SECURING ATTENDANCE OF WITNESSES

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Contents

I. Reference. A comprehensive resource is the NORTH CAROLINA DEFENDER MANUAL, Ch. 29, Witnesses (2d ed. 2012), available online at http://defendermanuals.sog.unc.edu/trial/29-witnesses. I gratefully acknowledge the incorporation in whole or in part of excerpts from this publication.

II. Witness Subpoena. Witnesses who are present in North Carolina must come to court to testify in a criminal proceeding if they are properly served with a subpoena (AOC-G-100). The subpoena must be issued and served in accordance with the provisions of N.C. Rule of Civil Procedure 45. This rule governs subpoenas in criminal proceedings, with certain exceptions discussed below. *See* G.S. 15A-801; G.S. 8-59.

A subpoena to obtain the testimony of a witness in a pending cause may be issued by a

- court clerk,
- magistrate,
- district or superior court judge, or
- attorney for a party.

N.C. R. CIV. P. 45(a)(4) (clerk, district court judge, superior court judge, magistrate, or attorney); G.S. 7A-103(1) (powers of clerk of superior court); G.S. 7A-292(4) (powers of magistrate). An unrepresented party may not issue a subpoena but may request the clerk to issue a subpoena, signed but otherwise blank, which the party then fills out. N.C. R. CIV. P. 45(a)(4). The mandatory contents of a subpoena are set out in N.C. R. CIV. P. 45(a)(1). The AOC subpoena form is available at http://www.nccourts.org/Forms/Documents/556.pdf.

A. Manner of Service. A subpoena may be served by

- the sheriff or a sheriff's deputy;
- a coroner; or
- any person who is not a party and is not less than 18 years old.

N.C. R. CIV. P. 45(b)(1).

Service on the party named in the subpoena may be made by

- personally delivering a copy of the subpoena to that person;
- registered or certified mail, return receipt requested; or
- telephone communication with the person to be subpoenaed if service is made by a sheriff, his or her designee who is not less than 18 years old and not a party, or a coroner. (Telephone communication may be used for subpoenas to testify, but not for subpoenas to produce documents.)

N.C. R. CIV. P. 45(b)(1).

G.S. 8-59 states that a subpoena also may be served by telephone communication by any employee of a law enforcement agency. However, when a person is served by telephone under this statute, neither a show cause order nor an order for the person's arrest may be issued for a violation of the subpoena until the person is personally served with the written subpoena. Although not expressly stated in Rule 45(b)(1), this limitation also may apply to subpoenas served by telephone by a sheriff, designee, or coroner under the above-cited rule of civil procedure.

A subpoena issued to a minor (a person under 18 years old) probably must be served on the minor and the minor's parent or guardian having custody of the minor, or if there is none, any other person having the care and custody of the minor. If no person fits these categories, then service must be made upon a guardian ad litem who has been appointed under N.C. R. CIV. P. 17. [Note: Although there is no rule or case law directly on point on whom to serve a subpoena to a minor in a criminal case, see N.C. R. CIV. P. 4(j)(2), which involves the service of a civil summons, and G.S. 110-132.2 (service of subpoena to establish paternity in IV-D case), which are the closest provisions relevant to the issue.]

In civil cases, a copy of the subpoena also must be served on other parties to the case, but G.S. 15A-801 exempts criminal cases from that requirement. The subpoenaing party in a criminal case need only serve the person or entity being subpoenaed in accordance with the above requirements.

B. Attendance Required Until Discharge. Every witness who has been summoned in a criminal prosecution must appear and continue to attend from day to day and session to session until discharged by the court or by the party who summoned him or her to appear. G.S. 8-63. The statute also states that the prosecutor may discharge a witness from a subpoena, but presumably this authority applies only to witnesses summoned by the prosecutor.

C. Consequences of Failure to Comply With Subpoena. A person who fails to obey a properly served subpoena without adequate excuse may be held in contempt of court for violating a court order (that is, the subpoena directing attendance, whether signed by an attorney or a judicial official). N.C. R. CIV. P. 45(e)(1); *see also* G.S. 5A-11(a)(3) (criminal contempt for willful disobedience of a court's lawful process or order); G.S. 5A-21 (civil contempt for continuing failure to comply with court order). A court may issue an order for arrest along with an order to show cause for contempt if the court has probable cause to believe the person named in the show cause order will not appear in response to the show cause order. G.S. 5A-16(b).

