JURY MISCONDUCT

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CONTENTS

I. Introduction. This chapter discusses the trial court's duties with respect to misconduct by and affecting jurors. The North Carolina Defender Manual, Ch. 26, Jury Misconduct (2d ed. 2012), and the North Carolina Prosecutors' Trial Manual, Jury Procedures and Juror Misconduct, 237-47 (5th ed. 2012), are excellent resources on this subject. I gratefully acknowledge the incorporation of excerpts from these publications.

II. Ensuring the Right to a Fair Trial by an Impartial Jury--Generally. Under the Sixth and Fourteenth Amendments to the United States Constitution, every criminal defendant who has a right to a jury trial is entitled to a fair trial by a neutral and impartial jury. *See* Pena-Rodriguez v. Colorado, 580 U.S. ___, 137 S. Ct. 855, 871 (2017); Morgan v. Illinois, 504 U.S. 719, 726-27 (1992); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968). This right also is guaranteed by Article I, Section 24 of the North Carolina Constitution. State v. Garcell, 363 N.C. 10, 43-44 (2009). It is protected in North Carolina through statutory admonitions, pattern jury instructions, the trial court's obligation to inquire into misconduct, and the trial court's authority to remedy misconduct.

A. Statutory Admonitions. G.S. 15A-1236(a) requires the trial judge at appropriate times to admonish the jurors that it is their duty:

- not to talk among themselves about the case except in the jury room after their deliberations have begun;
- not to talk to anyone else or to allow anyone else to talk with them or in their presence about the case, and to report to the judge immediately the attempt of anyone to communicate with them about the case;

- not to form an opinion about the guilt or innocence of the defendant or express any opinion about the case until they begin their deliberations;
- to avoid reading, watching, or listening to accounts of the trial; and
- not to talk during trial to parties, witnesses, or counsel.

The judge also may admonish the jurors about other matters that the judge considers appropriate. G.S. 15A-1236.

Although some cases hold that to constitute error, the defendant must object to any failure to properly admonish the jury and must show prejudice resulting from that failure, State v. Harris, 315 N.C. 556, 566 (1986), other cases suggest the issue is subject to plain error review on appeal. State v. Ward, 354 N.C. 231, 263 (2001) (the court noted that the defendant failed to assert plain error on appeal); State v. Smith, 222 N.C. App. 637, *3 (2012) (unpublished) (the court allowed plain error review of failure to instruct properly under G.S. 15A-1236, but did not find plain error).

B. **Pattern Jury Instructions.** The following pattern jury instructions contain admonitions to jurors about improper oral and electronic communications and contacts, impermissible research, and watching or listening to media:

- N.C.P.I. Crim.—100.25: Precautionary Instructions to Jurors (to be given after jury is impaneled)
- N.C.P.I. Crim.—100.31: Admonitions to Jurors at Recesses (to be given before first recess)
- N.C.P.I. Crim.—100.33: Recesses (to be given before second and subsequent recesses)

C. **Trial Court's Duty to Inquire about Misconduct.** "It is the duty and responsibility of the trial judge to insure that the jurors remain impartial . . . ." State v. Rutherford, 70 N.C. App. 674, 677 (1984). It is the trial judge's responsibility to conduct investigations into apparent juror misconduct, "including examination of jurors when warranted, to determine whether any misconduct has occurred and has prejudiced the defendant;" the scope of the inquiry is within the trial court's sound discretion. State v. Barnes, 345 N.C. 184, 226 (1997); *see also* State v. Burke, 343 N.C. 129, 149 (1996); State v. Gurkin, 234 N.C. App. 207, 212-13 (2014). Practice pointers about how to conduct the relevant inquiry are provided in Section II.E., below.

D. **Remedies for Misconduct.** If juror misconduct has occurred, the trial judge can take "any appropriate action." State v. Drake, 31 N.C. App. 187, 191 (1976). The most common remedies are:

- Using contempt powers. *See* G.S. 15A-1035 (a presiding judge may maintain courtroom order through the use of contempt powers as provided in G.S. Chapter 5A, Contempt); *see generally* Michael Crowell, Contempt in this Benchbook.
- Giving a curative Instruction. *Cf.* State v. Hines, 131 N.C. App. 457, 462-63 (1998) (so noting this as a possible remedy but finding it inadequate in a case where the prosecutor's notes erroneously were submitted to the jury). An

instruction should include a statement to the jury to disregard the conduct that occurred or the statements that were made. The judge may also individually or collectively determine if each juror will follow the judge's instruction.

- Discharging the juror and substituting an alternate juror. G.S. 15A-1215(a) authorizes a trial judge to replace a juror with an alternate if any juror becomes incapacitated or disqualified at any time before final submission of the case to the jury. *See also* G.S. 15A-2000(a)(2) (authorizing the substitution of an alternate juror during a capital sentencing hearing if any juror dies, becomes incapacitated or disqualified, or is discharged for any reason before the start of deliberations).

  An alternate juror may not be substituted once the jury has begun deliberations. State v. Bunning, 346 N.C. 253, 255 (1997).

