

## 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 Superior Court in this Benchbook 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 information or a bill of indictment. G.S. 15A-923(a).
  - A presentment from the grand jury may not serve as a pleading. G.S. 15A-923(a).
  - An indictment is required unless waived. However, an indictment may not be waived in a capital case or in a case in which the defendant is unrepresented. G.S. 15A-942(b). Waiver of the indictment must be in writing, signed by the defendant and his attorney, and attached to or executed on the bill of information. G.S. 15A-942(c). Note that the AOC form information—AOC-CR-123—includes a waiver of an indictment at the bottom of the form.
  - 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 Indictments in this Benchbook 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*, 554 U.S. 164 (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 Benchbook.

- 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

- Determine that the jurors are qualified to serve. See Jury Selection in this Benchbook for information about juror qualifications.
- Decide 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).
  - G.S. 15A-1213 provides: "[p]rior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required."
  - Note that the trial judge may *not* read the pleadings to the jury. *Id.*

**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). For more detailed information on all aspects of jury selection, see Jury Selection in this Benchbook.

- 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.

**9. Admonitions to jurors.** Give appropriate admonitions to the jurors before every break and overnight recess. G.S. 15A-1236(a) provides that "at appropriate times must admonish the jurors that it is their duty":

- Not to talk among themselves about the case except in the jury room after deliberations have begun.
- Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case.
- Not to form an opinion about the defendant's guilt or innocence, or express any opinion about the case until they begin deliberations.
- To avoid reading, watching, or listening to accounts of the trial.
- Not to talk during trial to parties, witnesses, or counsel.

The statute further provides that "[t]he judge may also admonish them with respect to other matters which he considers appropriate." G.S. 15A-1236(a).

**10. Note taking 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 Note Taking by the Jury in this Benchbook.

**11. Trial in absentia.** For trial in the defendant's absence, see Trial in the Defendant's Absence in this Benchbook.

**12. Restraining the defendant during trial.** For a discussion of this issue, see Restraining the Defendant during Trial in this Benchbook.

**13. Sequestration of witnesses.** For a discussion of this issue, see Sequestration of Witnesses in this Benchbook.

**14. 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.

For sample instructions, see Routine Limiting Instructions in Criminal Cases in this Benchbook.

**15. 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.

#### 16. 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.

**17. 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 the Superior and District Courts.

- 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 Ineffective Assistance of Counsel in this Benchbook.

**18. 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 Benchbook for more information.

**19. 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).

**20. 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.*

#### **21. 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).

**22. 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 defendant reach an absolute impasse as to tactical decisions, the client's wishes must control. *State v. Ali*, 329 N.C. 394, 404 (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*, 202 N.C. App. 740 (2010). For more information on this issue, see Absolute Impasse in this Benchbook.

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

**24. 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.

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

- 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).
- 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).

**26. 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 the Superior and District Courts.

- For the order of closing arguments, see "Closing Arguments" in this Benchbook.
- Consider asking whether counsel will be making any admissions of guilt. See the section on *Harbison* claims in Ineffective Assistance of Counsel in this Benchbook.
- 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.

### **27. Charge the jury.**

- The judge must charge the jury. G.S. 15A-1221(a)(9); 15A-1231(c); 15A-1232.
- It is recommended that you follow the North Carolina Pattern Jury Instructions whenever possible. You can put together the jury instructions electronically by using the Pattern Jury Instruction software that was loaded onto your AOC computer.
- 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(a).
- A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing. *State v. McAvoy*, 331 N.C. 583, 591 (1992).

### **28. 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.

#### 29. 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* Note Taking by the Jury in this Benchbook.
- 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 the 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 under Jury Deliberations in this Benchbook. 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.

**30. Extending the session.** If the trial or deliberations require you to extend the session, see Extending the Session in this Benchbook for more information about entry of an extension order.

**31. Verdict/deadlocked jury.**

- For guidance on how to handle a potential or actual jury deadlock, see Jury Deadlock in this Benchbook.
- For guidance on the form of the verdict, taking a verdict and polling the jury, see Jury Verdict in this Benchbook.

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

**33. 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, enter a Prayer for Judgment Continued. See Trial in the Defendant's Absence and Prayer for Judgment Continued in this Benchbook
- Determine whether defendant should be committed to custody or released on bail pending appeal.

#### 34. Judgment.

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

**35. 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").

#### 36. Adjourn or recess court.



## GRAND JURY QUESTIONNAIRE

The presiding judge is required to select a foreperson for the Grand Jury. Please complete this Questionnaire. Your answers will be sealed and can only be opened by order of the Court.

