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# TWO ISSUES IN MAR PROCEDURE: HEARINGS AND SHOWING REQUIRED TO SUCCEED ON A MAR

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In North Carolina, the motion for appropriate relief (MAR) is a single, unified post-trial procedure for raising errors made during a criminal trial.[1] Both defendants and the state are permitted to file MARs.[2] Although some time restrictions apply to the types of claims that a party can raise in a MAR,[3] a timely motion can assert "any error."[4] While most MARs are filed in trial court, sometimes they must be filed in the appellate division.[5]

One procedural issue that arises in connection with MARs is whether they can be resolved on the filed papers or whether hearings are necessary or required. This bulletin addresses that issue, setting out the law governing when a hearing is required on a MAR and discussing the related issue of the showing the movant must make to succeed on a MAR. These issues are related because a MAR will be denied without a hearing when it is "without merit"[6] and a determination of whether a MAR is without merit requires consideration of the showing required to succeed on a MAR.

# I. Hearings on MARs

## A. When Required

Section 15A-1420 of the North Carolina General Statutes (hereinafter G.S.) sets out the basic procedural rules for MAR proceedings. Subsection (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." 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: (1) there are no disputed facts and the claim must fail as a matter of law;[7] (2) 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;[8] (3) defendant

1. *See* Official Commentary to Chapter 15A, Article 89 of the North Carolina General Statutes (hereinafter G.S.) ("The [MAR] . . . provides a single, unified procedure for raising . . . errors which are asserted to have been made during the trial.").

2. *See* G.S. 15A-1414 (MARs by defendants); G.S. 15A-1415 (MARs by defendants); G.S. 15A-1416 (MARs by the state).

3. *See* G.S. 15A-1415; G.S. 15A-1416.

4. *See* G.S. 15A-1414 (defendant's MAR filed after verdict and within 10 days of entry of judgment may assert "any error"); G.S. 15A-1416 (state's MAR filed after verdict and within 10 days of entry of judgment may assert "any error").

5. *See* G.S. 15A-1413 (trial judges empowered to act on a MAR); G.S. 15A-1420 (MAR procedure); G.S. 15A-1418 (MARs in the appellate division).

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

7. *See* State v. McHone, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (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, 501 S.E.2d 665, 670–71 (1998) (holding that defendant was not entitled to a hearing when the legal basis of his MAR was without merit).

8. *See McHone*, 348 N.C. at 257–58, 499 S.E.2d at 763 ("[W]here facts are in dispute but the trial court can

cannot establish the requisite prejudice even if he or she can establish the asserted ground for relief;[9] or (4) the harmless error standard governs and the error, even if established, is harmless beyond a reasonable doubt.[10]

The statutory language leaves open the possibility that a MAR also is without merit within the meaning of G.S. 15A-1420(c)(1) when it fails for procedural reasons. There is no North Carolina case law on this issue. Among the possible reasons a MAR could fail on procedural grounds are: (1) procedural default;[11] (2) improper form;[12] (3) improper service;[13] (4) improper filing;[14] and (5) failure to include the requisite supporting affidavits or documentary evidence.[15]

#### 1. Hearings before Granting MARs

G.S. 15A-1420(c)(1) provides that "[a]ny party is entitled to a hearing on questions of law . . . unless the court determines that the motion is without merit." This language suggests that a party is entitled to a hearing even when the court concludes on the basis of the filings that the MAR must prevail. Put another way, it appears that a nonmovant is entitled to be heard before the court grants a MAR.

#### 2. Evidentiary Hearings

Two general rules derive from the MAR statute regarding when an evidentiary hearing is required. First, an evidentiary hearing is not required when the MAR cannot pass the threshold G.S. 15A-1420(c)(1) requirement that it not be without merit. Second, even if the MAR passes the threshold test, an evidentiary hearing may not be required or even permitted. Under the MAR statute, an evidentiary hearing is required only when the court cannot rule on the motion "without the hearing of evidence."[16] The statute provides the following additional guidance: (1) in determining whether an evidentiary hearing is required "to resolve questions of fact," the court must consider the MAR and any supporting or opposing information presented;[17] (2) although an evidentiary hearing is not required for a MAR made pursuant to G.S. 15A-1414,[18] an evidentiary hearing may be held for such a motion if "appropriate to resolve questions of fact;"[19] and (3) an evidentiary hearing may not be held when the MAR and supporting and opposing information present only questions of law.[20]

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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.").

9. *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 infra* § IIA2a, c (discussing the requisite prejudice in more detail).

10. *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, infra* § IIA2b (discussing the harmless error standard in more detail).

11. *See* G.S. 15A-1419 (setting out procedural default rules); *see also* Jessica Smith, *Procedural Default in State and Federal Post-Conviction Proceedings*, IOG Administration of Justice Bulletin No. 2001/01 (2001) (discussing procedural default rules in detail).

12. *See* G.S. 15A-1420(a)(1) (setting forth requirements for form).

13. *See* G.S. 15A-1420(a)(2) (setting forth requirements for service).

14. *See* G.S. 15A-1420(a)(3) (setting forth requirements for filing).

15. *See* G.S. 15A-1420(b)(1) (setting forth requirements for supporting affidavits and other documentary evidence).

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

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

18. G.S. 15A-1414 pertains to MARs by defendants filed after verdict but not more than 10 days after entry of judgment. These MARs are considered by the judge who tried the case. *See* G.S. 15A-1413(b).

19. G.S. 15A-1420(c)(2); *see McHone*, 348 N.C. at 258, 499 S.E.2d at 763 (stating that an evidentiary hearing is not required if the MAR is made pursuant to G.S. 15A-1414); State v. Essick, 67 N.C. App. 697, 702–03, 314 S.E.2d 268, 272 (1984) (holding that when the MAR is made pursuant to G.S. 15A-1414, an evidentiary hearing is not required).

20. *See* G.S. 15A-1420(c)(3); *McHone*, 348 N.C. at 257, 499 S.E.2d at 763 ("when a [MAR] presents only questions of law, . . . the trial court must determine the motion without an evidentiary hearing"); State v. Holden, 106 N.C. App. 244, 248, 416 S.E.2d 415, 418 (1992) ("Here the only question to be decided by the trial court was whether it had properly excluded the Rule 412(b)(2) evidence, a question of law . . . . Because only a question of law was involved, a hearing was not required."); *Essick*, 67 N.C. App. at 702–03, 314 S.E.2d at 272 (hearing not required "when only questions of law arise"); State v. Bush, 307 N.C. 152, 166–67, 297 S.E.2d 563, 572–73 (1982) ("As defendant's petition presented only questions of law arising from the record of his original trial for the Superior Court's determination, the Superior Court was required to determine the motion without an evidentiary hearing."), *habeas corpus granted on other grounds*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

Thus, once it has been determined that the MAR is not without merit, the inquiry of whether to hold an evidentiary hearing focuses on whether there is a disputed question of fact. 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 MAR case has held that bare allegations are not enough to establish the need for an evidentiary hearing;[21] some evidence must be offered to create an issue of fact warranting a hearing.[22]

**a. Evidentiary Hearings in Particular Types of Cases**

Having stated the general rules regarding evidentiary hearings, this bulletin now examines their application in two common categories of MAR cases: MARs challenging guilty pleas and MARs alleging ineffective assistance of counsel (IAC).

**i. MARs Challenging Guilty Pleas**

**(1) Effect of a Guilty Plea; Claims that Survive a Plea**

As a general rule, a defendant who voluntarily and intelligently enters an unconditional guilty plea waives all defects in the proceeding, including constitutional violations that occurred before entry of the plea.[23] One exception to this rule is that such a defendant is not precluded from challenging "the power of the state" to bring him or her into court to answer the charge.[24] Under this exception, a defendant who has pleaded guilty is not barred from contending that the indictment failed to state an offense or that the statute under which he or she was charged is unconstitutional.[25] In North Carolina, another exception exists for appeals from an adverse ruling in a pretrial suppression hearing.[26] The only other challenges that survive an

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21. *See* State v. Aiken, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (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").

22. Some evidence must be offered in support of a MAR made after entry of judgment or it fails for lack of supporting affidavits. *See* G.S. 15A-1420(b)(1) (MAR made after the entry of judgment "must be supported by affidavit or other documentary evidence if based upon . . . facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.").

Applying the standard for an evidentiary hearing in 28 U.S.C. § 2255 (the federal provision on collateral attacks by federal prisoners), at least one federal appellate court has held that self-serving and contradictory affidavits are not enough to entitle a defendant to an evidentiary hearing. *See* Holloway v. United States, 960 F.2d 1348, 1358 (8th Cir. 1992) (affirming district court's denial, without an evidentiary hearing, of defendant's claim that counsel was ineffective by failing to file an appeal; concluding that "the fact that [defendant] has managed to make a single, self-serving, self-contradicting statement is insufficient to render the motion, files, and records of this case inconclusive on the question of whether [defendant] instructed his counsel to appeal"); Kingsberry v. United States, 202 F.3d 1030, 1033 (8th Cir. 2000) (citing *Holloway* and holding that trial court did not abuse discretion in denying, without an evidentiary hearing, defendant's claim that counsel was ineffective regarding plea offer by advising him inaccurately as to sentence exposure and classification as career offender when "the veracity of [defendant's] own supporting affidavits can be challenged as they recite inconsistent facts regarding the substance of the alleged plea agreement offer"), *cert. denied*, 531 U.S. 829 (2000). A hearing on a motion pursuant to 28 U.S.C. § 2255 must be granted "[u]nless the motion and the files and records of the case conclusively show" that the petitioner is not entitled to relief.

23. *See* State v. Reynolds, 298 N.C. 380, 395, 259 S.E.2d 843, 852 (1979) (" 'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea' ") (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)); *see also* CHARLES ALAN WRIGHT, 1A FEDERAL PRACTICE & PROCEDURE § 175, 3d ed. (1999) ("A valid and unconditional plea of guilty waives all non-jurisdictional defects in the proceeding. It even bars the later assertion of constitutional challenges in the pretrial proceedings.") (footnote omitted).

24. *See* Blackledge v. Perry, 417 U.S. 21, 30 (1974); *Reynolds*, 298 N.C. at 395, 259 S.E.2d at 852 (discussing *Perry*).

25. *See* 1A FEDERAL PRACTICE & PROCEDURE *supra* n.23 § 175 (also noting that a defendant who has pleaded guilty may raise a claim that the prosecution is barred by double jeopardy if the defect appears on the face of the indictment). The scope of the power of the state exception is far from clear. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, 5 CRIMINAL PROCEDURE § 21.6(a) (2d. ed. 1999) (discussing possible interpretations of the power of the state test).

