

## **TRYING A NON-CAPITAL CRIMINAL CASE: AN OUTLINE FOR THE SUPERIOR COURT JUDGE**

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### **1. Read the case file.**

**2. Arraignment.** Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on the defendant's behalf in accordance with G.S. 15A-941. G.S. 15A-1221(a)(1a). See "Arraignment" in this Guide for more information.

### **3. Confirm jurisdiction.**

- Make sure that the superior court has jurisdiction over the case.
  - The superior court has original jurisdiction over all felonies and over misdemeanors joined with felonies.
  - The superior court has original jurisdiction over misdemeanors initiated by presentment. G.S. 7A-271(a)(2).
  - The superior court has jurisdiction over misdemeanors appealed from the district court for trial de novo. G.S. 7A-271(b).
- Make sure that the type of charging instrument is appropriate for trial in superior court.
  - For cases initiated in superior court, the charging document must be an indictment or a bill or information. G.S. 15A-923(a). A presentment from the grand jury may not serve as a pleading. *Id.*
  - If the case is an appeal for trial de novo from district court, the charging document may be a citation, criminal summons, warrant for arrest, or magistrate's order. If the defendant objects to the sufficiency of a summons, warrant, or magistrate's order, the prosecution may file a statement of charges, in certain circumstances. G.S. 15A-922(e). An objection to trial on a citation is untimely if raised for the first time in superior court. *State v. Monroe*, 57 N.C. App. 597 (1982).
- Check the charging instrument for fatal defects e.g., failure to charge an element; fatal defects create jurisdictional issues. See "Indictment" in this Guide for more information.

### **4. Competency.** Address any unresolved competency issues.

- Specifically, check for any unopened envelopes that might contain mental health evaluations.
- You may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves at trial. See *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

**5. Waiver of counsel.** If the defendant appears pro se, make sure a waiver of counsel was done in superior court. If not, make inquiry and proceed accordingly. See “Counsel Issues” in this Guide.

- If defendant is proceeding pro se, consider appointing standby counsel. See 15A-1243.

**6. Recordation.** The judge must require the court reporter to make a record of all proceedings, except jury selection in non-capital cases, opening statements and final arguments to the jury, and the lawyers’ arguments on questions of law. G.S. 15A-1241.

- Jury selection and/or opening and closing statements must be recorded if a motion to do so is made. *Id.*

## **7. Jurors – Preliminary Issues**

- Give introductory remarks to prospective jurors.
  - See “Introduction” under “Standard Remarks to Jurors” in this Guide.
- Determine that the jurors are qualified to serve. See G.S. 9-3.
- Decide you how you are going to deal with excuses from jurors and act accordingly. See G.S. 9-6.
  - One practice is to have the clerk screen excuses and then deal with any excuses that come up during jury selection, on the record. Some judges report that handling these matters off the record encourages excuses to be presented.
- Hear requests for deferral from those over 72 years old, as appropriate under G.S. 9-6.1.
- Give additional introductory remarks to prospective jurors in accordance with G.S. 15A-1213. G.S. 15A-1221(a)(2).
  - See “Remarks to Prospective Jurors After Excuses Heard” under “Standard Remarks to Jurors” in this Guide.
  - See “Remarks to Jurors Before Selection of Jury in a Specific Case” under “Standard Remarks to Jurors” in this Guide.

**8. Selecting and impaneling the jury.** The jury (including alternates(s)) is sworn, selected and impaneled in accordance with G.S. 15A-1211 through -1217. See G.S. 15A-1221(a)(3).

- See “Jury Selection” in this Guide.
- Note that the procedure for jury selection in criminal trials may be somewhat different from what you have experienced in civil trials. However, the statutory procedure for jury selection is mandatory for criminal trials.
- The indictment may not be read to the jurors during jury selection or trial. G.S. 15A-1221(b).
- Have the clerk impanel the jury in accordance with G.S. 15A-1216.
  - If the trial will not begin until the following day and you are in a jurisdiction where you will have potential jurors in court the next day, you may want to delay impaneling until then. In places where there the panel will not return until later in the week, it may be best to select an alternate and have the jury impaneled before you recess for the evening.

