The Racial Justice Act

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I. Introduction.

A. Core Provision. The Racial Justice Act (RJA) provides that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." G.S. 15A-2010. The full text of the act is reproduced in Appendix A.
The RJA further provides:

> "[a] finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."

G.S. 15A-2011(a). Thus, to prevail on a RJA claim, a defendant need not prove that race was the basis of the decision to seek or impose a death sentence in his or her particular case. By the express terms of the statute, a RJA claim "may be established" by showing that race was a significant factor in decisions to seek or impose the death sentence in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. This paper refers to this type of claim as a "Local or Statewide RJA Claim." As discussed *infra*, statistical evidence may be used to prove a Local or Statewide RJA Claim. In this respect the North Carolina General Assembly responded to the United States Supreme Court's designation of legislatures as the appropriate bodies to decide whether a statistical showing of racial discrimination can invalidate a criminal conviction or sentence. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting a capital defendant's claim that statistical evidence of racial discrimination in the administration of Georgia's capital punishment system showed a violation of Equal Protection; stating that the defendant's "arguments are best presented to the legislative bodies").

B. Issues of Statutory Interpretation Regarding the Core Provision. The statute's core provision presents a number of interpretation issues, some of which are explored here.

The statute speaks of race generally, and does not limit its application to any particular race. However, the RJA does not define the core term "race" or incorporate by reference any commonly used racial classifications.

The statute's use of the permissive term "may" when stating that "[a] finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed" is significant. It suggests both that:

(1) evidence that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed is not the exclusive way to establish a RJA claim and

(2) the fact that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed does not require the court to grant relief.

As to the first point, this suggests that a defendant can establish a RJA claim with case-specific evidence, such as evidence that racial issues motivated the prosecutor to seek the death penalty against the defendant in his or her specific case. Of course, a case-specific claim can be asserted under existing law. *See, e.g.,* Batson v. Kentucky, 476 U.S. 79 (1986). It is not clear whether the standard of proof for such a RJA claim differs from existing standards and if so, how.

As to the second point—that the court is not required to grant relief upon a prima facie showing—case law highlights the difference between the permissive word "may" and the mandatory word "shall." *Compare* State v. Peek, 313 N.C. 266 (1985) (statutory term "may" is construed as permissive), *with,* State v. Brown, 357 N.C. 382 (2003) (statutory term "shall" is mandatory). As discussed *infra,* the RJA provides for rebuttal evidence by the State. But as discussed below, there is some uncertainty about the scope of the State's rebuttal case.

While the statute provides that a claim may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State "at the time the death sentence was sought or imposed," it does not specify the relevant period of time. In part because the RJA authorizes the use of statistical evidence, *see infra*, questions inevitably will arise about the appropriate time period to be used in the statistical analysis.

Also, while the statute provides that a defendant may establish a RJA claim by showing that race was a "significant factor" in decisions to seek or impose the sentence of death, it does not provide guidance on the statutory term "significant factor."

II. Procedural Issues. As of the writing of this paper, at least one significant RJA-related matter was pending in the state Supreme Court. In August 2010, three capital defendants who had filed RJA motions in three different counties filed a joint petition in the North Carolina Supreme Court to designate their RJA cases as exceptional, a designation they argued would allow for bifurcation of statewide issues. *See* Joint Petition of Al-Bayyinah (Davie County), Murrell (Forsyth County), and Strickland (Union County) (on file with the author). The district attorneys in each county responded, arguing against the petition (responses on file with the author). Towards the end of August, the defendants replied (reply on file with the author) and the matter is now pending before the Chief Justice. Obviously, if the petition is granted, it could impact the discussion below pertaining to procedural issues.

A. Generally. The RJA specifies that a claim must be raised at the Rule 24 hearing or in post-conviction Motion for Appropriate Relief (MAR) proceedings. G.S. 15A-2012(a)(1). Subject to some exceptions discussed below, the RJA provides that the procedures and hearing of motions asserting Local or Statewide RJA Claims should follow those set out

in three provisions of the MAR statute: G.S. 15A-1420, 15A-1421, and 15A-1422. G.S. 15A-2012(c). The requirements of the three identified MAR provisions are discussed below.

The statute does not specifically speak to the procedure for raising other types of RJA claims. Also, in specifying that Local or Statewide RJA Claims should follow the three identified MAR provisions, the RJA does not distinguish between RJA claims raised in a MAR and those raised at the Rule 24 hearing. Thus, it is not clear whether the post-conviction MAR procedures are meant to be engrafted on a pre-trial RJA claim raised at the Rule 24 hearing.

For a general discussion of the Rule 24 hearing in a capital case, see ROBERT L. FARB, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK at 25-26 (UNC School of Government 2nd ed. 2004) [hereinafter CAPITAL CASE LAW HANDBOOK]. For a general discussion about MAR procedure, see Jessica Smith, *Motions for Appropriate Relief*, ADMIN. OF JUSTICE BULLETIN No. 2010/03 (UNC School of Government 2010) (online at: http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb1003.pdf) [hereinafter *Motions for Appropriate Relief*], and the Survival Guide section on MARS, included here as Appendix B and available online at: http://www.sog.unc.edu/faculty/smithjess/documents/MotionsforAppropriateRelief_000.pdf.

