MOTIONS FOR APPROPRIATE RELIEF

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I. Introduction.

A. MARs Generally.

A motion for appropriate relief (MAR) is a statutorily created vehicle for defendants to challenge their convictions and sentences.[1] A MAR may be filed before, during, or after direct appeal, although some restrictions apply to the types of claims that can be raised after a certain date. The statute also authorizes the State to file a MAR in certain circumstances. However, the overwhelming proportion of MARs are filed by the defense, and many of those are *pro se*. The statute also authorizes a judge to act *sua sponte* and grant relief on his or her own MAR.

Unlike an appeal, where the reviewing court is bound by the record, in a MAR proceeding, the trial court may hold an evidentiary hearing. Thus, the procedure often is used when the claim is one that depends on facts outside of the record, such as ineffective assistance of counsel.[2] However, MARs are not limited to claims that require factual findings and can assert errors of law.

B. Scope of This Chapter.

This Benchbook chapter discusses procedural issues that arise in connection with MARs filed in the trial division. These procedures apply to all MARs filed in the trial division with three exceptions:

- Racial Justice Act MARs;
- MARs by certain defendants who also are victims of human trafficking or related offenses; and

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

2. *See* State v. Fair, 354 N.C. 131, 167 (2001) ("[B]ecause of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [such] claims on direct appeal."). *Fair* also noted that defendants should nevertheless raise any ineffective assistance of counsel claims that are apparent from the record on direct appeal, to avoid procedural default under G.S. 15A-1419(a)(3). *See* Section X (discussing procedural default). *See also* State v. Johnson, 203 N.C. App. 718, 722-23 (2010) (dismissing the defendant's ineffective assistance claim without prejudice to file a MAR in superior court).

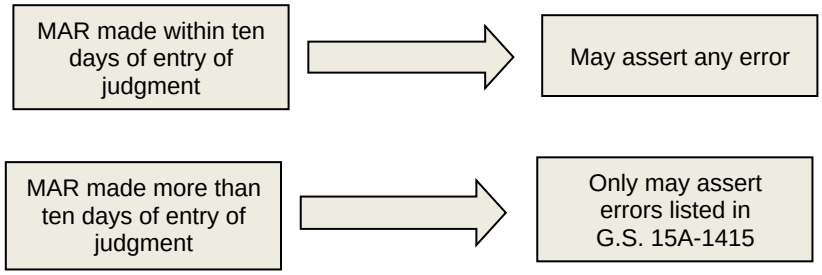
- MARs by juveniles raising *Miller*/8th Amendment issues.

Information about the procedures governing those MARs is provided in the accompanying footnote.[3]

II. Types of Claims That Can Be Raised.

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

Figure 1. Defendants' MARs—Claims and Timing Rules



1. Made Within Ten Days of Judgment.

a. Claims That May Be Asserted. Pursuant to G.S. 15A-1414, if a MAR is made within ten days of entry of judgment, it may assert "any error committed during or prior to the trial." This provision reflects the notion that the most efficient way to obtain review of a trial error warranting reversal is to bring it to the attention of the trial judge.[4] Such a procedure allows the trial judge to correct the error while avoiding the time and expense of an appeal.

b. Claims That Must Be Asserted. G.S. 15A-1414(b) provides that unless the claim falls within the list of claims in G.S. 15A-1415 that can be asserted more than ten days after entry of judgment,[5] a nonexclusive list of claims that *must* be asserted within the ten-day period includes:

- Any error of law, including that
  - the court erroneously failed to dismiss the charge before trial pursuant to G.S. 15A-954 (setting out ten grounds that the defendant may assert to support dismissal of the charge);

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

4. *See* Leon H. Corbett, *Post-Trial Motions and Appeals*, 14 WAKE FOREST L. REV. 997, 998, 1003 (1978) [hereinafter Corbett].

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

- the court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence;
- the evidence was insufficient to justify submission of the case to the jury; and
- the court erred in its jury instructions.

- The verdict is contrary to the weight of the evidence.
- For any other cause the defendant did not receive a fair and impartial trial.
- The sentence is not supported by evidence introduced at the trial and sentencing hearing.

2. Made More Than Ten Days After Judgment. Once the ten-day period expires, G.S. 15A-1415 contains an exclusive list of claims that may be asserted by the defendant.[6] Of course, all of these claims may be asserted before the expiration of the ten-day period.[7] G.S. 15A-1415 reflects legislative recognition that some errors are so egregious that the law should afford an extended or even unlimited time for raising them.[8] Thus, this provision includes claims that are "so basic that one should be able to go back into the courts at any time, even many years after conviction, and seek relief."[9]

a. Exclusive List of Claims That May Be Asserted. If the MAR is filed more than ten days after entry of judgment, the only claims that may be asserted are the ten claims discussed below, and illustrated in Figure 2 below.

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

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

i. Acts not a violation of law
ii. Trial court lacked jurisdiction
iii. Unconstitutional conviction
iv. Unconstitutional statute
v. Constitutionally protected conduct
vi. Retroactive change in the law
vii. Sentence was unauthorized, illegal, or invalid
viii. Sentence fully served
ix. Newly discovered evidence
x. Defendant was a victim of human trafficking, etc.

6. State v. Howard, 247 N.C. App. 193, 204 (2016) (G.S. 15A-1415 provides an exclusive list of claims that can be asserted; as such the trial court was without authority to grant the defendant's MAR that asserted a claim under the state's post-conviction DNA statute); State v. Wilkerson, 232 N.C. App. 482, 489 (2014) (the statute lists the only grounds that a defendant may assert in a MAR made more than 10 days after the entry of judgment); State v. Stubbs, 232 N.C. App. 274, 279 (2014) (G.S. 15A-1415 lists "the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment"), *aff'd on other grounds*, 368 N.C. 40 (2015); State v. Smith, 263 N.C. App. 550, 562 (2019) (same).
7. *See* G.S. 15A-1414; Official Commentary to G.S. 15A-1415; Official Commentary to G.S. 15A-1414.
8. *See* Corbett, *supra* note 4, at 1006.
9. Official Commentary to G.S. 15A-1415.

i. **Acts Not a Violation of Law.** G.S. 15A-1415(b)(1) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the acts charged in the criminal pleading did not, when committed, constitute a violation of criminal law. This provision allows a defendant to argue that he or she was convicted for something that was not a crime. For example, this provision would apply when the statute proscribing the crime for which the defendant was convicted was repealed before he or she committed the offense at issue.[10] Another example is when the defendant was convicted of sale of a controlled substance in violation of G.S. 90-95(a)(1), but the substance that the defendant sold was not in fact a controlled substance.

ii. **Trial Court Lacked Jurisdiction.** G.S. 15A-1415(b)(2) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the trial court lacked jurisdiction over the defendant or over the subject matter of the case. An assertion that an indictment was fatally defective is an example of a claim that would be properly raised under this provision.[11] Another example is an allegation that an unreasonable period of time elapsed between entry of prayer for judgment continued and entry of judgment.[12]

iii. **Unconstitutional Conviction.** G.S. 15A-1415(b)(3) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conviction was obtained in violation of the United States or North Carolina constitutions. An ineffective assistance of counsel claim is an example of a claim that would be properly asserted under this provision.[13] Another is a claim asserting that a guilty plea was not knowing, voluntary, and intelligent.[14]

iv. **Unconstitutional Statute.** G.S. 15A-1415(b)(4) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant was convicted or sentenced under a statute that violated the

10. *See* Corbett, *supra* note 4, at 1006.
11. *See* State v. Sturdivant, 304 N.C. 293, 308 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2) . . . ." (citations omitted)); State v. Futrelle, 266 N.C. App. 207, 209 (2019) (same). For more information about indictment defects, see Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, ADMIN. OF JUSTICE BULL. No. 2008/03 (UNC School of Government) (July 2008), *available at* https://www.sog.unc.edu/publications/bulletins/criminal-indictment-fatal-defect-fatal-variance-and-amendment.
12. *See* State v. Degree, 110 N.C. App. 638, 641 (1993) (unreasonable time between entry of prayer for judgment continued and entry of judgment leads to a loss of jurisdiction); *see generally* Jessica Smith, *Prayer For Judgment Continued* in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
13. *See, e.g.*, State v. House, 340 N.C. 187, 196–97 (1995).
14. *See* State v. Fennell, 51 N.C. App. 460, 462–63 (1981).

United States or North Carolina constitutions. An example of such a claim is one asserting that the habitual felon statute violates the double jeopardy clause[15] or that a sentence imposed under Structured Sentencing violates the Eighth Amendment.[16]

v. Constitutionally Protected Conduct. G.S. 15A-1415(b)(5) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the conduct for which the defendant was prosecuted was protected by the United States or North Carolina constitutions. This provision would apply, for example, when the defendant argues that the conduct leading to a disorderly conduct conviction was protected by the First Amendment. Another example would be when a defendant convicted of crime against nature for private consensual homosexual sex between adults alleges the conduct was protected by the Due Process Clause of the United States Constitution under *Lawrence v. Texas*.[17]

vi. Retroactive Change in Law. G.S. 15A-1415(b)(7) provides that a MAR filed more than ten days after entry of judgment may assert a claim that there has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required. The change in law must be significant[18] and can result from an appellate case or new legislation.[19] In both cases, G.S.15A-1415(b)(7) does not apply unless the change in law has retroactive application. Retroactive application refers to a new law that applies backward in time to cases decided and resolved before the new rule came about. When the change is brought about by legislation, determining whether the new

15. Note, however, that this claim has been rejected by the North Carolina courts. *See* Jeffrey B. Welty, *North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws*, ADMIN. OF JUSTICE BULL. No. 2013/07 (UNC School of Government) (August 2013), *available at* https://www.sog.unc.edu/publications/bulletins/north-carolinas-habitual-felon-violent-habitual-felon-and-habitual-breaking-and-entering-laws.

16. State v. Wilkerson, 232 N.C. App. 482, 490 (2014) (recognizing that such a claim falls within the scope of this subsection). Note that a claim asserting an illegal sentence may be challenged under either this provision of the MAR statute or under subsection 15A-1415(b)(8) (discussed below). *Id*. at 490-91 (so noting this overlap with respect to a claim that a sentence violated the Eighth Amendment).

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

18. State v. Chandler, 364 N.C. 313, 315-19 (2010) (*State v. Stancil*, 355 N.C. 266 (2002), dealing with the admissibility of expert opinions in child abuse cases, was not a significant change in the law; it merely applied existing law on expert opinion testimony to the context of child abuse cases); State v. Harwood, 228 N.C. App. 478 (2013) (declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR failed because *Garris* does not constitute a significant change in the law; rather *Garris* resolved an issue of first impression; "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)").

19. *See* Corbett, *supra* note 4, at 1009.

law applies retroactively is usually a simple matter of examining the statute's effective date. This is done by examining the session law's effective date provision, usually the last section of the session law.[20]

When the new rule derives from the case law, retroactivity analysis is more complicated. Because appellate courts generally do not indicate whether their rulings have retroactive application, it is necessary to determine after the fact whether a new court-made rule operates retroactively.[21] A defendant who alleges that his or her claim depends on a new federal criminal rule faces the difficult burden of establishing that the rule retroactively applies to his or her case under the test set forth in *Teague v. Lane*[22] and its progeny.[23] If the change is one of state law, the relevant retroactivity rule is that articulated in *State v. Rivens*.[24] For a detailed discussion of both of these tests, see Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. OF JUSTICE BULL. No. 2004/10 (UNC School of Government) (Dec. 2004).[25]

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

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

20. *See* State v. Whitehead, 365 N.C. 444, 447 (2012) (the superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case; the defendant was sentenced under the FSA; after SSL came into effect, he filed a MAR asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL; the superior court judge granted relief; the supreme court reversed, relying on the effective date of the SSL, as set out by the General Assembly when enacting that law). Session laws are available on the North Carolina General Assembly's Web page at https://www.ncleg.gov (last visited Jan. 20, 2023).

21. *Cf*. State v. Bennett, 262 N.C. App. 287, 289 (2018) (trial court erred by granting defendant's MAR on grounds of a retroactive change in the law where prior to the MAR being filed the Court of Appeals explicitly had held that the new procedural rule at issue did not apply retroactively).

22. 489 U.S. 288 (1989).

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

24. 299 N.C. 385 (1980); *see also* State v. Zuniga, 336 N.C. 508, 513 (1994) (noting that *Rivens* "correctly states the retroactivity standard applicable to new state rules").

