge may grant a MAR without the district attorney's signature ten business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c)). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.

C. Amendments

Although a defendant may amend a MAR in certain circumstances,[92] there are no statutory provisions permitting the state to amend a MAR. G.S. 15A-1415(g) provides that a defendant may amend a motion by the later of

- thirty days before a hearing on the merits begins or
- at any time before the date for the hearing has been set.

Although this provision suggests that an amendment after the hearing has begun would be untimely, that does not appear to be the case. G.S. 15A-1415(g) also provides that after the hearing has begun, the defendant may file amendments to conform the motion to evidence adduced at the hearing or to raise claims based on such evidence.[93]

One question that has arisen regarding MAR amendments is whether a defendant may raise new claims by amendment that would be untimely if they do not relate back to the filing date of the original motion. For example, suppose a defendant files a motion on January 1, 2010, within the ten-day window. Although the defendant may assert "any error" in this motion,[94] the defendant only asserts one error: that trial counsel rendered ineffective assistance of counsel. On April 1, 2010, the defendant timely amends the motion asserting a new claim that the evidence was insufficient to submit to the jury. According to G.S. 15A-1414(b)(1)c, this claim must be filed within the ten-day window to be timely. If the amendment relates back to the original motion, the new claim will be timely. If it does not relate back, it is untimely. The statute does not address relation back, and the issue does not appear to have been decided by the North Carolina appellate courts.

D. Responses

See section VII.B, regarding a judge's duty to order a response by the state to a defendant's MAR. G.S. 15A-1420(b)(2) provides that the party opposing the MAR may file affidavits or other documentary evidence.

VII. Judicial Officials' Duties upon Filing

A. Clerk's Duties

1. Non-Capital Cases

When receiving a MAR, the clerk must place the motion on the criminal docket and must "promptly" bring the motion, or a copy of it, to the resident judge or any judge holding court in the county or district.[95]

92. G.S. 15A-1415(g).

93. *See id*.

94. *See* Section II.A.1 (discussing the fact that in a motion made within ten days of judgment, the defendant may assert "any error").

95. G.S. 15A-1420(b1)(2).

2. Capital Cases

When a MAR is filed in a capital case, the clerk must refer the MAR to the senior resident superior court judge or his or her designee.[96]

B. Judge's Duties

1. Non-Capital Cases

In non-capital cases, the judge must review the motion and enter an order indicating whether the defendant should be allowed to proceed without the payment of costs[97] with respect to the appointment of counsel[98] and directing the state, if necessary, to file an answer.[99] If a hearing is necessary, the judge must calendar the case for hearing "without unnecessary delay."[100]

2. Capital Cases

In capital cases, the judge must review the motion and enter an order directing the state to file an answer within sixty days of the court's order.[101] As noted above, capital MARs are referred by the clerk to the senior resident superior court judge or his or her designee.[102] The referral is for "review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order, for subsequent events in the case, or other appropriate actions."[103] As with all MARs, if a hearing is necessary, the judge must calendar the case for hearing "without unnecessary delay."[104]

VIII. Discovery

A. State's Obligations

The state, to the extent allowed by law, must make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.[105] This requirement does not appear to apply unless the defendant is represented by counsel. It is not clear whether the relevant statutory provision requires the state to produce discovery pre-filing or whether a MAR must be filed to trigger the state's discovery obligations. As noted in Section IX.A.2 below, many judges do not appoint counsel to an indigent defendant unless the pro se MAR passes a frivolity review. Thus, as a practical matter, a MAR likely will have been filed when counsel is appointed, which is the trigger for the state's discovery obligations.

96. Gen. R. Prac. Sup. & Dist. Ct. R. 25(4).
97. *See* Section IX.B.
98. *See* Section IX.A.
99. G.S. 15A-1420(b1)(2).
100. *Id.*
101. *Id.*
102. Gen. R. Prac. Sup. & Dist. Ct. R. 25(4).
103. *Id.*
104. G.S. 15A-1420(b1)(2).
105. G.S. 15A-1415(f).

B. Protective Orders

If the state has a reasonable belief that allowing inspection of any portion of the files by counsel would not be in the interest of justice, it may submit those portions for court inspection.[106] If upon examination, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a MAR, the court, in its discretion, may allow the state to withhold that portion of the files.[107]

IX. Indigents

A. Right to Counsel

1. Basis of the Right

The United States Supreme Court has rejected the argument that defendants have a constitutionally protected right to counsel in post-conviction proceedings, such as MARs.[108] However, in North Carolina, indigent defendants have a statutory right to counsel in MARs proceedings. Specifically, G.S. 7A-451(a)(3) provides that an indigent defendant is entitled to counsel for a MAR if

- the defendant has been convicted of a felony,
- has been fined $500 or more, or
- has been sentenced to a term of imprisonment.[109]

Additionally, the MAR statute provides that a defendant has a right to be represented by counsel at an evidentiary hearing.[110]

2. Time to Appoint Counsel

G.S. 7A-451(b) provides that an indigent's "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process." Interpreting this provision, many judges do not appoint counsel unless the MAR passes a frivolity review.

3. Capital Cases

Appointment of counsel in capital MARs must be done in accordance with G.S. 7A-451(c), (d), and (e) and IDS rules.[111]

4. Other Considerations

When appointing counsel for a MAR, it is best if the trial judge appoints someone other than trial counsel so that claims of ineffective assistance can be asserted, if appropriate. Also, it is a good idea for the trial judge to have counsel file an amended MAR so that all issues are clearly

106. *Id.*

107. *Id.*

108. Pennsylvania v. Finely, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.") (citations omitted).

109. *See also* G.S. 15A-1421 (G.S. Chapter 7A applies in MAR proceedings).

110. G.S. 15A-1420(c)(4).

111. Gen. R. Prac. Sup. & Dist. Ct. R. 25(1).

presented before a hearing is held. This practice serves the additional purpose of avoiding an inadvertent procedural default because of failing to raise all possible claims in the first MAR.[112]

B. Costs

The court may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings.[113]

X. Counsel Issues

An indigent defendant's statutory right to counsel is discussed above in Section IX.A. As noted there, the MAR statute provides that all defendants are entitled to be represented by counsel at an evidentiary hearing held in connection with the MAR.[114]

A. Attorney–Client Privilege and Ineffective Assistance Claims

When a defendant's MAR alleges ineffective assistance of prior trial or appellate counsel, the defendant is deemed to waive the attorney–client privilege with respect to oral and written communications between counsel and the defendant, to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness.[115] This provision seems to suggest that the defendant's prior counsel should review the case file to determine which communications are necessary to defend against the claim rather than turn over the entire file to the state. The waiver of attorney–client privilege occurs automatically upon the filing of the MAR alleging ineffective assistance of prior counsel; the superior court is not required to enter an order waiving the privilege.[116]

B. File Sharing

For defendants represented by counsel in MAR proceedings in superior court, the defendant's prior trial or appellate counsel must make their complete files available to the defendant's MAR counsel.[117] Although this provision does not apply to an unrepresented MAR defendant, such a defendant is likely entitled to those files because they belong to the client, not the lawyer. By its terms, the statutory provision on file sharing is limited to MARs in superior court.