B. Judges Empowered to Act.

1. **Claim Raised at Rule 24 Hearing.** When the RJA claim is raised pretrial at the Rule 24 hearing, it appears that any judge empowered to act in the capital case can handle the motion.
2. **Claim Raised in MAR.** Under Rule 25(4) of the General Rules of Practice for the Superior and District Courts, capital MARs must be referred to the senior resident superior court judge or his or her designee "for review and administrative action, including as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order, for subsequent events in the case, or other appropriate actions." Because the RJA requires post-conviction RJA claims to be raised by way of a MAR, *see supra* section II.A, this provision appears to apply. If the senior resident superior court judge has a conflict (e.g., because he or she was the prosecutor in the district during the relevant time or because he or she will be called as a witness), another judge will need to handle the motion.

C. Form of the Motion, Service, Filing, Etc.

1. **Generally.** The RJA requires that the defendant "state with particularity how the evidence supports a [Local or Statewide RJA Claim]." G.S. 15A-2012(a). This seems to be a requirement as to form. The RJA does not contain a similar provision for other types of RJA claims.
2. **Claim Raised in MAR.** Subject to certain exceptions discussed below, the RJA incorporates G.S. 15A-1420 from the MAR statutes. G.S. 15A-2012(c). That provision prescribes the form of a MAR, rules for service and filing, and other matters. Detail about those requirements can be found in *Motions for Appropriate Relief*, *supra* at 17-19.

3. **Claim Raised at Rule 24 Hearing.** As noted above, a RJA claim can be asserted at the pretrial Rule 24 hearing. The RJA does not contain any provisions specifying the form of such a motion, nor does it incorporate the standard rules for motions practice. *See* G.S. 15A, Art. 52 (Motions Practice). And as noted above, it is not clear whether the post-conviction MAR procedural rules in G.S. 15A-1420 were meant to be engrafted onto a RJA claim made at a pretrial Rule 24 hearing.

D. Time for Filing.

1. **Claim Raised at Rule 24 Hearing.** For pending cases in which the Rule 24 hearing was not held before the act's effective date, the time for asserting a RJA claim is at the Rule 24 hearing. G.S. 15A-2012(a)(1). However, if the defense fails to assert a RJA claim at trial, it may be raised in a post-conviction MAR. *Id.* In pending capital cases for which the Rule 24 hearing was held before the RJA took effect, some judges have reported reopening the Rule 24 hearing for the filing of a RJA motion.
2. **Claim Raised in MAR.** The MAR statute requires capital defendants to file MARs within the 120-day time limit prescribed by G.S. 15A-1415(a). However, the RJA states that that this time limitation does not apply to RJA MARs. G.S. 15A-2012(b). Thus, the only time limitation on RJA MAR claims is that contained in the session law itself: For death sentences imposed before the effective date of the Act (August 11, 2009), motions must be filed within one year of the Act's effective date. S.L. 2009-464, sec. 2. By its terms, this time limitation only applies to cases in which the death sentence was imposed before August 11, 2009. For cases in which the death sentence was imposed on or after that date, RJA MARs are like non-capital MARs in that there is no outer limit on when permissible claims can be raised. *See* G.S. 15A-2012(b) (exempting RJA MARs from the 120-day filing rule that applies to all other capital MARs); *Motions for Appropriate Relief, supra* p. 3 at 10.

E. Judge's Duties Upon Filing.

1. **Claim Raised in MAR.** As noted above, subject to certain exceptions, the RJA incorporates G.S. 15A-1420 from the MAR statute. According to G.S. 15A-1420(b1)(2), when a capital MAR is filed, the judge must review the motion and enter an order directing the State to file an answer within sixty days of the court's order. As also was noted above, capital MARs are referred to the senior resident superior court judge or his or her designee for appropriate review and administrative action. *See supra* II.B.2. This action will include the setting of a hearing, which is required for all RJA claims. As discussed in section II.K, a hearing must be calendared without unnecessary delay.
2. **Claim Raised at Rule 24 Hearing.** And as noted above, it is not clear whether the post-conviction MAR procedural rules in G.S. 15A-1420 were meant to be engrafted onto a RJA claim made at a pretrial Rule 24 hearing. If not, it may be possible for a trial judge to defer ruling on a Rule 24 RJA claim under after the sentencing phase. If the jury does not recommend death, the Rule 24 RJA claim becomes moot.

F. Procedural and Related Bars. In a regular MAR, a defendant is limited as to the types of claims that can be raised more than ten days after entry of judgment. *See* G.S. 15A-1415(b), (c) (delineating the claims that may be asserted more than ten days after entry of

judgment). Additionally, even if a claim can be raised at that time, a review on the merits may be barred by the procedural default rules. *See* G.S. 15A-1419 (procedural default rules). The RJA expressly provides that neither of these provisions can bar a RJA claim. G.S. 15A-2012(b) ("Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.").

G. Discovery.

1. **Generally.** In connection with a number of filed RJA motions, defense counsel have requested broad discovery. Counsel have requested, among other things:

   - Policies, past and present, of the prosecutor's office with respect to decisions to pursue the death penalty, whether or not to offer a first-degree murder defendant a plea, and the use of peremptory strikes in jury selection.
   - Information on programs, past and present, designed to eliminate race as a factor in seeking or imposing the death penalty.
   - Communications, written and oral, received or delivered by anyone in the prosecutor's office concerning the race of a victim, defendant, or a potential juror suggesting that the case should be handled in a particular way on account of the race of those individuals.
   - Information on whether any claims or complaints of racial discrimination have been made against the prosecutor's office or any member of that office.
   - Detailed information regarding all first degree murder cases handled by the office.