G.S. 8-63 also provides that if a witness does not comply with a subpoena, he or she may be required to pay a financial penalty as set out in the statute.

D. Compensation and Expenses. Witnesses under subpoena, other than salaried law enforcement officers, are entitled to be compensated in the amount of $5.00 per day. G.S. 7A-314(a). A witness also may be entitled to receive reimbursement for travel expenses. *See* G.S. 7A-314(b). Witnesses are not entitled to receive their fees in advance. G.S. 6-51. Rather, the witness must apply to the clerk after attendance for payment. *See* G.S. 6-53 (witness to prove attendance by oath or affirmation); G.S. 7A-316 (to same effect); AOC-CR-235 (Witness Attendance Certificate).

A trial court decides, in its discretion, what compensation and allowances to authorize for a witness who appears as an expert witness, G.S. 7A-314(d), except requests by the defense for expert witness funds in capital cases are handled by the Office of Indigent Defense Services. *See* G.S. 7A-454; NORTH CAROLINA DEFENDER MANUAL, Ch. 5, Witnesses (2d ed. 2012), *available at* http://defendermanuals.sog.unc.edu/pretrial/5-experts-and-other-assistance.

E. Motion to Modify or Quash Witness Subpoena. A person commanded by a subpoena to appear at trial may file a motion to quash or modify the subpoena in the county in which the trial is to occur. The motion must be made within ten days after service of the subpoena or before the time specified for compliance if the time is less than ten days after service. N.C. R. CIV. P. 45(c)(5).

If a minor (a person under 18 years old) is subpoenaed, a judge has the discretion under N.C. R. SUPER. AND DIST. CTS. 7.1 (cases in which minor is victim of a crime or potential witness to a crime) to appoint a guardian ad litem to represent the minor. One role of the guardian ad litem might be to seek to quash a subpoena if the minor's parent is not acting in his or her best interests. Another role would be representing the minor when the child's welfare may be adversely affected by testifying in the presence of the defendant.

The trial court may modify or quash a subpoena if the subpoenaed person shows that it

- fails to allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- subjects the person subpoenaed to an undue burden;
- is unreasonable or oppressive; or
- is procedurally defective.

N.C. R. CIV. P. 45(c)(3), (c)(5); State v. Pallas, 144 N.C. App. 277, 281-82 (2001) (judge properly granted State's motion to quash subpoena of assistant district attorney who had prosecuted the co-defendant because his testimony may have been privileged work product [under former discovery statute] and lacked materiality); State v. McRae, 58 N.C. App. 225, 227 (1982) (no error in trial judge's denial of defendant's motion to quash the State's subpoenas for two young children because there is no age below which one is considered incompetent as a matter of law to testify in North Carolina).

If the trial court enters an order to quash or modify a subpoena, it may order the party who issued the subpoena to pay all or part of the reasonable expenses and attorney's fees of the subpoenaed person. N.C. R. CIV. P. 45(c)(8). This provision appears to have greater applicability to parties in civil cases than to either the State or defendant (particularly an indigent defendant) in a criminal case.

III. Material Witness Order. To assure the attendance of an uncooperative witness, the State or the defendant may seek a material witness order asserting that there are reasonable grounds to believe that a witness in a pending criminal proceeding has information material to the determination of the proceeding and may not come to court to testify even after being served with a subpoena. G.S. 15A-803(a).

G.S. 15A-803(g) authorizes the court to assure the attendance of a material witness by issuing a subpoena or an order for arrest. Since the purpose of a material witness order is to assure the attendance of a material witness who may not be responsive to a subpoena, it is not clear when a subpoena alone would be an effective device for the court to use. If arrested, the witness may be incarcerated or released on bond pending the proceeding where his or her testimony is required. G.S. 15A-803(e).

G.S. 15A-803 is used to secure the attendance of uncooperative in-state witnesses. For witnesses located outside North Carolina, the procedures in Art. 43, G.S. Ch. 15A (Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings) must be used. See the discussion in Section IV, below. *See also* State v. Tindall, 294 N.C. 689, 699-700 (1978) (noting that material witness order may not be issued for out-of-state witness; instead, Art. 43, G.S. Ch. 15A is available to do so).