25. Available online at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200410.pdf. Note that the bulletin cited here was written prior to the United States Supreme Court decision in *Edwards v. Vannoy* holding that *Teague's* purported exception to the general rule of non-retroactivity for "watershed rules" of criminal procedure was moribund. 593 U.S. ___, ___, 141 S. Ct. 1547, 1560 (2021) (announcing that "[n]ew procedural rules do not apply retroactively on federal collateral review").

A motion only can be granted pursuant to this section if an error of law exists in the sentence.[26] An example of an error of law with regard to sentence would be when the trial judge sentences the defendant under the Fair Sentencing Act but the applicable law is the Structured Sentencing Act or when a sentence is alleged to be invalid because it violates the Eighth Amendment.[27] Note that a claim that the sentence is not supported by the evidence must be asserted within ten days of entry of judgment.[28]

viii. Sentence Fully Served. G.S. 15A-1415(b)(9) provides that a MAR filed more than ten days after entry of judgment may assert a claim that the defendant is in confinement and is entitled to release because the sentence has been fully served. This ground could be asserted when, for example, the Department of Correction has not complied with a judge's ruling ordering credit for time served,[29] and if such credit was given, the defendant would be entitled to release.

ix. Newly Discovered Evidence. G.S. 15A-1415(c) provides that a MAR filed more than ten days after entry of judgment may assert a claim of newly discovered evidence. However, a motion asserting such a claim "must be filed within a reasonable time of its discovery."[30]

To assert this claim, the defendant must allege the discovery of new evidence that was unknown or unavailable at the time of trial and could not with due diligence have been discovered or made available at that time, including recanted testimony.[31] The defendant also must show that the evidence has a direct and material bearing upon his or her eligibility for the death penalty or guilt or innocence.[32] This language codifies the case law regarding newly discovered evidence.[33] That case law establishes that in order to obtain a new trial on grounds of newly discovered evidence, the defendant must establish that:

26. *See* State v. Morgan, 108 N.C. App. 673, 678 (1993).
27. State v. Wilkerson, 232 N.C. App. 482, 490 (2014) (recognizing the latter claim as falling within the scope of this subsection); State v. Stubbs, 232 N.C. App. 274, 280 (2014) (same), *aff'd on other grounds*, 368 N.C. 40 (2015). Note that a claim asserting an illegal sentence may challenged under either this provision of the MAR statute or under subsection 15A-1415(b)(4) (discussed above). *Wilkerson,* 232 N.C. App. at 490-91 (so noting this overlap with respect to a claim that a sentence violated the Eighth Amendment).
28. G.S. 15A-1414(b)(4); *see also* State v. Espinoza-Valenzuela, 203 N.C. App. 485, 496 (2010).
29. *See* G.S. 15-196.1 to 196.4 (provisions on credit for time served).
30. G.S. 15A-1415(c).
31. *Id.*
32. *Id.*
33. *See* State v. Powell, 321 N.C. 364, 371 (1988) (addressing a provision in an earlier MAR statute pertaining to newly discovered evidence).

- the witness or witnesses will give newly discovered evidence;
- the newly discovered evidence is probably true;
- the newly discovered evidence is competent, material, and relevant;
- due diligence and proper means were employed to procure the testimony at the trial;
- the newly discovered evidence is not merely cumulative;
- the newly discovered evidence does not tend only to contradict a former witness or to impeach or discredit the witness; and
- the newly discovered evidence is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail.[34]

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

- the court is reasonably well satisfied that the testimony given by a material witness is false; and
- there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.[35]

A number of published North Carolina cases apply these tests to claims of newly discovered evidence.[36]

34. *See* State v. Britt, 320 N.C. 705, 712–13 (1987); *see also* State v. Howard, 247 N.C. App. 193, 200-01 (2016); State v. Peterson, 228 N.C. App. 339, 344 (2013).
35. *See Britt,* 320 N.C. at 715.
36. Cases rejecting claims of newly discovered evidence include: State v. Rhodes, 366 N.C. 532, 537-38 (2013) (after the defendant was convicted of drug possession, his father told a probation officer that the contraband belonged to him; because the information implicating the defendant's father was available to the defendant before his conviction, the statement was not newly discovered evidence; the court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws; although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means; the court noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs); State v. Hall*,* 194 N.C. App. 42, 49-50 (2008) (evidence related to witness's bias was cumulative, pertained only to impeachment, and it was improbable that it would cause a jury to reach a different result on another trial); State v. Rhue*,* 150 N.C. App. 280, 288-89 (2002) (evidence was witness testimony that the murder victim had a gun; because the defendant testified that he never saw a weapon on the victim, the fact that the victim was armed was irrelevant to the defendant's assertion of self-defense; to the extent the defendant sought to discredit a trial witness's testimony that the victim was unarmed, this is not a proper basis for granting a MAR asserting newly discovered evidence); State v. Bishop*,* 346 N.C. 365, 401–04 (1997) (evidence consisting of eyewitness testimony that the defendant was not responsible for the crime; the State's cross-examination of the witness and the testimony of other witnesses "tended to substantially question his character for truthfulness and veracity" and support the trial court's conclusions that the witness's testimony was not true and that the defendant had not shown that a different result would probably be reached at another trial); State v. Wiggins, 334 N.C. 18, 37–39 (1993) (evidence was known to the defendant and available to him at the time of trial as the

By its terms, G.S. 15A-1415(c) speaks to evidence discovered "at any time after verdict" that was unknown or unavailable to the defendant "at the time of trial." No published North Carolina appellate case has considered whether a defendant who has pleaded guilty may assert a newly discovered evidence claim under the MAR statute. In *State v. Alexander*, 380 N.C. 572, 582-96 (2022), the North Carolina Supreme Court held that a defendant may be entitled to postconviction DNA testing under G.S. 15A-269 following a guilty plea notwithstanding language in that statute, including a reference to "the verdict," which the State argued should be interpreted as limiting relief to defendants who are convicted at trial. It remains to be seen whether[37] and how[38] North Carolina courts will interpret the applicability of G.S. 15A-1415(c) to cases involving guilty pleas.

x. Defendants who are victims of human trafficking, etc. 2019 legislation, S.L. 2019-158, sec. 5(a), amended G.S. 15A-1415 to allow a defendant who was convicted of a

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defendant and the witness both were in pretrial detention at the same jail and communicated with each other); State v. Eason, 328 N.C. 409, 432–35 (1991) (evidence tended to show that post-trial confession by a third party that was later recanted was not truthful where the witness stood by his disavowal and confession was uncorroborated and not credible); State v. Riggs, 100 N.C. App. 149, 156–57 (1990) (accomplice's testimony at his own trial that a third person was solely responsible for the crime; the testimony was cumulative, the defendant did not establish that it was probably true, and he failed to show due diligence); *Powell*, 321 N.C. at 370–71 (the defendant did not act with due diligence in obtaining testimony of witness whose statement the defendant was aware of at trial).

Cases finding merit in such claims include: State v. Reid, 380 N.C. 646 (2022) (newly discovered evidence of a third party's contemporaneous confession tending to exculpate the defendant entitled the defendant to a new trial where the trial court did not abuse its discretion by concluding that at the time of trial the defendant exercised due diligence in unsuccessfully attempting to procure the relevant witness's testimony, the substance of which was then unknown); State v. Peterson, 228 N.C. App. 339, 344-47 (2013) (newly discovered evidence that the State's expert bloodstain witness, Duane Deaver, had misrepresented his qualifications entitled the defendant to a new trial); State v. Stukes, 153 N.C. App. 770, 772-76 (2002) (newly discovered evidence consisted of a co-defendant's testimony offered at his own trial, which tended to exculpate the defendant); *see also* State v. Monroe, 330 N.C. 433, 434–35 (1991) (recounting the procedural history of the case and noting that the defendant was granted a new trial on the basis of newly discovered evidence; the defendant had contended that ballistic tests conducted by the Federal Bureau of Investigation after trial showed that the gun the State presented at trial was not used in the crime).

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

37. It is conceivable that in some cases, rather than applying G.S. 15A-1415(c), it may be appropriate to apply existing North Carolina caselaw regarding motions to withdraw guilty pleas to a MAR asserting newly discovered evidence following a guilty plea. *Cf.* State v. Salvetti, 202 N.C. App. 18, 25 (2010) ("A post sentencing motion to withdraw a plea is a motion for appropriate relief"). For more information about the analysis applicable to motions to withdraw guilty pleas, see Jessica Smith, Pleas and Plea Negotiations in Superior Court, in this Benchbook, *available at* https://benchbook.sog.unc.edu/criminal/pleas-and-plea-negotiations.

38. *Cf. Alexander*, 380 N.C. at 587 (referencing the Court's precedent that remedial statutes "should be construed liberally, in a manner . . . which brings within [them] all cases fairly falling within [the statutes'] intended scope"); *but cf. Alexander*, 380 N.C. at 605-06 (Newby, C.J., concurring in result) (expressing view that language of G.S. 15A-269 should be interpreted to limit availability of postconviction DNA testing to defendants convicted at trial).

nonviolent offense as defined in G.S. 15A-145.9 to file a MAR to have the conviction vacated if the defendant's participation in the offense was a result of having been a victim of human trafficking, sexual servitude, or the federal Trafficking Victims Protection Act.[39] MARs asserting this ground have special procedural rules and standards, as set forth in G.S. 15A-1416.1.

b. **No Outer Limit on Time.** Except for capital cases,[40] if the claim is listed in G.S. 15A-1415 it may be asserted at any time—one year, five years, or twenty years after judgment. Put another way, no statute of limitations applies to MARs.

c. **Calculating the Ten-Day Period.** The ten-day period begins to run with entry of judgment, which is when the sentence is pronounced.[41] For entry of judgment to occur, the judge must announce the ruling in open court or sign the judgment and file it with the clerk.[42] In capital cases, the oral pronouncement of the recommendation of the sentencing phase jury constitutes entry of judgment.[43] When computing the ten-day period, Saturdays and Sundays are excluded.[44] Presumably, legal holidays when the courthouse is closed would be excluded as well. In civil matters, when computing the time periods prescribed by the rules of civil procedure, the day of the event after which a designated time period begins to run is not included.[45] It is not clear whether this rule applies to the ten-day MAR provision.

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

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

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39. G.S. 15A-1415(b)(10). G.S. 15A-1415(b) previously was amended by 2013 legislation creating subsection (10) but confining relief to defendants convicted of a first offense of prostitution under G.S. 14-204(a) that was not dismissed under G.S. 14-204(b). S.L. 2013-368 sec. 9. The expanded eligibility described in the text for convictions of nonviolent offenses as defined in G.S. 15A-145.9 applies to motions filed on or after December 1, 2019. S.L. 2019-158 secs. 5(a), 6(a). *See also generally* JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 316-20 (7th ed. 2012) (discussing the offenses of human trafficking and sexual servitude); JESSICA SMITH AND JAMES M. MARKHAM, 2020 CUMULATIVE SUPPLEMENT TO NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (2021).

40. *See* Section III.B.

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

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

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

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

45. N.C. R. CIV. P. 6(a).

- when there has been a decision or judgment dismissing criminal charges as to one or more counts (e.g., a claim that the district court judge erroneously dismissed an impaired driving charge due to the State's failure to produce the chemical analyst in court[46]); or
- upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence, but only on questions of law (e.g., a claim that the district court judge erroneously granted a motion for a new trial on grounds of newly discovered evidence when the defense conceded that the evidence was known to it at the time of trial[47]).

