

JURY SELECTION

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Contents

I.	Introduction	2
II.	Qualifications of Jurors	2
	A. Service as a Juror During Past Two Years	3
	B. English Language Capability	3
	C. Restoration of Felon's Citizenship	3
III.	Selecting the Jury Pool	3
IV.	Challenges to Jury Pool.....	4
	A. Equal Protection Challenges	4
	B. Fair Cross-Section Challenges.....	4
	C. Remedy for Successful Challenge	5
V.	Supplemental Jurors to Original Jury Pool.....	5
VI.	Special Venire from Another County	5
VII.	Requests to be Excused Not Requiring Personal Appearance	6
	A. Excusing Juror Based on Age	6
	B. Excusing Jurors Who Are Students.....	6
	C. Excusing Juror with Disability	6
	D. Procedure.....	7
VIII.	Hardship Excuses.....	7
	A. Procedure.....	7
	B. Right to be Present	8
IX.	Preliminary Procedures Before Voir Dire Questioning.....	8
	A. Defendant's Plea to Charges.....	8
	B. Pleadings May Not Be Read to Prospective Jurors	8
	C. Judge's Preliminary Instructions to Prospective Jurors	8
	D. Jury Instruction on Employer's Unlawful Discharge of Employee for Juror's Service	8
	E. Jury Questionnaire.....	9
	F. Random Selection of Prospective Jurors for Questioning	9
X.	Voir Dire Procedure	9
	A. Generally.....	9
	B. Recording Jury Selection.....	9
	C. Number of Peremptory Challenges	10
	D. Parties' Right to Question Jurors.....	10
	E. Order of Questioning.....	10
	F. Order of Questioning with Co-Defendants	11
	G. Alternate Jurors.....	11
	H. Individual Voir Dire.....	11
	I. Reopening Voir Dire.....	12
XI.	Scope of Permitted Questioning.....	12
	A. Questions About Juror's Racial Bias	13
	B. Stakeout Questions.....	14
	C. Other Voir Dire Questions.....	16
XII.	Capital Case Issues.....	18
	A. Death Qualification of Jury.....	18
	B. Jurors Who May Be Biased in Favor of Death Penalty	20

	C.	Questions About Life Imprisonment in Capital Trial.....	20
XIII.		Challenges for Cause	20
	A.	Constitutional Basis	20
	B.	Statutory Grounds for Challenges for Cause	21
	C.	Preservation of Appellate Review of Denial of Challenge for Cause.....	22
	D.	Excusing Qualified Juror in Capital Case	23
XIV.		Peremptory Challenges	23
	A.	Generally.....	23
	B.	Equal Protection Limitations: <i>Batson</i> & Its Progeny.....	23
XV.		Impaneling of Jury.....	39

I. Introduction. This section covers jury selection in both capital and non-capital cases. For a comprehensive discussion of jury selection in capital cases, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK, 79-103 (3d ed. 2013). Another comprehensive resource is JULIE RAMSEUR LEWIS AND JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL VOL. 2 TRIAL, [Ch. 25, Selection of Jury](#) (2020 ed.) [hereinafter DEFENDER MANUAL]. The incorporation in whole or in part of excerpts from these publications is gratefully acknowledged.

II. Qualifications of Jurors. The qualifications of jurors are set out in G.S. 9-3:

- be a citizen of North Carolina and a resident of the county in which the juror serves
- has not served as a juror during the past two years (see additional discussion below)
- be at least eighteen years old
- be physically and mentally competent
- be able to understand the English language (see additional discussion below)
- has not been convicted of or plead guilty or no contest to a felony without restoration of citizenship (see additional discussion below)
- has not been adjudged mentally incompetent

In addition, a person who serves a full term of service as a grand juror is exempt from service as a juror or grand juror for six years. G.S. 9-3, 9-7(b).

G.S. 9-3 was modified by 2023 legislation, S.L. 2023-140, Sec. 44.(a), with an effective date of July 1, 2024. On or after the effective date, new G.S. 9-3(a)(1) requires that a person be a citizen of the United States to be qualified as a juror. Prior to the enactment of the legislation and as reflected in the bulleted list above, G.S. 9-3 did not explicitly require that a person be a United States citizen to serve as a juror, instead requiring that a person be a citizen of North Carolina. G.S. 9-3 (2022). It is arguable that a person necessarily must be a citizen of the United States to be a citizen of North Carolina. See U.S. Const. amend. XIV, § 1 (stating that United States citizens are citizens of the state in which they reside); DEFENDER MANUAL at 25.2 (stating that “a North Carolina citizen is one who is a citizen of the United States and a resident of North Carolina”). Older cases from the North Carolina Supreme Court held that people who were not United States citizens were disqualified from jury service under common law. *Hinton v. Hinton*, 196 N.C. 341 (1928); see also *State v. Emery*, 224 N.C. 581, 584 (1944) (citing *Hinton*). Note that Section 26 of Article I of the North Carolina Constitution, adopted in 1970, states that “[n]o person shall be excluded from jury service on account

of . . . national origin,” though it does not appear that the North Carolina appellate courts have analyzed that constitutional provision in the context of whether a person who is not a United States citizen is disqualified from serving as a juror. There is no federal constitutional prohibition on requiring that jurors be United States citizens. See *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 332 (1970) (stating that “States remain free to confine the selection [of jurors] to citizens”). The juror qualification requirements otherwise were substantively unchanged by the 2023 legislation. *Compare* G.S. 9-3(a)(1)-(10) (as modified by S.L. 2023-140, Sec. 44.(a)), *with* G.S. 9-3 (2022).

A person who does not meet the statutory requirements to be qualified to serve as a juror is subject to challenge for cause. G.S. 9-3; see *also* Section XIII, below (discussing challenges for cause).

- A. Service as a Juror During Past Two Years.** People who have served on federal juries as well as those who have served on state juries are disqualified from serving within two years. *State v. Golphin*, 352 N.C. 364, 424-25 (2000). The two-year exclusion is triggered only if the juror is sworn; merely receiving a jury summons is insufficient. *State v. Berry*, 35 N.C. App. 128, 134 (1978). The date to be used when determining the end of the two-year period is the date when all the jurors are sworn at the beginning of jury selection. *Golphin*, 352 N.C. at 425.
- B. English Language Capability.** In *State v. Smith*, 352 N.C. 531, 547-48 (2000), the court upheld the constitutionality of the requirement that jurors hear and understand English. Since *Smith* was decided, G.S. 9-3 was amended to require that a juror only needs to understand English, deleting the requirement to hear English. This change was made to accommodate jurors who are deaf or otherwise hard of hearing. For information how a judge or other court official arranges for services to these jurors, consult the Administrative Office of Courts.
- C. Restoration of Felon’s Citizenship.** A convicted felon’s citizenship is automatically restored on the unconditional discharge of an inmate, parolee, or probationer, an unconditional pardon, or the satisfaction of all the conditions of a conditional pardon. G.S. 13-1(1) through (3). Similar conditions apply to a felon who was convicted in federal court or another state court. G.S. 13-1(4), (5).
- III. Selecting the Jury Pool.** There is a two-step process for selecting the jury pool (also known as the “jury panel,” but the term “jury pool” will be used here). First, the jury commission for each county, either annually or biannually, constructs a master jury list of potential jurors to be used for grand and trial (petit) juries from lists of registered voters and licensed drivers. G.S. 9-2(a), 9-2(b).
- Second, the clerk of superior court (“the clerk”) or the assistant or deputy clerk prepares a randomized list of names from the master jury list of those to be summoned by the sheriff for jury duty. G.S. 9-5. Upon request of the clerk and with agreement of the clerk and senior resident superior court judge, the duties of the clerk may be performed by “judicial support staff.” G.S. 9-7.1(a). That term is defined to include certain employees of the Judicial Branch other than employees of the clerk. G.S. 9-7.1(b).
- When the jury pool reports to court, G.S. 9-14 requires the clerk to swear all jurors who have not been selected as grand jurors. See *also* N.C.P.I.—Crim. 100.22 (introductory remarks). Each juror takes the oath required by section 7 of article VI of the North Carolina Constitution and the oath required by G.S. 11-11.

Sometimes the jury pool, particularly for a capital trial, consists of a large number of prospective jurors. The trial judge in such a case may choose to subdivide the juror pool into separate panels for administrative reasons. If so, the judge should ensure that the subdivision of the jury pool is accomplished by a random process.

IV. Challenges to Jury Pool.

A. Equal Protection Challenges. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and article I, sections 19 and 26, of the North Carolina Constitution protect against jury selection procedures that intentionally exclude members of an identifiable class, such as race, from jury service. *Castaneda v. Partida*, 430 U.S. 482, 493-94 (1977); *State v. Hardy*, 293 N.C. 105, 113-15 (1977). A defendant alleging discrimination in the jury selection process need not belong to the class that is the subject of alleged discrimination—that is, a white defendant has standing to challenge the exclusion of blacks from jury service. See *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998).

The defendant has the burden of proving intentional discrimination. *State v. Ray*, 274 N.C. 556, 563 (1968). The defendant must first establish a prima facie case of discrimination against a particular group by showing that the jury selection procedure resulted in substantial underrepresentation of that group. Compare *Castaneda*, 430 U.S. at 496-97 (prima facie case established), with *Hardy*, 239 N.C. at 114-16 (prima facie case not established). The burden then shifts to the State to rebut the prima facie case by showing a race-neutral reason for the discrepancy. *Castaneda*, 430 U.S. at 497 (State failed to rebut prima facie case); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1387-88 (11th Cir. 1982) (State rebutted prima facie case).

B. Fair Cross-Section Challenges. The Sixth Amendment requires that the jury be drawn from a “representative cross-section” of the community. See *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 528-29 (1975). The primary difference between a fair cross-section and equal protection challenge is that to prove a fair cross-section violation, the defendant is not required to prove intentional discrimination by the State. Instead, the defendant need only show the exclusion of the alleged class was “systematic” or an inevitable result of the selection procedure that excluded the class from the process. *Taylor*, 419 U.S. at 538 (cross-section violation when state constitution and state law provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service; 53% of people eligible for jury service were female, but no more than 10% of people in jury pool were female); *State v. Bowman*, 349 N.C. 459, 467-69 (1998) (no prima facie case of systematic underrepresentation when black population was 39.17% and blacks in jury pool were 23%). The cross-section requirement applies only to the jury pool and not to the twelve-person jury. *Holland v. Illinois*, 493 U.S. 474, 480-81 (1990).

A challenge to the jury pool must comply with the procedural requirements of G.S. 15A-1211(c), which includes a requirement that the challenge must be in writing and be made and decided before any juror is examined.

- C. Remedy for Successful Challenge.** If a challenge on either equal protection or cross section grounds is successful, the trial court must dismiss the jury pool, G.S. 15A-1211(c), and a new jury pool must be lawfully selected.
- V. Supplemental Jurors to Original Jury Pool.** Sometimes an original jury pool will be insufficient to meet the court's needs. To facilitate the court's business, G.S. 9-11(b) permits a trial judge, in his or her discretion, at any time before or during a court session, to direct that supplemental jurors be selected from the master jury list in the same manner as regular jurors. The judge may discharge these jurors at any time during the session and they are subject to the same challenges as regular jurors. *Id.* This statute "neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served." *State v. Mebane*, 106 N.C. App. 516, 524 (1992) (finding no abuse of discretion by trial judge in continuing with jury selection after the original pool had been depleted even though only four of the fifty supplemental jurors selected from the jury list had been served and had reported for jury duty).
- Under G.S. 9-11, trial judges also are permitted, without using the jury list, to "order the sheriff to summon from day to day additional jurors to supplement the original venire." Supplemental jurors summoned by the sheriff must have the same qualifications as jurors selected for the regular jury list and are subject to the same challenges. G.S. 9-11(a). This type of juror is "selected infrequently and only to provide a source from which to fill the unexpected needs of the court." *State v. White*, 6 N.C. App. 425, 428 (1969).
- The sheriff may use his or her discretion in determining the method of selection of the supplemental jurors, but "must act with entire impartiality." *White*, 6 N.C. App. at 428 (quotation omitted). G.S. 9-11(a) provides that if the judge finds that the sheriff is not suitable to select additional jurors because of a direct or indirect interest in the trial, the judge can appoint some other suitable person to summon the supplemental jurors (for example, the head of another law enforcement agency in the county whose agency is not involved in the trial). Challenges to the selection of the supplemental jurors are sustainable if "there is partiality or misconduct [by] the Sheriff, or some irregularity in making out the list." *State v. Dixon*, 215 N.C. 438, 440 (1939) (quotation omitted).
- VI. Special Venire from Another County.** A special venire of jurors from outside the county or the district where the case is being tried may be summoned for jury duty by the judge if he or she determines that it is necessary for a fair trial. The defendant or the State may move for special venire or the judge may do so on his or her own motion. G.S. 9-12(a); G.S. 15A-958. This motion can be made as an alternative to a motion for a change of venue. *State v. Moore*, 319 N.C. 645, 646 (1987). The party making a motion for a special venire has the burden of proof to establish that "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *Id.* at 650 (quotation omitted); *State v. Jaynes*, 342 N.C. 249, 264 (1995).
- The judge can order the jurors to be brought from any county or counties in the district or set of districts in which the county of trial is located or in any adjoining district or districts as defined in G.S. 7A-41.1(a). See G.S. 9-12(a). These jurors are selected and serve in the same manner as supplemental jurors from master jury lists. They also are subject to the same challenges as other jurors with the exception of a challenge for non-residency in the county of trial. *Id.* Transportation may be furnished to the jurors instead of mileage. G.S. 9-12(b).

