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A BILL TO BE ENTITLED
AN ACT TO EXPEDITE THE POSTCONVICTION PROCESS IN NORTH
CAROLINA.

The General Assembly of North Carolina enacts:

Section 1. G.S. 15A-1415 reads as rewritten:

"§ 15A-1415. **Grounds for appropriate relief which may be asserted by defendant after verdict verdict; and without limitation as to time.**

(a) At any time after verdict, ~~the~~ a noncapital defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section. In a capital case, a postconviction motion for appropriate relief shall be filed within 120 days from the latest of the following:

(1) The court's judgment has been filed, but the defendant failed to perfect a timely appeal;

(2) The mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for

1 writ of certiorari to the United States Supreme Court has expired
2 without a petition being filed;

3 (3) The United States Supreme Court denied a timely petition for writ of
4 certiorari of the decision on direct appeal by the Supreme Court of
5 North Carolina;

6 (4) Following the denial of discretionary review by the Supreme Court of
7 North Carolina, the United States Supreme Court denied a timely
8 petition for writ of certiorari seeking review of the decision on direct
9 appeal by the North Carolina Court of Appeals;

10 (5) The United States Supreme Court granted the defendant's or the State's
11 timely petition for writ of certiorari of the decision on direct appeal by
12 the Supreme Court of North Carolina or North Carolina Court of
13 Appeals, but subsequently left the defendant's conviction and sentence
14 undisturbed; or

15 (6) The appointment of postconviction counsel for an indigent capital
16 defendant.

17 (b) The following are the only grounds which the defendant may assert by a
18 motion for appropriate relief made more than 10 days after entry of judgment:

19 (1) The acts charged in the criminal pleading did not at the time they were
20 committed constitute a violation of criminal law.

21 (2) The trial court lacked jurisdiction over the person of the defendant or
22 over the subject matter.

23 (3) The conviction was obtained in violation of the Constitution of the
24 United States or the Constitution of North Carolina.

25 (4) The defendant was convicted or sentenced under a statute that was in
26 violation of the Constitution of the United States or the Constitution of
27 North Carolina.

28 (5) The conduct for which the defendant was prosecuted was protected by
29 the Constitution of the United States or the Constitution of North
30 Carolina.

31 (6) ~~Evidence is available which was unknown or unavailable to the~~
32 ~~defendant at the time of the trial, which could not with due diligence~~
33 ~~have been discovered or made available at that time, and which has a~~
34 ~~direct and material bearing upon the guilt or innocence of the defendant.~~

35 (7) There has been a significant change in law, either substantive or
36 procedural, applied in the proceedings leading to the defendant's
37 conviction or sentence, and retroactive application of the changed legal
38 standard is required.

39 (8) The sentence imposed was unauthorized at the time imposed, contained
40 a type of sentence disposition or a term of imprisonment not authorized
41 for the particular class of offense and prior record or conviction level
42 was illegally imposed, or is otherwise invalid as a matter of law.
43 However, a motion for appropriate relief on the grounds that the

1 sentence imposed on the defendant is not supported by evidence
2 introduced at the trial and sentencing hearing must be made before the
3 sentencing judge.

4 (9) The defendant is in confinement and is entitled to release because his
5 sentence has been fully served.

6 (c) Notwithstanding the time limitations herein, a defendant at any time after
7 verdict may by a motion for appropriate relief, raise the ground that evidence is available
8 which was unknown or unavailable to the defendant at the time of trial, which could not
9 with due diligence have been discovered or made available at that time, including
10 recanted testimony, and which has a direct and material bearing upon the defendant's
11 eligibility for the death penalty or the defendant's guilt or innocence. A motion based
12 upon such newly discovered evidence must be filed within a reasonable time of its
13 discovery.

14 (d) For good cause shown, the defendant may be granted an extension of time to
15 file the motion for appropriate relief. The presumptive length of an extension of time
16 under this subsection is up to 30 days, but can be longer if the court finds extraordinary
17 circumstances.

18 (e) Where a defendant alleges ineffective assistance of prior trial or appellate
19 counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to
20 waive the attorney-client privilege with respect to both oral and written communications
21 between such counsel and the defendant to the extent the defendant's prior counsel
22 reasonably believes such communications are necessary to defend against the allegations
23 of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon
24 the filing of the motion for appropriate relief alleging ineffective assistance of prior
25 counsel, and the superior court need not enter an order waiving the privilege.