  The exercise of the power to discharge a juror and substitute an alternate rests in the trial judge's sound discretion and is not reversible error absent a showing of an abuse of discretion. State v. Nelson, 298 N.C. 573, 593 (1979).
- Granting a motion for a mistrial, if the misconduct is discovered before the verdict. *See* G.S. 15A-1061 ("The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."). Misconduct by a juror may result in a mistrial if it would render a fair and impartial trial impossible. Whether a motion for mistrial should be granted is a matter that rests in the trial judge's sound discretion, and this decision is not reversible absent an abuse of discretion. State v. McCarver, 341 N.C. 364, 383 (1995). *See, e.g.,* State v. Rutherford, 70 N.C. App. 674, 677 (1984) (no abuse of discretion in refusing to declare a mistrial when the judge made a full inquiry regarding a discussion between a juror and the State's witness during a lunch recess about whether they had mutual acquaintances). For information about mistrials, see Jessica Smith, Jury Deadlock and Absolute Impasse, and Robert Farb, Double Jeopardy, pp. 6-8, in this Benchbook.
- Granting a motion for a new trial for misconduct discovered after the verdict, typically made in a motion for appropriate relief. *Compare* State v. Sneeden, 274 N.C. 498, 504 (1968) (it was improper that the bailiff answered the jury's legal question, but no prejudice was shown), *with* State v. Johnson, 295 N.C. 227, 234 (1978) (bailiff's prejudicial comment to the jury that he was proud that the prosecutor had "stood up" for law enforcement officers required a new trial because the quality of the officers' investigation and their credibility were contested issues at trial). Like a motion for a mistrial, a motion for a new trial is addressed to the sound discretion of the trial judge, and unless his or her ruling is clearly erroneous or an abuse of discretion, it will not be disturbed.

E. Practice Pointers.

1. **How the Issue Arises.** The trial court may learn about potential misconduct from a variety of sources including courtroom staff, such as the bailiff, defense counsel, the prosecutor, or from the jurors themselves, typically in the form of a note.
2. **Inform and Hear from Counsel.** When an issue about juror misconduct arises, the trial court should, as a general rule, inform the parties and counsel of the issue, inform those persons how the judge plans to address the alleged misconduct, if at all, and hear from counsel on the issue.

3. **Address Issue in Open Court.** When misconduct is alleged to have occurred, the trial court typically will make inquiry of the relevant people in the courtroom, on the record, with the parties and their lawyers present. *See, e.g.,* State v. Drake, 31 N.C. App. 187, 191 (1976) (reversible error when the trial court denied a defense motion to examine a juror after hearing the uncontradicted testimony of a disinterested witness that she heard the juror during a recess tell other jurors his views of the defendant's defense). A trial court's ex parte conversation with a juror is disapproved, and it is prohibited in capital cases where a defendant has an unwaivable right to be present. State v. Harrington, 335 N.C. 105, 116-17 (1993) (ex parte conversation with a juror in a non-capital case about a juror's comments was disapproved, although it was not prejudicial to the defendant); JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 74-78 (3d. ed. 2013) (discussing a defendant's right to be present at trial, including a trial judge's communication with jurors).

   As a general rule, the relevant persons should be examined one at a time and without the others present. For example, if it is alleged that a juror was seen speaking to a State's witness at lunch, the person who reported the conduct, the juror, the State's witness, and any other relevant persons should be examined individually and without the others present.

   As a general rule, an inquiry should be made to determine whether other jurors were affected by the misconduct at issue. Thus, in the example above about a lunchtime conversation between a juror and a State's witness, the judge should ask the juror in question whether he or she spoke to any other jurors about the conversation or whether any other jurors may have overheard the conversation. Depending on the responses, it may be necessary to examine other potentially implicated jurors. Although an examination of other jurors is not *required* unless the trial court determines that some potentially prejudicial conduct occurred, *Harrington*, 335 N.C. at 115 (trial court did not abuse its discretion in not examining jurors other than the particular juror who was dismissed, because the dismissed juror's comments were not prejudicial to the defendant), the trial court has the discretion to engage in a broader inquiry to protect the record.

   When the misconduct may be cured by an instruction, the judge should inquire whether the juror can continue to be impartial and follow the court's instructions.
4. **Re-Opening Voir Dire.** When it is determined that a juror failed to mention a pertinent fact during voir dire or was not truthful during voir dire, the trial court may need to consider re-opening voir dire. For a discussion of that issue and the parties' rights to exercise remaining challenges, see Section IV.D.2, below.
5. **Deciding on Appropriate Remedy.** When juror misconduct has been found to have occurred, the trial court must implement an appropriate remedy. Section II.D, above, discusses the options available to the trial court.
6. **Findings of Fact and Conclusions of Law.** The judge should make findings of fact and conclusions of law when a hearing is held on jury misconduct.

III. Exposure to Extraneous Information and Impeaching the Verdict. Juror misconduct encompasses a wide range of improper activities. Exposure to extraneous information has been the subject of many cases and is discussed here. Other types of misconduct are discussed in Section IV, below.

A. What Constitutes Extraneous Information--Generally. A fundamental aspect of a criminal defendant's constitutional right to confront witnesses and evidence against the defendant is that a jury's verdict must be based on evidence produced at trial, not on extrinsic information that has not been subject to the rules of evidence, supervision of the court, and other procedural safeguards of a fair trial. *See, e.g.,* Parker v. Gladden, 385 U.S. 363, 364 (1966); Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). Issues of exposure to extraneous information are handled differently, depending on whether the issue is discovered before or after the verdict. Both scenarios are discussed below.

