

III. Pre-Arrestion Motions

- A. Generally
- B. Request for Arrestion
- C. Motion to Continue
- D. Motion for Change of Venue
- E. Motion to Dismiss for Improper Venue
- F. Motion for Special Venire
- G. Motion to Dismiss for Grand Jury Issues
- H. Motion to Dismiss for Defective Pleadings
- I. Motion to Strike Prejudicial or Inflammatory Language of Pleadings
- J. Motion for Bill of Particulars
- K. Motion for Joinder or Severance of Offenses and Co-Defendants

A. Generally

Authority

G.S. 15A-952.

Deadlines

Timing rules for these motions (discussed below) depend on whether a timely request for arrestion was filed, a request that has its own deadline (see *infra* Section III. B.). If the motions under this section are not filed within the timeline, they may be waived. The court may grant relief from waiver on any of these motions except on a motion to dismiss for improper venue (see *infra* Section III. E.).

If a request for arrestion was filed and arrestion is held before trial, all of the motions under this section are due before arrestion.

If a request for arrestion was filed but arrestion is not held before trial, the deadline is 5 p.m. on the Wednesday before trial.

If no request for arrestion is filed, the deadline for the motions discussed in headings B. through F. of this section is twenty-one days after return of the indictment.

Key Principles

Although not specifically addressed in G.S. 15A-952, a motion to dismiss an indictment for prosecutorial vindictiveness is arguably subject to this timeline per *State v. Frogge*, 351 N.C. 576 (2000).

Check your local rules and administrative policies on the timing of these motions. Some jurisdictions have local rules or practices that may affect (or purport to affect) the above statutory deadlines.

B. Request for Arraignment

Authority

G.S. 15A-941.

Deadlines

This request must be filed within twenty-one days of return of indictment or it is waived. If the defendant is unrepresented, the deadline is within twenty-one days of service of the indictment. This request, if timely, allows the defendant to assert the right to object to trial the same week as arraignment and extends the deadline for pre-arraignment motions (see *supra* Section III. A.).

Practice Tips

- Request arraignment in order to extend motions deadlines and to give the defense more control over the calendaring of the trial.
- If no discovery is received before the date of arraignment, move to continue the arraignment hearing.
- Many jurisdictions have local rules or administrative policies about arraignment that may obviate the need to file a request for arraignment. Check any applicable local rules and be familiar with the local practices of the jurisdiction.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.1B (Types and Timing of Pretrial Motions—Motions and Requests after Appointment of Counsel).

C. Motion to Continue

Authority

G.S. 15A-952(g); Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines

Technically, a motion to continue should be filed before arraignment (see *supra* Section III. A.). Practically, continuance motions may be filed whenever the need arises and are commonly filed and heard after the arraignment deadline. As a general rule, these motions should be filed immediately once counsel realizes the need for a continuance.

Key Principles

The court will consider the ends of justice, the complexity of the case, and the availability of other witnesses, among other factors, in deciding whether to grant a continuance.

Motions to continue are reviewed on appeal with an abuse of discretion standard if no constitutional grounds are asserted, so constitutional grounds should be alleged in the motion and any argument in support thereof. Constitutional grounds to support a continuance may include the right to prepare and present a defense, the right to effective representation, the right to confrontation, the right to counsel, and due process.

A timely motion, substantiated with a specific factual basis and asserting constitutional grounds, is more likely to result in relief.

Practice Tips

- Make these motions as early as possible and explain in detail why it is necessary for trial to be continued. Many jurisdictions have specific local rules on continuances for both administrative and trial settings, and counsel should be familiar with them.
- Where a continuance is sought to procure a witness, a record should be made about the expected testimony of the missing witness and how it would be useful to the defendant. A formal offer of proof of the absent witness's testimony is best; if a formal offer of proof is not possible, counsel should provide a forecast of the expected testimony.
- Consider including an affidavit with a specific factual showing of need or formally presenting evidence on the need for a continuance.

References

N.C. DEFENDER MANUAL Vol. 1, § 13.4A (Miscellaneous Motions—Motion for Continuance).

D. Motion for Change of Venue

Authority

G.S. 15A-957; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles

The motion must allege that the defendant is unable to receive a fair trial due to prejudice in the jurisdiction.

The court will consider the extent of bias in the community, the proposed new venue, the time and resources necessary to grant the request, and other potential effects on the parties and court.