XI. Procedural Default

In order for a court to reach the merits of the claims raised in a MAR, the defendant must satisfy certain procedural rules. If the defendant fails to do so, he or she is deemed to have committed a procedural default. When this occurs and the defendant cannot establish that an exception

112. *See* Section XI (discussing the procedural default rules).
113. G.S. 15A-1421.
114. G.S. 15A-1420(c)(4).
115. G.S. 15A-1415(e).
116. *Id.*
117. G.S. 15A-1415(f).

applies, the MAR is rejected on grounds of procedural bar. Thus, the procedural default rules preclude consideration on the merits when a procedural error has occurred.

A. Mandatory Bars

The procedural default rules are mandatory. Unless an exception applies, the judge does not have discretion to waive them.[118]

B. The Default Rules

G.S. 15A-1419 contains four procedural default rules, listed in the accompanying sidebar. The rules apply both in non-capital and capital cases.[119]

Grounds for Procedural Default

(1) The claim was not raised in a prior MAR.
(2) The issue was determined in a prior proceeding.
(3) The claim was not raised in a prior appeal.
(4) The defendant failed to timely file the MAR.

1. Claim Not Raised in Previous MAR

A MAR must be denied if upon a previous MAR the defendant was in a position to adequately raise the ground or issue but did not do so ("the (a)(1) bar").[120]

a. Lack of Counsel for the Prior MAR. The mere fact that a defendant was unrepresented in the prior MAR does not excuse a procedural default under this rule. In *State v. McKenzie*,[121] for example, after the trial judge denied the defendant's MAR based on the (a)(1) bar, the defendant appealed, arguing that the bar should not apply because he was not represented by counsel for his previous MAR and was not sufficiently advised of his legal rights to adequately raise the issues. The court of appeals disagreed, noting that although indigents are entitled to counsel in MAR proceedings,[122] nothing in the record indicated that defendant requested and was denied assistance of counsel. Thus, under *McKenzie*, a defendant cannot avoid the (a)(1) bar simply because he or she lacked counsel in the prior MAR proceeding; in order to avoid the bar, the defendant must establish an improper denial of counsel. The *McKenzie* court went on to state: "[f]urther, we cannot say, without more, that defendant's lack of counsel impaired his right to raise adequately the issues in the motion that he raises now."[123] This implies that even if an indigent defendant establishes a denial of counsel, the defendant cannot avoid the (a)(1) bar without making the additional showing that the lack of counsel "impaired his or her right to raise adequately the issues" in the prior MAR.[124]

118. G.S. 15A-1419(b).
119. G.S. 15A-1419(a).
120. G.S. 15A-1419(a)(1).
121. 46 N.C. App. 34 (1980).
122. See Section IX.A (discussing the right to counsel).
123. *McKenzie,* 46 N.C. App. at 39.
124. *Id.*

McKenzie does not preclude a defendant from asserting that ineffectiveness on the part of prior post-conviction counsel rendered defendant unable to raise adequately the issue in a prior MAR. However, the statute specifically provides that ineffectiveness of post-conviction counsel cannot constitute good cause for excusing a procedural default and thus undercuts this argument.[125]

b. Avoiding the Bar through "Supplemental" MARs. In *State v. McHone*,[126] the capital defendant filed a MAR on January 17, 1995. Without holding an evidentiary hearing, the trial court denied the motion. The defendant then filed a motion to vacate the trial court's order and a "supplemental" MAR pursuant to G.S. 15A-1415(g), a provision that allows MARs to be amended.[127] After a hearing, the trial court denied the supplemental MAR, and the defendant sought review with the North Carolina Supreme Court. Without addressing whether the trial court was authorized to consider the defendant's supplemental MAR after it had denied his initial MAR and without addressing the applicability of the (a)(1) bar, the court held that the trial judge erred by denying the defendant's supplemental MAR without an evidentiary hearing.

Thus, in *McHone*, after having lost his initial MAR, the defendant asserted new claims in a "supplemental MAR" instead of in a separate second MAR (which would have been subject to the (a)(1) bar if the defendant was in a position to adequately raise the issues in the initial MAR). It could be argued that *McHone* suggests that a supplemental MAR filed pursuant to G.S. 15A-1415(g) after an initial MAR has been denied is not subject to the (a)(1) bar. One difficulty with this contention is that G.S. 15A-1415(g) does not seem to contemplate that amendments may be made after the MAR being amended has been denied.[128] Moreover, a court-created exception to the (a)(1) bar for supplemental MARs would swallow the rule; a defendant whose initial MAR has been denied could always avoid the (a)(1) bar by filing a supplemental MAR rather than a separate second MAR. It is unlikely that the supreme court meant to endorse such a reading of the statute in an opinion that did not even mention the issue or its ramifications. A more promising argument for defendants might be that once a trial court has agreed to reconsider an order denying an initial MAR, the initial MAR has been reopened and new claims properly may be asserted by way of a G.S. 15A-1415(g) amendment rather than by a second MAR. Whether this argument ultimately will be successful is unclear.[129]

c. Specific Exception. General exceptions that apply to all four of the procedural bar rules are discussed in Section XI.C. Additionally, the statute prescribes a specific exception that applies only to this bar. Specifically, the (a)(1) bar does not apply when the previous MAR was made

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125. *See* Section XI.C (noting that under North Carolina law, ineffective assistance of post-conviction counsel cannot constitute good cause).

126. 348 N.C. 254 (1998).

127. *See* Section VI.C (discussing this provision).

128. *See* G.S. 15A-1415(g).

129. *Cf.* State v. Basden, 350 N.C. 579 (1999) (by allowing defendant time to respond to the State's motion for summary denial of defendant's motion to vacate denial of MAR, trial court "resurrected" defendant's MAR and made it "pending" for purposes of MAR discovery provision); Bacon v. Lee, 225 F.3d 470, 477 (4th Cir. 2000) ("Because the state MAR court reopened the original MAR, the question of whether a governing state rule was regularly and consistently applied to treat a motion to amend thereafter as a second MAR is in some doubt.").

1. within ten days after entry of judgment or
2. during the pendency of the direct appeal.[130]

The Official Commentary indicates that the first part of this exception allows counsel who made a MAR in open court to make an additional motion within ten days "without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion."[131] However, this exception is not limited to MARs made in open court; it applies to all MARs made within ten days of entry of judgment. Under the second part of this exception, a defendant may file an initial MAR while the direct appeal is pending and later make a second MAR raising new claims without danger of procedural default under subsection (a)(1).