VII. Requests to be Excused Not Requiring Personal Appearance. In certain situations, a person summoned for jury duty may request to be excused, deferred, or exempted from service without appearing in person. 2023 legislation amended G.S. 9-6 with a new subsection (a1), effective July 1, 2024, that states: "All applications for excuses from jury duty, including applications based on disqualification under G.S. 9-3, shall be made on a form developed and furnished by the Administrative Office of the Courts." S.L. 2023-140, Sec. 44.(b). The new form was not yet available at the time of writing.

A. Excusing Juror Based on Age. There is no maximum age for jury service. People who are 72 years old or older may request to be excused from the jury in writing rather than by personally appearing in court. A signed statement of the ground for the request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(a) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(a) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024). The district court judge, who handles these requests in advance of trial, has the discretion whether to allow or deny the request, but a judge may not adopt a blanket policy of excusing all elderly jurors who request to be excused. See *State v. Rogers*, 355 N.C. 420, 447-48 (2002).

The same standard applies at the superior court trial. See *State v. Elliott*, 360 N.C. 400, 406-08 (2006) (trial judge did not abuse his discretion in refusing to excuse an elderly prospective juror when she had no hardship other than advanced age; four elderly prospective jurors that had been excused each had a compelling personal hardship). A judge should remember, based on *State v. Rogers* that he or she must exercise his or her discretion whether to excuse elderly jurors and may not adopt a blanket policy of excusing them.

B. Excusing Jurors Who Are Students. A person who is a full-time student enrolled at an out-of-state postsecondary private educational institution, including a trade or professional institution, college, or university may request to be excused from the jury in writing rather than by personally appearing in court. A signed statement of the ground for the request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(a) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(a) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024). If the session of court for which the full-time student is summoned for jury service is scheduled during a period of time when he or she is taking classes or exams, G.S. 9-6(b1) mandates that the person must be excused upon request made pursuant to G.S. 9-6.1(a) and supported by documentation showing enrollment at the out-of-state educational institution.

C. Excusing Juror with Disability. A person summoned as a juror who has a disability that could interfere with his or her ability to serve as a juror may request in writing (rather than personally appearing in court) to be excused from jury service by filing a signed statement with the ground to support the request, including a brief description of the disability. The request must be filed with the chief district court judge or his or her designee (a district court judge, the clerk, or judicial support staff) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(b) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-

6.1(b) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change and has an effective date of July 1, 2024).

A superior court during jury selection also may excuse a juror who has a disability that could interfere with the ability to serve. *State v. Alston*, 341 N.C. 198, 222 (1995) (juror excused after it became apparent that she had been very sick with the measles and encephalitis and she did not understand the proceedings).

- D. Procedure.** A person summoned as a juror may request either a temporary or permanent exemption from jury service. G.S. 9-6.1(c). Except in situations where excusal is mandatory on the basis of enrollment as a full-time student out of state, the judge, clerk, or judicial support staff member responsible for hearing applications for excuses from jury duty has discretion whether to grant the requested excuse under the same standards otherwise applicable to hardship excuses, see Section VIII.A. below, and may substitute a temporary exemption for a requested permanent exemption. G.S. 9-6.1(c) (S.L. 2023-103, Sec. 8.(b) amended G.S. 9-6.1(c) by adding the clerk of superior court as a permissible designee and has an effective date of October 1, 2023). Eligible supplemental jurors summoned under G.S. 9-11 may give notice of their request for an excuse at the time of being summoned. *Id.* If a request is rejected the prospective juror must be immediately notified by telephone, letter, or personally. *Id.*

VIII. Hardship Excuses. The General Assembly has declared it is the public policy of the state that jury service is a solemn obligation of all qualified citizens and that people qualified for jury service should be excused or deferred only for reasons of “compelling personal hardship” or because service would be “contrary to the public welfare, health, or safety.” G.S. 9-6(a).

- A. Procedure.** The chief district court judge must promulgate procedures whereby applications for excuses from jury duty are heard and determined in district court before the date that a jury session or sessions of superior or district court convenes. G.S. 9-6(b). The chief district court judge may delegate the duty to receive, hear, and pass upon applications for excuses to another district court judge, judicial support staff, or to the clerk of superior court (with the clerk’s consent) (S.L. 2023-103, Sec. 8.(a) amended G.S. 9-6(b) by permitting the duty to receive, hear, and pass upon applications for excuses to be delegated to the clerk of superior court with the clerk’s consent, effective October 1, 2023; S.L. 2023-140, Sec. 44.(c) repeated this change in substance and has an effective date of July 1, 2024). As noted above, 2023 legislation, S.L. 2023-140, Sec. 44.(b), amended G.S. 9-6 with a new subsection (a1), effective July 1, 2024, requiring that requests for excuses from jury duty be made on a form developed by the Administrative Office of the Courts. The new form was not yet available at the time of writing.

With the exception of the mandatory excuse for certain full-time students enrolled out-of-state, G.S. 9-6(a) generally provides that an excuse from jury duty “should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.” A superior court judge during jury selection also may excuse or defer prospective jurors for hardship. G.S. 9-6(f). A judge has broad discretion in determining what constitutes hardship. See, e.g., *State v. Rogers*, 355 N.C. 420, 448 (2002) (language of G.S. 9-6(a) gives court “considerable latitude” and decision whether to excuse juror “lies in the [court’s] discretion”); *State v. Hedgepeth*, 350 N.C.

776, 797 (1999) (no error in failing to excuse juror who had inoperable brain tumor when trial judge was convinced that juror's memory impairment was insufficient to disqualify juror).

The judge (and presumably the clerk or judicial support staff) hearing applications for excuses from jury duty must excuse any person who is disqualified from service under G.S. 9-3. G.S. 9-6(d); see also Section II., above. The judge must inform the clerk of superior court of persons excused from jury service and the clerk must keep a record of excuses separate from the master jury list. G.S. 9-6(e). Effective July 1, 2024, G.S. 9-6(e) requires that this record be kept in accordance with G.S. 9-6.2, which requires, among other things, that the clerk communicate to the State Board of Elections information regarding requests to be excused from jury service on the basis that the person is not a United States citizen. See generally S.L. 2023-140, Sec. 44.

- B. Right to be Present.** A defendant's unwaivable right to be present during his or her capital trial does not apply to a district court's proceedings to hear hardship excuses before the superior court trial. *State v. McCarver*, 341 N.C. 364, 378-79 (1995). However, the unwaivable right to be present begins once the superior court case is called for trial, which means thereafter a superior court judge may not excuse jurors outside the defendant's presence. *State v. Cole*, 331 N.C. 272, 275 (1992); *State v. Smith*, 326 N.C. 792, 794 (1990).

IX. Preliminary Procedures Before Voir Dire Questioning.

- A. Defendant's Plea to Charges.** Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on the defendant's behalf. A defendant who filed a written request for an arraignment must be arraigned and have his or her plea recorded outside the prospective jurors' presence. G.S. 15A-1221; 15A-941.

- B. Pleadings May Not Be Read to Prospective Jurors.** The judge may not read the pleadings (e.g., the indictment) to the jury. G.S. 15A-1213.

- C. Judge's Preliminary Instructions to Prospective Jurors.** Before questioning begins, the trial judge must identify the parties and their attorneys and must briefly inform the prospective jurors of the

- charges against the defendant,
- dates of the alleged offenses,
- name of any alleged victim,
- defendant's plea, and
- any affirmative defense of which the defendant has given pretrial notice

G.S. 15A-1213; 15A-1221(a)(2). The judge may use N.C.P.I.—Crim. 100.20 to accomplish these duties. See also N.C.P.I.—Crim. 100.21 (remarks to prospective jurors after excuses heard).

In a capital case, there is an additional instruction, N.C.P.I.—Crim. 106.10, that the judge may give to the prospective jurors that briefly explains the trial and sentencing proceedings.

- D. Jury Instruction on Employer's Unlawful Discharge of Employee for Juror's Service.** If appropriate under the circumstances of a particular trial, a judge may

want to instruct the prospective jurors about the prohibition in G.S. 9-32 against an employer's discharging or demoting a juror because the employee has been called for jury duty or is serving as a grand juror or petit juror. Below is a suggested jury instruction to prospective jurors before voir dire begins.

Members of the jury, because this trial may be lengthy and may cause you to miss many work days, I want to inform you of North Carolina law concerning your employer and service as a juror. An employer is prohibited by law from discharging or demoting any employee because he or she has been called for jury duty or is serving as a juror. An employer who violates this law is subject to a civil lawsuit for damages suffered by an employee as a result of the violation, as well as reinstatement to the employee's former position.

- E. Jury Questionnaire.** A judge has the discretion to grant a party's request that prospective jurors complete a questionnaire as part of the jury selection process. *State v. Lyons*, 340 N.C. 646, 667 (1995) (no error in denying the defendant's motion for a questionnaire); *State v. Fisher*, 336 N.C. 684, 693-94 (1994) (same; noting that "[r]egulation of the manner and extent of the inquiry of prospective jurors concerning their fitness rests largely in the discretion of the trial court"). A judge may review the questionnaire to determine whether questions should be deleted or revised. *State v. Blakeney*, 352 N.C. 287, 298 (2000) (trial court did not abuse its discretion in deleting question on defendant's jury questionnaire that asked about jurors' contacts with people of other races; defendant did not show that he was prohibited from asking same question during voir dire); *Fisher*, 336 N.C. at 694 (similar holding).
- F. Random Selection of Prospective Jurors for Questioning.** G.S. 15A-1214(a) requires that the court clerk must call jurors from the jury pool by a system of random selection that precludes advance knowledge of the identity of the next juror to be called. All counties use an automated system to ensure a random selection. The statute also provides that a juror who is called and assigned to the jury box retains the seat assigned until excused.
- X. Voir Dire Procedure.**
- A. Generally.** Two sets of statutes govern jury voir dire, G.S. 9-14 and 9-15, and G.S. 15A-1211 through 15A-1217. These statutes grant the trial judge broad discretion to determine the extent and manner of voir dire. *See, e.g., Fisher*, 336 N.C. at 693-94 (extent and manner of voir dire subject to trial judge's close supervision and subject to reversal only on showing of abuse of discretion). Note that while a trial judge has broad discretion with respect to voir dire, the North Carolina Court of Appeals recently held that structural error occurred during jury selection where the trial court admonished prospective jurors in a manner that, while well intentioned, interjected issues of race and religion into the selection process such that some potential jurors likely would be reluctant to honestly answer questions posed in voir dire. *State v. Campbell*, 280 N.C. App. 83, 89 (2021).
- B. Recording Jury Selection.** In a capital case, jury selection must be recorded. G.S. 15A-1241(a)(1) (requiring recording of all proceedings except jury selection

in non-capital cases). Upon a motion of any party or on the judge's own motion, jury selection must be recorded in a non-capital case. G.S. 15A-1241(b).

- C. Number of Peremptory Challenges.** Peremptory challenges allow a party to remove a juror for any reason, except for impermissible racial and other reasons under *Baston v. Kentucky*, discussed in Section XIV.B., below. Challenges for cause are discussed in Section XIII., below.

Peremptory challenges under G.S. 15A-1217 are allotted to the parties based on the number of defendants, not on the number of charges against any defendant.

In capital cases, each defendant is allowed 14 challenges and the State is allowed 14 challenges for each defendant. In noncapital cases, each defendant is allowed six challenges and the State is allowed six challenges for each defendant.

Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges.

The North Carolina Supreme Court has held that a trial court does not have the authority to grant additional peremptory challenges other than permitted in G.S. 15A-1214(i) (trial court must grant additional peremptory challenge if, on reconsideration of defendant's previously denied challenge for cause, the court determines that juror should have been excused for cause). *State v. Smith*, 359 N.C. 199, 207 (2005); *State v. Hunt*, 325 N.C. 187, 198 (1997).

