

MOTIONS FOR APPROPRIATE RELIEF

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I. Introduction.

A. MARs Generally. A motion for appropriate relief (MAR) is a statutorily created vehicle for defendants to challenge their convictions and sentences.¹ 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 proportion of MARs are filed by the defense, and many of those are *pro se*. The statute also authorizes a judge to act *sua sponte* and grant relief on his or her own MAR.

Unlike an appeal, where the reviewing court is bound by the record, in a MAR proceeding, the trial 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 ineffective assistance of counsel.² However, MARs are not limited to claims that require factual findings and can assert errors of law.

B. Scope of This Section. This section of the Benchbook discusses the main procedural issues that arise in connection with MARs filed in the trial division. These

1. The MAR statutes are in North Carolina General Statutes Chapter 15A, Article 89 (Motion for Appropriate Relief and Other Post-Trial Relief).

2. 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.”). *Fair* also noted that defendants should nevertheless raise any ineffective assistance of counsel claims that are apparent from the record on direct appeal, to avoid procedural default under G.S. 15A-1419(a)(3). See Section X (discussing procedural default). See also *State v. Johnson*, 203 N.C. App. 718 (2010) (dismissing the defendant’s ineffective assistance claim without prejudice to file a MAR in superior court).

procedures apply to all MARs filed in the trial division with three exceptions:

- Racial Justice Act MARs;
- MARs by prostitution defendants who also are victims of human trafficking or related offenses; and
- MARs by juveniles raising *Miller*/8th Amendment issues.

Information about the procedures governing those MARs is provided in the accompanying footnote but not discussed elsewhere in this section.³

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 a 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 the 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.⁴ 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 falls within the list of claims in G.S. 15A-1415 that can be asserted more than ten days after entry of judgment,⁵ 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 of the case 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

3. For information about Racial Justice Act MARs, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 263-74 (3rd ed. 2013). For the statute governing MARs filed by prostitution defendants who also are victims of human trafficking or related offenses, see G.S. 15A-1416.1 (enacted by S.L. 2013-368 sec. 10). For the statute governing MARs by juveniles raising *Miller*/8th Amendment issues, see G.S. 15A-1340.19C.

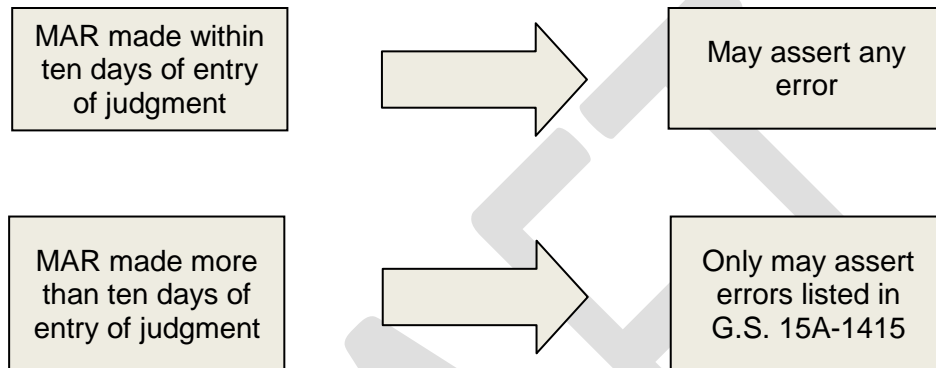
4. See Leon H. Corbett, *Post-Trial Motions and Appeals*, 14 WAKE FOREST L. REV. 977, 998, 1003 (1978) [hereinafter Corbett].

5. 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).

impartial trial.

- The sentence is not supported by evidence introduced at the trial and sentencing hearing.

Figure 1. Defendants' MARs—Claims and Timing Rules



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.⁶ G.S. 15A-1415 reflects legislative recognition that some errors are so egregious that the law should afford an extended or even unlimited time for raising them.⁷ 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.”⁸
 - a. **Exclusive List of Claims That May Be Asserted.** If the MAR is filed more than ten days after entry of judgment, the only claims that may be asserted are the ten claims discussed below, and illustrated in Figure 2 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, when 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

6. See G.S. 15A-1414; Official Commentary to G.S. 15A-1415; Official Commentary to G.S. 15A-1414.

7. See Corbett, *supra* n.4, at 1006.

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

committed the offense at issue.⁹ 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 in fact a controlled substance.

Figure 2. MAR Claims That May Be Asserted More Than 10 Days after Entry of Judgment

MAR Claims That May Be Asserted More Than 10 Days after Entry of Judgment

- Acts not a violation of law
- Trial court lacked jurisdiction
- Unconstitutional conviction
- Unconstitutional statute
- Constitutionally protected conduct
- Retroactive change in the law
- Sentence was unauthorized, illegal, or invalid
- Sentence fully served
- Newly discovered evidence
- Prostitution defendant was a victim of human trafficking, etc.

- 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 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.¹⁰ Another example is an allegation that an unreasonable period of time had elapsed between entry of prayer for judgment continued and entry of judgment.¹¹
- 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

9. See Corbett, *supra* n.4, at 1006.

10. See *State v. Sturdivant*, 304 N.C. 293, 308 (1981) (“[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 BULL. No. 2008/03 (UNC School of Government) (July 2008), available at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf.

11. 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); see generally [Jessica Smith, *Prayer For Judgment Continued*](#) in this Benchbook, available at <http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued>.

constitutions. An ineffective assistance of counsel claim is an example of a claim that would be properly asserted under this provision.¹² Another is a claim asserting that a guilty plea was not knowingly, voluntarily, and intelligently entered.¹³

- 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.¹⁴
- 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 First Amendment. Another example would be when a defendant convicted of crime against nature for private consensual homosexual sex between adults alleges the conduct was protected by the Due Process Clause of the United States Constitution under *Lawrence v. Texas*.¹⁵
- 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 must be significant¹⁶ and can result from an appellate case or new legislation.¹⁷ In both cases, G.S.15A-1415(b)(7)

12. See, e.g., *State v. House*, 340 N.C. 187, 196–97 (1995).

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

14. Note, however, that this claim has been rejected by the North Carolina courts. See [Jeffrey B. Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*](#), ADMIN. OF JUSTICE BULL. No. 2013/07 (UNC School of Government) (July 2008), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1307.pdf>.