- See “Remarks to Jurors After Jury Impaneled” under “Standard Remarks to Jurors” in this Guide.

**9. Admonitions to jurors.** Give “Admonitions to Jurors at Recesses” under “Standard Remarks to Jurors” in this Guide, see G.S. 15A-1236, before every break and overnight recess.

**10. Notetaking by jurors.** Unless the judge on his or her own motion or on motion of any party directs otherwise, jurors may take notes during trial. See G.S. 15A-1228; see also “Making Notes By Jurors” under “Standard Remarks to Jurors” in this Guide.

- Ask the jurors before the trial begins whether they want to take notes. If they indicate that they want to do so, give them the appropriate instruction about note taking and offer pads and pens.

**11. Trial in absentia.** For trial in the defendant’s absence, see “Criminal Trial in Defendant’s Absence” in this Guide.

**12. Sequestration of witnesses.** See generally G.S. 15A-1225; N.C. R. Evid. 615; G.S. 15A-825(6a) (victims’ rights act).

- When entering a sequestration order, articulate exactly what you are ordering, including the extent to which witnesses are prohibited from talking with each other about their testimony or the case.
- If you enter a sequestration order, think about possible sanctions (e.g., excluding evidence, contempt) so that you are prepared to deal with violations as they arise.

**13. Limiting instructions.** Be prepared to give standard limiting instructions during trial. Common scenarios requiring such an instruction include:

- 404(b) prior bad acts evidence.
- Out of court statements being offered for corroboration or impeachment.
- Expert testimony about syndromes.

**14. Exhibits.** It is advisable to create your own exhibit list during the trial.

- It is recommended that your exhibit list track the following information: exhibit number; description of exhibit; who authenticated the exhibit; whether the exhibit was offered in evidence; whether the exhibit was admitted in evidence; and the information discussed below regarding items that might contain biological evidence.
- Check regularly with the clerk regarding which exhibits have been admitted etc., to make sure that everyone is on the same page.
- When physical evidence is offered or admitted into evidence in a criminal proceeding, you must ask the parties (a) to identify the collecting agency and (b) whether the evidence in question is reasonably likely to contain biological evidence and if that biological evidence is relevant to establishing the identity of the perpetrator. G.S. 15A-268(a3). If either party asserts that the evidence may have biological evidentiary value, and you so find, you must instruct that the

evidence be so designated in the court's records and that the evidence be preserved pursuant to the G.S. 15A-268. *Id.* The Exhibits/Evidence Log Form (AOC-G-150) has fields for the courtroom clerk to record this information and the your finding.

#### **15. Jury instructions – thinking ahead**

- Before the trial begins, consider asking the parties if they know which jury instructions they will be tendering. Doing this will give you a jump start on compiling the charge and will save time later. Also, reviewing the instructions for the crime(s) charged may help you deal with objections as to relevancy.

**16. Opening statements.** Each party must be given the opportunity to make a brief opening statement. See G.S. 15A-1221(a)(4); Rules 9 & 10 of the General Rules of Practice for Superior and District Court.

- Defense may reserve opening statement until it presents evidence. G.S. 15A-1221(a)(4) & (a)(6).
- Consider discussing with counsel issues pertaining to opening and closing statements e.g., improper arguments, etc.
- Consider asking whether counsel will be making any admissions of guilt. See the section on *Harbison* claims on “Post-Conviction Issues: Ineffective Assistance of Counsel” in this Guide.

**17. The State's case.** The State must present evidence. G.S. 15A-1221(a)(5).

- Before the close of the State's case, be sure to arraign the defendant on any prior convictions that elevate the offense as required by G.S. 15A-928(c). See “Arraignment” in this Guide for more information.

