

## 27.6 Polling of the Jury

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## 27.6 Polling of the Jury

### A. In General

“To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented and still assents to the verdict tendered to the court.” *State v. Boger*, 202 N.C. 702, 704 (1932). The right to poll the jury in criminal cases is firmly established by article I, section 24 of the N.C. Constitution and by statute. *See, e.g., State v. Lackey*, 204 N.C. App. 153 (2010).

By polling the jury, the judge gives each juror an opportunity, before the verdict is recorded, to declare in open court his or her assent to the verdict that the foreman has returned and thus enables the judge and the parties “to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he [or she] has not fully assented.” *Davis v. State*, 273 N.C. 533, 541 (1968) (emphasis in original); *see also State v. Black*, 328 N.C. 191, 198 (1991) (“The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered.”); *State v. Young*, 77 N.C. 498, 499 (1877) (the right to poll the jury “is surely one of the best safeguards for the protection of the accused” since it is the mode of “ascertaining the *fact* that it is the verdict of the whole jury”) (emphasis in original).

In both capital and noncapital cases, the poll must be conducted individually. *See* G.S. 15A-1238; G.S. 15A-2000(b). It is error for the trial judge to ask the jury collectively if they assented to and still assent to the verdict. *See Boger*, 202 N.C. 702, 704 (trial judge erred by requesting the jury to “stand up” if they assented to the verdict of manslaughter); *State v. Holadia*, 149 N.C. App. 248 (2002) (error to question the jury collectively and have them respond collectively by raising their hands).

The appellate courts have approved of three questions to be asked of individual jurors at the time of polling:

1. Was this your verdict?
2. Is this now your verdict?
3. Do you still agree and assent thereto?

*See, e.g., State v. Asbury*, 291 N.C. 164 (1976); *State v. Norris*, 284 N.C. 103 (1973). The first question is asked to ensure that no improper influence or coercion took place in the jury room during deliberations and the latter two are asked to confirm that the juror still assents in open court to the jury verdict. *See Asbury*, 291 N.C. 164.

Although jurors must be polled individually, they do not necessarily have to be questioned about each conviction separately. For example, if the jury returns verdicts against a defendant finding him or her guilty of kidnapping and second-degree murder, G.S. 15A-1238 has been interpreted as not requiring that the jurors be polled about the kidnapping and then polled separately about the murder. Instead, the judge may direct the clerk to recite all of the verdicts and ask each juror if they were his or her verdicts and whether he or she still assents. *See, e.g., State v. Ramseur*, 338 N.C. 502 (1994); *State v. Hunt*, 198 N.C. App. 488 (2009); *State v. Sutton*, 53 N.C. App. 281 (1981).

Likewise, the jury does not necessarily have to be questioned about each theory of conviction separately. For example, if the jury returns a verdict against a defendant finding him or her guilty of first-degree murder, G.S. 15A-1238 has been interpreted as not requiring that the jurors be polled separately about the theories underlying the murder conviction. Instead, the judge may direct the clerk to recite the verdict and underlying theories and ask each juror if that was his or her verdict and whether he or she still assents. *See State v. Carroll*, 356 N.C. 526, 545 (2002) (holding that jury was properly polled where record revealed that the jury was thoroughly aware of the requirement of a unanimous verdict on each theory of first-degree murder; both theories were clearly represented on the verdict sheet; and “following the clerk’s announcement that the jury unanimously found defendant ‘guilty of first degree murder on the basis of malice, premeditation and deliberation and under the first degree felony murder rule,’ each juror individually affirmed that this was indeed his verdict”).

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**Practice note:** If you would like the jurors to be polled separately as to each individual conviction or as to each underlying theory of a conviction, you should specifically request the judge to do so during your motion to poll and offer reasons why it is important in your particular case. Be sure your request and, if denied, the judge’s ruling are both on the record.

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## **B. Noncapital Cases and Guilt-Innocence Phase of Capital Cases**

**Need for motion.** The jury must be polled on the motion of any party or on the trial judge’s own motion. G.S. 15A-1238. Pursuant to this statute:

- The poll must be conducted after verdict but before the jury has been dispersed.
- The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his or her verdict.
- If the poll reveals that there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

“[W]hile best practice dictates that the trial judge explicitly inquire as to whether either party wishes to poll the jury, it is not required; ultimately, the responsibility lies with trial counsel.” *State v. Govan*, 240 N.C. App. 89 (2015) (unpublished) (citing *State v. Carmon*, 156 N.C. App. 235, 245 (2003), which found no error where the trial judge dismissed the jury without asking the defendant if he wished to poll the jury; “[i]t was the responsibility of defendant to make this request, even if at an inopportune time”).

Although not specifically addressed in the statute, G.S. 15A-1238 appears to authorize the polling of the jury as to both general and special verdicts. If polling of the jury with regard to a special verdict is desired, this should be made clear in the motion for polling. *See State v. Long*, 230 N.C. App. 411 (2013) (unpublished) (finding defendant’s request that “the jury be polled” made immediately after clerk had read both the general and special verdicts to be a request for polling as to the general verdict only; defendant waived appellate review where he failed to make a timely request for polling or object to the trial judge’s collective poll of the jury as to the special verdict finding the presence of two statutory aggravating factors). For a general discussion of general and special verdicts, see *infra* § 34.7B, Types of Verdicts.