2. Issue Determined in Prior Proceeding

G.S. 15A-1419(a)(2) provides that a MAR must be denied if the ground or issue was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in North Carolina or federal courts. This provision establishes that as a general rule, a party has one chance to raise an issue; once an issue has been raised and lost, the party is precluded from re-litigating it in MAR proceedings. This is the only procedural default rule that applies to both the state and the defendant.

a. Specific Exception. General exceptions that apply to all four of the procedural bar rules are discussed in Section XI.C. Additionally, the statute prescribes a specific exception that applies only to this bar. Specifically, this bar does not apply if, since the time the previous determination, there has been a retroactively effective change in the law controlling such issue.[132] For a discussion of the retroactivity rules, see Section II.A.2.a.vi and *Retroactivity of Judge-Made Rules*, *supra* p. 7.

3. Claim Not Raised in Previous Appeal

A MAR must be denied if upon a previous appeal the defendant was in a position to raise adequately the ground or issue underlying the present motion but did not do so ("the (a)(3) bar").[133]

a. No Bar to Jurisdictional Issues. In *State v. Wallace*,[134] the defendant filed a MAR challenging the constitutionality of the short-form indictments used to charge him, contending that the constitutionally inadequate indictments deprived the trial court of jurisdiction to hear his case. He further argued that notwithstanding his failure to challenge the indictments on direct appeal, the issue could be heard in the MAR proceeding. Although the court ultimately rejected defendant's contention on the merits, it held that while the (a)(3) bar generally precludes a defendant from raising an issue that could have been raised on direct appeal, defendant's challenge to the trial court's jurisdiction was properly presented. Thus, under *Wallace*, the (a)(3) bar does not prohibit a defendant from

130. *See* G.S. 15A-1419(a)(1). For a case applying the ten-day exception to the (a)(1) bar, see *State v. Garner*, 136 N.C. App. 1 (1999).
131. Official Commentary to G.S. 15A-1419.
132. G.S. 15A-1419(a)(2).
133. G.S. 15A-1419(a)(3).
134. 351 N.C. 481 (2000).

raising in a MAR jurisdictional issues that were not raised on appeal. Whether *Wallace* will be extended to any of the other statutory procedural bars remains to be seen.

b. **Ineffective Assistance Claims.** This bar applies when the defendant was in a position to adequately raise the ground or issue in a previous appeal but did not do so. In most instances, a defendant is not in a position to adequately raise a claim of ineffective assistance of counsel on a direct appeal. The appellate court is a court of record and is bound by the record of the trial proceedings below. However, an ineffective assistance claim, such as a claim that the lawyer labored under an impermissible conflict of interest, almost always depends on facts outside of the record and thus requires an evidentiary hearing. Not surprisingly, when such claims are raised on appeal, the appellate courts often dismiss them without prejudice to raise the claims in the trial court.[135] This suggests that as a general rule, ineffective assistance of counsel claims will not be subject to this bar. However, some ineffectiveness claims can be decided on appeal,[136] and as to these claims, there is no reason to except them from this bar.

4. Failure to Timely File

A MAR must be denied if a capital defendant failed to timely file a MAR as required by G.S. 15A-1415(a).[137] Because G.S. 15A-1415(a) provides that, in non-capital cases, a defendant may file a MAR at any time after verdict, this bar does not apply to those cases. However, as discussed above in Section III.B, G.S. 15A-1415(a) prescribes a 120-day filing period for capital MARs. Also as discussed above, the MAR statute allows for extensions and amendments and excepts claims of newly discovered evidence from the 120-filing rule.[138]

a. **Amendments and Relation Back.** One issue regarding this bar is whether amendments to capital MARs raising new claims must be filed within the 120-day deadline of G.S. 15A-1415(a) or whether they can be made later on grounds that they relate back to the original filing for purposes of the 120-day rule. On the one hand, it may be argued that allowing new claims to be asserted in amendments filed after the deadline will frustrate the purpose of the 1996 legislative revisions that added the 120-day rule: to expedite the post-conviction process.[139] In support of this argument it may be noted that G.S. 15A-1415(g) contains no language allowing for relation back of new claims raised in amended MARs.[140] On the other hand, because both provisions were enacted in the same bill, G.S. 15A-1415(g) arguably was meant to serve as a limited exception to G.S. 15A-1415(a), allowing, in certain circumstances, for the assertion of new claims outside of the 120-day period. Under this view, G.S. 15A-1415(g) is not an exception that swallows the rule; rather, it

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135. *See, e.g.,* State v. Thompson, 359 N.C. 77, 122 (2004) ("[W]hen this court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent [MAR] in the trial court.").

136. State v. Goode, ___ N.C. App. ___, 677 S.E.2d 507 (June 16, 2009) (deciding an ineffective assistance of counsel claim asserting a *Harbison* error (unconsented-to admission of guilt) on direct appeal).

137. G.S. 15A-1419(a)(4).

138. *See* Sections III.C (extension of time) and VI.C (amendments).

139. *See* State v. Buckner, 351 N.C. 401, 408 (2000) (purpose of amendments to G.S. 15A-1415 was to expedite the post-conviction process while ensuring thorough and complete review).

140. *Compare* N.C. R. Civ. Pro. 15(c) ("[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed").

allows new claims to be raised in connection with a properly filed MAR only within a limited window of time, ending when the time for making an amendment ends.

C. General Exceptions

The statute contains two general exceptions to the procedural default rules.

1. Good Cause and Actual Prejudice

A defendant is excused from procedural default if he or she can demonstrate good cause and actual prejudice.[141]

a. Good Cause. G.S. 15A-1419(c) provides that good cause can be shown only if the defendant establishes, by a preponderance of the evidence, that his or her failure to raise the claim or file a timely motion was

- the result of state action in violation of the federal or state constitutions, including ineffective assistance of trial or appellate counsel;
- the result of the recognition of a new federal or state right that is retroactively applicable; or
- based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous state or federal post-conviction review.

The first ground—result of state action in violation of the federal or state constitutions—expressly includes ineffective assistance of trial or appellate counsel. However, the statue also provides that a trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause; neither may a claim of ineffective assistance of prior post-conviction counsel constitute good cause.[142] Examples of the types of ineffective assistance claims that could fall within the good cause provision include claims of an impermissible conflict of interest or a denial of counsel at a critical stage of the criminal proceeding.[143]

The second ground pertains to a retroactively applicable new right. For a discussion of retroactivity, see Section II.A.2.a.vi.

b. Actual Prejudice. G.S. 15A-1419(d) provides that actual prejudice may be shown only if the defendant establishes, by a preponderance of the evidence, that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.

c. Applicability to the "Previously Determined" Procedural Bar. Because it states that "good cause may only be shown if the defendant establishes . . . that his failure to raise the claim or file a timely motion" resulted from one of the good cause grounds, G.S. 15A-1419(c) does not apply to procedural defaults under subsection (a)(2). As discussed above, the (a)(2) bar does not involve a failure to raise a claim or a failure to file a timely motion; a

141. G.S. 15A-1419(b)(1).

142. G.S. 15A-1419(c).

143. For more information about ineffective assistance of counsel claims, see Jessica Smith, Ineffective Assistance of Counsel Claims in North Carolina Criminal Cases (UNC School of Government, 2003).

claim is barred by subsection (a)(2) because the defendant previously raised the claim and it was decided unfavorably.[144] Thus, the statutory language suggests that the good cause and actual prejudice exception does not apply to a default on grounds of the (a)(2) bar.