B. Discovered Before the Verdict. "'[W]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.'" State v. Campbell, 340 N.C. 612, 634 (1995) (trial court did not mishandle inquiries it made of the jury following a defendant's failed escape attempt that occurred out of jury's presence).

When information that would be inadmissible at trial reaches the jury, the trial judge must, after appropriate inquiry, weigh all the circumstances and determine in his or her discretion whether or not a defendant's right to a fair trial has been violated. State v. Jones, 50 N.C. App. 263, 268 (1981) (trial judge found that jurors had not formed an opinion as a result of reading a newspaper article revealing the defendant's prior heroin conviction and that they could make a decision based solely on the evidence presented at trial; denial of mistrial was not error); State v. Hines, 131 N.C. App. 457, 462 (1998) (the defendants' right to confrontation was violated and their motion for a mistrial should have been granted when the prosecutor's notes and typewritten list of statements made by the defendants, including hearsay statements, were mistakenly published to the jury without being admitted into evidence).

The denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial court that prejudicial misconduct has not been shown, and the decision will be reversed only on a clear showing that the trial court abused its discretion. State v. Bonney, 329 N.C. 61, 74 (1991) (no error in denying a mistrial motion when the juror had not begun to read a book found in the jury room); State v. Degree, 114 N.C. App. 385, 392 (1994) (no error in denying a mistrial motion when a juror inadvertently saw a newspaper article reporting that the defendant, charged with rape, had AIDS; the trial court examined the juror regarding the article, who stated, "I was reading and I saw the defendant's name and I quit," and it was reasonable to conclude that the juror did not read the article and had formed no opinion that would jeopardize the defendant's right to a fair trial); State v. Salentine, 237 N.C. App. 76, 82-84 (2014) (no error in denying the defendant's mistrial motion and in not conducting an inquiry of other jurors; the trial judge's extensive examination of a juror and his credibility concerning the alleged misconduct in contacting non-jurors was sufficient to show that prejudicial misconduct had not occurred).

C. Discovered After the Verdict.

1. General Rule: No Impeachment of the Verdict. As a general rule, once a verdict is rendered, it may not 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* State v. Cherry, 298 N.C. 86, 101 (1979) (jurors' general

knowledge of parole eligibility for first-degree murder was not grounds to set aside verdict). Consistent with the general rule, G.S. 15A-1240(a) provides that when there is an inquiry into a verdict's validity, no evidence may be received to show the effect of any statement, conduct, event, or condition on a juror's mind or concerning the mental processes by which the verdict was determined. *See* State v. Heavner, 227 N.C. App. 139, 150-51 (2013) (trial court erroneously admitted and considered in a hearing on a motion for appropriate relief a juror's testimony that his conversation with the defendant's mother did not in any way affect his deliberations in the defendant's case); State v. Lyles, 94 N.C. App. 240, 245 (1989) (the trial court did not err in a hearing on a motion for appropriate relief by excluding juror testimony about how extraneous information affected the jury's verdict); State v. Froneberger, 55 N.C. App. 148, 155-56 (1981) (testimony of defense counsel's secretary about a juror's conversation concerning "second thoughts" about the verdict was inadmissible under G.S. 15A-1240(a) in a motion to set aside the verdict). "However, harsh injustice has sometimes resulted from the view that jury verdicts are beyond challenge. Thus, as an 'accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in [an] individual case,' certain exceptions to the rule have been carved out." *Lyles*, 94 N.C. App. at 244 (1989) (a juror in the deliberation room removed a tape covering police information about the defendant in a photographic array exhibit that cast doubt on the defendant's alibi defense; the jurors' exposure to this extraneous information placed there by the police department was properly the subject of jurors' testimony in a hearing on a motion for a new trial and required a new trial because the information was prejudicial and violated the defendant's confrontation rights). Exceptions to the general rule are discussed in the sections that follow.

2. Exceptions to the General Rule: G.S. 15A-1240(b) and (c). G.S. 15A-1240(b) provides that G.S. 15A-1240(a) "do[es] not bar evidence concerning whether the verdict was reached by lot."

Additionally, G.S. 15A-1240(c)(1) allows impeachment of a verdict through a juror's testimony--subject to the limitations of G.S. 15A-1240(a)--when matters not in evidence came to the attention of one or more jurors under circumstances that would violate the defendant's constitutional right to confront the witnesses against the defendant. If the challenged evidence does not implicate the defendant's right to confrontation, G.S. 15A-1240(c)(1) does not apply. For example, in *State v. Rosier*, 322 N.C. 826, 832 (1988), the court ruled that the defendant's right to confrontation was not violated when the jury foreman watched a program on child abuse contrary to the trial judge's instructions, and the foreman told other jurors about a young friend of his who had been raped. The jurors' affidavits concerning these events should not have been considered by the trial court because "[p]arties do not have the right to cross examine jurors as to the arguments they make during deliberation as the foreman did in this case." *Id.* at 832.

Finally, G.S. 15A-1240(c)(2) allows a juror's testimony when it concerns bribery, intimidation, or attempted bribery or intimidation of a juror.

3. **Exception to the General Rule: Evidence Rule 606(b).** Evidence Rule 606(b), which applies in both criminal and civil cases, provides that a juror is competent to testify when the validity of a verdict is challenged, but only on the question (1) whether extraneous prejudicial information was improperly brought to the jury's attention, or (2) whether any outside influence was improperly brought to bear upon any juror.

