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MOTIONS FOR APPROPRIATE RELIEF: GROUNDS THAT MAY BE ASSERTED AND TIMING RULES FOR ASSERTING THEM

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This bulletin discusses the grounds that may be asserted in motions for appropriate relief filed by the state and the defense and the time for asserting those grounds.¹ These issues are related because the grounds that may be raised in these motions depend, in part, on when the motions are made. The other factor affecting the grounds that may be asserted is whether the motion is made by the state or the defense.

Timing Rules

Post-Verdict Motion

As a general rule, a motion for appropriate relief may not be filed until after the verdict is rendered.² A verdict is “the answer of the *jury* concerning any matter of fact submitted to [it] for trial.”³ When there is no verdict by the jury—such as when the defendant pleads guilty—a motion for appropriate relief may not be filed until after sentencing.⁴ In *State v. Allen*,⁵ the

1. For a discussion of the grounds that may be raised in sua sponte motions for appropriate relief by the court, see Jessica Smith, [Trial Judge’s Authority to Sua Sponte Correct Errors After Entry of Judgment in a Criminal Case](#), Administration of Justice Bulletin, No. 2003/02 pp. 2-3 (School of Government 2003).

2. See *State v. Handy*, 326 N.C. 532, 535 (1990) (“A motion for appropriate relief is a post-verdict motion . . .”) (emphasis in original); 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”).

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

4. See *id.* at 535-36.

5. 144 N.C. App. 386 (2001).

North Carolina Court of Appeals held that a mistrial is not a “verdict” within the meaning of the motion for appropriate relief statute.

Ten-Day Window

A critical ten-day window of time applies to motions for appropriate relief made by defendants and by the state: motions made within ten days of entry of judgment may assert a greater number of errors than motions made after that time. On pages 4-9, this bulletin discusses the specific claims that may be raised before and after the ten-day period.

For purposes of applying the ten-day window, “entry of judgment” occurs when sentence is pronounced.⁶ Interpreting this provision, North Carolina courts have indicated that for entry of judgment to occur in a criminal case, a judge must either announce the ruling in open court or sign the judgment containing the ruling and file it with the clerk.⁷ The North Carolina Supreme Court has stated that in capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment.⁸ The court reasoned that since the trial judge is required to impose the sentence recommended by the jury, the jury recommendation is, in effect, the trial judge’s sentence. Finally, when computing the ten-day period, Saturdays and Sundays are excluded.⁹

Capital Cases

Some additional timing rules apply to motions for appropriate relief made by defendants in capital cases. As noted, in all cases, a ten-day window applies, after which time a great number of claims are time-barred. For non-capital cases, there is no outer limit on when

6. See G.S. 15A-101(4a); see also Handy, 326 N.C. at 535. Prayer for judgment continued upon payment of costs, without more, does not constitute entry of judgment. See G.S. 15A-101(4a).

7. See Department of Correction v. Brunson, 152 N.C. App. 430, 437 (2002) (citing State v. Boone, 310 N.C. 284 (1984)).

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

9. See State v. Craver, 70 N.C. App. 555, 560 (1984). 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. See G.S. 1A-1 R. 6(a).

these motions may be filed; thus, a motion for appropriate relief in a non-capital case may be filed years after verdict and be limited only with regard to the types of claims that may be asserted then. For capital cases in which the trial court judgment was entered after October 1, 1996, however, there is an outer time limit for the filing of motions for appropriate relief. Specifically, unless an extension has been granted or an exception applies,¹⁰ 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 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
- The appointment of post-conviction counsel for an indigent capital defendant.¹¹

10. See infra p. 7 (noting that claims of newly discovered evidence are excepted from this rule); G.S. 15A-1419(a)(4) & (b)-(d) (untimeliness of capital motion may be excused if defendant demonstrates good cause and actual prejudice or fundamental miscarriage of justice).

11. See G.S. 15A-1415(a); 1995 N.C. Sess. Laws. 719 sec. 8 (effective date).

Extensions

Under G.S. 15A-1415(d), a defendant may be granted an extension of time to file a motion for appropriate relief. No provision is made for extensions for the state. G.S. 15A-1415(d) provides that the presumptive length of an extension is up to thirty days, but the extension can be longer if the court finds “extraordinary circumstances.” The term “extraordinary circumstances” is not defined by the statute.

