
29.3 Sequestration of Witnesses

The practice of separating witnesses and excluding them from the courtroom until they are called to testify "is a long-established and well-recognized measure designed to increase the likelihood that testimony will be candid." *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988). The value of sequestration has been extolled by courts and commentators. As early as 1917, the N.C. Supreme Court noted that "[n]o harm can come from separation of the witnesses, and much injury might result if it is not done when it is made to appear to the presiding judge that there may be collusion among the witnesses, tracking each other's testimony, like sheep jumping over a fence." *Lee v. Thornton*, 174 N.C. 288, 289 (1917); *see also* Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 ALA. L. REV. 177, 179 (1995) (discussing the origins of sequestration and noting that it has been used without change for "perhaps longer than any other truth-seeking device"); Sarah Chapman Carter, Comment, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 63 (2004) ("Separation of witnesses during a trial has been deemed 'one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.'" (citation omitted)); *Geders v. United States*, 425 U.S. 80, 87 (1976) (noting that "the practice of sequestration of witnesses 'already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law'" (quoting 6 J. WIGMORE, EVIDENCE § 1837, at 348 (3d ed., 1940))).

A. Purpose of Sequestration

There are two purposes for sequestering witnesses at trial. First, sequestration prevents a later witness from tailoring his or her testimony to that of a previous witness and, second, it aids the factfinder in detecting testimony that is less than candid. *State v. Harrell*, 67 N.C. App. 57, 64 (1984) (citing *Geders v. United States*, 425 U.S. 80 (1976)). The idea of keeping the witnesses from interacting with each other is not to *prevent* the fabrication of false stories before they testify but to *detect* fabrications by separate cross-examinations. *State v. Jackson*, 309 N.C. 26 (1983).

B. Statutory Authorization

A judge's authority to exclude witnesses has been codified in two separate provisions. G.S. 15A-1225 authorizes, on motion of a party, the exclusion of some or all of the witnesses from the courtroom until they are called to testify. N.C. Rule of Evidence 615 (enacted after G.S. 15A-1225) also authorizes the exclusion of witnesses from the courtroom so they cannot hear the testimony of other witnesses. Under Rule 615, a trial judge may order sequestration on motion of either party or on his or her own motion.

Exceptions to the rule. Rule 615 sets out the following four exceptions to the general rule allowing the exclusion of witnesses from the courtroom until called to testify:

1. A party who is a natural person may not be excluded. To exclude parties would "raise serious problems of confrontation and due process." N.C. R. EVID. 615 Official Commentary; *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) ("The defendant's constitutional right to confront the witnesses against him immunizes him from . . . physical sequestration."). An alleged crime victim is not considered a "party" in a criminal action and has no statutory right that guarantees him or her the right to be present at all times during the trial. *Cf.* G.S. 15A-832(e) ("When the victim is to be called as a witness . . ., the court shall make every effort to permit the fullest attendance possible by the victim . . ."; however, "[t]his subsection shall not be construed to interfere with the defendant's right to a fair trial.").
2. An officer or employee of a party that is not a natural person is entitled to have its designated representative present. The exception would allow a police officer who has been in charge of an investigation to remain in the courtroom during testimony even though he or she will be a witness. N.C. R. EVID. 615 Official Commentary; *see also State v. Stanley*, 310 N.C. 353, 356–57 (1984) (in case involving charge of first-degree rape of child under twelve, no abuse of discretion shown where trial judge allowed two State's witnesses—a DSS worker and a juvenile court officer—to remain in the courtroom at the State's request during the victim's testimony because, as the trial judge explained, they "were instrumental in the preparation of the case and . . . necessary to the handling of the examination of" the witness).
3. A person whose presence is shown by a party to be essential to the presentation of his or her cause may not be excluded. This category includes an expert who needs to listen to other testimony in order to testify in his or her capacity as an expert. *See* N.C. R. EVID. R. 615 Official Commentary. It also has been used to allow a law enforcement officer in charge of an investigation to remain in the courtroom while other witnesses were sequestered. *See State v. Jones*, 337 N.C. 198 (1994) (no abuse of discretion by trial judge in allowing the lead officer to remain in the courtroom as a person essential to the presentation of the State's case; ruling did not amount to an endorsement of the officer's veracity at a critical point in the trial).
4. A person whose presence is determined by the judge to be "in the interest of justice" may be present during others' testimony. This exception would apply, for example, to a case in which a minor child is testifying and the judge determines that it is in the interest of justice for the child's parent or guardian to be in the courtroom even though the parent or guardian may be called subsequently to testify. *See* N.C. R. EVID. 615 Official

> Commentary. If the judge relies on this exception, he or she should state the reasons for determining that the presence of the person is in the interest of justice. *Id.* G.S. 15A-1225 also specifically allows (but does not mandate) the presence of the parent or guardian of a minor child who is called as a witness. *See State v. Weaver*, 117 N.C. App. 434, 436 (1994) (finding no error under G.S. 15A-1225 in the exclusion of the mother of two child witnesses from the courtroom; "[t]hat a parent *may* be present while a child is testifying does not mean that such presence is required" (emphasis in original)).