2. Fundamental Miscarriage of Justice

A defendant will be excused from procedural default if he or she can demonstrate that a failure to consider the claim will result in a fundamental miscarriage of justice.[145] According to the statute, a fundamental miscarriage of justice results only if

- the defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense or
- the defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.[146]

a. Claims of Newly Discovered Evidence. A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by G.S. 15A-1419(a) or 15A-1415(c), may show a fundamental miscarriage of justice only by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.[147]

XII. Hearings and Related Issues

A. Hearing Required Unless MAR Is "Without Merit"

G.S. 15A-1420(c)(1) provides that unless the court determines that the MAR is "without merit," "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing materials presented." This suggests that the non-movant is entitled to a hearing before a MAR is granted.

Neither the statute nor the case law fully explains what is meant by the term "without merit." At the least, the term must include MARs that fail for substantive reasons. Thus, a court may deny a MAR without a hearing on grounds that it is without merit when

- there are no disputed facts and the claim must fail as a matter of law,[148]
- there are disputed facts and the claim must fail as a matter of law even if all disputed facts are resolved in the movant's favor,[149]

144. *See* Section XI.B.2.

145. G.S. 15A-1419(b)(2).

146. G.S. 15A-1419(e)

147. *Id*.; *see* Section II.A.2.a.ix (discussing claims of newly discovered evidence).

148. *See* State v. McHone, 348 N.C. 254, 257 (1998) ("[W]hen a [MAR] presents only a question of . . . law and it is clear . . . that the defendant is not entitled to prevail, 'the motion is without merit' within the meaning of subsection (c)(1) and may be dismissed . . . without any hearing."); State v. Rice, 129 N.C. App. 715, 723–24 (1998) (holding that defendant was not entitled to a hearing when the legal basis of his MAR was without merit).

149. *See McHone*, 348 N.C. at 257–58 ("[W]here facts are in dispute but the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him, the trial court may determine that the motion 'is without merit' within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact.").

- defendant cannot establish the requisite prejudice even if he or she can establish the asserted ground for relief,[150] or
- the harmless error standard governs and the error, even if established, is harmless beyond a reasonable doubt.[151]

The statutory language leaves open the possibility that a MAR is also without merit within the meaning of G.S. 15A-1420(c)(1) when it fails for procedural reasons. Among the possible reasons a MAR could fail on procedural grounds are

- procedural default,[152]
- improper form,[153]
- improper service,[154]
- improper filing,[155]
- failure to include the requisite supporting affidavits or documentary evidence,[156] or
- failure to file the required attorney certification.[157]

B. Evidentiary Hearings

An evidentiary hearing is required only when the trial court cannot rule on the motion "without the hearing of evidence."[158] Such a hearing is prohibited when the matter presents only questions of law.[159] In determining whether an evidentiary hearing is required, the trial court must consider the MAR and any supporting or opposing information presented.[160] Although there is no North Carolina case law so stating, it seems reasonable to suggest that to trigger the requirement of a hearing, the factual question must be genuine and material. Consistent with this suggestion, at least one case has held that bare MAR allegations are not enough to establish

150. *See* G.S. 15A-1420(c)(6) ("Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."); G.S. 15A-1443(a) (prejudice standard); *see generally* Section XII.I.3 (discussing the requisite prejudice).

151. *See* G.S. 15A-1420(c)(6) (incorporating standards of prejudice set forth in G.S. 15A-1443); G.S. 15A-1443(b) (harmless error standard); *see generally*, Section XII.I.3.a (discussing the harmless error standard).

152. *See* Section XI (discussing procedural default).

153. *See* Section VI.A (discussing form of the motion).

154. *See* Section VI.B (discussing service requirements).

155. *See id.* (discussing filing requirements).

156. *See* Section VI.A.3 (discussing the need for these items).

157. *See* Section VI.A.2 (discussing the certification).

158. G.S. 15A-1420(c)(4).

159. *See* G.S. 15A-1420(c)(3); State v. McHone, 348 N.C. 254, 257 (1998) ("when a [MAR] presents only questions of law, . . . the trial court must determine the motion without an evidentiary hearing"); State v. Holden, 106 N.C. App. 244, 248 (1992) ("Here the only question to be decided by the trial court was whether it had properly excluded the Rule 412(b)(2) evidence, a question of law. . . . Because only a question of law was involved, a hearing was not required."); State v. Essick, 67 N.C. App. 697, 702–03 (1984) (hearing not required "when only questions of law arise"); State v. Bush, 307 N.C. 152, 166–67 (1982) ("As defendant's petition presented only questions of law arising from the record of his original trial for the Superior Court's determination, the Superior Court was required to determine the motion without an evidentiary hearing."), *habeas corpus granted on other grounds*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

160. G.S. 15A-1420(c)(1).

the need for an evidentiary hearing;[161] some evidence must be offered to create an issue of fact warranting a hearing.[162] There are North Carolina cases going both ways on whether or not an evidentiary hearing was required.[163]

C. Hearings in Particular Types of Cases

For a discussion about how these rules apply to MARs challenging guilty pleas and to MARs raising claims of ineffective assistance of counsel, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR,* Admin. of Justice Bulletin No. 2001/04 (UNC School of Government, Oct. 2001).[164]

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161. *See* State v. Aiken, 73 N.C. App. 487, 501 (1985) (trial court did not err in summarily denying defendant's MAR when defendant filed no supporting affidavit and offered no evidence beyond "bare allegations").

162. Some evidence must be offered in support of a MAR made after entry of judgment or it fails for lack of supporting affidavits. *See* Section VI.A.3.

163. Sample cases in which an evidentiary hearing was not required include: State v. Harris, 338 N.C. 129, 143 (1994) (trial court did not err by declining to hold an evidentiary hearing on claim asserted in defendant's G.S. 15A-1414 MAR alleging ineffective assistance of counsel when "[t]here were no specific contentions that required an evidentiary hearing to resolve questions of fact"); State v. Robinson, 336 N.C. 78, 125 (1994) (trial court correctly determined that, as a matter of law, defendant was not entitled to relief on his G.S. 15A-1414 MAR and no evidentiary hearing was required); *Bush*, 307 N.C. at 166–67 (since defendant's MAR presented only questions of law, "the Superior Court was required to determine the motion without a hearing."); State v. Rice, 129 N.C. App. 715, 723 (1998) (trial court did not err in denying the MAR without an evidentiary hearing when the MAR was without merit); *Holden*, 106 N.C. App. at 248 (trial court did not err in denying the MAR without a hearing when it presented only the legal question of whether the court had properly excluded evidence); *Aiken*, 73 N.C. App. at 501 (trial court did not err in summarily denying defendant's MAR when defendant "filed no supporting affidavit and offered no evidence beyond the bare allegations" in the MAR); *Essick*, 67 N.C. App. at 702–03 (trial court did not err in refusing to allow defendant to offer oral testimony in support of his MAR made pursuant to G.S. 15A-1414).