Appeal and Tolling

G.S. 15A-1414 governs defense motions for appropriate relief made within ten days of entry of judgment. When a motion is made pursuant to G.S. 15A-1414, it may be made and acted upon in the trial court regardless of whether notice of appeal has been given.¹² G.S. 15A-1415 governs defense motions made more than ten days after entry of judgment. When a case is in the appellate division for review, a motion pursuant to G.S. 15A-1415 must be made in that division.¹³ The motion for appropriate relief statute contains no parallel rules for motions filed by the state. In any event, these rules suggest that the ten-day window is not tolled by the filing of an appeal.

Amendments and Relation Back

Although there are no statutory provisions permitting the state to amend a motion for appropriate relief, defendants are authorized to amend. G.S. 15A-1415(g) begins by providing 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 so. 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.¹⁴

12. See G.S. 15A-1414(c).

13. See G.S. 15A-1518(a).

14. See G.S. 15A-1415(g).

One question that has arisen regarding amendments to motions for appropriate relief is whether a defendant may raise new claims by amendment that would be untimely if the new claims are not deemed to relate back to the filing date of the original motion. For example, suppose a defendant files a motion on January 1, 2003, within the ten-day window discussed above. Although the defendant may assert “any error” in this motion,¹⁵ the defendant only asserts one error, that trial counsel rendered ineffective assistance of counsel. On April 1, 2003, the defendant timely amends the motion. The amended motion asserts a new claim that the evidence was insufficient to submit to the jury. According to G.S. 15A-1414(b)(1)c, this claim had to be filed within the ten-day window to be timely.¹⁶ If the amendment relates back to the original motion, the new claim will be deemed to be timely filed. 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.

Procedural Default

G.S. 15A-1419(a) provides that unless an exception applies, the court must deny a motion for appropriate relief if:

- upon a previous motion for appropriate relief, the defendant was in a position to adequately raise the ground or issue but did not do so;
- the ground or issue underlying the motion was previously determined on the merits on appeal or in an earlier motion or proceeding in North Carolina or federal court;
- upon a previous appeal, the defendant was in a position to adequately raise the ground or issue but did not do so; and
- the motion for appropriate relief is filed in a capital case and is untimely under the special 120-day rule that applies to motions in those cases.

This bulletin does not discuss these procedural default rules, which in some respects act like time bars.¹⁷

15. See G.S. 15A-1414(a).

16. See *infra* p. 4.

17. For a discussion of these rules and the exceptions to them, see Jessica Smith, Procedural Default in State and Federal Post-

Grounds That May Be Asserted

Defense Motions

Motions Filed Within the Ten-Day Window

G.S. 15A-1414(a) provides that a defense motion filed within ten days of entry of judgment, may assert “any error committed during or prior to the trial.” This provision reflects a notion on the part of the legislature that the most efficient way to obtain review of a trial error that would warrant reversal on appeal is to bring that error to the attention of the trial judge.¹⁸ Such a procedure allows the trial judge to correct the error and avoid the time and expense of appeal. More recently, the North Carolina appellate courts have recognized that some claims cannot adequately be asserted on appeal and must be raised in a motion for appropriate relief proceeding, which allows for an evidentiary hearing and consideration of evidence beyond the appellate record.¹⁹

G.S. 15A-1414(b) provides that certain errors, if they are to be asserted in a motion for appropriate relief, *must* be asserted within the ten-day window. This rule, however, does not preclude a defendant from opting to seek review through direct appeal. Specifically, G.S. 15A-1414(b) provides that unless included in G.S. 15A-1415,²⁰ all errors, including but not limited to the following, must be asserted within the ten-day period:

- Any error of law, including that: the court erroneously failed to dismiss the charge before trial pursuant to G.S. 15A-954;²¹ the

Conviction Proceedings, Administration of Justice Bulletin, no. 2001/01 pp. 3-13 (School of Government 2003).

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

19. 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.”).