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

- results from an incorrect determination of the defendant's prior record level or prior conviction level (e.g., a claim alleging that the trial judge incorrectly added the defendant's prior record points and categorized the defendant as a prior record level III offender when a correct tabulation would have put the defendant in prior record level IV);
- contains a type of sentence disposition that is not authorized for the class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to intermediate punishment when only active punishment is authorized for the offense of conviction);
- contains a term of imprisonment that is for a duration not authorized for the class of offense and prior record or conviction level (e.g., a claim alleging that the trial judge sentenced the defendant to a term of imprisonment not authorized for the offense of conviction); or
- imposes an intermediate punishment based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation (e.g., a claim alleging that the judge imposed an intermediate punishment based on findings of extraordinary mitigating circumstances for a Class B1 felony).[48]

As noted above, G.S. 15A-1416(a) provides that a MAR filed by the State within ten days of judgment may raise any error that it "may assert

46. G.S. 20-139.1(e2) (criminal case may not be dismissed for failure of the analyst to appear, subject to specified exceptions).
47. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
48. Extraordinary mitigation may not be used for a Class A or Class B1 felony, a drug trafficking offense under G.S. 90-95(h), a drug trafficking conspiracy offense under G.S. 90-95(i), or if the defendant has five or more points as determined by G.S. 15A1340.14. G.S. 15A-1340.13(h)(1)-(3).

upon appeal." G.S. 15A-1445(b) allows the State to appeal a superior court judge's pre-trial ruling granting a motion to suppress, as provided in G.S. 15A-979. The latter statute provides for immediate appeal by the State of a pre-trial ruling on a motion to suppress. However, it is not clear that the State could use a MAR to challenge an adverse superior court ruling on a suppression motion. If the appellate court affirms the superior court's pre-trial ruling, the procedural bar rules would seem to prevent the State from re-asserting the issue in a MAR.[49] Additionally, the State would not be able to use a MAR in lieu of an appeal to challenge a trial judge's pre-trial ruling because a MAR can be made only after the verdict has been rendered.[50] Finally, because G.S. 15A-979 does not provide a right of appeal by the State of an adverse ruling on a motion to suppress made and granted during trial,[51] the issue is not one that the State "may assert upon appeal."

2. Made More Than Ten Days After Judgment. Once the ten-day period has expired,[52] the State's right to file a MAR is very limited, and it is not clear that the MAR statute provides for anything that is not already provided for by law. Under G.S. 15A-1416(b), the State may file a MAR more than ten days after entry of judgment for

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

If the claim falls within the second category, the procedural provisions of those Articles control.[53]

Although the Official Commentary to G.S. 15A-1416 says that the State is authorized "without limitation as to time" to seek imposition of a sentence after a PJC, the court lacks jurisdiction to enter the judgment if a PJC extends for an unreasonable period of time.[54]

There is no statutory authority for the State to make a motion to set aside the judgment on the basis of newly discovered evidence.[55]

C. Motions by the Judge. Under G.S. 15A-1420(d), a judge has the authority to consider a MAR *sua sponte*. Specifically, the statute provides that "[a]t any time that a defendant would be entitled to relief by [MAR], the court may grant such

49. *See* Section X.B.2 (discussing the procedural bar rule that applies when an issue has been ruled on in a prior proceeding).
50. *See* Section III.A.
51. *See* Official Commentary to G.S. 15A-976 (when a trial judge waits until after the trial has begun to rule on a motion to suppress, "this would have the effect of denying the State's right to appeal an adverse ruling").
52. See Section II.A.2.c for the rule regarding calculating the ten-day period.
53. G.S. 15A-1416(b)(2).
54. See Jessica Smith, *Prayer for Judgment Continued*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
55. *See* State v. Oakley, 75 N.C. App. 99, 102 (1985) (State learned that victim's medical bills were substantially greater than amount provided in restitution).

relief upon its own motion."[56] If the court acts *sua sponte* under this provision, it must provide appropriate notice to the parties.[57]

1. **When the Defendant Would Benefit.** The court has authority to act under G.S. 15A-1420(d) only when "[the] defendant would be entitled to relief." Thus, for example, if after the session has ended, the DOC notifies the trial court that it sentenced the defendant to a term of imprisonment in excess of the statutory maximum, the court need not await a MAR from the defendant to correct its sentencing error.[58] Because the defendant would be entitled to relief,[59] the trial court may exercise its authority under G.S. 15A-1420(d) and *sua sponte* correct the error. Of course, a defendant must be present for any resentencing that is held.[60] See Section XI below for a discussion of when a hearing is necessary.
2. **When the State Would Benefit.** Because G.S. 15A-1420(d) only authorizes the court to act *sua sponte* when the defendant would be entitled to relief, it does not authorize action when the error works to the defendant's advantage and any relief would benefit only the State.[61]

D. "Consent" MARs. Occasionally defense counsel and the prosecutor will inform the judge that both sides agree that relief requested in a MAR should be granted. These requests may become more common as a result of 2012 legislative changes that added a new subsection (e) to G.S. 15A-1420 stating: "Nothing in this section shall prevent the parties to the action from entering into an agreement for appropriate relief, including an agreement as to any aspect, procedural or otherwise, of a motion for appropriate relief." The 2012 statutory amendments may be read to override G.S. 15A-1420(c)(6), which suggests that a judge is not authorized to grant a MAR unless a valid ground for relief exists.[62] Absent guidance from the appellate division, caution is advised before setting aside an error-free conviction and sentence on a consent MAR.

III. Time for Filing.

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

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56. G.S. 15A-1420(d); *see* State v. Williams, 227 N.C. App. 209, 213 (2013) (because the defendant could have raised the issue, the trial court's *sua sponte* MAR was proper).
57. G.S. 15A-1420(d); *see Williams*, 227 N.C. App. at 214 (2013) (trial court's oral notice, given one day after judgment was entered, was adequate).
58. DOC has no authority to modify a judgment. *See* Hamilton v. Freeman, 147 N.C. App. 195, 204 (2001). Rather, the DOC should notify the court and the parties of the sentencing error. *See id.*
59. *See* G.S. 15A-1415(b)(8) (allowing a MAR when the sentence is unauthorized at the time imposed).
60. *See* Jessica Smith, *Trial in the Defendant's Absence*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/trial-defendants-absence.
61. State v. Oakley, 75 N.C. App. 99, 103-04 (1985) (trial court had no authority to strike a plea under G.S. 15A-1420(d) when such relief benefited the State only).
62. G.S. 15A-1420(c)(6) (defendant must show the existence of the asserted ground for relief); *see* Section XI.H (discussing burdens and standards for granting relief on a MAR). Whatever the new provision means, it probably cannot be read to avoid procedural rules contained in *other* sections that bar the granting of a MAR in certain circumstances. *See, e.g.,* Section X (Procedural Default), below.

A. Post-Verdict Motion. A MAR may not be filed until after the verdict is rendered.[63] A verdict is "the answer of the *jury* concerning any matter of fact submitted to [it] for trial."[64] When there is no verdict by the jury—such as when the defendant pleads guilty—a MAR may not be filed until after sentencing.[65] A mistrial is not a "verdict" within the meaning of the MAR statute.[66]

B. Capital Cases. As noted in Section I.B. above, special rules apply to Racial Justice Act MARs. But even for non-RJA capital MARs, special rules apply. For capital cases in which the trial court judgment was entered after October 1, 1996, there is an outer time limit for the filing of MARs. Specifically, unless an extension has been granted[67] or an exception applies, motions in such cases must be filed within 120 days from the latest of the following events:

- The court's judgment has been filed, but the defendant failed to perfect a timely appeal;
- The mandate issued by a court of the appellate division on direct appeal pursuant to North Carolina Rule of Appellate Procedure 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;
- The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;
- Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;
- The United States Supreme Court granted a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the conviction and sentence undisturbed; or
- The appointment of post-conviction counsel for an indigent capital defendant.[68]

A claim of newly discovered evidence[69] is not subject to the 120-day time limit imposed on capital MARs.[70] But as discussed above, such a claim must be filed within a reasonable time of its discovery.[71]

63. *See* State v. Handy, 326 N.C. 532, 535 (1990) ("A [MAR] is a *post-verdict* motion"); G.S. 15A-1414(a) ("After the verdict . . . ."); G.S. 15A-1415(a) ("At any time after verdict . . . ."); G.S. 15A-1415(c) ("at any time after verdict"); G.S. 15A-1416(a) ("After the verdict . . . ."); G.S. 15A-1416(b) ("At any time after verdict . . . .").
64. *Handy*, 326 N.C. at 535 (quotation omitted) (emphasis in original).
65. *See id*. at 536.
66. State v. Allen, 144 N.C. App. 386, 390 (2001).
67. *See* Section III.C (discussing extensions).
68. *See* G.S. 15A-1415(a); 1995 N.C. Sess. Laws. ch. 719 sec. 8 (effective date of October 1, 1996).
69. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
70. G.S. 15A-1415(c).
71. *See* Section II.A.2.a.ix (discussing claims of newly discovered evidence).

C. Extensions. "For good cause shown," a defendant may be granted an extension of time to file a MAR.[72] It seems clear that this provision applies to the 120-day filing period for capital cases. It is not clear whether it applies to the ten-day period for a defendant's MAR under G.S. 15A-1414. As noted above,[73] once the ten-day period expires, G.S. 15A-1415 sets out an exclusive list of claims that a defendant can raise in a MAR. However, if a trial judge is aware of a defendant's desire to file a G.S. 15A-1414 MAR and wishes to extend the filing period while avoiding a potential issue later about the court's authority to grant such an extension, the judge could simply enter a PJC. Judgment then could be entered when the MAR is ready to be filed, ensuring that the MAR will be filed within ten days of entry of judgment.[74]

The presumptive length of an extension is up to thirty days, but the extension can be longer if the court finds "extraordinary circumstances."[75] No statutory guidance is provided on the meaning of this term.

IV. Pre-Filing Issues.

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

A. Capital Cases. The General Rules of Practice for the Superior and District Courts provide that all requests for appointment of experts made before the filing of a MAR and after a denial by the Office of Indigent Defense Services (IDS) must be ruled on by the senior resident superior court judge or his or her designee, in accordance with IDS rules.[76] Those rules also provide that all requests for other *ex parte* and similar matters arising before a MAR is filed in a capital case must be ruled on by the senior resident superior court judge, or his or her designee, in accordance with rules adopted by IDS.[77]

B. Requests for Transcripts. Occasionally, an indigent defendant will make a pre-filing request for the transcript of the trial or plea proceeding to help prepare a MAR. The Unites States Supreme Court has held that the state must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when the transcript is needed for an effective defense or appeal and would be available at a price to non-indigent defendants.[78] The effect of this rule "is to make available to an indigent defendant those tools available to a solvent defendant which are necessary for preparing an equally effective defense [or appeal]."[79] The Court has identified two factors relevant to the determination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices

72. G.S. 15A-1415(d).
73. *See* Section II.A.2.
74. For more information about PJCs, see Jessica Smith, *Prayer for Judgment Continued*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/prayer-judgment-continued.
75. G.S. 15A-1415(d).
76. GEN. R. PRAC. SUP. & DIST. CT. R. 25(2).
77. *Id.* at R. 25(3). The IDS rules are posted on the IDS website at http://www.ncids.org (last visited Jan. 24, 2023).
78. Britt v. North Carolina, 404 U.S. 226, 227 (1971); *see also* State v. Rankin, 306 N.C. 712, 715 (1982).
79. *Rankin,* 306 N.C. at 715.

that would fulfill the same functions as a transcript."[80] However, an indigent defendant's broad right to a transcript for purposes of a trial or direct appeal does not apply with equal force in post-conviction proceedings, such as MAR proceedings. In *United States v. MacCollom*,[81] the Court upheld the constitutionality of a federal habeas statute that allowed trial judges to deny free transcripts to indigent petitioners who raise frivolous claims. In that case, the defendant, who had not appealed his conviction, asked for the transcript in connection with a collateral attack. The Court found the procedural posture of the case significant:

> Respondent chose to forgo his opportunity for direct appeal with its attendant unconditional free transcript. This choice affects his . . . claim[s]. Equal protection does not require the Government to furnish to the indigent a delayed duplicate of a right of appeal with attendant free transcript which it offered in the first instance, even though a criminal defendant of means might well decide to purchase such a transcript in pursuit of [post-conviction] relief. . . . We think it enough at the collateral-relief stage that [the government] has provided that the transcript be [paid] for [with] public funds if one demonstrates to a [trial court] judge that his . . . claim is not frivolous, and that the transcript is needed to decide the issue presented.[82]

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

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

A. Form of the Motion. As a general rule a MAR must

- be in writing,
- state the grounds for the motion,
- set forth the relief sought,
- be timely filed, and
- if made in superior court by a lawyer, contain a required certification.[83]

1. Oral Motions. The MAR need not be in writing if it is made in open court, before the judge who presided at trial, before the end of the session (if made in superior court), and within ten days after entry of judgment.[84]

80. *Britt,* 404 U.S. at 227.
81. 426 U.S. 317 (1976).
82. *Id.* at 325–26.
83. G.S. 15A-1420(a).
84. *Id.*

2. Certification. If made in superior court by a lawyer, the MAR must contain a required certification. The statute specifies that the attorney must certify, in writing, that

- there is a sound legal basis for the motion and that it is being made in good faith,
- the attorney has notified both the district attorney's office and the attorney who initially represented the defendant of the motion, and
- the attorney has reviewed the trial transcript or made a good-faith determination that the nature of the relief sought does not require that the trial transcript be read in its entirety.[85]

If the trial transcript is unavailable, instead of certifying that he or she has read the trial transcript, the attorney must set forth in writing what efforts were undertaken to locate the transcript.[86] A motion may not be granted if the lawyer fails to provide the required certification.[87]

3. Supporting Affidavits. G.S. 15A-1420(b) provides that a MAR must be supported by affidavit or other documentary evidence if based on facts that are not ascertainable from the record and transcript of the case or that are not within the knowledge of the judge who hears the motion.[88] One open issue is whether, to be sufficient, the affidavit must contain admissible evidence.