For further discussion of jury polling, including a collection of cases dealing with the topic as well as a recommended colloquy for judges to follow, see Jessica Smith, [Polling the Jury](#), N.C. SUPERIOR COURT JUDGES’ BENCHBOOK, at 8–12 (UNC School of Government, Feb. 2015).

**Timeliness of motion.** A defendant waives his or her right to request a polling of the jury pursuant to G.S. 15A-1238 where he or she does not make the request before the jury’s discharge. *State v. Baynard*, 79 N.C. App. 559 (1986). The rationale behind requiring that the polling occur before dispersal of the jury is to ensure that nothing extraneous to the jury’s deliberations can cause any of the jurors to change their minds. *See State v. Black*, 328 N.C. 191, 198 (1991) (defendant’s motion to poll came too late where it was made after the jury had entered its verdict and was given a thirty-minute recess during which it was free to leave the courtroom and go into the streets); *see also State v. Ballew*, 113 N.C. App. 674 (1994) (defendant waived right to poll jury where request was made after the jury had been released to the jury room and had been told that they could discuss the case with anyone if they wished), *aff’d per curiam*, 339 N.C. 733 (1995); *State v. Froneberger*, 55 N.C. App. 148 (1981) (defendant waived right to poll jury where motion was not made until after the jury was discharged and court had recessed for lunch).

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**Practice note:** Counsel should *always* request that the jury be polled after a defendant is convicted and, if applicable, after the jury has rendered a special verdict. A juror who was struggling with the verdict or feeling pressured by the other jurors may welcome the opportunity to say so in open court. It is especially important to timely request polling because, as a general rule, once a verdict has been rendered and received in open court, it may not later be impeached—that is, a juror may not testify nor may evidence be received as to matters occurring during deliberations or calling into question the reasons on which the verdict was based. *See, e.g., State v. Martin*, 315 N.C. 667 (1986). For a

discussion of the anti-impeachment rule and its limited exceptions, see *supra* § 26.2B, Discovered After Verdict.

Counsel should also object to any error in the polling procedure at the time it occurs in order to ensure that the issue is preserved for appellate review. See *State v. Osorio*, 196 N.C. App. 458 (2009) (refusing to review defendant's contention that the trial judge erred by failing to individually poll the jurors where defendant neither requested a jury poll nor objected to the collective polling of the jury by the show of hands); see also *State v. Flowers*, 347 N.C. 1, 22 (1997) (defendant waived the right to individual polling because he made no request that the jury be polled; procedure used by the trial judge asking the jurors to respond collectively regarding the verdicts was proper because it "merely served to insure that before the verdicts were accepted, the record reflected the facts that the written verdicts were returned in open court and were unanimous").

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### **C. Sentencing Phase of Capital Cases**

After delivery of the sentence recommendation by the foreman of the jury in a capital case, the jury must be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned. G.S. 15A-2000(b). Since this right to a jury poll is statutorily mandated, it is not dependent on a defendant's request for polling. *State v. Buchanan*, 330 N.C. 202 (1991). The trial judge's error in failing to properly poll a capital jury is not waived by the defendant's failure to object. *Id.*; see also *State v. Tirado*, 358 N.C. 551 (2004) (granting defendant a new sentencing hearing where trial judge deferred polling the jury on the verdict in defendant's case until the jury heard additional evidence and rendered a verdict in a co-defendant's case; although defense counsel made no contemporaneous objection to the trial judge's deferral of the polling, trial judge should have granted defendant's motion for mistrial made after co-defendant's verdict was returned).

### **D. Equivocation by Juror During Polling**

If, during polling in a noncapital case, there is not unanimous concurrence by all jurors, the judge must direct the jury to retire for further deliberations. G.S. 15A-1238; see also G.S. 15A-1235(c) (if the jury has been unable to agree on a verdict, "the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)"). If it ultimately appears "that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." G.S. 15A-1235(d); see also *infra* § 31.7, Juror Deadlock.

G.S. 15A-2000(b) is silent as to what the judge must do when the polling reveals a nonunanimous sentencing recommendation in a capital case. It does not contain language mandating further deliberations as in G.S. 15A-1238; however, the N.C. Supreme Court has held that when "an inconsistency arises between the verdict and the responses of jurors during the polling process, the trial court must nevertheless allow the jury a reasonable opportunity to attempt to reach a unanimous sentence recommendation." *State v. Maness*, 363 N.C. 261, 288 (2009) (approving of trial judge's decision to order the jury

to resume deliberations where a poll revealed nonunanimity in the verdict after one-and-a-half hours of deliberations). If the judge concludes under G.S. 15A-2000(b) that “the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation,” he or she is authorized to impose a life sentence. *Id.*

For a collection of cases that consider or decide whether the declaration of a mistrial or the granting of a new trial is warranted where a juror who has assented to a verdict of guilty in a criminal case equivocates upon being polled after verdict, see M. J. Greene, Annotation, *Juror’s Reluctant, Equivocal, or Conditional Assent to Verdict, on Polling, as Ground for Mistrial or New Trial in Criminal Case*, 25 A.L.R.3d 1149 (1969 & Supp. 2010).