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

16. *State v. Chandler*, 364 N.C. 313, 315-17 (2010) (*State v. Stancil*, 355 N.C. 266 (2002), dealing with the admissibility of expert opinions in child abuse cases, was not a significant change in the law; it merely applied existing law on expert opinion testimony to the context of child abuse cases); *State v. Harwood*, ___ N.C. App. ___, 746 S.E.2d 445 (2013) (declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR failed because *Garris* does not constitute a significant change in the law; rather *Garris* resolved an issue of first impression; "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)").

17. See *Corbett*, *supra* n.4, at 1009.

does not apply unless the change in law has retroactive application. Retroactive application refers to a new law that applies backward in time to cases decided and resolved 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.¹⁸

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*¹⁹ and its progeny.²⁰ If the change is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*.²¹ For a detailed discussion of both of these tests, see [Jessica Smith, *Retroactivity of Judge-Made Rules*](#), ADMIN. OF JUSTICE BULL. No. 2004/10 (UNC School of Government) (Dec. 2004).²²

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.

18. See *State v. Whitehead*, 365 N.C. 444 (2012) (the superior court judge erred by “retroactively” applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case; the defendant was sentenced under the FSA; after SSL came into effect, he filed a MAR asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL; the superior court judge granted relief; the supreme court reversed, relying on the effective date of the SSL, as set out by the General Assembly when enacting that law). Session laws are available on the North Carolina General Assembly’s Web page at <http://www.ncga.state.nc.us> (last visited Nov. 14, 2013).

19. 489 U.S. 288 (1989).

20. *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).

21. 299 N.C. 385 (1980); see also *State v. Zuniga*, 336 N.C. 508, 513 (1994) (noting that *Rivens* “correctly states the retroactivity standard applicable to new state rules”).

22. Available online at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200410.pdf>.

A motion only can be granted pursuant to this section if an error of law exists in the sentence.²³ 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.²⁴

- 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 be asserted when, for example, the Department of Correction has not complied with a judge's ruling ordering credit for time served,²⁵ 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."²⁶

To assert this claim, the defendant must 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.²⁷ 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.²⁸ This language codifies the case law regarding newly discovered evidence.²⁹ 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;

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

24. G.S. 15A-1414(b)(4); see also *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 496 (2010).

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

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

27. *Id.*

28. *Id.*

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

- 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.³⁰

If the defendant seeks a new trial because 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.³¹

A number of published North Carolina cases apply these tests to claims of newly discovered evidence.³²

30. See *State v. Britt*, 320 N.C. 705, 712–13 (1987); see also *State v. Peterson*, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2013).

31. See *Britt*, 320 N.C. at 715.

32. Cases rejecting claims of newly discovered evidence include: *State v. Rhodes*, ___ N.C. ___, 743 S.E.2d 37 (2013) (after the defendant was convicted of drug possession, his father told a probation officer that the contraband belonged to him; because the information implicating the defendant's father was available to the defendant before his conviction, the statement was not newly discovered evidence; the court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws; although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means; the court noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs); *State v. Hall*, 194 N.C. App. 42, 49-50 (2008) (evidence was cumulative, pertained only to impeachment, and it was improbable that it would cause a jury to reach a different result on another trial); *State v. Rhue*, 150 N.C. App. 280, 288-89 (2002) (evidence was witness testimony that the murder victim had a gun; 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 and not credible); *State v. Riggs*, 100 N.C. App. 149, 156–57 (1990) (accomplice's testimony at his own trial that a third person was solely responsible for the crime; the testimony was cumulative, the defendant did not establish that it was probably true, and he failed to show due diligence); *Powell*, 321 N.C. at 370–71 (the defendant did not act with due diligence).

- x. **Prostitution defendants who are victims of human trafficking, etc.** 2013 legislation, S.L. 2013-368, sec. 9, amended G.S. 15A-1415 to allow a defendant who was convicted of a first offense of prostitution under G.S. 14-204(a) that was not dismissed under G.S. 14-204(b) to file a MAR to have the conviction vacated if the defendant's participation in the offense was a result of having been a victim of human trafficking, sexual servitude, or the federal trafficking victims protection act. *See generally* JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 316-20 (7th ed. 2012) (discussing the offenses of human trafficking and sexual servitude). MARs asserting this ground have special procedural rules and standards, as set forth in G.S. 15A-1416.1 (enacted by S.L. 2013-368, sec. 10).
- b. **No Outer Limit on Time.** Except for capital cases,³³ 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.³⁴ 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.³⁵ In capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment.³⁶ When computing the ten-day period, Saturdays and Sundays are excluded.³⁷ 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 pe-

Cases finding merit in such claims include: *State v. Peterson*, __ N.C. App. __, __ S.E.2d __ (July 16, 2013) (newly discovered evidence that the State's expert bloodstain witness, Duane Deaver, had misrepresented his qualification entitled the defendant to a new trial); *State v. Stukes*, 153 N.C. App. 770, 772-76 (2002) (newly discovered evidence consisted of a co-defendant's testimony offered at his own 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 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 repeatedly questioned by the defendant's friends and family and that she was embarrassed about the events at issue).

33. See Section III.B.

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

35. 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).

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

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

riod begins to run is not included.³⁸ 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:

- 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 court³⁹); 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 (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 trial⁴⁰).