   For an example of an order issued in connection with a broad discovery request, see Appendix C.

   Most discovery requests that have been filed to date have been filed by the defense. However, judges should expect to see prosecution discovery requests, particularly regarding statistical evidence offered by the defense. Such requests may ask for, among other things, data collection procedures, guidelines for the statistical sampling, training of data collectors, and sources of data.
2. **Claim Raised at Rule 24 Hearing.** The RJA does not speak directly to the issue of discovery on a RJA claim. Because a Rule 24 RJA Claim is made at trial, the normal discovery rules apply, G.S. 15A Article 48 (Discovery in Superior Court). It is not clear whether a trial court would have inherent authority to order discovery on a pre-trial Rule 24 motion broader than that allowed by these rules. For a discussion of a judge's inherent authority to order discovery before trial, see CAPITAL CASE LAW HANDBOOK, *supra* p. 3 at 48-50. For a more general discussion on inherent authority, see the paper by SOG faculty member Michael Crowell posted here: http://www.sog.unc.edu/programs/judicial_authority_administration/documents/InherentauthorityOct07_000.pdf [hereinafter Crowell, *Inherent Authority*].
3. **Claim Raised in MAR.** The MAR statute contains a discovery provision in G.S. 15A-1415. Although the RJA expressly incorporates other MAR provisions, *see* G.S.

15A-2012(c) ("Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion . . . shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422."), it does not specifically incorporate G.S. 15A-1415. Thus, it is not clear whether G.S. 15A-1415 applies to RJA MARs. For a discussion of G.S. 15A-1415, see *Motions for Appropriate Relief, supra* p. 3 at 20-21. If that statute does not apply or does not provide for the requested discovery, it is not clear whether a court would have inherent authority to order discovery in connection with a RJA MAR claim. There are, however, some cases upholding a trial court's exercise of inherent authority to order discovery in connection with MARs. *See* State v. Taylor, 327 N.C. 147, 154 (1990); State v. Buckner, 351 N.C. 401 (2000). For a general discussion of inherent authority, see Crowell, *Inherent Authority, supra* p. 5.

H. Counsel/Costs.

1. **Claim Raised at Rule 24 Hearing.** Every capital defendant has a constitutional right to the assistance of counsel for trial and for all critical pretrial stages. *See, e.g.,* State v. Detter, 298 N.C. 604 (1979) ("the right to counsel . . . applies not only at trial but also at and after any pretrial proceeding that is determined to constitute a critical stage"). Hearings on RJA claims are likely to be deemed critical stages for which a defendant has a constitutional right to counsel. *See* JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES 10-13 (UNC School of Government 2003) (discussing critical and non-critical stages).
2. **Claim Raised in MAR.** 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. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today.") (citations omitted). However, in North Carolina, indigent capital defendants have a statutory right to counsel in MAR proceedings. G.S. 7A-451(a)(3); G.S. 15A-1421. By expressly incorporating the relevant MAR provision, the RJA makes it clear that indigent defendants have a statutory right to counsel for purposes of a RJA MAR. G.S. 15A-2012(c).

   It is worth noting that under prior law, G.S. 7A-451 required a capital defendant who wanted counsel for purposes of a MAR to apply to the superior court to determine whether he or she was indigent and entitled to counsel. Effective July 31, 2009, however, S.L. 2009-387 (H 506) amended the statute to provide that a capital defendant who desires counsel for a MAR may apply directly to IDS for counsel and to authorize IDS to appoint counsel if the defendant was previously adjudicated indigent for trial or direct appeal. If the defendant was not previously adjudicated indigent, IDS must request the superior court to determine whether the defendant is indigent.

I. Costs. The RJA provides that the court may enter orders relieving indigent defendants of all or a portion of the costs of the proceedings, as is the case for all MARs. G.S. 15A-2012(c) (incorporating G.S. 15A-1421, the MAR provision authorizing the court to "make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings").

J. Experts. To establish a statistical RJA claim, a defendant likely will require the services of an expert. For a capital trial in which the RJA claim is raised at the Rule 24 hearing, the appointment of experts should follow normal procedures. *See* CAPITAL CASE LAW HANDBOOK, *supra* p. 3 at 37-43 (discussing those procedures); 1 NORTH CAROLINA DEFENDER MANUAL, at Ch. 5 (UNC School of Government) (online at: http://www.ncids.org/Def%20Manual%20Info/Defender_Manual/DefManChpt05.pdf) (same).

In RJA MAR proceedings, indigent defendants have a statutory right to expert assistance as a necessary expense of representation. G.S. 15A-1421 (MAR provision incorporating provisions of G.S. 7A); G.S. 15A-2012(c) (RJA provision incorporating G.S. 15A-1421); G.S. 7A-450(b) ("Whenever a person . . . is determined to be an indigent person entitled to counsel, [the State must] provide him with counsel and the other necessary expenses of representation."); G.S. 7A-454 (expert fees); State v. Taylor, 327 N.C. 147 (1990) (recognizing the right to expert assistance in MAR proceedings but finding that the defendant had not made a sufficient showing of need in the case before the court).

Part 2D the IDS Rules for Providing Legal Representation in Capital Cases provides for the appointment and compensation of experts and payment of other expenses related to legal representation in capital cases. Requests for experts go to IDS, with a right to go to a judge if IDS denies the request. Rule 25(2) of the General Rule of Practice for Superior and District Courts provides that all requests for appointment of experts made prior to the filing of a capital MAR and subsequent to a denial by the Director of IDS must be ruled on by the senior resident superior court judge or his or her designee in accordance with IDS rules.