B. Service and Filing. G.S. 15A-1420(b1)(1) sets out the rules for filing and service of a MAR. It provides that the motion should be filed with the clerk of superior court of the district where the defendant was indicted. In non-capital cases, service must be made on the district attorney. In capital cases, service must be made on both the district attorney and the attorney general. As written, the statute seems to speak only to MARs by defendants. Presumably, MARs by the State are filed in the same way. It is unclear who receives service of a MAR by the State, as the defendant may no longer be represented by trial counsel. Also, by referencing when the defendant was indicted, the statute restricts its application to superior court convictions and does not address MARs challenging district court convictions. A separate provision in the MAR statute suggests that service for MARs filed in district court must be done pursuant to G.S. 15A-951(c).[89]

85. G.S. 15A-1420(a)(1)c1.
86. *Id.*
87. G.S. 15A-1420(a)(5).
88. State v. Payne, 312 N.C. 647, 668-69 (1985) (denying a MAR because the defendant failed to submit supporting affidavits).
89. *See* G.S. 15A-1420(a)(4) (providing that a MAR may not be granted in district court without the signature of the district attorney indicating that the State has had an opportunity to consent or object to the motion but that a district court judge may grant a MAR without the district attorney's signature ten business days after the district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c)). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.

C. Amendments.

1. Defendant's MAR. A defendant may amend a MAR in certain circumstances. First, and as discussed in Section VIII.A.5 below, G.S. 15A-1420(b1)(3) provides that once the MAR judge assigns appointed counsel, counsel must review the defendant's pro se filing and either adopt it or file an amended MAR.[90] If counsel opts to adopt the MAR, presumably the required attorney certification still must be filed.[91] Second, G.S. 15A-1415(g) provides that a defendant may amend a motion by the later of

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

Although this provision suggests that an amendment after the hearing has begun would be untimely, that does not appear to be the case. G.S. 15A-1415(g) also provides that after the hearing has begun, the defendant may file amendments to "conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence."[92]

One question that has arisen regarding MAR amendments is whether a defendant may raise new claims by amendment that would be untimely if they do not relate back to the filing date of the original motion. For example, suppose a defendant files a motion on January 1, 2022, within the ten-day window. Although the defendant may assert "any error" in this motion,[93] the defendant only asserts one error: that trial counsel rendered ineffective assistance of counsel. On April 1, 2022, the defendant timely amends the motion asserting a new claim that the evidence was insufficient to submit to the jury. According to G.S. 15A-1414(b)(1)c, this claim must be filed within the ten-day window to be timely. If the amendment relates back to the original motion, the new claim will be timely. If it does not relate back, it is untimely. The statute does not address relation back, and the issue does not appear to have been decided by the North Carolina appellate courts.

2. State's MAR. No statutory provisions speak to the State's ability to amend a MAR.

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

VI. Case Processing and Assignment.

A. Clerk's Duties.

1. Non-Capital Cases. When receiving a MAR, the clerk must place the motion on the criminal docket and "promptly" bring the motion (or copy) to

90. G.S. 15A-1420(b1)(3).
91. *See* Section V.A.2 (discussing the required certification).
92. G.S. 15A-1415(g).
93. *See* Section II.A.1 (a motion made within ten days of judgment may assert "any error").

the attention of the senior resident superior court judge or chief district court judge for assignment pursuant to G.S. 15A-1413.[94]

2. **Capital Cases.** When a MAR is filed in a capital case, the clerk must refer the MAR to the senior resident superior court judge or his or her designee.[95]

B. Senior Resident/Chief District Court Judge's Duties. When the motion is received from the clerk, the Senior Resident Judge or Chief District Court Judge must assign the motion pursuant to G.S. 15A-1413 for review and administrative action.[96]

1. **Assignment of G.S. 15A-1415 MARs.** A G.S. 15A-1415 motion (MAR made more than ten days after judgment) may be heard and determined by any trial judge who:

   - is empowered to act in criminal matters in the district court district or superior court district in which the judgment was entered and
   - is assigned pursuant to G.S. 15A-1413 to review the motion and take the appropriate administrative action to dispense with the motion.[97]

   The assignment of a G.S. 15A-1415 MAR is in the discretion of the senior resident superior court judge or chief district court judge.[98]

2. **Assignment of G.S. 15A-1414 MARs.** The judge who presided over the trial may act on a G.S. 15A-1414 motion (MAR made within ten day of entry of judgment), even if he or she is in another district and his or her commission has expired.[99] However, if the judge who presided at the trial is unavailable, the senior resident superior court judge or the chief district court judge must treat the MAR as one filed under G.S. 15A-1415 for purposes of assignment.[100]

C. MAR Judge's Initial Duties. In both non-capital and capital cases, assignment to the MAR judge is for:

> review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, including disclosure of expert witness information described in G.S. 15A‑903(a)(2) and G.S. 15A‑905(c)(2) for expert witnesses

94. G.S. 15A-1420(b1)(2).
95. GEN. R. PRAC. SUP. & DIST. CT. R. 25(4).
96. G.S. 15A-1420(b1)(2); -1413(d).
97. G.S. 15A-1413(a).
98. G.S. 15A-1413(e).
99. G.S. 15A-1413(b).
100. *Id.*

reasonably expected to be called at a hearing on the motion, or other appropriate actions.[101]

Additionally, the trial court should:

- Conduct an initial review and dismiss the motion if it is frivolous.[102]
- Enter an order indicating whether the defendant should be allowed to proceed without the payment of costs.[103]
- If the motion presents sufficient information warranting a hearing or the interests of justice so require and if the defendant is entitled to counsel,[104] enter an order appointing counsel.[105]
- Enter an order requiring that appointed counsel either adopt the motion or file an amended MAR.[106]

After counsel files an initial or amended motion, or a determination is made that the defendant is proceeding without counsel, the judge may direct the State to file an answer.[107] Should the State contend that as a matter of law the defendant is not entitled to the relief sought, it may request leave to file a limited answer so alleging.[108] The MAR judge then proceeds to resolve the MAR, with or without a hearing, as appropriate.[109]

D. Trial Court's Authority to Act When Case Is on Appeal.

1. Motions Asserting Claims under G.S. 15A-1415. When a case is in the appellate division for review, a MAR asserting a ground set out in G.S. 15A-1415 must be made in the appellate division.[110] A case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448 or when a petition for a writ of certiorari has been granted.[111] When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.[112]

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101. G.S. 15A-1413(d); GEN. R. PRAC. SUP. & DIST. CT. R. 25(4).
102. G.S. 15A-1420(b1)(3). *See* State v. Lane, 271 N.C. App. 307, 320 (2020) (MAR was not frivolous where it "raised arguments not yet addressed by North Carolina appellate courts that support a modification or reversal of existing law").
103. *See* Section VIII.B (discussing costs).
104. *See* Section VIII.A (discussing the right to counsel).
105. G.S. 15A-1420(b1)(3).
106. *Id*.
107. *Id.*
108. *Id.*
109. *See* Section XI (hearings); Section XII (the judge's order).
110. G.S. 15A-1418(a); *see* Section II.A.2 (discussing claims that can be asserted in a MAR under G.S. 15A-1415).
111. G.S. 15A-1418(a). *See also* State v. Lebeau, 271 N.C. App. 111, 113-14 (2020) (in the context of a direct appeal not involving a MAR, interpreting the plain language of G.S. 15A-1448(a)(3) to provide that a trial court's jurisdiction is not divested immediately upon the noticing of an appeal; rather, jurisdiction is divested when notice of appeal has been given and the 14-day window for filing a notice of appeal described by Rule 4 of the North Carolina Rules of Appellate Procedure has expired).
112. *Id.*

2. Motions Made Within Ten Days of Judgment. Defendants' MARs made under G.S. 15A-1414 within ten days of entry of judgment may be heard and acted upon in the trial division regardless of whether notice of appeal has been given.[113] Though G.S. 15A-1416 does not contain an explicit provision parallel to that of G.S. 15A-1414(c), the North Carolina Court of Appeals has held that a trial court properly retained jurisdiction to act upon the State's MAR made within 10 days of judgment regardless of the fact that the defendant had entered a written notice of appeal prior to the state filing the MAR.[114]

VII. Discovery.

A. State's Obligations. The State, to the extent allowed by law, must "make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[115] This requirement does not appear to apply unless the defendant is represented by counsel. It is not clear whether the relevant statutory provision requires the State to produce discovery pre-filing or whether a MAR must be filed to trigger the State's discovery obligations. As noted in Section VIII.A.2 below, many judges do not appoint counsel to an indigent defendant unless the pro se MAR passes a frivolity review. Thus, as a practical matter, a MAR likely will have been filed when counsel is appointed, which is the trigger for the State's discovery obligations.

B. Protective Orders. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel would not be in the interest of justice, it may submit those portions for court inspection.[116] If upon examination, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a MAR, the court, in its discretion, may allow the State to withhold that portion of the files.[117]

C. Expert Witness Information. As discussed above in Section VI.C, the MAR statute provides that the initial duties of the judge assigned to the MAR include, "as may be appropriate," "entry of a scheduling order for subsequent events in the case, including disclosure of expert witness information described in G.S. 15A‑903(a)(2) and G.S. 15A‑905(c)(2) for expert witnesses reasonably expected to be called at a hearing on the motion."[118]

D. Inherent Authority to Order Discovery. Beyond the MAR statute's explicit discovery provisions, the North Carolina Supreme Court has held that the

113. G.S. 15A-1414(c); *see* Section II.A.1 (discussing MARs made within ten days of entry of judgment).
114. State v. Joiner, 273 N.C. App. 611, 613-14 (2020) (relying on *Lebeau*, 271 N.C. App. at 113-14, to conclude that because the trial court was not immediately divested of jurisdiction by the noticing of the defendant's appeal, the State's MAR filed thereafter and within 10 days of judgment was timely and properly filed in the trial court; consequently, the trial court retained jurisdiction to issue an order on the MAR under G.S. 15A-1448(a)(2) (case remains open for taking of appeal until trial court rules on MAR made under G.S. 15A-1414 or G.S. 15A-1416(a))).
115. G.S. 15A-1415(f).
116. *Id.*
117. *Id.*
118. G.S. 15A-1413(d).

judiciary has inherent authority "to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such a motion."[119] The Court stated that such discovery orders are proper where they further the interest of justice by "significantly assisting in the search for the truth."[120]

VIII. Indigents.

A. Counsel.

1. Right to Counsel. The United States Supreme Court has rejected the argument that defendants have a constitutionally protected right to counsel in post-conviction proceedings, such as MARs.[121] However, in North Carolina, indigent defendants have a statutory right to counsel in MAR proceedings. Specifically, G.S. 7A-451(a)(3) provides that an indigent defendant is entitled to counsel for a MAR if appointment is authorized by Chapter 15A and

- the defendant has been convicted of a felony,
- has been fined $500 or more, or
- has been sentenced to a term of imprisonment.[122]

For its part, Chapter 15A, specifically the MAR statute, provides that counsel should be appointed "[i]f the motion presents sufficient information to warrant a hearing or the interests of justice so require."[123] As a practical matter, and to clarify the issues for the court and the State and to promote the efficient use of court resources, the interests of justice may require appointment of counsel whenever a MAR passes frivolity review.[124] Additionally, the MAR statute provides that a defendant has a right to be represented by counsel at an evidentiary hearing.[125]

2. Time to Appoint Counsel. G.S. 7A-451(b) provides that an indigent's "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process." Many judges have interpreted this provision to mean that they need not appoint counsel unless the MAR passes a frivolity review. 2017 amendments to the MAR

119. State v. Taylor, 327 N.C. 147, 154 (1990).
120. *Id*. at 152-55 (explaining in a case involving a MAR alleging ineffective assistance of counsel and predating the enactment of G.S. 15A-1415(e) that it would be within the trial court's inherent authority to grant the State's discovery motion seeking trial counsel's files so long as disclosure was limited to matters relevant to the IAC claim). *See also* State v. Cataldo, 281 N.C. App. 425, 427 (2022) (with respect to a MAR alleging ineffective assistance of counsel on basis of trial counsel's unreasonable failure to subpoena known DHHS and DSS records relevant to the victim's credibility, the trial court erred by narrowing the scope of *in camera* review of any such records which the Court of Appeals previously had held (in an unpublished opinion) was required by the defendant's sufficiently supported motion for post-conviction discovery).
121. Pennsylvania v. Finely, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." (citation omitted)).
122. G.S. 7A-451(a)(3). *See also* G.S. 15A-1421 (G.S. Chapter 7A applies in MAR proceedings).
123. G.S. 15A-1420(b1)(3).
124. *See* Section VI.C (discussing the required frivolity review).
125. G.S. 15A-1420(c)(4).

statute seemed to confirm the propriety of this approach. The 2017 amendments added new language to the MAR statute providing:

> The judge assigned to the motion shall conduct an initial review of the motion. If the judge determines that all of the claims alleged in the motion are frivolous, the judge shall deny the motion. If the motion presents sufficient information to warrant a hearing or the interests of justice so require, the judge shall appoint counsel for an indigent defendant who is not represented by counsel.[126]

The order in which the statute states the tasks to be undertaken by the assigned judge suggests appointment of counsel should be made after a frivolity review.