1. Name (please print) \_\_\_\_\_; Age \_\_\_\_\_
2. Number of years completed in school. \_\_\_\_\_
3. Have you ever served on a Grand Jury before (including the past six months)? \_\_\_\_\_
4. Have you ever served as foreperson of a Grand Jury?  
If so, when? \_\_\_\_\_
5. Have you ever been convicted of a criminal offense (other than minor traffic convictions)? \_\_\_\_\_
6. Where are you employed? \_\_\_\_\_
7. How long have you worked there? \_\_\_\_\_
8. What position do you hold and/or what are your work duties?  
\_\_\_\_\_
9. Do you supervise other employees at work? \_\_\_\_\_
10. List any professional, religious, or civic organizations to which you belong. \_\_\_\_\_
11. List any offices or positions of leadership you have held in the above organizations. \_\_\_\_\_
12. Whom do you recommend (including yourself) to be the foreperson of this Grand Jury? \_\_\_\_\_
13. If chosen, would you be willing to serve as foreperson for the next six months? \_\_\_\_\_

\_\_\_\_\_  
Signature



NORTH CAROLINA  
\_\_\_\_\_ COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON  
APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That \_\_\_\_\_ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, and that in order to assist the court in making this selection, each grand juror would be required to complete a written questionnaire, such questionnaires being used for purposes of gaining information as to the qualities and characteristics of each grand juror. Upon completion of the questionnaires, each questionnaire was reviewed by the court, paying particular attention to qualities of leadership ability, fairness, education, prior grand jury experience and ability to follow instructions. In selecting a grand jury foreperson, all members of the grand jury were considered as possible candidates and the court specifically made the selection of the foreperson and assistant foreperson in a racially neutral manner.

Considering information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, \_\_\_\_\_ is a fit and proper person to serve as foreperson of this grand jury and \_\_\_\_\_ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints \_\_\_\_\_ as foreperson of the grand jury of this county, and \_\_\_\_\_ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

It is further ORDERED that the Clerk place the eighteen completed questionnaires in a sealed envelope, not to be opened except by court order, and that it be kept with the permanent minutes of this court.

This the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Forrest Donald Bridges  
Superior Court Judge

NORTH CAROLINA  
\_\_\_\_\_ COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

IN RE: GRAND JURY FOREPERSON  
APPOINTMENT

ORDER

This matter coming on to be heard before the undersigned Judge assigned to preside over the Superior Court of the above-captioned county. This is a session at which this court is required to impanel a new grand jury and to appoint a new foreperson of the grand jury.

It appears to the court and the court finds as facts the following:

That \_\_\_\_\_ new jurors were randomly selected by the clerk from the jurors regularly summoned from this session of court.

Upon selection and composition of the new grand jury as described above, the undersigned judge proceeded to explain to the grand jury the responsibilities of the foreperson and assistant foreperson of the grand jury. The court further informed the grand jurors that it is the responsibility of the court to appoint a foreperson and assistant foreperson, but that the court would entertain recommendations from the grand jury for the positions of foreperson and assistant foreperson. The grand jury also was informed by the court that, in making such recommendations, all members of the grand jury should be considered as possible candidates, that any recommendations should be based upon the leadership ability, fairness, education, prior grand jury experience and ability to follow instructions and that the persons recommended must be selected in a racially neutral manner. After receiving the recommendations of the grand jurors, the Court again inquired and was assured that the recommendations had been made in a racially neutral manner.

Considering the recommendations and other information received from the grand jurors, this court in its discretion determines that based on the criteria of leadership ability, fairness, education, prior grand jury experience, and ability to follow instructions, \_\_\_\_\_ is a fit and proper person to serve as foreperson of this grand jury and \_\_\_\_\_ is a fit and proper person to serve as assistant foreperson.

Based on the foregoing facts, the court concludes as matters of law:

That the presiding Judge must appoint a member of the grand jury as foreperson.

That this selection was made through a racially neutral procedure.

THEREFORE, the court in the exercise of its informed discretion hereby appoints  
\_\_\_\_\_ as foreperson of the grand jury of this county, and  
\_\_\_\_\_ as assistant foreperson.

It is further ORDERED that the clerk shall keep a copy of this Order with the permanent minutes of this Court.