K. Hearing Required. The RJA states that "[t]he court shall schedule a hearing on [a RJA] claim and shall prescribe a time for the submission of evidence by both parties." G.S. 15A-2012(a)(2). An evidentiary hearing appears to be required regardless of whether the claim is asserted at the Rule 24 hearing or by way of a MAR. In this respect, a RJA MAR differs from a standard MAR; for a standard MAR, evidentiary hearings are not always required. G.S. 15A-1420(c).

1. **Calendaring Hearings.** Although the RJA requires a hearing on a RJA claim, it does not specify when that hearing must be held. As noted above, however, subject to certain exceptions, the RJA incorporates G.S. 15A-1420 from the MAR statutes. That statute requires that a hearing must be calendared "without unnecessary delay." G.S. 15A-1420(b1)(2).
2. **Prehearing Conference.** G.S. 15A-1420(c)(1) provides that on motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.

L. Presence of the Defendant.

1. **Claim Raised At Rule 24 Hearing.** A defendant has an unwaivable right to be present at all stages of his or her capital murder trial. This unwaivable right to be present does not apply at the Rule 24 hearing. State v. Chapman, 342 N.C. 330 (1995). Because the RJA is so new, there is no case law addressing whether the

unwaivable right to be present applies to a hearing on a pre-trial RJA claim. For a general discussion of a capital defendant's right to be present, see CAPITAL LAW HANDBOOK *supra* p. 3 at 70-75.

2. **Claim Raised in MAR.** Under the MAR statute, a defendant has no right to be present at a hearing where only issues of law are argued. G.S. 15A-1420(c)(3). However, that statute provides that a defendant has a statutory right to be present at an evidentiary hearing. G.S. 15A-1420(c)(4). Any waiver of that right must be in writing. *Id.*

M. Evidence. The RJA provides that evidence relevant to establish a Local or Statewide RJA Claim may include statistical or other evidence that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

G.S. 15A-2011(b). Factor (1) focuses on the defendant's race. Factor (2) focuses on the victim's race. And factor (3) focuses on the race of the venire members.

Although many, if not all, Local or Statewide RJA Claims will offer statistical evidence, the RJA provides that "other evidence" also may be relevant to establish such a claim. *Id.* It specifies that such other evidence may include, but is not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both. *Id.* A juror's testimony must be consistent with N.C. R. Evid. 606(b). *Id.* Rule 606(b) provides that

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The RJA's reference to a juror's testimony being consistent with Rule 606(b) is odd, at least with respect to RJA MARs, given that all of the rules of evidence apply at evidentiary hearings on MARs. G.S. 8C-1, R. 101, 1101.

The State may offer evidence to rebut the defendant's claims or evidence, including statistical evidence. G.S. 15A-2011(c). Also, the court may consider evidence of the impact on the defendant's trial of any program designed to eliminate race as a factor in seeking or imposing a sentence of death. *Id.* However, the statute does not specify whether the State's rebuttal evidence must be limited to the scope of the defendant's claim. For example, may the State rebut a statewide statistical claim with statistical evidence showing that race was not a factor in the judicial division? And, is the State's evidence of the impact of a local program designed to eliminate race as a factor appropriate rebuttal to a statewide claim?

N. Burdens and Standards. The RJA provides that the defendant has the burden of proving a Local or Statewide RJA Claim. *Id.* The statute is silent on the burden for other RJA Claims.

G.S. 15A-1420, a MAR provision incorporated by reference into the RJA, specifies that the movant bears the burden of establishing the necessary facts by a preponderance of the evidence. G.S. 15A-1420(c)(5). Under the MAR statute, even if a defendant shows the existence of the asserted ground for relief, relief must be denied unless prejudice occurred, in accordance with G.S. 15A-1443. G.S. 15A-1420(c)(6). The RJA, however, dispenses with the prejudice requirement. G.S. 15A-2012(a)(3) (if the court finds that the defendant has established a Local or Statewide RJA Claim, it must order relief).

O. Relief Available. The RJA provides that if the court finds that the defendant has established a Local or Statewide RJA Claim, it must "order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." G.S. 15A-2012(a)(3). Thus, the defendant is not entitled to a new trial or having the conviction vacated. The statute does not specifically prescribe a remedy for other RJA Claims.

P. Order & Findings. The RJA does not speak to the issue of whether findings and an order are required on a RJA claim. However, for RJA MAR claims, the MAR statute requires an order. G.S. 15A-1420(c)(7). Also, if an evidentiary hearing was held on the MAR, the court must make findings of fact. G.S. 15A-1420(c)(4). As discussed above, provided that the defendant states with particularity how the evidence supports the claim, he or she is entitled to a hearing.

Q. Appeal. The RJA expressly incorporates G.S. 15A-1422, the MAR provision on appeal. G.S. 15A-2012(c). For a detailed discussion of that provision, see *Motions for Appropriate Relief, supra* p. 3 at 35-37. It is not clear how a party would appeal an adverse ruling on a RJA claim raised at the Rule 24 hearing. At a minimum, such a ruling would be appealable on direct appeal.

Appendix A: The Racial Justice Act

§ 15A-2010. North Carolina Racial Justice Act.

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.

§ 15A-2011. Proof of racial discrimination.

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.

(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.

(c) The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.

§ 15A-2012. Hearing procedure.

(a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

(3) If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

(b) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422.

