

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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SENATE BILL 29

Short Title: Capital Cases/Revise Appeal Process.

(Public)

Sponsors: Senators Odom; Albertson, Speed, Parnell, Hoyle, Kerr, Plyler, and Plexico.

Referred to: Judiciary II/Election Laws.

January 26, 1995

A BILL TO BE ENTITLED

AN ACT TO EXPEDITE THE POSTCONVICTION PROCESS IN NORTH CAROLINA FOR CAPITAL CASES.

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 entry of 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.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;

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

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1 (4) Following the denial of discretionary review by the Supreme Court of
2 North Carolina, the United States Supreme Court denied a timely
3 petition for certiorari seeking review of the decision on direct appeal by
4 the North Carolina Court of Appeals;

5 (5) The United States Supreme Court granted the defendant's or the State's
6 timely petition for certiorari of the decision on direct appeal by the
7 Supreme Court of North Carolina or North Carolina Court of Appeals,
8 but subsequently left the defendant's conviction and sentence
9 undisturbed; or

10 (6) The appointment of postconviction counsel for an indigent capital
11 defendant.

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

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

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

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

21 (4) The defendant was convicted or sentenced under a statute that was in
22 violation of the Constitution of the United States or the Constitution of
23 North Carolina.

24 (5) The conduct for which the defendant was prosecuted was protected by
25 the Constitution of the United States or the Constitution of North
26 Carolina.

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

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

35 (8) The sentence imposed was unauthorized at the time imposed, contained
36 a type of sentence disposition or a term of imprisonment not authorized
37 for the particular class of offense and prior record or conviction level
38 was illegally imposed, or is otherwise invalid as a matter of law.
39 However, a motion for appropriate relief on the grounds that the
40 sentence imposed on the defendant is not supported by evidence
41 introduced at the trial and sentencing hearing must be made before the
42 sentencing judge.

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

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

11 (d) For good cause shown, the defendant may be granted up to a 30-day extension
12 of time to file the motion for appropriate relief.

13 (e) Where a defendant alleges ineffective assistance of counsel as a ground for the
14 illegality of his detention, he shall be deemed to completely waive the attorney-client
15 privilege with respect to both oral and written communications between such counsel and
16 the defendant. This waiver of the attorney-client privilege shall be automatic upon the
17 filing of the motion for appropriate relief, and the superior court need not enter an order
18 waiving the privilege. Counsel alleged to have been ineffective thereafter may be free to
19 discuss and disclose any aspect of their representation of the defendant with
20 representatives of the State in defending against the allegations of ineffectiveness.

21 (f) Any amendment to a motion for appropriate relief must be filed with prior
22 leave of the superior court upon a showing of good cause for having failed to raise the
23 grounds for relief in the original motion. An amendment, if any, must be filed within 30
24 days of the date the original motion for appropriate relief is filed, and if untimely, the
25 superior court shall not grant leave to amend."

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

27 "**§ 15A-1419. When motion for appropriate relief denied.**

28 (a) The following are grounds for the denial of a motion for appropriate relief:

29 (1) Upon a previous motion made pursuant to this Article, the defendant
30 was in a position to adequately raise the ground or issue underlying the
31 present motion but did not do so. ~~This subdivision does not apply to a~~
32 ~~motion based upon deprivation of the right to counsel at the trial or upon~~
33 ~~failure of the trial court to advise the defendant of such right.—This~~
34 subdivision does not apply when the previous motion was made within
35 10 days after entry of judgment.

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

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

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

3 (b) ~~Although the~~ The court may shall deny the motion under any of the
4 circumstances specified in this section, except that in the interest of justice and or for
5 good cause shown shown, it may in its discretion the court shall grant the motion if it is
6 otherwise meritorious. prejudice resulted to defendant from a meritorious claim. A
7 defendant only may show his motion is in the interest of justice by establishing by clear
8 and convincing evidence that but for the constitutional error or in view of the newly
9 discovered evidence pursuant to G.S. 15A-1415(c), no reasonable fact finder would have
10 found the defendant guilty of the underlying offense or eligible for the death penalty. A
11 trial attorney's ignorance of, inadvertence, or tactical decision to withhold a claim may
12 not constitute good cause shown. Good cause only may be shown if the defendant
13 establishes by clear and convincing evidence that his failure to raise the claim is (i) the
14 result of State action in violation of the United States Constitution or North Carolina
15 Constitution; (ii) the result of the recognition of a new federal or State right is
16 retroactively applicable; or (iii) based on a factual predicate that could not have been
17 discovered through the exercise of reasonable diligence in time to present the claim on a
18 previous State or federal postconviction review. A claim of ineffective assistance of prior
19 postconviction counsel shall not constitute good cause. Prejudice only may be shown if
20 the defendant establishes by clear and convincing evidence that an error during the trial
21 or sentencing worked to the defendant's actual and substantial disadvantage, raising a
22 reasonable probability, viewing the record as a whole, that a different result would have
23 occurred but for the error.