Extraneous information under Rule 606(b) has been interpreted to mean information that reaches a juror without being introduced into evidence and that deals specifically "with the defendant or the case which is being tried." *Rosier*, 322 N.C. at 832 (judge's consideration of jurors' affidavits was improper when the affidavits revealed that the jury foreman watched a program on child abuse contrary to the trial judge's instructions and told jurors about a young friend of his who had been raped because that information was not "extraneous information" within the meaning of Rule 606 as it did not involve the defendant or the case being tried; also holding that other matters in the jurors' affidavits—that votes were changed because of the foreman's statements, that the foreman would not let a juror send a note to the judge, and that some of the jurors did not think the defendant was guilty—dealt with deliberations in the jury room and were inadmissible because a juror may not impeach a verdict through testimony); State v. Quesinberry, 325 N.C. 125, 132 (1989) (jurors' affidavits in a motion for appropriate relief showing that they considered the defendant's parole eligibility in a capital sentencing hearing were inadmissible under Rule 606 because they were internal influences; there were no allegations that jurors received the parole eligibility information from an outside source), *vacated on other grounds*, 494 U.S. 1022 (1990).

General information that jurors learn in their day-to-day experiences does not constitute "extraneous information." *Compare* State v. Heatwole, 344 N.C. 1, 12 (1996) (juror's communication with his professor about violent tendencies of paranoid schizophrenics was not "extraneous information" because it did not involve the defendant or the case being tried), *and Rosier*, 322 N.C. at 832 (1988) (see summary above), *with* State v. Lyles, 94 N.C. App. 240, 245 (1989) (testimony by jurors was proper under both Rule 606 and G.S. 15A-1240(c)(1) when a juror peeled paper from the bottom of an exhibit during deliberations and uncovered information that implied that the defendant had prior criminal involvement and directly contradicted the defendant's alibi witnesses; jurors' exposure to the information entitled the defendant to a new trial). *See also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 148, at 535-39 (7th ed. 2011) (discussing the anti-impeachment rule).

4. **Practice Pointers.** When a defendant asserts that he or she is entitled to relief under G.S. 15A-1240(c) or Rule 606(b), the judge first must determine whether the type of alleged misconduct falls within the scope of the statute or Rule 606(b) (as discussed above). If it does not, the judge may dismiss the matter summarily without a hearing. *See, e.g.,* State v. Barnes, 345 N.C. 184, 228 (1997) (the trial court did not abuse its discretion by failing to inquire of the jury concerning defense counsel's unsubstantiated assertions that: (1) the jury consulted a Bible before deliberations "[a]s there is no evidence that the alleged Bible reading was

in any way directed to the facts or governing law at issue in the case"; and (2) a juror's alleged actions in calling a minister to ask a question about the death penalty, when there was no alleged evidence that the content of any possible discussion prejudiced the defendants or that the juror gained access to improper or prejudicial matters and considered them in this case); State v. Patino, 207 N.C. App. 322, 330 (2010) (the trial court did not abuse its discretion by failing to inquire of the jury concerning alleged jury misconduct in looking up definitions of legal terms on the Internet because the definitions are not extraneous information under evidence Rule 606 and did not implicate the defendant's confrontation rights under G.S. 15A-1240).

If the alleged misconduct falls within the scope of the statute or Rule 606(b) and may be prejudicial, a hearing should be held, taking recorded testimony under oath, and with the defendant present unless the defendant waives the right to be present. But in a capital trial, a defendant has an unwaivable right to be present. *See* State v. Smith, 326 N.C. 792, 794 (1990) (error in capital case when judge spoke privately with prospective jurors); State v. Artis, 325 N.C. 278, 297 (1989) (error in a capital case when the judge spoke with a juror in chambers), *vacated on other grounds*, 494 U.S. 1023 (1990); JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK 74-78 (3d. ed. 2013).

If the judge finds a violation of the defendant's constitutional confrontation rights, the error is presumed prejudicial and the burden is on the State to prove that the jury's exposure to the improper information was harmless beyond a reasonable doubt. *See* State v. Lyles, 94 N.C. App. 240, 248 (1989) (citing G.S. 15A-1443(b)).

The judge should make findings of fact and conclusions of law when a hearing is held on jury misconduct.

5. Exception to the General Rule: Clear Statement that Juror Relied on Racial Stereotypes or Animus. In *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 869 (2017), the United States Supreme Court held that when a juror during jury deliberations makes a clear statement indicating that the juror relied on racial stereotypes or animus to convict a defendant, the Sixth Amendment requires that federal and state statutes and rules limiting impeachment of a verdict must give way to permit the trial court to consider the evidence of a juror's statement and any resulting violation of the Sixth Amendment right to a jury trial. (The Court includes within the right to a jury trial the fairness and impartiality of the jury's deliberations and resulting verdict.)

In that case, a Colorado jury convicted the defendant of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that during deliberations juror H.C. expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. Counsel obtained affidavits from the jurors describing a number of biased statements by H.C. The trial court acknowledged H.C.'s apparent bias but denied the defendant's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying about statements made during deliberations in a proceeding inquiring into a verdict's validity. The state appellate courts affirmed.