The exercise of peremptory challenges is discussed in more detail in Section XIV., below. The case law sometimes refers to a peremptory challenge as a "peremptory strike" and the exercise of a peremptory challenge as "striking" a prospective juror. This chapter also uses that terminology at times, particularly when helpful for clarity while discussing "*Batson* challenges," a term that refers to a party's claim of allegedly impermissible use of a peremptory strike by the opposing party.

- D. Parties' Right to Question Jurors.** Counsel for both parties are statutorily entitled to question jurors and are primarily responsible for conducting voir dire. G.S. 15A-1214(c); G.S. 9-15(a). The trial judge "may briefly question prospective jurors individually or as a group concerning general fitness and competency." G.S. 15A-1214(b). However, both parties are entitled to repeat the judge's questions. G.S. 15A-1214(c). *State v. Jones*, 336 N.C. 490, 496-98 (1994) (trial judge erred when, at outset of jury selection, he indicated that counsel for either side would not be permitted to ask any question of a prospective juror that had been previously asked and answered).

To expedite voir dire, the trial judge may require the parties to direct certain general questions to the panel as a whole; however, a blanket ban prohibiting parties from questioning jurors individually violates G.S. 15A-1214(c). See *State v. Campbell*, 340 N.C. 612, 627 (1995); *State v. Phillips*, 300 N.C. 678, 681-82 (1980).

- E. Order of Questioning.** G.S. 15A-1214(d) requires that the prosecutor question prospective jurors first. When the prosecutor is satisfied with a panel of twelve after exercising challenges for cause and peremptory challenges, the prosecutor passes the panel to the defense for questioning and exercise of challenges for cause and peremptory challenges. Then the questioning reverts to the State to fill all vacancies and then back to the defendant. Failure to comply with the statute is

error, although it may not necessarily constitute prejudicial error. See, e.g., *State v. Lawrence*, 352 N.C. 1, 13 (2000); *State v. Woodley*, 286 N.C. App. 450, 464-66 (2022) (defendant was not prejudiced by statutorily noncompliant jury selection procedure involving the passing of five jurors at a time because of social distancing in the jury box during COVID-19 pandemic).

In noncapital cases the trial court has discretion whether to allow a party to attempt to rehabilitate a juror who is challenged for cause by the opposing party. *State v. Enoch*, 261 N.C. App. 474, 488 (2018) (citing precedent establishing that providing an opportunity to rehabilitate is not mandatory; trial court did not err by denying defendant an opportunity to rehabilitate before granting State's peremptory challenge). Note that challenges for cause are discussed in detail in Section XIII. and juror rehabilitation in capital cases is discussed in Section XII.A.

- F. Order of Questioning with Co-Defendants.** After the State is satisfied with a panel of twelve jurors, the panel should be passed to each co-defendant consecutively, who exercise challenges for cause and peremptory challenges, and then the questioning reverts to the State to fill all vacancies and then goes back to the co-defendants. G.S. 15A-1214(e), (f). The trial judge has the discretion to determine the order of examination among multiple defendants. G.S. 15A-1214(e).
- G. Alternate Jurors.** The trial judge may permit the seating of one or more alternate jurors. G.S. 15A-1215(a). However, in a capital trial or a capital sentencing hearing (when the defendant has pled guilty to the offense), the judge is required to provide for the selection of at least two alternate jurors. G.S. 15A-1215(b). The judge should consider the expected length of a capital trial or sentencing hearing in deciding how many additional alternates beside the required two should be selected. The same considerations are relevant in determining how many alternates, if any, should be selected in a non-capital case.
- H. Individual Voir Dire.** Individual voir dire is a process in which a single prospective juror is questioned by the parties without the presence of the other prospective jurors. A defendant does not have a right to individual voir dire. *State v. Nicholson*, 355 N.C. 1, 18 (2002). The trial judge in capital cases has statutory authority to permit individual voir dire of jurors. G.S. 15A-1214(j). Even absent statutory authority, it would appear that a judge also may do so in a non-capital case given a trial court's broad authority over the jury selection process. *State v. Ysaguirre*, 309 N.C. 780, 784 (1983) (implicitly recognizing discretion to allow individual voir dire in non-capital case). A judge who permits individual voir dire may limit it to certain issues, such as death qualification, pretrial publicity, or other sensitive topics. *State v. Roache*, 358 N.C. 243, 274 (2004).
- When conducting individual voir dire in a capital case pursuant to G.S. 15A-1214(j), the State first must pass on each juror just as it passes on twelve jurors when conducting regular voir dire. G.S. 15A-1214(j); *Roache*, 358 N.C. at 272-74. The North Carolina Supreme Court has stated that in cases where G.S. 15A-1214(j) does not apply but individual voir dire nevertheless is conducted, the State must pass on twelve jurors just as it would during regular voir dire. *Roache*, 358 N.C. at 274.

- I. **Reopening Voir Dire.** After a juror has been accepted by one or both parties, if the trial judge discovers that a juror has made a misrepresentation during voir dire or for other “good reason,” the judge may reopen voir dire of the juror, before or after the jury has been impaneled. *State v. Holden*, 346 N.C. 404, 429 (1997); G.S. 15A-1214(g). For example, when a juror appears to have changed his or her mind since the State’s examination, or the juror’s answers to defense questions appear inconsistent with answers to the State’s questions, there may be a good reason to reopen voir dire. *State v. Womble*, 343 N.C. 667, 678 (1996) (trial judge had good reason to reopen voir dire of juror whose answers to questions posed by defense counsel indicated that he might be unable to return death sentence); *State v. Brady*, 299 N.C. 547, 553 (1980) (trial judge did not commit reversible error by permitting further examination and challenge of juror by State after jury was impaneled and trial had begun, when juror indicated that he was employed by and worked closely with defendant’s brother).

The trial judge may question the juror or permit the parties to do so, and the judge may excuse the juror for cause. G.S. 15A-1214(g). Once the judge reopens examination of a juror, each party has the “absolute” right to exercise any remaining peremptory challenges to excuse the juror. G.S. 15A-1214(g)(3); *State v. Womble*, 343 N.C. 667, 678 (1996). Reopening occurs when the judge allows the parties to question the juror, *State v. Boggess*, 358 N.C. 676, 683 (2004), *State v. Hammonds*, 218 N.C. App. 158, 165 (2012), even if neither party asks any questions. *State v. Thomas*, 230 N.C. App. 127, 132-33 (2013). In *Thomas*, after the jury was impaneled a juror informed a court official that she knew a State’s witness. The trial judge questioned the juror, but neither party did so even though the judge gave them the opportunity. The court held that once the trial judge allowed the parties to question the juror, it reopened examination. The defendant was not required to ask any questions in order to exercise a peremptory challenge to remove the juror. The court remanded the case for a new trial. The North Carolina Supreme Court has observed that a trial judge “has leeway to make an initial inquiry” into whether there are grounds for reopening voir dire by, for example, questioning the juror or consulting with the parties, and that this initial inquiry does not necessarily constitute a formal reopening of voir dire such that the juror may be challenged for cause or by peremptory challenge. *Boggess*, 358 N.C. at 683 (2004); see also *State v. Gidderon*, 289 N.C. App. 216, 219-222 (2023) (trial court did not abuse its discretion by declining to reopen voir dire after examining juror); *State v. Adams*, 285 N.C. App. 379, 390 (2022) (same).

- XI. **Scope of Permitted Questioning.** Jury voir dire serves two basic purposes. It assists counsel: (1) to determine whether a basis for a challenge for cause exists, and (2) to intelligently exercise peremptory challenges. *State v. Wiley*, 355 N.C. 592, 611 (2002); *State v. Anderson*, 350 N.C. 152, 170 (1999).

The scope of permitted voir dire is largely a matter of trial court discretion. There are a large number of appellate cases concerning proper and improper voir dire questions, and sometimes they appear inconsistent. An explanation for the apparent inconsistency is that appellate courts emphasize a trial judge’s broad discretion in controlling jury selection. If one judge allows a question in one trial, while a different judge disallows a similar question in another trial, both judges’ rulings may be affirmed.

Also, one must remember that appellate courts review only a small number of all voir dire rulings, namely a convicted defendant’s appellate challenge when a trial judge upheld a prosecutor’s question over a defendant’s objection or sustained a prosecutor’s

objection to a defendant's question. Left unreviewed are a prosecutor's unsuccessful objection to a defendant's question, a defendant's successful objection to a prosecutor's question, and all questions in a trial in which the defendant was found not guilty, a mistrial was declared, or a conviction was not appealed by the defendant.

For a more detailed discussion of voir dire questions in capital trials, see JEFFREY B. WELTY, NORTH CAROLINA CAPITAL CASE LAW HANDBOOK, 81-95 (3d ed. 2013).

A. Questions About Juror's Racial Bias. The United States Supreme Court held in *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), that the black defendant, who was a civil rights activist and whose defense was selective prosecution for marijuana possession because of his civil rights activity, was entitled under the Due Process Clause of the Fourteenth Amendment to voir dire jurors about racial bias. *Ham* later was limited by *Ristaino v. Ross*, 424 U.S. 589 (1976), which held that the Due Process Clause does not provide for a general right to question prospective jurors about racial prejudice. Such questions are constitutionally mandated in the "special circumstances" where racial issues are "inextricably bound up with the conduct of the trial," such as was the case in *Ham*. *Ristaino*, 424 U.S. at 597. In *Ristaino*, an assault with intent to murder case tried in Massachusetts state court, the Court noted that while voir dire questioning about racial bias was not constitutionally mandated on the mere basis that the defendants were black and the victim was white, "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." 424 U.S. at 597, n.9. See also *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion adopting supervisory rule for federal courts that it is reversible error for trial court to disallow requested voir dire on racial or ethnic prejudice if circumstances of the case indicate that there is a reasonable possibility that such prejudice might have influenced the jury). In *State v. Crump*, 376 N.C. 375, 381-89 (2020), the North Carolina Supreme Court held that the trial court committed prejudicial error during voir dire where it "flatly prohibited" the defendant from posing questions "about racial bias and police-officer shootings of black men." The case involved assault charges related to an exchange of gunfire between the defendant and officers, and the issue of police officer shootings of black men was a topic of significant national attention at the time of the trial. The court in *Crump* grounded its reasoning in the state and federal constitutional guarantees of a fair and impartial jury and the essential role that inquiry into relevant issues through voir dire plays in ensuring those rights. *Id.* at 381-82. The court contrasted the improper categorical denial of a line of inquiry into a relevant issue in the case at hand with a trial court's general discretion to properly regulate the manner and extent of questioning during voir dire. *Id.* at 384.

With respect to capital cases, the United States Supreme Court in *Turner v. Murray*, 476 U.S. 28, 36-37 (1986), held that defendants being tried for an interracial crime have a right under the Sixth Amendment to question prospective jurors about racial bias. The trial judge has the discretion to determine the breadth of racial bias questions. See *State v. Robinson*, 330 N.C. 1, 12-13 (1991) (trial judge in capital trial allowed defendant to question jurors whether racial prejudice would affect their ability to be fair and impartial and allowed defendant to ask white jurors about their associations with blacks; trial judge did not err in prohibiting other questions, such as "Do you belong to any social club or political organization or church in which there are no black members?" and "Do you feel

like the presence of blacks in your neighborhood has lowered the value of your property . . . ?”); *see also Crump*, 376 N.C. at 384 (noting *Robinson's* recognition of a trial court's discretion to manage the form and number of questions on the issue of racial bias).

Issues concerning racial and other impermissible reasons in exercising peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986), are discussed in Section XIV.B. below.

- B. Stakeout Questions.** Probably the most litigated voir dire question is commonly known as the stakeout question (also known as a hypothetical question). The North Carolina Supreme Court has described the stakeout question as an impermissible attempt to elicit in advance what a juror's position would be under a certain state of the evidence or on a given state of facts. *State v. Vinson*, 287 N.C. 326, 336 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976); *see also Crump*, 376 N.C. at 388 (mere fact that question “implicated a factual circumstance bearing similarity to the defendant's own case does not transform an appropriate question into an impermissible stakeout question”). Jurors should not be asked to pledge themselves to a future course of action before hearing evidence and receiving instructions on the law. *Id.*

As the cases below illustrate, appellate courts may appear to be inconsistent in deciding the stakeout issue. However, this apparent inconsistency may be explained because a trial judge has broad discretion over jury questioning and his or her rulings will be upheld unless there is an abuse of discretion.

Cases Upholding Trial Court's Ruling Barring Defense Question

State v. Rogers, 316 N.C. 203, 219 (1986) (defendant wanted to ask prospective jurors whether the fact that defense called fewer witnesses than the State would make a difference in their verdict), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570 (1988).