A trial court must exercise its discretion in deciding whether to grant a material witness order in a way that does not violate a defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his or her behalf. State v. Tindall, 294 N.C. 689, 698-99 (1978) (noting Sixth Amendment right but finding no violation); State v. Jacobs, 128 N.C. App. 559, 565 (1998) (no abuse of discretion in denying defendant's motion for a material witness order because the testimony of the witness who was the subject of the motion would have been merely cumulative and was therefore not material to the determination of guilt or innocence).

There is no AOC form for the application and court order for a material witness.

A. **Procedure.** To obtain a material witness order, the State or the defendant must file a motion supported by an affidavit showing cause for its issuance. The witness must be given:

- reasonable notice;
- an opportunity to be heard and present evidence; and
- the right to representation by counsel at a hearing on the motion.

G.S. 15A-803(d). The witness is entitled to the appointment of counsel in accordance with rules adopted by the Office of Indigent Defense Services. *Id.*

B. **Issuance of Order.** A material witness order may be issued by a district court judge only when a defendant is bound over to superior court at a probable cause hearing or by a superior court judge at any time after criminal proceedings have been initiated. G.S. 15A-803(b). It is unclear what "proceedings" mean (it is not defined in G.S. Chapter 15A), but it is likely a broad term that includes when a criminal charge is brought. However, there is no case law on this issue

The judge must make findings of fact that support the issuance of the material witness order. G.S. 15A-803(d).

C. **Length of Witness's Incarceration and Order's Validity.** A witness may be incarcerated pursuant to a material witness order for up to twenty days. G.S. 15A-803(c). The place of incarceration is not set out in the statute, but a county detention facility appears the most appropriate place, particularly considering the brief authorized term of confinement. This order may be renewed one or more times by the trial court, in its discretion, for periods not longer than five days each. *Id.* The material witness order remains in effect for the period stated in the order unless modified or vacated earlier by a superior court judge. *Id.*

D. **Modifying or Vacating Order.** A superior court judge may modify or vacate a material witness order if the witness, the State, or any defendant shows new or changed facts or circumstances. G.S. 15A-803(f).

E. **Voluntary Protective Custody for Material Witness.** If a witness wishes, he or she may request a superior court judge to place him or her in protective custody. If the judge determines that the witness is material, the judge may order that the witness be:

- confined;
- placed in custody in a non-penal institution;
- released to the custody of a law enforcement officer or other person; or
- made subject to any other provisions appropriate to the circumstances.

G.S. 15A-804(a). A superior court judge can modify or vacate the order on request by the witness or on the judge's own motion. G.S. 15A-804(d). A voluntary protective custody order may be issued even if there is also a material witness order in effect for the witness and vice versa. G.S. 15A-804(c).

The custodian of a witness under a voluntary protective custody order may not release the witness without the witness's consent "unless directed to do so by a superior court judge, or unless the order so provides." G.S. 15A-804(b).

The Official Commentary to this statute states that "[a]lthough it may seem farfetched in North Carolina, the basis for this section sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody."

There is no AOC form for the voluntary protective custody order.

IV. Securing Attendance of Nonresident Witness. If the State or the defendant wants to secure the presence of a person located in another state (as defined in G.S. 15A-811 to include also the District of Columbia and any U.S. territory) to be a witness in a criminal proceeding in North Carolina, the party first must apply for a certificate and order under seal from the North Carolina court in which the criminal proceeding is pending. The moving party then must seek an order from the other state's court requiring the person to attend court proceedings in North Carolina. G.S. 15A-813. The AOC form certificate to secure the attendance of out-of-state witnesses is AOC-CR-901M, Certificate for Attendance of Out-of-State Witness, available at http://www.nccourts.org/Forms/Documents/162.pdf.

In applying to a North Carolina court for a certificate and order of attendance for an out-of-state witness, the applicant must show that the person requested to be a witness "is a material witness" in a proceeding that is pending in a court of record in this state. G.S. 15A-813. In addition to making an adequate showing that the testimony of the prospective witnesses is material, the applicant must adequately designate the location where the witness can be found.

The application must be timely filed with the court. *See* State v. Cyrus, 60 N.C. App. 774, 775-76 (1983) (no constitutional or statutory violation by trial judge in denying defendant's motion to secure the attendance of a material out-of-state witness made on the first day of trial when the defense had knowledge well before the case was calendared that the witness had problems that might prevent him from returning to North Carolina).