The United States Supreme Court reversed. It noted that the rule significantly restricting the impeachment of a jury verdict (described by the Court as the "no-impeachment rule," although there are exceptions to the rule that are discussed earlier in this section) evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. *Id*. at ___, 137 S. Ct. at 865. As the Court noted, this "case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Id*. at ___, 137 S. Ct. at 861. The affidavits by the two jurors described a number of biased statements made by juror H.C. Specifically, he told other jurors that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id*. at ___, 137 S. Ct. at 862. He also stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." *Id*. He further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id*. And he said that he did not find petitioner's alibi witness credible because, among other things, the witness was "an illegal." *Id*. The Court noted that with respect to this last comment, the witness testified during trial that he was a legal resident of the United States.

The Court ruled that the Sixth Amendment requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in the juror's finding of guilt. The Court elaborated on its ruling:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.
> 580 U.S. at ___, 137 S. Ct. at 869.

Although the Court used the term "racial bias," it made clear, noting the defendant's Hispanic identity, that it recognizes "ethnic" bias within that term. It would appear that the Court also would recognize bias based on national origin (in this case, the juror's

comments referred to Mexicans) and religion (see lower court cases summarized below involving religious bias). It is also possible that the Court also would recognize sex bias, as it has done in the exercise of peremptory challenges in jury selection. *See* Robert L. Farb, Jury Selection, pp. 20-28, in this Benchbook.

Because the issue was not presented, the Court declined to address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. It likewise declined to decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.

In the absence of guidance from the Court or North Carolina appellate cases, some suggestions for a trial court in dealing with this issue are:

- determine if the allegation of a juror's racial or ethnic bias is sufficiently substantial to justify an evidentiary hearing
- question under oath the person reporting the conduct, to include the context of the remarks (permit counsel to ask questions)
- question under oath any person likely to have been a witness to the alleged conduct (permit counsel to ask questions)
- question under oath the juror alleged to have made the remarks (permit counsel to ask questions)
- question each person separately (that is, not in the presence of others)
- determine if a juror was racially or ethnically biased
- make findings of fact and conclusions of law to support the ruling

For cases in other jurisdictions that had recognized juror bias before *Pena-Rodriguez* and that may be useful until North Carolina's appellate courts have addressed bias issues, see:

State v. Santiago, 715 A.2d 1, 14 (Conn. 1998) (setting the standard for conducting the inquiry).

State v. Phillips, 927 A.2d 931 (Conn. App. Ct. 2007) (finding of racial prejudice automatically requires a new trial).

Spencer v. State, 398 S.E.2d 179, 184-85 (Ga. 1990) (a juror's affidavit showed only that two of the twelve jurors possessed some racial prejudice and did not establish that racial prejudice caused those two jurors to vote to convict defendant and impose the death penalty).

State v. Jackson, 912 P.2d 71, 80-81 (Haw. 1996) (jurors' comments concerning race and appearance of defendant's wife were not substantially prejudicial to deprive defendant of

right to fair trial by impartial jury, because comments were made after agreement on verdict had been reached).

Commonwealth v. Laguer, 571 N.E.2d 371, 375 (Mass. 1991) (if a juror's affidavit is found on remand to be essentially true that a juror or jurors were ethnically biased, the defendant will be entitled to a new trial).

Commonwealth v. McCowen, 939 N.E.2d 735, 761 (Mass. 2010) (setting out the procedure for the trial court to follow in deciding allegations of a juror's racial bias, including parties' burdens of proof).

Flesher v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 89 (Mo. 2010) (the trial court abused its discretion in failing to hold an evidentiary hearing to determine whether the alleged juror misconduct occurred when the juror allegedly made anti-Semitic comments during deliberations).

State v. Hidanovic, 747 N.W.2d 463, 467 (N.D. 2008) (the trial court did not abuse its discretion in denying the defendant's motion for a new trial on the ground of juror misconduct consisting of alleged statement expressing bias against Bosnians).

State v. Brown, 62 A.3d 1099, 1108 (R.I. 2013) (allegations of a juror's racial bias did not warrant an evidentiary hearing).

State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995) (a juror's allegations about another juror's use of a racial epithet did not demonstrate racial prejudice toward the defendant).

After Hour Welding, Inc. v. Laneil Management Co., 324 N.W.2d 686, 689 (Wis. 1982) (remanding to the trial court to conduct a hearing in civil case concerning jurors' anti-Semitic comments as alleged in a juror's affidavit).

United States v. Villar, 586 F.3d 76, 84 (1st Cir. 2009) (district court erred when it concluded that it had no discretion to hold an inquiry into possible ethnic bias in jury deliberations).

D. Selected Examples of Extraneous Information.

1. Dictionaries & Similar Resources. Dictionary definitions consulted by jurors are not considered extraneous information under evidence Rule 606(b), and the consultation does not violate a defendant's constitutional right to confrontation. In *Lindsey v. Boddie-Noell Enterprises, Inc.*, 355 N.C. 487 (2002), the supreme court reversed per curiam the decision of the court of appeals, 147 N.C. App. 166 (2001), and adopted the reasoning of the dissenting opinion. The dissenting opinion stated that the dictionary definitions at issue were not "extraneous information" within the meaning of Rule of Evidence 606(b) because definitions of the words

"willful" and "wanton" did not specifically concern the defendant or the evidence presented in the case. 147 N.C. App. at 179. The definitions were simply matters of common knowledge that jurors were supposed to know. The dissenting opinion also stated that even if the dictionary definitions were "extraneous information" within the meaning of Rule 606(b), there was no actual prejudice to the defendant because the trial judge sufficiently instructed the jury about those definitions. *Id*. at 180. *See also* State v. Patino, 207 N.C. App. 322, 330 (2010) (definitions of legal terms that jurors consulted on the Internet were not extraneous information under Rule 606 and did not implicate the defendant's constitutional right to confront witnesses against him); *State v. McLain*, 10 N.C. App. 146, 148 (1970) (the court stated that it was improper for the jury to obtain and read a dictionary definition of one of the offenses, but the trial judge properly instructed the jury to disregard the dictionary definition and the defendant did not show that he was prejudiced).