The defendant has the burden of proof to demonstrate reasonable likelihood that he or she will not receive a fair trial. *State v. Jerrett*, 309 N.C. 239 (1983). Parties may stipulate to a change of venue.

Practice Tips

- Attach to the motion any documentary evidence of pretrial publicity, community polling, and any other evidence of bias in the community.
- A statistician or polling expert may be useful to support the grounds of the motion.
- As an alternative request for relief, consider asking for a special venire (see *infra* Section III. F.), individual *voir dire* of the jurors, or, possibly, a continuance (as a “cooling-off” period).

- Where a defendant faces multiple charges in multiple jurisdictions, changing venue to one jurisdiction may be advantageous in order to obtain a global resolution of all charges.

References

N.C. DEFENDER MANUAL Vol. 1, § 11.3 (Change of Venue).

E. Motion to Dismiss for Improper Venue**Authority**

G.S. 15A-924(a)(3); G.S. 15A-952(b)(5).

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles

This motion is waived if not raised in a timely manner. Thus, unchallenged venue becomes conclusive venue, and the trial court may not grant relief from a waiver of this motion. Improper venue does not deprive the trial court of jurisdiction.

A bill of particulars may be sought to identify the county of the offense when it is not identified in the pleading as an alternative to a motion to dismiss for improper venue.

Failure of a charging document to identify venue at all or failure to correctly identify it will not result in dismissal if not challenged in a timely manner. The manner of challenge is a motion to dismiss for improper venue filed before arraignment (or a bill of particulars to identify venue).

Dismissal for improper venue does not bar retrial on the charges as a matter of double jeopardy but may nonetheless have strategic value to the defense.

Once challenged, the State has the burden to prove proper venue by a preponderance of evidence. *State v. Bullard*, 312 N.C. 129 (1984).

Some offenses have specific venue rules in the relevant statutes (e.g., G.S. 163-278.27—illegal political campaign contributions).

References

N.C. DEFENDER MANUAL Vol. 1, § 11.2 (Challenging Improper Venue).

F. Motion for Special Venire**Authority**

G.S. 9-12; G.S. 15A-952(b)(3); G.S. 15A-958; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key Principles

The defendant has the burden to demonstrate the existence of prejudice in the county to a degree that a fair trial would be impossible. *State v. Robinson*, 355 N.C. 320 (2002). If granted, the venire will be composed of jurors from another county.

Practice Tips

- This motion may be combined with an alternative request to change venue. From a practical and logistical perspective, moving venue may be preferable to bringing in a special venire from another county. Jurors in a special venire may react unfavorably to having to travel.

References

N.C. DEFENDER MANUAL Vol. 1, § 11.4A (Alternative Relief—Special Venire).

G. Motion to Dismiss for Grand Jury Issues**Authority**

G.S. 15A-955; G.S. 9-3; G.S. 15A-621 through G.S. 15A-631; G.S. 15A-1211; Fifth, Sixth, and Fourteenth Amendments (especially Equal Protection) to the U.S. Constitution; Article I, Sections 18 and 19 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadlines for pre-arraignment motions. *See supra* Section III. A.

Key principles

This motion includes challenges to the array of the grand jury, such as improper selection or exclusion of grand jurors, improper selection of the foreperson, that a qualified number of grand jurors did not agree, that all witnesses before the grand jury were unqualified or that the evidence before them was incompetent, as well as fair cross-section issues.

The manner of challenge is a motion to dismiss or motion to quash the indictment. Challenges to the grand jury are waived if not brought in a timely manner.

Practice Tips

- While grand jury proceedings are secret and not recorded, the clerk of court keeps minutes of the indictments, which are public record and may be reviewed by counsel in investigating potential grand jury challenges. Additionally, the identity of individual grand jurors is also public record. This information may be requested from the clerk of superior court in the jurisdiction of the criminal case. Such a request could be informal, by subpoena, or by public records request.
- Minor, technical, or clerical mistakes in the return of the indictment by the grand jury are unlikely to result in dismissal or an order quashing the indictment. Where there is a substantive issue with the grand jury process, counsel should identify the issue and applicable law and address it with the court with a motion to dismiss or motion to quash.

References

N.C. DEFENDER MANUAL Vol. 1, § 9.4 (Challenges to Grand Jury Procedures).

H. Motion to Dismiss for Defective Pleadings

Authority

G.S. 15A-924; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadline for pre-arraignment motions. *See supra* Section III. A. However, pleading defects that deprive the court of jurisdiction may be raised at any time without regard to timing.

