JURY SELECTION

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Contents

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.

As discussed throughout this section, trial courts have significant discretion with respect to many aspects of jury selection. Note, however, that new G.S. 9-33, enacted by S.L. 2025-54 and effective December 1, 2025, directs the Administrative Office of the Courts to prescribe rules governing any training or educational material provided at any time to jurors and prohibits trial courts from providing jurors with any training or educational material that is not allowed under AOC rules.

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

- be a citizen of the United States
- be a resident 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) (effective July 1, 2024), to require that a person be a citizen of the United States to be qualified as a juror. Prior to the enactment of the legislation, 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). 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* State v. Reber, 296 N.C. App. 114, 124 (2024) (because he failed to assert challenges for cause and failed to exhaust his peremptory challenges, the defendant could not show he was prejudiced by impanelment of four jurors who already had served on a jury in the same session of court and thus were not qualified under G.S. 9-3). Section XIII, below, discusses challenges for cause in more detail.

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 venire" or "jury panel," but the term "jury pool" will be used here, *see State v. Griffin*, 298 N.C. App. 85, 86 (2025) (noting the synonymous use of these terms)). 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 on mere showing that black population was 39.17% and blacks in defendant's jury pool were 23%; stating that "[s]tatistics concerning one jury pool, standing alone, are insufficient" to establish a constitutional violation under *Duren*); State v.

Robinson, 292 N.C. App. 355, 360 (2024) (citing *Bowman* for same principle). 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. G.S. 9-6(a1) requires that all applications for excuses from jury duty, including applications based on disqualification under G.S. 9-3, be made on a form developed and furnished by the Administrative Office of the Courts. Form AOC-G-400 is used for this purpose.

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). 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). 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 to be excused from jury service in writing rather than personally appearing in court. A signed statement with the ground to support the request, including a brief description of the disability 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).

D. Procedure. A person summoned as a juror may request either a temporary or permanent exemption from jury service on the basis of age, status as an out-of-state student, or disability. 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). 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) *Id*. As noted above, G.S. 9-6(a1) requires that requests for excuses from jury duty be made on a form developed by the Administrative Office of the Courts. Form AOC-G-400 is used for this purpose.

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). This record must 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. *Id*.

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; G.S. 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; G.S. 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. The clerk does not call for replacements for any jurors excused by the defense until the defense indicates satisfaction with those jurors remaining. G.S. 15A-1214(e). The questioning then reverts to the State, but examination and exercise of challenges is limited to the replacement jurors. G.S. 15A-1214(f). When the State is satisfied with replacement jurors, the panel passes back to the defendant who likewise is limited to examining and challenging the replacement jurors. *Id*. This procedure repeats until each party has accepted twelve jurors. *Id*. 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) (noting that failure to comply with the statutory mandate of G.S. 15A-1214 is preserved for appellate review even if a defendant fails to object, but finding no prejudicial error where the trial court permitted the State, without objection, to pass a panel of ten jurors to the defendant, rather than a full panel of twelve); 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).

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. The clerk does not call for replacements for any jurors excused until all defendants indicate satisfaction with those jurors remaining. G.S. 15A-1214(e). The questioning then reverts to the State to fill all vacancies and then goes back to the co-defendants, with all parties limited to examining and challenging only the replacement jurors. 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.** In a noncapital case, the trial judge has discretion over whether to seat 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.

Alternate jurors attend the trial at all times with the jury and are kept together with them. G.S. 15A-1215(a); State v. Glenn, ___ N.C. App. ___, 2025 WL 3084462, *2 (2025). After the jury has been impaneled, alternate jurors may be substituted to the trial panel if a juror dies, becomes incapacitated or disqualified, or is discharged for any other reason. *Id.*; State v. Griffin, 298 N.C. App. 85, 90 (2025) (holding that vacancies should be filled by alternate jurors only after the jury has been impaneled; prior to impanelment, vacancies should be filled from the jury pool even if alternate jurors already have been selected). If the need arises, alternate jurors replace jurors on the trial panel in the order in which the alternates were selected. G.S. 15A-1215(a).

The traditional rule in North Carolina was that an alternate juror could not be substituted to the trial panel once the jury had begun deliberations. *See* Jury Misconduct (discussing this issue in more detail). However, G.S. 15A-1215(a) was amended in 2021 to permit substitution of an alternate juror after deliberations have begun. *Id*. When this occurs, the trial judge must instruct the jury to begin its deliberations anew. *Id.*; *Glenn*, ___ N.C. App. at ___, 2025 WL 3084462, *2-3 (no error in substitution of alternate juror after deliberations had begun; trial court correctly followed statutory procedure). G.S. 15A-1215(a) states that alternate jurors "must be discharged in the same manner and at the same time as the original jury." This language appears to require that the trial court retain alternate jurors until jury deliberations conclude, in contrast to the prior practice of discharging alternate jurors upon submission of the case the jury.