26. *See Reynolds*, 298 N.C. at 395–96, 259 S.E.2d at 852 (noting that a defendant who gives proper notice may

unconditional guilty plea are those going to the voluntary and intelligent nature of the plea, including those that allege IAC in relation to it.[27]

In *Brady v. United States,*[28] the United States Supreme Court adopted the following standard for voluntariness of a guilty plea, first articulated by Judge Tuttle of the United States Court of Appeals for the Fifth Circuit:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[29]

The *Brady* Court indicated that a plea is intelligent when the defendant is made aware of the nature of the charges, is not incompetent or otherwise not in control of his or her mental faculties, and is advised by competent counsel.[30] While *Brady* suggests that IAC goes to the intelligent nature of the plea, other decisions suggest that it goes to voluntariness.[31] Regardless of how IAC claims are characterized, it is clear that when the alleged ineffectiveness pertains to the plea, an IAC claim is not extinguished by entry of the plea.[32]

#### (2) Evidentiary Hearings on Claims that Plea was Not Intelligent and Voluntary

This section discusses when evidentiary hearings are required for MARs that challenge guilty pleas on grounds they were not intelligently and voluntarily made. The section that follows discusses evidentiary hearings for MARs asserting IAC and includes a discussion of when such hearings are required for MARs challenging guilty pleas on grounds of IAC.

When a MAR challenges a guilty plea on grounds it was not intelligently and voluntarily made, an evidentiary hearing rarely will be warranted when the trial court scrupulously followed the procedures for taking guilty pleas[33] and the record of the plea hearing is unambiguous on the relevant issue. This rule stems from two North Carolina cases: *Blackledge v. Allison*,[34] decided by the United States Supreme Court, and *State v. Dickens*,[35] decided by the North Carolina Supreme Court.

In *Blackledge v. Allison*, the defendant pleaded guilty to attempted safe robbery in North Carolina state court. The minimum sentence for the offense was ten years; the maximum was life. The defendant's plea was taken prior to North Carolina's enactment in 1973 of a comprehensive set of procedures governing dispositions by guilty plea and plea agreement. Pursuant to the procedures then in effect, the judge read a set of questions from a printed form concerning the defendant's understanding of the charge, its consequences, and the voluntariness of his plea. The court clerk transcribed the defendant's "yes" or "no" responses on a copy of the form that the defendant then signed. Among the questions posed were the following: "Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum [*sic*] of 10 years to life?" and "Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat[s] to you to influence you to plead guilty in this case?" Defendant answered the first question in the affirmative and the second in the negative. The record did not indicate whether any inquiry was made of the prosecutor or defense counsel. The trial judge accepted the plea. Three days later, at a

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appeal the denial of a suppression motion under G.S. 15A-979(b)).

27. *See* State v. Loye, 56 N.C. App. 501, 502, 289 S.E.2d 860, 861 (1982) ("A defendant is entitled to collaterally attack a judgment entered on his guilty plea, on the grounds that it was not voluntarily and knowingly given.") (citing Blackledge v. Allison, 431 U.S. 63 (1977)). *See generally* Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea must be knowing and voluntary).

28. 397 U.S. 742 (1970).

29. *Id*. at 755.

30. *See id*. at 756.

31. *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice [was competent].").

32. *See id.; Loye*, 56 N.C. App. at 504, 289 S.E.2d at 863 (ordering, over a dissent, a new trial on claim that defendant who pled guilty was denied effective assistance of counsel because of counsel's conflict of interest); State v. Goforth, 130 N.C. App. 603, 603–06, 503 S.E.2d 676, 677–79 (1998) (considering defendant's claim that counsel was ineffective by erroneously informing her that she could appeal her sentence but rejecting the claim on grounds that defendant had not established prejudice required under the second prong of the *Strickland* test).

33. The procedures for taking guilty pleas in superior court are set forth in G.S. Ch. 15A, Art. 58.

34. 431 U.S. 63 (1977).

35. 299 N.C. 76, 261 S.E.2d 183 (1980).

sentencing hearing, of which there was no record, the defendant was sentenced to seventeen to twenty-one years in prison. Subsequently, the defendant filed a petition for writ of habeas corpus in federal district court alleging that his lawyer told him that he had discussed the case with the judge and the solicitor and that if the defendant would plead guilty, he would get a ten-year sentence. The defendant alleged that a third party witnessed his lawyer's statements and that his lawyer told him to answer the judge's questions so that his guilty plea would be accepted.

The federal district court rejected the defendant's petition, finding that the printed plea form "conclusively" showed that the defendant was "carefully examined" by the court before the plea was accepted and therefore "must stand."[36] After a motion for reconsideration was denied, the defendant appealed. The United States Court of Appeals for the Fourth Circuit reversed and remanded for an evidentiary hearing, finding that the defendant's claim was not foreclosed by his responses at the plea proceedings. The United States Supreme Court affirmed.

In an opinion written by Justice Stewart, the Court acknowledged that

> the representations of the defendant, his lawyer, and the prosecutor at . . . a [plea] hearing, as well as any findings made by the judge accepting the plea, constitute a *formidable barrier* in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.[37]

The Court noted, however, that "the barrier of the plea . . . proceeding record, although imposing, is not invariably insurmountable."[38] The Court refused to adopt a per se rule that would prevent defendants from ever challenging the constitutionality of their guilty pleas.[39]

Assessing the defendant's allegations in the case before it, the Court concluded that when considered in light of the record of the plea, the allegations were not so "palpably incredible" or "patently frivolous or false" as to warrant summary dismissal.[40] The Court found it significant that in addition to alleging that his plea was induced by a broken promise, the defendant elaborated with specific factual allegations including the exact terms of the promise, when, where, and by whom it was made, and the identity of one witness to its communication.[41] Considering the record, the Court noted that no transcript of the plea was made, the only record of the proceeding was a standard form, there was no way of knowing whether the judge deviated from the text of the form, the record was silent as to what statements the defendant, his lawyer, or the prosecutor might have made regarding promised sentencing concessions, there was no record of the sentencing proceeding, the form questions did not inform the defendant that plea bargaining was a legitimate practice that could be freely disclosed, and neither lawyer was asked to disclose any agreement or promise that had been made.[42] Thus, the Court concluded, the process did nothing to dispel the defendant's belief that any bargain struck must remain a secret.[43]

Significantly, the Court noted that after the defendant's plea was taken, North Carolina revised its plea bargaining procedures "to prevent the very kind of problem" presented.[44] It noted that under the new procedures, plea bargaining is expressly legitimate and the judge must inform the defendant that courts have approved plea bargaining.[45] Also, specific inquiry about whether a plea bargain has been struck is made of the defendant, his or her counsel, and the prosecutor, and the proceeding is transcribed verbatim.[46] Significantly, the Court went on to state:

> [A] petitioner challenging a plea given pursuant to procedures like those now mandated in North Carolina will necessarily b[e] asserting that not only his own transcribed responses, but those given by two lawyers, were untruthful. Especially as it becomes routine for prosecutors and defense lawyers to acknowledge that plea bargains have been made, *such*

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36. 431 U.S. at 70.
37. *Id.* at 73–74 (emphasis added).
38. *Id.* at 74.
39. *See id.* at 75 ("the federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment").
40. *Id.* at 76 (quotation omitted).
41. *See id.* at 75–76.
42. *See id.* at 77.
43. *See id.*
44. *Id.* at 79.
45. *See id.*
46. *See id.*

> *a contention will entitle a petitioner to an evidentiary hearing only in the most extraordinary circumstances*.[47]

The Court recognized that allowing "indiscriminate" hearings in post-conviction proceedings would eliminate the "chief virtues" of the plea system: speed, economy, and finality.[48]

*Blackledge* was a federal case interpreting the standard for evidentiary hearings for writs of habeas corpus.[49] Three years after *Blackledge* was decided, the North Carolina Supreme Court relied on it to interpret the standard for evidentiary hearings in North Carolina's MAR statute. In *State v. Dickens*,[50] the defendant pleaded guilty to eight counts of issuing worthless checks. Before accepting the defendant's pleas, the trial court posed certain questions to him and, based on his answers, found that there was a factual basis for entry of the pleas, that the defendant was satisfied with his counsel, and that the pleas were made freely, voluntarily, and understandingly. The court then entered judgment and sentenced the defendant to prison. Subsequently, the defendant moved for leave to withdraw his guilty pleas asserting that when he pleaded guilty, he did so on the understanding that a plea bargain had been made and that his punishment would be payment of a fine and restitution, not prison. The defendant acknowledged his statements to the contrary at the plea proceeding, but alleged that he was told to say that no one made him any promises inducing him to enter the plea.[51] The trial court denied the defendant's motion, and the defendant appealed. The court of appeals affirmed. When the case came to the North Carolina Supreme Court, the court treated the defendant's motion as a MAR.

Reviewing the record of the plea hearing, the North Carolina Supreme Court found it "deficient." Specifically, the court noted that (1) the defendant had not given written answers to two pertinent questions;[52] (2) the record did not indicate whether the defendant, his counsel, or the prosecutor ever stated, in response to mandatory inquiries from the court prior to the taking of the guilty pleas, that no plea bargains had been made or discussed with defendant; and (3) the record on appeal did not include a verbatim record of the plea proceedings. Given the deficient state of the record, the court concluded that a question of fact existed as to whether the defendant's guilty pleas were tendered under the misapprehension that a plea bargain had been made with respect to sentence, thus warranting an evidentiary hearing.

The Court went on to note that North Carolina had recently revised its plea bargaining procedures. It observed that if the new procedures are followed, "only in a rare case will there be merit in a defendant's post-conviction claim that his plea of guilty was not knowingly and voluntarily made."[53] Citing *Blackledge*, it added: "in most cases reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing."[54] The court admonished, however, that regardless of whether evidentiary hearings are held, "the importance of protecting the innocent and insuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts."[55]

*Dickens* and *Blackledge* make clear that when the trial court follows proper plea procedures and the transcript of the plea proceeding is unambiguous on the relevant issue, a defendant challenging the plea will be entitled to an evidentiary hearing "only in the most extraordinary circumstances."[56] Put in the framework of the general rules set forth above governing when hearings are required in MAR proceedings, *Dickens* and *Blackledge* teach that when the trial court follows plea procedures and the record of the proceeding is unambiguous, a defendant will face a formidable barrier in establishing the merits of his or her claim and

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47. *Id.* at 80 n.19 (emphasis added).