State v. Maness, 363 N.C. 261, 269 (2009) (defendant asked whether the juror could, if convinced that life imprisonment was the appropriate penalty, return such a verdict even if the other jurors were of a different opinion).

State v. Jaynes, 353 N.C. 534, 548-49 (2001) (defense counsel asked about which specific circumstances would cause jurors to consider life sentence).

State v. Bracey, 303 N.C. 112, 119 (1981) (defense counsel asked jurors if they would change their opinion that defendant was not guilty if eleven other jurors held a different opinion)

State v. Jackson, 284 N.C. 321, 325 (1973) (defendant asked jurors if they would adopt an interpretation of the evidence that points to innocence and reject that of guilt if they found that the evidence was susceptible to two reasonable interpretations).

State v. Richmond, 347 N.C. 412, 424 (1998) (defense counsel asked whether jurors could return life sentence knowing that defendant had prior conviction for first-degree murder).

State v. Wiley, 355 N.C. 592, 610 (2002) (defense counsel asked, "Have you ever heard of a case where you thought that life without the possibility of parole should be the punishment?").

State v. Miller, 339 N.C. 663, 679 (1995) (defendant sought to ask whether, because of defendant's drug abuse, jurors could consider a particular mitigating circumstance; general questions, such as whether the juror could follow instructions about considering mitigating circumstances, are permissible, but this inquiry was an improper attempt to stake out the jurors).

State v. Leroux, 326 N.C. 368, 383 (1990) (defendant made inquiries such as "Would your theories about the overindulgence of alcohol tend to color your thinking about [defendant] if you find that he is an alcoholic from the evidence?" and "Do you have such strong feelings about the use of alcohol that you couldn't be fair to someone that you believe to be an alcoholic?"; counsel may not "fish" for legal conclusions or argue its case during jury voir dire).

Cases Reversing Trial Court's Ruling Barring Defense Question

State v. Crump, 376 N.C. 375, 386-88 (2020) (rejecting State's argument that defense counsel posed stake out questions by asking (1) whether prospective jurors were aware of a recent case in the same jurisdiction involving similar circumstance to the case at hand, and (2) generally whether prospective jurors had opinions and/or biases regarding police officer shootings of black men; neither of these lines of inquiry involved improper stake out questions as they did not pose a hypothetical and appropriately explored the relevant issue of prospective jurors' ability to be unbiased)

State v. Hatfield, 128 N.C. App. 294, 297 (1998) (defense counsel should have been allowed to ask prospective jurors if they thought that children were more likely to tell the truth when they made allegations of sexual abuse; the question properly inquired into jurors' sympathies toward molested child and was indistinguishable from *State v. McKoy*, 323 N.C. 1 (1988), summarized below).

State v. Hedgepeth, 66 N.C. App. 390, 393 (1984) (defense counsel should have been allowed to ask prospective jurors about their willingness and ability to follow the judge's instructions that they were to consider defendant's prior criminal record only to determine his credibility as a witness).

Cases Upholding Trial Court's Ruling Allowing Prosecutor's Question

State v. McKoy, 323 N.C. 1, 13 (1988) (prosecutor asked whether jurors would be sympathetic toward a defendant who was intoxicated at the time of the offense), *vacated in part on other grounds*, 494 U.S. 433 (1990).

State v. Bond, 345 N.C. 1, 16 (1996) (prosecutor asked whether jurors could return a death sentence knowing that defendant was an accessory and not present at the shooting scene).

State v. Green, 336 N.C. 142, 158 (1994) (prosecutor asked whether any juror could conceive of any first-degree murder case when the death penalty would be the right punishment).

State v. Clark, 319 N.C. 215, 220 (1987) (prosecutor asked jurors whether lack of eyewitnesses would cause them any problems after having informed them that State would rely on circumstantial evidence and having defined circumstantial evidence).

State v. Chapman, 359 N.C. 328, 346 (2005) (prosecutor asked prospective jurors, "Would you feel sympathy towards the defendant simply because you would see him here in court each day of the trial?").

State v. Johnson, 164 N.C. App. 1, 21 (2004) (prosecutor asked jurors whether they would consider accomplice's testimony when accomplice was testifying pursuant to plea bargain).

State v. Roberts, 135 N.C. App. 690, 697 (1999) (prosecutor asked whether jurors had a "per se problem with eyewitness identification").

State v. Henderson, 155 N.C. App. 719, 726 (2003) (prosecutor asked whether jurors would expect State to provide medical evidence that the crime occurred).

C. Other Voir Dire Questions

1. **Confusing Statements About Law.** Parties may not ask questions that incorporate incorrect or misleading statements of law. See *State v. Bryant*, 282 N.C. 92, 95 (1972) (improper to ask jurors if after hearing the evidence "you thought that [defendant] was probably guilty, and if you were not convinced absolutely that he was not guilty," would you be able to return a verdict of not guilty); *State v. Wood*, 20 N.C. App. 267, 269 (1973) (improper to ask if juror should have "one single reasonable doubt" would juror vote to find the defendant not guilty).
2. **Defendant's Failure to Testify or Offer Evidence.** Because a criminal defendant has the right not to testify, a defendant may ask jurors whether exercising that right would affect their ability to be fair and impartial or to follow the trial court's instructions on the law. See *State v. Bates*, 343 N.C. 564, 588 (1996) (citing precedent establishing that such inquiry is "entirely proper"). However, the trial court retains considerable discretion as to the manner and extent of this inquiry so long as the defendant is provided sufficient opportunity to explore the issue, *State v. Campbell*, 359 N.C. 644, 665 (2005) (trial court did not err by limiting inquiry where jurors were properly instructed by court on defendant's right not to testify and the defendant was able to inquire whether they could be able to follow the law). It is worth noting that several appellate cases have found questions concerning the potential effect of a defendant's decision not to testify on a juror's verdict to have been properly disallowed as stake out questions. See, e.g., *State v. Hill*, 331 N.C. 387, 404 (1992) (court held that trial judge properly refused to allow defendant to ask prospective jurors, before they had been instructed on applicable legal principles, whether they would "feel the need to hear from" the defendant to find him not guilty); *State v. Phillips*, 300 N.C. 678, 682 (1980) (trial judge properly

barred the defendant from asking juror if defendant would have to prove anything to her before he would be entitled to verdict of not guilty; court stated that jurors should not be asked what kind of verdict they would render under certain named circumstances).

3. **Jurors' Personal Lives, Experiences, and Beliefs.** Generally, the parties are entitled to inquire into the experiences, beliefs, and attitudes of prospective jurors which are relevant to their ability to be fair and impartial and to follow the law in the case at hand. See, e.g., *State v. Lloyd*, 321 N.C. 301, 307 (so stating), vacated on other grounds, 488 U.S. 807 (1988). The appellate courts have been careful to note, however, that this generally permissible line of inquiry does not amount to "the right to delve without restraint into all matters concerning potential jurors' private lives." *Id.* As with other matters, the trial court has considerable discretion to control the manner and extent of inquiry on this issue. See, e.g., *State v. Anderson*, 350 N.C. 152, 171-72 (1999) (trial judge did not err by sustaining the State's objection to defendant's questions about jurors' religious beliefs; impermissible questions concerned jurors' church memberships and whether their churches' members ever expressed opinions about the death penalty; instead of questions relating to the jurors' religious beliefs, the impermissible questions concerned the juror's affiliations and beliefs espoused by others in their churches); *State v. Mash*, 328 N.C. 61 (1991) (trial judge properly prohibited defendant from questioning jurors about their "difficulty" in considering expert mental health testimony and the jurors' personal experiences with alcohol; court noted that trial judge allowed sufficient inquiry in this case about jurors' ability to be fair, to consider the evidence, and to follow the law); *State v. Laws*, 325 N.C. 81, 109 (1989) (trial judge properly barred defendant's question as to whether juror believed in literal interpretation of the Bible; counsel's right to inquire about jurors' beliefs to determine their biases and attitudes does not extend to all aspects of their private lives or religious beliefs; judge had allowed the defendant to inquire about other aspects of the jurors' religious activities), vacated on other grounds, 494 U.S. 1022 (1990); *State v. Huffstetler*, 312 N.C. 92, 104 (1984) (trial judge properly barred defendant's inquiry of jurors concerning the death penalty positions held by the leaders of their churches).
4. **Pretrial Publicity.** Due process requires that a defendant receive a fair trial by an impartial jury free from prejudicial outside influences, such as pretrial publicity. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Parties may question prospective jurors whether they have knowledge of the case and, if so, whether they could set aside that knowledge and base their verdict solely on the evidence introduced at trial and the judge's instructions on the law. *State v. Moseley*, 338 N.C. 1, 18 (1994). The trial judge in his or her discretion may allow individual voir dire on the pretrial publicity issue, particularly if the judge finds it appropriate to allow the parties to question the prospective jurors about the content of their knowledge of the case, even though such inquiry is not necessarily constitutional required (see *Mu'Min v. Virginia*, discussed below). Individual voir dire on pretrial publicity was noted in *State v. Boykin*, 291 N.C. 264, 269 (1980), and utilized by the trial judge in *State v. Moseley*. See Section X.H. above, for a discussion of individual voir dire.

In *Mu'Min v. Virginia*, 500 U.S. 415, 419 (1991), the Court considered a case in which defendant's first-degree murder trial had received extensive pretrial publicity. The trial judge questioned prospective jurors about their knowledge of the homicide and—if they admitted knowledge—whether they could be fair and impartial. However, the trial court refused the defendant's request that the judge question prospective jurors concerning the *content* of that knowledge. On appeal, the Court held that the trial court's refusal did not violate the defendant's Sixth Amendment right to an impartial jury or right to due process under the Fourteenth Amendment.

When a defendant makes a motion for a change of venue based on pretrial publicity, the judge conducts a full hearing, and the record fails to show that any juror objectionable to the defendant was permitted to sit on the jury or fails to show the defendant exhausted his or her peremptory challenges before accepting the jury, the denial of the motion for a change of venue is not error. *State v. Harding*, 291 N.C. 223, 227 (1976); *State v. Harrill*, 289 N.C. 186, 191 (1976), *vacated on other grounds*, 428 U.S. 904. It is an abuse of discretion to fail to grant a change of venue or a special venire panel if the evidence presented shows the existence of prejudicial pretrial publicity such that "there is a reasonable likelihood that a fair trial cannot be had." *Boykin*, 291 N.C. at 270.

XII. Capital Case Issues.

A. Death Qualification of Jury. Under *Wainwright v. Witt*, 469 U.S. 412 (1985), a prospective juror in a capital case is subject to a challenge for cause if his or her views about capital punishment would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and . . . oath." 469 U.S. at 424 (internal quotations omitted). Similarly, under G.S. 15A-1212(8), a juror may be challenged for cause if he or she "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." See *State v. Richardson*, 385 N.C. 101, 206 (2023) (stating that G.S. 15A-1212(8) codifies the constitutional principles flowing from *Wainwright* and related North Carolina precedent). The process of removing prospective jurors whose opposition to capital punishment meets this standard is sometimes called "death qualification" of the jury.

The mere fact that a prospective juror is opposed to capital punishment is not enough. *Wainwright*, 469 U.S. at 421; *Richardson*, 385 N.C. at 206. However, when a juror's personal beliefs about the death penalty would substantially limit his or her ability to follow the court's instructions during a capital sentencing hearing or would prevent the juror from fairly considering the imposition of a death sentence, the juror must be excused. *Id.* Furthermore, the juror's bias need not be "unmistakably clear" to justify removal; it is enough that the trial judge is left with the "definite impression" that the juror would not be impartial. *Wainwright*, 469 U.S. at 425-26.

The North Carolina Supreme Court has rejected the argument that a death-qualified jury will be more inclined to convict than a jury that has not been death qualified. *State v. Taylor*, 332 N.C. 372, 390 (1992). The United States Supreme Court has held that even if this were so, death qualification would not violate a defendant's Sixth Amendment right to a fair and impartial jury. *Lockhart v. McCree*, 476 U.S. 162, 183 (1986). Therefore, a defendant is not entitled to

two different juries—one that has not been death qualified to consider guilt or innocence and a second that has been death qualified to consider punishment. North Carolina statutory law provides that the same jury should be used for both the guilt/innocence and sentencing stages of a capital trial, unless the trial jury is unable to reconvene for sentencing. G.S. 15A-2000(a)(2); *State v. Bondurant*, 309 N.C. 674, 682 (1983) (holding that G.S. 15A-2000 “contemplates that the same jury which determines guilt will recommend the sentence”). Likewise, it is permissible to death qualify a jury for a joint trial that is capital as to one defendant but noncapital as to another. *Buchanan v. Kentucky*, 483 U.S. 402, 419-20 (1987).