26 (f) In the case of a defendant who has been convicted of a capital offense and
27 sentenced to death, the defendant's prior trial or appellate counsel shall make available to
28 the capital defendant's counsel their complete files relating to the case of the defendant.
29 The State, to the extent allowed by law, shall make available to the capital defendant's
30 counsel the complete files of all law enforcement and prosecutorial agencies involved in
31 the investigation of the crimes committed or the prosecution of the defendant. If the State
32 has a reasonable belief that allowing inspection of any portion of the files by counsel for
33 the capital defendant would not be in the interest of justice, the State may submit for
34 inspection by the court those portions of the files so identified. If upon examination of
35 the files, the court finds that the files could not assist the capital defendant in
36 investigating, preparing, or presenting a motion for appropriate relief, the court in its
37 discretion may allow the State to withhold that portion of the files.

38 (g) The defendant may file amendments to a motion for appropriate relief at least
39 30 days prior to the commencement of a hearing on the merits of the claims asserted in
40 the motion or at any time before the date for the hearing has been set, whichever is later.
41 Where the defendant has filed an amendment to a motion for appropriate relief, the State
42 shall, upon request, be granted a continuance of 30 days before the date of hearing. After

1 such hearing has begun, the defendant may file amendments only to conform the motion
2 to evidence adduced at the hearing, or to raise claims based on such evidence."

3 Sec. 2. G.S. 15A-1419 reads as rewritten:

4 **"§ 15A-1419. When motion for appropriate relief denied.**

5 (a) The following are grounds for the denial of a motion for appropriate relief:
6 relief, including motions filed in capital cases:

7 (1) Upon a previous motion made pursuant to this Article, the defendant
8 was in a position to adequately raise the ground or issue underlying the
9 present motion but did not do so. ~~This subdivision does not apply to a~~
10 ~~motion based upon deprivation of the right to counsel at the trial or upon~~
11 ~~failure of the trial court to advise the defendant of such right.—~~This
12 subdivision does not apply when the previous motion was made within
13 10 days after entry of ~~judgment.~~ judgment or the previous motion was
14 made during the pendency of the direct appeal.

15 (2) The ground or issue underlying the motion was previously determined
16 on the merits upon an appeal from the judgment or upon a previous
17 motion or proceeding in the courts of this State or a federal court, unless
18 since the time of such previous determination there has been a
19 retroactively effective change in the law controlling such issue.

20 (3) Upon a previous appeal the defendant was in a position to adequately
21 raise the ground or issue underlying the present motion but did not do
22 so.

23 (4) The defendant failed to file a timely motion for appropriate relief as
24 required by G.S. 15A-1415(a).

25 (b) ~~Although the~~ ~~The court may shall~~ deny the motion under any of the
26 circumstances specified in this section, ~~in the interest of justice and for good cause shown~~
27 ~~it may in its discretion grant the motion if it is otherwise meritorious.~~ unless the
28 defendant can demonstrate:

29 (1) Good cause for excusing the grounds for denial listed in subsection (a)
30 of this section and can demonstrate actual prejudice resulting from the
31 defendant's claim; or

32 (2) That failure to consider the defendant's claim will result in a
33 fundamental miscarriage of justice.

34 (c) For the purposes of subsection (b) of this section, good cause may only be
35 shown if the defendant establishes by a preponderance of the evidence that his failure to
36 raise the claim or file a timely motion was:

37 (1) The result of State action in violation of the United States Constitution
38 or the North Carolina Constitution including ineffective assistance of
39 trial or appellate counsel;

40 (2) The result of the recognition of a new federal or State right which is
41 retroactively applicable; or

- 1 (3) Based on a factual predicate that could not have been discovered
2 through the exercise of reasonable diligence in time to present the claim
3 on a previous State or federal postconviction review.

4 A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a
5 claim may not constitute good cause, nor may a claim of ineffective assistance of prior
6 postconviction counsel constitute good cause.

7 (d) For the purposes of subsection (b) of this section, actual prejudice may only be
8 shown if the defendant establishes by a preponderance of the evidence that an error
9 during the trial or sentencing worked to the defendant's actual and substantial
10 disadvantage, raising a reasonable probability, viewing the record as a whole, that a
11 different result would have occurred but for the error.

12 (e) For the purposes of subsection (b) of this section, a fundamental miscarriage of
13 justice only results if:

14 (1) The defendant establishes that more likely than not, but for the error, no
15 reasonable fact finder would have found the defendant guilty of the
16 underlying offense; or

17 (2) The defendant establishes by clear and convincing evidence that, but for
18 the error, no reasonable fact finder would have found the defendant
19 eligible for the death penalty.

