

## Motions for Appropriate Relief

The purpose for developing this policy is to establish guidelines for the best practices in the receipt and handling of motions for appropriate relief. It is a general guideline and will not address all situations or issues that may arise. In dealing with motions for appropriate relief, the prosecutor should remember that the “prosecutor has the responsibility of a minister of justice and not simply an advocate; the prosecutor’s duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” (*Rule 3.8: Special Responsibilities of a Prosecutor, Comment*)

**A. Designate a Person to Review the Motion for Appropriate Relief:** The District Attorney’s Office should develop a policy to designate a person or persons to review motions for appropriate relief as they are received. This may be the prosecutor that was assigned to the underlying charge, or someone else designated to act upon receipt of a motion for appropriate relief. If the motion for appropriate relief is to be assigned to the prosecutor that originally handled the case, there should be a person or persons designated with oversight to the status of motions for appropriate relief that are pending.

**B. Receipt of a Motion for Appropriate Relief:** After receipt of a motion for appropriate relief the District Attorney’s Office should stamp the motion as received, and either create a file separate from the original file or pull the original file to incorporate the motion. Whoever is designated as the appropriate person to review motions for appropriate relief should develop procedures to include the following:

1. Thoroughly read the Motion for Appropriate relief and determine if there is any merit to the grounds asserted under 15A-1414(b) (Motions made within 10 days) or 15A-1415 (Motions made outside of 10 days);
2. Determine if the Motion for Appropriate Relief is proper in form, service, and filing under 15A-420;
3. If the defendant claims the basis of the motion is 15A-1415(c), and that evidence is available to the defendant that was not available at the time of trial, that has a direct and material bearing upon the defendant’s eligibility for the death penalty or upon the defendant’s guilt or innocence, this information should be carefully examined to determine if there is any merit to this claim;
4. Where the defendant claims the basis of the motion is 15A-1415(e), ineffective assistance of trial or appellate counsel, this claim should be reviewed and contact should be made both orally and in writing to the prior trial or appellate counsel, and an effort made to communicate with counsel regarding the allegations, stressing that the attorney client privilege has been waived with respect to both oral and written communications, to the extent that such communications are necessary to defend against the claim of ineffective assistance of counsel. If the prior attorney for the defendant disagrees as to the necessity to discuss or provide prior oral or written communications to defend against the claim of ineffective assistance of counsel, the district attorney should apply to an appropriate judge for an order to compel;
5. After review, if there appears to be any merit to the claim raised by the defendant, under any of the above provisions, the prosecutor should make contact with the trial judge, if the motion is made within 10 days under 15A-1414; or the Senior Resident Superior Court Judge, or the Chief

District Court Judge as the case may be, if the motion is made outside the 10 days under 15A-1413; and inform the judge in writing that there is merit to the claim offered by the defendant. If it is clear that the claim raised by the defendant is accurate and would therefore clearly constitute a ground for relief, this should be conceded and the appropriate judge should be informed of this fact.

6. If the prosecutor becomes aware of any information that would constitute grounds for a motion for appropriate relief under either 15A-1414, or 15A-1415, and the defendant has not filed a motion for appropriate relief, the prosecutor should either file a State's motion for appropriate relief pursuant to 15A-1416, or provide this information in writing to the appropriate judge as described above, so the Judge may act on his or her own motion pursuant to 15A-1420(d).

**C. Develop a System:** It is important that a system be developed to manage the status of a motion for appropriate relief in District Court and Superior Court from the time it is received until the time it is ruled upon by the judge. You should designate a specific place that files containing motions for appropriate relief are to be kept, and/or a system that allows central contact to these files to assure these files are properly updated as information and documents relating to the motion for appropriate relief are received by the district attorney's office. Additionally, these files should be reviewed periodically to check the status of the motion for appropriate relief and, if necessary, contact the appropriate judicial official or office staff to inquire as to the status of the motion for appropriate relief. All inquiries regarding the status of a motion for appropriate relief should be reduced to writing, to establish a record of the inquiry into the motion that is under review. A copy should be maintained in the prosecutor's file to document the status of that particular motion. Please also consider the following:

1. Pro Se Counsel: If the motion for appropriate relief survives summary dismissal by the judge, the prosecutor should schedule the matter for an administrative setting on the motions calendar to address counsel;
2. Procedural Bar: The prosecutor should assess whether there is any procedural bar pursuant to 15A-419, and file a motion to dismiss if appropriate. This can typically be done either by a review of the clerk's file or an internal file that is maintained in the District Attorney's Office.
3. Calendaring to get a Ruling: The prosecutor should assess if it is necessary to calendar the motion for appropriate relief on a motions calendar, so that the motion may be ruled upon on its face.
4. Notification of Other Prosecuting Agencies: When a motion for appropriate relief is filed challenging an underlying conviction, the prosecutor assigned to the motion for appropriate relief should check for pending charges in other jurisdictions (i.e.... Possession of Firearm by a Felon or any charge affected by Habitual Status). The prosecutor should notify the District Attorney's Office, United State's Attorney's Office, or other prosecuting agencies with pending charges in writing of the pending motion for appropriate relief that has been filed. This is particularly important if the motion for appropriate relief could affect the underlying pending charges.

**D. Responding to a Motion for Appropriate Relief:** If the judge directs the District Attorney's Office to file a response to the motion for appropriate relief under 15A-1420(b)(2), the prosecutor assigned should determine if there is in fact any merit to the claim. If there is merit to the claim the prosecutor should promptly respond to the Court and indicate that there is merit to the claim, preserving the right to argue in good faith procedural defects or factual inaccuracy of any claim.

1. Capital Cases: Remember, under 15A-1420(c), that in Capital Cases any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the Court determines the Motion for Appropriate Relief is without merit.
2. Racial Justice Motions: Remember that a racial justice motion is essentially a motion for appropriate relief and should be treated accordingly for procedural purposes.

**E. Scheduling a Hearing:** If the Judge directs the State to hold an evidentiary hearing, under 15A-1420(b)(3), on the merits of the motion for appropriate relief, the prosecutor should candidly concede to the court the merit of any factual claims that would constitute a basis for relief, preserving the right to argue in good faith procedural defects or factual inaccuracy of any claim. The defendant has the right to be present during any hearing where issues of fact are to be resolved but should, if possible, be present where questions of law are to be argued as well.

**F. Procedural Defects:** Many times a motion for appropriate Relief may be filed *pro se* and be procedurally defective on its face, or may not be sufficient in form for some reason. It is important to remember it is the prosecutor's duty to review the motion for appropriate relief for substance over form. Therefore, conceding an error in sentencing, or legal or factual inaccuracy in a judgment conforms to the special responsibilities of the prosecutor.

**G. Appeals:** If a motion for appropriate Relief is raised within 10 days, pursuant to 15A-1414(b), and the underlying case is appealed by the defendant, the prosecutor handling this matter should promptly notify the prosecutor designated to handle motions for appropriate relief, so that they may assist the prosecutor handling the underlying case in settling the record on appeal with respect to the motion for appropriate relief. If a motion for appropriate relief is raised outside the 10 days and the defendant has no right to appeal, and therefore, files a writ of certiorari, the prosecutor handling the matter should promptly notify the prosecutor designated to handle motions for appropriate relief, so they may assist in verifying the form and validity of the writ of certiorari. Once again any confirmed error in sentencing, or legal or factual inaccuracy should be conceded by the prosecutor reviewing these matters.

**H. Effects of Motions for Appropriate Relief on the Innocence Commission:** The innocence Commission cannot review evidence that was heard by a fact finder either a jury at trial or before a judge during a Motion for Appropriate Relief evidentiary hearing. If there was a Motion for Appropriate Relief heard prior to the inquiry of the Innocence Commission, then the evidence is not eligible to be considered by the Commission. If a Motion for Appropriate Relief was denied without a hearing, then the evidence may be considered by the Commission. All evidence may be considered if the case is sent forward from the Innocence Commission to the three-judge panel.