This the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Forrest Donald Bridges  
Superior Court Judge



## NOTICE TO ATTORNEYS CONCERNING JURY SELECTION

Counsel are expected to familiarize themselves prior to trial with the provisions of G.S. 15A-1214 and related case law pertaining to jury selection. During the course of jury selection, counsel should anticipate that those provisions will be enforced, including, but not limited to the following:

1. The purpose of the jury selection process is to provide reasonable opportunity for counsel to satisfy themselves and the people they represent that prospective jurors meet the qualifications required by law, can and will serve as fair and impartial jurors throughout the trial of the matter, decide the case based upon the evidence presented in the courtroom and follow the law as instructed by the court.
2. Counsel should not attempt to use the jury selection process for purposes of:
  - (a) Visiting with or seeking to establish rapport with the jurors;
  - (b) Indoctrinating the jurors to a particular view;
  - (c) Arguing the case during questioning; or
  - (d) Asking what kind of verdict they would render under certain circumstances.
3. General questions should be addressed to the jury panel as a whole and counsel should seek to avoid undue repetition arising from asking the same questions to each individual juror. Counsel may address jurors individually when asking questions that apply only to that person, questions prompted by affirmative answers to general questions, or questions relating to unique personal experiences of that juror. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).
4. Examples of *improper* questions from counsel during jury selection that will not be permitted include:
  - (a) Hypothetical questions tending to “stake out” the juror or elicit in advance what a juror’s decision will be, given certain facts. *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975); *State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159 (1978). Examples of improper hypotheticals include:
    - (1) Asking a juror how he would weight a particular mitigating or aggravating circumstance. *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995);
    - (2) “If you were to find that the defendant had previously been convicted of a murder, could you still follow the judge’s instructions...” *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994);
    - (3) “If I choose not to put on a defense, would you hold that against me...” *State v. Blankenship*, 337 N.C. 543, 447 S.E. 727 (1994) as distinguished from “If the defendant chooses not to testify...”

- (b) Questions that include an incorrect statement of law. *State v. Hedgepeth*, 66 N.C. App. 390, \_\_\_ S.E.2d \_\_\_ (1984)
  - (c) Questions of law posed to a juror (the jurors are not expected to know the law until receiving instructions from the court).
  - (d) Questions about parole eligibility. *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994); *State v. Smith*, 347 N.C. App. 453, 496 S.E.2d 841 (1995)
  - (e) Questions about capital punishment as a deterrent to crime or other legislative policy issues. *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991)
  - (f) Questions concerning juror perceptions of the meaning of life imprisonment.
5. Counsel are properly permitted to ask questions reasonably directed toward determining that the juror has formed no opinion as to the guilt or innocence of the defendant, can fairly and impartially discharge the duties of a juror and can follow the law as instructed by the court. Such questions include, for example:
- (a) Asking jurors if they can follow the law as provided by the court regarding particular trial issues. *State v. Hedgepeth*, 66 N.C. App. 390, \_\_\_ S.E.2d \_\_\_ (1984);
  - (b) "Death qualifying" questions, asking whether a juror's views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412 (1985); *State v. Brown*, 327 N.C. 1, \_\_\_ S.E.2d \_\_\_ (1990);
  - (c) "Non-death qualifying" questions, asking prospective jurors as to whether they would automatically vote for the death penalty following conviction of first degree murder, without regard to the existence of mitigating circumstances. *Morgan v. Illinois*, 504 U.S. 719 (1992); *State v. Fletcher*, 348 N.C. 292, \_\_\_ S.E.2d \_\_\_ (1998)
6. The Court shall determine, in the exercise of discretion, whether to require that *voir dire* be conducted solely by one of defendant's two co-counsel, or to permit alternation of questions between counsel at appropriate intervals. *State v. Fullwood*, 343 N.C. 725, \_\_\_ S.E.2d \_\_\_ (1996).

STATE OF NORTH CAROLINA  
COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NUMBER 00 CR 10369

STATE OF NORTH CAROLINA

VS

**JUROR RESPONSIBILITIES**

KOVA DUAN WRIGHT

\*\*\*\*\*

As a juror selected in the above captioned case, I understand that I have these duties and responsibilities:

1. I will serve for the duration of the case. During the trial of this case, I will pay attention to the evidence and I will base my verdict on the evidence as presented in court and on the law as instructed by the presiding judge.
2. I will not talk with any fellow juror about the case until instructed by the judge. I understand that the only place this case may be talked about is in the jury room, and then only after the jury has begun deliberations, after hearing all of the evidence, closing arguments by the attorneys and instructions on the law from the Judge.
3. I will not talk about this case with anyone else, or allow anyone else to talk with me or say anything in my presence about this case, until the case has concluded. If anyone communicates or attempts to communicate with me or in my presence about this case, I will notify the presiding Judge of that fact immediately.
4. I will not form an opinion about the case, nor will I express to anyone any opinion about the case, until the presiding Judge has to the jury to begin its deliberations.
5. I will not read, watch, or listen to any media accounts of the jury selection or the trial.
6. I will not go to the scene where the events of this trial are alleged to have taken place, nor will I attempt to personally investigate any aspect of the case.