20. For a discussion of the claims included in G.S. 15A-1415, see *infra* pp. 4-9.

21. G.S. 15A-954 (b) sets out ten grounds that the defendant may assert to support dismissal of the charge. They include that: (1) the statute alleged to have been violated is unconstitutional on its face or as applied; (2) the statute of limitations has run; (3) the defendant has been denied a speedy trial as required by the United States or North Carolina Constitutions; (4) the defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his or her case that there is no remedy but to dismiss the prosecution; (5) 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.

Motions Filed Outside of the Ten-Day Window

G.S. 15A-1415(b) sets out an exclusive list of eight claims that may be asserted in a motion filed more than ten days after entry of judgment. Of course, all of these claims may be asserted before the expiration of the ten-day period.²² The one additional claim that may be asserted outside of the ten-day window is a claim of newly discovered evidence. G.S. 15A-1415(b) 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.²³ Thus, the Official Commentary states that 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.”²⁴ The eight claims listed in G.S. 15A-1415(b), as well as claims of newly discovered evidence, are discussed in the sections that follow.

One issue that has arisen is how to handle a claim that is included in the list of claims that must be asserted within ten days of entry of judgment but also is included in G.S. 15A-1415 as a claim that may be

defendant already has been placed in jeopardy of the same offense; (6) the defendant already has been charged with the same offense in a North Carolina court, and the criminal pleading is still pending and valid; (7) an issue of fact or law essential to a successful prosecution already has been decided in the defendant's favor in a prior action between the parties; (8) the court has no jurisdiction of the offense charged; (9) the defendant has been granted immunity by law from prosecution; and (10) the pleading fails to charge an offense as provided in G.S. 15A-924(e).

22. 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).

23. See Corbett, *supra* n. 18 at 1006.

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

asserted outside of the ten-day window. Consider, for example, a double jeopardy claim. By incorporating the grounds in G.S. 15A-954, G.S. 15A-1414 indicates that this claim must be raised within ten days of entry of judgment. However, G.S. 15A-1415 provides that claims asserting that the conviction was obtained in violation of the United States Constitution may be raised outside of the ten-day window. A double jeopardy claim is one such claim. The answer to the question of how to treat this claim is provided in G.S. 15A-1414, which states: “[u]nless 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.”²⁵ Since the claim is included in G.S. 15A-1415, it may be asserted outside of the ten-day window.

Acts Do Not Constitute a Violation of Law. G.S. 15A-1415(b)(1) provides that a defendant may bring a motion more than ten days after entry of judgment on grounds that at the time the acts were committed, they did not 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 prior to his or her conviction.²⁶ Another example would be when the defendant was convicted of sale of a controlled substance in violation of G.S. 90-95(a)(1), and the substance that the defendant sold was not a controlled substance.

Trial Court Lacked Jurisdiction. G.S. 15A-1415(b)(2) allows a defendant to assert a claim more than ten days after judgment that the trial court lacked subject matter jurisdiction or jurisdiction over the defendant. An assertion that an indictment was fatally defective is an example of a claim that would be properly raised under this provision.²⁷ Another example is an allegation that an unreasonable period of time had elapsed between entry of a prayer for judgment continued and entry of judgment.²⁸

25. G.S. 15A-1414(b) (emphasis added).

26. See Corbett, supra n.18 at 1006.

27. 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)).

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

Unconstitutional Conviction. Under G.S. 15A-1415(b)(3), a defendant may file a motion more than ten days after entry of judgment asserting 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.²⁹ Another example is a claim asserting that a guilty plea was not knowingly, voluntarily, and intelligently entered.³⁰

Unconstitutional Statute. G.S. 15A-1415(b)(4) provides that a defendant may assert, more than ten days after entry of judgment, that he or she was convicted or sentenced under a statute that violates the United States or North Carolina constitutions. This ground would apply, for example, if a defendant alleges that the state’s habitual felon statute violates the double jeopardy clause of the Fifth Amendment.