2. **Bibles.** When a jury consults a Bible during its deliberations, the issues are whether a Bible is extraneous information under Rule 606(b) and whether the consultation violated a defendant's constitutional rights. These questions have not been squarely decided by North Carolina appellate courts. *But see* State v. Barnes, 345 N.C. 184, 228 (1997) (finding no abuse of discretion in the trial judge's failure to inquire of the jury concerning defense counsel's unsubstantiated assertion that the jury consulted a Bible before deliberations "[a]s there is no evidence that the alleged Bible reading was in any way directed to the facts or governing law at issue in the case").

3. **News Media Reports.** The trial court must weigh all the circumstances in determining in its sound judicial discretion whether the defendant's right to a fair trial has been violated when inadmissible information or evidence reaches the jury through news media reports. State v. Jones, 50 N.C. App. 263, 268 (1981) (although a newspaper article included the defendant's inadmissible prior heroin conviction, other circumstances found by the trial court justified its conclusion that the jurors who had read the article had not formed an opinion and they could make a decision solely on the evidence presented at trial).

When there is a substantial reason to believe that the jury has become aware of improper and prejudicial matters such as media reports, the trial court must question the jury concerning whether such exposure has occurred and, if so, whether the exposure was prejudicial. State v. Barts, 316 N.C. 666, 683 (1986) (no abuse of discretion in denying a mistrial motion when the defendant made no showing that the jury had been exposed to a highly prejudicial newspaper article about the defendant, and the trial court's inquiry of the jury as a whole revealed no violation of the judge's instruction to avoid exposure to the news media; specific questioning of each juror was not required in this case); State v. McVay, 279 N.C. 428, 433 (1971) (holding that while an inquiry of the jury was not required because there was no evidence that the jury actually was exposed to the newspaper article, the better practice is to inquire of the jurors to see if they had been exposed or influenced by it).

If a jury has been exposed to media coverage, the trial judge properly may deny a mistrial motion if the coverage was merely an objective account of what has occurred at trial and was not prejudicial to

the defendant. *See* State v. Woods, 293 N.C. 58, 65 (1977). However, when the jurors have been exposed to prejudicial matters and the error is not cured by a subsequent instruction by the court, a new trial is warranted. *See* State v. Reid, 53 N.C. App. 130, 131 (1981) (newspaper article read by four jurors in a homicide trial quoted the trial judge's comment (made outside the jury's presence), in denying the motion to dismiss the charge, "too many shots . . . motion denied;" when excessive force was a crucial issue, and the judge's statement irreparably prejudiced defendant).

When there is evidence that jurors read a newspaper or other media account of a trial, but the trial judge decides not to declare a mistrial, a jury instruction could include: "Your verdict must be based entirely on the evidence introduced at trial and you are not to be influenced by anything you may have read in a newspaper or by any other outside influence." This instruction is a substantially similar to that given in *State v. Woods*, cited above.

IV. Other Common Types of Misconduct.

A. Third Party Communication. It is misconduct for a juror during the trial to discuss the matter or to receive any information related to the case except in open court and in the manner provided by law. Thus, any communication between jurors and third parties including victims, defendants, counsel, courtroom personnel, witnesses, relatives, friends, etc., is prohibited except, for example, a bailiff's routine communications to the jurors about lunch breaks, travel arrangements for a jury view, etc.

If allegedly improper contact with a juror is discovered, or if a prejudicial statement is inadvertently overheard by a juror, the trial judge must determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the trial judge's discretion concerning what inquiry to make. State v. Burke, 343 N.C. 129, 149 (1996) (the trial judge did not err in not conducting an inquiry when defense counsel declined the judge's offer to question a juror who overheard a spectator's prejudicial comment about the defendant, and the trial judge took measures to insulate the jurors from future contacts); State v. Jacobs, 172 N.C. App. 220, 230 (2005) (the trial judge did not err in not conducting an inquiry when there was no indication that alleged inappropriate communication between the prosecutor and the court clerk in the vicinity of a juror had any influence on the juror or the jury's verdict).

If outside contacts are improperly brought to bear against a juror and are intended to influence the verdict and the contacts prejudice the defendant, the trial court abuses its discretion in denying a motion for a mistrial or new trial. *See* State v. Lewis, 188 N.C. App. 308 (2008) (granting the defendant a new trial when the lead detective made comments during a break to a deputy sheriff serving as a juror that were intended to influence the verdict, namely that the defendant had failed a polygraph test). "'[B]rief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict or require that the jury be discharged . . . .'" O'Berry v. Perry, 266 N.C. 77, 81 (1965) (a juror walked with the plaintiff and his witness from the courthouse to restaurant for lunch, but no conversation of case occurred; no abuse of discretion in denying motion to set aside verdict; this ruling would be equally applicable to criminal cases); State v. Barnes, 345 N.C. 184, 228 (1997) (the trial court did not abuse its discretion by failing to inquire of the jury concerning defense counsel's

unsubstantiated assertions that a juror's alleged actions in calling a minister to ask a question about the death penalty, when there was no alleged evidence that the content of any possible discussion prejudiced the defendants or that the juror gained access to improper or prejudicial matters and considered them in this case).