**18. Defense motion to dismiss.** At the conclusion of the State's case, rule on any motions to dismiss made under G.S. 15A-1227(a)(1).

**19. The defense case.** G.S. 15A-1221(a)(6).

- The defense is not required to put on evidence. *Id.*
- Consider informing the defendant, out of the presence of the jury, of his or her right to testify/not to testify.
  - Sample colloquy regarding the right to testify/not to testify: “You have the right to testify or not to testify. The decision about whether or not to testify should not be made by your lawyer, the district attorney, me, your family members, or anyone else. That decision is yours and yours alone. If you choose not to testify, I will give an instruction to the jury saying that they are not to hold that against you. Do you have any questions about your right to testify or not to testify, or anything related to that right? What is your decision about whether you will testify in this case? Let the record reflect that I have had this conversation with the defendant in open court with [his/her] lawyer present, outside the presence of the jury, and that the defendant has decided that [he/she] [will/will not] testify in this case.”

- Alternate colloquy, for judges who do not wish to require a represented defendant to answer questions by the court: “You do not have to talk to me and you have the right to remain silent. Your lawyer tells me that you have decided [not to testify][to testify]. If this is correct, you do not need to say anything. However, this is not correct, now is the time to tell me.”
- If the defense has reserved opening statement, it may be given before the defense presents its case. *Id.*

**20. Rebuttal and additional evidence.**

- Each party may introduce rebuttal evidence in accordance with G.S. 15A-1226(a). See G.S. 15A-1221(a)(7).
- The judge, in his or her discretion, may permit any party to introduce additional evidence at any time before the verdict. G.S. 15A-1226(b).

**21. Absolute impasse.** As a general rule, some decisions in the course of a criminal trial are made by the defendant and others are made by defense counsel. A defendant decides, for example, whether to testify and whether to plead guilty. Counsel typically decides strategy issues, such as which jurors to strike, which witnesses to call, and whether and how to conduct cross-examination. However, in North Carolina, there is a doctrine of absolute impasse. Under this doctrine, when defense counsel and a fully informed criminal D reach an absolute impasse as to tactical decisions, the client's wishes must control. *State v. Ali*, 329 NC 394 (1991). Reversible error occurs if an absolute impasse is brought to the trial judge's attention and the judge fails to require defense counsel to abide by the defendant's wishes. See, e.g., *State v. Freeman*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 17 (Mar. 2, 2010).

**22. Defense motion to dismiss.** At the close of all evidence, rule on any motions to dismiss made under G.S. 15A-1227(a)(2).

**23. Offers of proof.** Deal with offers of proof as they arise during the trial. See generally N.C.R. Evid. 103(a)(2).

- You may hear these at lunch, at the end of the day, etc.

**24. Charge Conference.** See generally G.S. 15A-1231; Rule 21 of the General Rules of Practice for Superior and District Court.

- Give “Remarks to Jurors Before Charge Conference” under “Standard Remarks to Jury” in this Guide.
- The charge conference is mandatory. G.S. 15A-1231(b).
- It must be held out of the jury's presence. *Id.*
- It must be recorded. *Id.*
- Any party may tender written instructions. G.S. 15A-1231(a). Any party tendering written instructions to the judge must provide copies to the other parties. *Id.*
- Inform the parties of:
  - The offenses (and lesser included offenses) on which you will charge;
  - The affirmative defenses on which you will charge;
  - What, if any parts of the tendered instructions you will give; and
  - Any other instructions that you will give, if a party asks.
 G.S. 15A-1231(b).

- Consult “Criminal Jury Instructions Checklist” in this Guide.
- Be sure to include a final mandate in your instructions.
- Review the charging instrument to make sure that it supports the crimes charged and the State’s theory of the case (there is a problem e.g., if the indictment charges kidnapping for the purpose of committing a felony but the evidence shows a purpose of facilitating flight).
- Every charge conference should include discussion of the possible verdicts.
  - Always articulate how the verdict sheet should read.
  - Make sure that a verdict sheet is being prepared (usually by the clerk, although in some counties by the court reporter, lawyers, or judge).