48. *Id.* at 71.

49. The *Blackledge* Court noted that the standard for evidentiary hearings on writs of habeas corpus is the same as the one applicable to motions pursuant to 28 U.S.C. § 2255 (counterpart to writ of habeas corpus for federal prisoners). *See id.* at 74 & n.4 (noting that the remedy under § 2255 is meant to be "exactly commensurate" with the federal habeas corpus remedy) (quotation omitted).

50. 299 N.C. 76, 261 S.E.2d 183 (1980).

51. *See id.* 299 N.C. at 76, 261 S.E.2d at 185.

52. Question 10 in the Transcript of Plea form read: "Have you agreed to plead as part of a plea bargain? Before you answer, I advise you that the courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval." Question 7 asked, in part: "Do you understand that upon your plea you could be imprisoned for a maximum of 2 years 4 months?" The defendant did not give a written answer to either of these questions.

53. *Dickens*, 299 N.C. at 84, 261 S.E.2d at 188.

54. *Id.* (citing *Blackledge*, 431 U.S. at 80–81).

55. *Id.* (quotation omitted).

56. *Blackledge*, 431 U.S. at 80 n.19.

will be granted an evidentiary hearing only in the most extraordinary circumstances.

What circumstances qualify as "extraordinary" have yet to be clarified by the North Carolina appellate courts. One federal court of appeals has held that in order to overcome the formidable barrier of an unambiguous plea transcript and obtain a hearing under 28 U.S.C. § 2255, there must be some independent indicia of the likely merit of a defendant's allegations, such as one or more affidavits from reliable third parties.[57]

*Dickens* and *Blackledge* also make clear—and in fact illustrate—that when the transcript of the plea proceeding is ambiguous or otherwise "deficient,"[58] the "formidable barrier"[59] is removed. In these situations, a defendant is entitled to an evidentiary hearing unless the MAR claims are "so patently false or frivolous as to warrant summary dismissal."[60]

One question that arises is whether the decision about holding an evidentiary hearing on a MAR that challenges a guilty plea may be made based on the written Transcript of Plea form[61] or whether the verbatim transcript of the plea proceeding must be obtained and consulted. The answer is unclear. On the one hand, the key language in *Dickens* references the verbatim record of the guilty plea proceedings.[62] On the other hand, reference to the verbatim record of the plea proceedings was necessary in *Dickens* because the Transcript of Plea form was incomplete and did not reflect the nature of the representations, if any, made by the defendant, his attorney, or the prosecutor in response to inquiries by the court as to whether any plea bargains had been made. When the form has been properly completed and the defendant does not indicate that it fails to accurately or fully reflect what occurred at the plea proceedings, reference to the verbatim transcript may not be necessary. Practical considerations associated with obtaining the verbatim transcript for every MAR that challenges a guilty plea support this view. The issue, however, remains to be decided.

*State v. Hardison*[63] should not be read as undermining these principles. In *Hardison*, a case decided after *Blackledge* and *Dickens* but not mentioning them, the North Carolina Court of Appeals reversed and remanded when the trial court had denied the defendant's MAR without an evidentiary hearing. In *Hardison*, the defendant's MAR asserted two claims. First, that his attorney had a conflict of interest that deprived him of effective assistance of counsel. Second, that the guilty plea was invalid because it was not freely, voluntarily, and understandingly made. On the second claim, the defendant alleged that he was induced by his attorney, the prosecutor, an SBI agent, and a codefendant's attorney to enter guilty pleas to the charges against him with promises that he would not be sentenced to more than twenty years in prison. The defendant was sentenced to serve a term of life plus twenty years imprisonment.

Addressing the conflict of interest claim, the court of appeals noted that at the trial level proceedings, the defendant was asked about and indicated his satisfaction with his attorney's representation. However, the court also noted that subsequent comments by the defendant's counsel revealed a potential conflict of interest. Specifically, the defendant's counsel revealed that he was in an "awkward position" because he "ha[d] been personal friends" with the victims "for probably fifty years." The court concluded that because the record was silent as to whether the trial judge engaged in any further questioning of counsel or the defendant regarding the potential conflict once it had been revealed, it erred in denying the defendant's MAR without an evidentiary hearing. In *Hardison*, the record was not unambiguous on the issue of effective assistance of counsel; the record revealed that the defendant's own counsel had raised the issue of conflict of interest. Additionally, the court found that the MAR "raised issues of fact with sufficient particularity to merit an evidentiary hearing."[64] This holding is consistent with the principles suggested above: when the record of the plea proceeding is ambiguous and a defendant's

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57. *See* United States v. Cervantes, 132 F.3d 1106, 1110 (5th Cir. 1998) (district court did not err in dismissing 28 U.S.C. § 2255 motion without conducting an evidentiary hearing). *But see* State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997) (not citing or mentioning *Blackledge* or *Dickens* and holding that an evidentiary hearing was required on claim of secret plea agreement when there appeared to be no independent indicia of the likely merit of the claim).

The standard for a hearing under 28 U.S.C. § 2255 is the same as that for federal writs of habeas corpus. *See supra* n.49.

58. *Dickens*, 299 N.C. at 83, 261 S.E.2d at 187.

59. *Blackledge*, 431 U.S. at 74.

60. *Id.* at 78 (quotation omitted).

61. *See* AOC-CR-300 (2/2000).

62. *See* Dickens, 299 N.C. at 84, 261 S.E.2d at 188 ("Thus, in most cases references to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion . . . and will permit a trial judge to dispose of such a motion without holding an evidentiary hearing.")

63. 126 N.C. App. 52, 483 S.E.2d 459 (1997).

64. 126 N.C. App. at 54, 483 S.E.2d at 460.

allegations are not patently frivolous or false, a hearing is warranted.

The *Hardison* court then held that the defendant's claim that his plea was not freely, voluntarily, and understandingly made warranted a hearing as well. The court found the facts "strikingly similar"[65] to those in *State v. Mercer*.[66] In *Mercer*, the defendant filed a MAR challenging his plea on grounds it was not voluntarily and intelligently entered. The trial judge held an evidentiary hearing and rejected the defendant's claim. The defendant appealed and the North Carolina Court of Appeals found the trial court's findings insufficient. Specifically, it found that the trial court failed to make any findings of fact assessing the credibility of, or resolving conflicts in, the evidence as presented at the evidentiary hearing and that, therefore, it could not determine the propriety of the trial court's conclusion regarding voluntariness. The court reversed and remanded for further findings of fact.

The *Hardison* court cited *Mercer* for the proposition that an evidentiary hearing was warranted. Although an evidentiary hearing was held in *Mercer*, that aspect of the case was not challenged or reviewed on appeal. *Mercer* involved a review of a trial court's findings and conclusions after an evidentiary hearing; it did not involve a review of the trial court's decision to hold the evidentiary hearing. Thus, *Mercer* was not dispositive of the issue before the *Hardison* court. Also, *Hardison* was not strikingly similar to *Mercer*. In *Mercer*, the defendant presented independent evidence to support his claim that he had a secret plea agreement. In *Hardison*, the court did not point to any evidence supporting the defendant's allegation of a secret agreement that induced his plea.[67]

The *Hardison* court's final comments regarding the defendant's guilty plea claim are significant. Specifically, the court noted that the trial court "summarily concluded that the silence of the transcript of the plea regarding any secret plea arrangement was dispositive and that defendant's plea was freely, voluntarily, and understandingly made" and that it treated the defendant's "serious allegations in a cursory manner."[68] Thus, the real problem in *Hardison* with respect to the secret plea agreement claim may have been that the trial court treated the unambiguous transcript as dispositive—not as a formidable barrier but as a per se, insurmountable one—a strategy expressly rejected by the *Blackledge* Court.[69] Additionally, *Hardison*'s comments regarding the cursory treatment given to the claim suggest that a summary disposition of a MAR challenging the validity of a guilty plea will not suffice and that some explanation as to reasoning is required. Such a suggestion is consistent with *Dickens*'s admonition that "the importance of protecting the innocent and insuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts."[70]

#### ii. MARs Alleging Ineffective Assistance of Counsel

MARs asserting ineffective assistance of counsel (IAC) claims may present difficult questions regarding whether an evidentiary hearing is necessary. This section discusses those difficulties.

##### (1) The IAC Standard

To establish IAC, the defendant must satisfy the two-part test set forth by the United States Supreme Court in *Strickland v. Washington*,[71] and adopted by the North Carolina Supreme Court in *State v. Braswell*.[72] Under that test, a defendant must first show that counsel's performance was "deficient."[73] This prong of the test requires a showing that counsel's performance fell below an objective standard of reasonableness.[74] Second, a defendant must show that

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65. 126 N.C. App. at 57, 483 S.E.2d at 462.

66. 84 N.C. App. 623, 353 S.E. 2d 682 (1987).

67. In *Hardison*, the plea transcript was unambiguous on the issue of whether there was a secret plea agreement. The defendant signed a standard transcript of plea, the defendant was thoroughly questioned by the trial court regarding whether the plea was the product of the defendant's informed choice, the defendant indicated that he had not agreed to plead guilty as part of any plea arrangement or as a result of any promises or threats, and the court entered an order finding that the plea was entered knowingly and voluntarily. Thus, it may be argued that *Hardison* illustrates extraordinary circumstances that can overcome the formidable barrier of the plea agreement. Given that *Hardison* did not even cite *Blackledge* or *Dickens* or otherwise acknowledge the governing legal standard, it is difficult to accept the suggestion that the case meant to so decide this issue of first impression.

68. *Hardison*, 126 N.C. App. at 57, 483 S.E.2d at 462 (quotation omitted).

69. *See Blackledge*, 431 U.S. at 75.

70. *Dickens*, 299 N.C. at 84, 261 S.E.2d at 188 (quotation omitted).

71. 466 U.S. 668 (1984).

72. 312 N.C. 553, 324 S.E.2d 241 (1985).

73. *Strickland*, 466 U.S. at 687.