Constitutionally Protected Conduct. G.S. 15A-1415(b)(5) allows a defendant to bring a motion more than ten days after entry of judgment asserting 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 who was convicted of crime against nature for private consensual homosexual sex between adults alleges a violation of his or her due process rights.³¹

Retroactive Change in Law. Under G.S. 15A-1415(b)(7), a defendant may file a motion more than ten days after entry of judgment on grounds that “[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the . . . 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 a statutory change.³² In both cases, G.S. 15A-1415(b)(7) does not apply unless the change in law has retroactive application. That is, whether the new law applies backwards 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

29. 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)).

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

31. Cf. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

32. See Corbett, supra n. 18 at 1009.

effective date. When the new rule derives from the case law, this determination becomes more complicated. Because appellate courts generally do not indicate whether their rulings have retroactive application,³³ it becomes necessary to determine after the fact whether a new court-made rule operates retroactively.

If the defendant alleges that his or her claim depends on a new federal criminal rule, he or she 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*,³⁴ and its progeny. In *State v. Zuniga*,³⁵ the North Carolina Supreme Court adopted the *Teague* test for determining whether new federal rules of criminal procedure apply retroactively in state motion for appropriate relief proceedings.³⁶

The *Teague* test involves a three-step inquiry.³⁷ First, the court determines the date on which the defendant's conviction became final. Second, it determines whether a court considering the claim at the time the conviction became final would have felt compelled by existing law to conclude that the rule the defendant seeks was required by the Constitution.³⁸ If not, the rule is new. If the rule is new, it cannot apply retroactively on collateral review unless the court finds, in the third step of the analysis, that it falls within one of two narrow exceptions.³⁹

The first "limited" *Teague* exception applies to rules "'forbidding criminal punishment of certain primary conduct [and] . . . prohibiting a certain category of punishment for a class of defendants because of their status or offense.'"⁴⁰ The second "even more circumscribed[]" exception "permits retroactive application of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'"⁴¹ The precise scope of this second exception remains to be defined. However, the United States Supreme Court has made clear that it is only meant to apply "to a small core of

rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty."⁴² An example is the rule of *Gideon v. Wainwright*,⁴³ establishing an affirmative right to counsel in all felony cases.⁴⁴

Although a defendant bears a heavy burden of establishing that a new federal rule applies retroactively, that burden has been satisfied in at least one North Carolina case. At issue in *Zuniga*, was whether *McKoy v. North Carolina*,⁴⁵ which invalidated the unanimity requirement of North Carolina's capital sentencing scheme, should be applied retroactively under *Teague*. The unanimity requirement prevented the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury had not unanimously found. Following the lead of the United States Court of Appeals for the Fourth Circuit, the North Carolina Supreme Court held that the *McKoy* rule fell within the second *Teague* exception and thus retroactively applied to the defendant's case.⁴⁶

If the change in law that would result in a favorable ruling for the defendant is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*.⁴⁷ Under *Rivens*, a new state rule is presumed to operate retroactively unless there is a compelling reason to make it prospective only.⁴⁸

State v. Honeycutt,⁴⁹ decided only months after *Rivens*, is one of the few published North Carolina cases dealing with a motion for appropriate relief asserted on grounds of a retroactive change in state law. In *Honeycutt*, the defendant filed a motion for appropriate relief asserting that after his case was decided, the North Carolina Supreme Court issued a decision in *State v. Haywood*, changing the law regarding the admissibility of declarations against penal interest. For more than a century, the North Carolina courts had ruled that declarations against penal interest were inadmissible for any purpose. Then,

33. But see *State v. Lucas*, 353 N.C. 568, 598 (2001) (stating that ruling applies to cases "in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final").

34. 489 U.S. 288 (1989).

35. 336 N.C. 508 (1994).

36. See *id.* at 510, 513.

37. See *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

38. *Id.* (quotation omitted).

39. See *id.* at 156-57.

40. *Id.* at 157 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

41. *Id.* (quotation omitted).

42. *Id.* (quotation omitted).

43. 372 U.S. 335 (1963).

44. See *O'Dell*, 521 U.S. at 167 (noting that *Gideon* was a "sweeping rule").

45. 494 U.S. 433 (1990).

46. *Zuniga*, 336 N.C. at 514.