**25. Closing arguments.** Closing arguments are done after all evidence has been presented. G.S. 15A-1221(a)(8); Rule 10 of the General Rules of Practice for Superior and District Court.

- Give “Remarks to Jurors Before Final Arguments of Counsel” under “Standard Remarks to Jurors” in this Guide.
- For the order of closing arguments, see “Closing Arguments” in this Guide.
- Consider asking whether counsel will be making any admissions of guilt. See the section on *Harbison* claims on “Post-Conviction Issues: Ineffective Assistance of Counsel” in this Guide.
- Consider reviewing with counsel the limits on closing arguments prescribed by G.S. 15A-1230.
- For the court’s control over argument, see G.S. 7A-97.

**26. Charge the jury.** The judge must charge the jury. G.S. 15A-1221(a)(9); 15A-1231(c); 15A-1232. You must give an instruction informing the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty. G.S. 15A-1235.

**27. Discharging alternates.**

- Before sending the jury to deliberate, excuse any alternate jurors. G.S. 15A-1221(a)(10); 15A-1215.
  - Exception: where there is a bifurcated proceeding (e.g., habitual felon, or jury sentencing hearing under G.S. 15A-1340.16(a1)), retain the alternates somewhere outside of courtroom pending return of the jury with a verdict.
- When you get to the portion of the pattern jury instruction stating that a verdict requires agreement of all 12 jurors, deal with the issue of alternates.
  - Ask jurors 1 thru 12: “Is anyone feeling the onset of any illness or does anyone know of any reason whatsoever why you cannot fully participate in the deliberations, working with your fellow jurors toward a unanimous verdict? If so, raise your hand.”
  - Assuming no juror needs to be relieved of his or her duties, discharge the alternate(s), saying: “This will conclude the duties of our alternate juror, [Mr./Ms.\_\_\_\_\_]. From this point forward, please do not communicate with any of the jurors about the case and do not re-enter the jury room. You may have a seat in the audience and I will speak with you further in a moment.”
    - Think about what the alternate juror(s) will do once excused (e.g., talk with lawyers/parties about impressions of the evidence and

- arguments, remain the courtroom to view the outcome of the case, etc.) and address these issues later with the discharged alternates.
- If a juror needs to be relieved, use an alternate juror.

**28. Jury deliberations.** G.S. 15A-1221(a)(10).

- During your concluding instructions, instruct the jury: “Your first order of business when you retire to the jury room will be to select one of your members as foreperson to lead you in your deliberations, but do not begin your discussions of the case until you receive the verdict sheet from the bailiff. When you receive the verdict sheet, that will be your signal to begin your deliberations. Once you have agreed unanimously upon a verdict, your foreperson should mark that verdict, date and sign the verdict sheet, and then knock on the door of the jury room as a signal to us that you have arrived at a verdict. You will then be returned to the courtroom to announce your verdict.”
- After the jury leaves the courtroom, check with counsel about whether any additional instructions or corrections are needed.
- If issues are raised, announce your decision and return the jury to the courtroom for further instruction, if necessary.
- If no issues are raised send the verdict sheet to the jury, stating: “Please take the verdict sheet to the jurors. It is now \_\_\_\_\_ o'clock am/pm.”
- Unless the judge on his or her own motion or on motion of any party directs otherwise, jurors may take their notes into the jury room during deliberations. See G.S. 15A-1228; see also “Making Notes By Jurors” under “Standard Remarks to Jurors” in this Guide.
- An alternate may not be substituted for an original juror once deliberations have begun, except in a bifurcated proceeding as noted above.
- Recess court during the jury deliberations.
  - You may wish to take pleas, handle probation violations, or handle other non-jury matters while the jury is deliberating. You even may wish to start jury selection in another case.
- At least one attorney representing the defendant must remain in the immediate area of the courtroom so as to be available at all times during deliberations. Rule 13 of the General Rules of Practice for Superior and District Courts.
  - Suggested colloquy: “Court is at ease while the jury deliberates [or, if you are going to handle other matters—e.g., pleas in other cases—while the jury deliberates: Court is at ease in this case while the jury deliberates] but counsel should remain in the courtroom or right outside the door in case the jury has questions or if your presence is required for some other reason.”
- Address the jury’s requests for evidence and/or exhibits and/or questions as they arise. See generally G.S. 15A-1233 (review of testimony; use of evidence by the jury); “Jury Review of Evidence” in this Guide. Always address the entire jury on these issues, not just the jury foreperson.
  - Suggested procedure for dealing with questions from the jury:
    - Make sure any questions from the jury are presented in writing and are made part of the court file as “court exhibits.”
    - Present all questions on the record in open court, outside of the presence of the jury.
    - Get input from counsel and/or an unrepresented defendant about how to address the question.