3. **Capital Cases.** Appointment of counsel in capital MARs must be done in accordance with G.S. 7A-451(c), (d), and (e) and IDS rules.[127]
4. **Trial versus New Counsel.** When appointing counsel for a MAR, it is best if the trial judge appoints someone other than trial counsel so that claims of ineffective assistance can be asserted, if appropriate.
5. **Counsel's Statutory Duties upon Appointment.** The statute specifies that appointed counsel must review the motion filed by the defendant pro se and either adopt the motion or file an amended motion.[128]

B. Costs. The court "may make appropriate orders relieving indigent defendants of all or a portion of the costs of the proceedings."[129]

IX. Counsel Issues.

An indigent defendant's statutory right to counsel is discussed above in Section VIII.A. Other counsel issues are addressed here.

A. Attorney–Client Privilege and Ineffective Assistance Claims. When a defendant's MAR alleges ineffective assistance of prior trial or appellate counsel, the defendant is deemed to waive the attorney–client privilege with respect to oral and written communications between counsel and the defendant, "to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness."[130] This provision seems to suggest that the defendant's prior counsel should review the case file to determine which communications are necessary to defend against the claim rather than turn over the entire file to the State. The waiver of attorney–client privilege occurs automatically upon the filing of the MAR alleging ineffective assistance of prior counsel; the superior court is not required to enter an order waiving the privilege.[131]

126. G.S. 15A-1420(b1)(3), as amended by S.L. 2017-176, sec. 1.(b).
127. GEN. R. PRAC. SUP. & DIST. CT. R. 25(1).
128. G.S. 15A-1420(b1)(3).
129. G.S. 15A-1421.
130. G.S. 15A-1415(e).
131. *Id.*

B. File Sharing. For defendants represented by counsel in MAR proceedings in superior court, the defendant's prior trial or appellate counsel must make their complete files available to the defendant's MAR counsel.[132] Although this provision does not apply to an unrepresented MAR defendant, such a defendant is likely entitled to those files because they belong to the client, not the lawyer. By its terms, the statutory provision on file sharing is limited to MARs in superior court.

X. Procedural Default. In order for a court to reach the merits of the claims raised in a MAR, the defendant must satisfy certain procedural rules. If the defendant fails to do so, he or she is deemed to have committed a procedural default. When this occurs and the defendant cannot establish that an exception applies, the MAR is rejected on grounds of procedural bar. Thus, the procedural default rules preclude consideration on the merits when a procedural error has occurred.

A. Mandatory Bars. The procedural default rules are mandatory. Unless an exception applies, the judge does not have discretion to waive them.[133]

B. The Default Rules. G.S. 15A-1419 contains four procedural default rules. The rules apply both in non-capital and capital cases.[134]

Figure 3. Grounds for Procedural Default

Grounds for Procedural Default

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

1. Claim Not Raised in Previous MAR. A MAR must be denied if upon a previous MAR the defendant was in a position to adequately raise the ground or issue but did not do so ("the (a)(1) bar").[135]

a. Lack of Counsel for the Prior MAR. The mere fact that a defendant was unrepresented in the prior MAR does not excuse a procedural default under this rule;[136] case law suggests that to excuse an (a)(1) default, there must have been an improper denial of counsel that impaired the defendant's ability to raise the issue.

132. G.S. 15A-1415(f).
133. G.S. 15A-1419(b).
134. G.S. 15A-1419(a).
135. G.S. 15A-1419(a)(1). Note that the North Carolina Court of Appeals held in *State v. Blake*, 275 N.C. App. 699, 714 (2020) that the trial court erred by entering an order in a MAR proceeding which declared a preemptive bar to the defendant filing future MARs on the purported basis of G.S. 15A-1419(a). The Court in *Blake* explained that the MAR statute "does not give a trial court authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion." 275 N.C. App. at 714. *See also* State v. Ballard, 283 N.C. App. 236, 249 (2022) (same).
136. State v. McKenzie, 46 N.C. App. 34, 39 (1980).

Although a defendant might assert that ineffectiveness on the part of prior post-conviction counsel rendered the defendant unable to adequately raise the issue in a prior MAR, the statute specifically provides that ineffectiveness of post-conviction counsel cannot constitute good cause for excusing a procedural default and thus undercuts this argument.[137]

b. Avoiding the Bar Through "Supplemental" MARs. In *State v. McHone*,[138] the capital defendant filed a MAR on January 17, 1995. Without holding an evidentiary hearing, the trial court denied the motion. The defendant then filed a motion to vacate the trial court's order and a "supplemental" MAR pursuant to G.S. 15A-1415(g), a provision that allows MARs to be amended.[139] After a hearing, the trial court denied the supplemental MAR, and the defendant sought review with the North Carolina Supreme Court. Without addressing whether the trial court was authorized to consider the defendant's supplemental MAR after it had denied his initial MAR and without addressing the applicability of the (a)(1) bar, the court held that the trial judge erred by denying the defendant's supplemental MAR without an evidentiary hearing.

Thus, in *McHone*, after having lost his initial MAR, the defendant asserted new claims in a "supplemental MAR" instead of in a separate second MAR (which would have been subject to the (a)(1) bar if the defendant was in a position to adequately raise the issues in the initial MAR). It could be argued that *McHone* suggests that a supplemental MAR filed pursuant to G.S. 15A-1415(g) after an initial MAR has been denied is not subject to the (a)(1) bar. One difficulty with this contention is that G.S. 15A-1415(g) does not seem to contemplate that amendments may be made after the MAR being amended has been denied.[140] Moreover, a court-created exception to the (a)(1) bar for supplemental MARs would swallow the rule; a defendant whose initial MAR has been denied could always avoid the (a)(1) bar by filing a supplemental MAR rather than a separate second MAR. It is unlikely that the supreme court meant to endorse such a reading of the statute in an opinion that did not even mention the issue or its ramifications. A more promising argument for defendants might be that once a trial court has agreed to reconsider an order denying an initial MAR, the initial MAR has been reopened and new claims properly may be asserted by way of a G.S. 15A-1415(g) amendment rather than by a second MAR. Whether this argument ultimately will be successful is unclear.[141]

137. G.S. 15A-1419(c). *See* Section X.C.1.a. (noting that under North Carolina law, ineffective assistance of post-conviction counsel cannot constitute good cause).
138. 348 N.C. 254 (1998).
139. *Id.* at 256. *See also* Section V.C (discussing this provision).
140. *See* G.S. 15A-1415(g).
141. *Cf.* State v. Basden, 350 N.C. 579, 582-83 (1999) (by allowing the defendant time to respond to the State's motion for summary denial of the defendant's motion to vacate denial of MAR, trial court "resurrected" defendant's MAR and made it "pending" for purposes of MAR discovery provision); Bacon v. Lee, 225 F.3d 470, 477 (4th Cir.

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

- within ten days after entry of judgment, or
- during the pendency of the direct appeal.[142]

The first part of this exception allows counsel who made a MAR in open court to make an additional motion within ten days "without being faced with a bar on the basis of not having raised the available grounds when he stood in open court and made his first motion."[143] However, this exception is not limited to MARs made in open court; it applies to all MARs made within ten days of entry of judgment. Under the second part of this exception, a defendant may file an initial MAR while the direct appeal is pending and later make a second MAR raising new claims without danger of procedural default under subsection (a)(1).

2. Issue Determined in Prior Proceeding. G.S. 15A-1419(a)(2) provides that a MAR must be denied if the ground or issue was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in North Carolina or federal courts. This provision establishes that as a general rule, a party has one chance to raise an issue; once an issue has been raised and lost, the party is precluded from re-litigating it in MAR proceedings.[144] This is the only procedural default rule that applies to both the State and the defendant.

a. Specific Exception. General exceptions that apply to all four of the procedural bar rules are discussed in Section X.C. Additionally, the statute prescribes a specific exception that applies only to this bar. Specifically, this bar does not apply if, since the time of the previous determination, there has been a retroactively effective change in the law controlling such issue.[145] For a discussion of the retroactivity rules, see Section II.A.2.a.vi and *Retroactivity of Judge-Made Rules*, *supra* note 25.

3. Claim Not Raised in Previous Appeal. A MAR must be denied if upon a previous appeal the defendant was in a position to raise adequately the ground or issue underlying the present motion but did not do so ("the (a)(3) bar").[146]

2000) ("Because the state MAR court reopened the original MAR, the question of whether a governing state rule was regularly and consistently applied to treat a motion to amend thereafter as a second MAR is in some doubt.").

142. G.S. 15A-1419(a)(1). For a case applying the ten-day exception to the (a)(1) bar, see *State v. Garner*, 136 N.C. App. 1, 21 (1999).

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

144. *See, e.g.*, State v. Hyman, 263 N.C. App. 310, 316 (2018) (trial court properly applied the G.S. 15A-1419(a)(2) procedural bar to a claim defendant raised in a previous MAR which the Court of Appeals addressed on the merits).

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

146. G.S. 15A-1419(a)(3). The North Carolina Supreme Court has recognized that it may not be readily discernible from the trial record and supporting documentation whether a defendant was in a position to raise adequately a

a. No Bar to Jurisdictional Issues. In *State v. Wallace*,[147] the defendant filed a MAR challenging the constitutionality of the short-form indictments used to charge him, contending that the constitutionally inadequate indictments deprived the trial court of jurisdiction to hear his case. He further argued that notwithstanding his failure to challenge the indictments on direct appeal, the issue could be heard in the MAR proceeding. Although the court ultimately rejected the defendant's contention on the merits, it held that while the (a)(3) bar generally precludes a defendant from raising an issue that could have been raised on direct appeal, the defendant's challenge to the trial court's jurisdiction was properly presented. Thus, under *Wallace*, the (a)(3) bar does not prohibit a defendant from raising in a MAR jurisdictional issues that were not raised on appeal. Whether *Wallace* will be extended to any of the other statutory procedural bars remains to be seen.

b. Ineffective Assistance Claims. This bar applies when the defendant was in a position to adequately raise the ground or issue in a previous appeal but did not do so. In most instances, a defendant is not in a position to adequately raise a claim of ineffective assistance of counsel on a direct appeal. The appellate court is a court of record and is bound by the record of the trial proceedings below. However, an ineffective assistance claim, such as a claim that the lawyer labored under an impermissible conflict of interest, almost always depends on facts outside of the record and thus requires an evidentiary hearing. Not surprisingly, when such claims are raised on appeal, the appellate courts often dismiss them without prejudice to raise the claims in the trial court.[148] This suggests that as a general rule, ineffective assistance of counsel claims will not be subject to this bar. However, some ineffectiveness claims can be decided on appeal,[149] and as to these claims, there is no reason to except them from this bar.