Appendix B: Survival Guide Section on Motions for Appropriate Relief

MOTIONS FOR APPROPRIATE RELIEF

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For more detailed information on the topics covered in this outline, see Jessica Smith, *Motions for Appropriate Relief,* ADMIN. OF JUSTICE BULLETIN No. 2010/03 (June 2010) (online at: http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb1003.pdf) [hereinafter *MAR Bulletin*].

I. Introduction. A motion for appropriate relief (MAR) is a statutorily created vehicle for defendants to challenge their convictions and sentences. The MAR statutes are in G.S. Ch. 15A, Art. 89. The MAR statutes also authorize the State to file a MAR in certain circumstances and for a judge to act *sua sponte* and grant relief on his or her own MAR.

II. Types of Claims That Can Be Raised.

A. Motions by the Defendant. 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. If the MAR is made within ten days of entry of judgment, it may assert any error committed during or before trial.

b. Claims That Must Be Asserted. Unless the claim can be framed to fall within the list of claims that can be asserted more than ten days after entry of judgment (see below), 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 pretrial pursuant to G.S. 15A-954;
  - the court's ruling was contrary to law with regard to motions or evidentiary rulings;
  - the evidence was insufficient to go to the jury; and
  - the court erred in its jury instructions.
- The verdict is contrary to the weight of the evidence.
- For any other cause the defendant did not receive a fair and impartial trial.
- The sentence is not supported by the evidence.

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.

a. Claims That May Be Asserted after Ten Days. A MAR filed more than ten days after entry of judgment may assert a claim:

(1) That the acts charged did not, at the time they were committed, constitute a violation of criminal law.

(2) That the trial court lacked jurisdiction over the defendant or the subject matter.
(3) That the conviction was obtained in violation of the United States or North Carolina constitutions.
(4) That the defendant was convicted or sentenced under a statute that violated the United States or North Carolina constitutions.
(5) That the conduct for which the defendant was prosecuted was protected by the United States or North Carolina constitutions.
(6) 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.
(7) That the sentence imposed

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

Note that a claim that the sentence is not supported by the evidence must be asserted within ten days of entry of judgment.
(8) That the defendant is confined and is entitled to release because the sentence has been fully served.
(9) Of newly discovered evidence. A motion asserting such a claim must be filed within a reasonable time of its discovery. The statute requires a defendant to allege the discovery of new evidence that was unknown or unavailable at the time of trial and could not with due diligence have been discovered or made available at that time, including recanted testimony. The defendant must show that the evidence has a direct and material bearing upon his or her eligibility for the death penalty or guilt or innocence.

b. **No Outer Limit on Time.** Except for capital cases, if the claim is listed in G.S. 15A-1415 it may be asserted at any time after judgment.

c. **Calculating the Ten-Day Period.** The ten-day period begins to run with entry of judgment, which is when the sentence is pronounced. 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. In capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment. When computing the ten-day period, Saturdays and Sundays are excluded.

B. Motions by the State.

1. Made within Ten Days of Judgment. 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 the State's appeals from district court; G.S. 15A-1445(a) governs the State's appeals from superior court to the appellate division.

2. **Made More Than Ten Days after Judgment.** Once the ten-day period has expired, the State's right to file a MAR is very limited. The State may file a MAR more than ten days after entry of judgment for

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

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

C. **Motions by the Judge.** A judge has the authority to consider a MAR *sua sponte* any time that a defendant would be entitled to relief by way of a MAR. This provision does not authorize action when the error works to the defendant's advantage and any relief would benefit only the State. If the court acts *sua sponte*, it must provide appropriate notice to the parties.

D. **"Consent" MARs.** Occasionally the parties will tell the judge that both sides agree that relief requested in a MAR should be granted. A judge should review such a motion carefully, keeping in mind that he or she is not authorized to grant a MAR unless a valid ground for relief exists.

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. A verdict is the answer of the jury concerning any matter of fact submitted to it. When there is no verdict by the jury—such as when the defendant pleads guilty—a MAR may not be filed until after sentencing. A mistrial is not a verdict within the meaning of the MAR statute.

B. **Capital Cases.** For capital cases in which the trial court judgment was entered after October 1, 1996, there is an outer time limit for the filing of MARs. Unless an extension has been granted or an exception applies, motions in such cases must be filed within 120 days from the latest of a set of events listed in G.S. 15A-1415(a). A claim of newly discovered evidence is not subject to the 120-day time limit imposed on capital MARs. But as discussed above, such a claim must be filed within a reasonable time of its discovery.

C. **Extensions.** For good cause shown, a defendant may be granted an extension of time to file a MAR. The presumptive length of an extension is up to thirty days, but it can be longer if the court finds extraordinary circumstances.

IV. **Pre-Filing Issues.** Discovery issues are discussed in Section VIII. An indigent's right to counsel for a MAR is discussed in Section IX.A. Other pre-filing issues are discussed here.

A. Capital Cases. All requests for (1) appointment of experts made before the filing of a MAR and after a denial by the Office of Indigent Defense Services (IDS) and (2) 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.

B. Requests for Transcripts. Occasionally, an indigent defendant will make a pre-filing request for the transcript of the trial or plea proceeding to help prepare a MAR. 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 fact, the United States Supreme Court has upheld the constitutionality of a federal habeas statute that allowed trial judges to deny free transcripts to indigent petitioners who raise frivolous claims.