- Announce your decision before proceeding, allowing time for objections.
- Bring the jury into the courtroom, addressing all questions on the record, in open court.
- Never send messages back and forth to the jury room.
- If exhibits are sent back to the jury room, ensure safekeeping during breaks and/or overnight recesses.
- If the jury asks for a transcript of testimony, rule on that request “in your discretion.”
- See G.S. 15A-1234 regarding additional instructions that may be given to a deliberating jury.
- If the jury fails to arrive at a verdict before the conclusion of the first day, instruct the jury as to conduct and set a time for their return.

**29. Extending the session.** If the trial or deliberations require you to extend the session, see “Extension of Session” in this Guide for more information about entry of an extension order.

**30. Verdict/deadlocked jury.**

- When and if the jury has agreed on a verdict, reconvene court and take the verdict. See generally G.S. 15A-1237 (verdict); 15A-1238 (polling the jury); G.S. 15A-1239 (judicial comment on verdict).
  - See “Criminal Verdicts,” section 2, “Taking a Verdict” in this Guide.
- If the jury cannot agree on a verdict, consult “Criminal Verdicts,” section 1, “Failure of Jury to Reach a Verdict” in this Guide. See also G.S. 15A-1235.

**31. Discharge the jury.** Thank and discharge the jury.

**32. Discharge or sentence the defendant.**

- If the verdict is not guilty, discharge the defendant.
- If defendant has been found guilty:
  - Rule on any motions to dismiss made under G.S. 15A-1227(a)(3).
  - Move to any additional proceeding (e.g., habitual felon, or jury sentencing hearing under G.S. 15A-1340.16(a1)).
  - Sentence the defendant in open court
    - If the defendant is not present, see “Trial in Defendant’s Absence” in this Guide
  - Determine whether defendant should be committed to custody or released on bail pending appeal.

**33. Judgment.**

- Check (and double check) the judgment.
- Sign the judgment.

**34. Fee Applications.** For indigent defendants who have not waived the right to appointed counsel, ask the lawyer for his or her fee application (AOC-CR-225) and complete both sides of the form. The front side includes an order for payment to counsel. The back side includes a judgment requiring the defendant to repay the state for counsel

expenses if convicted. Be sure to inform the defendant of the amount requested and awarded. See generally G.S. 7A-458; Rule 1.9, Part 1 N.C. Office of Indigent Defense Services Rules for the Continued Delivery of Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level (available online at: <http://www.aoc.state.nc.us/www/ids/>). If counsel has not completed the application, ask counsel for an oral statement of the number of hours for which counsel will seek compensation. Following these steps ensures that notice is given to the defendant of the amount to be entered against him or her (AOC-CR-225 requires “due notice to the defendant”).

### **35. Adjourn or recess court.**

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