74. *Id*. at 687–88. The Supreme Court recently clarified that "[t]he relevant question [under this inquiry] is not whether counsel's choices were strategic, but whether they

the deficient performance prejudiced the defense.[75] When an IAC claim is raised after a jury trial, the second prong of the test requires a defendant to show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[76] This has been interpreted to mean that an error "does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."[77] When an IAC claim is raised after a guilty plea, the second prong of the test requires a defendant to show that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial."[78] While a defendant must allege that but for counsel's deficient performance he or she would not have pleaded guilty,[79] a "mere allegation" by a defendant to that effect is not enough.[80]

When applying the *Strickland* analysis, the court does not engage in hindsight.[81] Additionally, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[82] Finally, if the court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different or that a defendant would not have pleaded guilty, it need not determine whether counsel's performance was actually deficient. In other words, it is permissible for a court to resolve IAC claims by first addressing the prejudice prong of the IAC analysis.[83]

#### (2) Step One: Determine If the Claim Is without Merit

When determining whether an evidentiary hearing is required for a MAR alleging IAC, a preliminary determination should be made as to whether the claim is without merit.[84] In making this determination, the court should evaluate the substantive basis of the claim vis-à-vis the *Strickland* test.[85] When a claim arises under the federal constitution, the court normally goes on to consider whether it is without merit because any error that occurred was harmless beyond a reasonable doubt.[86] As discussed below, controlling case law suggests that this inquiry is not necessary for IAC claims.[87]

#### (3) Step Two: Determine If There Are Disputed Facts

For many IAC claims, it may be helpful in making the determination of whether there are unresolved factual issues requiring an evidentiary hearing to focus on whether the claim genuinely depends on matters

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were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000).

75. *See Strickland,* 466 U.S. at 687.

76. *Id.*

77. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

78. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In *Hill*, the United States Supreme Court explained that analysis of the second prong of the *Strickland* test in many guilty plea cases will "closely resemble" analysis of that prong in cases that go to trial. *Hill*, 474 U.S. at 59. It stated:

> For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

*Id*. at 59–60.

79. *See id*. at 60.

80. State v. Goforth, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998) (quotation omitted).

81. *See* State v. Mason, 337 N.C. 165, 177–78, 446 S.E.2d 58, 65 (1994) (" '[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' ") (quoting *Strickland*, 466 U.S. at 689).

82. *Id*. (quoting *Strickland*, 466 U.S. at 689).

83. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

84. *See supra* pp. 2–3 (discussing this preliminary determination).

85. *See supra* pp. 9–10 (*Strickland* test).

86. *See supra* pp. 2–3 (discussing substantive defects that make a claim without merit, including that the error was harmless beyond a reasonable doubt); *infra* pp. 18–20 (discussing the harmless error standard in detail).

87. *See infra* p. 19 & n.145.

outside the record. If the claim does not genuinely depend on matters outside the record, there is no need for an evidentiary hearing and no difficulty created by adjudicating it based on the filings, and if necessary, the transcript. However, when the IAC claim genuinely depends on evidence outside of the record—as most properly presented IAC claims will to rebut the presumption of reasonable professional assistance—and when the disputed facts, if established, would entitle the defendant to relief,[88] an evidentiary hearing should be held.[89]

Consider an IAC claim asserting that counsel was ineffective by failing to make key objections at trial that is supported by no evidence other than the trial record. When the claim is based entirely on the trial record, the presumption of reasonable professional assistance allows the court to presume that counsel's failures to object were reasonable tactical decisions, flawed, if at all, only in hindsight.[90] If the defendant proffers no evidence to rebut the presumption, it is dispositive; there are no factual issues to resolve and no hearing is necessary. Suppose, however, that the defendant contends that counsel's failures were not reasonable tactical decisions but resulted from the fact that counsel was impaired by alcohol and drugs. If supporting affidavits indicate that the defendant will be able to produce competent evidence not included in the record—though the defendant need not prove the claim in advance of the evidentiary hearing—the defendant has proffered evidence to rebut the presumption and in so doing, has presented a claim that genuinely depends on matters outside of the record and involves issues of fact triggering the need for a hearing.

Consider also a claim alleging that the defendant told counsel of alibi witnesses but that counsel failed to contact the witnesses. Assume the defendant's supporting affidavit neither identifies the witnesses nor alludes to the substance of their testimony. While such a claim alludes to matters outside of the record, it does not state the claim with sufficient particularity or give any indication that the defendant will be able to establish the matters asserted with competent evidence. Thus, the claim should not be considered to genuinely depend on evidence outside the record and should be denied without a hearing.[91] However, if the defendant's motion identifies the witnesses by name and includes their affidavits, the defendant has presented a claim that genuinely depends on matters outside of the record and involves issues of fact triggering the need for a hearing.[92]

The North Carolina courts have recognized that an IAC by conflict of interest claim does not appear on the record and generally will require an evidentiary hearing.[93] This does not mean that a defendant's bare assertion that counsel labored under a conflict of interest is enough to obtain a hearing. To obtain a hearing on such a claim, a defendant must provide a description of the alleged conflict, the facts of which, if established, would entitle him or her to relief. The requisite detail was provided in *State v. Arsenault*.[94] In that case, the defendant's MAR asserted, among other things, that he was denied the effective assistance of counsel because of his trial counsel's divided loyalties. The record, which included an affidavit of a codefendant submitted with the defendant's MAR, revealed that the defendant's trial counsel advised the codefendant not to enter a guilty plea and not to testify as to exculpatory information beneficial to the defendant. At

88. If a defendant would be entitled to no relief even if the disputed facts are established, the claim is without merit and no evidentiary hearing is necessary. *See supra* pp. 2–3.

89. *Cf.* State v. Wise, 64 N.C. App. 108, 112, 306 S.E.2d 569, 572 (1983) (finding that evidence before the court on direct appeal was not sufficient to support defendant's IAC/conflict of interest claim and deciding rather than overrule it on the merits based on "an inadequate record," to dismiss and allow defendant to seek relief through a MAR, for which a hearing may be held); United States v. Chacon-Palomares, 208 F.3d 1157, 1159 (9th Cir. 2000) (applying federal standard for evidentiary hearings in 28 U.S.C. § 2255 in a case when defendant alleged counsel was ineffective by advising him to reject a plea offer and supported the claim with affidavits from his wife and a friend; holding that trial court erred in rejecting petition without an evidentiary hearing and stating that "[e]videntiary hearings are particularly appropriate when claims raise facts which occurred out of the courtroom and off the record" (quotation omitted)).

90. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL AND NANCY J. KING, 3 CRIMINAL PROCEDURE § 11.7(e) at 633 (1999).

91. *Cf.* Saunders v. United States, 236 F.3d 950, 952–53 (8th Cir. 2001) (case with these facts decided under federal standard for hearings in 28 U.S.C. § 2255 and holding that district court properly denied IAC claim without holding an evidentiary hearing), *cert. denied*, 121 S. Ct. 2524 (2001).

92. *Cf.* Koskela v. United States, 235 F.3d 1148, 1149 (8th Cir. 2001) (case with these facts decided under federal standard for hearings in 28 U.S.C. § 2255 and holding that district court erred by denying motion without a hearing).

93. *See Wise*, 64 N.C. App. at 111, 306 S.E.2d at 569, 571 (1983) (conflict of interest claim will not appear "on the face of the record").

94. 46 N.C. App. 7, 264 S.E.2d 592 (1980).

the time, the codefendant's counsel was defendant's trial counsel's law partner. As to the allegations, the court concluded: "While this advice was undoubtedly in the best interest of the [codefendant], it was not in the defendant's best interest and clearly indicates an actual conflict of interest on the part of defendant's attorney, if true."[95] The court found that the defendant raised a "substantial question of violation of his constitutional right" for which an evidentiary hearing was necessary.[96]

When a defendant pleads guilty, he or she does not waive the right to challenge the validity of the guilty plea on grounds that counsel was ineffective.[97] When the record of the plea proceeding is unambiguous on the relevant issue, the *Blackledge/Dickens* rule requires that a defendant be granted a hearing on such a claim only in the most extraordinary circumstances.[98] For example, when the IAC claim relies on facts known to a defendant at the time of the plea—such as, "counsel was ineffective by failing to meet with me"—and when a defendant unambiguously stated at the plea proceeding that he or she was satisfied with the services of counsel,[99] the defendant must point to extraordinary circumstances warranting a hearing. When, however, a defendant subsequently learns of facts revealing counsel's ineffectiveness—such as, "after I pled guilty I learned that counsel had a conflict of interest"—the plea record will be silent on the issue. In this scenario, a defendant should be granted a hearing provided the MAR is not patently frivolous or false.[100]

Consider also a situation when a defendant alleges that counsel was ineffective in connection with a plea by providing incorrect information regarding the applicable sentence. When the record of the plea proceeding unambiguously reveals that the judge informed the defendant of the correct sentence, the defendant cannot establish that he or she was prejudiced by counsel's performance within the meaning of the second prong of the *Strickland/Braswell* analysis.[101]

### b. Sample North Carolina Cases

#### i. Evidentiary Hearing Not Required

*State v. Harris*, 338 N.C. 129, 143, 449 S.E.2d 371, 376–77 (1994) (holding that trial court did not err in declining to hold an evidentiary hearing on claim asserted in defendant's G.S. 15A-1414 MAR alleging IAC 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, 443 S.E. 2d 306, 330 (1994) (holding that when trial court correctly determined that, as a matter of law, defendant was not entitled to relief on his G.S. 15A-1414 MAR, no evidentiary hearing was required).

*State v. Bush*, 307 N.C. 152, 166–67, 297 S.E.2d 563, 572–73 (1982) (holding that since defendant's MAR presented only questions of law, "the Superior Court was required to determine the motion without a hearing."), *habeas corpus granted on other grounds by*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

*State v. Rice*, 129 N.C. App. 715, 723, 501 S.E.2d 665, 670 (1998) (holding that the trial court did not err in denying the MAR without an evidentiary hearing when the MAR was without merit).

*State v. Holden*, 106 N.C. App. 244, 248, 416 S.E.2d 415, 418 (1992) (holding that the 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).

*State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) (holding that the 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).

*State v. Essick*, 67 N.C. App. 697, 702–03, 314 S.E.2d 268, 272 (1984) (holding that the 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).

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95. 46 N.C. App. at 13, 264 S.E.2d at 595. For an extensive discussion of ineffective assistance of counsel in the context of guilty pleas, see Gregory Sarno, *Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas*, 10 A.L.R. 4th 8 (1981).

96. 46 N.C. App. at 14, 264 S.E.2d at 596.

97. *See supra* p. 4.

98. *See supra* pp. 5–8.

99. The Transcript of Plea form, AOC-CR-300 (2/2000), asks, in part: "6.(b). Are you satisfied with your lawyer's legal services?"

100. *See supra* p 8.

