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January 26, 1995

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,~~ Within the time limitations specified herein, the defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section. 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 certiorari to the United States Supreme Court has expired without a petition being filed;

- 1           (3)    The United States Supreme Court denied a timely petition for certiorari  
2           of the decision on direct appeal by the Supreme Court of North  
3           Carolina;  
4           (4)    Following the denial of discretionary review by the Supreme Court of  
5           North Carolina, the United States Supreme Court denied a timely  
6           petition for certiorari seeking review of the decision on direct appeal by  
7           the North Carolina Court of Appeals;  
8           (5)    The United States Supreme Court granted the defendant's or the State's  
9           timely petition for certiorari of the decision on direct appeal by the  
10           Supreme Court of North Carolina or North Carolina Court of Appeals,  
11           but subsequently left the defendant's conviction and sentence  
12           undisturbed; or  
13           (6)    The appointment of postconviction counsel for an indigent capital  
14           defendant.

15           (b)    The following are the only grounds which the defendant may assert by a  
16 motion for appropriate relief made more than 10 days after entry of ~~judgment~~: judgment  
17 and within the 120-day time limitation of subsection (a) of this section:

- 18           (1)    The acts charged in the criminal pleading did not at the time they were  
19 committed constitute a violation of criminal law.  
20           (2)    The trial court lacked jurisdiction over the person of the defendant or  
21 over the subject matter.  
22           (3)    The conviction was obtained in violation of the Constitution of the  
23 United States or the Constitution of North Carolina.  
24           (4)    The defendant was convicted or sentenced under a statute that was in  
25 violation of the Constitution of the United States or the Constitution of  
26 North Carolina.  
27           (5)    The conduct for which the defendant was prosecuted was protected by  
28 the Constitution of the United States or the Constitution of North  
29 Carolina.  
30           ~~(6)    Evidence is available which was unknown or unavailable to the~~  
31           ~~defendant at the time of the trial, which could not with due diligence~~  
32           ~~have been discovered or made available at that time, and which has a~~  
33           ~~direct and material bearing upon the guilt or innocence of the defendant.~~  
34           (7)    There has been a significant change in law, either substantive or  
35 procedural, applied in the proceedings leading to the defendant's  
36 conviction or sentence, and retroactive application of the changed legal  
37 standard is required.  
38           (8)    The sentence imposed was unauthorized at the time imposed, contained  
39 a type of sentence disposition or a term of imprisonment not authorized  
40 for the particular class of offense and prior record or conviction level  
41 was illegally imposed, or is otherwise invalid as a matter of law.  
42 However, a motion for appropriate relief on the grounds that the  
43 sentence imposed on the defendant is not supported by evidence

1 introduced at the trial and sentencing hearing must be made before the  
2 sentencing judge.

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

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

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 the complete files of the trial or appellate counsel. The  
29 capital defendant's counsel may inspect and photocopy the files, but the defendant's prior  
30 counsel shall maintain custody of their respective files, except as to the material which is  
31 admitted into evidence.

32 (g) Any amendment to a motion for appropriate relief must be filed with prior  
33 leave of the superior court upon a showing of good cause for having failed to raise the  
34 grounds for relief in the original motion. An amendment, if any, must be filed within 30  
35 days of the date the original motion for appropriate relief is filed, and if untimely, the  
36 superior court shall not grant leave to amend. Nothing in this section shall prohibit the  
37 court from granting leave to amend the motion based upon evidence discovered after the  
38 motion for appropriate relief is filed."

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

40 "**§ 15A-1419. When motion for appropriate relief denied.**

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

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

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

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

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

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

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

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

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

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

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

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

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

42 (d) For the purposes of subsection (b) of this section, actual prejudice may only be  
43 shown if the defendant establishes by a preponderance of the evidence that an error

1 during the trial or sentencing worked to the defendant's actual and substantial  
2 disadvantage, raising a reasonable probability, viewing the record as a whole, that a  
3 different result would have occurred but for the error.

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

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

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

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

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

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

20 "**§ 15A-1420. Motion for appropriate relief; procedure.**

21 (a) Form, Service, Filing.

22 (1) A motion for appropriate relief must:

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

24 1. In open court;

25 2. Before the judge who presided at trial;

26 3. Before the end of the session if made in superior court;  
27 and

28 4. Within 10 days after entry of judgment;

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

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

31 d. Be timely filed.

32 (2) A written motion for appropriate relief must be served in the manner  
33 provided in G.S. 15A-951(b). When the written motion is made more  
34 than 10 days after entry of judgment, service of the motion and a notice  
35 of hearing must be made not less than five working days prior to the  
36 date of the hearing. When a motion for appropriate relief is permitted to  
37 be made orally the court must determine whether the matter may be  
38 heard immediately or at a later time. If the opposing party, or his  
39 counsel if he is represented, is not present, the court must provide for  
40 the giving of adequate notice of the motion and the date of hearing to  
41 the opposing party, or his counsel if he is represented by counsel.