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 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);
- contains a type of sentence disposition that is not authorized for the 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);
- contains a term of imprisonment that is for a duration not authorized for the class of offense and prior record or

38. G.S. 1A-1 R. 6(a).

39. G.S. 20-139.1(e2) (criminal case may not be dismissed for failure of the analyst to appear, subject to specified exceptions).

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

- 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
- 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).⁴¹

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 seem to prevent the State from re-asserting the issue in a MAR.⁴² 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.⁴³ Finally, because G.S. 15A-979 does not provide a right of appeal by the State of an adverse ruling on a motion to suppress made and granted during trial,⁴⁴ 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,⁴⁵ 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 prayer for judgment continued (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.

If the claim falls within the second category, the procedural provisions of

41. Extraordinary mitigation may not be used for a Class A or Class B1 felony, a drug trafficking offense under G.S. 90-95(h), a drug trafficking conspiracy offense under G.S. 90-95(i), or if the defendant has five or more points as determined by G.S. 15A1340.14. G.S. 15A-1340.13(h)(1)-(3).

42. See Section X.B.2 (discussing the procedural bar rule that applies when an issue has been ruled on in a prior proceeding).

43. See Section III.A.

44. 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”).

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

those Articles control.⁴⁶

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.⁴⁷

There is no statutory authority for the State to make a motion to set aside the judgment on the basis of newly discovered evidence.⁴⁸

- 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.”⁴⁹ If the court acts *sua sponte* under this provision, it must provide appropriate notice to the parties.⁵⁰
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.⁵¹ Because the defendant would be entitled to relief,⁵² the trial court may exercise its authority under G.S. 15A-1420(d) and *sua sponte* correct the error. Of course, a defendant must be present for any resentencing that is held.⁵³ See Section XI 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.⁵⁴
- D. “Consent” MARs.** Occasionally defense counsel and the prosecutor will inform the judge that both sides agree that relief requested in a MAR should be granted. These requests may become more common as a result of 2012 legislative changes that added a new subsection (e) to G.S. 15A-1420 stating: “Nothing in this section shall prevent the parties to the action from entering into an agreement for appropriate relief . . .” The 2012 statutory amendments may be read to override G.S. 15A-1420(c)(6), which suggests that a judge is not authorized to grant a MAR unless a valid ground for relief exists.⁵⁶ Absent

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

47. See [Jessica Smith, Prayer for Judgment Continued](#), in this Benchbook, available at <http://shopping.netsuite.com/s.nl/c.433425/it.l/id.81/f>.

48. 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).

49. G.S. 15A-1420(d); see *State v. Williams*, ___ N.C. App. ___, 741S.E.2d 486, 489 (2013) (because the defendant could have raised the issue, the trial court’s *sua sponte* MAR was proper).

50. G.S. 15A-1420(d); see *State v. Williams*, ___ N.C. App. ___, 741S.E.2d 486, 489 (2013) (trial court’s oral notice, given one day after judgment was entered, was adequate).

51. DOC has no authority to modify a judgment. See *Hamilton v. Freeman*, 147 N.C. App. 195, 204 (2001). Rather, the DOC should notify the court and the parties of the sentencing error. See *id.*

52. See G.S. 15A-1415(b)(8) (allowing a MAR when the sentence is unauthorized at the time imposed).

53. See [Jessica Smith, Trial in the Defendant’s Absence](#), in this Benchbook, available at <http://benchbook.sog.unc.edu/criminal/trial-defendants-absence>.

guidance from the appellate division, caution is advised before setting aside an error-free conviction and sentence on a consent MAR.

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.⁵⁷ A verdict is “the answer of the *jury* concerning any matter of fact submitted to [it] for trial.”⁵⁸ When there is no verdict by the jury—such as when the defendant pleads guilty—a MAR may not be filed until after sentencing.⁵⁹ A mistrial is not a “verdict” within the meaning of the MAR statute.⁶⁰
- B. Capital Cases.** As noted in Section I.B. above, special rules apply to Racial Justice Act MARs. But even for non-RJA capital MARs, special rules apply. 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 granted⁶¹ 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

54. *State v. Oakley*, 75 N.C. App. 99, 103-04 (1985) (trial court had no authority to strike a plea under G.S. 15A-1420(d) when such relief benefited the State only).

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

57. 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 . . .”).

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

59. See *id.* at 536.

60. *State v. Allen*, 144 N.C. App. 386, 390 (2001).

61. See Section III.C (discussing extensions).

defendant.⁶²

A claim of newly discovered evidence⁶³ is not subject to the 120-day time limit imposed on capital MARs.⁶⁴ But as discussed above, such a claim must be filed within a reasonable time of its discovery.⁶⁵

- C. Extensions.** “For good cause shown,” a defendant may be granted an extension of time to file a MAR.⁶⁶ 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,⁶⁷ once the ten-day period expires, G.S. 15A-1415 sets out an exclusive list of 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.⁶⁸

The presumptive length of an extension is up to thirty days, but the extension can be longer if the court finds “extraordinary circumstances.”⁶⁹ No statutory guidance is provided on the meaning of this term.

IV. Pre-Filing Issues.

Discovery issues are discussed in Section VII, below. An indigent defendant’s right to counsel for a MAR is discussed in Section VIII.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.⁷⁰ Those rules also provide that all requests for other *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.⁷¹
- 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

62. See G.S. 15A-1415(a); 1995 N.C. Sess. Laws. 719 sec. 8 (effective date of October 1, 1996).

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

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

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

66. G.S. 15A-1415(d).

67. See Section II.A.2.

68. For more information about PJs, see [Jessica Smith, Prayer for Judgment Continued](#), in this Benchbook, available at <http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued>.

69. G.S. 15A-1415(d).

70. GEN. R. PRAC. SUP. & DIST. CT. R. 25(2).

71. *Id.* at R. 25(3). The IDS rules are posted on the IDS website at

<http://www.ncids.org/Attorney/IDSRules.html?c=Information%20for%20Counsel,%20IDS%20Rules> (last visited Nov. 14, 2013).