101. *See* State v. Taylor, 141 N.C. App. 321, 326–27, 541 S.E.2d 199, 202–03 (2000) (defendant failed to show prejudice resulting from counsel's alleged deficient performance in connection with plea bargain when "both alleged deficiencies . . . were clarified for defendant on the record by the judge").

#### ii. Evidentiary Hearing Required

*State v. Morganherring*, 350 N.C. 701, 713, 517 S.E.2d 622, 629 (1999) (noting that by prior order, court had remanded defendant's MAR to superior court for an evidentiary hearing to specifically address five issues), *cert. denied*, 529 U.S. 1024 (2000).

*State v. McHone*, 348 N.C. 254, 258–59, 499 S.E.2d 761, 763–64 (1998) (holding that defendant was entitled to an evidentiary hearing on his MAR, as supplemented, when the trial court was presented "with a question of fact which it was required to resolve" regarding whether the state had engaged in improper ex parte contact with the judge).

*State v. Barnes*, 348 N.C. 75, 505 S.E.2d 878 (1998) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing).

*State v. Francis*, 492 S.E.2d 29 (N.C. 1997) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing).

*State v. Farrar*, 472 S.E.2d 21 (N.C. 1996) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing).

*State v. Stevens*, 305 N.C. 712, 716, 291 S.E.2d 585, 589 (1982) (noting that by prior order of the court, case was remanded to superior court for an evidentiary hearing).

*State v. Dickens*, 299 N.C. 76, 85, 261 S.E.2d 183, 188 (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, 483 S.E.2d 459, 460 (1997) (holding that the trial court erred in 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, 246 S.E.2d 592, 596 (1980) (holding that 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, 254 S.E.2d 216, 217 (1979) (stating, without explanation, that "defendant has raised substantial questions of violation of constitutional rights which cannot be determined from the record and that an evidentiary hearing . . . is necessary").

## B. Other Procedural Issues

### 1. Conducting Evidentiary Hearings

An evidentiary hearing on a MAR is held before a judge.[102] Because the MAR statute does not state that the rules of evidence are inapplicable to evidentiary hearings, those rules apply.[103]

### 2. Burden of Proof on Factual Issues; Findings Required

If an evidentiary hearing is held, the moving party has the burden of proving, by a preponderance of the evidence, every fact essential to support the motion[104] and the court must make findings of fact.[105]

### 3. Calendaring Hearings

G.S. 15A-1420(b1)(2) provides that if a hearing is necessary, the judge must calendar the case for hearing without "unnecessary delay." The statute does not distinguish between evidentiary hearings and hearings for legal argument. Nor does it define "unnecessary delay."

### 4. Oral MARs

When a MAR is made orally,[106] the court must determine whether the matter "may be heard immediately or at a later time."[107] If the opposing party, or his or her counsel if represented, is not present, the court must provide for "the giving of adequate notice of the motion" and the date of hearing to the opposing party, or his or her counsel if represented.[108] The term "adequate notice" is not defined.

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102. *See* G.S. 15A-1420(c)(4) ("If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence . . . ."); *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984) (noting that in an evidentiary hearing on a MAR, the judge sits without a jury).

103. *See* G.S. 8C-1 R. 101, 1101; *Adcock*, 310 N.C. at 37, 310 S.E.2d at 608 ("In hearings before a judge sitting without a jury, adherence to the rudimentary rules of evidence is desirable . . . . Such adherence invites confidence in the trial judge's findings.") (quotation omitted).

104. *See* G.S. 15A-1420(c)(5); *infra* p. 14 & n.113.

105. *See* G.S. 15A-1420(c)(4); *Adcock*, 310 N.C. at 37, 310 S.E.2d at 608.

106. *See* G.S. 15A-1420(a)(1)a (when a MAR may be made orally).

107. G.S. 15A-1420(a)(2).

108. *Id.*

#### 5. Hearings on MARs Filed in the Appellate Division

G.S. 15A-1418(b) provides that when a MAR is made in the appellate division, the appellate court must determine whether it can be decided on the basis of the material presented or whether remand is necessary for "taking evidence or conducting other proceedings."

### C. Defendant's Right to be Present and to Be Represented by Counsel

The defendant has no right to be present at a MAR hearing when only questions of law are argued.[109] However, the defendant has a right to be present at an evidentiary hearing and to be represented by counsel.[110] A waiver of the right to be present must be in writing.[111]

### D. Conferences on Prehearing Matters

Upon the motion of either party, the judge may direct the attorneys to appear before him or her for a conference on any prehearing matter in the case.[112]

## II. Showing Required to Succeed on a MAR and Applicable Presumptions

### A. Showing Required

#### 1. Factual Issues

G.S. 15A-1420(c)(5) provides that if an evidentiary hearing is held, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion."[113]

#### 2. Existence of Asserted Ground and Prejudice

To succeed on a MAR, a defendant "must show the existence of the asserted ground for relief" and "prejudice."[114] The term prejudice, as used in the MAR statute, is defined by cross-reference to and incorporation of G.S. 15A-1443.[115] G.S. 15A-1443 sets forth the required prejudice that must be established in a criminal appeal.[116] Thus, when trial judges decide MARs, they are required to apply a standard normally applied on appellate review.

Under G.S. 15A-1443, the relevant standards for establishing prejudice vary depending on whether or not the alleged error arises under the federal constitution. G.S. 15A-1443(a) provides that if the error does not involve federal constitutional rights, it is prejudicial 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." G.S. 15A-1443(b) provides that if the error involves a violation of federal constitutional rights, it is prejudicial unless it is "harmless beyond a reasonable doubt." While there are very few published appellate MAR cases applying these standards, many direct appeal cases do so. Although the results in the direct appeal cases are fact-dependent, two general principles can be discerned from them. First, 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) varies depending on the weight of evidence in the case. The more conclusive or overwhelming the evidence is against a defendant, the harder it will be for the defendant to establish that the error affected the result of the

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109. *See* G.S. 15A-1420(c)(3).

110. *See* G.S. 15A-1420(c)(4); *see also* State v. McHone, 348 N.C. 254, 259, 499 S.E.2d 761, 764 (1998) ("The defendant has a right to be present at any such evidentiary hearing and to be represented by counsel."). *See generally* G.S. 7A-451(a)(3) (indigent defendant's statutory right to appointed counsel in MAR proceedings).

111. *See* G.S. 15A-1420(c)(4).

112. *See* G.S. 15A-1420(c)(1).

113. *See* State v. Morganherring, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999), *cert. denied*, 529 U.S. 1024 (2000); State v. Atkins, 349 N.C. 62, 111, 505 S.E.2d 97, 127 (1998); State v. Eason, 328 N.C. 409, 434, 402 S.E.2d 809, 823 (1991); State v. Artis, 325 N.C. 278, 334, 384 S.E.2d 470, 502 (1989), *rev'd on other grounds* 494 U.S. 1023 (1990); State v. Martin, 318 N.C. 648, 650, 350 S.E.2d 63, 64 (1986); State v. Stevens, 305 N.C. 712, 719, 291 S.E.2d 585, 591 (1982); State v. Doisey, 138 N.C. App. 620, 627, 532 S.E.2d 240, 245 (2000), *review denied by*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 121 S. Ct. 1153 (2001); State v. Garner, 136 N.C. App. 1, 13, 523 S.E.2d 689, 698 (1999), *appeal dismissed and cert. denied,* 351 N.C. 477, 543 S.E.2d 500 (2000).

114. G.S. 15A-1420(c)(6); *see* State v. Bush, 307 N.C. 152, 167, 297 S.E.2d 563, 573 (1982) ("Even after a showing by the defendant that the asserted ground for relief existed, the Superior Court was still required . . . to deny him any relief unless prejudice appears . . . .") (footnote and quotation omitted), *habeas corpus granted on other grounds,* 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

115. *See* G.S. 15A-1420(c)(6) ("Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.").

116. G.S. 15A-1443 is in Article 91 of the Criminal Procedure Act; Article 91 is entitled "Appeal to Appellate Division."

proceeding[117] and the easier it will be for the state to establish that the error was harmless beyond a reasonable doubt.[118] Conversely, when the evidence of guilt is conflicting or not so overwhelming as to be conclusive, the easier it will be for the defendant to establish prejudice[119] and the harder for the state to establish that the error was harmless.[120] The second general principle that derives from the statute and the direct appeal case law is that a defendant is not prejudiced by an error resulting from his or her own conduct.[121] Because these principles are general ones, not all cases are consistent with them.

The following sections discuss in more detail the standards for determining if prejudice exists.

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117. *See* State v. Braxton, 352 N.C. 158, __, 531 S.E.2d 428, 442–43 (2000) (assuming that trial court erroneously admitted hearsay statements into evidence and finding: "[i]n light of the overwhelming evidence of defendant's guilt, defendant cannot show that there is a reasonable possibility that the outcome of his trial would have been different if the trial court had excluded the testimony at issue."), *cert. denied*, 121 S. Ct. 890 (2001); State v. Ratliff, 341 N.C. 610, 618, 461 S.E.2d 325, 329 (1995) (finding no prejudice from trial court's error in overruling defendant's objection and allowing state to make an incorrect statement of the law in closing argument and stating: "[t]he combination of the overwhelming evidence against defendant and the nature of the error leads this Court to conclude there is no reasonable possibility that the error affected the outcome in this case"); State v. Ellis, 130 N.C. App. 596, 599, 504 S.E.2d 787, 789 (1998) ("Notably, however, even if this Court were to conclude that it was error for the trial court to deny defendant's motion for a continuance, on this record, defendant cannot show prejudice in light of the overwhelming evidence of his guilt."). *But see* State v. Grover, 142 N.C. App. 411, 543 S.E.2d 179 (2001) (holding over a dissent that erroneous admission of opinion testimony in child sexual abuse case was prejudicial under G.S. 15A-1443(a) without evaluating the weight of the other evidence against defendant), *temporary stay allowed*, 353 N.C. 388, 547 S.E.2d 818 (2001), *writ of supersedeas allowed,* 353 N.C. 454, 548 S.E.2d 164 (2001).