B. Impaired Jurors. "The law requires that jurors, while in the discharge of their duties, shall be temperate, and in such condition of mind as to enable them to discharge those duties honestly, intelligently, and free from the influence and dominion of" impairing substances. State v. Jenkins, 116 N.C. 972, 974 (1895). If a juror, while hearing the evidence, argument of counsel, or charge, or while deliberating as to verdict, is so incapacitated by reason of intoxicants or otherwise as to be physically or mentally incapable of functioning as a competent, qualified juror, the trial judge may order a mistrial (unless the impaired juror can be discharged and replaced with an alternate juror at any time before the jury has begun deliberations). State v. Tyson, 138 N.C. 627 (1905) (mistrial was proper when a juror was found to be intoxicated and unfit for duty during the trial). However, the use of impairing substances outside the courtroom does not justify granting a mistrial (or replacement of the impaired juror by an alternate juror) unless it is found that the juror is unfit to serve while present in court. *See* State v. Crocker, 239 N.C. 446, 451 (1954) (although several jurors became intoxicated during an overnight recess, a mistrial over the defendant's objection was not warranted when there was no evidence or finding that any of those jurors were impaired when the court reconvened the following morning).

Under G.S. 15A-1215, if a juror becomes incapacitated for any reason, an alternate may be substituted unless the jury has begun its deliberations.

C. Sleeping or Otherwise Inattentive Juror. A defendant in superior court has the state constitutional right to be convicted by a jury of twelve unless the defendant waives the right to a jury trial in a non-capital case. N.C. CONST. art. I, § 24; G.S. 15A-1201; State v. Hudson, 280 N.C. 74, 79 (1971). If a juror is sleeping during the trial or otherwise inattentive, the defendant can move to substitute the juror or for a mistrial. The defendant must show by competent evidence that the juror was inattentive or sleeping and the defendant was prejudiced thereby. State v. Lovin, 339 N.C. 695, 715 (1995) (no abuse of discretion in the denial of the defendant's motion to substitute an occasionally sleeping juror because the evidence was sufficient to support the conclusion that the juror, although inattentive to parts of the case, could nevertheless perform his duties); State v. Williams, 33 N.C. App. 397, 398 (1977) (no error in the trial judge's failure to grant a mistrial ex mero motu based on a juror falling asleep during cross-examination of a witness because the defendant did not show any prejudice at trial or on appeal and raised the mistrial ground for the first time on appeal). *See also* State v. Engle, 5 N.C. App. 101, 105 (1969) (no competent evidence was presented at trial that a juror was sleeping, and the court of appeals would not consider affidavits from courtroom witnesses about that juror when the affidavits were presented for the first time on appeal).

D. Juror's Failure to Disclose Information During Voir Dire.

1. Discovery of Juror's Non-Disclosure Before Jury is Impaneled. If it is discovered that a juror made an incorrect statement during voir dire before the jury is impaneled:

- the judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for a challenge for cause;
- if the judge determines there is a basis for a challenge for cause, the judge must excuse the juror or sustain any challenge for cause that has been made;
- if the judge determines there is no basis for a challenge for cause, any party who has not exhausted his or her peremptory challenges may challenge the juror.

G.S. 15A-1214(g).

2. Discovery of Juror's Non-Disclosure After Jury is Impaneled. If the juror's failure to disclose is discovered after the jury is impaneled but before the jury begins its deliberations, the trial court may reopen the examination of the juror and its decision on reopening is with its sound discretion. State v. Holden, 346 N.C. 404, 428 (1997). (Some judges believe that they may question a juror about alleged misconduct without reopening the examination of the juror by the prosecutor and defendant, but it is unclear whether that view would be upheld by an appellate court.) If the trial court reopens the examination of the juror, then both the prosecutor and defendant have the absolute right to exercise any remaining peremptory challenges to excuse the juror (assuming, of course, that the trial court does not excuse the juror for cause). *Id*. at 428 (trial court did not err in allowing prosecutor to exercise a remaining peremptory challenge after all the evidence had been presented, but before the jury had begun deliberations); State v. Thomas, 230 N.C. App. 127, 128 (2013) (the trial court committed reversible error by reopening examination of a juror after impanelment but denying the defendant's motion to exercise remaining peremptory challenge); State v. Hammonds, 218 N.C. App. 158, 163 (similar ruling). If the juror is removed for cause or by a peremptory challenge, then the trial court must replace that juror with an alternate juror. If there is not an available alternate juror, then grounds for a mistrial may exist.

If the failure to disclose is discovered after the jury has begun deliberations but before it reaches a verdict, then grounds for a mistrial may exist.

3. Discovery of Juror's Non-Disclosure After Verdict. If a juror fails to disclose or misrepresents potentially important information during jury selection, the party moving for a new trial (typically by a motion for appropriate relief) must show:

- the juror concealed material information during voir dire;
- the moving party exercised due diligence during voir dire to uncover the information; and
- the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

State v. Maske, 358 N.C. 40, 48 (2004) (a juror's inadvertent failure to disclose four-decades-old information that she had forgotten was not concealment and she did not demonstrate bias). If the party meets this

burden, the trial judge must grant the motion. For a discussion of the meaning of bias implied as a matter of law, see *State v. Buckom*, 126 N.C. App. 368, 382 (1997) (finding no implied bias by a juror based on limited association in the same organization as the State's witness).