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

1 (b) Supporting Affidavits.

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

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

8 ~~(b1) Filing petition with clerk; delivery of copy to district attorney; review of~~  
9 ~~petition by judge.~~

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

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

32 Filing Motion with Clerk; Review of Motion by Judge.

33 (1) The proceeding shall be commenced by filing with the clerk of superior  
34 court of the district wherein the defendant was indicted a motion, with  
35 service on the district attorney in noncapital cases, and service on both  
36 the district attorney and Attorney General in capital cases.

37 (2) The clerk, upon receipt of the motion, shall place the motion on the  
38 criminal docket. The clerk shall promptly bring the motion, or a copy of  
39 the motion, to the attention of the resident judge or any judge holding  
40 court in the county or district. In noncapital cases, the judge shall  
41 review the motion and enter an order whether the defendant should be  
42 allowed to proceed without the payment of costs, with respect to the  
43 appointment of counsel, and directing the State, if necessary, to file an

1           answer. In capital cases, the judge shall review the motion and enter an  
2           order directing the State to file its answer within 60 days of the date of  
3           the order. If a hearing is necessary, the judge shall calendar the case for  
4           hearing without unnecessary delay. In capital cases, the hearing shall be  
5           held within 60 days of the filing of the State's answer and may be  
6           continued only for good cause shown.

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

- 8       (1) Any party is entitled to a hearing on questions of law or fact arising  
9       from the motion and any supporting or opposing information presented  
10       unless the court determines that the motion is without merit. The court  
11       must determine, on the basis of these materials and the requirements of  
12       this subsection, whether an evidentiary hearing is required to resolve  
13       questions of fact. Upon motion of either party, the judge may in his  
14       discretion direct the attorneys for the parties to appear before him for a  
15       conference on issues to be presented at the hearing.
- 16       (2) An evidentiary hearing is not required when the motion is made in the  
17       trial court pursuant to G.S. 15A-1414, but the court may hold an  
18       evidentiary hearing if it is appropriate to resolve questions of fact.
- 19       (3) The court must determine the motion without an evidentiary hearing  
20       when the motion and supporting and opposing information present only  
21       questions of law. The defendant has no right to be present at such a  
22       hearing where only questions of law are to be argued.
- 23       (4) If the court cannot rule upon the motion without the hearing of  
24       evidence, it must conduct a hearing for the taking of evidence, and must  
25       make findings of fact. The defendant has a right to be present at the  
26       evidentiary hearing and to be represented by counsel. A waiver of the  
27       right to be present must be in writing.
- 28       (5) If an evidentiary hearing is held, the moving party has the burden of  
29       proving by a preponderance of the evidence every fact essential to  
30       support the motion.
- 31       (6) A defendant who seeks relief by motion for appropriate relief must  
32       show the existence of the asserted ground for relief. Relief must be  
33       denied unless prejudice appears, in accordance with G.S. 15A-1443(d).
- 34       (7) The court must rule upon the motion and enter its order accordingly.  
35       When the motion is based upon an asserted violation of the rights of the  
36       defendant under the Constitution or laws or treaties of the United States,  
37       the court must make and enter conclusions of law and a statement of the  
38       reasons for its determination to the extent required, when taken with  
39       other records and transcripts in the case, to indicate whether the  
40       defendant has had a full and fair hearing on the merits of the grounds so  
41       asserted.

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

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

5 "**§ 15-194. Time for execution.**

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

19 In sentencing a capital defendant to a death sentence pursuant to G.S. 15A-2000(b),  
20 the sentencing judge need not specify the date and time the execution is to be carried out  
21 by the Department of Correction. The warden of the State penitentiary at Raleigh shall  
22 immediately schedule a date for the execution of the original death sentence not less than  
23 30 days nor more than 45 days from the date of receiving notification of any one of the  
24 following:

- 25 (1) The United States Supreme Court has filed an opinion upholding the  
26 sentence of death following completion of the initial State and federal  
27 postconviction proceedings, if any;  
28 (2) The mandate issued by the Supreme Court of North Carolina on direct  
29 appeal pursuant to N.C.R.App.P.32(b) affirming the capital defendant's  
30 death sentence and the time for filing a petition for certiorari to the  
31 United States Supreme Court has expired without a petition being filed;  
32 (3) The capital defendant, if indigent, failed to timely seek the appointment  
33 of counsel pursuant to G.S. 7A-451(c), or failed to file a timely motion  
34 for appropriate relief as required by G.S. 15A-1415(a);  
35 (4) The superior court denied the capital defendant's motion for appropriate  
36 relief, but the capital defendant failed to file a timely petition for writ of  
37 certiorari to the Supreme Court of North Carolina pursuant to  
38 N.C.R.App.P. 21(f);  
39 (5) The Supreme Court of North Carolina denied the capital defendant's  
40 petition for writ of certiorari pursuant to N.C.R.App.P 21(f), or, if  
41 certiorari was granted, upheld the capital defendant's death sentence, but  
42 the capital defendant failed to file a timely petition for writ of certiorari  
43 to the United States Supreme Court; or