118. *See* State v. Mitchell, 353 N.C. 309, 324, 543 S.E.2d 830, 841 (2001) (assuming that prosecutor improperly commented on defendant's exercise of his right not to testify and concluding "in light of the overwhelming evidence of defendant's guilt, that the prosecutorial error and the trial court's failure to intervene ex mero motu were harmless beyond a reasonable doubt"); State v. Kimble, 140 N.C. App. 153, 159, 535 S.E.2d 882, 887 (2000) (assuming that admission of hearsay statements violated defendant's Confrontation Clause rights, error was harmless when there was "overwhelming evidence" of defendant's guilt even without the statements and the facts established in the statements were properly admitted in evidence through other witnesses); State v. Harris, 136 N.C. App. 611, 614–18, 525 S.E.2d 208, 210–12 (2000) (assuming that admission of hearsay statement violated defendant's rights under the Confrontation Clause, error was harmless beyond a reasonable doubt when other evidence of defendant's guilt was "overwhelming" and staggering"), *review denied by*, 351 N.C. 644, 543 S.E.2d 877 (2000); State v. Roope, 130 N.C. App. 356, 367, 503 S.E.2d 118, 126 (1998) (holding that although admission of codefendant's out-of-court confession violated defendant's Sixth Amendment rights, error was harmless beyond a reasonable doubt when there was "overwhelming evidence" of guilt from other sources).

119. *See* State v. Israel, 353 N.C. 211, __, 539 S.E.2d 633, 638 (2000) (holding that when evidence of defendant's guilt was "equivocal" and when trial court erroneously excluded evidence tending to show the crime was perpetrated by the third party, there was a reasonable possibility that a different result would have been reached at trial); State v. Willis, 136 N.C. App. 820, 824, 526 S.E.2d 191, 194 (2000) (holding that because "[t]he evidence of defendant's identity as the perpetrator of the robbery . . . though sufficient to support his conviction, was not so overwhelming as to be conclusive," there was a reasonable possibility that had the evidence of defendant's prior robbery conviction not been erroneously admitted, a different result may have been reached at trial). When the conflict in the evidence is only a "limited" one, defendant may have difficulty establishing the requisite prejudice. *See* State v. Chavis, 141 N.C. App. 553, 566–67, 540 S.E.2d 404, 414 (2000) (holding that a "limited conflict in the evidence" was "not sufficient to support a reasonable possibility a different result would have been reached at trial" if testimony had not been erroneously admitted).

120. *See* State v. Baymon, 336 N.C. 748, 759, 446 S.E.2d 1, 6 (1994) (considering all of the evidence including "conflicting expert medical testimony," court could not conclude error was harmless beyond a reasonable doubt); State v. Downey, 127 N.C. App. 167, 171, 487 S.E.2d 831, 835 (1997) (noting that evidence was "sharply conflicting" and "not overwhelming" and stating: "we cannot conclude as a matter of law that the trial court's error was harmless beyond a reasonable doubt"); *State v. Hines*, 131 N.C. App. 457, 464, 508 S.E.2d 310, 315 (1998) (noting that "there was not overwhelming evidence of . . . guilt" and concluding that state failed to show that inadvertent publication to the jury of extrinsic materials was harmless beyond a reasonable doubt).

121. *See infra* pp. 20–21.

**a. Errors Not Arising Under the Federal Constitution**

G.S. 15A-1443(a) provides that if the error asserted in the MAR does not arise under the federal constitution, it is prejudicial 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 establishing prejudice under this provision.[122]

G.S. 15A-1443(a) also provides that prejudice exists "in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se." Examples of errors that have been deemed to be reversible per se include the presence of an alternate juror in the jury room during deliberations,[123] 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 at the guilt-innocence or sentencing phase,[124] and allowing a capital case to proceed without the appointment of assistant counsel as required by G.S. 7A-450(b1).[125]

G.S 15A-1443(a) clearly states that it applies to all errors *not* arising under the federal constitution. In *State v. Huff*,[126] the North Carolina Supreme Court carved out an exception to this unambiguous statutory language. In *Huff*, the court held that notwithstanding the express language of G.S. 15A-1443(a), the proper standard to be applied when reviewing violations of a defendant's state constitutional right to be present at all stages of a capital trial is the harmless beyond a reasonable doubt standard articulated by the United States Supreme Court in *Chapman v. California*,[127] and incorporated into G.S. 15A-1443(b).[128] 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).[129]

The following section lists a MAR case applying the G.S. 15A-1443(a) prejudice standard. Because there is a dearth of published appellate MAR cases applying the standard, this bulletin also lists several direct appeal cases applying the G.S. 15A-1443(a) standard. The list of direct appeal cases is not exhaustive; rather, it illustrates application of the standard in several relatively recent cases.

**i. MAR Case Applying the G.S. 15A-1443(a) Standard**

*State v. Serzan*, 119 N.C. App. 557, 561, 459 S.E.2d 297, 301 (1995) (defendant alleged that the state violated discovery procedures by failing to provide him with a surveillance tape from the crime scene and not informing him of the tape until trial; defendant contended the tape would have contradicted a witness's testimony that she observed defendant's face; because the witness and another person identified defendant from a photographic line-up as well as in open court, the court held that "there is no reasonable possibility that a different result would have occurred had the tape been presented to defendant at an earlier time").

**ii. Sample Direct Appeal Cases Applying the G.S. 15A-1443(a) Standard**

**(1) Prejudice Found**

*State v. Israel*, 353 N.C. 211, __, 539 S.E.2d 633, 638 (2000) (holding that "it is apparent from the equivocal

122. *See* G.S. 15A-1443(a).

123. *See* State v. Parker, 350 N.C. 411, 426, 516 S.E.2d 106, 117 (1999) ("It is well settled in North Carolina that the presence of an alternate in the jury room *during deliberations* violates [G.S. 15A-1215(a)] and constitutes reversible error *per se*."), *cert. denied*, 528 U.S. 1084 (2000).

124. *See* State v. Mitchell, 321 N.C. 650, 659, 365 S.E.2d 554, 559 (1988) ("[W]e hold that the trial court's refusal to permit both counsel to address the jury during defendant's final arguments [in the guilt-innocence phase and in the sentencing phase] constituted prejudicial error per se . . . ."); State v. Simpson, 320 N.C. 313, 327, 357 S.E.2d 332, 340 (1987) ("The trial court erred in refusing to permit both counsel for the defendant to address the jury during the defendant's final argument [at sentencing]. This deprived the defendant of a substantial right and amounted to prejudicial error.").

125. *See* State v. Hucks, 323 N.C. 574, 576, 374 S.E.2d 240, 242 (1988) ("We agree that allowing the capital case against [defendant] to proceed without the appointment of additional counsel to assist him violated the mandate of [G.S. 7A-450(b1)]. This denial of [defendant's] statutory right to additional counsel was prejudicial error per se.").

126. 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds by*, 497 U.S. 1021 (1990).

127. 386 U.S. 18 (1967).

128. *See Huff*, 325 N.C. at 33, 381 S.E.2d at 653; *infra* p. 18.

129. *See Huff,* 325 N.C. at 33, 381 S.E.2d at 653. The *Huff* court rejected the notion that the General Assembly could set the standard of review for state constitutional violations. It said: "[U]nder our constitutional form of government, only this Court may authoritatively construe the Constitution of North Carolina with finality and it is for this Court, and not the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution." *Id.* 325 N.C. at 34, 381 S.E.2d at 654 (quotation omitted).

evidence of defendant's guilt," that had the trial court not erroneously excluded evidence tending to show the crime was perpetrated by the third party, there was a reasonable possibility that a different result would have been reached at trial).

*State v. Grover*, 142 N.C. App. 411, __, 543 S.E.2d 179, 185 (2001) (holding, over a dissent, that trial court's erroneous admission of opinion testimony in child sexual abuse case was prejudicial), *temporary stay allowed*, 353 N.C. 388, 547 S.E.2d 818 (2001), *writ of supersedeas allowed* 353 N.C. 454, 548 S.E.2d 164 (2001).

*State v. Perry*, 142 N.C. App. 177, 541 S.E.2d 746, 750 (2001) (holding that trial court's erroneous ruling granting state's motion for joinder caused prejudice).

*State v. Moctezuma*, 141 N.C. App. 90, 95, 539 S.E.2d 52, 56 (2000) (holding that notwithstanding court's limiting instruction, erroneous admission of irrelevant evidence of drugs and drug paraphernalia seized at defendant's residence in drug trafficking prosecution based on cocaine found in van was prejudicial).

*State v. Bates*, 140 N.C. App. 743, 747–48, 538 S.E.2d 597, 600–01 (2000) (holding that erroneous admission of psychologist's testimony and expert's opinion on child sexual abuse was prejudicial), *review denied by*, 353 N.C. 383 (2001).

*State v. Willis*, 136 N.C. App. 820, 824, 526 S.E.2d 191, 194 (2000) (holding that because "[t]he evidence of defendant's identity as the perpetrator . . . though sufficient to support his conviction, was not so overwhelming as to be conclusive," there was a reasonable possibility that had evidence of defendant's prior conviction not been erroneously admitted, a different result may have been reached at trial).

**(2) No Prejudice Found**

*State v. Smith*, 352 N.C. 531, 546, 532 S.E.2d 773, 784 (2000) (holding that defendant was not prejudiced by untranslated dialogue between prospective juror and prosecutor when later inquiry of juror in English revealed that juror could not understand English and was unqualified to serve), *cert. denied,* 121 S. Ct. 1419 (2001).

*State v. Braxton*, 352 N.C. 158, __, 531 S.E.2d 428, 448 (2000) (holding that defendant did not suffer prejudice from trial court's initial exclusion of corroborative evidence when evidence was later admitted), *cert. denied*, 121 S. Ct. 890 (2001).

*State v. Davis*, 142 N.C. App. 81, 89, 542 S.E.2d 236, 240–41 (2001) (holding that even if it was error to instruct the jury that it could consider defendant's refusal to submit to blood test as evidence of guilt, it was not prejudicial when other evidence was sufficient to sustain jury's verdict), *review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001).

*State v. Chavis*, 141 N.C. App. 553, 566–67, 540 S.E.2d 404, 414 (2000) (holding that trial court's erroneous admission of testimony concerning the triggering event of PTSD directly implicating defendant as the one who sexually assaulted the victim was not prejudicial; "limited conflict in the evidence" was "not sufficient to support a reasonable possibility a different result would have been reached at trial if [the expert] had not been allowed to testify").

*State v. Choppy*, 141 N.C. App. 32, 37, 539 S.E.2d 44, 48 (2000) (holding that defendant who was found guilty of attempted first-degree murder was not prejudiced by trial court's erroneous jury instruction on attempted second-degree murder when correct instruction would have given the jury only the choice of attempted first-degree murder or not guilty), *appeal dismissed and review denied by*, 353 N.C. 384, 547 S.E.2d 817 (2001).

