33.5 Order of Arguments
A. Right to Last Argument
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A. Right to Last Argument

Noncapital cases. A defendant who does not introduce evidence after the State has rested is entitled as a matter of right to open and close argument to the jury. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10 ("[I]f no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him."). The right to final argument is a substantial legal right that cannot be taken away by an exercise of judicial discretion, and the erroneous denial of this critically important right entitles a defendant to a new trial. *State v. Raper*, 203 N.C. 489 (1932); *State v. English*, 194 N.C. App. 314 (2008); *State v. Hall*, 57 N.C. App. 561 (1982).

If the defendant introduces evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, the State has the right to the opening and final closing arguments. *State v. Battle*, 322 N.C. 69 (1988); *State v. Gladden*, 315 N.C. 398 (1986); *State v. Pickard*, 107 N.C. App. 94 (1992); *State v. Curtis*, 18 N.C. App. 116 (1973). Eliciting evidence by the cross-examination of a State's witness is usually not considered the "introduction" of evidence by the defendant and does not deprive him or her of the right to last argument. *See Raper*, 203 N.C. 489; *see also infra* § 33.5B, What Constitutes "Introduction" of Evidence.

Multiple defendants. In a case involving multiple defendants, the State is entitled to the final argument if any one of the defendants introduces evidence. N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10; *see also State v. Taylor*, 289 N.C. 223 (1976); *State v. Diaz*, 155 N.C. App. 307 (2002).

Capital cases. If the defendant offers evidence, then all of his or her addresses to the jury during the *guilt-innocence* phase must be made before the prosecution's closing argument. *State v. Gladden*, 315 N.C. 398 (1986). A defendant always has the right to the last argument in the *sentencing phase* of a capital case even if he or she has presented evidence during the sentencing phase. G.S. 15A-2000(a)(4); *State v. Barrow*, 350 N.C. 640 (1999). While G.S. 15A-2000(a)(4) grants a defendant the right to last argument in the sentencing phase, it does not give him or her the right to make both the first and last arguments. *State v. Wilson*, 313 N.C. 516 (1985).

B. What Constitutes "Introduction" of Evidence

Generally. A defendant clearly "introduces" evidence when he or she offers witness testimony or exhibits during the presentation of his or her case. However, even if a defendant does not formally offer testimony or other evidentiary matter during his or her case, the right to final argument may still be lost if the judge finds that the defendant "introduced" evidence, within the meaning Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, during the *cross-examination* of a State's witness. This can happen notwithstanding that (1) "any testimony elicited during cross-examination is 'considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case'"; and (2) the general rule is that there is no right to offer evidence during cross-examination of the other party's witness. *State v. Shuler*, 135 N.C. App. 449, 452–53 (1999) (quoting 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170, at 559 (5th ed. 1998) [now, § 170 at 646 (8th ed. 2018)]. While there is generally no right to "offer" evidence during cross-examination, the trial judge, in his or her discretion, may vary the order of proof to allow the introduction of defense evidence during the State's case. *Shuler*, 135 N.C. App. 449, 452–53.

It is not always easy to determine what constitutes the "introduction" of evidence in North Carolina, but recent decisions recognize that cross-examination typically does not constitute the "introduction" of evidence.

The *Hall* test. The N.C. Court of Appeals first attempted to establish a test for determining when evidence has been introduced in *State v. Hall*, 57 N.C. App. 561 (1982). Defense counsel in *Hall* questioned a State's witness on cross-examination about the color of a sweatsuit allegedly worn by the defendant. In order to impeach the witness, defense counsel then showed the witness the sweatsuit and asked him to describe its colors (which were different than those earlier described by the witness). Although the sweatsuit was never formally offered into evidence and it was not given to the jury for examination, the trial judge held that the defendant had "introduced" the sweatsuit into evidence during his cross-examination and thereby lost the right to final argument.

The N.C. Court of Appeals reversed, finding that the trial judge erred in denying the defendant the right to final argument. The court stated that *"the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness." Id.* at 564 (emphasis added). The sweatsuit in *Hall* was not offered into evidence because it was not given to the jury "for the purpose of their determination as to whether it impeached the witness." *Id.* The court further stated that if the party merely shows something to a witness in order to refresh his or her recollection, it has not been "offered" into evidence.

The N.C. Supreme Court relied on the *Hall* test in *State v. Macon*, 346 N.C. 109 (1997). In *Macon*, the defendant asked an officer on cross-examination about statements made by the defendant during an interview with that officer. The officer stated that another officer

had made notes during that interview. Defense counsel then had the testifying officer read from the other officer's notes. The notes were marked as an exhibit but were not formally offered into evidence and were not published to the jury. The trial judge found that when defense counsel had the officer read the notes to the jury, the defendant had offered evidence and lost his right to open and close jury argument. The N.C. Supreme Court agreed, quoting the *Hall* test, but the court's reasoning was not entirely consistent with *Hall.* The court found that the contents of the notes were offered for substantive purposes, not impeachment or corroboration, suggesting that had the cross-examination been for impeachment or corroboration purposes, it would not have constituted the introduction of evidence. *Id*. at 114.