In the event anyone seeks to talk to me about the case or if I have a personal emergency, I will bring that matter to the attention of the courtroom baliff as soon as possible. The bailiff will bring it to the attention of the judge.

**Juror's signature:** \_\_\_\_\_

**Printed name of juror:** \_\_\_\_\_

**Telephone:** *Home:* \_\_\_\_\_ *Office:* \_\_\_\_\_

## EXHIBIT LIST

EXHIBIT #	DESCRIPTION	PURPOSE	AUTHENTICATED	OFFERED	ADMITTED	BIOLOGICAL?	WHO COLLECTED?	PRESERVE?
S-1	Photo- victim- alive	Illustrative	Sadler	Y	Y			
S-2	Photo - victim- dead	Illustrative	Stip	Y	Y			
S-3	Photo Robt Howard	Illustrative						
S-4	Statement to police fr Darlene White	Corroborative	White					
S-5	Photo- front porch of 926 Druid Cir	Illustrative	Burke	Y	Y			
S-6	Photo- view of crime scene from next door	Illustrative	Burke	Y	Y			
S-7	Photo- above w/ police cars	Illustrative	Burke	Y	Y			
S-9	Drawing of Druid & Edison	Illustrative	Oteka	Y	Y			
S-10	Photo of house where victim	Illustrative	Oteka	Y	Y			
S-11	Photo of Druid & Edison Sts	Illustrative	Oteka	Y	Y			
S-12	Photo of 922 Druid Cir	Illustrative	Hardin	Y	Y			
S-13	Photo - another view of 922	Illustrative	Hardin	Y	Y			
S-14	Photo- closeup of porch of	Illustrative	Hardin	Y	Y			



## NOTICE TO ATTORNEYS CONCERNING CLOSING ARGUMENTS

Counsel are reminded of the provisions of G.S. 15A-1230 setting parameters for closing arguments, as well as the cases cited below. Jury arguments that violate these parameters will not be permitted in the trial of this case, with or without objection from opposing counsel. In the event of any doubt as to the propriety of a planned argument, counsel should address those concerns during the charge conference.

In closing arguments to the jury, an attorney shall not:

- (1) become abusive,
- (2) express his personal belief as to the truth or falsity of the evidence,
- (3) express his personal belief as to which party should prevail, or
- (4) make arguments premised on matters outside the record.

The trial court will monitor vigilantly the course of such arguments, intervene as warranted, entertain objections, and impose remedies pertaining to those objections. Such remedies include, but are not necessarily limited to, requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments. *State v. Jones*, 355 N.C. 117, \_\_\_ S.E2d \_\_\_ (1998).

### EXAMPLES OF IMPROPER ARGUMENTS:

1. *Reference to notorious crimes; personally degrading remarks.* A prosecutor's reference to the "Columbine [school] shootings" and the "Oklahoma City bombing" as examples of national tragedies; degrading remarks against the defendant, saying "You got this quitter, this loser, this worthless piece of -- who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly..." An argument containing these remarks was improper for three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice. *State v. Jones*, 355 N.C. 117, \_\_\_ S.E.2d \_\_\_ (1998).

2. *Expressing an opinion that a witness is lying.* "He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Golphin*, 352 N.C. 364, \_\_\_ S.E.2d \_\_\_ ( ).

3. *Reference to Defendant's failure to testify.* The prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State, but it is error for the prosecutor to comment directly on a defendant's right not to testify by stating, "'The defendant has not taken the stand in this case.'" *State v. Barden*, 356 N.C. 316, \_\_\_ S.E.2d \_\_\_ (2002).

4. *Urging jury to make an example of this defendant.* It is error for counsel for the state, in argument to the jury, to comment on the frequent occurrence of murder in the community and the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant. *State v. Phifer*, 197 N.C. 729, 150 S.E. 353 (1929).

5. *Urging the jury to follow community sentiment.* It is proper to tell the jury that they are the voice and conscience of the community, but it is improper to demand punishment because of community sentiment, asking the jury to lend an *ear* to the community rather than a *voice*. *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985).