4. Failure to Timely File. A MAR must be denied if a capital defendant failed to timely file a MAR as required by G.S. 15A-1415(a).[150] Because G.S. 15A-1415(a) provides that in non-capital cases a defendant may file

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ground or issue upon a previous appeal and, in such a case, may be necessary for a MAR court to hold an evidentiary hearing to ascertain whether a claim is subject to the (a)(3) bar. State v. Allen, 378 N.C. 286, 310 (2021) (trial court erred by summarily dismissing as procedurally barred the defendant's claim that he was impermissibly visibly shackled during trial; evidentiary hearing was necessary to ascertain whether defendant was in a position to raise the claim on direct appeal).

147. 351 N.C. 481, 503-04 (2000).

148. *See, e.g.*, State v. Thompson, 359 N.C. 77, 123 (2004) ("[W]hen this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent [MAR] in the trial court.").

149. State v. Casey, 263 N.C. App. 510, 519-22 (2019) (ineffective assistance of trial counsel claim was subject to the (a)(3) bar where deficient performance was apparent from the cold record but not raised on direct appeal). *See also* State v. Goode, 197 N.C. App. 543, 545-48 (2009) (deciding an ineffective assistance of counsel claim asserting a *Harbison* error (unconsented-to admission of guilt) on direct appeal).

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

a MAR at any time after verdict, this bar does not apply to those cases. However, as discussed above in Section III.B, G.S. 15A-1415(a) prescribes a 120-day filing period for capital MARs. Also as discussed above, the MAR statute allows for extensions and amendments and excludes claims of newly discovered evidence from the 120-day filing rule.[151]

a. Amendments and Relation Back. One issue regarding this bar is whether amendments to capital MARs raising new claims must be filed within the 120-day deadline of G.S. 15A-1415(a) or whether they can be made later on grounds that they relate back to the original filing for purposes of the 120-day rule. On the one hand, it may be argued that allowing new claims to be asserted in amendments filed after the deadline will frustrate the purpose of the 1996 legislative revisions that added the 120-day rule: to expedite the post-conviction process.[152] In support of this argument it may be noted that G.S. 15A-1415(g) contains no language allowing for relation back of new claims raised in amended MARs.[153] On the other hand, because both provisions were enacted in the same bill, G.S. 15A-1415(g) arguably was meant to serve as a limited exception to G.S. 15A-1415(a), allowing, in certain circumstances, for the assertion of new claims outside of the 120-day period. Under this view, G.S. 15A-1415(g) is not an exception that swallows the rule; rather, it allows new claims to be raised in connection with a properly filed MAR only within a limited window of time, ending when the time for making an amendment ends.

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

1. Good Cause and Actual Prejudice. A defendant is excused from procedural default if he or she can demonstrate good cause and actual prejudice.[154]

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

- the result of state action in violation of the federal or state constitutions, including ineffective assistance of trial or appellate counsel;
- the result of the recognition of a new federal or state right that is retroactively applicable; or

151. *See* Sections III.C (extension of time) and V.C (amendments).
152. *See* State v. Buckner, 351 N.C. 401, 408 (2000) (purpose of amendments was to expedite the post-conviction process).
153. *Compare* N.C. R. CIV. P. 15(c) ("[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed").
154. G.S. 15A-1419(b)(1).

- based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous state or federal post-conviction review.

The first ground—result of state action in violation of the federal or state constitutions—expressly includes ineffective assistance of trial or appellate counsel. However, the statue also provides that "a trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause"; neither may "a claim of ineffective assistance of prior post-conviction counsel constitute good cause."[155] Examples of the types of ineffective assistance claims that could fall within the good cause provision include claims of an impermissible conflict of interest or a denial of counsel at a critical stage of the criminal proceeding.[156]

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

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

c. Applicability to the "Previously Determined" Procedural Bar. Because it states that "good cause may only be shown if the defendant establishes . . . that his failure to raise the claim or file a timely motion" resulted from one of the good cause grounds, G.S. 15A-1419(c) does not apply to procedural defaults under subsection (a)(2). As discussed above, the (a)(2) bar does not involve a failure to raise a claim or a failure to file a timely motion; a claim is barred by subsection (a)(2) because the defendant previously raised the claim and it was decided unfavorably.[157] Thus, the statutory language suggests that the good cause and actual prejudice exception does not apply to a default on grounds of the (a)(2) bar.

2. Fundamental Miscarriage of Justice. A defendant will be excused from procedural default if he or she can demonstrate that a failure to consider the claim will result in a fundamental miscarriage of justice.[158] According to the statute, a fundamental miscarriage of justice results only if

155. G.S. 15A-1419(c).
156. For more information about ineffective assistance of counsel claims, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NORTH CAROLINA CRIMINAL CASES (UNC School of Government, 2003).
157. *See* Section X.B.2.
158. G.S. 15A-1419(b)(2).

- the defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense or
- the defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.[159]

a. Claims of Newly Discovered Evidence. A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by G.S. 15A-1419(a) or 15A-1415(c), may show a fundamental miscarriage of justice only by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty.[160]

XI. Hearings and Related Issues.

A. Hearing Required Unless MAR Is "Without Merit". G.S. 15A-1420(c)(1) provides that unless the court determines that the MAR is "without merit," "[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented." This language can be read to suggest that the non-movant is entitled to a hearing before a MAR is granted. However, one court of appeals case held that the trial court did not err when granting its *sua sponte* MAR without a hearing when the prosecutor failed to request a hearing, instead asking for a continuance so that the prosecutor who handled the case could decide how to proceed.[161]

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

- there are no disputed facts and the claim must fail as a matter of law;[162]
- 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;[163]
- the defendant cannot establish the requisite prejudice even if he or she can establish the asserted ground for relief;[164] or

159. G.S. 15A-1419(e).
160. *Id*.; *see* Section II.A.2.a.ix (discussing claims of newly discovered evidence).
161. State v. Williams, 227 N.C. App. 209, 214 (2013).
162. *See* State v. McHone, 348 N.C. 254, 257 (1998) ("[W]hen a [MAR] presents only a question of . . . law and it is clear . . . that the defendant is not entitled to prevail, 'the motion is without merit' within the meaning of subsection (c)(1) and may be dismissed . . . without any hearing."); State v. Rice, 129 N.C. App. 715, 723–24 (1998) (the defendant was not entitled to a hearing when the legal basis of his MAR was without merit).
163. *See McHone*, 348 N.C. at 257–58 ("[W]here facts are in dispute but the trial court can determine that the defendant is entitled to no relief even upon the facts as asserted by him, the trial court may determine that the motion 'is without merit' within the meaning of subsection (c)(1) and deny it without any hearing on questions of law or fact.").
164. *See* G.S. 15A-1420(c)(6) ("Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."); G.S. 15A-1443(a) (prejudice standard); *see generally* Section XI.H.3 (discussing the requisite prejudice).

- the harmless error standard governs and the error, even if established, is harmless beyond a reasonable doubt.[165]

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

- procedural default;[166]
- improper form;[167]
- improper service;[168]
- improper filing;[169]
- failure to include the requisite supporting affidavits or documentary evidence;[170] or
- failure to file the required attorney certification.[171]

On the other hand, a MAR is not without merit when the allegations in the defendant's MAR, if true, would entitle the defendant to relief; in this situation summary denial is improper.[172]

B. Evidentiary Hearings. An evidentiary hearing is not required if a MAR was filed within ten days of entry of judgment.[173] However, the trial court may hold an evidentiary hearing on a G.S. 15A-1414 MAR if "appropriate to resolve questions of fact."[174]

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165. *See* G.S. 15A-1420(c)(6) (incorporating standards of prejudice set forth in G.S. 15A-1443); G.S. 15A-1443(b) (harmless error standard); *see generally*, Section XI.H.3.a (discussing the harmless error standard).
166. *See* Section X (discussing procedural default).
167. *See* Section V.A (discussing form of the motion).
168. *See* Section V.B (discussing service requirements).
169. *See id.* (discussing filing requirements).
170. *See* Section V.A.3 (discussing the need for these items).
171. *See* Section V.A.2 (discussing the certification).
172. State v. Allen, 378 N.C. 286, 301 (2021) (trial court erred by summarily dismissing defendant's MAR claiming ineffective assistance of counsel based on alleged unreasonable failure by trial counsel to investigate crime scene where claim was supported by facts that would entitle defendant to relief if proven true); State v. Jackson, 220 N.C. App. 1, 21-22 (2012) (the trial court erred by summarily denying the defendant's MAR where the MAR adequately forecast evidence on each issue).
173. G.S. 15A-1420(c)(2); *see also* State v. Howard, 247 N.C. App. 193, 207 n.11 (2016).
174 G.S. 15A-1420(c)(2). For cases where the trial court did not err by denying a G.S. 15A-1414 MAR without an evidentiary hearing, see *State v. Rollins*, 367 N.C. 114 (2013) (affirming per curiam 224 N.C. App. 197, 202 (2012) where the Court of Appeals held that the trial court did not abuse its discretion by denying a hearing on a G.S. 15A-1414 MAR asserting juror misconduct, specifically that a juror watched "irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations"; although the MAR was supported by an affidavit from one of the jurors, the court found that it "merely contained general allegations and speculation"; reasoning that the MAR failed to specify which news broadcast the juror in question had seen; the degree of attention the juror had paid to the broadcast; the extent to which the juror received or remembered the broadcast; whether the juror had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct); *State v. Harris*, 338 N.C. 129, 143 (1994) (trial court did not err by declining to hold an evidentiary hearing on defendant's G.S. 15A-1414 MAR alleging ineffective assistance of counsel when "[t]here were no specific contentions that required an evidentiary hearing to resolve questions of fact"); *State v. Robinson*, 336 N.C. 78, 125-26 (1994) (trial

For other MARs, the statute provides that the trial court must proceed without an evidentiary hearing when the MAR presents only issues of law.[175] The statute also states a corollary to that rule: that if the trial court cannot rule on the MAR "without the hearing of evidence," it must hold an evidentiary hearing.[176] In determining whether an evidentiary hearing is required, the trial court must consider the MAR and any supporting or opposing information presented.[177] Although there is no North Carolina case law so stating, it seems reasonable to suggest that to trigger the requirement of a hearing, the factual question must be genuine and material. Consistent with this suggestion, at least one case has held that bare MAR allegations are not enough to establish the need for an evidentiary hearing;[178] some evidence must be offered to create an issue of fact warranting a hearing.[179] There are North Carolina cases going both ways on whether or not an evidentiary hearing was required.[180]

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court correctly determined that, as a matter of law, defendant was not entitled to relief on his G.S. 15A-1414 MAR and no evidentiary hearing was required); *State v. Marino*, 229 N.C. App. 130, 140-41 (2013) (trial court did not abuse its discretion by denying the defendant's G.S. 15A-1414 MAR without an evidentiary hearing); *State v. Sullivan*, 216 N.C. App. 495, 500 (2011) (same); and *State v. Shropshire*, 210 N.C. App. 478, 481 (2011) (the trial court did not err by denying the defendant's MAR without an evidentiary hearing; the motion was made immediately after the trial court pronounced sentence and sought to withdraw the plea; no issue of fact was presented; the defendant's statement that he did not understand the trial court's decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively").

175. G.S. 15A-1420(c)(3); State v. McHone, 348 N.C. 254, 257 (1998); State v. Howard, 247 N.C. App. 193, 207 (2016) (citing *McHone*); State v. Holden, 106 N.C. App. 244, 248 (1992); State v. Essick, 67 N.C. App. 697, 702–03 (1984); State v. Bush, 307 N.C. 152, 166–67 (1982), *habeas corpus granted on other grounds*, 669 F. Supp. 1322 (E.D.N.C. 1986), *aff'd*, 826 F.2d 1059 (4th Cir. 1987) (unpublished).

176. G.S. 15A-1420(c)(4); *Howard*, 247 N.C. App. 193 at 207-211 (trial court erred by granting the defendant's MAR without an evidentiary hearing where claims involved "a large and unusual constellation of conflicting evidence").