24 (c) For purposes of this Article, a new rule of State law or procedure will be
25 deemed prospective only, unless (i) the new rule places the defendant's conduct
26 beyond the reach of criminal law or prohibits the imposition of punishment for a class of
27 defendants because of their status or offense, or (ii) the new rule is a watershed rule of
28 criminal procedure implicating the fundamental fairness and accuracy of the criminal
29 proceeding."

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

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

32 **"§ 15A-1420. Motion for appropriate relief; procedure.**

33 (a) Form, Service, Filing.

34 (1) A motion for appropriate relief must:

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

36 1. In open court;

37 2. Before the judge who presided at trial;

38 3. Before the end of the session if made in superior court;
39 and

40 4. Within 10 days after entry of judgment;

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

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

43 d. Be timely filed.

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

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

13 (b) Supporting Affidavits.

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

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

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

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

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

1 Filing motion with clerk; review of motion by judge.

- 2 (1) The proceeding shall be commenced by filing with the clerk of superior
3 court of the district wherein the defendant was indicted a motion, with
4 service on the district attorney in noncapital cases, and service on both
5 the district attorney and Attorney General in capital cases.
- 6 (2) The clerk, upon receipt of the motion, shall place the motion on the
7 criminal docket. The clerk shall promptly bring the motion, or a copy of
8 the motion, to the attention of the resident judge or any judge holding
9 court in the county or district. In noncapital cases, the judge shall
10 review the motion and enter an order whether the defendant should be
11 allowed to proceed without the payment of costs, with respect to the
12 appointment of counsel, and directing the State, if necessary, to file an
13 answer. In capital cases, the judge shall review the motion and enter an
14 order directing the State to file its answer within 60 days of the date of
15 the order. If a hearing is necessary, the district attorney or Attorney
16 General shall calendar the case for hearing without unnecessary delay.
17 In capital cases, the hearing shall be held within 60 days of the filing of
18 the State's answer and may be continued only for good cause shown.

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

- 20 (1) Any party is entitled to a hearing on questions of law or fact arising
21 from the motion and any supporting or opposing information presented
22 unless the court determines that the motion is without merit. The court
23 must determine, on the basis of these materials and the requirements of
24 this subsection, whether an evidentiary hearing is required to resolve
25 questions of fact.
- 26 (2) An evidentiary hearing is not required when the motion is made in the
27 trial court pursuant to G.S. 15A-1414, but the court may hold an
28 evidentiary hearing if it is appropriate to resolve questions of fact.
- 29 (3) The court must determine the motion without an evidentiary hearing
30 when the motion and supporting and opposing information present only
31 questions of law. The defendant has no right to be present at such a
32 hearing where only questions of law are to be argued.
- 33 (4) If the court cannot rule upon the motion without the hearing of
34 evidence, it must conduct a hearing for the taking of evidence, and must
35 make findings of fact. The defendant has a right to be present at the
36 evidentiary hearing and to be represented by counsel. A waiver of the
37 right to be present must be in writing.
- 38 (5) If an evidentiary hearing is held, the moving party has the burden of
39 proving by a preponderance of the evidence every fact essential to
40 support the motion.
- 41 (6) A defendant who seeks relief by motion for appropriate relief must
42 show the existence of the asserted ground for relief. Relief must be
43 denied unless prejudice appears, in accordance with G.S. 15A-1443(d).

1 (7) The court must rule upon the motion and enter its order accordingly.
2 When the motion is based upon an asserted violation of the rights of the
3 defendant under the Constitution or laws or treaties of the United States,
4 the court must make and enter conclusions of law and a statement of the
5 reasons for its determination to the extent required, when taken with
6 other records and transcripts in the case, to indicate whether the
7 defendant has had a full and fair hearing on the merits of the grounds so
8 asserted.