6. *Argument conveying perceived accountability of jury to the victim, the witnesses, the community, or society in general.* *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984).

#### **EXAMPLES OF PROPER ARGUMENTS:**

1. *Urging jury to disbelieve certain testimony.* Counsel are entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of a witness' story. Where the record includes evidence contradicting the witness' statement, counsel may comment on the untruthfulness of that statement. *State v. Golphin*, 352 N.C. 364, \_\_\_ S.E.2d \_\_\_ ( ).

2. *Reminding jury of their duty to make a decision.* It is permissible for a prosecutor to argue that "the buck stops here" or that jurors had become "judges" or had become the "they" as in "they ought to do something". These statements correctly inform the jury that for purposes of the trial they have become representatives of the community and it is proper for them to act as the voice and conscience of the community, so as to temper the harshness of the law with the common sense judgment of the community. *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985).



## EXAMINATION OF MULTIPLE DEFENDANTS WITH ONE ATTORNEY

1. Do you understand that you are entitled to the right to have the independent judgment of an attorney free of any possible conflicts of interests?

----- Have you talked with your attorney about the advantages and disadvantages of joint representation?

----- Do you understand that there are all kinds of potential problems with your being represented by the same attorney who represents a co-defendant?

----- Do you now consent to a joint representation of you by your attorney, at the same time representing a co-defendant, fully understanding that this joint representation could damage your position in this case?

----- Do you understand that, by insisting upon joint representation of yourself and co-defendants by your attorney, you will be waiving, or giving up, any right to argue on appeal that you were not provided effective assistance of counsel at trial due to a conflict of interest?

----- Do you understand that by agreeing to a joint representation of yourself and co-defendants by your attorney, you are waiving certain protections afforded to you by the Sixth Amendment of the Constitution of the United States?

----- What is the likelihood that one defendant may testify against another in this case?

**For further guidance, see State v. Yelton, 87 N.C. App. 554, 361 S.E.2d 753 (1987).**

2. Do you understand that, because your attorney is jointly representing you and other defendants, he may be prevented from opening possible plea negotiations on your behalf and from a possible agreement for you to testify for the prosecution in exchange for a lesser charge or a recommendation for leniency?

3. Do you understand that you and the other defendants could possibly occupy opposing positions at the trial?

4. Do you understand that your attorney's joint representation may cause the jury to link you with one or more of the other defendants?

5. Do you understand that one or more of the other defendants may choose to testify in his defense, and, if so, your attorney will not be able to cross-examine such defendant in your behalf?

6. Do you understand that your attorney may fail or refrain from cross-examining a State's witness about matters helpful to you but harmful to another defendant; and he may fail to object to the admission of evidence which might otherwise be inadmissible because it helps another defendant but is harmful to you; and he may fail or refrain from objecting to evidence harmful to you, but of help to another defendant?

7. Do you understand that your attorney may be prohibited from attempting to shift the blame from you in the crime charged to a co-defendant, because he represents both of you?

8. Do you understand that if you are convicted, this same attorney will be representing you at the sentencing hearing where aggravating and mitigating circumstances will be considered by the court as they may apply to you and any co-defendants also represented by the same attorney?

9. Do you understand that one of the other defendants may plead guilty and thereafter reveal to the State information damaging to you which he received as a result of joint representation?

10. I also advise you that it is not possible for me to enumerate all of the possible conflicts of interest which might occur between you and your attorney by virtue of his joint representation of you and others. Do you understand that there might be other conflicts of interest?

11. With these things in mind, do you have any questions that you want to ask me about any of these things I have said to you?

12. Do you now of your own free will, understandingly and voluntarily waive your right to representation by an attorney unhindered by a possible conflict of interest?

13. With all this in mind, are you now satisfied for your attorney, \_\_\_\_\_, to represent you in this case?

## GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

### Rule 12. Courtroom decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators.

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court.



## **PRINCIPLES OF PROFESSIONALISM FOR ATTORNEYS AND JUDGES**

### **PREAMBLE**

The following guidelines are hereby adopted for attorneys practicing within the 27B Judicial District or appearing in Court before the undersigned Judge. These standards are not intended to supplant other rules; all attorneys are bound by the Code of Professional Responsibility and the Rules of Court. Through the Chief Justice's initiative on professionalism, attorneys are encouraged to aspire to a higher standard than is required by existing rules. Consequently, attorneys who fail to comply with these guidelines may expect a gentle reminder from the presiding judge. The gentleness of the reminder may be inversely proportional to the degree by which the attorney's conduct falls short of these expectations.