MAR. The United 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 and would be available at a price to non-indigent defendants.⁷² 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].”⁷³ 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.⁷⁴ 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*,⁷⁵ 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[s]. Equal protection does not require the Government to furnish to the indigent a delayed duplicate 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.⁷⁶

To the extent that the attorney certification requirement, discussed in Section V.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. 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,

72. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); see also *State v. Rankin*, 306 N.C. 712, 715 (1982).

73. *Rankin*, 306 N.C. at 715.

74. *Britt*, 404 U.S. at 227.

75. 426 U.S. 317 (1976).

76. *Id.* at 325–26.

- be timely filed, and
- if made in superior court by a lawyer, contain a required certification.⁷⁷

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.⁷⁸
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.⁷⁹

If 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.⁸⁰ A motion may not be granted if the lawyer fails to provide the required certification.⁸¹

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.⁸² 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-

77. G.S. 15A-1420(a).

78. *Id.*

79. G.S. 15A-1420(a)(1)c1.

80. *Id.*

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

82. *State v. Payne*, 312 N.C. 647, 668-69 (1985) (denying a MAR because the defendant failed to submit supporting affidavits).

951(c).⁸³

C. Amendments. Although a defendant may amend a MAR in certain circumstances,⁸⁴ 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.⁸⁵

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, 2012, within the ten-day window. Although the defendant may assert “any error” in this motion,⁸⁶ the defendant only asserts one error: that trial counsel rendered ineffective assistance of counsel. On April 1, 2012, 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 VI, 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.

VI. Case Processing and Assignment.

In 2012, the North Carolina General Assembly enacted tight new timelines for MAR case processing.⁸⁷ However, in 2013, the legislature repealed those rules.⁸⁸ This section dis-

83. 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.

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

85. *Id.*

86. See Section II.A.1 (a motion made within ten days of judgment may assert “any error”).

87. S.L. 2012-168; see generally Jessica Smith, Tight New Timelines for Motions for Appropriate Relief, NC Criminal Law Blog (Oct. 29, 2012) (<http://nccriminallaw.sog.unc.edu/?p=3943>) (describing the 2012 legislation).

88. S.L. 2013-385; see generally Jessica Smith, Remember Those Timelines for Non-Capital Motions for Appropriate Relief?, NC Criminal Law Blog (Oct. 8, 2013) (<http://nccriminallaw.sog.unc.edu/?p=4485>) (discussing the repealing legislation).

cusses the case processing and assignment rules in effect as result of the 2013 legislation.

A. Clerk's Duties.

1. **Non-Capital Cases.** When receiving a MAR, the clerk must place the motion on the criminal docket and "promptly" bring the motion (or copy) to the attention of the senior resident superior court judge or chief district court judge for assignment pursuant to G.S. 15A-1413.⁸⁹
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.⁹⁰

B. Senior Resident/Chief District Court Judge's Duties. When the motion is received from the clerk, the Senior Resident Judge or Chief District Court Judge must assign the motion pursuant to G.S. 15A-1413 for review and administrative action.⁹¹

1. **Assignment of G.S. 15A-1415 MARs.** A G.S. 15A-1415 motion (MAR made more than ten days after judgment) may be heard and determined by any trial judge who:
 - is empowered to act in criminal matters in the district court district or superior court district in which the judgment was entered and
 - is assigned pursuant to G.S. 15A-1413 to review the motion and take the appropriate administrative action to dispense with the motion.⁹²

The assignment of a G.S. 15A-1415 MAR is in the discretion of the senior resident superior court judge or chief district court judge.⁹³

2. **Assignment of G.S. 15A-1414 MARs.** The judge who presided over the trial may act on a G.S. 15A-1414 motion (MAR made within ten day of entry of judgment), even if he or she is in another district and his or her commission has expired.⁹⁴ However, if the judge who presided at the trial is unavailable, the senior resident superior court judge or the chief district court judge must treat the MAR as one filed under G.S. 15A-1415 for purposes of assignment.⁹⁵

C. MAR Judge's Duties. In both non-capital and capital cases, assignment to the MAR judge 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."⁹⁶ Typically this

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

90. Gen. R. Prac. Sup. & Dist. Ct. R. 25(4).

91. G.S. 15A-1420(b1)(2); -1413(d).

92. G.S. 15A-1413(a).

93. G.S. 15A-1413(e).

94. G.S. 15A-1413(b).

95. *Id.*

96. G.S. 15A-1413(d); Gen. R. Prac. Sup. & Dist. Ct. R. 25(4).

includes:

- An initial frivolity review and
 - dismissal if the motion is frivolous on its face or
 - further action if it is not.
- Entry of an order indicating whether the defendant should be allowed to proceed without the payment of costs. See Section VIII.B
- Entry of an order with respect to the appointment of counsel. See Section IX.A
- Entry of an order requiring counsel to file an amended MAR if the defendant is entitled to counsel and the MAR was filed *pro se*.
- Entry of an order directing the State, if necessary, to answer.
- Calendaring the case for a hearing, if necessary.

D. Trial Court's Authority to Act When Case Is On 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.¹³⁷ 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.¹³⁸ 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.¹³⁹
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.¹⁴⁰

VII. 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.¹⁴¹ 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 VIII.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.
- 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

137. G.S. 15A-1418(a); see Section II.A.2 (discussing claims that can be asserted in a MAR under G.S. 15A-1415).

138. G.S. 15A-1418(a).

139. *Id.*

140. G.S. 15A-1414(c); see Section II.A.1 (discussing MARs made within ten days of entry of judgment).

141. G.S. 15A-1415(f).

submit those portions for court inspection.¹⁴² 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.¹⁴³

VIII. 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.¹⁴⁴ However, in North Carolina, indigent defendants have a statutory right to counsel in MAR 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.¹⁴⁵

Additionally, the MAR statute provides that a defendant has a right to be represented by counsel at an evidentiary hearing.¹⁴⁶

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.¹⁴⁸

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 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.¹⁴⁹

142. *Id.*

143. *Id.*

144. *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.") (citation omitted).