A trial court must exercise its discretion in deciding whether to grant an application in a way that does not violate the violate a defendant's Sixth Amendment right to compulsory process for obtaining witnesses in his or her behalf. Preston v. Blackledge, 332 F.Supp. 681, 684 (E.D.N.C. 1971) (Sixth Amendment compulsory process was violated when state judge in fifth trial for defendants, when prior trials had resulted in hung juries, denied defendants' applications for attendance of out-of-state alibi witnesses when applications had been granted in all prior trials).

A. Issuance of Certificate. If a trial court finds that the applicant has made a sufficient showing to secure the witness's presence, it may issue a certificate under seal that sets out the facts and specifies the number of days the witness will be required to attend. G.S. 15A-813. The certificate and order must be "presented to a judge of a court of record in the county [of the other state] in which the witness is found," and it may include a recommendation that the witness be immediately taken into custody and delivered to an officer of this state to assure his or her attendance. *Id*.

The trial court in the witness's home state then may have the witness appear before it to determine whether to issue an order. *Cf.* G.S. 15A-812 (witness in North Carolina may be summoned to another state to testify if found to be a material and necessary witness and no undue hardship will result); see Section IV.E., below. If the home state trial court finds that the witness is material and necessary, will suffer no undue hardship, and will be protected from arrest and service of process by the trial state, it may issue an order directing the

witness's attendance in North Carolina. *See* Preston v. Blackledge, 332 F.Supp. 681, 683-84 (E.D.N.C. 1971).

B. **Compensation.** The out-of-state witness is entitled to compensation for mileage and $5.00 for each day that he or she is required to travel and attend as a witness. If the witness is required to appear for more than one day, he or she also is entitled to reimbursement of actual expenses incurred for lodging and meals in the same manner as state employees who are authorized to travel within the state. G.S. 7A-314(c); G.S. 15A-813; AOC-CR-235, "Witness Attendance Certificate" Side Two, available at http://www.nccourts.org/Forms/Documents/76.pdf.

C. **Failure to Comply.** If a witness fails to comply with an order directing him or her to attend a North Carolina proceeding, the witness may be punished by the home state court in the same manner as if the failure had been to attend a trial in the home state. *Cf.* G.S. 15A-812 (providing this remedy when North Carolina witness fails to comply with order to attend out-of-state proceeding). Additionally, if a witness comes to this state and then fails without good cause to attend and testify as directed by the order, he or she may be punished as any other witness who disobeys an order issued from a North Carolina court of record. G.S. 15A-813.

D. **Exemption from Arrest and Service of Process.** If a nonresident witness comes to North Carolina in obedience to an order directing him or her to attend and testify, the witness may not be arrested or served with criminal or civil process in connection with matters that arose before he or she entered this state under the order. G.S. 15A-814.

E. **Witness Certification Sent to North Carolina From Another State.** G.S. 15A-812 sets out the procedures that a judge must follow when another state has sent a witness certification to a North Carolina court that requests the attendance of the witness in its state. A North Carolina trial judge must issue an order directing the witness to appear at a hearing on the certification. If the judge finds the witness is material and the other factors set out in G.S. 15A-812, the judge must issue an order with the certificate attached, directing the witness to appear in the other state for the criminal proceeding. At the hearing the certificate is prima facie evidence of all the facts stated within it. *Id.*

If, however, the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the other state, the judge may in lieu of notification of the hearing direct that the witness be brought before the judge for the hearing. If the judge at the hearing is satisfied of the desirability of custody and delivery to the officer, with the certificate being prima facie evidence of such desirability, the judge may in lieu of issuing a subpoena or other process order that the witness be taken forthwith into custody and delivered to the officer of the other state. *Id.*

There is no AOC form for a North Carolina judge to issue a court order for the matters discussed in this section.

V. Securing Attendance of Witness Confined in State Institution in North Carolina.

There are two separate statutory provisions to secure the attendance of witnesses confined in institutions within North Carolina. Either provision can be used, although G.S.

15A-805 may be broader in one respect because it may include people confined in institutions other than prisons and jails (see discussion below), while the writ of habeas corpus ad testificandum is broader in another respect because it allows a prisoner or jail inmate to be brought back for civil as well as criminal proceedings.

A. Court Order Under G.S. 15A-805. Upon a motion of the State or the defendant, a judge of a court with a pending criminal proceeding must, for good cause shown, enter an order requiring that a person confined in an institution in North Carolina be brought to court to testify as a witness. "Institution" is not defined in the statute, but it clearly includes a prison or jail, and may also include, for example, a mental health facility where a person has been involuntarily committed. *See* Official Commentary to G.S. 15A-805 ["order for the production of a prisoner (or other person confined in an institution)"].