### **I. CIVILITY**

Professionalism requires civility by attorneys toward one another in the courtroom and in every other professional encounter. No matter how high the stakes or how hotly contested a matter might be, attorneys should be able to shake hands with opposing counsel at the beginning and end of each court appearance or other transaction. Lawyers should seek to maintain a relationship of courtesy, cordiality and respect with opposing counsel, reserving the right to disagree without being disagreeable.

### **II. COLLEGIALITY**

Attorneys should remember at all times to treat their profession as a calling. It is important that each attorney take pride in the profession and conduct himself or herself at all times in a manner that will enhance the profession in the eyes of the community. Remember that your opposing counsel is an adversary, not an enemy.

### **III. DILIGENCE**

Professionalism requires an attorney to attend to his or her business in a diligent manner. Files and clients should not go neglected and telephone calls should be returned in a timely manner.

### **IV. CANDOR**

Professionalism not only demands honesty on the part of an attorney but also requires candor in all communications with the Court, opposing counsel, and the client. The protection of client confidence often will prevent disclosure of certain information but will never justify misrepresentation of facts or misleading comments.

## **V. SEEK A MENTOR/ BE A MENTOR**

Because the law is a seamless web, mastering the nuances of practice is usually a daunting task. Experienced lawyers can be of great help to less seasoned practitioners, but all of us can benefit from consultation with others from time to time.

## **VI. RESPECT**

Professionalism means that each attorney will hold and show the utmost respect for the American court system, the presiding judge, opposing counsel, the client, court personnel and self. Each time that you appear in court you should remember that you are not only addressing “Your Honor” but you are also addressing a matter of your honor. As long as you remind yourself of this point, you will not be tempted to engage in personal attacks on opposing counsel, engage in talking objections, openly criticize rulings of the Court, or otherwise engage in conduct that would tend to bring the profession into disrepute. Some examples of the manner in which this respect should be demonstrated include:

1. A lawyer should speak and write courteously and respectfully in all communications with the Court and opposing counsel.
2. Before scheduling depositions, hearing or motions, a lawyer should endeavor to contact opposing counsel and seek mutually acceptable settings. Upon learning that a cancellation may become necessary or requested, opposing counsel should be promptly notified.
3. If a lawyer knows that the client is going to submit to a voluntary dismissal of a matter, the lawyer should promptly notify opposing counsel so as to avoid unnecessary trial preparation and expense.
4. A lawyer should make a diligent effort to identify clearly for opposing counsel or parties all changes made in documents circulated for review.
5. In the courtroom, counsel should:
  - a. Avoid interruption of opposing counsel except when necessary to voice an objection.
  - b. Always offer an exhibit or provide a copy in advance to opposing counsel before presenting the exhibit to a witness.
  - c. Make reasonable efforts to resolve discovery disputes prior to seeking intervention by the Court.
  - d. Act and speak respectfully to all court personnel.
  - e. Avoid visual or verbal displays of temper toward the Court, particularly upon an adverse ruling from the bench.
6. In the courtroom, a judge should:
  - a. Avoid visual or verbal displays of temper toward counsel.
  - b. Accommodate reasonable personal requests by lawyers.

- c. Treat lawyers and litigants with courtesy, and, while maintaining control of proceedings, attempt to do so in a manner intended to avoid personal humiliation.
- d. Conduct themselves at all times, in and outside court, in a way that recognizes and avoids the perceptions of favoritism that may arise from actions that are not clearly enunciated.





## BATSON CHECKLIST

### INFORMATION NEEDED TO MAKE A BATSON DETERMINATION

1. Take note of the apparent race and sex of each juror as each juror is called into the jury box.
2. Take note of the apparent race and sex of each attorney in the case, the defendant, the judge and as many of the potential witnesses as possible.
3. Keep track of each peremptory challenge exercised by each side, noting apparent race and sex of the jurors excused.
4. Keep track of each challenge for cause allowed, noting the apparent race and sex of the jurors excused.
5. Keep track of the apparent race and sex of the jurors for which no challenge has been exercised.
6. Pay attention to the answers given by potential jurors to questions asked by the attorneys so as to form an impression as to the legitimacy of any racially neutral reasons for exercising peremptory challenges.
7. Take note of any questions posed by the attorneys tending to indicate any pattern of racial motivation for exercise of peremptory challenges.
8. Taking into consideration each of the factors listed above, look for any pattern that might point toward purposeful discrimination.
9. During any *Batson* hearing, make note of the reasons given by Prosecutor (or Defense Attorney) for the exercise of a peremptory challenge.