Key Principles

These motions apply where a pleading is defective, such as where it fails to charge an offense or an element of an offense; misidentifies the victim or defendant; lacks an allegation of ownership for certain offenses; as well as for date, time, or place deficiencies or for other pleading defects.

A proper pleading, at a minimum, must confer jurisdiction on the court and provide notice of the charges to the defendant. Many offenses have specific pleading requirements. Many pleading defects are capable of amendment by the State before trial. The scope of all potential pleading defects is beyond the scope of this guide, but the reference materials listed below are helpful resources in this area. A citation requires less formality than other more formal pleadings and may confer jurisdiction even where it fails to allege an element of the crime or suffers some other defect that would be fatal for an indictment. *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701 (2017). Counsel may object to trial by citation and demand a more formal pleading under G.S. 15A-922(c).

Practice Tips

- Think carefully about the timing and remedy of motions under this section. While these motions are listed in this “Pre-Arraignment Motions” section with the attendant deadline, certain pleading defects deprive the court of jurisdiction and are, therefore, fatal defects which may be raised at any time, even post-conviction.
- Any proceeding begun with a fatally defective pleading will have to be abandoned if the court determines that the pleading fails to confer jurisdiction. Jeopardy does not attach to a fatally defective pleading, and the State therefore may be allowed to reinstate the charges, but the defendant is usually better situated by reserving this objection for trial. Misdemeanor charges that are dismissed for a fatally flawed pleading may not be re-filed beyond the statute of limitations in G.S. 15-1.
- Minor pleading defects or mistakes that are capable of amendment pretrial may nonetheless result in a fatal variance of proof between the allegation and the evidence at trial. A fatal variance occurs when an otherwise valid indictment contains factual allegations that do not conform to the evidence in some material way, such as a factual allegation that supports an

element of the crime. Variance arguments are waived unless raised in the trial court. Variance is raised in a motion to dismiss at the close of the State's evidence and is waived on appeal unless raised in the trial court. (For more information on variances, including the required language to use in making the motion, see *infra* Section VI. G.).

- Under G.S. 15A-924(b), a motion may be filed to request that the State elect between multiple offenses charged in a single count of the indictment. This is known as a duplicitous pleading, and it is a type of pleading defect. If the State makes an election between the charges or obtains leave to seek superseding indictments, this defect is not fatal. If the State fails to make election between duplicitous counts of an indictment, the court may dismiss the duplicitous count of the indictment upon request of defense counsel.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 8 (Criminal Pleadings), particularly § 8.5 (Common Pleading Defects in Superior Court).

See also Jessica Smith, [The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment](#), ADMIN. OF JUST. BULL. No. 2008/03 (UNC School of Government, July 2008), for more information on superior court pleadings issues and offense-specific pleading requirements.

See also John Donovan and Amanda Maris, [District Court Pleadings to Go](#) (Checklist) (Spring Public Defender Conference, May 2011), for more information on misdemeanor pleadings.

I. Motion to Strike Prejudicial or Inflammatory Language of Pleadings

Authority

G.S.15A-924(f).

Deadlines

This motion is subject to the general deadline for pre-arraignment motions. See *supra* Section III. A.

Key Principles

If a pleading contains surplus language that is inflammatory or needlessly prejudicial, this motion allows the defendant to request that the court strike the offensive language from the pleading.

Practice Tips

- An indictment cannot be read to the jury, but the statement of charges in the indictment may form the basis of the court's description of the charges to the jury. In bench trials, the finder of fact will read the indictment or other pleading. Additionally, once the case is resolved, the charging document will remain in the file and will be accessible by the public unless the matter is expunged. Therefore, counsel should consider moving to strike any objectionable language from the pleadings when appropriate to best protect the defendant in these situations.

J. Motion for Bill of Particulars

Authority

G.S. 15A-925; Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines

This motion is subject to the general deadline for pre-arraignment motions. *See supra* Section III. A.

Key Principles

This motion is used to request specific facts related to the offense that are not contained in the pleading. It is a request made to the State to supplement the pleadings with more information.

The motion must request specific information and allege that such information is essential to adequately prepare and conduct a defense. Information such as the particular theory of the case or time, date, and location information about an offense may be obtained this way.

If the motion is granted, the proceedings are stayed until the bill of particulars is filed with the court and served on the defendant.

This motion, if granted, ties the State to the information contained in its bill of particulars; the State's proof at trial must then conform to the information in the bill.