145. G.S. 7A-451(a)(3). *See also* G.S. 15A-1421 (G.S. Chapter 7A applies in MAR proceedings).

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

148. GEN. R. PRAC. SUP. & DIST. CT. R. 25(1).

149. *See* Section X (discussing the procedural default rules).

- B. Costs.** The court may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings.¹⁵⁰

IX. Counsel Issues.

An indigent defendant's statutory right to counsel is discussed above in Section VIII.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.¹⁵²

- 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.¹⁵³ 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.¹⁵⁴

- E. 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.¹⁵⁵ 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.

X. 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 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.¹⁵⁶
- B. The Default Rules.** G.S. 15A-1419 contains four procedural default rules. The rules apply both in non-capital and capital cases.¹⁵⁷

150. G.S. 15A-1421.

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

153. G.S. 15A-1415(e).

154. *Id.*

155. G.S. 15A-1415(f).

156. G.S. 15A-1419(b).

157. G.S. 15A-1419(a).

Figure 3. Grounds for Procedural Default

| 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”).¹⁵⁸
 - 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;¹⁵⁹ case law suggests that to excuse an (a)(1) default, there must have been an improper denial of counsel that impaired the defendant’s ability to raise the issue.

Although a defendant might assert that ineffectiveness on the part of prior post-conviction counsel rendered the defendant unable to adequately raise the issue in a prior MAR, the statute specifically provides that ineffectiveness of post-conviction counsel cannot constitute good cause for excusing a procedural default and thus undercuts this argument.¹⁶⁰
 - b. **Avoiding the Bar Through “Supplemental” MARs.** In *State v. McHone*,¹⁶¹ 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.¹⁶² 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

158. G.S. 15A-1419(a)(1).

159. *State v. McKenzie*, 46 N.C. App. 34, 39 (1980).

160. G.S. 15A-1419(c). See Section X.C.1.a. (noting that under North Carolina law, ineffective assistance of post-conviction counsel cannot constitute good cause).

161. 348 N.C. 254 (1998).

162. *Id.* at 256. See also Section V.C (discussing this provision).

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.¹⁶³ 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.¹⁶⁴

c. Specific Exception. General exceptions that apply to all four procedural bar rules are discussed in Section X.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:

- within ten days after entry of judgment, or
- during the pendency of the direct appeal.¹⁶⁵

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."¹⁶⁶ However, this exception is not limited to MARs made in open court; it applies to all MARs made within ten days of entry of

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

164. *Cf.* *State v. Basden*, 350 N.C. 579, 582-83 (1999) (by allowing the defendant time to respond to the State's motion for summary denial of the 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.").

165. 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, 21 (1999).

166. Official Commentary to G.S. 15A-1419.

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 X.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.¹⁶⁷ For a discussion of the retroactivity rules, see Section II.A.2.a.vi and *Retroactivity of Judge-Made Rules*, *supra* n.22.
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”).¹⁶⁸
 - a. **No Bar to Jurisdictional Issues.** In *State v. Wallace*,¹⁶⁹ 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 the 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, the 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 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 proceed-

167. G.S. 15A-1419(a)(2).

168. G.S. 15A-1419(a)(3).

169. 351 N.C. 481 (2000).

ings 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.¹⁷⁰ This suggests that as a general rule, ineffective assistance of counsel claims will not be subject to this bar. However, some ineffective-ness claims can be decided on appeal,¹⁷¹ 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).¹⁷² 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 excludes claims of newly discovered evidence from the 120-filing rule.¹⁷³
 - 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.¹⁷⁴ 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.¹⁷⁵ 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 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.

170. See, e.g., *State v. Thompson*, 359 N.C. 77, 123 (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.”).

171. *State v. Goode*, 197 N.C. App. 543 (2009) (deciding an ineffective assistance of counsel claim asserting a *Harbison* error (unconsented-to admission of guilt) on direct appeal).

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

173. See Sections III.C (extension of time) and V.C (amendments).

174. See *State v. Buckner*, 351 N.C. 401, 408 (2000) (purpose of amendments was to expedite the post-conviction process).

175. 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”).

- 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.¹⁷⁶
 - 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 statute 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.¹⁷⁷ 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.¹⁷⁸

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 subsec-

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

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

178. 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).

tion (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 claim is barred by subsection (a)(2) because the defendant previously raised the claim and it was decided unfavorably.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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.¹⁸²

XI. 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 language can be read to suggest that the non-movant is entitled to a hearing before a MAR is granted. However, one court of appeals case held that the trial court did not err when granting its *sua sponte* MAR without a hearing when the prosecutor failed to request a hearing, instead asking for a continuance so that the prosecutor who handled the case could decide how to proceed.¹⁸³

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

179. See Section X.B.2.

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

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

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

183. *State v. Williams*, ___ N.C. App. ___, 741 S.E.2d 486, 489 (2013).

- there are no disputed facts and the claim must fail as a matter of law;¹⁸⁴
- 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;¹⁸⁵
- the defendant cannot establish the requisite prejudice even if he or she can establish the asserted ground for relief;¹⁸⁶ or
- the harmless error standard governs and the error, even if established, is harmless beyond a reasonable doubt.¹⁸⁷

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;¹⁸⁸
- improper form;¹⁸⁹
- improper service;¹⁹⁰
- improper filing;¹⁹¹
- failure to include the requisite supporting affidavits or documentary evidence;¹⁹² or
- failure to file the required attorney certification.¹⁹³

On the other hand, a MAR is not without merit when the allegations in the defendant's MAR, if true, would entitle the defendant to relief; in this situation summary denial is improper.¹⁹⁴

- B. Evidentiary Hearings.** An evidentiary hearing is not required if MAR was filed within ten days of entry of judgment.¹⁹⁵ However, the trial court may hold an evidentiary hearing on a G.S. 15A-1414 MAR if "appropriate to resolve questions of fact."¹⁹⁶

184. 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) (the defendant was not entitled to a hearing when the legal basis of his MAR was without merit).