## PROCEDURE FOR DETERMINING *BATSON* OBJECTION

1. Ask objecting party to state the basis for *Batson* objection
2. Allow opposing counsel to respond to the objection
3. Initial ruling must determine:
  - a. Whether objecting party has established a *Batson* issue (is there sufficient evidence of a “protected class”? *Do not take judicial notice of race of individuals in question, do not rely on court reporter to note race of individuals*).
  - b. Whether objecting party has established a prima facie case that the peremptory challenge was exercised on the basis of race or gender.
4. If there is a prima facie showing, allow opposing counsel an opportunity to provide racially neutral reasons for the exercise of the peremptory challenge. *YOU WILL NOT SWEAR WITNESSES OR RECEIVE EVIDENCE ON THESE POINTS, BUT YOU WILL MAKE DETERMINATIONS OF CREDIBILITY OF COUNSEL AS THEY MAKE THEIR STATEMENTS.*
5. Allow an opportunity for rebuttal by objecting party.
6. Make your determination, using the attached Sample *Batson* order.

SAMPLE BATSON ORDER

NORTH CAROLINA  
\_\_\_\_\_ COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. \_\_\_\_ CRS \_\_\_\_\_

STATE OF NORTH CAROLINA

VS.

\_\_\_\_\_  
Defendant

This matter was heard in open Court upon the State's attempt to exercise a peremptory challenge as to potential juror number \_\_\_\_, Mr./Ms. \_\_\_\_\_, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times the Defendant was present and represented by counsel.

Upon indication by counsel of the *Batson* issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the *Batson* objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The State then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the State for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.

2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.

3. The Defendant in this case is (black/white) \_\_\_\_\_; the alleged victim in this case is/was (black/white) \_\_\_\_\_; the key witnesses in this case are (black/white) \_\_\_\_\_.

4. As of the time that the State attempted to exercise this peremptory challenge, \_\_\_\_\_ jurors had been accepted by the State, of which \_\_\_\_ are white and \_\_\_\_ are black.

5. As of the time that the State attempted to exercise this peremptory challenge, the State has exercised \_\_\_\_ prior peremptory challenges, of which \_\_\_\_ were of persons of the African American race.

6. Statements and questions of the State which tend to support an inference of discrimination in the jury selection process are:

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7. Statements and questions of the State which tend to refute an inference of discrimination in the jury selection process are:

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8. The State **has/has not** repeatedly used peremptory challenges against blacks so as to tend to establish a pattern of strikes against blacks in the venire.

9. The State **has/has not** used a disproportionate number of peremptory challenges to strike black jurors in this case.

10. The State's acceptance rate of potential black jurors does/does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has/has not** made a prima facie showing of discrimination in the jury selection process.

12. Because the Defendant has not made a prima facie showing of discrimination, no further findings are necessary.

OR

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

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OR

12. In the exercise of discretion, the Court proceeds with consideration of racially neutral reasons for exercise of the peremptory challenge without first determining whether or not a prima facie case of discrimination has been shown. The reasons offered by the State were as follows:

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13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

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14. This Court **finds/does not find** the prosecutor to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.

15. In response to such reasons stated by the prosecutor, Defense counsel **has/has not** shown that the prosecutor's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has/has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. No determination has been made as to the presence or absence of sufficient racially neutral reasons for the State's exercise of a peremptory challenge as to this juror, as the Defendant has failed to make out a prima facie showing of discrimination in the jury selection process.

OR

1. Notwithstanding the fact that the Defendant has failed to make out a prima facie showing of racial discrimination in the jury selection process, the Court has, in the exercise of discretion, elected to proceed with consideration of racially neutral reasons provided by the State in connection with its attempt to exercise of this peremptory challenge.

OR

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the State for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:

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3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do/do not** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

**IT IS THEREFORE ORDERED** that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number \_\_\_\_, Mr./Ms. \_\_\_\_\_, is **overruled/sustained** and the peremptory challenge is **allowed/denied**.

This Order is entered in open court, this the \_\_\_\_ day of \_\_\_\_\_, 199\_.

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Superior Court Judge

NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 99 CVS 3239

ALFRED E. FORD, ADMINISTRATOR )  
Of the Estate of GERALDINE LORETTA )  
FORD, deceased, )  
Plaintiff )

vs. )

*Batson Order*

ROBERT C. RUPPENTHAL, M.D. )  
And THE NALLE CLINIC, INC., )  
Defendants )

This matter was heard in open Court upon the Plaintiff's attempt to exercise a peremptory challenge as to potential juror number 11, Mr. William Bellamy, and an objection made thereto by the Defendant pursuant to the decision of *Batson v. Kentucky* and related cases. The hearing was conducted in open court and at all times both parties were present and represented by counsel.