The State has a right to ask prospective jurors questions that are designed to determine whether the jurors are subject to a *Witt* challenge. Thus, a prosecutor may ask prospective jurors whether their views about the death penalty would substantially impair their ability to sit on the jury, *State v. Price*, 326 N.C. 56, 67, *vacated on other grounds*, 498 U.S. 802 (1990), and whether they would have the “intestinal fortitude” to vote for a sentence of death if they were satisfied that the legal requirements for such a sentence had been met. *State v. Murrell*, 362 N.C. 375, 390-91 (2008).

When the State challenges a prospective juror under *Witt*, the defense may ask the judge for the opportunity to question the juror. This request is commonly known as the opportunity to rehabilitate, because the defendant wants to show that the juror’s purported opposition to capital punishment would not substantially impair his or her performance of duties as juror and that the State’s challenge for cause should therefore be denied. A trial judge may not automatically deny the defendant’s request but instead must exercise his or her discretion in deciding whether to allow a defendant to rehabilitate a prospective juror. *State v. Brogden*, 334 N.C. 39, 44 (1993); *see also Richardson*, 385 N.C. at 207 (whether to allow rehabilitation is a matter within the trial court’s discretion). If a juror’s responses are clear and unequivocal and the defendant fails to show that defense questioning would likely produce different responses, then the judge may grant the State’s challenge for cause without allowing the opportunity to rehabilitate the juror. *Richardson*, 385 N.C. at 207; *State v. Kemmerlin*, 356 N.C. 446, 462 (2002); *State v. Nicholson*, 355 N.C. 1, 27 (2002); *State v. Reeves*, 337 N.C. 700, 739 (1994).

Consistent with the general principles governing the reopening of voir dire, discussed in Section X above, there are limited circumstances in which it is permissible to revisit the death qualification of a seated juror. For example, the court held in *State v. Barts*, 316 N.C. 666, 680 (1986), that it was proper to reopen voir dire of a juror who reported that after she was seated, she became so agitated and emotional when contemplating the prospect of deciding whether to impose the death penalty that she sought medical attention, then stated emphatically that she would never be able to vote for the death penalty. In *State v. Holden*, 321 N.C. 125, 153 (1987), the court held that it was also proper for the court to reopen voir dire immediately before the sentencing phase of a capital case when the court learned that a juror had expressed to a third party her inability to follow the law and to consider returning a sentence of death.

If a prospective juror expresses reservations about the death penalty that are not serious enough to justify a *Witt* challenge, the State may use a peremptory strike to remove the juror. *See, e.g., State v. Fullwood*, 323 N.C. 371, 381-83 (1988), *vacated on other grounds*, 494 U.S. 1022 (1990).

If a trial judge wrongly excuses a juror under *Witt* when in fact the juror's reservations about the death penalty do not rise to the requisite level, any resulting death sentence must be vacated. *Gray v. Mississippi*, 481 U.S. 648, 667 (1987). However, the defendant's conviction of first-degree murder remains intact. *State v. Rannels*, 333 N.C. 644, 655 (1993).

B. Jurors Who May Be Biased in Favor of Death Penalty. In *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), the United States Supreme Court held that

A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

In order to challenge "automatic death" jurors, the defendant must be allowed an opportunity to question prospective jurors about their ability to consider a sentence other than death for first-degree murder. *Id.* at 729-34. Because the defendant's rights under *Morgan* are the counterpart to the State's rights under *Witt*, it appears that the State would have the same opportunity to rehabilitate prospective jurors challenged for cause by the defendant as the defendant has to rehabilitate prospective jurors challenged for cause by the State.

C. Questions About Life Imprisonment in Capital Trial. The Court in *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994), held that when life imprisonment without parole is the alternative punishment to a death sentence, a capital sentencing jury must be informed of that fact when future dangerousness is an issue. G.S. 15A-2002 complies with this ruling by requiring the judge to instruct a capital sentencing jury that a sentence of life imprisonment means a sentence of life without parole. In addition, the judge may give N.C.P.I.—Crim. 106.10 to the prospective jurors that briefly explains the trial and sentencing proceedings, which includes a statement that a defendant convicted of first-degree murder will be sentenced to death or life imprisonment without parole. The North Carolina Supreme Court in *State v. Williams*, 355 N.C. 501, 544 (2002), made clear that it adhered to its prior rulings that a defendant is not entitled to ask prospective jurors whether they could understand and follow an instruction that life imprisonment means life without parole. Whether the trial court could allow such questioning in its discretion has not been decided.

XIII. Challenges for Cause.

A. Constitutional Basis. Under the Sixth Amendment and the Fourteenth Amendment's Due Process Clause, jurors who are biased against the defendant and cannot decide the case based on the trial evidence and the law must be

excused. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A defendant does not have a right to any particular juror, but the defendant is entitled to twelve jurors who are competent and qualified to serve. *State v. McKenna*, 289 N.C. 668, 681, *vacated on other grounds*, 429 U.S. 912 (1976). The method for excusing a juror who is biased or is not qualified to serve is referred to as a challenge for cause.

B. Statutory Grounds for Challenges for Cause. G.S. 15A-1212 sets out statutory grounds for challenging a juror for cause. These grounds include that the prospective juror:

- is not qualified under G.S. 9-3 (see Section II above);
- is incapable of rendering jury service due to mental or physical infirmity;
- is, or has been previously, a party, a witness, a grand juror, a trial juror, or a participant in civil or criminal proceedings involving a transaction which relates to a charge against the defendant;
- is, or has been previously, a party adverse to the defendant in a civil action;
- has complained against or been accused by the defendant in a criminal prosecution;
- is related to the defendant or alleged victim of the crime by blood or marriage within the sixth degree (degrees of kinship are explained in G.S. 104A-1; to calculate your degree of kinship to another person, you ascend up from yourself through the generations until you reach a common ancestor and then descend down to the other person; the count excludes yourself; for example, you are related in the second degree to your siblings and the fourth degree to your first cousin);
- has formed or expressed an opinion of the defendant's guilt or innocence;
- is presently charged with a felony;
- as a matter of conscience is unable to render a verdict in accordance with the law; or
- for any other reason is unable to render a fair and impartial verdict.

G.S. 15A-1211(d) states that a judge "may excuse a juror without challenge by any party if [the judge] determines that grounds for challenge for cause are present." See, e.g., *State v. Tirado*, 358 N.C. 551, 572-74 (2004) (trial court did not err by excusing prospective juror who was no longer a resident of the county); *State v. Wiley*, ___ N.C. App. ___, ___, 892 S.E.2d 86, 88-89 (2023) (trial court did not err by excusing juror midtrial upon learning that he no longer was a resident of the county).

1. Prior Knowledge of Case. North Carolina courts have consistently held that a juror is not disqualified simply because the juror has prior knowledge of the case. To be excused for cause, the prior knowledge or connection to the case must prevent the juror from rendering an impartial verdict. *State v. Jaynes*, 353 N.C. 534, 546 (2001) (juror's knowledge of defendant's prior death sentence was not disqualifying because she stated that she could set her knowledge aside and base her sentencing decision on evidence presented in court); *State v. Yelverton*, 334 N.C. 532, 543 (1993) (similar ruling on prior knowledge); *State v. Hunt*, 37 N.C. App. 315, 320 (1978) (similar ruling involving police officer as a

prospective juror who had heard defendant's case discussed by other officers).

2. **Juror's Opinion on Impartiality Not Dispositive.** A juror's subjective or expressed belief that he or she can set aside prior information and decided the case on the evidence does not necessarily render the juror qualified. The trial judge must make an independent, objective evaluation of the juror's impartiality. *State v. Brogden*, 334 N.C. 39, 53 (1993) (Frye, J., concurring).
3. **Inability to Follow Law.** Jurors who are unable to follow certain legal principles must be excused for cause. *Compare State v. Cunningham*, 333 N.C. 744, 755 (1993) (error to fail to excuse juror whose answers to questions on voir dire failed to show that she would afford the defendant the presumption of innocence), *State v. Hightower*, 331 N.C. 636, 641 (error to fail to excuse juror who expected defendant to testify), *and State v. Leonard*, 296 N.C. 58, 63 (1978) (error to fail to excuse jurors who stated they would not acquit even if defendant proved insanity defense), *with State v. McKinnon*, 328 N.C. 668, 677 (1991) (no error when judge refused to excuse juror who initially stated that she would want defendant to present evidence on his behalf; juror later agreed to abide by proper burden of proof).
4. **Other Sources of Bias.** Other possible sources of juror bias may be asserted. For example, it has been held to be error to fail to remove a juror for cause when:
 - a juror's husband was police officer and juror stated her connection with police would bias her, *State v. Lee*, 292 N.C. 617, 625 (1977); and
 - a juror was related to accomplice witnesses and said he would likely believe these witnesses, *State v. Allred*, 275 NC. 554, 563 (1969).

By contrast, having a connection to those involved in the case on the State's side may not justify a challenge for cause. *State v. Benson*, 323 N.C. 318, 323-24 (1988) (no challenge for cause where juror had a mere acquaintance with four police officers who were prospective State's witnesses); *State v. Whitfield*, 310 N.C. 608, 612 (1984) (no challenge for cause where first juror challenged was father of assistant district attorney who was not participating in defendant's trial; second juror challenged was a member of police department but officers who handled case and testified were sheriff's deputies). A challenge for cause also was properly rejected when a juror had a friend who had been murdered but stated she could separate facts of defendant's case from friend's case. *State v. House*, 340 N.C. 187, 194 (1995).

- C. Preservation of Appellate Review of Denial of Challenge for Cause.** If the defendant challenges a juror for cause and the trial judge declines to remove the juror, the defendant must follow precise steps under G.S. 15A-1214(h) to preserve the error for appellate review:

1. exhaust all peremptory challenges;

2. renew the motion for cause against the juror at the end of jury selection as set out in G.S. 15A-1214(i); and
3. have the renewal motion denied.

Regarding the second step—renewing a motion for cause—a defendant who has exhausted peremptory challenges may move orally or in writing to renew a previously denied challenge for cause if the defendant:

1. had peremptorily challenged the juror; or
2. states in the motion that the defendant would have challenged that juror if his or her peremptory challenges had not already been exhausted.

G.S. 15A-1214(i); see *also* State v. Johnson, 317 N.C. 417, 433 (1986) (G.S. 15A-1214(h) and (i), read together, require a defendant who has peremptory challenges available when a challenge for cause is denied must exercise a peremptory to remove the unwanted juror); State v. Wilson, 283 N.C. App. 419, 424-25 (2022) (defendant failed to preserve appellate review of alleged erroneous denial of challenge for cause by not adhering to procedures of G.S. 15A-1214(i)).

If the judge reconsiders the denial of the challenge for cause and determines that the juror should have been excused for cause, the judge must allow the party an additional peremptory challenge. G.S. 15A-1214(i).

- D. Excusing Qualified Juror in Capital Case.** Just as it is error for the trial judge to decline to excuse an unqualified juror, it is also error for the judge to exclude a juror who is qualified to serve on the death penalty issue. *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968). If the trial judge does so, the error is reversible per se on appeal, even if the State does not exhaust its peremptories. *Gray v. Mississippi*, 481 U.S. 648, 664 (1987) (improperly excusing qualified juror under *Witherspoon* reversible error per se).

XIV. Peremptory Challenges.

- A. Generally.** The right to peremptory challenges is statutory, not constitutional. See *Rivera v. Illinois*, 556 U.S. 148, 157 (2009) (peremptory challenges are creatures of statute and states may decline to authorize them).

Peremptory challenges allow the parties to excuse jurors based on the party's own criteria, generally without inquiry or a required explanation. The only limit on the exercise of peremptories is that neither side may exercise a peremptory challenge because of the juror's race, gender, or other constitutionally protected characteristic.

For a discussion of the number of peremptory challenges allotted to each side, see Section X.C. above.

- B. Equal Protection Limitations: *Batson* & Its Progeny.** Under the United States Supreme Court's landmark ruling in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), it is a violation of the Equal Protection Clause for either party to exercise a peremptory challenge based on a prospective juror's race or sex. Although *Batson* concerned only racial discrimination, its principles were extended to "gender-based" discrimination in *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994). The North Carolina constitution also prohibits discrimination in jury selection. *State v. Waring*, 364 N.C. 443, 474 (2010). In *Flowers v. Mississippi*, 139 S. Ct.

2228, 2243 (2019), the United States Supreme Court observed that because they “operate at the front lines of American justice,” trial court judges “possess the primary responsibility to enforce *Batson* and prevent racial discrimination from seeping into the jury selection process.” See also *State v. Campbell*, 384 N.C. 126, 131 (2023) (quoting *Flowers* on this point).