47. 299 N.C. 385 (1980). See *Zuniga*, 336 N.C. at 513 (noting that *Rivens* "correctly states the retroactivity standard applicable to new state rules") (emphasis in original).

48. See *Rivens*, 299 N.C. at 390 (citing examples of North Carolina cases in which rules were held not to have retroactive effect).

49. 46 N.C. App. 588 (1980).

in *Haywood*, the North Carolina Supreme Court changed course and held that such declarations may be admitted under certain conditions. The defendant in *Honeycutt* asserted that although he had litigated this evidentiary issue in his case and lost, he was entitled to retroactive application of the new *Haywood* rule. The superior court judge agreed and ordered a new trial. The state appealed, contending that the new rule should have prospective application only.

The *Honeycutt* court concluded without difficulty that *Haywood* involved a new rule. It then turned to the more difficult question of whether the new rule applied retroactively. The court concluded that the new rule should be given prospective application only, finding that retroactive application “could easily disrupt the orderly administration of [the] criminal law.”⁵⁰ The court found this conclusion bolstered by its belief that the change in evidentiary law did not “rise to the magnitude of a constitutional reform.”⁵¹

Sentence Was Unauthorized, Illegal or Invalid. G.S. 15A-1415(b)(8) provides that more than ten days after entry of judgment, a defendant may assert the ground that “[t]he 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.⁵² 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 and 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.⁵³

Sentence Fully Served. G.S. 15A-1415(b)(9) provides that a motion may be brought more than ten days after entry of judgment if “[t]he defendant is entitled to release because his sentence has been fully served.” This ground could be asserted when, for example, the Department of Correction has not compiled with a judge’s ruling ordering credit for time served⁵⁴ and if such credit was given, the defendant would be entitled to release.

50. *Id.* at 591 (quotation omitted).

51. *Id.*

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

53. See *supra* p. 4; G.S. 15A-1414(b)(4).

54. See G.S. 15-196.1 to 196.4.

Claim of Newly Discovered Evidence. G.S. 15A-1415(c) provides that a defendant’s claim of newly discovered evidence is not subject to G.S. 15A-1415(b)’s ten-day window or the 120-day time limit imposed on capital defendants for filing motions for appropriate relief.⁵⁵ However, a motion asserting newly discovered evidence under G.S. 15A-1415(c) “must be filed within a reasonable time of its discovery.”⁵⁶

G.S. 15A-1415(c) describes these types of claims as alleging that 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, and has a direct and material bearing upon the defendant’s eligibility for the death penalty or the defendant’s guilt or innocence.⁵⁷ The North Carolina Supreme Court has noted that this language in the motion for appropriate relief statute codifies the case law regarding newly discovered evidence.⁵⁸ 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 was used 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.⁵⁹

55. See *supra* p. 2.

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

57. See G.S. 15A-1415(c). Before 1996, the newly discovered evidence ground was in G.S. 15A-1415(b)(6). See 1995 N.C. Sess. Laws 719 sec. 1.

58. See *State v. Powell*, 321 N.C. 364, 371 (1988) (addressing old G.S. 15A-1415(b)(6)); see generally *supra* n. 57 (citing legislative history of old G.S. 15A-1415(b)(6)).

59. See *State v. Britt*, 320 N.C. 705, 712-13 (1987) (affirming denial of motion for appropriate relief under old G.S. 15A-1415(b)(6)).

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.⁶⁰

For examples of cases involving claims of newly discovered evidence, see:

State v. Stukes, 153 N.C. App. 770 (2002) (affirming trial court's granting of a new trial in 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).

State v. Rhue, 150 N.C. App. 280 (2002) (trial court did not err in denying motion for appropriate relief alleging newly discovered evidence without an evidentiary hearing in murder case in which self-defense was asserted; new evidence was witness testimony that the victim had a gun on the night of the shooting; because defendant testified that he never saw a weapon on the victim, the fact that the victim was actually armed was irrelevant to the issue of self-defense; also, to the extent defendant sought to discredit a trial witness's testimony that the victim was unarmed, this is not a proper basis for granting a motion on these grounds).

State v. Doisey, 138 N.C. App. 620, 628 (2000) (trial court did not err in denying defendant's motion for appropriate relief 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 being repeatedly questioned by defendant's friends and family and that the victim was embarrassed about the events at issue).