Sample cases in which an evidentiary hearing was required include: State v. Morganherring, 350 N.C. 701, 713 (1999) (noting that by prior order, court had remanded defendant's MAR to superior court for an evidentiary hearing to specifically address five issues); *McHone*, 348 N.C. at 258–59 (defendant was entitled to an evidentiary hearing on his MAR as supplemented when the trial court was presented "with a question of fact which it was required to resolve" regarding whether the State had engaged in improper ex parte contact with the judge); State v. Barnes, 348 N.C. 75 (1998) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing); State v. Francis, 492 S.E.2d 29 (N.C. 1997) (same); State v. Farrar, 472 S.E.2d 21 (N.C. 1996) (same); State v. Stevens, 305 N.C. 712, 716 (1982) (noting that, by prior order of the court, case was remanded to superior court for an evidentiary hearing); State v. Dickens, 299 N.C. 76, 85 (1980) (finding record of plea proceeding deficient and remanding for a hearing on whether defendant entered guilty pleas under the misapprehension that a plea bargain had been made with respect to sentence); State v. Hardison, 126 N.C. App. 52, 54 (1997) (trial court erred by failing to hold an evidentiary hearing to address issues of fact regarding counsel's alleged conflict of interest and invalidity of the plea agreement); State v. Arsenault, 46 N.C. App. 7, 14 (1980) (defendant raised "a substantial question of violation of his constitutional right [to effective assistance of counsel] which cannot be determined from the record, and evidentiary hearing pursuant to G.S. 15A-1420(c) is necessary"); State v. Roberts, 41 N.C. App. 187, 188 (1979) ("defendant has raised substantial questions of violation of constitutional rights which cannot be determined from the record and that an evidentiary hearing . . . is necessary").

164. Online at shopping.netsuite.com/s.nl/c.433425/it.I/id.199/.f.

D. Calendaring Hearings

G.S. 15A-1420(b1)(1) provides that if a hearing is necessary, the judge must calendar it "without unnecessary delay." However, when a MAR is made orally,[165] the court must determine whether the matter "may be heard immediately or at a later time."[166] If the opposing party, or counsel if represented, is not present, the court must provide for "adequate notice of the motion" and the date of hearing to the opposing party, or counsel if represented.[167]

E. Pre-Hearing Conferences

Upon motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.[168]

F. Presence of the Defendant

The defendant has no statutory right to be present when only issues of law are argued.[169] However, a defendant has a statutory right to be present at an evidentiary hearing.[170] A waiver of this right must be in writing.[171]

G. Counsel

An indigent defendant has a right to appointed counsel, as discussed in Section IX.A. Additionally, G.S. 15A-1420(c)(4) provides that all defendants have the right to be represented by counsel at the evidentiary hearing.

H. Rules of Evidence

The rules of evidence apply in an evidentiary hearing on a MAR.[172]

I. Burdens and Standards

1. Factual Issues

The movant bears the burden of establishing the necessary facts by a preponderance of the evidence.[173]

2. Basis for Relief

A defendant must show the existence of the asserted ground for relief,[174] for example, that his or her constitutional rights were violated. Although the statute does not say, presumably the standard is the same when the state seeks the relief.

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165. *See* Section VI.A.1 (discussing oral MARs).
166. G.S. 15A-1420(a)(2).
167. *Id.*
168. G.S. 15A-1420(c)(1).
169. G.S. 15A-1420(c)(3).
170. G.S. 15A-1420(c)(4).
171. *Id.*
172. G.S. 8C-1, R. 101, 1101.
173. G.S. 15A-1420(c)(5).
174. G.S. 15A-1420(c)(6).

3. Prejudice

Even if a movant shows the existence of the asserted ground for relief, relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.[175] That provision sets forth the required prejudice that must be established in a criminal appeal. Thus, when trial judges decide MARs, they are required to apply a standard normally applied on appellate review. Under G.S. 15A-1443 and as discussed immediately below, the relevant standards for establishing prejudice vary depending on whether or not the alleged error involves constitutional rights.

a. Non-Constitutional Errors. Under G.S. 15A-1443(a), when the error relates to non-constitutional rights, prejudice results if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." The defendant bears the burden of showing such prejudice.[176] The statute provides that prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.[177] Examples of errors that are reversible per se include the presence of an alternate juror in the jury room during deliberations,[178] the trial court's refusal to allow more than one of a capital defendant's attorneys to participate in the final argument to the jury,[179] and allowing a capital case to proceed without the appointment of assistant counsel as required by G.S. 7A-450(b1).[180]

G.S 15A-1443(a) expressly applies to "errors relating to rights other than under the Constitution of the United States." However, in *State v. Huff*,[181] the court held that notwithstanding the express language of G.S. 15A-1443(a), the proper standard to be applied when reviewing violations of a defendant's state constitutional right to be present at all stages of a capital trial is the harmless beyond a reasonable doubt standard articulated by the United States Supreme Court in *Chapman v. California*[182] and incorporated into G.S. 15A-1443(b).[183] Thus, when there has been a violation of defendant's state constitutional right to be present at his or her capital trial, the harmless error standard applies, not the standard prescribed in G.S. 15A-1443(a).[184]

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175. G.S. 15A-1443(a).

176. *Id.*

177. *Id.*

178. *See* State v. Parker, 350 N.C. 411, 426 (1999) ("the presence of an alternate in the jury room during deliberations violates [G.S. 15A-1215(a)] and constitutes reversible error per se").

179. *See* State v. Mitchell, 321 N.C. 650, 659 (1988) ("the trial court's refusal to permit both counsel to address the jury during defendant's final arguments constituted prejudicial error per se").

180. *See* State v. Hucks, 323 N.C. 574, 576 (1988) ("We agree that allowing the capital case against [defendant] to proceed without the appointment of additional counsel to assist him violated the mandate of [G.S. 7A-450(b1)]. This denial of [defendant's] statutory right to additional counsel was prejudicial error per se.").

181. 325 N.C. 1 (1989), *vacated on other grounds by*, Huff v. North Carolina, 497 U.S. 1021 (1990).

182. 386 U.S. 18 (1967).

183. *See Huff*, 325 N.C. at 33.