V. Judges Empowered to Act.

A. Motions Made More Than Ten Days after Judgment. MARs made by defendants pursuant to G.S. 15A-1415 may be heard and determined by any judge who is empowered to act in criminal matters in the district where judgment was entered. The statute does not address who may hear a MAR made by the State outside of the ten-day window.

B. Motions Made within Ten Days of Judgment. The trial judge may act on a MAR made by a defendant within ten days of judgment even if the judge is in another district and if the judge's commission has expired. If that judge is unavailable to hear the matter because of, for example, retirement or recusal, presumably the matter may be heard by any judge empowered to act in the district where judgment was entered. The statute does not address who may act on MARs filed by the State within the ten-day window.

C. Referral to Trial Judge. When a MAR is made before a judge who did not hear the case, the judge may, if practicable, refer all or a part of the matter to the judge who heard the case.

D. MARs Asserting Certain Sentencing Errors. A MAR asserting that the sentence is not supported by evidence must be made before the sentencing judge.

E. Capital MARs. Capital MARs must be referred to the senior resident superior court judge or his or her designee for review and administrative action, including, as appropriate, dismissal, calendaring for hearing, entry of a scheduling order, or other action.

F. MARs Filed during Appeal

1. **Motions Asserting Claims under G.S. 15A-1415.** When a case is in the appellate division for review, a MAR asserting a ground set out in G.S. 15A-1415 must be made in the appellate division. A case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448 or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not

granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

2. **Motions Made within Ten Days of Judgment.** Defendants' MARs made 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.

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

A. Form of the Motion.

Form of the Motion. A MAR must

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

1. **Oral Motions.** The MAR need not be in writing if 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.
2. **Certification.** If made in superior court by a lawyer, the MAR must contain a required certification. The attorney must certify, in writing, that

    - there is a sound legal basis for the motion and that it is made in good faith,
    - the attorney has notified 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 determined in good-faith that the nature of the relief sought does not require that the trial transcript be read in its entirety.

    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. A motion may not be granted if the lawyer fails to provide the required certification.
3. **Supporting Affidavits.** 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.

B. Service and Filing. G.S. 15A-1420(b1)(1) sets out the rules for filing and service of a MAR. By referencing when the defendant was indicted, that subsection restricts its application to superior court convictions and does not address MARs challenging district court convictions. A separate provision suggests that service for MARs filed in district court must be done pursuant to G.S. 15A-951(c).

C. Amendments. Although a defendant may amend a MAR in certain circumstances, there are no statutory provisions permitting the State to amend. A defendant may amend 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. Additionally,

after a hearing has begun, the defendant may amend to conform the motion to evidence adduced at the hearing or to raise claims based on such evidence.

D. Responses. See section VII.B, regarding a judge's duty to order a response by the State to a defendant's MAR. The party opposing the MAR may file affidavits or other documentary evidence.

VII. Judicial Officials' Duties upon Filing.

A. Clerk's Duties.

1. **Non-Capital Cases.** When receiving a MAR, the clerk must place the motion on the criminal docket and promptly bring the motion (or copy) to the resident judge or any judge holding court in the county or district.
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.

B. Judge's Duties.

1. **Non-Capital Cases.** In non-capital cases, the judge must review the motion and enter an order indicating whether the defendant should be allowed to proceed without the payment of costs, *see* Section IX.B, with respect to the appointment of counsel, *see* Section IX.A, and directing the State, if necessary, to answer. If a hearing is necessary, the judge must calendar the case for hearing without unnecessary delay.
2. **Capital Cases.** In capital cases, the judge must review the motion and enter an order directing the State to file an answer within sixty days of the court's order. As noted above, capital MARs are referred by the clerk to the senior resident superior court judge or his or her designee. The referral is for review and administrative action, including, as appropriate, dismissal, calendaring for hearing, entry of a scheduling order, or other actions. As with all MARs, if a hearing is necessary, the judge must calendar the case for hearing without unnecessary delay.

VIII. Discovery.

A. State's Obligations. The State, to the extent allowed by law, must make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes or the prosecution of the defendant.

B. Protective Orders. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel would not be in the interest of justice, it may submit those portions for court inspection. If 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.

IX. Indigents.

A. Right to Counsel.

1. **Basis of the Right.** The United States Supreme Court has rejected the

argument that defendants have a constitutionally protected right to counsel in post-conviction proceedings, such as MARs. However, North Carolina indigent defendants have a statutory right to counsel in MAR proceedings. Specifically, 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. Additionally, a defendant has a right to be represented by counsel at an evidentiary hearing.

2. **Time to Appoint Counsel.** 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 on the defendant 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.
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 also avoids an inadvertent procedural default because of failing to raise all possible claims in the first MAR.

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

X. **Counsel Issues.** An indigent defendant's statutory right to counsel is discussed above in Section IX.A.

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. 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.

B. **File Sharing.** For defendants represented by counsel in MAR proceedings in superior court, the defendant's prior trial or appellate counsel must make their complete files available to the defendant's MAR counsel. 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.

XI. Procedural Default.

Procedural Default. In order for a court to reach the merits of a defendant's MAR claims, 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, 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.