G.S. 15A-805 does not require that the motion be in writing, that it be accompanied by an affidavit, or that it be made within a certain time. The statute does not specify any particular method by which the movant show the "good cause" necessary to the production of the witness. *See* State v. Rankin, 312 N.C. 592, 597-98 (1985) (so noting and holding that the defendant's Sixth Amendment right to compulsory process was violated when the trial judge denied defendant's motion to compel the attendance of prisoner to testify at defendant's trial without giving defense counsel an opportunity to show "good cause" or to explain why the motion was not filed until the day before the trial was to begin).

If the prisoner has pending criminal proceedings and the judge determines that the order of production would unreasonably interfere with those prior proceedings, G.S. 15A-805(b) provides that the judge may deny the motion. The statute also appears to provide that if an order of production is obtained for a prisoner with pending criminal proceedings, the prisoner or the prosecutor in the other district may apply to a judge or justice in the appellate division and request that the order of production be vacated for good cause shown. G.S. 15A-805(b). Presumably, these provisions for denial or cancellation of an order of production would have to yield to the constitutional rights of the defendant then on trial to obtain necessary witnesses for his or her defense.

There is no AOC form for the motion and court order. However, there is an AOC form to request and issue a writ of habeas corpus ad testificandum, discussed below.

B. Habeas Corpus Ad Testificandum. Independently of G.S. 15A-805, G.S. 17-41 to 17-46 set out a more complicated procedure to obtain the presence of a person confined in a jail or prison to testify at a criminal or civil proceeding. The difference between a writ of habeas corpus ad testificandum and a witness subpoena is that a subpoena directs the witness to appear at the proceeding, while the writ of habeas corpus directs the custodian of the witness to bring him or her to court.

The application for the writ must:

- be made by the party to the proceeding or by his or her attorney;
- be verified by the applicant
- state the title and nature of the proceeding for which the prisoner's testimony is desired;

- state that the prisoner's testimony is material and necessary to the proceeding

The AOC form for this writ is: AOC-G-112, Application and Writ of Habeas Corpus Ad Testificandum, available at http://www.nccourts.org/Forms/Documents/567.pdf.

VI. Securing Attendance of Witness in Custody Outside North Carolina. If a prisoner (other than a person confined as mentally ill) who is confined in another state is needed as a witness in a criminal proceeding in North Carolina, the State or the defendant may apply to the court where the action is pending for a certificate securing the attendance of the prisoner. G.S. 15A-822. The judge may issue the certificate if

- there is reasonable cause to believe that the prisoner possesses material information; and
- the state in which the prisoner is confined has a statute that is equivalent to G.S. 15A-821 (permitting prisoners in North Carolina to testify in proceedings in other states).

Id. The certificate, if issued, must

- be under the seal of that court;
- certify that the prisoner is a material witness in a pending criminal proceeding; and
- specify the number of days that the prisoner's attendance is required.

G.S. 15A-822(a)(4). After the certificate is issued, the judge may cause it to be delivered to a court of another state that is authorized to initiate or undertake action to deliver prisoners to North Carolina as witnesses. G.S. 15A-822(c).

There is no AOC form for the application or certificate.

VII. Securing Attendance of Witness in Federal Custody. The State or the defendant may secure the attendance of a witness who is confined in a federal institution by making application in the court where the defendant's criminal proceeding is pending. The applicant must show that there is "reasonable cause" to believe that the witness "possesses information material" to the pending proceeding. G.S. 15A-823.

Upon a party's application, the judge may issue a certificate (known as a writ of habeas corpus ad testificandum) addressed to the Attorney General of the United States certifying that there is reasonable cause to believe that the prisoner possesses material information and requesting the Attorney General to have the prisoner brought to court "for a specified number of days under custody of a federal public servant." G.S. 15A-823(a)(3).

The judge, after issuing the certificate, "may cause it to be delivered to the Attorney General of the United States" or to his or her authorized representative. G.S. 15A-823(c). It is the policy of the U.S. Bureau of Prisons to allow federal prisoners to testify in state court criminal proceedings pursuant to a writ of habeas corpus ad testificandum issued by a state court. Barber v. Page, 390 U.S. 719, 724 (1968).

There is no AOC form for the application or certificate.