185. 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.").

186. 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 XI.I.3 (discussing the requisite prejudice).

187. 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 XI.I.3.a (discussing the harmless error standard).

188. See Section X (discussing procedural default).

189. See Section V.A (discussing form of the motion).

190. See Section V.B (discussing service requirements).

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

192. See Section V.A.3 (discussing the need for these items).

193. See Section V.A.2 (discussing the certification).

194. *State v. Jackson*, ___ N.C. App. ___, 727 S.E.2d 322, 337 (2012) (the trial court erred by summarily denying the defendant's MAR where the MAR adequately forecast evidence on each issue).

195. G.S. 15A-1420(c)(2).

196. *Id.*; see *State v. Rollins*, ___ N.C. ___, 748 S.E.2d 146 (2013) (trial court did not abuse its discretion by denying a hearing on a G.S. 15A-1414 MAR asserting juror misconduct, specifically that a juror watched "irrelevant and prejudi-

For other MARs, the statute provides that trial court must proceed without an evidentiary hearing when the MAR presents only issues of law.¹⁹⁷ The statute also states a corollary to that rule: that if the trial court cannot rule on the MAR “without the hearing of evidence,” it must hold an evidentiary hearing.¹⁹⁸ In determining whether an evidentiary hearing is required, the trial court must consider the MAR and any supporting or opposing information presented.²⁰¹ 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 the need for an evidentiary hearing;²⁰² some evidence must be offered to create an issue of fact warranting a hearing.²⁰³ There are North Carolina cases going both ways on whether or not an evidentiary hearing was required.²⁰⁴

cial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations”; although the MAR was supported by an affidavit from one of the jurors, the court found that it “merely contained general allegations and speculation”; reasoning that the MAR failed to specify which news broadcast the juror in question had seen; the degree of attention the juror had paid to the broadcast; the extent to which the juror received or remembered the broadcast; whether the juror had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct); *State v. Harris*, 338 N.C. 129, 143 (1994) (trial court did not err by declining to hold an evidentiary hearing on 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, 125-26 (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); *State v. Marino*, ___ N.C. App. ___, 747 S.E.2d 633 (2013) (trial court did not abuse its discretion by denying the defendant’s G.S. 15A-1414 MAR without an evidentiary hearing); *State v. Sullivan*, ___ N.C. App. ___, 717 S.E.2d 581 (2011) (same); *State v. Shropshire*, 210 N.C. App. 478 (2011) (the trial court did not err by denying the defendant’s MAR without an evidentiary hearing; the motion was made immediately after the trial court pronounced sentence and sought to withdraw the plea; no issue of fact was presented; the defendant’s statement that he did not understand the trial court’s decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that “the court will determine whether the sentences will be served concurrently or consecutively”).

197. G.S. 15A-1420(c)(3); *State v. McHone*, 348 N.C. 254, 257 (1998); *State v. Holden*, 106 N.C. App. 244, 248 (1992); *State v. Essick*, 67 N.C. App. 697, 702–03 (1984); *State v. Bush*, 307 N.C. 152, 166–67 (1982), *habeas corpus granted on other grounds*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff’d*, 826 F.2d 1059 (4th Cir. 1987) (unpublished).

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

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

202. 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”).

203. 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 V.A.3.

204. Sample cases in which an evidentiary hearing was not required include: *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, 723-24 (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

- C. Hearings in Particular Types of Cases.** For a discussion about how these rules apply to MARs challenging guilty pleas and 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 BULL. No. 2001/04 (UNC School of Government) (Oct. 2001).²⁰⁵
- D. Pre-Hearing Conferences.** Upon motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.²⁰⁶
- F. Presence of the Defendant.** The defendant has no statutory right to be present when only issues of law are argued.²⁰⁷ However, a defendant has a statutory right to be present at an evidentiary hearing.²⁰⁸ A waiver of this right must be in writing.²⁰⁹
- G. Counsel.** An indigent defendant has a right to appointed counsel, as discussed in Section VIII.A. Additionally, G.S. 15A-1420(c)(4) provides that all defendants have the right to counsel at the evidentiary hearing.
- H. Evidence.**
- 1. Evidence Rules.** The rules of evidence apply in an evidentiary hearing on a MAR.²¹⁰
 - 2. Scope of the Hearing.** The nature of the evidence presented will depend on the claim asserted in the MAR. A *Strickland* ineffective assistance of counsel claim, for example, may involve defense witnesses who testify about accepted standards of practice for lawyers handling the particular issue.
When the defendant asserts a claim of newly discovered evidence, the State may introduce evidence undercutting that claim. For example, if the defendant introduces evidence that the State's key expert witness misrepresented his qualifications, the State may introduce evidence supporting the expert's qualifications.²¹¹ However, the trial court does not err by precluding the State from offering evidence that the jury would have

N.C. 75 (1998) (No. 74P98) (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) (No. 305PA97) (same); *State v. Farrar*, 472 S.E.2d 21 (N.C. 1996) (No. 86P96) (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, 84-85 (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 . . . an evidentiary hearing . . . is necessary").

205. Available online at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200104.pdf>.

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

207. G.S. 15A-1420(c)(3).

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

209. *Id.*

210. G.S. 8C-1, R. 101, 1101.

211. *State v. Peterson*, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2013).

reached the same verdict based on evidence not introduced at trial.²¹²

I. Burdens and Standards.

1. **Factual Issues.** The movant bears the burden of establishing the necessary facts by a preponderance of the evidence.²¹³
2. **Basis for Relief.** A defendant must show the existence of the asserted ground for relief,²¹⁴ 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.
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-1443.²¹⁵ 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.²¹⁶ 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*.²¹⁷ Examples of errors that are reversible *per se* include the presence of an alternate juror in the jury room during deliberations,²¹⁸ 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,²¹⁹ and allowing a capital case to proceed without the appointment of assistant counsel as required by G.S. 7A-450(b1).²²⁰

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*,²²¹ 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 article I, section 23 state constitutional right to be present at all stages of a capital trial is the harmless beyond a reasonable doubt standard articulated

212 *Id.* (“the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial”).