184. See *id*. The *Huff* court rejected the notion that the General Assembly could set the standard of review for state constitutional violations, stating: "[U]nder our constitutional form of government, only this Court may authoritatively construe the Constitution of North Carolina with finality and it is for this Court, and not the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution." *Id.* at 34 (quotation omitted).

b. **Constitutional Errors.** G.S. 15A-1443(b) provides that a violation of the defendant's rights under the federal constitution is prejudicial unless the court finds that it was harmless beyond a reasonable doubt. As noted in the previous subsection, the North Carolina Supreme Court has held that notwithstanding this statutory language, the standard in G.S. 15A-1443(b) also applies to certain errors implicating state constitutional rights. The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless.[185]
c. **Invited Error.** G.S. 15A-1443(c) provides that a defendant is not prejudiced by the granting of relief which he or she has sought or by an error resulting from his or her own conduct. Several North Carolina court cases have applied this rule in the direct appeal context.[186]
d. **General Principle.** Although the results in the direct appeal cases are fact-dependent, at least one general principle can be discerned from them: A defendant's burden of establishing prejudice under G.S. 15A-1443(a) or the state's burden of establishing harmless error under G.S. 15A-1443(b) depends on the weight of evidence in the case. The more conclusive or overwhelming the evidence is against a defendant, the harder it will be for the defendant to establish that the error affected the result of the proceeding and the easier it will be for the state to establish that the error was harmless beyond a reasonable doubt. Conversely, when the evidence of guilt is conflicting or not so overwhelming as to be conclusive, it will be easier for the defendant to establish prejudice and harder for the state to establish that the error was harmless.

185. G.S. 15A-1433(b).

186. State v. McNeil, 350 N.C. 657, 669 (1999) (citing G.S. 15A-1443(c) and holding that by opposing State's joinder motion, defendant obtained a benefit which he cannot claim on appeal was unlawful and requires a new trial); State v. Roseboro, 344 N.C. 364, 373 (1996) (citing G.S. 15A-1443(c) and holding that trial court's limitation of defense witness's testimony to corroborative purposes was "invited error from which defendant cannot gain relief" when defendant "unequivocally agreed" that he offered the witness's testimony only for corroboration); State v. Lyons, 340 N.C. 646, 666–67 (1995) (citing G.S. 15A-1443(c) and holding that defendant cannot successfully contend that the trial court erred by instructing the jury on the doctrine of transferred intent when defendant made "a formal, written request" for a transferred intent instruction); State v. Jackson, 340 N.C. 301, 318 (1995) (citing G.S. 15A-1443(c) and rejecting defendant's contention that his telephone statement that was not revealed by the prosecution until trial was impermissibly used to impeach his expert witness when the statement was substantially identical to his formal confession given minutes earlier and when defendant had a copy of the confession long before trial but chose not to provide it to his expert); State v. Eason, 336 N.C. 730, 741 (1994) (citing G.S. 15A-1443(c) and holding that by asking the judge for a return to the original venue, defendant "invited" the judge to take action which he cannot complain of now); State v. Sierra, 335 N.C. 753, 760 (1994) (citing G.S. 15A-1443(c) and holding that "defendant . . . will not be heard to complain on appeal" of trial court's failure to instruct jury on second degree murder when "[d]efendant stated . . . three times that he did not want such an instruction, telling the trial court that . . . [it] was not supported by the evidence and was contrary to defendant's theory of the case"); State v. Gay, 334 N.C. 467, 484–85 (1993) (citing G.S. 15A-1443(c) and rejecting defendant's argument that reliability of guilty verdicts was impaired by the testimony of her expert witness and by the court's failure to prevent counsel from both sides from relying on it in closing arguments when expert was defendant's witness and defendant introduced the testimony, incorporated it into her closing, and did not object to the State doing the same).

J. Attorney Certification Required for Superior Court Motions

A MAR filed in superior court by a lawyer may not be granted unless the attorney has provided the required certification, discussed above in Section VI.A.2.

K. State's Opportunity to Consent or Object for District Court Motions

G.S. 15A-1420(a)(4) provides that a MAR may not be granted in district court without the signature of the district attorney, indicating that the state has had an opportunity to consent or object to the motion. However, the district court judge may grant a MAR without the district attorney's signature ten business days after the district attorney has been notified in open court of the motion or served with the motion pursuant to G.S. 15A-951(c).[187]

L. Relief Available

The following relief is available when the court grants a MAR:

- new trial on all or any of the charges,
- dismissal of all or any of the charges,
- relief sought by the state pursuant to G.S. 15A-1416,
- referral to the North Carolina Innocence Inquiry Commission for claims of factual innocence, or
- any other appropriate relief.[188]

The catchall of "any appropriate relief" gives broad authority to the court to fashion an appropriate remedy for an established wrong.

When the trial court grants relief and the offense is divided into degrees or includes lesser offenses and the court believes that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense included in the one charged, the court may, with consent of the state, accept a plea of guilty to the lesser degree or lesser offense.[189]

If resentencing is required, the trial division may enter an appropriate sentence.[190] If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence.[191]

XIII. The Order

A. Ruling and Order Required

A judge must rule on the MAR and enter an order.[192]

187. G.S. 15A-1420(a)(4). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.

188. G.S. 15A-1417.

189. *Id.*

190. *Id.*

191. *Id.*

192. G.S. 15A-1420(c)(7).

B. Factual Findings Required

If an evidentiary hearing is held, the court must make findings of fact.[193]

C. Reasons for Decision

When drafting an order, it is best if the judge explains the reasons for his or her decision. This clarification can be helpful if the case ends up in federal habeas proceedings. A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground.[194] If the state trial court does not clearly state its reasons, the federal habeas court will be unable to determine whether the state decisions rests on adequate and independent state law grounds.

D. Federal Rights

G.S. 15A-1420(c)(7) provides that when a MAR is based on an asserted violation of the defendant's rights under federal law, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

E. Consent for Taking under Advisement

To avoid any problems with an order being entered out of county, out of session, or out of term, a judge should obtain the parties' consent before taking a MAR under advisement after a hearing.[195]

XIV. Appeal

A. Superior Court Rulings

1. Ruling on Defendant's MAR Filed within Ten Days of Judgment

The grant or denial of relief sought in a MAR under G.S. 15A-1414 is subject to an appeal regularly taken.[196] Article 91 of G.S. Chapter 15A sets out the grounds and procedure for appeal to the appellate division by the defendant.

2. Ruling on Defendant's MAR Filed More Than Ten Days after Judgment

A ruling on a MAR pursuant to G.S. 15A-1415 is subject to review as follows:

- if the time for appeal from the conviction has not expired, by appeal;
- if an appeal is pending when the ruling is entered, in that appeal; or

193. G.S. 15A-1420(c)(4). Findings of fact are required also for motions to suppress. In that context, if the evidence is not contradicted on a specific point, failure to find that fact is not error. *See* State v. Munsey, 342 N.C. 882 (1996).

194. Beard v. Kindler, 130 S. Ct. 612 (2009).

195. *See* Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County*, Admin. of Justice bulletin No. 2008/05 (UNC School of Government, Nov. 2008) (online at shopping.netsuite.com/s.nl/c.433425/it.I/id.364/.f).

196. G.S. 15A-1422(b).

• if the time for appeal has expired and no appeal is pending, by writ of certiorari.[197]

As noted above, Article 91 of G.S. Chapter 15A sets out the grounds and procedure for appeal to the appellate division by the defendant.