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

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

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

180. Sample cases in which an evidentiary hearing was not required include: *Bush*, 307 N.C. at 166–67 (since defendant's MAR presented only questions of law, "the Superior Court was required to determine the motion without an evidentiary hearing."); State v. Lane, 271 N.C. App. 307, 320 (2020) (trial court properly denied a MAR without an evidentiary hearing where MAR presented only questions of law); State v. Rice, 129 N.C. App. 715, 723-24 (1998) (trial court did not err in denying the MAR without an evidentiary hearing when the MAR was without merit); *Holden*, 106 N.C. App. at 248 (trial court did not err in denying the MAR without a hearing when it presented only the legal question of whether the court had properly excluded evidence); *Aiken*, 73 N.C. App. at 501 (trial court did not err in summarily denying defendant's MAR when defendant "filed no supporting affidavit and offered no evidence beyond the bare allegations" in the MAR); *Essick*, 67 N.C. App. at 702–03 (trial court did not err in refusing to allow defendant to offer oral testimony in support of his MAR made pursuant to G.S. 15A-1414).

Sample cases in which an evidentiary hearing was required include: State v. Morganherring, 350 N.C. 701, 713 (1999) (noting that by prior order, court had remanded defendant's MAR to superior court for an evidentiary hearing to specifically address five issues); *McHone*, 348 N.C. at 258–59 (defendant was entitled to an evidentiary hearing on his MAR as supplemented when the trial court was presented "with a question of fact which it was required to resolve" regarding whether the State had engaged in improper ex parte contact with the judge); State v. Barnes, 348 N.C. 75 (1998) (No. 74P98) (remanding to superior court, without explanation, for the purpose of conducting an evidentiary hearing); State v. Francis, 492 S.E.2d 29 (N.C. 1997) (No. 305PA97) (same); State v. Farrar, 472 S.E.2d 21 (N.C. 1996) (No. 86P96) (same); State v. Stevens, 305 N.C. 712, 716 (1982) (noting that, by prior order of the court, case was remanded to superior court for an evidentiary hearing); State v. Dickens, 299 N.C. 76, 84-85 (1980) (finding record of plea proceeding deficient and remanding for a hearing on whether defendant entered guilty pleas under the misapprehension that a plea bargain had been made with respect to sentence); State v. Ballard, 283 N.C. App. 236, 248-49 (2022) (where defendant's MAR alleged ineffective assistance of counsel, evidentiary hearing was

C. Hearings in Particular Types of Cases. For a discussion about how these rules apply to MARs challenging guilty pleas and raising claims of ineffective assistance of counsel, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR,* ADMIN. OF JUSTICE BULL. No. 2001/04 (UNC School of Government) (Oct. 2001).[181]

D. Pre-Hearing Conferences. Upon motion of either party, the judge may direct the attorneys to appear for a conference on any prehearing matter.[182]

E. Presence of the Defendant. The defendant has no statutory right to be present when only issues of law are argued.[183] However, a defendant has a statutory right to be present at an evidentiary hearing.[184] A waiver of this right must be in writing.[185]

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

G. Evidence.

1. Evidence Rules. The rules of evidence apply in an evidentiary hearing on a MAR.[186]

2. Scope of the Hearing. The nature of the evidence presented will depend on the claim asserted in the MAR. A *Strickland* ineffective assistance of counsel claim, for example, may involve defense witnesses who testify about accepted standards of practice for lawyers handling the particular issue.

When the defendant asserts a claim of newly discovered evidence, the State may introduce evidence undercutting that claim. For example, if the defendant introduces evidence that the State's key expert witness

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necessary on the factual issue of whether trial counsel made a strategic decision to not investigate a potential alibi witness); State v. Martin, 244 N.C. App. 727, 732-37 (2016) (trial court erred by denying, without an evidentiary hearing, the defendant's MAR claiming ineffective assistance of counsel; in this "he said, she said" rape case where defense counsel conceded that decisions were not strategic, the court held: "defense counsel's failure to obtain a medical expert to rebut the testimony of . . . the sexual abuse nurse examiner, and his failure to properly cross-examine the State's witnesses with regard to material evidence that could have had a substantial impact on the jury's verdict, entitles Defendant to an evidentiary hearing" to resolve issues of fact); State v. Hardison, 126 N.C. App. 52, 54 (1997) (trial court erred by failing to hold an evidentiary hearing to address issues of fact regarding counsel's alleged conflict of interest and invalidity of the plea agreement); State v. Arsenault, 46 N.C. App. 7, 14 (1980) (defendant raised "a substantial question of violation of his constitutional right [to effective assistance of counsel] which cannot be determined from the record, and evidentiary hearing pursuant to G.S. 15A-1420(c) is necessary"); State v. Roberts, 41 N.C. App. 187, 188 (1979) ("defendant has raised substantial questions of violation of constitutional rights which cannot be determined from the record and . . . an evidentiary hearing . . . is necessary").

181. Available online at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200104.pdf (last visited Jan. 25, 2023).

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

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

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

185. *Id.*

186. N.C. R. EVID. 101, 1101; State v. Howard, 247 N.C. App. 193, 211 (2016) ("[T]he North Carolina Rules of Evidence apply to post-conviction proceedings.").

misrepresented his qualifications, the State may introduce evidence supporting the expert's qualifications.[187] However, the trial court does not err by precluding the State from offering evidence that the jury would have reached the same verdict based on evidence not introduced at trial.[188]

H. Burdens and Standards.

1. Factual Issues. The movant bears the burden of establishing the necessary facts by a preponderance of the evidence.[189]

2. Basis for Relief. A defendant must show the existence of the asserted ground for relief,[190] for example, that his or her constitutional rights were violated. Although the statute does not say, presumably the standard is the same when the State seeks the relief.

3. Prejudice. Even if a movant shows the existence of the asserted ground for relief, relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.[191] That provision sets forth the required prejudice that must be established in a criminal appeal. Thus, when trial judges decide MARs, they are required to apply a standard normally applied on appellate review. Under G.S. 15A-1443 and as discussed immediately below, the relevant standards for establishing prejudice vary depending on whether or not the alleged error involves constitutional rights.

a. Non-Constitutional Errors. Under G.S. 15A-1443(a), when the error relates to non-constitutional rights, prejudice results if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." The defendant bears the burden of showing such prejudice.[192] The statute provides that "[p]rejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible *per se*."[193] Examples of errors that are reversible *per se* include the presence of an alternate juror in the jury room during deliberations,[194] 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,[195] and allowing a capital case to proceed without the appointment of assistant counsel as required by G.S. 7A-450(b1).[196]

187. State v. Peterson, 228 N.C. App. 339, 344-45 (2013).
188. *Id.* at 347-48 ("[T]he State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial.").
189. G.S. 15A-1420(c)(5); *see also Howard*, 247 N.C. App. at 207 (noting this standard).
190. G.S. 15A-1420(c)(6); *see also* State v. Foreman, 270 N.C. App. 784, 791 (2020) (noting this standard).
191. *Id*. Note that a different standard for eligibility for relief has been developed in North Carolina caselaw for situations where a defendant makes a post-sentencing motion to withdraw a guilty plea. *See* Jessica Smith, Pleas and Plea Negotiations in Superior Court, in this Benchbook, *available at* https://benchbook.sog.unc.edu/criminal/pleas-and-plea-negotiations.
192. G.S. 15A-1443(a).
193. *Id.*
194. *See* State v. Parker, 350 N.C. 411, 426 (1999).
195. *See* State v. Mitchell, 321 N.C. 650, 659 (1988).
196. *See* State v. Hucks, 323 N.C. 574, 576 (1988).

G.S 15A-1443(a) expressly applies to "errors relating to rights arising other than under the Constitution of the United States." However, in *State v. Huff*,[197] the court held that notwithstanding the express language of G.S. 15A-1443(a), the proper standard to be applied when reviewing violations of a defendant's article I, section 23 state constitutional right to be present at all stages of a capital trial is the harmless beyond a reasonable doubt standard articulated by the United States Supreme Court in *Chapman v. California*[198] and incorporated into G.S. 15A-1443(b).[199] 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).[200]

b. Constitutional Errors. G.S. 15A-1443(b) provides that a violation of the defendant's rights under the federal constitution is prejudicial unless the court finds that it was harmless beyond a reasonable doubt. As noted in the previous subsection, the North Carolina Supreme Court has held that notwithstanding this statutory language, the standard in G.S. 15A-1443(b) also applies to certain errors implicating state constitutional rights. The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless.[201] Notwithstanding G.S. 15A-1443(b), a defendant asserting a Sixth Amendment ineffective assistance of counsel claim in a MAR usually bears the burden of affirmatively proving that he or she was prejudiced by counsel's deficient performance under the analytical framework set out by the United States Supreme Court in *Strickland v. Washington*.[202]

197. 325 N.C. 1, 34-35 (1989), *vacated on other grounds by* Huff v. North Carolina, 497 U.S. 1021 (1990).
198. 386 U.S. 18 (1967).
199. *See Huff*, 325 N.C. at 33 (citing to G.S. 15A-1443(b)).
200. See *id*. The *Huff* court rejected the notion that the General Assembly could set the standard of review for state constitutional violations, stating: "[U]nder our constitutional form of government, only this Court may authoritatively construe the Constitution of North Carolina with finality, and it is for this Court, and not for the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution." *Id.* at 34 (quotation and citation omitted).
201. G.S. 15A-1443(b).
202. 466 U.S. 668 (1984) (stating this general rule but noting certain circumstances, including actual or constructive denial of counsel, where prejudice is presumed; under the general rule, prejudice exists where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *See also* State v. Braswell, 312 N.C. 553 562-63 (1985) (adopting, in a case on direct appeal, the *Strickland* test as a "uniform standard" applicable to ineffective assistance of counsel claims under the North Carolina Constitution; noting that the *Strickland* prejudice test is analogous to the statutory test for prejudice set out in G.S. 15A-1443(a)); State v. Todd, 369 N.C. 707, 711 (2017) (with respect to a MAR, "both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim."); State v. Baskins, 260 N.C. App. 589, 596-97 (same). The North Carolina Supreme Court has held that a MAR court assessing prejudice "must examine whether any instances of deficient performance . . . prejudiced [the defendant] when considered both individually and cumulatively." State v. Allen, 378 N.C. 286, 304 (2021) ("To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant."). For cases discussing the prejudice analysis applicable to ineffective assistance of counsel claims in cases involving guilty pleas, see *Hill v. Lockhart*, 474 U.S. 52 (1985); *State v. Nkiam*, 243 N.C. App. 777 (2015); and *State v. Jeminez*, 275 N.C. App. 278 (2020). *See generally* SMITH, *supra note* 156.

c. **Invited Error.** G.S. 15A-1443(c) provides that a defendant is not prejudiced by the granting of relief which he or she has sought or by an error resulting from his or her own conduct. Several North Carolina court cases have applied this rule in the direct appeal context.[203]

d. **General Principle.** Although the results in the direct appeal cases are fact-dependent, at least one general principle can be discerned from them: A defendant's burden of establishing prejudice under G.S. 15A-1443(a) or the State's burden of establishing harmless error under G.S. 15A-1443(b) depends on the weight of evidence in the case. The more conclusive or overwhelming the evidence is against a defendant, the harder it will be for the defendant to establish that the error affected the result of the proceeding and the easier it will be for the State to establish that the error was harmless beyond a reasonable doubt. Conversely, when the evidence of guilt is conflicting or not so overwhelming as to be conclusive, it will be easier for the defendant to establish prejudice and harder for the State to establish that the error was harmless.

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

J. State's Opportunity to Consent or Object to District Court Motions. G.S. 15A-1420(a)(4) provides that a MAR may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the district court judge may grant a MAR without the district attorney's signature ten business days after

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

the district attorney has been notified in open court of the motion or served with the motion pursuant to G.S. 15A-951(c).[204]

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

- new trial on all or any of the charges;
- dismissal of all or any of the charges;
- the relief sought by the State pursuant to G.S. 15A-1416;
- referral to the North Carolina Innocence Inquiry Commission for claims of factual innocence; or
- any other appropriate relief.[205]

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

When the trial court grants relief and the offense is divided into degrees or includes lesser offenses and the court believes that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.[206]

"If resentencing is required, the trial division may enter an appropriate sentence."[207] "If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence."[208]

If the defendant has established a claim of ineffective assistance of appellate counsel, the appropriate relief appears to be for the trial court to consider the underlying issue on the merits. For example, if the defendant has successfully established that appellate counsel was ineffective for failing to raise a constitutional issue on appeal, the relief provided by the MAR judge would be for the judge to consider the merits of the constitutional claim. This procedure is suggested because the trial court cannot order the appellate division to take an appeal.