213. G.S. 15A-1420(c)(5).

214. G.S. 15A-1420(c)(6).

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

216. *Id.*

217. *Id.*

218. See *State v. Parker*, 350 N.C. 411, 426 (1999).

219. See *State v. Mitchell*, 321 N.C. 650, 659 (1988).

220. See *State v. Hucks*, 323 N.C. 574, 576 (1988).

221. 325 N.C. 1 (1989), *vacated on other grounds by Huff v. North Carolina*, 497 U.S. 1021 (1990).

by the United States Supreme Court in *Chapman v. California*²²² and incorporated into G.S. 15A-1443(b).²²³ 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).²²⁴

- 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.²²⁵
- 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.²²⁶
- 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

222. 386 U.S. 18 (1967).

223. See *Huff*, 325 N.C. at 33 (citing to G.S. 15A-1443(b)).

224. 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 for the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution." *Id.* at 34 (quotation and citation omitted).

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

226. See, e.g., *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).

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.

- 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 V.A.2.
- K. State's Opportunity to Consent or Object to 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).²²⁷
- 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;
 - the 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.²²⁸

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, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.²²⁹

If resentencing is required, the trial division may enter an appropriate sentence.²³⁰ 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.²³¹

227. 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.

228. G.S. 15A-1417(a).

229. G.S. 15A-1417(b).

230. G.S. 15A-1417(c).

231. *Id.*

XIII. The Judge's Order.

- A. Ruling and Order Required.** A judge must rule on the MAR and enter an order.²³²
- B. Factual Findings Required.** If an evidentiary hearing is held, the court must make findings of fact.²³³
- 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.²³⁴ 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.²³⁵

XIII. Appeal.

- A. Superior Court Rulings.**
- 1. Ruling on Defendant's MAR Filed Within Ten Days of Judgment.** The MAR statute provides that the grant or denial of relief sought in a MAR under G.S. 15A-1414 (MAR made within ten days of judgment) is subject to an appeal regularly taken.²³⁶ G.S. 15A-1444 governs appeals by defendants; G.S. 15A-1445 governs appeals by the State.
 - 2. Ruling on Defendant's MAR Filed More Than Ten Days After Judgment.** The MAR statute provides that a ruling on a MAR pursuant to G.S. 15A-1415 (MAR made more than ten days after judgment) is subject to review as follows:
 - if the time for appeal from the conviction has not expired, by appeal;

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

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

234. *Beard v. Kindler*, 558 U.S. 53 (2009).

235. See Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County*, ADMIN. OF JUSTICE BULL. No. 2008/05 (UNC School of Government) (Nov. 2008), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0805.pdf>.

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

- if an appeal is pending when the ruling is entered, in that appeal; or
- if the time for appeal has expired and no appeal is pending, by writ of certiorari.²³⁷

Notwithstanding this last provision in the MAR statute—that if the time for appeal has expired and no appeal is pending review is by writ of certiorari—the North Carolina Court of Appeals has cited G.S. 15A-1445 as providing the State with a right of appeal in these circumstances.²³⁸ These recent decisions seem to create some conflict with an earlier decision by the same court, holding that when the State appeals a superior court MAR ruling, G.S. 15A-1422 governs, not G.S. 15A-1445.²³⁹

With regard to writs of certiorari, Rule 21(e) of Rules of Appellate procedure provides that petitions for writ of certiorari to review orders of the trial court denying G.S. 15A-1415(b) MARs by capital defendants must be filed in the North Carolina Supreme Court.²⁴⁰ 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.

- 3. Ruling on State's MAR.** G.S. 15A-1422, the MAR provision on appeal, does not address appeal from a superior court ruling on a MAR filed by the State under G.S. 15A-1416.²⁴² 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.²⁴³ 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-

237. G.S. 15A-1422(c); see, e.g., *State v. Morgan*, 118 N.C. App. 461, 463 (1995) (where the time for appeal had ended and no appeal was pending, the defendant's only option for review of a trial court's order denying his MAR was by writ of certiorari); *State v. Garner*, 67 N.C. App. 761, 762 (1984) (same); *State v. Roberts*, 41 N.C. App. 187, 188 (1979) (same); see also N.C. R. APP. PROC. R. 21(a)(1) (scope of writ of certiorari). As noted above, Article 91 of G.S. Chapter 15A sets out the grounds and procedure for appeal by the defendant.

238. *State v. Peterson*, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2013) (holding that under G.S. 15A-1445(a)(2) the State could appeal a trial court's order granting a defendant's MAR on the basis of newly discovered evidence); *State v. Lee*, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2013) (holding that under G.S. 15A-1445(a)(3) the State could appeal when the superior court granted the defendant's MAR asserting a sentencing error and entered an amended judgment).

239. *State v. Starkey*, 177 N.C. App. 264, 266 (2006) (finding no right of review under G.S. 15A-1422 and declining State's petition for writ of certiorari).

240. Rule 21(f) 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 60 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 30 days of service of the petition.

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

243. *State v. Linemann*, 135 N.C. App. 734, 735 (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, 266-67 (2006).

1445.²⁴⁴ It is not clear whether a similar argument based on G.S. 7A-27 (appeals of right from the courts of the trial decisions) would be treated in the same way.