State v. Bishop, 346 N.C. 365, 401-04 (1997) (trial court did not err in denying defendant's claim of

newly discovered evidence; alleged new evidence was a witness who testified that he saw the crime and that defendant was not responsible for it; 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 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) (rejecting defendant's claim of newly discovered evidence when information was known to the defendant and available to him at the time of trial).

State v. Monroe, 330 N.C. 433, 434-35 (1991) (recounting procedural history of case and noting that 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 the gun used in the crime).

State v. Eason, 328 N.C. 409, 432-35 (1991) (trial judge did not err in rejecting claim that post-trial confession by a third-party was newly discovered evidence; first, defendant failed to show that a third-party would give newly discovered evidence because the individual later recanted his confession and stood by his disavowal and the confession was made after consuming a large quantity of alcohol and was uncorroborated; also confession was not credible because individual was drunk and depressed when he made it, was confused about the name of the murder victim and had limited knowledge of the details of the crime, and the alleged murder weapon was not even being manufactured when individual said it was acquired).

State v. Riggs, 100 N.C. App. 149, 156-157 (1990) (defendant was not entitled to new trial based on an alleged accomplice's testimony at the accomplice's trial; accomplice testified that a third person was solely responsible for the crime; testimony was cumulative of that offered at defendant's trial, and it could not be said, given the testimony of another witness, that the accomplice's testimony was probably true; additionally, defendant failed to show due diligence, because he

60. See *id.* at 715.

did not attempt to call the accomplice to testify at his trial).

State v. Powell, 321 N.C. 364, 370-371 (1988) (trial court did not abuse its discretion by concluding that defendant did not act with due diligence in seeking a witness; defendant learned of the witness's statement during the trial).

State v. Britt, 320 N.C. 705, 711-17 (1987) (trial court did not err in concluding that defendant failed to establish that recanting witness's trial testimony was false).

Motions by the State

As with defendants, a critical ten-day window applies to motions for appropriate relief filed by the state. G.S. 15A-1416 provides that in a motion filed within ten days of entry of judgment, the state may assert "any error which it may assert upon 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:

- When there has been a decision or judgment dismissing criminal charges as to one or more counts; or
- 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.

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:

- Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or prior conviction level under G.S. 15A-1340.21;
- Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;
- Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

- Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) 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.

G.S. 15A-1445(b) allows the state to appeal a superior court order granting a motion to suppress.

Once the ten-day window has expired, the state only can assert two grounds in a motion for appropriate relief. Specifically, G.S. 15A-1416(b) provides that at any time after verdict, the state may make a motion for appropriate relief for:

- The imposition of sentence when prayer for judgment has been continued and grounds for the imposition of sentence are asserted; or
- The initiation of any proceeding authorized under Article 82 (Probation), Article 83 (Imprisonment), and Article 84 (Fines), with regard to the modification of sentences.⁶¹

Notwithstanding G.S. 15A-1416(b), there is some limit on when the state may move for imposition of a sentence when prayer for judgment has been continued. Specifically, if the state delays unreasonably before moving for imposition of a sentence in these circumstances, the delay will result in a loss of jurisdiction.⁶² In this context, reasonableness is determined by balancing a number of factors, including the reason for the delay, the length of the delay, whether the defendant consented to the delay, and the actual prejudice to the defendant resulting from the delay.⁶³ Thus, although the motion for appropriate relief statute suggests that motions to impose sentence after prayer for judgment continued may be filed at any time, such motions must be made at a reasonable time.

Note that there is no statutory authority for the state to make a motion to set aside the judgment on the basis of newly discovered evidence.⁶⁴

61. The procedural provisions of those Articles control such a motion. See G.S. 15A-1416(b).

62. See *State v. Absher*, 335 N.C. 155, 156 (1993); *State v. Lea*, 156 N.C. App. 178 (2003); *State v. Degree*, 110 N.C. App. 638, 641 (1993).

63. See *Lea*, 156 N.C. App. at 180 (citing *Degree*, 110 N.C. App. at 641).

64. 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).

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