XII. The Judge's Order.

A. Ruling and Order Required. A judge must rule on the MAR and enter an order.[209]

B. Factual Findings Required. If an evidentiary hearing is held, the court must make findings of fact.[210]

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204. G.S. 15A-1420(a)(4). G.S. 15A-951(c) is the provision on service of motions in Article 52 of G.S. Chapter 15A.
205. G.S. 15A-1417(a).
206. G.S. 15A-1417(b).
207. G.S. 15A-1417(c).
208. *Id.*
209. G.S. 15A-1420(c)(7).
210. G.S. 15A-1420(c)(4). *See* State v. Graham, 270 N.C. App. 478, 499-502 (2020) (trial court abused its discretion by denying defendant's MAR without making findings of fact sufficient to resolve material conflicts in evidence presented at an evidentiary hearing concerning recanted testimony of a child victim in a sexual assault case; remanded for entry of a new order containing sufficient findings), *aff'd on other grounds*, 379 N.C. 75 (2021).

C. Reasons for Decision. When drafting an order, it is best if the judge explains the reasons for his or her decision. This clarification can be helpful if the case ends up in federal habeas proceedings. A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground.[211] If the state trial court does not clearly state its reasons, the federal habeas court will be unable to determine whether the state decision rests on adequate and independent state law grounds.

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

E. Consent for Taking under Advisement. To avoid any problems with an order being entered out of county, out of session, or out of term, a judge should obtain the parties' consent before taking a MAR under advisement after a hearing.[212]

XIII. Appeal.

A. Superior Court Rulings.

1. Ruling on Defendant's MAR Filed Within Ten Days of Judgment. Under G.S. 15A-1422(b), the grant or denial of relief sought in a MAR under G.S. 15A-1414 (MAR made by the defendant within ten days of judgment) "is subject to appellate review only in an appeal regularly taken."[213] This provision precludes review by way of writ of certiorari for G.S. 15A-1414 MAR rulings.[214]

2. Ruling on Defendant's MAR Filed More Than Ten Days After Judgment. Under the MAR statute, a ruling on a MAR pursuant to G.S. 15A-1415 (MAR made by the defendant more than ten days after judgment) is subject to review as follows:

- if the time for appeal from the conviction has not expired, by appeal;
- if an appeal is pending when the ruling is entered, in that appeal; or
- if the time for appeal has expired and no appeal is pending, by writ of certiorari.[215]

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211. Beard v. Kindler, 558 U.S. 53, 55 (2009).
212. *See* Michael Crowell, *Out-of-Term, Out-of-Session, Out-of-County*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/judicial-administration-and-general-matters/out-term-out-session-out-county.
213. G.S. 15A-1422(b).
214. *See* State v. Thomsen, 369 N.C. 22, 26-27 (2016) (noting that G.S. 15A-1422(b) limits the Court of Appeals' jurisdiction to review MARs in other ways).
215. G.S. 15A-1422(c)(1)-(3); *see* N.C. R. APP. P. 21 ("The writ of certiorari may be issued . . . for review pursuant to [G.S.] 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief); *see generally* State v. Wilkerson, 232 N.C. App. 482, 486-88 (2014) (the court of appeals had authority to grant the State's petition for the issuance of a writ of certiorari authorizing appellate review of a trial court decision granting the defendant's MAR

The statute does not distinguish between rulings where the State prevails or where the defendant prevails.[216]

Note that Rule 21(e) of the Rules of Appellate Procedure provides that petitions for writ of certiorari to review orders of the trial court denying G.S. 15A-1415(b) MARs by *capital* defendants must be filed in the North Carolina Supreme Court.[217] The rule provides that in all other cases, petitions must be filed in and determined by the court of appeals.

Separate from the MAR statute, G.S. 15A-1445 gives the State a right of appeal for certain trial court rulings granting a G.S. 15A-1415 MAR.[218] G.S. 15A-1445 is within G.S. Chapter 15A, Article 91, entitled "Appeal to Appellate Division." The parallel provision in that Article pertaining to when a defendant may appeal,[219] by its terms does not appear to provide the defendant with any alternative avenues to seek review of a MAR ruling outside of the MAR procedure described above.[220]

3. Ruling on State's MAR. G.S. 15A-1422, the MAR provision on appeal, does not address review of a superior court ruling on a MAR filed by the State under G.S. 15A-1416. The proper procedure for review from a ruling on such a motion appears to be by certiorari. This suggestion finds support in *State v. Thomsen*,[221] which held, in the context of an appeal from a trial court's sua sponte MAR, that the Court of Appeals had jurisdiction to review a MAR ruling by way of certiorari "because nothing in the Criminal Procedure Act, or any other statute . . ., revokes the jurisdiction . . . that subsection 7A-32(c) confers more generally"; G.S. 7A-32(c) empowers the Court of Appeals to issue a writ of certiorari "to supervise and control the proceedings of any of the trial courts."[222]

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alleging an Eighth Amendment violation and resentencing him to a lesser sentence); State v. Morgan, 118 N.C. App. 461, 463 (1995) (where the time for appeal had ended and no appeal was pending, the defendant's only option for review of a trial court's order denying his MAR was by writ of certiorari); State v. Garner, 67 N.C. App. 761, 762 (1984) (same); State v. Roberts, 41 N.C. App. 187, 188 (1979) (same).

216. State v. Stubbs, 368 N.C. 40 (2015) (so noting and holding: "given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court").

217. Subsection (f) of that rule provides that a petition for writ of certiorari to review a trial court's order on a capital MAR must be filed in the supreme court within 60 days after delivery of the transcript of the hearing on the MAR to the petitioning party and that the responding party must file its response within 30 days of service of the petition.

218. *See* State v. Peterson, 228 N.C. App. 339, 342-43 (2013) (holding that under G.S. 15A-1445(a)(2) the State could appeal a trial court's order granting a defendant's MAR on the basis of newly discovered evidence and ordering a new trial); *see also* State v. Howard, 247 N.C. App. 193, 201-02 (2016) (same, following *Peterson*); State v. Lee, 228 N.C. App. 324, 328 (2013) (holding that under G.S. 15A-1445(a)(3) the State could appeal when the superior court granted the defendant's MAR asserting a sentencing error and entered an amended judgment). *Cf.* State v. Carver, 277 N.C. App. 89, 93-96 (2021) (analyzing *Peterson* and *Howard* in process of holding that state had no right to appeal trial court's order granting a defendant's MAR and ordering a new trial on the basis of ineffective assistance of counsel where that claim was not "inextricably intertwined" with a claim of newly discovered evidence).

219. *See* G.S. 15A-1444.

220. *See* G.S. 15A-1444(f) ("The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.").

221. 369 N.C. 22, 26 (2016).

222. *See also* State v. Linemann, 135 N.C. App. 734, 735 (1999) (treating a defendant's attempt to seek review of a trial court ruling granting the State's MAR as a petition for writ of certiorari and granting the petition).

4. **Ruling on Judge's Own MAR.** In certain circumstances, a judge may sua sponte grant relief to the defendant on a MAR.[223] Although no provision in the MAR statute addresses appeal from such a sua sponte order, the North Carolina Supreme Court has held the appellate courts have jurisdiction to review such a ruling by certiorari.[224]
5. **"Consent" MARs.** Consent MARs are discussed in Section II.D above. Although no provision in the MAR statute addresses appeal from such an order, the Court of Appeals likely has jurisdiction to review such a ruling by certiorari, in the event a party re-assesses the merits of a granted motion.[225]

B. District Court Rulings. There is no right to appeal a MAR when the movant is entitled to a trial de novo on appeal.[226] Thus, a defendant cannot appeal a district court judge's adverse ruling on a MAR when the defendant is entitled to a trial de novo in superior court. But what of a MAR ruling favoring the defendant, such as one vacating a conviction? Based on the cases discussed above holding that G.S. 15A-1445 gives the State a right to appeal certain superior court rulings granting MARs, G.S. 15A-1432 (Appeals by the State from district court judge) may provide one avenue for review. Another is a writ of certiorari to superior court.[227]

C. Court of Appeals Rulings. G.S. 15A-1422(f) and G.S. 7A-28(a) provide that decisions of the Court of Appeals on MARs under G.S. 15A-1415(b) (defendant's MAR made more than 10 days after entry of judgment) are final and not subject to further review by appeal, certification, writ, motion or otherwise. Furthermore, G.S. 7A-31(a) provides that "[i]n any cause in which appeal is taken to the Court of Appeals, *except . . . a motion for appropriate relief* . . . the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court (emphasis added)." However, the North Carolina Supreme Court has held that these statutes "cannot restrict [that] Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise jurisdiction to review upon appeal any decision of the courts below."[228] Presumably it would come to the same conclusion with respect to Rule 21(e) of the Appellate Rules, which provides that petitions for writs of certiorari to review trial court MAR orders shall be determined by the Court of Appeals with no further review by the Supreme Court and with respect to other types of MAR cases.

223. *See supra* Section II.C.
224. State v. Thomsen, 369 N.C. 22, 26 (2016).
225. *See id*.
226. G.S. 15A-1422(d); *see generally Thomsen,* 369 N.C. at 26-27 (so noting).
227. *See generally Thomsen,* 369 N.C. 22; GEN. R. PRAC. SUP. & DIST. CT. R. 19.
228. State v. Ellis, 361 N.C. 200, 205 (2007) (quotation omitted); *see also* State v. Todd, 369 N.C. 707, 709-10 (2017) (Article IV, Section 12, Clause 1 gave the court jurisdiction to decide an appeal from a divided decision of the court of appeals, notwithstanding G.S. 7A-28); State v. Barrett, 307 N.C. 126 (1982) (noting that under G.S. 15A-1422(f) the defendant had no right of review of a decision of the Court of Appeals denying his G.S. 15A-1415 MAR but going on to arrest judgment where the record disclosed that the defendant was convicted of a crime against nature, an offense that is not a lesser of the charged crime).

XIV. Relationship to Other Proceedings.

A. Appeal. The making of a MAR is not a prerequisite for asserting an error on appeal.[229] If an error asserted on appeal has been the subject of a MAR, denial of the MAR has no effect on the right to assert the error on appeal.[230] Put another way, an adverse ruling on a MAR does not constitute a procedural default barring appeal. However, as discussed in Section X, failure to raise a claim on appeal may result in a procedural default with respect to a subsequent MAR proceeding.

A defendant may file a MAR under G.S. 15A-1414, and the motion may be acted upon in the trial division even when notice of appeal has been given.[231] When the case is in the appellate division for review, a MAR under G.S. 15A-1415 must be made in that division.[232] The statute contains no parallel rules for motions filed by the State, but note, as discussed in Section VI.D.2, that the Court of Appeals has held that a trial court may act upon a MAR filed by the State under G.S. 15A-1416(a) even when notice of appeal has been given by the defendant.[233]

B. State Habeas Corpus. The availability of relief by way of a MAR is not a bar to relief by writ of habeas corpus.[234] However, Rule 25(5) of the General Rules of Practice of the Superior and District Courts states that subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for a MAR.[235]

C. Innocence Inquiry Commission Proceedings. A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission is not a MAR and does not impact rights or relief available through the MAR statutes.[236] Similarly, a claim of factual innocence asserted through the Innocence Inquiry Commission does not adversely affect a defendant's right to other post-conviction relief.[237]

229. G.S. 15A-1422(a).
230. G.S. 15A-1422(e).
231. G.S. 15A-1414(c); State v. Hallum, 246 N.C. App. 658 (2016) (stating rule).
232. G.S. 15A-1418(a); *see* Section VI.D.1 (discussing when a case is in the appellate division for review).
233. *See* State v. Joiner, 273 N.C. App. 611, 613-14 (2020).
234. G.S. 15A-1411(c).
235. For more information about habeas corpus, see Jessica Smith, *Habeas Corpus*, in this Benchbook, *available at* http://benchbook.sog.unc.edu/criminal/habeas-corpus.
236. G.S. 15A-1411(d).
237. G.S. 15A-1470(b).

Appendix A: Sample Language for MAR Orders

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

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

II. Order Denying MAR – Defect in Form

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

III. Order Denying MAR – Filed in Wrong Division

Judgment was rendered in this case on [insert date]. Notice of appeal was filed on [insert date]. The Defendant's Motion for Appropriate Relief was filed on [insert date], more than ten days after entry of judgment. Under G.S. 15A-1418, the Defendant's motion cannot be heard in this court and must be filed in the Appellate Division. The Defendant's motion is therefore dismissed without prejudice.

IV. Order Denying a MAR – Procedural Default

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

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

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