The defendant need not be of the same race or gender as the prospective juror who was excused in order to assert that the State improperly challenged the juror. *Powers v. Ohio*, 499 U.S. 400, 415 (1991); *State v. Locklear*, 349 N.C. 118, 140 (1998).

To preserve a *Batson* challenge for appellate review, an appellant must make a record which shows the race of a challenged juror. *State v. Bennett*, 374 N.C. 579, 592 (2020). Several North Carolina Supreme Court cases hold that statements of counsel based on a prospective juror’s appearance are not sufficient to establish the race of a prospective juror, nor are the subjective impressions of the court reporter. See, e.g., *State v. Brogden*, 329 N.C. 534, 546 (1991) (holding that the defendant failed to preserve a *Batson* claim by defense counsel’s subjective impressions of jurors’ race and notations made by the court reporter of her subjective impressions); *State v. Payne*, 327 N.C. 194, 200 (1990) (defense lawyer’s affidavit was insufficient to establish jurors’ race). However, in *Bennett* the North Carolina Supreme Court explained that subjective impressions of a prospective juror’s race are sufficient to establish a record for appellate review in situations where there is a “complete absence of any dispute” among the trial participants about the prospective juror’s race. 374 N.C. at 594-95. Distinguishing *Brogden* and *Payne* as cases involving attempts to “establish racial identity on the basis of the subjective impressions of a limited number of trial participants,” the court observed that the record in *Bennett* established that trial counsel, the prosecutor, and the trial court “each agreed that [the prospective jurors at issue] were African American.” *Id.* The court reasoned that this agreement among the participants amounted to a stipulation of the racial identity of the prospective jurors; thus, the court proceeded to review the merits of the defendant’s *Batson* claim. *Id.* at 595. The best evidence of a prospective juror’s race or gender may be the juror’s own statement of the characteristic for the record. See *State v. Mitchell*, 321 N.C. 650, 656 (1988) (if there is any question about a prospective juror’s race, it must be resolved by the trial judge’s questioning of the juror or other proper evidence). A juror may make such a self-identifying statement in a questionnaire or in open court. Note, however, that the court in *Bennett* emphasized that its research failed “to find a decision from any . . . American jurisdiction” precluding methods for determining racial identity other than self-identification. 374 N.C. at 596-97. Similar principles presumably apply to situations involving *Batson* challenges on the basis of gender though there is no North Carolina case law on the issue.

When a party contends that the other side has exercised a peremptory challenge in a discriminatory manner—that is, when a party makes a *Batson* claim—the trial judge must follow a three-step process to resolve the issue:

1. *Prima facie showing*. The party making the *Batson* claim must make a prima facie showing that the other side exercised a peremptory challenge based on race or gender.
2. *Neutral justification*. If a prima facie showing has been made, the other side must offer a justification for its use of its peremptory challenge that is not based on race or gender.

3. *Pretext for purposeful discrimination.* The party making the *Batson* claim then may attempt to show that the nondiscriminatory justification is pretextual and that the other party in fact engaged in purposeful discrimination. See generally *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008).

Each of these steps are discussed below.

1. **Prima Facie Showing.** The *Batson* requirement of a prima facie showing “is not intended to be a high hurdle for defendants to cross.” *State v. Hoffman*, 348 N.C. 548, 553 (2008). Indeed, the Court held in *Johnson v. California*, 545 U.S. 162, 168 (2005), that establishing a prima facie case does not require a litigant to show that it is more likely than not that the opposing party has engaged in discrimination. Nonetheless, the showing must be a strong enough to permit an inference of discrimination and to require a response. As reflected in the case summaries below, more than a few *Batson* challenges fail at this stage. Among the factors that a court may consider in assessing whether such a showing has been made by a defendant alleging racial discrimination are

the defendant’s race, the victim’s race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution’s use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State’s acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145 (1995) (describing factors in context of a defendant’s *Batson* claim as to prosecutor’s use of peremptory challenges against black jurors).

Courts sometimes refer to accounting for the races of the defendant, victim, and witnesses as evaluating the “susceptibility of the particular case to racial discrimination.” *State v. Porter*, 326 N.C. 489, 498 (1990) (quotation omitted). The analysis of whether a prima facie case has been established should take account of the totality of relevant facts before the trial court. *State v. Campbell*, 384 N.C. 126, 136 (2023); *State v. Hobbs*, 374 N.C. 345, 351 (2020) (*Hobbs I*) (stating that historical evidence of discrimination in a jurisdiction also is a factor that must be considered); see also *State v. Richardson*, 385 N.C. 101, 197-98 (2023) (recognizing that the court in *Hobbs I* held that historical evidence of discrimination in a jurisdiction must be considered). In *State v. Richardson*, the North Carolina Supreme Court indicated that trial courts have discretion, which may be guided by the rules of evidence, as to the admissibility of evidence presented by a party as support for a prima facie case. 385 N.C. at 197-98 (“We acknowledge the lack of any precedent which categorically provides that the rules of evidence may not be employed in the discretion of a trial court during the prima facie stage of a *Batson* challenge during jury selection and . . . decline to create such an

exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here . . .”). The *Richardson* court held that the trial court did not clearly err in excluding on hearsay grounds an affidavit from two academic researchers who had studied jury selection in North Carolina capital cases and which purportedly showed that the prosecutor in *Richardson* had disproportionately used peremptory challenges to excuse Black jurors in four prior capital cases. *Id.*

Similar factors to those identified in *Quick* are relevant when considering a claim by the State that the defendant exercised a peremptory challenge in a discriminatory manner, *State v. Cofield*, 129 N.C. App. 268, 276 (1998) (quoting *Quick*'s list of factors in case involving claim asserted by the State); see also *State v. Hurd*, 246 N.C. App. 281, 291-92 (2016) (applying general *Batson* framework to so-called “reverse *Batson*” claim asserted by the State in context of defendant’s use of peremptory challenge to remove white male juror). Similar factors also are relevant when considering a claim of gender discrimination. *Richardson*, 385 N.C. at 203-04 (so stating); *State v. Call*, 349 N.C. 382, 403-04 (1998) (listing factors concerning gender analogous to those in *Quick* concerning race).

If the trial judge finds that the party has failed to make a prima facie showing, the judge should terminate the inquiry at that stage and need not make extensive written findings of fact. *Campbell*, 384 N.C. at 138. *Richardson*, 385 N.C. at 202. If the judge rules that the party has made a prima facie showing, the remaining steps in the three-step process must be completed. If a party offers, or the trial judge requests, a neutral justification before the trial judge has ruled on the sufficiency of the prima facie case, the sufficiency of the prima facie case becomes moot, and the issue becomes the validity of the neutral justification. *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *State v. Tucker*, ___ N.C. ___, 895 S.E.2d 532, 546 (2023) (noting that prima facie case determination is mooted if a party voluntarily offers neutral justifications before trial judge has ruled); *State v. Williams*, 343 N.C. 345, 359 (1996). Note, however, that not all pre-ruling exchanges between a trial judge and the party exercising a strike objected to on *Batson* grounds necessarily constitute a request for or the volunteered provision of a neutral justification that moots the issue of whether a prima facie case has been established. See, e.g., *Richardson*, 385 N.C. at 193 (prima facie case determination was not mooted where, prior to ruling, trial court asked prosecutor to respond “to the prima facie showing issue;” the court’s request and prosecutor’s response were concerned solely with the sufficiency of the defense’s prima facie case rather than any non-discriminatory justification for the prosecutor’s strike).

Some appellate cases contemplate that the judge, after finding no prima facie case, has the option of allowing the parties to articulate for the record their arguments relevant to the second and third steps in the *Batson* process, as such a procedure may facilitate appellate review if the judge’s ruling on the adequacy of the prima facie case is rejected on appeal. *Williams*, 343 N.C. at 359 (trial court did so in response to a request from the party asserting the *Batson* claim). However, recent North Carolina appellate cases indicate that it is error for a trial court to order the parties to articulate arguments concerning the second and third steps

of the *Batson* analysis after ruling that no prima facie case exists. In *State v. Campbell*, the trial judge ruled that a prima facie case had not been established but nevertheless ordered the State to articulate reasons for its peremptory challenge. 384 N.C. at 136. The North Carolina Supreme Court stated that the “*Batson* inquiry should have concluded when the trial court first determined that defendant failed to make a prima facie showing” and went on to say that the State “appropriately objected to the trial court’s attempt to move beyond step one.” Later, in *State v. Tucker*, ___ N.C. ___, 895 S.E.2d 532 (2023), the Court relied on *Campbell* to expressly state that it is error for a trial court to rule that no prima facie case has been established and then direct parties to place race-neutral reasons into the record. ___ N.C. at ___, 895 S.E.2d at 546 (discussing issue while determining whether a MAR was procedurally barred). After the trial court has ruled that no prima facie case exists, a party appropriately may object to the court’s attempt to require that arguments concerning the second and third *Batson* steps be placed into the record or may decline to offer arguments when explicitly given the opportunity to do so. *Campbell*, 384 N.C. at 136 (after trial judge ruled that no prima facie case existed, prosecutor first declined judge’s invitation to offer neutral justification for peremptory strike and then “appropriately objected” to judge’s subsequent order to state a neutral justification); *Richardson*, 385 N.C. at 194 (after trial judge ruled that no prima facie case existed prosecutor declined judge’s invitation to offer neutral reasons for peremptory strike, stating “the record is clear”). Note that if a trial court rules on the ultimate issue of purposeful discrimination in a situation where the parties have articulated arguments for the record (for example where a trial court finds no prima facie case yet the challenged party nevertheless volunteers neutral reasons for a strike), that ruling renders moot the initial finding that no prima facie case has been established, *Hobbs I*, 374 N.C. at 354 (so stating), and obligates the trial court to make adequate findings of fact and conclusions of law on that ultimate issue just as if the court had found the existence of a prima facie case. *Williams*, 343 N.C. at 359.

Case Summaries: Prima Facie Showing Generally

Johnson v. California, 545 U.S. 162, 168, 170 (2005). The defendant, who was black, was charged with murder. Out of a pool of forty-three prospective jurors for his trial, three were black. The prosecutor used three of his twelve peremptory strikes to remove the African-American jurors. When the defendant objected under *Batson*, the trial judge ruled that the defendant had failed to establish a prima facie case of discrimination. A defendant under California law was required to present “strong evidence” of discrimination to make a prima facie case; the state supreme court indicated that this required evidence that it was “*more likely than not*” that the prosecutor had acted in a discriminatory manner. The United States Supreme Court reversed, holding that the California courts used “an inappropriate yardstick by which to measure the sufficiency of a prima facie case” and that a defendant need only present “evidence sufficient to permit the trial judge to draw an inference that

discrimination has occurred,” a lower threshold than the preponderance standard employed below.

State v. Locklear, 349 N.C. 118, 141 (1998). The court held that under *Powers v. Ohio*, 499 U.S. 400 (1991), the defendant, a Native American, had standing to contest the state’s peremptory challenges of prospective black jurors. The court rejected the defendant’s argument that it was a violation of the Equal Protection Clause for the trial judge to consider his *Batson* motion separately as to challenged Native American and black prospective jurors. The court noted that racial identity between the defendant and some of the challenged jurors in this case was a legitimate factor that the trial judge could consider in ruling on the defendant’s motion. 349 N.C. at 141 (citing *Powers* for proposition that “[r]acial identity between the defendant and the excused person might in some cases be the explanation for the prosecutor’s adoption of the forbidden stereotype.”). Likewise, the fact that the defendant and the challenged black jurors were of different races was also a relevant circumstance that the trial judge could consider.

Case Summaries: Upholding Trial Court’s Finding on Prima Facie Case

State v. Richardson, 385 N.C. 101, 201 (2023). The trial court did not err in determining that the defendant failed to make a prima facie showing of discrimination based upon either race or gender in the prosecutor’s peremptory strike of a Black female prospective juror. With respect to alleged racial discrimination, the court noted that while the prosecutor had struck Black prospective jurors at a higher rate than white prospective jurors, this difference standing alone was insufficient to establish a prima facie case given that the challenged strike occurred early in the selection process, the case was not particularly susceptible to racial discrimination, and the prosecutor’s statements and questions during voir dire did not appear to be racially motivated. As for the alleged gender discrimination, the court noted that the prosecutor had struck women at a higher rate than men but explained that this difference was insufficient to establish a prima facie case given that there were twice as many women as men available as potential jurors and four of the five jurors already seated were women.