*State v. Peoples*, 141 N.C. App. 115, 120–21, 539 S.E.2d 25, 29–30 (2000) (holding that trial court's erroneous denial of defendant's right to inform the jury of the punishment for the offenses charged was not prejudicial when the court "fail[ed] to see how such error had any impact on the jury's determination").

*State v. Kimble*, 140 N.C. App. 153, 168, 535 S.E.2d 882, 892 (2000) (holding that trial court's error in allowing the state to impeach defendant on a collateral matter with extrinsic evidence was not prejudicial when subject was collateral and thus "unlikely to have impacted the outcome of the trial," state's inquiry was brief and was terminated by a sustained objection and instruction to disregard the question, and defendant's prior testimony on the issue significantly decreased the potential for prejudice).

*State v. Godley*, 140 N.C. App. 15, 25–26, 535 S.E.2d 566, 574–75 (2000) (holding that although the state's exhibition of investigating officer's gun was error, it was not prejudicial), *review denied*, 353 N.C. 387, 547 S.E.2d 25 (2001), *cert. denied,* 121 S. Ct. 1499 (2001).

*State v. Hendricks*, 138 N.C. App. 668, 670–71, 531 S.E.2d 896, 898–99 (2000) (holding that although trial judge failed to comply with procedural requirements for taking a plea, no prejudice resulted when defendant did not argue that he would have changed his plea if the requirements had been adhered to, defendant did not assert that his plea was not knowing or voluntary, and when defendant responded to and signed questions in the transcript of the plea).

### b. Errors Arising Under the Federal Constitution

G.S. 15A-1443(b) provides that if the error involves a violation of a defendant's rights under the federal constitution, it "is prejudicial unless the . . . court finds that it was harmless beyond a reasonable doubt." The error must actually involve a constitutional right to trigger harmless error review; a defendant's mere allegation that a constitutional right is involved is not enough.[130] The state bears the burden of demonstrating that the error was harmless beyond a reasonable doubt.[131] Also, in *State v. Huff*, the North Carolina Supreme Court held that the harmless error standard prescribed by G.S. 15A-1443(b)—not the standard in G.S. 15A-1443(a)—applies when there has been a violation of a defendant's state constitutional right to be present at his or her capital trial.[132]

The Official Commentary to G.S. 15A-1443 states that subsection (b) "reflects the standard of prejudice with regard to violation of the defendant's rights under the Constitution of the United States, as set out in the case of *Chapman v. California*."[133] However, federal law governs review of such violations regardless of G.S. 15A-1443(b); as *Chapman* makes clear, when a federal constitutional right is at issue, federal law, not a state harmless error rule, applies.[134]

In *Chapman*, the United States Supreme Court rejected the contention that the federal constitution required automatic reversal for all constitutional errors. Instead, it held that as a general rule, constitutional errors should be evaluated against a harmless error standard. Under that standard, the error will require reversal unless the court is convinced "beyond a reasonable doubt" that it "did not contribute to the verdict obtained."[135]

Over the years, the United States Supreme Court has applied the *Chapman* harmless error standard to a wide range of constitutional errors including the following: improper comment on defendant's failure to testify, admission of evidence obtained in violation of the Fourth Amendment, admission of evidence obtained in violation of a defendant's right to counsel, admission at trial of an out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment's Confrontation Clause, admission of evidence at the sentencing stage of a capital case in violation of the right to counsel, erroneous use during trial of a defendant's silence following *Miranda* warnings, restriction on a defendant's right to cross examination in violation of the Confrontation Clause, denial of the right to present exculpatory evidence, denial of the right to be present during a trial proceeding, denial of an indigent's right to appointed counsel at a preliminary hearing, a jury instruction containing an unconstitutional rebuttable presumption, a jury instruction containing an unconstitutional conclusive presumption, an unconstitutionally overbroad jury instruction in a capital case, the submission of an invalid aggravating factor to the jury in a capital sentencing proceeding, an improper description of an element of an offense, and admission of a coerced confession.[136]

The *Chapman* standard, however, is only a general rule, subject to exception. In fact, the United States Supreme Court has held that a number of errors are not subject to harmless error inquiry and instead require automatic reversal. Those errors include: denial of counsel, involvement of an impartial adjudicator, denial of a defendant's constitutional right to self-representation, discrimination in the selection of the petit jury, improper exclusion of a juror because of views on capital punishment, racial discrimination in the selection of the grand jury, violation of *Anders* standards governing the withdrawal of appointed appellate counsel, denial of consultation between defendant and counsel during an overnight trial recess, denial of the right to a public trial, use of an erroneous reasonable doubt instruction, representation by counsel acting under an actual conflict of interest that adversely affects performance, and the court's failure to make inquiry into a possible conflict of interest under

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130. *See* State v. Ratliff, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995) (rejecting defendant's argument that error implicated constitutional rights and warranted harmless error review).

131. *See* G.S. 15A-1443(b).

132. *See supra* p. 16 (discussing *Huff*).

133. 386 U.S. 18 (1967).

134. *See id.* at 20–21; *see also* State v. Huff, 325 N.C. 1, 34, 381 S.E.2d 635, 654 (1989) ("While the General Assembly has no authority to fix the standard for reversal in review of violations of the federal Constitution, it did so in [G.S.] 15A-1443(b) in an apparent attempt to reflect the United States Supreme Court's decision in *Chapman* . . . ."), *vacated on other grounds*, 497 U.S. 1021 (1990); State v. May, 110 N.C. App. 268, 270, 429 S.E.2d 360, 362 (1993) ("whether a defendant's conviction . . . will withstand his denial of rights guaranteed by the Federal Constitution is a question that must be answered by reference to federal law").

135. *Chapman*, 386 U.S. at 24.

136. *See* LAFAVE, *supra* n.25 § 27.6(d) at 948–49 (listing these errors and providing case citations).

circumstances that mandate such an inquiry.[137] In 1991, the Court clarified that only those errors that involve "structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" warrant automatic reversal.[138] Applying this standard, the North Carolina Court of Appeals in *State v. May*[139] held that IAC for purposes of a guilty plea is a structural defect warranting automatic reversal. In *Rose v. Lee*, the Fourth Circuit recently endorsed the view that IAC is a structural error not subject to harmless error review.[140]

One leading commentator argues that the nature of the *Chapman* inquiry makes it "irrelevant" to constitutional errors that are remedied by barring reprosecution, such as violation of the right to a speedy trial or violation of the bar against double jeopardy,[141] and that reversal is automatic once such a violation is found.[142] The same commentator also contends that *Chapman* has no relevance to errors that are harmful by definition: "[I]t would be wasted effort to look to *Chapman* when the constitutional violation is one . . . that already requires—as an element of the violation—a finding of likely prejudicial impact."[143] Examples of such errors include IAC and nondisclosure of material exculpatory evidence.[144] The latter contention is consistent with the holdings of *May* and *Rose*.[145]

Finally, in *Brecht v. Abrahamson*,[146] the United States Supreme Court held that the *Chapman* harmless error standard applies only on direct appeal and that the more deferential *Kotteakos*[147] harmless error standard applies in federal habeas proceedings.[148] Under the *Kotteakos* standard, the inquiry focuses on whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[149] The *Brecht* Court held that this standard "is better tailored to the nature and purpose of [federal] collateral review than the *Chapman* standard" and promotes the considerations underlying its federal habeas jurisprudence.[150] The Court articulated those considerations as including the state's interest in finality of convictions that have survived direct review in the state court system, comity and federalism, and an interest in not degrading the prominence of the trial by liberally allowing relitigation of claims on collateral review.[151] What implications *Brecht* has for interpretation of G.S. 15A-1443(b) as applied in MAR proceedings remains to be seen.[152]

The following section lists a MAR case applying the G.S. 15A-1443(b) prejudice standard. Because there is a dearth of published appellate MAR cases applying the standard, this bulletin also lists several direct appeal cases applying it. The list of direct appeal cases is not exhaustive; rather, it illustrates application of the standard in several relatively recent direct appeal cases.

#### i. MAR Case Applying the Harmless Error Standard

*State v. Bush*, 307 N.C. 152, 158–165, 297 S.E.2d 563, 566–72 (1982) (holding that erroneous instruction on self-defense was favorable to defendant and thus harmless beyond a reasonable doubt), *habeas corpus granted on other grounds by* 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987).

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137. *See id.* § 27.6(d) at 950–51 (listing these errors and providing case citations).

138. Arizona v. Fulminante, 499 U.S. 279 (1991).

139. 110 N.C. App. 268, 429 S.E.2d 360 (1993).

140. 252 F.3d 676, 689 (4th Cir. 2001) ("[W]e agree with the district court that if [defendant] was denied effective assistance of counsel, the error would not be subject to harmless error review."), *cert. denied*, __ S. Ct. __ (Oct. 1, 2001) (No. 01-5975).

141. *See* LAFAVE, *supra* n.25 § 27.6(d) at 947.

142. *See id.*

143. *Id.*

144. *See id.* (citing Kyles v. Whitley, 514 U.S. 419 (1995)). The standards for establishing IAC, and that nondisclosed exculpatory evidence was material, both require showings of prejudice. *See* Strickland v. Washington, 466 U.S. 668 (1984) (IAC); State v. Brawsell, 312 N.C. 553, 324 S.E.2d 241 (1985) (same); United States v. Bagley, 473 U.S. 667 (1985) (nondisclosed exculpatory evidence).

145. As indicated in the text, the North Carolina Court of Appeals in *May* and the Fourth Circuit in *Rose* held that IAC is a structural error warranting automatic reversal.

146. 507 U.S. 619 (1993).

147. *See* Kotteakos v. United States, 328 U.S. 750 (1946).

148. *See Brecht*, 507 U.S. at 623. The Court acknowledged that structural defects still warrant automatic reversal. *See id.* at 629–30.

149. *See Kotteakos*, 328 U.S. at 776.

150. *Brecht*, 507 U.S. at 623.

151. *See id.* at 635.

152. Certainly a very strong argument can be made that by incorporating by reference G.S. 15A-1443(b) into the MAR statute, the General Assembly intended the more stringent *Chapman* standard to apply in MAR proceedings. *See* Official Commentary to G.S. 15A-1443 ("Subsection (b) reflects the standard of prejudice . . . set out in the case of [*Chapman*]."); G.S. 15A-1420(c)(6) ("Relief must be denied [on a MAR] unless prejudice appears, in accordance with G.S. 15A-1443.").