The exercise of the power to discharge a juror and substitute an alternate rests in the trial judge's sound discretion and is not reversible error absent a showing of an abuse of discretion. State v. Nelson, 298 N.C. 573, 593 (1979); State v. Knight, 262 N.C. App. 121, 129 (2018).

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).

Upon a finding of good cause, the trial judge in a capital case has statutory authority to permit individual voir dire of jurors on all issues. G.S. 15A-1214(j); State v. Roache, 358 N.C. 243, 274 (2004) (presuming that trial court found good cause for individual voir dire despite lack of specific finding on the record). 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.

Even absent statutory authority, it appears that a judge also may permit individual voir dire in a non-capital case given a trial court's broad authority over the jury selection process. State v. Ysaguire, 309 N.C. 780, 784 (1983) (implicitly recognizing discretion to allow individual voir dire in non-capital case); *see also* State v. Johnson, ___ N.C. App. ___, ___, 2025 WL 3084545, *3 (2025) (trial court did not abuse its discretion by denying defendant's motion for individual voir dire in a non-capital case). A judge may limit individual voir dire to certain issues, such as death qualification, pretrial publicity, or other sensitive topics. *Roache*, 358 N.C. at 274. 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 a typical voir dire. *Roache*, 358 N.C. at 274 (distinguishing the "distinct procedure" mandated by G.S. 15A-1214(j) of passing jurors individually when a trial court permits individual voir dire on all issues in a capital case from the standard procedure outlined in G.S. 15A-1214(d) through (f) of passing a full panel of twelve jurors, the latter of which applies in non-capital cases or when a trial court permits individual voir dire on certain issues).

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); *see also* Jury Misconduct (discussing possibility that a trial judge may reopen voir dire even after the jury has begun deliberations since G.S. 15A-1215, as amended by S.L. 2021-94, now permits substitution of an alternate juror after deliberations begin; noting that no published appellate case has directly considered the propriety of doing so). 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), *invalidated on other grounds by* Roper v. Simmons, 543 U.S. 551 (2005); 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); *Womble*, 343 N.C. at 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 and, consequently, erred by denying the defendant's attempt to exercise a remaining peremptory challenge to remove the juror. The defendant was not required to ask any questions in order to exercise the peremptory challenge. 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).

If voir dire is reopened and a juror is excused prior to the jury being impaneled, that juror's replacement should be called from the jury pool rather than the roster of any alternate jurors that may have already been selected at the time voir dire is reopened. State v. Griffin, 298 N.C. App. 85, 90 (2025) (holding this to be the proper procedure in a case where two alternate jurors already had been selected at the time when a juror was excused for cause for a medical reason prior to the jury being impaneled). If a juror is excused after the jury has been impaneled, he or she is replaced with an alternate juror. *Id*.

J. Prejudicial Responses During Voir Dire. Occasionally a juror's response to a permissible voir dire question may include information that is prejudicial to the defendant. Examples of this situation include a prospective juror who worked as a police officer stating during voir dire that he knew the defendant because he "had dealings with the defendant on similar charges," *State v. Mobley*, 86 N.C. App. 528, 532 (1987), and a prospective juror who worked as a prison guard stating that he "knew [the defendant] from [the defendant's] time in prison." State v. Bruer, 294 N.C. App. 442, 445-48 (2024); *see also* State v. Howard, 133 N.C. App. 614, 615 (1999) (prospective juror stated that she had been a Durham County detention officer and knew the defendant "from there"). The North Carolina Court of Appeals has set out the following procedure for trial judges in situations where a juror makes a prejudicial comment during voir dire:

> [W]here [prejudicial] answers are given or comments made by a prospective juror during the jury selection process, the trial court should make an inquiry of all jurors, both accepted and prospective, to determine whether they heard the statements, the effect of such statements on them, and whether they could

> disabuse their minds of the harmful effects of the prejudicial comments. Unless the trial court determines that the statements were so minimally prejudicial that the members of the jury might reasonably be expected to disregard them and render a fair and impartial verdict without regard to such statements, the far more prudent course is to dismiss the panel, restore all peremptory challenges to all parties, and begin the process of jury selection anew.

Bruer, 294 N.C. App. at 446-47 (quoting *Howard*, 133 N.C. App. at 619). While restarting jury selection following a prejudicial answer can result in "delay and inconvenience," not doing so is reversible error. *Howard*, 133 N.C. App. at 619.