The *Shuler* test. In *State v. Shuler*, 135 N.C. App. 449 (1999), the N.C. Court of Appeals revisited the "introduction of evidence" issue. The defendant in *Shuler* was charged with multiple counts of embezzlement. One of the defendant's co-workers testified for the State about statements made by the defendant during an interview that both had attended. On cross-examination, defense counsel questioned the witness further about the interview and read portions of the transcript of the interviews to the witness to put the defendant's statements in context. Defense counsel also asked the witness about new matters and about the witness's accounting procedures. The trial judge ruled that the defendant had introduced evidence and had thereby lost the right to last argument.

In reviewing the trial judge's decision, the N.C. Court of Appeals stated that *evidence is "introduced" during cross-examination within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts when (1) "it is 'offered' into evidence by the cross-examiner and accepted as such by the trial court"; or (2) "[a]lthough not formally offered and accepted into evidence, . . . new matter is presented to the jury during cross-examination and that matter is* not *relevant to any issue in the case." Id.* at 452–53 (citations omitted and emphasis added). After reviewing the cross-examination testimony in *Shuler*, the court found that the trial judge had committed reversible error when he denied the defendant the right to final argument because the defendant had not "introduced" evidence and the matters that the defendant raised, although new, were relevant to testimony given during direct examination.

Subsequent cases. Cases decided by the N.C. Court of Appeals after *Hall* and *Shuler* have utilized either the *Shuler* or *Hall* test or both the *Hall* and *Shuler* tests. *See, e.g., State v. Hogan*, 218 N.C. App. 305 (2012) (defendant did not introduce evidence under Rule 10 when, during cross-examination of the prosecuting witness, defense counsel read and referenced the witness's police statement; court relied on a case that based its holding on *Shuler* and found that the statements used by defense counsel "were 'directly related to [the witness's] own testimony on direct examination.'") (citation omitted); *State v. Matthews*, 218 N.C. App. 277 (2012) (defendant questioned police officer on cross-examination and identified a report made by that officer in which another man was identified as a suspect; court, citing *Shuler*, granted a new trial and stated that it could not "say that the identification of other suspects by police constituted new evidence that was 'not relevant to any issue in the case.'"); *State v. English*, 194 N.C. App. 314 (2008) (after acknowledging the *Hall* test, the court found that defendant did not introduce

evidence by eliciting detective's testimony about a statement taken during the investigation, contained in the detective's report, because the testimony related to evidence introduced on direct examination and could have been an attempt to impeach the co-defendant; it did not amount to "new matter" under *Shuler*); *State v. Hennis*, 184 N.C. App. 536 (2007) (defendant did not offer evidence under either the *Hall* or *Shuler* test when, on cross-examination, he had an officer draw a diagram of the arrest scene and questioned him about changes to an incident report that were added months after it was initially written); *State v. Bell*, 179 N.C. App. 430 (2006) (finding under the *Shuler* test that the defendant did not introduce evidence during his cross-examination of a drug chemist regarding the method and instruments she used to identify the substance seized from the defendant because the cross-examination was relevant and directly related to the chemist's testimony on direct); *State v. Wells*, 171 N.C. App. 136 (2005) (defendant did not introduce evidence under the *Shuler* test when he cross-examined a State's witness about his prior inconsistent statement because the statement directly related to the witness's testimony on direct examination). *But see State v. Lindsey*, ___ N.C. App. ___, 791 S.E.2d 496 (2016) (unpublished) (citing both *Hall* and *Shuler,* and finding that trial judge did not err in determining that defendant introduced substantive evidence when he played a videotape of the vehicle stop since the playing of the video allowed the jury to hear exculpatory statements by defendant that went beyond officer's direct testimony and introduced new evidence of flashing lights not otherwise in evidence); *State v. Wolfe*, 205 N.C. App. 324 (2010) (unpublished) (court cited both the *Hall* and *Shuler* tests, then upheld ruling by trial judge that defendant lost the last argument when he played a voice mail message during the cross-examination of a detective; following *Hall*, court found that the message was not introduced to illustrate the detective's testimony but was substantive evidence used to exculpate defendant).

Practice note: If you intend to cross-examine a State's witness about an object or document that has not been previously introduced by the State, be prepared to argue that you have not introduced evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts. If the facts permit, you should argue that you have not offered evidence under either the *Hall* test or the *Shuler* test and that the exhibit relates to the witness's testimony on direct examination or, at least, to other issues in the case.

Additional reference. For further discussion of the loss of the right to open and close arguments, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 166, at 614 n.517, and § 170, at 647 n.609 (8th ed. 2018). For a quick guide to which party gets last argument with links to supporting cases, see Jonathan Holbrook, *Who Goes Last?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 10, 2018).