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

6 The warden shall send a certified copy of the document fixing the date to the clerk of  
7 superior court of the county in which the case was tried or, if venue was changed, in  
8 which the defendant was indicted. The certified copy shall be recorded in the minutes of  
9 the court. The clerk-warden shall also send certified copies to the ~~eondemned person,~~ the  
10 ~~eondemned person's~~ capital defendant, the capital defendant's attorney, and the district  
11 attorney who prosecuted the ~~ease-~~case and the Attorney General of North Carolina."

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

13 **"§ 15A-1441. Correction of errors by appellate division.**

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

17           Sec. 7. G.S. 15A-1443 reads as rewritten:

18 **"§ 15A-1443. Existence and showing of prejudice.**

19           (a) ~~A~~On direct appeal a defendant is prejudiced by errors relating to rights arising  
20 other than under the Constitution of the United States when there is a reasonable  
21 possibility that, had the error in question not been committed, a different result would  
22 have been reached at the trial out of which the appeal arises. The burden of showing such  
23 prejudice under this subsection is upon the defendant. Prejudice also exists in any  
24 instance in which it is deemed to exist as a matter of law or error is deemed reversible per  
25 se.

26           (b) ~~A~~On direct appeal a violation of the defendant's rights under the Constitution  
27 of the United States is prejudicial unless the appellate court finds that it was harmless  
28 beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a  
29 reasonable doubt, that the error was harmless.

30           (c) A defendant is not prejudiced by the granting of relief which he has sought or  
31 by error resulting from his own conduct.

32           (d) On State postconviction review of a motion for appropriate relief, the  
33 defendant shall bear the burden of showing the existence of the asserted ground for relief,  
34 and that he was prejudiced thereby. In order to show prejudice from a federal or State  
35 constitutional error found on State postconviction review, the defendant must prove that,  
36 viewing the record as a whole, the error had a substantial and injurious effect or influence  
37 in determining the jury's verdict. Where the matter is evenly balanced as to the  
38 harmlessness of the error, the error must be treated as if it had a substantial and injurious  
39 effect or influence in determining the jury's verdict."

40           Sec. 8. G.S. 7A-451 is amended by adding the following subsections:

41           "(c) In any capital case, an indigent defendant who is under a sentence of death  
42 may apply to the superior court of the district where the defendant was indicted for the  
43 appointment of counsel to represent the defendant in preparing, filing, and litigating a

1 motion for appropriate relief. The application for the appointment of such postconviction  
2 counsel may be made while the petition for certiorari to the United States Supreme Court  
3 is pending and shall be made no later than 10 days from the latest of the following:

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

8 (2) The United States Supreme Court denied a timely petition for certiorari  
9 of the decision on direct appeal by the Supreme Court of North  
10 Carolina; or

11 (3) The United States Supreme Court granted the defendant's or the State's  
12 timely petition for certiorari of the decision on direct appeal by the  
13 Supreme Court of North Carolina, but subsequently left the defendant's  
14 death sentence undisturbed.

15 If there is not a criminal or mixed session of superior court scheduled for that district,  
16 the application must be made no later than 10 days from the beginning of the next  
17 criminal or mixed session of superior court in the district. Upon application by the  
18 defendant, the superior court shall enter an order (i) appointing counsel and, if the  
19 circumstances of the case warrant, one associate counsel to represent the defendant upon  
20 a finding that the defendant is indigent and accepts the appointment of counsel, or is  
21 unable competently to decide whether to accept or reject the appointment of counsel; (ii)  
22 finding, after a hearing if necessary, that the defendant rejected the offer of counsel and  
23 made the decision with an understanding of its legal consequences; or (iii) denying the  
24 appointment of counsel upon a finding that the defendant is not indigent.

25 (d) The appointment of counsel as provided in subsection (c) of this section and  
26 the procedure for compensation shall comply with the Rules and Regulations Relating to  
27 the Appointment of Counsel for Indigent Defendants pursuant to G.S. 7A-459.

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

32 Sec. 9. This act becomes effective October 1, 1995. Section 5 of this act  
33 applies to death sentences rendered by a trial court on or after that date. The remaining  
34 sections of this act apply to cases in which, on or after October 1, 1995, the direct appeal  
35 to the State appellate courts and subsequent review of the decision on direct appeal have  
36 been completed or the time for such appeals has expired.