Upon indication by counsel of the *Batson* issue, all further proceedings on this issue were conducted in open court but outside the presence of all jurors.

Under the procedure followed, the Defendant first was allowed to articulate the reasons for the *Batson* objection for purposes of determining whether or not a prima facie showing of racial discrimination had been made. The Plaintiff then was given an opportunity to express any racially neutral reasons for its exercise of the peremptory challenge. The Defendant then was given an opportunity rebut any or all of the reasons enunciated by the Plaintiff for the exercise of the challenge.

Based upon the presentations of counsel as described above, the Court makes the following **FINDINGS OF FACT**:

1. The Court has observed the manner and appearance of counsel and jurors during voir dire and has made all relevant determinations of credibility for purposes of this Order.
2. In making these Findings of Fact, the undersigned has made determinations as to the race of various individuals. As to jurors, any findings of race are based upon statements provided by the jurors themselves in questionnaires. As to the parties, lawyers and witnesses, findings of race are based upon statements of counsel, stipulations of counsel and the lack of objections to observations of the undersigned noted at the time of announcement of this Order.
3. The Defendant in this case is **white**; the Plaintiff in this case is **black**. Plaintiff is represented by two counsel, one of which is white and one of which is black. Defendant's counsel is white.
4. As of the time that the Plaintiff attempted to exercise this peremptory challenge, 10 jurors had been accepted by both parties, of which 8 are white and 2 are black.

5. As of the time that the Plaintiff attempted to exercise this peremptory challenge, the Plaintiff had exercised 7 prior peremptory challenges, all of which were of persons of the white race.

6. Statements and questions of the Plaintiff which tend to refute an inference of discrimination in the jury selection process are:

- a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
- b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
- c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

7. The Plaintiff **has** repeatedly used peremptory challenges against whites so as to tend to establish a pattern of strikes against whites in the venire.

9. The Plaintiff **has** used a disproportionate number of peremptory challenges to strike white jurors in this case.

10. The Plaintiff acceptance rate of potential white jurors does not indicate the likelihood of discrimination in the jury selection process.

11. The Defendant **has** made a prima facie showing of discrimination in the jury selection process.

12. Upon the establishment of a prima facie showing of discrimination, the Court proceeded with consideration of the racially neutral reasons offered by the State for the attempt to exercise a peremptory challenge. The reasons offered by the State were as follows:

- a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
- b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
- c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

13. The Defendant then was offered an opportunity to rebut the reasons offered by the State and, in such rebuttal, stated:

Defendant contended that the reasons given by Plaintiff's counsel were pretextual, saying that responses given by this potential juror were no different in substance than those given by many of the other jurors who were accepted by both parties.

14. This Court **finds** the Plaintiff's counsel to be credible in stating racially neutral reasons for the exercise of the peremptory challenge.



15. In response to such reasons stated by Plaintiff's counsel, Defendant **has not** shown that Plaintiff's counsel's explanations are pretextual.

16. Based upon consideration of presentations made by both sides and taking into account the various arguments presented, the Defendant **has not** proven purposeful discrimination in the jury selection process in this case.

Based upon the foregoing findings of fact, the Court concludes as Matters of Law:

1. Because the Defendant has made out a prima facie showing of racial discrimination in this jury selection process, the Court next proceeds with consideration of the racially neutral reasons offered by the Plaintiff for the exercise of this peremptory challenge.

2. The racially neutral reasons stated by the prosecutor for the exercise of this peremptory challenge are:

- a. The potential juror expressed some concern over the number of lawsuits he considered to be filed frivolously.
- b. The potential juror, who works for Microsoft, stated that his company had been sued hundreds of times and that 99.9% of those lawsuits were frivolous.
- c. The potential juror commented that physicians could not be expected to be perfect in their treatment of patients.

3. The above stated reasons, taken in their totality and in connection with all of the Findings of Fact hereinbefore stated, **do** constitute a sufficient racially neutral basis for the exercise of a peremptory challenge as to this juror.

**IT IS THEREFORE ORDERED** that the Defendant's objection to the State's exercise of a peremptory challenge as to potential juror number 11, Mr. William Bellamy, is **overruled** and the peremptory challenge is **allowed**.

This Order is entered in open court, this the 19<sup>th</sup> day of September, 2001.

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Superior Court Judge