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.²⁴⁵ Not statutory MAR provision addresses appeal from a *sua sponte* court order. In one case, the court of appeals, without discussion, treated the trial court's *sua sponte* MAR made immediately after judgment as a defense motion made under G.S. 15A-1414 (MAR made within ten days of judgment).²⁴⁶

- B. **District Court Rulings.** There is no right to appeal a MAR when the movant is entitled to a trial *de novo* on appeal.²⁴⁹ 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.²⁵⁰ As worded, this provision does not address appeal by the State from a district court judge's ruling on a MAR. It is not clear whether the court would fill in this statutory gap by reference to G.S. 15A-1432 (appeals by the State from district court judges).²⁵² Relief possibly can be obtained by writ of certiorari to the superior court.²⁵³

- F. **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.²⁵⁴ 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."²⁵⁵

Rule 21(e) of the Appellate Rules provides that petitions for writs of certiorari to review trial court MAR orders shall be determined by the court appeals with no further review by the supreme court.²⁵⁷

XIV. Relationship to Other Proceedings.

- A. **Appeal.** The making of a MAR is not a prerequisite for asserting an error on appeal.²⁵⁸ 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.²⁵⁹ Put another way, an adverse ruling on a MAR does not constitute a procedural default barring appeal. However, as discussed in Section X, 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.²⁶⁰

When the case is in the appellate division for review, a MAR under G.S. 15A-1415 must be made in that division.²⁶¹ The statute contains no parallel rules for

244. *Starkey*, 177 N.C. App. 264, 266-67 ("[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-1445). *But see* n.238, above.

245. *See supra* Section II.C.

246. *State v. Starkey*, 177 N.C. App. 264 (2006) (treating the trial court's *sua sponte* MAR made immediately after judgment as a defense motion made under G.S. 15A-1414 (MARs made less than ten days after entry of judgment) for purposes of appeal).

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.²⁶² However, Rule 25(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.²⁶³
- 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.²⁶⁴ 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.²⁶⁵

249. G.S. 15A-1422(d).

250. See G.S. 15A-1431 (appeals by defendants from district court).

252. Compare text accompanying n.238 with text accompanying n.244.

253. See GEN. R. PRAC. SUP. & DIST. CT. R. 19.

254. G.S. 15A-1422(f); 7A-28(a).

255. *State v. Ellis*, 361 N.C. 200, 206 (2007) (quotation omitted) (going on to review MAR ruling); see also *State v. Barrett*, 307 N.C. 126 (1982) (noting that under G.S. 15A-1422(f) the defendant had no right of review of a decision of the court of appeals denying his G.S. 15A-1415 MAR but going on to arrest judgment where the record disclosed that the defendant was convicted of a crime against nature, an offense that is not a lesser of the charged crime).

257. At least one North Carolina Supreme Court case suggests that this provision only applies to trial court orders denying defense MARs and does not bar the supreme court from granting a writ of certiorari from a court of appeals decision when the trial court granted the defendant's MAR. *State v. Roberts*, 351 N.C. 325 (2000).

258. G.S. 15A-1422(a).

259. G.S. 15A-1420(e), as amended by S.L. 2012-168 .

260. G.S. 15A-1414(c).

261. G.S. 15A-1418(a); see Section VI.D.1 (discussing when a case is in the appellate division for review).

262. G.S. 15A-1411(c).

263. For more information about habeas corpus, see [Jessica Smith, Habeas Corpus](#), in this Benchbook.

264. G.S. 15A-1411(d).

265. G.S. 15A-1470(b).

Appendix B: Sample Language for MAR Orders

I. Order Denying MAR – Lack of Merit on Its Face

The Defendant's Motion for Appropriate Relief, filed [insert date] is denied because it fails to state a ground that would entitle the defendant to relief. [Explain, e.g., The defendant's motion asserts that the trial judge erred by sentencing him in the aggravated range, having considered an impermissible aggravating factor. However, the record reveals that the defendant was sentenced in the presumptive range. Therefore, the motion lacks merit in that it fails to state a claim that would entitle the defendant to relief].

II. Order Denying MAR – Defect in Form

The Defendant's Motion for Appropriate Relief, filed [insert date] is denied because it [was not made in writing, as required by G.S. 15A-1420(a)(1)a.] [does not state the grounds for the motion as required by G.S. 15A-1420(a)(1)b.] [does not set forth the relief sought, as required by G.S. 15A-1420(a)(1)c.] [was not timely filed, as required by G.S. 15A-1420(a)(1)d.] [does not contain the attorney certification, as required by G.S. 15A-1420(a)(1)c1.] [does not contain supporting affidavits, required by G.S. 15A-1420(b).]

III. Order Denying MAR – Filed in Wrong Division

Judgment was rendered in this case on [insert date]. Notice of appeal was filed on [insert date]. The Defendant's Motion for Appropriate Relief was filed on [insert date], more than ten days after entry of judgment. Under G.S. 15A-1415, the Defendant's motion cannot be heard in this court and must be filed in the Appellate Division. The Defendant's motion is therefore dismissed without prejudice.

IV. Order Denying a MAR – Procedural Default

The Defendant's Motion for Appropriate Relief, dated [insert date] is denied on grounds of procedural default, as required by G.S. 15A-1419(b). Specifically [the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. Upon a MAR filed [insert date] and decided [insert date], the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. G.S. 15A-1419(a)(1).] [the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. 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. [Insert details of when the ground or issue was previously addressed]. G.S. 15A-1419(a)(2).] [the Defendant's motion asserts [briefly explain ground or issue raised in the defendant's motion]. The defendant previously appealed his conviction [briefly explain the procedural history of the appeal]. Upon the previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. G.S. 15A-1419(a)(3).]

[the Defendant filed this Motion for Appropriate Relief on [insert date]. G.S. 15A-1415(a) sets out the timing rules for filing motions for appropriate relief. The defendant's motion was untimely filed and thus is procedurally defaulted. G.S. 15A-1419(a)(4).

The Defendant has not asserted a basis for excusing [his/her] procedural default.

DRAFT

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