Rule 21(e) of the North Carolina Rules of Appellate procedure provides that petitions for writ of certiorari to review orders of the trial court denying MARs on grounds listed in G.S. 15A-1415(b) by capital defendants must be filed in the North Carolina Supreme Court. It further provides that in all other cases, petitions must be filed in and determined by the court of appeals, and the supreme court will not entertain petitions for certiorari or petitions for further discretionary review.[198]

3. Ruling on State's MAR

G.S. 15A-1422, the provision in the MAR statute on appeal, does not address appeal from a superior court ruling on a MAR filed by the state under G.S. 15A-1416.[199] Noting this statutory silence, the court of appeals has treated a defendant's attempt to seek review of a trial court ruling granting the state's MAR as a petition for writ of certiorari and, in at least one instance, has granted such a petition.[200] It is not clear whether the court would treat an attempted appeal by the state from an adverse ruling on its own MAR in the same way. The court of appeals also has rejected attempts to fill in statutory gaps in the MAR provision on appeals by reference to provisions on direct appeal, such as G.S. 15A-1445.[201] It is not clear whether a similar argument based on G.S. 7A-27 would be treated in the same way.[202]

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197. G.S. 15A-1422(c); *see also* N.C. R. App. Proc. R. 21(a)(1).

198. Rule 21(f) further provides that a petition for writ of certiorari to review a trial court's order on a capital MAR must be filed in the supreme court within sixty days after delivery of the transcript of the hearing on the MAR to the petitioning party and that the responding party must file its response within thirty days of service of the petition.

199. *See supra* Section II.B (discussing the state's right to file a MAR under G.S. 15A-1416).

200. State v. Linemann, 135 N.C. App. 734 (1999). It is not clear that Rule 21 of the Rules of Appellate Procedure authorizes the court to entertain a petition for writ of certiorari in these circumstances. Rule 21(a) authorizes a writ of certiorari for review pursuant to G.S. 15A-1422(c)(3) of an order denying relief on a MAR made under G.S. 15A-1415. That latter provision authorizes MARs by the defendant, not the state. Also, in a related context, the court strictly construed Rule 21 to deny a petition by the State seeking review of a trial judge's *sua sponte* MAR granting relief to the defendant. State v. Starkey, 177 N.C. App. 264 (2006).

201. *Starkey*, 177 N.C. App. 264 ("[a]s the State is appealing the entry of an order granting the trial's court's [MAR] and not the judgment entered on the jury verdicts, whether or not the State has a right of appeal to this Court is controlled by [G.S.] 15A-1422" not G.S. 15A-1455).

202. G.S. 7A-27 provides, in relevant part:

> (a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.
>
> (b) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.
>
> . . .
>
> (e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals.

4. Ruling on Judge's Own MAR

As noted above, a judge may, in certain circumstances, *sua sponte* grant relief to the defendant on a MAR.[203] In *State v. Starkey*,[204] the State attempted to appeal a trial court's ruling on its own MAR. The court rejected the State's argument that review was appropriate under G.S. 15A-1422(b). Although not mentioned by the appellate decision, G.S. 15A-1422(b) speaks to the granting or denial of relief on a motion pursuant to G.S. 15A-1414, which is the provision on a defendant's motion filed within ten days of entry of judgment.[205] Since the trial court had acted on its own MAR, the motion was not one filed by the defendant within the ten-day window. *Starkey* also rejected the State's attempt to seek review of the trial judge's ruling by writ of certiorari.[206]

B. District Court Rulings

There is no right to appeal a MAR when the movant is entitled to a trial de novo on appeal.[207] Thus, a defendant cannot appeal a district court judge's ruling on a MAR when the defendant is entitled to a trial de novo in superior court.[208] As worded, this provision does not address appeal by the state from a district court judge's ruling on a MAR. Given that the North Carolina Court of Appeals has rejected attempts to fill in other gaps in the MAR statute by reference to the direct appeal statutes,[209] it appears unlikely that the court would fill in this statutory gap by reference to G.S. 15A-1432 (appeals by the state from district court judges). Relief possibly can be obtained by writ of certiorari to the superior court.[210]

C. Court of Appeals Rulings

Decisions of the court of appeals on MARs under G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion or otherwise.[211] However, the North Carolina Supreme Court has held that the statutes setting forth this rule "cannot restrict [that] Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review upon appeal any decision of the courts below."[212] Other MAR rulings by the court of appeals are reviewable by writ of certiorari to the North Carolina Supreme Court.[213]

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203. *See supra* Section II.C.
204. 177 N.C. App. 264 (2006).
205. *See supra* Section II.A.1 (discussing these motions).
206. *Starkey,* 177 N.C. App. 264.
207. G.S. 15-1422(d).
208. *See* G.S. 15A-1431 (appeals by defendants from district court).
209. *See Starkey,* 117 N.C. App. 264.
210. *See* Gen. R. Prac. Sup. & Dist. Ct. R. 19.
211. G.S. 15A-1422(f); 7A-28(a).
212. State v. Ellis, 361 N.C. 200 (2007) (quotation omitted) (going on to review MAR ruling).
213. G.S. 7A-31(a).

XV. Relationship to Other Proceedings

A. Appeal

The making of a MAR is not a prerequisite for asserting an error on appeal.[214] Also, if an error asserted on appeal has been the subject of a MAR, denial of the MAR has no effect on the right to assert the error on appeal.[215] Put another way, an adverse ruling on a MAR does not constitute a procedural default barring appeal. However, as discussed in Section XI, failure to raise a claim on appeal may result in a procedural default with respect to a subsequent MAR proceeding. A defendant may file a MAR under G.S. 15A-1414, and the motion may be acted upon in the trial division even when notice of appeal has been given.[216] When the case is in the appellate division for review, a MAR under G.S. 15A-1415 must be made in that division.[217] The statute contains no parallel rules for motions filed by the state.

B. Habeas Corpus

The availability of relief by way of a MAR is not a bar to relief by writ of habeas corpus.[218] However, Rule 24(5) of the General Rules of Practice of the Superior and District Courts states that subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for a MAR.[219]

C. Innocence Inquiry Commission Proceedings

A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission is not a MAR and does not impact rights or relief available through the MAR statutes.[220] Similarly, a claim of factual innocence asserted through the Innocence Inquiry Commission does not adversely affect a defendant's right to other post-conviction relief.[221]

214. G.S. 15A-1422(a).
215. G.S. 15A-1420(e).
216. G.S. 15A-1414(c).
217. G.S. 15A-1418; *see* Section V.F.1 (discussing when a case is in the appellate division for review).
218. G.S. 15A-1411(c).
219. For more information about habeas corpus, see Jessica Smith, Habeas Corpus, in The Survival Guide: Superior Court Judges' Trial Notebook (UNC School of Government, Jan. 2010) (available online at www.sog.unc.edu/faculty/smithjess/survival_guide.html).
220. G.S. 15A-1411(d).
221. G.S. 15A-1470(b).

Appendix. MAR Statutes: Article 89, Chapter 15A of the N.C. General Statutes

§ 15A-1411. Motion for appropriate relief.

(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420.

(b) A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding.

(c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, coram nobis and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus.

(d) A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission does not constitute a motion for appropriate relief and does not impact rights or relief provided for in this Article.

§ 15A-1412. Provisions of Article procedural.