E. Unauthorized Jury View of Crime Scene. A jury view is authorized by G.S. 15A-1229. An unauthorized view of a crime scene by jurors is considered misconduct. State v. Perry, 121 N.C. 533 (1897). However, the fact that a juror makes an unauthorized visit to the place of the crime is not grounds for a new trial unless it appears that the defendant was prejudiced. State v. Boggan, 133 N.C. 761 (1903) (no undue influence shown when the jurors passed through a crime scene during their stay at a hotel pending the trial); State v. Hawkins, 59 N.C. App. 190, 192 (1982) (although jurors used information about the lighting at the crime scene provided by a juror who visited the scene, there was no constitutional violation because there was testimony by an officer about the lighting conditions); State v. Smith, 13 N.C. App. 583, 585 (1972) (any possible prejudice from an unauthorized viewing by one juror was removed by the trial court's having the entire jury view the scene). Whether to grant relief for a juror's unauthorized view is in the trial judge's sound discretion. State v. Farris, 13 N.C. App. 143, 145 (1971).

For a discussion of all aspects of a jury view, see Jessica Smith, Jury View in this Benchbook.

F. Presence of Unauthorized Person in Jury Room during Deliberations.

1. Alternate Jurors. The presence of an alternate juror in the jury room during deliberations violates a statutory mandate and the defendant's state constitutional right to a jury trial as contemplated by article I, section 24 of the N.C. Constitution. *See* G.S. 15A-1215(a) (alternate jurors must be discharged on final submission of a case to the jury); State v. Bindyke, 288 N.C. 608, 627 (1975) (new trial granted based on constitutional violation when an alternate juror was present in the jury room for three to four minutes during deliberations).

The presence of an alternate juror in the jury room at any time after deliberations begin is reversible error per se. *Bindyke*, 288 N.C. at 627. However, if the alternate's presence is inadvertent and momentary, and occurs under circumstances from which it can clearly be determined that the jury has not begun deliberating, then the alternate's presence will not void the trial. If the trial judge believes it is probable that deliberations had not yet begun when the alternate was in the jury room, the trial judge may recall the jury and the alternate and make a limited inquiry concerning whether there has been any discussion of the case or comment as to what the verdict should be. If the answer is yes, the judge must declare a mistrial. If the answer is no, the alternate must be excused and the jury returns to deliberate. *Id*. at 628; State v. Jernigan, 118 N.C. App. 240, 245 (1995) (no mistrial warranted when the alternate was present in the jury room during the selection of a foreman because this did not amount to deliberation; the judge had instructed the jury to select a foreperson and not to deliberate while the judge talked with the lawyers); State v. Locklear, 180 N.C. App. 115, 120 (2006) (no prejudicial error occurred when an alternate spoke with jurors after deliberations had begun because the conversations did not take place in the deliberation

room and the alternate did not express her feelings about the case to the other jurors).

2. Non-jurors. The presence of a non-juror in the jury room is improper, but it does not automatically invalidate a verdict. If the trial judge finds that neither the deliberations nor the verdict were in any manner influenced by the entrance of a non-juror, and there was no communication between the non-juror and any juror, the judge may deny a motion to set aside the verdict. State v. Hill, 225 N.C. 74, 76 (1945) (affirming the denial of the defendant's motion to set aside the verdict based on the presence of two reporters in the jury room for several minutes, when an inquiry showed that neither the deliberations nor the verdict were in any way influenced by their unauthorized presence); State v. Battle, 271 N.C. 594, 595 (1967) (no error in the denial of the defendant's motion to set aside the verdict when a juror from a different case mistakenly went into the jury room for a brief time with the defendant's jury, and the jurors had not discussed the case in that juror's presence); State v. Riera, 6 N.C. App. 381, 385 (1969) (no error in the denial of the defendant's motion for mistrial when the jury became silent and said nothing when an unauthorized person mistakenly entered the jury room during deliberations), *rev'd on other grounds*, 276 N.C. 361 (1970).

Although older cases such as *State v. Hill* and *State v. Battle*, cited above, indicate that a trial judge's refusal to set aside the verdict or grant a mistrial is not reviewable on appeal, later cases utilize an abuse of discretion standard of review. State v. Billups, 301 N.C. 607, 616 (1981) (the trial court did not abuse its discretion by denying the defendant's motion for a mistrial when a prosecuting witness entered the jury room during a recess at the conclusion of trial but before the court's charge to the jury; the witness entered to use the bathroom and did not communicate with any of the jurors); State v. Washington, 141 N.C. App. 354, 375 (2000) (the trial court did not abuse its discretion by failing to declare a mistrial sua sponte when the bailiff entered the jury room during deliberations to retrieve some magazines; the bailiff did not communicate with any of the jurors or hear any deliberations); State v. Phillips, 87 N.C. App. 246, 249 (1987) (the trial court did not abuse its discretion by failing to set aside the verdicts when the victim's wife was in the jury room before the opening of court one day, and the sheriff took coffee cups to the jury in the jury room).