Practice Tips

- The State's oral representations in response to a motion for a bill of particulars do not operate like a written bill; a bill of particulars must be in writing to have any effect. *State v. Stallings*, 107 N.C. App. 241 (1992).
- This is a particularly effective tool where the offense allows conviction based on different prongs or theories.

References

N.C. DEFENDER MANUAL Vol. 1, § 8.4 (Felonies and Misdemeanors Initiated in Superior Court).

K. Motion for Joinder or Severance of Offenses and Co-Defendants

Authority

G.S. 15A-926(a); G.S. 15A-927; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Deadlines

These motions are subject to the general deadline for pre-arraignment motions. *See supra* Section III. A.

Joinder of Offenses (G.S. 15A-926)

If offenses are related, the defendant may move to have the offenses joined for trial. The motion must be made pretrial and within the deadline, unless the basis for the motion is discovered at trial.

The standard for joinder of offenses is whether the offenses are based on the same act or transaction or the same series of acts or transactions. The court will consider the closeness in time and space of the offenses, similarities of the alleged victims, motive, modus operandi, types of evidence, and other relevant factors in deciding the issue.

Failure to make a timely motion to join offenses for trial results in waiver of the right of either party to have offenses joined for trial.

Where the State could have sought to join related offenses and did not, a motion to dismiss may be made and granted as to the subsequent trial of a related offense, subject to the exceptions in G.S. 15A-926(c)(2).

Severance of Offenses (G.S. 15A-927)

The defendant should move to have related offenses severed for trial whenever a separate trial is necessary for a fair determination of guilt or innocence. The court considers the number of offenses, complexity of evidence, and whether the jury can distinguish the evidence and apply the law intelligently to each offense in deciding the motion.

If joining offenses will impair the ability of the defendant to present a defense as to one or both charges, counsel should move to sever the offenses (and oppose any request for joinder from the State).

A defense motion to sever offenses that is granted during trial results in a mistrial; the State cannot move for severance of offenses after trial has begun unless the defendant consents.

Joinder of Co-Defendants (G.S. 15A-926(b))

For co-defendants to be joined for trial, each must be charged with full accountability for each offense or the charges must all be part of the same plan, scheme, act, or otherwise be so connected that separating proof of each charge from the others would be difficult. The court will consider if the defendants are joinable under the statute and, if so, whether joinder of them for trial will deny any defendant the right to a fair trial.

The State typically makes this motion to join co-defendants for trial under G.S. 15A-926(b). *See* G.S. 15A-927(c) for objections to joinder of co-defendant trials.

Severance of Co-Defendants (G.S. 15A-927)

If a joint trial will deny any defendant the right to a fair trial, one defendant may move to sever his or her trial from that of any co-defendants, even if the cases of the defendant and the co-defendants are otherwise eligible for joinder.

Examples of when a joint trial will not be fair include but are not limited to situations where a defendant has made an admission admissible against the speaker but not the other co-defendants, where defenses among the co-defendants are in opposition to one another, or where a joint trial would otherwise be confusing to the jury.

Practice Tips

- The prejudice to the client caused by joinder of offenses or co-defendants is potentially significant, and counsel should be prepared to oppose such requests in a timely manner.
- Joinder of offenses may be beneficial to the defendant, insofar as multiple cases may be resolved at once. On the other hand, joinder of offenses may be detrimental to the defendant where the strength of the evidence in each case differs or where facts relating to some

offenses may risk prejudicing the jury as to the other offenses. Counsel should carefully consider the strategic impact of joinder or severance of offenses.

- Joinder of co-defendants for trial may implicate *Bruton* issues where one co-defendant has made an admission that implicates the guilt of another co-defendant but the statement is only admissible against the declarant. In that situation, counsel should consider requesting redaction of the admission to excise any reference to the non-declarant defendant, as well as a limiting instruction. *See* G.S. 15A-927(c)(1), *Bruton v. U.S.*, 391 U.S. 123 (1968), and the “References” section, below, for more information on this point.
- Request limiting instructions or redaction as to any other evidence that is presented or limited as a result of the joinder or severance. For instance, if character evidence is presented against one co-defendant and not the other, it may be appropriate to request that the jury be instructed that such evidence should not be considered for any purpose for the other co-defendant.
- If a defense motion for joinder or severance of offenses or co-defendants is denied pretrial, counsel must renew the motion at the close of all evidence to preserve the issue for appellate review.

References

N.C. DEFENDER MANUAL Vol. 1, ch. 6 (Joinder and Severance).