20 A defendant raising a claim of newly discovered evidence of factual innocence or
21 ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of
22 this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by
23 proving by clear and convincing evidence that, in light of the new evidence, if credible,
24 no reasonable juror would have found the defendant guilty beyond a reasonable doubt or
25 eligible for the death penalty."

26 Sec. 3. G.S. 15-217.1 is recodified as G.S. 15A-1420(b1).

27 Sec. 4. G.S. 15A-1420, as amended by Section 3 of this act, reads as rewritten:

28 **"§ 15A-1420. Motion for appropriate relief; procedure.**

29 (a) Form, Service, Filing.

30 (1) A motion for appropriate relief must:

31 a. Be made in writing unless it is made:

32 1. In open court;

33 2. Before the judge who presided at trial;

34 3. Before the end of the session if made in superior court;
35 and

36 4. Within 10 days after entry of judgment;

37 b. State the grounds for the motion; ~~and~~

38 c. Set forth the relief ~~sought~~ sought; and

39 d. Be timely filed.

40 (2) A written motion for appropriate relief must be served in the manner
41 provided in G.S. 15A-951(b). When the written motion is made more
42 than 10 days after entry of judgment, service of the motion and a notice
43 of hearing must be made not less than five working days prior to the

1 date of the hearing. When a motion for appropriate relief is permitted to
2 be made orally the court must determine whether the matter may be
3 heard immediately or at a later time. If the opposing party, or his
4 counsel if he is represented, is not present, the court must provide for
5 the giving of adequate notice of the motion and the date of hearing to
6 the opposing party, or his counsel if he is represented by counsel.

7 (3) A written motion for appropriate relief must be filed in the manner
8 provided in G.S. 15A-951(c).

9 (b) Supporting Affidavits.

10 (1) A motion for appropriate relief made after the entry of judgment must
11 be supported by affidavit or other documentary evidence if based upon
12 the existence or occurrence of facts which are not ascertainable from the
13 records and any transcript of the case or which are not within the
14 knowledge of the judge who hears the motion.

15 (2) The opposing party may file affidavits or other documentary evidence.

16 ~~(b1) Filing petition With clerk; delivery of copy to district attorney; review of~~
17 ~~petition by judge.~~

18 ~~The proceeding shall be commenced by filing with the clerk of superior court of the~~
19 ~~county in which the conviction took place a petition, with two copies thereof, verified by~~
20 ~~affidavit. One copy shall be delivered by the clerk to the district attorney of the~~
21 ~~prosecutorial district as defined in G.S. 7A-60 who prosecutes the criminal docket of the~~
22 ~~superior court of the county in which said petition is filed, either in person or by ordinary~~
23 ~~mail, and the clerk shall enter upon his docket the date and manner of delivery of such~~
24 ~~copy.~~

25 ~~The clerk shall place the petition upon the criminal docket upon his receipt thereof.~~
26 ~~The clerk shall promptly after the delivery of copy to the district attorney bring the~~
27 ~~petition, or a copy thereof, to the attention of the resident judge or any judge holding the~~
28 ~~courts of the district or any judge holding court in the county. Such judge shall review the~~
29 ~~petition and make such order as he deems appropriate with respect to permitting the~~
30 ~~petitioner to prosecute such action without providing for the payment of costs, with~~
31 ~~respect to the appointment of counsel, and with respect to the time and place of hearing~~
32 ~~upon the petition. If it appears to the judge that substantial injustice may be done by any~~
33 ~~delay in hearing upon the matters alleged in the petition, he may issue such order as may~~
34 ~~be appropriate to bring the petitioner before the court without delay, and may direct the~~
35 ~~district attorney to answer the petition at a time specified in the order, and the court shall~~
36 ~~thereupon inquire into the matters alleged as directed by the reviewing judge, as in the~~
37 ~~case of a writ of **habeas corpus**. If upon review of the petition it does not appear to the~~
38 ~~judge that an order advancing the hearing or other order is appropriate, he shall return the~~
39 ~~petition to the clerk with a notation to that effect.~~

40 Filing Motion With Clerk; Review of Motion by Judge.

41 (1) The proceeding shall be commenced by filing with the clerk of superior
42 court of the district wherein the defendant was indicted a motion, with

1 service on the district attorney in noncapital cases, and service on both
2 the district attorney and Attorney General in capital cases.