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

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.
   a. **Specific Exception.** General exceptions that apply to all four of the procedural bar rules are discussed in Section XI.C. Additionally, the statute prescribes a specific exception that applies only to this bar: it does not apply when the previous MAR was made within ten days after entry of judgment or during the pendency of the direct appeal.
2. **Issue Determined in Prior Proceeding.** 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 is the only procedural default rule that applies to both the State and the defendant.
   a. **Specific Exception.** General exceptions that apply to all four of the procedural bar rules are discussed in Section XI.C. Additionally, the statute prescribes a specific exception that applies only to this bar: 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.
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.
   a. **No Bar to Jurisdictional Issues.** This bar does not prohibit a defendant from raising jurisdictional issues that were not raised on appeal.
4. **Failure to Timely File.** A MAR must be denied if a capital defendant failed to timely file a MAR. As discussed above in Section III.B, there is a 120-day filing period for capital MARs. Also as discussed above, the MAR statute allows for extensions and amendments and exempts claims of newly discovered evidence from the 120-filing rule.

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. "Good cause" is defined in G.S. 15A-1419(c); "actual prejudice" is defined in G.S. 15A-1419(d).
2. **Fundamental Miscarriage of Justice.** A defendant will be excused from procedural default if he or she can show that a failure to consider the claim will result in a fundamental miscarriage of justice. "Fundamental

miscarriage of justice" is defined in G.S. 15A-1419(e).

XII. Hearings and Related Issues.

A. Hearing Required Unless MAR Is "Without Merit." Unless the court determines that the MAR is without merit, any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing materials presented. This suggests that the non-movant is entitled to a hearing before a MAR is granted.

B. Evidentiary Hearings. An evidentiary hearing is required only when the trial court cannot rule on the motion without the hearing of evidence. Such a hearing is prohibited when the matter presents only questions of law. In determining whether an evidentiary hearing is required, the trial court must consider the MAR and any supporting or opposing information presented. Although there is no case law on point, it seems reasonable to suggest that to trigger the need for 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; some evidence must be offered to create an issue of fact warranting a hearing.

C. Hearings in Particular Types of Cases. For a discussion about how these rules apply to MARs challenging guilty pleas and to MARs raising claims of ineffective assistance of counsel, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR,* ADMIN. OF JUSTICE BULLETIN No. 2001/04 (UNC School of Government, Oct. 2001) (online at shopping.netsuite.com/s.nl/c.433425/it.I/id.199/.f).

D. Calendaring Hearings. If a hearing is necessary, the judge must calendar it without unnecessary delay. However, when a MAR is made orally, the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or counsel if represented, is not present, the court must provide for adequate notice of the motion and the date of hearing to the opposing party, or counsel if represented.

E. Pre-Hearing Conferences. Upon motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.

F. Presence of the Defendant. The defendant has no statutory right to be present when only issues of law are argued. However, a defendant has a statutory right to be present at an evidentiary hearing. A waiver of this right must be in writing.

G. Counsel. An indigent defendant has a right to appointed counsel, as discussed in Section IX.A. Additionally, all defendants have the right to be represented by counsel at the evidentiary hearing.

H. Rules of Evidence. The rules of evidence apply in an evidentiary hearing on a MAR.

I. Burdens and Standards.

1. **Factual Issues.** The movant bears the burden of establishing the necessary facts by a preponderance of the evidence.
2. **Basis for Relief.** A defendant must show the existence of the asserted ground for relief. 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, the provision that sets forth the required prejudice that must be established in a criminal appeal.

J. Attorney Certification Required for Superior Court Motions. A MAR filed in superior court by a lawyer may not be granted unless the attorney has provided the required certification, discussed above in Section VI.A.2.

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

L. Relief Available. The following relief is available when the court grants a MAR:

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

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

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

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

XIII. The Order.

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

B. 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. 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.

C. **Federal Rights.** 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.

D. **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.

XIV. Appeal.

A. Superior Court Rulings.

1. **Ruling on Defendant's MAR Filed within Ten Days of Judgment.** The grant or denial of relief sought in a MAR filed within ten days after entry of judgment is subject to an appeal regularly taken. Article 91 of G.S. Ch. 15A sets out the grounds and procedure for appeal to the appellate division by the defendant.
2. **Ruling on Defendant's MAR Filed More Than Ten Days after Judgment.** A ruling on a MAR pursuant to G.S. 15A-1415 is subject to review as follows:

   - if the time for appeal from the conviction has not expired, by appeal;
   - if an appeal is pending when the ruling is entered, in that appeal; or
   - if the time for appeal has expired and no appeal is pending, by writ of certiorari.

   Article 91 of G.S. Ch. 15A sets out the grounds and procedure for appeal to the appellate division by the defendant. Rule 21(e) of the North Carolina Rules of Appellate procedure provides that petitions for writ of certiorari to review orders of the trial court denying MARs on grounds listed in G.S. 15A-1415(b) by capital defendants must be filed in the North Carolina Supreme Court. It further provides that in all other cases, petitions must be filed in and determined by the court of appeals, and the supreme court will not entertain petitions for certiorari or petitions for further discretionary review.
3. **Ruling on State's MAR.** The provision in the MAR statute on appeal does not address appeal from a superior court ruling on a MAR filed by the State. 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. 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.

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. In at least one case, the court of appeals rejected the State's attempt to obtain review on a trial court's sua sponte MAR ruling either by appeal or writ of certiorari.

B. District Court Rulings. There is no right to appeal a MAR when the movant is entitled to a trial de novo on appeal. 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. This provision does not address appeal by the State from a district court judge's ruling on a MAR. Possibly the State can obtain relief by writ of certiorari to the superior court.

C. Court of Appeals Rulings. Decisions of the court of appeals on MARs under G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion or otherwise. 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." State v. Ellis, 361 N.C. 200 (2007). Other MAR rulings by the court of appeals are reviewable by writ of certiorari to the North Carolina Supreme Court.