State v. Campbell, 384 N.C. 126, 136 (2023). The trial court did not err in determining that the defendant failed to make a prima facie showing where the State exercised three out of four peremptory strikes to remove black prospective jurors. The court observed that the defendant, the victim, and at least one key witness all were black. It went on to explain that while numerical analysis can be useful in evaluating the existence of a prima facie case, “reliance on a single mathematical ratio, standing alone in a cold record” was insufficient to show that the trial court erred in finding that a prima facie case had not been made. The court noted that there was no information in the record about the total number of black prospective jurors in the jury pool or the racial make-up of the jurors who were seated.

State v. Waring, 364 N.C. 443, 480 (2010). The trial court correctly ruled that the defendant failed to make a prima facie showing when the State successfully challenged for cause the first three black prospective jurors, then peremptorily challenged the fourth; the fourth juror expressed personal opposition to the death penalty, even though she ultimately stated that she could follow the law and consider capital punishment if seated.

State v. Maness, 363 N.C. 261, 275 (2009). When the prosecutor struck prospective juror A, who was black, the prosecutor had used five of eight peremptory challenges to remove black jurors and had accepted only three of eight black prospective jurors. Nonetheless, the trial court correctly rejected the defendant's *Batson* claim for lack of a prima facie case. Numerical analysis, "while often useful, is not necessarily dispositive," and the court noted that race was not a factor in the trial and that the State had questioned prospective jurors in a consistent manner regardless of race.

State v. Taylor, 362 N.C. 514, 529 (2008). When the State exercised a third peremptory challenge on a black prospective juror, the defendant made a *Batson* claim. The trial court properly found no prima facie case. The State had also used seven challenges on white jurors and had accepted two black jurors. The fact that "the state had accepted two out of five, or forty percent, of eligible African-American jurors" tended to show a lack of discrimination. Furthermore, "the prosecutor's statements and questions during voir dire appear[ed] evenhanded and not racially motivated," and the prospective juror expressed hesitation about her ability to vote for the death penalty.

State v. Smith, 351 N.C. 251, 262 (2000). The court held that the trial court did not err in finding that the defendant failed to establish a prima facie case under *Batson*. The defendant noted that the State exercised six of its eight peremptory challenges to excuse African Americans and that number was disproportionate to the population of Halifax County, which was 50 to 60 percent black. The court noted that the State had accepted the first black prospective juror to enter the jury box and also had struck whites before striking the prospective black juror in issue. The court also noted that the defendant, the victim, and the state's key witnesses were all black. The court concluded its review by observing that the prosecutor did not make any racially motivated statements or ask any racially motivated questions of prospective African-American jurors.

State v. Ross, 338 N.C. 280, 286 (1994). The court held that the defendant failed to make a prima facie showing of discrimination where the State exercised only one peremptory challenge during jury selection and used it to remove a black man. The prosecutor accepted two black jurors who sat on the trial jury, and there was no other evidence showing discrimination by the prosecutor. (The court's opinion has a useful discussion of what constitutes a prima facie case.)

Case Summaries: Reversing Trial Court's Finding on Prima Facie Case

State v. Barden, 356 N.C. 316, 344 (2002). The court held that the trial judge erred in ruling that the defendant had not made a prima facie showing of racial discrimination under *Batson*. When the defendant asserted the *Batson* claim, the prosecutor had accepted only 28.6 percent of the African-American prospective jurors (peremptorily challenging five of seven eligible jurors) but had accepted 95 percent of the white jurors (peremptorily challenging only one of twenty eligible white jurors). The court stated that although a numerical analysis is not necessarily dispositive, it can be useful in determining whether a prima facie case has been made. The court also stated that the issue was a close one and noted that it had held in *State v. Gregory*, 340 N.C. 365 (1995), that a 37.5 percent acceptance rate of minority jurors had not established a prima facie case.

State v. Hoffman, 348 N.C. 548, 553 (1998). A black defendant was tried for the murder of a white person and jury selection included a series of *Batson* challenges. The State successfully challenged the first black prospective juror for cause based on her death penalty views. The State exercised a peremptory challenge to the second black prospective juror. The trial judge ruled that the defendant had not established a prima facie showing, noting in part that there was no pattern of peremptory challenges against black prospective jurors. The State initially accepted the third black prospective juror but was allowed the next day to excuse this juror for cause based on her death penalty views that were revealed that next day. The State exercised a peremptory challenge on the fourth black prospective juror, who twice had been represented by defendant's trial counsel. The court held that the trial judge did not err in ruling that the defendant had not established a prima facie case as to this juror. Eleven white jurors had been seated when the State then exercised a peremptory challenge against another prospective black juror. The trial judge again ruled that the defendant had not established a prima facie case. The North Carolina Supreme Court determined that this ruling was error. It noted that the State had peremptorily challenged every black prospective juror who was not excused for cause. Later, during the selection of the alternate jurors, the state peremptorily challenged the next prospective black juror. The court held that the trial judge again erred in his ruling that the defendant had not established a prima facie case.

State v. McCord, 140 N.C. App. 634 (2000). The defendant was convicted of first-degree murder and other offenses. The defendant was black and the victim was white. The initial panel of prospective jurors consisted of ten white jurors and two black jurors, A and B. The defendant objected on *Batson* grounds to the State's use of peremptory challenges of A and B. Before ruling on whether the defendant had established a prima facie case to require the State to give reasons for the challenges, the trial judge allowed the State to offer reasons. The judge considered the reasons and ruled that they were nondiscriminatory. The court upheld the trial judge's ruling concerning jurors A and B. Later during the voir dire, the State

exercised peremptory challenges of two additional black jurors, C and D, and the defendant again objected on *Batson* grounds. The trial judge ruled that the defendant had failed to establish a prima facie case, but the Court of Appeals held, relying on *State v. Hoffman*, 348 N.C. 548 (1998), discussed in detail above, that the defendant had established a prima facie case concerning jurors C and D. The court noted that the defendant was black and the victim was white, that the State used its peremptory challenges to excuse four of the six black jurors in the jury pool, and that the composition of the jury panel was eleven white jurors and one black juror.

State v. Cofield, 129 N.C. App. 268, 277 (1998). During jury selection the State accepted a jury of six black and six white jurors and passed them to the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The State challenged the exercise of these challenges as racially discriminatory under *Batson*. The court held that the trial judge correctly ruled that a prima facie case had been established.

2. **Neutral Justification.** If the party making a *Batson* claim presents a prima facie case, the other side must come forward with a neutral justification for its use of the peremptory strike. The justification must be “comprehensible”, *State v. Maness*, 363 N.C. 261, 272 (2009), “clear[,] and reasonably specific,” *Batson v. Kentucky*, 476 U.S. 79, 98, n.20 (1986), but “need not rise to the level of a challenge for cause.” *Maness*, 363 N.C. at 272. Indeed, at this stage, the explanation need not be “persuasive, or even plausible.” *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *State v. Clegg*, 380 N.C. 127, 149 (2022) (citing *Purkett* for notion that inquiry at this stage “is limited only to whether the [party] offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny”). Because it will rarely, if ever, be the case that a party admits purposeful discrimination at this stage, the second step in the process is not normally dispositive. It can be, however, if a party fails to present a neutral justification for the dismissal of each prospective juror when several are at issue, *State v. Wright*, 189 N.C. App. 346, 352 (2008), or if “a discriminatory intent is inherent in the explanation” offered by a party. *State v. Fletcher*, 348 N.C. 292, 313 (1998). Rather, the second step is typically a prelude to the third step, when the judge assesses the validity of the proffered justification.
3. **Pretext for Purposeful Discrimination.** In the final step of the process, the court must determine whether the party whose conduct is at issue engaged in purposeful discrimination—that is, whether the party’s neutral justification is a mere pretext. The burden of showing discrimination rests with the party making a *Batson* claim. *Rice v. Collins*, 546 U.S. 333, 338 (2006). Accordingly, the party making the claim must be given an opportunity to rebut the neutral justification offered by the other party. *State v. Green*, 324 N.C. 238, 240-41 (1989). This opportunity does not include cross-examining the prosecutor about his or her use of peremptory challenges. *State v. Jackson*, 322 N.C. 251, 258 (1988).

The party making the claim need not show that the other party used its peremptory challenge based solely or exclusively on the race or gender of the prospective juror. It is sufficient to show that the juror's race or gender was a "significant," *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), or motivating factor, *State v. Waring*, 364 N.C. 443, 480-81 (2010), in striking the juror. The appellate courts have characterized this burden as "showing that a peremptory strike was motivated in substantial part by discriminatory intent" or, put another way, showing that "it was more likely than not that the challenge was improperly motivated." *Clegg*, 380 N.C. at 157 (citing U.S. Supreme Court precedent).

Determining whether a party has engaged in intentional discrimination requires consideration of all relevant circumstances. *Waring*, 364 N.C. at 475; see also *State v. Cuthbertson*, 288 N.C. App. 388, 401 (2023) (trial court's independent consideration of relevant factors identified by precedent but not raised by parties was proof to appellate court that trial court properly considered all relevant circumstances). The trial court may not rule summarily in rendering this determination but instead must make findings of fact and conclusions of law explaining how it weighed the totality of relevant evidence. *State v. Hobbs*, 374 N.C. 345, 358-59 (2020) (*Hobbs I*) (so stating); *State v. Hood*, 273 N.C. App. 348, 357 (2020) (trial court erred by ruling summarily on *Batson* challenge; remanding for specific findings in light of *Hobbs I* and noting that such findings must take account of all relevant circumstances); *State v. Alexander*, 274 N.C. App. 31, 46 (2020) (similar). A trial court's failure to make factual findings supporting an asserted nondiscriminatory reason for a challenged peremptory strike generally will result in that reason carrying no weight on appellate review or at subsequent *Batson* proceedings. *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (disregarding the State's asserted race-neutral reason for a peremptory strike on the basis of prospective juror's apparent nervousness where the trial court made no finding for the record concerning the juror's demeanor or the credibility of the reason); *Clegg*, 380 N.C. at 155 (trial court properly rejected a "body language and lack of eye contact" reason asserted on a *Batson* rehearing where it had made no specific finding corroborating that demeanor at trial).

The factors that are relevant at the prima facie case stage are also relevant for assessing whether a party has engaged in intentional discrimination. See *State v. Hobbs*, 384 N.C. 144, 148 (2023) (*Hobbs II*) (listing such factors as relevant to third step). For example, if the party accepted some jurors of the same race or gender as the juror that the party excused, that is a factor that weighs against a finding of intentional discrimination. *State v. Bell*, 359 N.C. 1, 12 (2004). Whether the party accepted an unusually high or low percentage of prospective jurors from a particular group would also be relevant. The United States Supreme Court has provided the following non-exclusive list as an example of evidence that a party may present to attempt to show purposeful discrimination on the basis of race:

- statistical evidence about the opposing party's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;

- evidence of the opposing party's disparate questioning and investigation of black and white prospective jurors in the case;
- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- the opposing party's misrepresentations of the record when defending the strikes during the *Batson* hearing;
- relevant history of the opposing party's peremptory strikes in past cases;
- other relevant circumstances that bear upon the issue of racial discrimination.

Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019); *see also Hobbs I*, 374 N.C. at 356. Analogous factors presumably could be used in a case involving alleged discrimination on the basis of gender. Note that the North Carolina Supreme Court has stated that the nature of one party's peremptory challenges is not a factor relevant to whether the other party has engaged in intentional discrimination. *Hobbs I*, 374 N.C. at 357 (2020) (in context of defendant's *Batson* challenge to prosecution peremptory strikes court stated that "the peremptory challenges exercised by the defendant are not relevant to the State's motivations").

In the context of a *Batson* claim based upon racial discrimination, the *Flowers* court provided general guidance about several of the factors listed above. With respect to the relevant history of the opposing party's peremptory strikes in past cases, the Court explained "that a defendant may prove purposeful discrimination by establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question," but that demonstrating such history is not necessary to prevail on a *Batson* claim. 139 S. Ct. at 2244-45. *See also Hobbs II*, 384 N.C. at 149 (trial court considered historical use of peremptory strikes in the jurisdiction). Relevant history also may include previous proceedings in the case where the *Batson* claim is raised. The *Batson* claim in *Flowers* arose from the sixth trial against the defendant following a series of mistrials and conviction reversals by the state appellate court, including a reversal for a separate *Batson* violation. Examining this direct history, of which the trial court was aware, the Court observed that in the defendant's prior trials the State used peremptory strikes against "as many black prospective jurors as possible" and that this pattern "necessarily inform[ed]" its assessment of purposeful discrimination in the proceeding at hand where the State used peremptory strikes against five of six black prospective jurors. 139 S. Ct. at 2245-46.