Sequestration not a matter of right but favored. The judge's ruling on a motion to sequester witnesses under either N.C. Rule of Evidence 615 or G.S. 15A-1225 is discretionary and will be reversed only on a showing of abuse of discretion. *See State v. Fullwood*, 323 N.C. 371 (1988), *vacated on other grounds*¸ 494 U.S. 1022 (1990); *State v. Harrell*, 67 N.C. App. 57 (1984). The Official Commentary to N.C. Rule of Evidence 615 notes that the rule is similar to Federal Rule of Evidence 615; however, the federal rule makes sequestration a matter of right on request. Still, in discussing the difference between the two rules, Judge (now Justice) Edmunds, in a concurring opinion, emphasized the importance of granting sequestration requests:

> Those with experience in state and federal trials cannot fail to have observed the impact of these different rules. Testimony provided by witnesses who hear each other testify often converges. This effect, while not necessarily sinister, appears to be a reflection of human nature; it can lead irresolute witnesses, consciously or not, to conform their testimony to what they have heard before, undermining a jury's ability to evaluate the evidence provided by each witness. Particularly in cases as consequential as the capital murder case at bar, trial courts should be mindful of the words of the Commentary to North Carolina Rule of Evidence 615: "[T]he practice should be to sequester witnesses on request of either party unless some reason exists not to."

State v. Wilds, 133 N.C. App. 195, 209–10 (1999); *see also State v. Anthony*, 354 N.C. 372, 396 (2001) (acknowledging the recommendation of the Official Commentary to N.C. Rule of Evidence 615 that witnesses should ordinarily be sequestered if requested and cautioning judges to give sequestration motions "thoughtful consideration," particularly in capital cases).

Scope of sequestration. G.S. 15A-1225 and N.C. Rule of Evidence 615 provide for the exclusion of witnesses from the courtroom itself. But, the cases indicate that, if requested, the judge may order further that witnesses not interact with each other before trial, outside the courtroom, or during recesses. *See Geders v. United States*, 425 U.S. 80 (1976) (trial judge had broad power to sequester witnesses before, during, and after their testimony); *State v. Stanley*, 310 N.C. 353, 357 (1984) (trial judge's power to control the progress of a trial "has long included the broad power to sequester witnesses before, during, and after their testimony"); *State v. Jackson*, 309 N.C. 26 (1983) (for good reason and at his discretion, the trial judge could have ordered the separation before trial of two inmate-witnesses who were incarcerated in the same cell); *State v. Washington*, 141 N.C. App. 354

(2000) (no error in judge's failure to prohibit two State's witnesses from travelling to court together while under a sequestration order because the order only precluded the witnesses from being present while the other testified in court, and defendant had made no specific request in his written motion to prevent contact outside the courtroom).

Grounds and timing. The sequestration statutes do not require that a motion to exclude witnesses be in writing or that it be made at a certain time. *See State v. Mason*, 295 N.C. 584, 590 (1978) (motions to sequester are not required to be made at or before arraignment under G.S. 15A-952(b), and no law prohibits them from being "made after the jury panel is called into open court and just prior to the State's calling its first witness"). However, when practical, a written motion to sequester should be filed before trial and should set out with specificity the reasons that it should be granted.

Practice note: Some appellate decisions have upheld a trial judge's denial of a motion to sequester when the motion was not timely or defense counsel failed to state specific reasons for believing that the State's witnesses would tailor their testimony to the testimony of previous witnesses. *See, e.g., State v. Conaway*, 339 N.C. 487 (1995) (denial of sequestration motion upheld where defendant had only a general concern that the co-defendant witnesses who were testifying for the State would tailor their testimony because they each had a stake in the outcome of the case); *State v. Pittman*, 332 N.C. 244 (1992) (no abuse of discretion by trial judge in denying defendant's motion for sequestration where defendant gave no reason for suspecting the State's witnesses would tailor their testimony); *State v. Patino*, 207 N.C. App. 322, 326 (2010) (upholding denial of defendant's motion to sequester the State's witnesses where defense counsel did not give specific reasons to suspect that witnesses might tailor their testimony; counsel's assertions that there were a "number" of State's witnesses and "they might have forgotten in the time since the incident occurred" were not "typical reason[s] for sequestering witnesses"); *State v. Lindsey*, 25 N.C. App. 343 (1975) (sequestration motion properly denied where it was made after the State had begun to present its case and defendant gave no explanation for seeking sequestration); *State v. Jones*, 21 N.C. App. 666 (1974) (to same effect).