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. A party may not ask potential jurors so-called stakeout questions, which are questions that 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 386-88 (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). Jurors should not be asked to pledge themselves to a future course of action before hearing evidence and receiving instructions on the law. *Id.* In this context as well as other aspects of jury questioning, the trial judge maintains broad discretion. A trial judge's ruling on whether to allow a particular question will be upheld unless there is an abuse

of discretion. *See, e.g.*, State v. Jackson, 284 N.C. 321, 325 (1973) (not abuse of discretion to prevent defendant from asking 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. Clark, 319 N.C. 215, 220 (1987) (not abuse of discretion to permit prosecutor to ask 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).

Note that it is permissible in a capital case for a prosecutor to explore whether, if the defendant is convicted and regardless of the facts and circumstances, jurors would be unable to follow the trial court's instructions during a sentencing hearing or be unwilling to vote for a sentence of death because of their personal beliefs concerning the death penalty. Likewise, it is permissible for a defendant to explore whether jurors would be willing to consider a life sentence or would automatically vote for a sentence of death. This type of permissible questioning in capital cases, which sometimes resembles stakeout questioning, is called "death qualification" and "life qualification" and is discussed in more detail in Section XII. below.

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, 63-64 (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); *see also* State v. Hogan, 281 N.C. App. 272, 274 (2022) (noting that many jurors were excused for cause based upon stated inability to be fair and impartial due to extensive pretrial publicity).

   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 prospective jurors about the content of their knowledge of the case, though such inquiry is not constitutionally required. *See* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (holding that a defendant does not have a constitutional right to question jurors on the content of any pretrial publicity to which they have been exposed). Individual voir dire on pretrial publicity was noted in *State v. Boykin*, 291 N.C. 264, 272 (1980), and utilized by the trial judge in *State v. Moseley*. See Section X.H. above, for a discussion of individual voir dire.

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. Juror Bias Concerning Death Penalty. In *Witherspoon v. Illinois*, 391 U.S. 510, 519-23 (1968), the United States Supreme Court held that it is unconstitutional in a capital case to excuse a prospective juror for cause merely because he or she "expressed qualms about capital punishment" during voir dire. Later, in *Wainwright v. Witt*, 469 U.S. 412 (1985), the Court clarified the *Witherspoon* standard (sometimes referred to in subsequent cases as the *Witherspoon-Witt* standard), holding that 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* G.S. 15A-1212, official commentary (describing subsection (8) as a codification of *Witherspoon*, though it applies more broadly beyond capital cases); State v. Richardson, 385 N.C. 101, 206 (2023) (stating that G.S. 15A-1212(8) codifies these constitutional principles and related North Carolina precedent). In *Morgan v. Illinois,* 504 U.S. 719, 729 (1992), the Court recognized a corollary rule that a capital defendant is entitled to excuse for cause a juror who will automatically vote for the death penalty upon conviction. The subsections below discuss these rules and associated permissible inquiry into jurors' views on the death penalty during voir dire. *See id*. at 731 (recognizing that applying the principles flowing from *Witherspoon* requires inquiry into jurors' views on the death penalty); State v. Green, 336 N.C. 142, 159 (1994) ("Both the defendant and the State have the right to question prospective jurors about their views on capital punishment.").

1. Jurors Biased Against Death Penalty. The mere fact that a prospective juror is opposed to capital punishment is not enough to justify excusing the juror for cause. *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*. It need not be "unmistakably clear" that a juror would automatically vote against imposition of the death penalty 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; *see also* State v. Gillard, 386 N.C. 797, 853-859 (2024) (trial

court did not abuse its discretion by excusing three jurors for cause based upon their hesitation to impose the death penalty; two jurors repeatedly stated that they would "have a hard time" imposing the death penalty and the third stated that she "would not be able to"). The process of removing prospective jurors whose opposition to capital punishment meets the *Witherspoon-Witt* standard is sometimes called "death qualification" of the jury. If a trial judge wrongly excuses a juror under *Witherspoon-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). In such circumstances, the defendant's conviction of first-degree murder remains intact. State v. Rannels, 333 N.C. 644, 655 (1993).

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 must be allowed to ask prospective jurors questions that are designed to determine whether the jurors are subject to a *Witherspoon-Witt* challenge. *Lockheart*, 476 U.S. at 170, n.7. 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 capacity 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) (no abuse of discretion to permit prosecutor to use the phrase "intestinal fortitude" as a metaphor for such capacity; collecting cases reaching same result where jurors were asked if they would have the "backbone," the "courage," or be "strong enough" to impose death penalty); *see also Gillard*, 386 N.C. at 853-59 (prosecutor asked jurors whether they personally would be able to sentence the defendant to death if appropriate under the facts and circumstances).