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

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

13 **"§ 15-194. Time for execution.**

14 (a) Whenever the Supreme Court has filed an opinion upholding the sentence of
15 death, or a stay of execution granted by any competent judicial tribunal or proceeding has
16 expired or been terminated, or a reprieve by the Governor has expired or been terminated,
17 a hearing shall be held in a superior court anywhere within the district where the case was
18 tried to fix a new date for the execution of the original sentence. The district attorney
19 shall promptly calendar such hearing. ~~The condemned person shall be present at the hearing~~
20 ~~unless the condemned person has an attorney appearing at the hearing.~~ The defendant's
21 presence at the hearing is not required so long as the defendant has an attorney appearing
22 at the hearing. The judge shall set the date of execution for not less than ~~60~~30 days nor
23 more than ~~90~~45 days from the date of the hearing. The hearing may be conducted,
24 whether or not in session, by any regular or special superior court judge resident in the
25 district or assigned to hold court in this district wherever the case is docketed. ~~The order~~
26 ~~fixing the date shall be recorded in the minutes of the court, and the clerk of the superior court~~
27 ~~shall immediately send a certified copy to the warden of the State penitentiary, at Raleigh. The~~
28 ~~clerk shall also send certified copies to the condemned person, the condemned person's attorney,~~
29 ~~and the district attorney who prosecuted the case.~~ Whenever a superior court has entered an
30 order denying a motion for appropriate relief pursuant to G.S. 15A-1415, the superior
31 court judge contemporaneously shall reschedule the defendant's execution date for not
32 less than 30 days nor more than 45 days from the date of the order denying the
33 defendant's motion.

34 (b) Notwithstanding these provisions, if the court appoints counsel to represent an
35 indigent capital defendant for the purpose of preparing, filing, and litigating a motion for
36 appropriate relief pursuant to G.S. 7A-451(c), the court shall stay execution of the
37 sentence of death until disposition of the motion for appropriate relief by the superior
38 court at which time, if relief is denied, the superior court shall fix a new execution date
39 pursuant to subsection (a) of this section."

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

41 **"§ 15A-1441. Correction of errors by appellate division.**

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

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

5 "**§ 15A-1443. Existence and showing of prejudice.**

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

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

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

19 (d) On State postconviction review of a motion for appropriate relief, the
20 defendant shall bear the burden of showing the existence of the asserted ground for relief,
21 and that he was prejudiced thereby. In order to show prejudice from a federal or State
22 constitutional error found on State postconviction review, the defendant must prove by
23 clear and convincing evidence that, viewing the record as a whole, the error had a
24 substantial and injurious effect or influence in determining the jury's verdict."

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

26 "(c) In any capital case, an indigent defendant who is under a sentence of death
27 may apply to the superior court of the district where the defendant was indicted for the
28 appointment of counsel to represent the defendant in preparing, filing, and litigating a
29 motion for appropriate relief. The application for the appointment of such postconviction
30 counsel shall be made within 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 a
33 petition for certiorari to the United States Supreme Court has expired
34 without a petition being filed;

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

38 (3) The United States Supreme Court granted the defendant's or the State's
39 timely petition for certiorari of the decision on direct appeal by the
40 Supreme Court of North Carolina, but subsequently left the defendant's
41 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 within 10 days of the beginning of the next criminal or

1 mixed session of superior court in the district. The district attorney or Attorney General
2 shall arrange for the defendant to appear in superior court within the time limits specified
3 above. Upon application by the defendant, the superior court shall enter an order (i)
4 appointing counsel and, if the circumstances of the case warrant, one associate
5 counsel to represent the defendant upon a finding that the defendant is indigent and
6 accepts the appointment of counsel, or is unable competently to decide whether to accept
7 or reject the appointment of counsel; (ii) finding, after a hearing if necessary, that the
8 defendant rejected the offer of counsel and made the decision with an understanding of its
9 legal consequences; or (iii) denying the appointment of counsel upon a finding that the
10 defendant is not indigent.

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

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

18 Sec. 9. The Administrative Office of the Courts shall investigate, study, and
19 report to the General Assembly the cost and feasibility of computer-aided transcription
20 for capital cases, with the goal of court reporters preparing and delivering trial transcripts
21 within 30 days of receipt of the order for the transcript.

22 Sec. 10. Sections 9 and 10 of this act are effective upon ratification. The
23 remainder of this act becomes effective for any case becoming final on or after the date of
24 ratification.