It may be difficult to articulate specific reasons for suspecting that the State's witnesses will use a previous witness's testimony as their own. To penalize a defendant for not being able to do so appears to conflict with the recommendation of the Official Commentary to N.C. Rule of Evidence 615 that sequestration should be granted liberally "unless some reason exists not to." If you do not have a particular reason to suspect that the State's witnesses will tailor their testimony but still want them sequestered, you should emphasize the purpose of the rule, citing *State v. Anthony*, 354 N.C. 372, 396 (2001) (taking note of the commentary to Rule 615 and cautioning judges, particularly in capital cases, to give such motions "thoughtful consideration"), and *State v. Van Cross*, 293 N.C. 296, 299 (1977) ("It is the general practice in North Carolina in both civil and criminal cases to separate the witnesses and send them out of the hearing of the court when requested . . . .").

A sample sequestration motion can be found on the N.C. Office of Indigent Defense Services website in the Motions Bank, Non-Capital (indexed under the "Witnesses" heading).

Logistical issues in sequestering witnesses. If the logistics of separating witnesses in the courthouse is a problem, a motion to sequester should offer recommendations on how to implement the sequestration order. If no realistic solutions are offered, the trial judge's decision to deny the motion may be upheld on this ground. *See State v. Call*, 349 N.C. 382, 400 (1998) (no abuse of discretion by trial judge in denying defendant's motion to sequester because "the courthouse could not accommodate sequestration of the witnesses"); *see also State v. Bumgarner*, 299 N.C. 113, 117 (1980) (trial judge did not abuse his discretion by denying defendant's sequestration motion "on the grounds that no notice had been given, that there was no reason appearing from the statement of counsel to sequester, and that the number of witnesses involved was too great for the limited area in the courthouse").

Sequestration at pretrial hearings. Although sequestration of witnesses at pretrial hearings is not specifically addressed by statute, the discretionary power of judges to sequester witnesses includes the power to exclude witnesses at proceedings that occur before trial. *See State v. Hyde*, 352 N.C. 37 (2000) (pretrial motions hearing); *State v. Byrd*, 67 N.C. App. 168 (1984) (probable cause hearing); *State v. Trapper*, 48 N.C. App. 481 (1980) (suppression hearing); *State v. Accor*, 13 N.C. App. 10 (1971) (preliminary hearing), *aff'd*, 281 N.C. 287 (1972).

C. Constitutional Considerations

The U.S. Supreme Court has never held that a failure to sequester witnesses can violate a defendant's constitutional right to due process. *Larson v. Palmateer*, 515 F.3d 1057 (9th Cir. 2008) (stating that the decision whether to sequester witnesses at common law was a discretionary one and there is no indication that Fed. R. Evid. 615 has a constitutional basis); *see also Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988) (holding that a refusal to separate witnesses until they testify is not a denial of due process). Likewise, the N.C. Court of Appeals has held that "[d]ue process does not automatically require separation of witnesses who are to testify to the same set of facts." *State v. Harrell*, 67 N.C. App. 57, 64 (1984) (finding that although defendant's arguments in favor of sequestration were persuasive, there was no abuse of discretion by the trial judge and there was no violation of defendant's right to due process or his right to confront and cross-examine witnesses).

Even though due process may not "automatically" require sequestration, there may be instances where it is appropriate to argue a constitutional basis in addition to a statutory one. *See, e.g.*, *Commonwealth v. Fant*, 391 A.2d 1040, 1043–44 (Pa. 1978) (holding that the trial judge's denial of defendant's motion to sequester witnesses who identified defendant as the perpetrator of the crimes was an abuse of discretion and led to a denial of due process where the witnesses identified defendant for the first time "in the highly suggestive setting of open court"; the suggestive identification occurred nine months after the alleged murders; the witnesses, depending on when they testified, heard anywhere from one to sixteen other witnesses testify that the defendant was the perpetrator; and neither the prosecutor nor the judge offered any reason for the denial of the motion to sequester); *Commonwealth v. Lavelle*, 419 A.2d 1269 (Pa. Super. Ct. 1980) (applying *Fant* and finding an abuse of discretion and a denial of due process based on the trial judge's failure to sequester witnesses who identified defendant as the perpetrator of the alleged crimes).