#### ii. Sample Direct Appeal Cases Applying the Harmless Error Standard

##### (1) Error Held Not Harmless

*State v. Flippen*, 344 N.C. 689, 701, 477 S.E.2d 158, 166 (1996) (holding that trial court's failure to give a mandatory peremptory instruction regarding a mitigating circumstance when parties had stipulated to the existence of the mitigating circumstance was not harmless beyond a reasonable doubt).

*State v. McGill*, 141 N.C. App. 98, 103–04, 539 S.E.2d 351, 356 (2000) (holding that trial court's failure to provide defendant access to favorable and material evidence was prejudicial error when the state did not argue that the error was harmless beyond a reasonable doubt).

*State v. Pinchback*, 140 N.C. App. 512, 520–21, 537 S.E.2d 222, 227 (2000) (holding that state did not show that erroneous admission of pretrial identification was harmless beyond a reasonable doubt).

*State v. Hines*, 131 N.C. App. 457, 463–64, 508 S.E.2d 310, 315 (1998) (holding that state failed to show that Confrontation Clause violation resulting from inadvertent publication to jury of extrinsic materials was harmless beyond a reasonable doubt).

*State v. Downey*, 127 N.C. App. 167, 171, 487 S.E.2d 831, 835 (1997) (holding that state did not establish that trial court's erroneous admission of hearsay statement implicating defendant's Confrontation Clause rights was harmless beyond a reasonable doubt).

##### (2) Error Held Harmless

*State v. Mitchell,* 353 N.C.309, 326, 543 S.E.2d 830, 841 (2001) (holding that even if prosecutor's reference to defendant's failure to testify was error, in light of the "overwhelming" evidence of guilt, the error and the trial court's failure to intervene ex mero motu were harmless beyond a reasonable doubt), *petition for cert. filed* (Aug 24, 2001) (No. 01-6002).

*State v. Davis*, 353 N.C. 1, __, 539 S.E.2d 243, 261 (2000) (assuming arguendo that trial court erroneously excluded evidence tending to suggest that defendant would have a positive impact on society in prison, and concluding that error was harmless beyond a reasonable doubt when other evidence was admitted on the issue of defendant's positive influence on others), *cert. denied*, __ S. Ct. __ (Oct. 1, 2001) (No. 00-9996).

*State v. Blakeney*, 352 N.C. 287, 317–18, 531 S.E.2d 799, 820–21 (2000) (holding that trial court's error in refusing to submit nonstatutory mitigating circumstance to the jury was harmless beyond a reasonable doubt when error did not preclude any juror from considering and giving weight to the mitigating evidence underlying defendant's proposed circumstance), *cert. denied*, 531 U.S. 1117 (2001).

*State v. Kimble*, 140 N.C. App. 153, 159, 535 S.E.2d 882, 887 (2000) (assuming arguendo that admission of hearsay statements violated defendant's Confrontation Clause rights and holding that error was harmless beyond all doubt when (1) there was overwhelming evidence that defendant committed murder even without admission of statements, and (2) the facts established through the statements were properly admitted in evidence through other witnesses).

*State v. Parker*, 140 N.C. App. 169, 182, 539 S.E.2d 656, 665 (2000) (holding that even if hearsay statement was improperly admitted in violation of defendant's rights, error was harmless beyond a reasonable doubt because statement was nearly identical to properly admitted evidence), *appeal dismissed, review denied,* 353 N.C. 394, 547 S.E.2d 37 (2001), *cert. denied*, 121 S. Ct. 1987 (2001).

*State v. Harris*, 136 N.C. App. 611, 614–18, 525 S.E.2d 208, 210–12 (2000) (holding that even if admission of hearsay statement was error, error was harmless beyond a reasonable doubt when evidence of defendant's guilt was "overwhelming" and "staggering" even without the statement), *review denied*, 351 N.C. 644 (2000).

*State v. Roope*, 130 N.C. App. 356, 367, 503 S.E.2d 118, 126 (1998) (holding that, although admission of nontestifying codefendant's confession violated defendant's rights, error was harmless beyond a reasonable doubt when there was "overwhelming evidence" of guilt from other sources).

### c. Invited Error

G.S. 15A-1443(c) provides that a defendant is not prejudiced "by the granting of relief which he has sought or by error resulting from his own conduct." The following direct appeal cases illustrate this rule.

*State v. McNeil*, 350 N.C. 657, 669, 518 S.E.2d 486, 494 (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), *cert. denied*, 529 U.S. 1024 (2000).

*State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (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, 459 S.E.2d 770, 781 (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, 457 S.E.2d 862, 872 (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, 445 S.E.2d 917, 924 (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, 440 S.E.2d 791, 795 (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, 434 S.E.2d 840, 850 (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).

## B. Applicable Presumptions

Two presumptions have appeared in the MAR case law: the presumption of regularity and the presumption that counsel's performance falls within the range of reasonable professional assistance. Application of these presumptions is not limited to the MAR context. There seems to be no impediment to applying other presumptions in the MAR context, provided they do not conflict with the applicable burdens of proof or other rules governing MAR proceedings.[153]

### 1. Presumption of Regularity

In North Carolina, there is a presumption that the acts of the court were properly done absent "ample evidence to the contrary."[154] This presumption is known as the presumption of regularity. In *Parke v. Raley*,[155] the United States Supreme Court held that the presumption of regularity applies when a defendant collaterally attacks previous convictions as invalid under *Boykin v. Alabama*.[156] Citing *Parke*, the North Carolina Court of Appeals in *State v. Bass*[157] applied the presumption to a guilty plea challenged in a MAR on *Boykin* grounds.

In *Bass*, the defendant pled guilty to driving while impaired and received a suspended sentence. On the judgment, the trial judge noted that defendant "freely, voluntarily, and understandingly pled guilty." Subsequently, the defendant was convicted of habitual impaired driving, partly as a result of the first conviction. The defendant then filed a MAR, alleging that the initial driving while impaired conviction was invalid because he was deprived of his constitutional rights under *Boykin*. Specifically, the defendant argued that at the time he pleaded guilty, he was without counsel and that he was not informed of his rights against self-incrimination, to a jury trial, and to confront his accusers.

At the evidentiary hearing on the MAR, the defendant testified that although he did not recall being informed of his rights, he did not recall anything that the judge said on the day in question. Three defense attorneys who testified for the defendant said that they never saw defendants being advised of their *Boykin* rights in district court during 1991, the year the defendant pleaded guilty. However, none of the attorneys testified to being present in court when the defendant entered his guilty plea. A transcript of the plea proceeding was not available. The trial court denied the defendant's MAR.

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153. *See generally* KENNETH S. BROUN, 1 BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE §§ 52–79 (5th ed. 1998) (discussing various presumptions that have been recognized by the North Carolina courts.)

154. *Id.* § 64 at 201, 203–04 (5th Ed. 1998) (quotation omitted).

155. 506 U.S. 20 (1992).

156. *See id.* at 30–31; *see also* Boykin v. Alabama, 395 U.S. 238 (1969).

157. 133 N.C. App. 646, 516 S.E.2d 156 (1999).

The defendant appealed, arguing that his conviction must be vacated because there was no evidence on the record that the judge advised him of his constitutional rights. The court of appeals concluded otherwise, finding that there was competent evidence to support the trial court's finding that the defendant had not met his burden of proof concerning his MAR. Citing *Parke*, the court held that the presumption of regularity applies when final judgment has been reached and that the presumption must be overcome by the defendant when no transcript is available. Turning to the case at hand, the court affirmed, stating:

> A transcript is not available in this case and the only evidence presented to the trial court is based on the recollection of the defendant and the "habit" evidence presented by attorneys practicing at the time. Meanwhile, the trial court has before it a finding made by [the judge] that the defendant's plea was made voluntarily. The presumption of regularity applies . . . .[158]

Thus, under *Parke* and *Bass*, the presumption of regularity applies when a defendant challenges a prior conviction on *Boykin* grounds and a transcript of the plea proceeding is not available.

It is unclear how the presumption of regularity relates to the *Blackledge/Dickens* framework for granting evidentiary hearings on MARs that challenge guilty pleas.[159] Under that framework, when the trial court follows proper plea procedure and the record of the plea proceeding is unambiguous, a defendant challenging the plea will be entitled to an evidentiary hearing only in the most extraordinary circumstances. However, when the record of the plea is ambiguous or otherwise deficient—as a nonexistent record surely is—a hearing is required, provided the MAR is not palpably incredible or patently frivolous or false.

One possibility is that the presumption of regularity is applied in the initial determination of whether a hearing is required. This, however, seems inconsistent with the *Blackledge/Dickens* framework, which contemplates that when the record is deficient and the MAR is detailed and credible, the defendant gets a hearing. A second possibility is that when the record is deficient and the MAR satisfies the *Blackledge/Dickens* standard for detail and credibility, the presumption is applied only after the evidentiary hearing has been held and the trial court is weighing the evidence. This seems the better view and is in fact how the presumption operated in *Bass*.

### 2. Presumption of Reasonable Professional Assistance

In *Strickland v. Washington*,[160] the United States Supreme Court held that when applying the two-part test for IAC and evaluating whether counsel's performance was deficient, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[161] Thus, when a MAR alleges IAC, a presumption of reasonable professional assistance applies. The relationship of this presumption to the two-prong *Strickland* test is discussed above.[162]

158. *Id.* 133 N.C. App. at 649, 516 S.E.2d at 158–59.
159. *See supra* pp. 5–8 (discussing the *Blackledge/Dickens* framework in detail).
160. 466 U.S. 668 (1984).
161. *Id.* at 689.
162. *See supra* pp. 9–10.

## APPENDIX: STATUTES

G.S. 15A-1420. Motion for appropriate relief; procedure

(a) Form, Service, Filing.
  (1) A motion for appropriate relief must:
    a. Be made in writing unless it is made:
      1. In open court;
      2. Before the judge who presided at trial;
      3. Before the end of the session if made in superior court; and
      4. Within 10 days after entry of judgment;
    b. State the grounds for the motion;
    c. Set forth the relief sought; and
    d. Be timely filed.
  (2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.
  (3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).
(b) Supporting Affidavits.
  (1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.
  (2) The opposing party may file affidavits or other documentary evidence.
(b1) Filing Motion With Clerk; Review of Motion by Judge.
  (1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.
  (2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket. The clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district. In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer. In capital cases, the judge shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary delay.
(c) Hearings, Showing of Prejudice; Findings.
  (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
  (2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.
  (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

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

G.S. 15A-1443. Existence and showing of prejudice.

(a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. 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.
(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.
(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.

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