The provision in this Article for the right to seek relief by motion for appropriate relief is procedural and is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief.

§ 15A-1413. Trial judges empowered to act.

(a) A motion for appropriate relief made pursuant to G.S. 15A-1415 may be heard and determined in the trial division by any judge who is empowered to act in criminal matters in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, in which the judgment was entered.

(b) The judge who presided at the trial is empowered to act upon a motion for appropriate relief made pursuant to G.S. 15A-1414. He may act even though he is in another district or even though his commission has expired.

(c) When a motion for appropriate relief may be made before a judge who did not hear the case, he may, if it is practicable to do so, refer all or a part of the matter for decision to the judge who heard the case.

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

(a) After the verdict but not more than 10 days after entry of judgment, the defendant by motion may seek appropriate relief for any error committed during or prior to the trial.

(b) Unless included in G.S. 15A-1415, all errors, including but not limited to the following, must be asserted within 10 days after entry of judgment:

(1) Any error of law, including the following:

a. The court erroneously failed to dismiss the charge prior to trial pursuant to G.S. 15A-954.

b. The court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence.

c. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury, whether or not a motion so asserting was made before verdict.

d. The court erroneously instructed the jury.

(2) The verdict is contrary to the weight of the evidence.
(3) For any other cause the defendant did not receive a fair and impartial trial.
(4) The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing. This motion must be addressed to the sentencing judge.

(c) The motion may be made and acted upon in the trial court whether or not notice of appeal has been given.

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

(a) At any time after verdict, a noncapital defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section. In a capital case, a postconviction motion for appropriate relief shall be filed within 120 days from the latest of the following:

(1) The court's judgment has been filed, but the defendant failed to perfect a timely appeal;
(2) The mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
(3) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;
(4) Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;
(5) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the defendant's conviction and sentence undisturbed; or
(6) The appointment of postconviction counsel for an indigent capital defendant.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law.
(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.
(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.
(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.
(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.
(6) Repealed by Session Laws 1995 (Regular Session, 1996), c. 719, s. 1, effective June 21, 1996.
(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.
(8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise

invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served.

(c) Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.

(d) For good cause shown, the defendant may be granted an extension of time to file the motion for appropriate relief. The presumptive length of an extension of time under this subsection is up to 30 days, but can be longer if the court finds extraordinary circumstances.

(e) Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

(f) In the case of a defendant who is represented by counsel in postconviction proceedings in superior court, the defendant's prior trial or appellate counsel shall make available to the defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

(g) The defendant may file amendments to a motion for appropriate relief at least 30 days prior to the commencement of a hearing on the merits of the claims asserted in the motion or at any time before the date for the hearing has been set, whichever is later. Where the defendant has filed an amendment to a motion for appropriate relief, the State shall, upon request, be granted a continuance of 30 days before the date of hearing. After such hearing has begun, the defendant may file amendments only to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence.

§ 15A-1416. Motion by the State for appropriate relief.

(a) After the verdict but not more than 10 days after entry of judgment, the State by motion may seek appropriate relief for any error which it may assert upon appeal.

(b) At any time after verdict the State may make a motion for appropriate relief for:

(1) The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted.
(2) The initiation of any proceeding authorized under Article 82, Probation; Article 83, Imprisonment; and Article 84, Fines, with regard to the modification of sentences. The procedural provisions of those Articles are controlling.

§ 15A-1417. Relief available.

(a) The following relief is available when the court grants a motion for appropriate relief:
(1) New trial on all or any of the charges.
(2) Dismissal of all or any of the charges.
(3) The relief sought by the State pursuant to G.S. 15A-1416.
(3a) For claims of factual innocence, referral to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes.
(4) Any other appropriate relief.

(b) When relief is granted in the trial court and the offense is divided into degrees or necessarily includes lesser offenses, and the court is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense necessarily included in the one charged, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.

(c) If resentencing is required, the trial division may enter an appropriate sentence. If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence.

§ 15A-1418. Motion for appropriate relief in the appellate division.

(a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

(b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

(c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it.)

§ 15A-1419. When motion for appropriate relief denied.

(a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

(b) The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate:

(1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or

(2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

(c) For the purposes of subsection (b) of this section, good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:

(1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;

(2) The result of the recognition of a new federal or State right which is retroactively applicable; or

(3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause, nor may a claim of ineffective assistance of prior postconviction counsel constitute good cause.

(d) For the purposes of subsection (b) of this section, actual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.

(e) For the purposes of subsection (b) of this section, a fundamental miscarriage of justice only results if:

(1) The defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or

(2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.)

§ 15A-1420. Motion for appropriate relief; procedure.

(a) Form, Service, Filing.

(1) A motion for appropriate relief must:

a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

b. State the grounds for the motion;

c. Set forth the relief sought;

c1. If the motion for appropriate relief is being made in superior court and is being made by an attorney, the attorney must certify in writing that there is a sound legal basis for the motion and that it is being made in good faith; and that the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion; and further, that the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought in the motion does not require that the trial transcript be read in its entirety. In the event that the trial transcript is unavailable, instead of certifying that the attorney has read the trial transcript, the attorney shall set forth in writing what efforts were undertaken to locate the transcript; and

d. Be timely filed.

(2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

(3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

(4) An oral or written motion for appropriate relief may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the court may grant a motion for appropriate relief without the district attorney's signature 10 business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c).

(5) An oral or written motion for appropriate relief made in superior court and made by an attorney may not be granted by the court unless the attorney has complied with the requirements of sub-subdivision c1. of subdivision (1) of this subsection.

(b) Supporting Affidavits.
(1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.
(2) The opposing party may file affidavits or other documentary evidence.
(b1) Filing Motion with Clerk; Review of Motion by Judge.
(1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.
(2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket. The clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district. In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer. In capital cases, the judge shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary delay.
(c) Hearings, Showing of Prejudice; Findings.
(1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
(2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.
(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.
(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions

of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

(d) Action on Court's Own Motion.—At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion. The court must cause appropriate notice to be given to the parties.

§ 15A-1421. Indigent defendants.

The provisions of Chapter 7A of the General Statutes with regard to the appointment of counsel for indigent defendants are applicable to proceedings under this Article. The court also may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings.

§ 15A-1422. Review upon appeal.

(a) The making of a motion for appropriate relief is not a prerequisite for asserting an error upon appeal.

(b) The grant or denial of relief sought pursuant to G.S. 15A-1414 is subject to appellate review only in an appeal regularly taken.

(c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:

(1) If the time for appeal from the conviction has not expired, by appeal.

(2) If an appeal is pending when the ruling is entered, in that appeal.

(3) If the time for appeal has expired and no appeal is pending, by writ of certiorari.

(d) There is no right to appeal from the denial of a motion for appropriate relief when the movant is entitled to a trial de novo upon appeal.

(e) When an error asserted upon appeal has also been the subject of a motion for appropriate relief, denial of the motion has no effect on the right to assert error upon appeal.

(f) Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise.

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