D. Response to Violations of Sequestration Orders

Although not specifically addressed by the sequestration statutes, a trial judge has the discretion to impose a variety of sanctions in the event that a witness violates a sequestration order. These include:

- Sanctioning the witness. If a witness intentionally violates a sequestration order, he or she could be held in contempt. *See Holder v. United States*, 150 U.S. 91 (1893). The problem with this sanction is that it does not remedy any unfairness to the parties that may have resulted from the violation. *See Lee v. Thornton*, 174 N.C. 288 (1917).
- Instructing the jury to consider the violation in assessing the credibility of the witness. *See Holder*, 150 U.S. 91.
- Permitting cross-examination of the witness regarding the violation. *See, e.g., State v. Wilson*, 322 N.C. 117 (1988) (where defendant's mother remained in the courtroom during testimony by the State's witnesses, including that of an alleged accomplice, and then testified and directly contradicted that testimony, it was appropriate for the State to impeach her credibility by cross-examining her about her presence during parts of the trial and her knowledge of the existence of the sequestration order).
- Declaring a mistrial. *See, e.g., State v. Howell*, 343 N.C. 229, 237 (1996) (no evidence that the inadvertent violation of a sequestration order by a State's witness "so prejudiced defendant as to render the denial of a mistrial an abuse of discretion").
- Excluding the testimony of the witness who violated the order (*see Holder*, 150 U.S. 91) or striking the testimony once the violation becomes known. *See State v. McGraw*, 137 N.C. App. 726 (2000). Like the declaration of a mistrial, this is a harsh remedy and may be appropriate only when the party offering the testimony (or his or her attorney) is at fault and the opposing party will suffer prejudice if the testimony is not excluded. *See, e.g., United States v. Blasco*, 702 F.2d 1315 (11th Cir. 1983). The exclusion of testimony by a defense witness may be constitutionally limited, as discussed below.

For further discussion of this topic, see J.A. Bock, Annotation, *Effect of Witness' Violation of Order of Exclusion*, 14 A.L.R.3d 16 (1967 & Supp. 2011).

Exclusion of defense witness testimony. If the trial judge excludes the testimony of a material defense witness as a result of a sequestration order violation, "in the absence of connivance by the defendant or counsel (and possibly despite such connivance)," it "may well be an abuse of discretion or a denial of the defendant's constitutional right to present evidence." 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 174, at 649 (7th ed. 2011); *see also United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (finding that the trial judge who excluded a defense witness's testimony "would have been well advised to employ a lesser sanction to punish the violation because to do so would have preserved both the purpose of the sequestration rule and the defendant's right to present a defense").

Even though the defendant's right to present a defense may be impinged by the exclusion of the testimony of his or her witness, North Carolina appellate courts have upheld decisions by trial judges that have precluded a defense witness from testifying in some circumstances.

See, e.g., *State v. Williamson*, 122 N.C. App. 229 (1996) (no abuse of discretion in excluding the testimony of defendant's girlfriend because she was not on the potential witness list, she had been present in the courtroom for a portion of the State's evidence, she had discussed other testimony with the defendant's sister who had been present for the entire trial, and the defendant was the party who had moved for an order sequestering the witnesses); *State v. Williamson*, 110 N.C. App. 626, 632 (1993) (no abuse of discretion in the exclusion of a defense witness's testimony where he had been present during defendant's testimony in violation of a sequestration order, there was the "distinct possibility of collusive testimony," and it was unlikely that the witness's testimony could have "effectively controverted any of the State's case"); *State v. Sings*, 35 N.C. App. 1 (1978) (where defendant failed to show that his father's excluded testimony would have been material or that he suffered any prejudice as a result of the exclusion, the trial judge's refusal to permit the witness to testify after violating a sequestration order was upheld). *But see State v. Hare*, 74 N.C. 591 (1876) (error to exclude a defense witness from testifying who was not aware of the sequestration order and had come into the courtroom during the examination of a prior witness but did not hear that testimony).

Practice note: If the judge is considering excluding the testimony of your witness because of a sequestration violation, you should argue that exclusion would violate your client's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution. Where appropriate, you should assert that the violation was unintentional, that it occurred without the fault of the defendant or yourself, and that the witness is material to the defense. Also explain how the defense will be prejudiced by the exclusion and make an offer of proof of materiality by asking that the witness be sworn and allowed to testify outside the presence of the jury. If the judge refuses to allow you to make your offer of proof, state with specificity what the witness would have testified to and in what way it would have been material. It is not enough for you simply to tell the judge that the witness's testimony is material. *See State v. Hodge*, 142 N.C. 676 (1906) (no error in the exclusion of a defense witness where counsel asserted that the testimony was material but did not make it known to the judge what that testimony would have been and how it would have been material).

E. Additional Resources

For additional discussion of sequestration of witnesses, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 174 (7th ed. 2011), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 615, at 517–23 (2017).