When the State challenges a prospective juror under *Witherspoon-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. *See also* Section XIII.C. (discussing rehabilitation of jurors challenged for cause on other grounds). 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); *Gillard*, 386 N.C. at 853-59 (trial court properly exercised its discretion to disallow further questioning of jurors whose responses showed that rehabilitation was unlikely). 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. *Gillard*, 386 N.C. at 857 (so noting with respect to juror who expressed absolute opposition to death penalty); *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).

2. Jurors 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; State v. Conner, 335 N.C. 618, 644-45 (1994) (reversible error under *Morgan* for trial court to sustain State's objection to defendant's questions intended to determine whether jurors would be willing to consider life sentence in appropriate circumstances or would automatically vote for death sentence). This type of questioning sometimes is referred to as "life qualification" of the jury. *Id*.

3. Reopening Voir Dire. 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 a seated juror's bias concerning the death penalty. 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.

4. **Stakeout Challenges to Death and Life Qualification.** Many appellate cases have considered a defendant's arguments that the trial court erred by prohibiting purportedly permissible life qualification questions upon a faulty finding that they were impermissible as stakeout questions. *See, e.g.*, State v. Robinson, 339 N.C. 263, 271-72 (1994) (rejecting such an argument). Appellate cases also have considered a defendant's argument that the trial court erred by not prohibiting death qualification questions from a prosecutor on stakeout grounds. *See, e.g.*, State v. Bond, 345 N.C. 1, 17 (1996) (rejecting such an argument); State v. Laws, 325 N.C. 81, 103 (1989) (same), *death sentence vacated on other grounds*, 494 U.S. 1022 (1990). Given the broad discretion afforded to trial courts with respect to voir dire and the deferential standard of review applied on appeal, it is difficult to distill the appellate decisions into clear guidance as to when a life qualification or death qualification question crosses the line to become an impermissible stakeout question. *Compare, e.g.*, *Robinson*, 339 N.C. at 271-72 (characterizing as a stakeout question defendant asking whether jurors could consider a life sentence even if they found that defendant had previous conviction for first-degree murder), *with*, *Bond*, 345 N.C. at 17 (characterizing as not a stakeout question prosecutor asking whether juror would be unwilling to vote for death sentence given that evidence would show that the defendant did not pull the trigger but acted as accomplice). A trial court should be mindful, though, of the holding of *Morgan v. Illinois,* 504 U.S. at 729, that a death sentence may not be imposed if a defendant is improperly prohibited from asking life qualification questions. *See* State v. Jaynes, 353 NC. 534, 550 (2001) (trial court complied with *Morgan* by allowing defendant to ask whether jurors would automatically vote for the death penalty and did not err by prohibiting, on stakeout grounds, inquiry into which specific circumstances would cause jurors to consider a life sentence); State v. Richmond 347 N.C. 412, 425 (1998) (citing *Robinson* to hold that trial court did not err by prohibiting defendant from asking whether jurors could consider a life sentence even if they found that defendant had previous conviction for first-degree murder; noting that there was no violation of *Morgan* because trial court allowed defendant to ask jurors more generally whether they would be able to consider all aggravating and mitigating circumstances).

5. **Peremptory Strikes.** If a prospective juror expresses reservations about the death penalty that are not serious enough to justify a *Witherspoon-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). A defendant likewise may use a peremptory strike to remove a prospective juror who expresses bias in favor of the death penalty that does not rise to the level of supporting excusal for cause under *Morgan*.

B. 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 trial court does not abuse its discretion by prohibiting a defendant from asking 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, stating that a challenge for cause "may be made" if a 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. Simpson, 292 N.C. App. 532, 538-40 (2024) (trial court did not err by excusing two jurors who expressed strong bias against law enforcement during voir dire).

A trial court's decision whether to excuse a juror challenged for cause, if preserved for appellate review, is reviewed for abuse of discretion. State v. Rogers, 355 N.C. 420, 434 (2002) (stating this standard in the context of both a juror's inability to be impartial due to a personal relationship with the defendant's mother and another juror's total inability to vote for the death penalty in a capital case); *see also* State v. Davis, 191 N.C. App. 535, 544 (2008) (finding trial court's failure to act on its own motion to remove juror who was unqualified under G.S. 9-3 was not subject to plain error review and defendant failed to preserve the issue by not challenging juror for cause). Appellate cases applying some of these statutory grounds for challenge for cause are discussed in the subsections below.