On the issue of disparate questioning and investigation, the *Flowers* court explained that while it is possible for such inquiry to "reflect ordinary race-neutral considerations," the "dramatically disparate" approach revealed in the record was further evidence of purposeful discrimination. *Id.* at 2247-48. The Court took note of the fact that, on average, the State asked twenty-nine questions to each struck black prospective juror and only one to each seated white juror. This disparity was not reasonably attributable to differences between the jurors unrelated to race. *Id. Compare Hobbs II*, 384 N.C. at 149 (trial court did

not err in finding no disparity in questioning and that any differences that did exist were a function of the different styles of three prosecutors involved in voir dire), *with Clegg*, 380 N.C. at 159-61 (trial court erred by failing to adequately consider disparate questioning described in the opinion).

Appellate courts considering *Batson* claims often have focused on whether the reason given by the party using the peremptory challenge applied equally to prospective jurors of a different race or gender who were not challenged by the party. For example, “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step” *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *Flowers*, 139 S. Ct. at 2249; *Hobbs I*, 374 N.C. at 358-59; *see also* *State v. Barden*, 362 N.C. 277, 279 (2008) (remanding for further consideration of a *Batson* challenge and instructing the trial court to “consider the voir dire responses of prospective juror Baggett and those of Teresa Birch, a white woman seated on defendant’s jury” and to give “[t]he State . . . an opportunity to offer race-neutral reasons for striking juror Baggett while seating juror Birch”); *Hobbs II*, 384 N.C. at 156 (noting that trial court conducted “extensive comparative juror analysis”).

In *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008), the prosecutor struck a juror because “[h]e’s a student teacher . . . [and] might, to go home quickly, come back with guilty of a lesser verdict so there wouldn’t be a penalty phase.” However, the United States Supreme Court found this explanation to be pretextual, in part because of “the prosecutor’s acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as” the excused juror’s student teaching. 552 U.S. at 483. Such juror comparisons have sometimes been characterized as “[m]ore powerful than . . . bare statistics.” *Miller-El v. Dretke*, 545 U.S. at 241. Yet courts have also noted the difficulty of finding appropriate comparisons, given the many factors a party may consider when assessing the suitability of a juror. *State v. Porter*, 326 N.C. 489, 501 (1990) (“Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant’s approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror . . .”); *see also Hobbs II*, 384 N.C. at 150 (suggesting that the trial court’s approach of considering each juror’s characteristics “as a totality” rather than under a “single factor approach” was supported by U.S. Supreme Court case law instructing that the “overall record” and “all of the circumstances” should be accounted for in the analysis of purposeful discrimination).

Flowers also addressed the issue of a party misrepresenting the record when offering race-neutral reasons for a peremptory challenge, saying that it is “entirely understandable” that incorrect statements may be made in the course of the sometimes hurried “back and forth of a *Batson* hearing” and that isolated mistakes “should not be confused with

racial discrimination.” 139 S. Ct. at 2250. The Court stated, however, that “when considered with other evidence of discrimination, a series of factually inaccurate explanations for striking black prospective jurors can be telling,” and, under the facts presented, considered certain misrepresentations to be further evidence of discrimination. *Id.* See also *Clegg*, 380 N.C. at 144 (shifting explanations or misrepresentations of the record may be indications of pretext). In addition to the possibility of misrepresentations serving as evidence of discrimination, an asserted nondiscriminatory justification that is unsupported by the record carries no weight in the ultimate determination of whether a challenged peremptory strike is motivated by purposeful discrimination, and the unsupported reason must be disregarded. *Clegg*, 380 N.C. at 157 (“If the trial court finds that all of [a party’s] proffered race-neutral justifications are invalid, it is functionally identical to [the party] offering no race-neutral justifications at all.”). While articulated in the context of a *Batson* claim of racial discrimination, analogous principles seemingly would apply to claims of gender discrimination.

The appellate courts have noted that in many cases a trial court’s ultimate determination of whether a peremptory strike was impermissibly motivated in substantial part by discriminatory intent will turn largely on the court’s evaluation of credibility and demeanor – determinations that “lie peculiarly within a trial judge’s province.” *Flowers*, 139 S. Ct. at 2244 (quotation omitted); *Hobbs II*, 384 N.C. at 148. As noted above, a trial court must make findings of fact and conclusions of law explaining how it weighed the totality of relevant evidence. *Hobbs I*, 374 N.C. at 358-59. Importantly, the trial court’s task is to evaluate the race-neutral reasons articulated by the party who has exercised the objected-to peremptory strike and, in doing so, the court should not consider “reasoning not presented by the [party] on its own accord.” *Clegg*, 380 N.C. at 158 (trial court erred by considering race-neutral reasoning not advanced by the party). Additionally, proffered reasons not supported by the record must be disregarded. *Id.* at 157. A trial court’s properly supported ruling on a *Batson* challenge is given great deference on appeal and will be overturned only if it is clearly erroneous. *Id.* at 145.

Case Summaries: Strike Motivated by Purposeful Discrimination

Foster v. Chatman, 578 U.S. 488 (2023). The Court determined that prosecutors were motivated in substantial part by race in exercising peremptory strikes against two black prospective jurors in a capital murder case. The Court’s analysis focused largely on a prosecutor’s misrepresentations of the record when asserting race-neutral reasons for the strikes. Additionally, the credibility of certain asserted reasons, which included representations that the prospective jurors were considered perhaps acceptable at a point in time during voir dire, was undermined by evidence that the prosecution had listed the each of them on a list titled “definite NO’s” which was later discovered in the prosecution’s file. The prosecutor’s credibility also was undermined by side-by-side comparisons between accepted white jurors and the black prospective jurors who were struck.

State v. Clegg, 380 N.C. 127 (2022). Though the trial court properly considered certain historical evidence offered by the defendant in support of a *Batson* challenge and properly disregarded various race-neutral reasons asserted by the prosecution in rebuttal, the trial court erred by failing to properly apply the “motivated in substantial part by discriminatory intent” burden of proof. Specifically, the trial court erroneously focused on ways that the facts at hand were distinguishable from the facts of U.S. Supreme Court cases finding *Batson* violations rather than focusing on the general legal principles that derive from those cases. The trial court explicitly found that the race-neutral reasons offered by the prosecution were insufficient but nevertheless ruled that the defendant, who offered supporting evidence, had not met his burden under *Batson*. The trial court also erred by “considering within its *Batson* step three analysis reasoning not presented by the prosecution on its own accord.” The court held that the totality of the evidence presented for the trial court’s proper consideration established that it was sufficiently likely that the strike was motivated by discriminatory intent and thus reversed the trial court’s contrary ruling.

Miller-El v. Dretke, 545 U.S. 231 (2005). The Court granted habeas relief to a capital defendant based on racial discrimination by the prosecution during jury selection. The state struck ten of eleven eligible black prospective jurors; explained some of its strikes with reasons that applied equally to white jurors who were not removed; questioned black and white prospective jurors differently about the death penalty; used a Texas procedure called the “jury shuffle” to minimize the number of African Americans likely to sit on the jury; and apparently relied on a training manual that expressly encouraged prosecutors to remove minorities from the jury. In light of this evidence, the Court determined that the state’s race-neutral reasons for its strikes were pretexts for purposeful discrimination.

State v. Cofield, 129 N.C. App. 268, 279 (1998). During jury selection the State accepted a jury of six black and six white jurors and passed them to the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The State challenged the exercise of these challenges as racially discriminatory under *Batson*. The court held that the trial judge did not clearly err in finding, based on the evidence before the judge, that the defendant’s explanations for the challenges were merely pretextual excuses for purposeful racial discrimination.

Case Summaries: Strike Not Motivated by Purposeful Discrimination

State v. Hobbs, 384 N.C. 144 (2023). The trial court did not err in determining that there was no purposeful discrimination in the State’s peremptory strike of three black prospective jurors. Evidence in the record supported the trial court’s findings that the State did not engage in disparate questioning or investigation during voir dire, that there was not a history of discriminatory peremptory strike usage in the jurisdiction, and that side-by-side juror comparisons did not reveal intentional

discrimination. The opinion includes detailed descriptions of the side-by-side juror comparisons.

State v. Waring, 364 N.C. 443, 487-91 (2010). The court held that the trial court correctly found no purposeful discrimination in the State's decision to excuse a black prospective juror. The prosecutor's race-neutral reasons were (1) the juror had never formed a personal view about the death penalty; (2) she did not keep up with the news; and (3) she had been charged with a felony. The supreme court noted that only two of the nine peremptory challenges exercised by the prosecutor were used on black jurors and that two black jurors were passed by the State, an acceptance rate of 50 percent. Further, the court compared the prospective juror at issue with white jurors accepted by the State and found that the reasons given by the prosecutor were genuine distinctions.

State v. Maness, 363 N.C. 261, 272 (2009). The court held that the trial court did not clearly err in accepting the prosecutor's race-neutral justification for removing an African-American prospective juror. The prosecutor noted that the juror had a history of mental illness and had worked with substance abusers and so might "overly identify with defense evidence pertaining to defendant's cannabis dependence and attention deficit disorder."

State v. Spruill, 338 N.C. 612, 632 (1994). The court found no *Batson* error after considering the following factors: (1) the race of the defendant, victims, and key witnesses; (2) the prosecutor's questions and statements during voir dire; (3) the prosecutor's use of a disproportionate number of peremptory challenges to strike black jurors in a single case; and (4) the prosecutor's acceptance rate of black jurors.

State v. Jackson, 322 N.C. 251, 257 (1988). The court held that the criteria prosecutors used in selecting jurors were valid: they wanted a jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." Stating that it may not have reached the same result as the trial court but noting the deferential standard of review, the court upheld the trial judge's conclusion that the State did not discriminate in exercising its peremptory challenges based on this criteria and other circumstances.

State v. Rouse, 339 N.C. 59, 80 (1994), *overruled in part on other grounds*, *State v. Hurst*, 360 N.C. 181 (2006). Evidence supported the contention that the reason for the prosecutor's peremptory challenge of a black juror was the juror's reservations about the death penalty and not her race.

State v. Porter, 326 N.C. 489, 501 (1990). The court noted that the case was tried at a time when racial tensions were particularly high in the county following a sheriff deputy's shooting of a man known as an "Indian activist" – an incident unrelated to the case at hand. The prosecutor asked Indian prospective jurors about their perceptions of racism in the

criminal justice system, and peremptorily challenged those Indian jurors who indicated that racism might be motivating the prosecution. The court deemed the challenged line of questioning to be a permissible effort to determine whether prospective jurors' perceptions of the trial process would affect their ability to render a fair verdict. The defendant further argued that the prosecutor impermissibly exercised peremptory challenges to exclude potential Indian jurors based on their race. In concluding that the trial court did not err in finding no discrimination by the prosecutor, the court stated that the alleged disparate treatment of prospective jurors is not necessarily dispositive. The court explained: "Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State." 326 N.C. at 501.

4. **Remedies.** In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court stated:

[W]e express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. 476 U.S. at 99, n.24 (citations omitted).

In *State v. McCollum*, 334 N.C. 208 (1993), the court stated that when a trial judge determines that a party has committed a *Batson* violation, it is the "better practice" and "clearly fairer" to order that jury selection start over with a new panel of prospective jurors. *Id.* at 236. According to the court, asking "jurors who have been improperly excluded from a jury because of their race to then return to the jury[,] to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would . . . require near superhuman effort." *Id.* Nonetheless, the court of appeals affirmed a case in which the trial judge found a *Batson* violation by the defendant and required the improperly challenged jurors to serve. *State v. Cofield*, 129 N.C. App. 268, 273 (1998).

Appellate courts review trial judges' *Batson* rulings deferentially. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."); *State v. Clegg*, 380 N.C. 127, 145 (2022) (same). If an appellate court determines that a trial judge erred in finding no prima facie case, the usual remedy is a remand for a retrospective *Batson* hearing. See, e.g., *State v. Barden*, 356 N.C. 316, 345 (2002). If an appellate court holds that a trial judge erred in finding no purposeful

discrimination, *Batson* itself demands that the defendant's "conviction be reversed." *Batson*, 476 U.S. at 100; *Clegg*, 380 N.C. at 162.

There are no North Carolina cases that explain how an appellate court should proceed if it rules that a trial court erred in finding a *Batson* violation by a defendant and therefore incorrectly forced the defendant to accept a juror that the defendant wished to remove. In *Rivera v. Illinois*, 556 U.S. 148, 157 (2009), the Court held that the proper remedy for depriving a defendant of a peremptory challenge through an incorrect *Batson* ruling is a matter of state law.

- XV. Impaneling of Jury.** After all jurors, including alternate jurors, have been selected, the clerk impanels the jury by instructing them in the language set out in G.S. 15A-1216. See also N.C.P.I.—Crim. 100.25 (precautionary instructions to jurors).

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