XV. Relationship to Other Proceedings.

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

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

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. 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.

Appendix C: Sample Discovery Order on RJA Motion

STATE OF NORTH CAROLINA IN THE GENRAL COURT OF JUSTICE

WAKE COUNTY 08-CRS-76922

08-CRS-76923

)

STATE OF NORTH CAROLINA)

) ORDER on DEFENDANT'S

V.) MOTIONS for DISCOVERY on

) RACIAL JUSTICE ACT

ARMOND DEVEGA,)

Defendant)

This matter came on for hearing before the Honorable James Hardin on January 28, 2010, a regularly scheduled session of Wake County Superior Court. That based on the Court's review of the entire file, articles cited, materials presented, and arguments of counsel the Court makes the following:

FINDINGS OF FACT

1. That the State is present and represented by Howard Cummings and Matthew Lively.

2. That the Defendant is present along with his counsel Terry Alford and Philip Lane.

3. That on December 17th, 2009, Judge Stephens heard a motion by Defendant's counsel to re-open the Rule 24 hearing in light of the recently enacted legislation addressing the Racial Justice Act.

4. Judge Stephens declared the Rule 24 re-opened in light of the Racial Justice Act and deemed the motions timely filed and properly before the Court.

5. The Court then made inquiry as to the State's position on whether it intended to proceed capitally against Defendant and the State stated its intention was to proceed capitally.

6. That this Court defers to Judge Stephens' prior ruling in this matter.

7. That the motions before the Court have been properly and timely filed and this Court has jurisdiction over the parties and the subject matter.

8. That all parties have had due and adequate notice of these proceedings.

9. That in August 2009, the North Carolina Legislature passed and the Governor signed into law legislation known as the Racial Justice Act.

10. That the Defendant has made a request for materials as set out in his motion from the year 2000 until present.

11. That the State estimates that it has prosecuted 300 cases with a First Degree Murder charge since the year 2000 with varying dispositions.

12. That the State has a page with "bullet points" that it considers in making a determination in whether to seek the death penalty or not.

13. That the prosecutor must file a written report to the District Attorney addressing each "bullet point" when he or she decides not to seek the death penalty in the respective case.

14. That these reports are not a part of the actual client's file but are kept in Mr. Willoughby's office.

<u>CONCLUSIONS OF LAW</u>

15. That all parties are present and represented by their respective counsel.

16. That the Court has jurisdiction over the parties and this subject matter before this court.

17. That the Court has heard evidence from the State and by Defendant's counsel on matters relating to a Motion for Discovery pursuant to legislation recently enacted by the North Carolina Legislature relating to the Racial Justice Act.

THEREFORE, based upon the evidence presented, arguments of counsel, the Court hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the State shall cause a request to be made of the Administrative Office of the Court requesting:
    a. A list of all defendants who have been charged on warrant with Murder since 2000.
    b. A list of all named defendants who have been indicted for Murder since 2000.
    c. A disposition list of each defendant charged on those warrants as to whether the defendant was convicted and received a sentence of life without parole or a death penalty.
2. That once the lists are received by the State, these lists shall be delivered to the Defendant in a reasonable time.
3. Once the lists are received by Defendant, the Clerk shall make available to Defendant's counsel and their assistants, all the clerk's files, transcripts, and other public records housed in the custody of the clerk of Court in Wake County so that they can make an initial review of whether additional information is required.
4. To the extent that the files and trial transcripts are not contained in the various clerk's files or individually named defendant's file the DA will review its files and determine whether it has available trial transcripts; if it does those transcripts shall be made available and accessible to the Defendant.

5. The Defendant shall make available to the District Attorney a list of those files where trial transcripts are not available in the various clerk's files.
6. That a blank copy of the page, not relating to a particular case, containing the "bullet points" shall be delivered to the Defendant.
7. The Court will defer the delivery of the criteria for each case identified in Mr. Willoughby's file until and only if the defendant makes an initial showing that there has been statistical racial bias in this district; the Court does Order that the State deliver to the Defendant a copy of the policy regardless of the form and how the policy relates to the States' decision making as it relates to seeking the death penalty.
8. The request for the race of each employee of the District Attorney's office is denied.
9. That the items requested in paragraph B of the Defendant's motion have been addressed in paragraphs 1 through 7 of this Order.
10. Defendant's request for programs designed to eliminate race as a factor in seeking or imposing the death penalty is denied as the District Attorney indicates that there is no such policy.
11. Defendant's request for a description of any lawsuits against the District Attorney's office since he was elected claiming racial discrimination with regard to hiring, promotion or retention is denied.
12. In the Court's discretion, the Court denies the Defendant's request for records of victim's compensation fund showing the name and race of each person who received an award for the death of a murder victim.
13. The Court recommends that the State provide these materials to the Defendant as early as possible.

14. The Court shall reconvene for a status conference in 90 days from the day the Defendant receives the list previously identified in paragraph 1 a-c.

15. That the Court recommends and requests that a room be made available to the Defendant's counsel and their assistants in order to review these files, copy, and that the Defendant may have a scanner in the room and may scan whatever is necessary to comply with this Order.

16. That the Court orders that the Defendant's attorneys may have assistance in going through and scanning the court files; one of the Defendant's attorneys must be present to supervise the process.

17. That the Defendant made an exception to the ruling of the Court.

So ordered, this the _____ day of February, 2010

____
The Honorable James E. Hardin, Jr.
Superior Court Judge Presiding