3 (2) The clerk, upon receipt of the motion, shall place the motion on the
4 criminal docket. The clerk shall promptly bring the motion, or a copy of
5 the motion, to the attention of the resident judge or any judge holding
6 court in the county or district. In noncapital cases, the judge shall
7 review the motion and enter an order whether the defendant should be
8 allowed to proceed without the payment of costs, with respect to the
9 appointment of counsel, and directing the State, if necessary, to file an
10 answer. In capital cases, the judge shall review the motion and enter an
11 order directing the State to file its answer within 60 days of the date of
12 the order. If a hearing is necessary, the judge shall calendar the case for
13 hearing without unnecessary delay.

14 (c) Hearings, Showing of Prejudice; Findings.

15 (1) Any party is entitled to a hearing on questions of law or fact arising
16 from the motion and any supporting or opposing information presented
17 unless the court determines that the motion is without merit. The court
18 must determine, on the basis of these materials and the requirements of
19 this subsection, whether an evidentiary hearing is required to resolve
20 questions of fact. Upon the motion of either party, the judge may direct
21 the attorneys for the parties to appear before him for a conference on
22 any prehearing matter in the case.

23 (2) An evidentiary hearing is not required when the motion is made in the
24 trial court pursuant to G.S. 15A-1414, but the court may hold an
25 evidentiary hearing if it is appropriate to resolve questions of fact.

26 (3) The court must determine the motion without an evidentiary hearing
27 when the motion and supporting and opposing information present only
28 questions of law. The defendant has no right to be present at such a
29 hearing where only questions of law are to be argued.

30 (4) If the court cannot rule upon the motion without the hearing of
31 evidence, it must conduct a hearing for the taking of evidence, and must
32 make findings of fact. The defendant has a right to be present at the
33 evidentiary hearing and to be represented by counsel. A waiver of the
34 right to be present must be in writing.

35 (5) If an evidentiary hearing is held, the moving party has the burden of
36 proving by a preponderance of the evidence every fact essential to
37 support the motion.

38 (6) A defendant who seeks relief by motion for appropriate relief must
39 show the existence of the asserted ground for relief. Relief must be
40 denied unless prejudice appears, in accordance with G.S. 15A-1443.

41 (7) The court must rule upon the motion and enter its order accordingly.
42 When the motion is based upon an asserted violation of the rights of the
43 defendant under the Constitution or laws or treaties of the United States,

1 the court must make and enter conclusions of law and a statement of the
2 reasons for its determination to the extent required, when taken with
3 other records and transcripts in the case, to indicate whether the
4 defendant has had a full and fair hearing on the merits of the grounds so
5 asserted.

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

9 Sec. 5. G.S. 15-194 reads as rewritten:

10 **"§ 15-194. Time for execution.**

11 ~~Whenever the Supreme Court has filed an opinion upholding the sentence of death, or~~
12 ~~a stay of execution granted by any competent judicial tribunal or proceeding has expired~~
13 ~~or been terminated, or a reprieve by the Governor has expired or been terminated, a~~
14 ~~hearing shall be held in a superior court anywhere within the district where the case was~~
15 ~~tried to fix a new date for the execution of the original sentence. The district attorney~~
16 ~~shall promptly calendar such hearing. The condemned person shall be present at the~~
17 ~~hearing unless the condemned person has an attorney appearing at the hearing. The judge~~
18 ~~shall set the date of execution for not less than 60 days nor more than 90 days from the~~
19 ~~date of the hearing. The hearing may be conducted, whether or not in session, by any~~
20 ~~regular or special superior court judge resident in the district or assigned to hold court in~~
21 ~~this district wherever the case is docketed. The order fixing the date shall be recorded in~~
22 ~~the minutes of the court, and the clerk of the superior court shall immediately send a~~
23 ~~certified copy to the warden of the State penitentiary, at Raleigh.~~

24 In sentencing a capital defendant to a death sentence pursuant to G.S. 15A-2000(b),
25 the sentencing judge need not specify the date and time the execution is to be carried out
26 by the Department of Correction. The warden of the State penitentiary at Raleigh shall
27 immediately schedule a date for the execution of the original death sentence not less than
28 30 days nor more than 45 days from the date of receiving notification of any one of the
29 following:

- 30 (1) The United States Supreme Court has filed an opinion upholding the
31 sentence of death following completion of the initial State and federal
32 postconviction proceedings, if any;
33 (2) The mandate issued by the Supreme Court of North Carolina on direct
34 appeal pursuant to N.C.R. App. P. 32(b) affirming the capital
35 defendant's death sentence and the time for filing a petition for writ of
36 certiorari to the United States Supreme Court has expired without a
37 petition being filed;
38 (3) The capital defendant, if indigent, failed to timely seek the appointment
39 of counsel pursuant to G.S. 7A-451(c), or failed to file a timely motion
40 for appropriate relief as required by G.S. 15A-1415(a);
41 (4) The superior court denied the capital defendant's motion for appropriate
42 relief, but the capital defendant failed to file a timely petition for writ of

1 certiorari to the Supreme Court of North Carolina pursuant to N.C.R.
2 App. P. 21(f);

3 (5) The Supreme Court of North Carolina denied the capital defendant's
4 petition for writ of certiorari pursuant to N.C.R. App. P. 21(f), or, if
5 certiorari was granted, upheld the capital defendant's death sentence, but
6 the capital defendant failed to file a timely petition for writ of certiorari
7 to the United States Supreme Court; or

8 (6) Following State postconviction proceedings, if any, the capital
9 defendant failed to file a timely petition for writ of habeas corpus in the
10 appropriate federal district court, or failed to timely appeal or petition an
11 adverse habeas corpus decision to the United States Court of Appeals
12 for the Fourth Circuit or the United States Supreme Court.

13 The warden shall send a certified copy of the document fixing the date to the clerk of
14 superior court of the county in which the case was tried or, if venue was changed, in
15 which the defendant was indicted. The certified copy shall be recorded in the minutes of
16 the court. The clerk-warden shall also send certified copies to the condemned person, the
17 condemned person's capital defendant, the capital defendant's attorney, and the district
18 attorney who prosecuted the case-case, and the Attorney General of North Carolina."

19 Sec. 6. G.S. 15A-1441 reads as rewritten:

20 **"§ 15A-1441. Correction of errors by appellate division.**

21 Errors of law may be corrected upon appellate review as provided in this ~~Article.~~
22 Article, except that review of capital cases shall be given priority on direct appeal and in
23 State postconviction proceedings."

24 Sec. 7. G.S. 7A-451 is amended by adding the following subsections:

25 "(c) In any capital case, an indigent defendant who is under a sentence of death
26 may apply to the superior court of the district where the defendant was indicted for the
27 appointment of counsel to represent the defendant in preparing, filing, and litigating a
28 motion for appropriate relief. The application for the appointment of such postconviction
29 counsel may be made prior to completion of review on direct appeal and shall be made no
30 later than 10 days from the latest of the following:

31 (1) The mandate has been issued by the Supreme Court of North Carolina
32 on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing
33 a petition for writ of certiorari to the United States Supreme Court has
34 expired without a petition being filed;

35 (2) The United States Supreme Court denied a timely petition for writ of
36 certiorari of the decision on direct appeal by the Supreme Court of
37 North Carolina; or

38 (3) The United States Supreme Court granted the defendant's or the State's
39 timely petition for writ of certiorari of the decision on direct appeal by
40 the Supreme Court of North Carolina, but subsequently left the
41 defendant's death sentence undisturbed.

42 If there is not a criminal or mixed session of superior court scheduled for that district,
43 the application must be made no later than 10 days from the beginning of the next

1 criminal or mixed session of superior court in the district. Upon application, supported by
2 the defendant's affidavit, the superior court shall enter an order appointing two counsel if
3 the court finds that the defendant is indigent and desires counsel. The defendant does not
4 have a right to be present at the time of appointment of counsel, and the appointment
5 need not be made in open court. If the defendant was previously adjudicated an indigent
6 for purposes of trial or direct appeal, the defendant shall be presumed indigent for
7 purposes of this subsection.

8 (d) The appointment of counsel as provided in subsection (c) of this section and
9 the procedure for compensation shall comply with the Rules and Regulations Relating to
10 the Appointment of Counsel for Indigent Defendants pursuant to G.S. 7A-459. The court
11 may appoint counsel recruited by the Appellate Defender pursuant to G.S. 7A-486.3(5).

12 (e) No counsel appointed pursuant to subsection (c) of this section shall have
13 previously represented the defendant at trial or on direct appeal in the case for which the
14 appointment is made unless the defendant expressly requests continued representation
15 and understandingly waives future allegations of ineffective assistance of counsel."

16 Sec. 8. This act is effective upon ratification. The deadline for filing a motion
17 for appropriate relief in Section 1 applies to cases in which the trial court judgment is
18 entered after October 1, 1996.