

## Motions for Appropriate Relief and Procedural Default

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As noted in an earlier [post](#), I get asked a lot of questions about motions for appropriate relief (MARs). One procedural issue that causes some confusion is procedural default. The MAR statute provides that in order for a court to reach the merits of a defendant's 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, the MAR is rejected on grounds of procedural bar. Thus, the procedural default rules—which are mandatory—preclude consideration on the merits when a procedural error has occurred.

G.S. 15A-1419 contains four procedural default rules:

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. In addition to the general exceptions that apply to all four of the procedural bar rules and are discussed below, the statute prescribes a specific exception that applies only to this bar: it does not apply when the previous MAR was made within ten days after entry of judgment or during the pendency of the direct appeal.
2. *Issue Determined in Prior Proceeding.* 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. In addition to the general exceptions that apply to all four of the procedural bar rules and are discussed below, the statute prescribes a specific exception that applies only to this bar: it does not apply if, since the time the previous determination, there has been a retroactively effective change in the law controlling such issue.
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. Case law establishes that this bar does not prohibit a defendant from raising jurisdictional issues that were not raised on appeal. The issue of whether this exception will be extended to the other procedural bar rules has not yet been presented to the appellate courts.
4. *Failure to Timely File.* A MAR must be denied if a capital defendant failed to timely file a MAR. G.S. 15A-1415(a) sets out a 120-day filing period for capital MARs. However, the MAR statute allows for extensions and amendments and exempts claims of newly discovered evidence from the 120-day filing rule.

The statute contains two general exceptions to the procedural default rules. First, a defendant is excused from procedural default if he or she can demonstrate good cause and actual prejudice. "Good cause" is defined in G.S. 15A-1419(c); "actual prejudice" is defined in G.S. 15A-1419(d). Second, a defendant will be excused from procedural default if he or she can show that a failure to consider the claim will result in a fundamental miscarriage of justice. "Fundamental miscarriage of justice" is defined in G.S. 15A-1419(e).

Understanding the procedural bar rules is important for defense lawyers, prosecutors, and judges. Defense lawyers need to be aware of the procedural default rules. If a defense lawyer fires off a MAR or prepares an appeal that does not raise all relevant issues and is not successful, the procedural bar rules later may preclude consideration of

otherwise meritorious claims. At the same time, prosecutors should be sure to review MARs for procedural default as a default will preclude the court's consideration of the claim on the merits. Finally, judges should be cautious about treating pro se filings as MARs, as doing so may inadvertently create a procedural bar issue later on. When a pro se post-conviction filing raises non-frivolous issues, a better practice for the judge would be appoint counsel for an indigent defendant to file a proper MAR raising the claim stated in the pro se filing and any others that are appropriate. Also, because the procedural default rules are mandatory, judges should review all MAR claims for procedural default.