1. Juror not Qualified under G.S. 9-3. A juror who does not satisfy the statutory qualifications of G.S. 9-3 is subject to challenge for cause. *See, e.g.*, State v. Reber, 296 N.C. App. 114, 124 (2024) (recognizing that jurors who already had served on a jury in the same session of court were not qualified under G.S. 9-3 and subject to challenge for cause, though defendant failed to make such a challenge); State v. Wiley, 290 N.C. App. 221, 225-26 (2023) (trial court did not err by excusing juror midtrial upon learning that he no longer was a resident of the county).

2. Juror Incapable of Serving due to Mental or Physical Infirmity. A juror who has a mental of physical infirmity that renders him or her incapable of jury service is subject to challenge for cause. *Compare* State v. Hedgepeth, 350 N.C. 776, 797 (1999) (trial court did not abuse its discretion by refusing to excuse juror whose memory was affected by inoperable brain tumor but still was able to work full time and could take notes to bolster memory during trial), *and* State v. Lovette, 225 N.C. App 456, 466 (2013) (trial court did not abuse its discretion by refusing to excuse juror who had difficulty hearing but demonstrated the ability to hear attorneys even when they faced away from him; trial court obtained a listening device for the juror to use), *with* State v. Neal, 346 N.C. 608, 619 (1997) (trial court did not abuse its discretion by excusing juror who had medical history of coronary bypass surgery and Valium addiction and said the stress of being a prospective juror interfered with his sleep).

3. Juror With an Existing Opinion on Guilt or Innocence. A juror who has formed or expressed an opinion as to the guilt or innocence of the defendant is subject to challenge for cause. State v. Wallace, 351 N.C. 481, 520 (2000) (so noting in context of juror who indicated he had formed such an opinion based on pretrial publicity). A juror should be excused on this ground when the juror's preconception of a defendant's guilt or innocence impairs the juror's ability to be impartial. *See* State v.

Wright, 52 N.C. App. 166, 171-72 (1981) (noting that anyone who has prior knowledge of a criminal case likely has some "notion regarding guilt or innocence" but nevertheless may be able to disregard the prior opinion and render an impartial verdict on the evidence presented); *see also* State v. Corbett, 309 N.C. 382, 390 (1983) (citing *Wright* favorably).

It is improper for a party to elicit whether the opinion a juror has formed is favorable or adverse to the defendant. G.S. 15A-1212(6); *see also* State v. Zigler, 42 N.C. App. 148, 154 (1979) (trial court correctly sustained objection to prosecutor's "clearly improper" asking whether jurors had formed an opinion that the defendant was guilty). While not required in every case where a juror volunteers an existing opinion on guilt or innocence that is adverse to the defendant, a trial court may give remedial, curative, or cautionary instructions to other jurors exposed to the adverse opinion if necessary under the circumstances. *Cf. State v. Gibbs*, 335 N.C. 1, 28 (1993) (defendant did not request and trial court did not err by failing to give such an instruction to remaining jurors exposed to unfavorable opinions of jurors who were excused for cause).

4. 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), *and* State v. Hogan, 281 N.C. App. 272, 281 (2022) (no error when judge refused to excuse juror who reiterated to the court that she could fairly evaluate law enforcement testimony and apply the presumption of innocence despite initially expressing some bias on those issues). Challenges for cause based upon a juror's inability to follow the law concerning capital punishment are discussed above in Section XII.

5. Inability to Render Fair and Impartial Verdict.

a. 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. 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).

b. Bias from Personal Relationships It is error to fail to remove a juror for cause when the juror has a personal relationship such that the juror is "subject to strong influences which [run] counter to [a] defendant's right to a trial by an impartial jury." State v. Lee, 292 N.C. 617, 625 (1977) (trial court erred by refusing to excuse

juror who was married to a police officer, acquainted with an important State's witness, and stated that she would lend more credibility to police testimony than evidence offered by the defendant); State v. Allred, 275 N.C. 554, 563 (1969) (trial court erred by refusing to excuse juror who was second cousin to State witnesses and said he would likely believe these witnesses); State v. Campbell, 359 N.C. 644, 666 (2005) (trial court did not err by excusing juror who had close relationship with murder victim); State v. Rogers, 355 N.C. 420, 434 (2002) (trial court did not err by excusing juror who knew defendant personally through her close relationship with defendant's mother).

However, not all personal relationships are sufficient to justify a challenge for cause. *See, e.g.*, *Lee,* 292 N.C. at 625 ("[W]e hasten to add that a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause."); *Allred,* 275 NC. at 563 ("We do not hold that relationship within the ninth degree between a juror and a state's witness, standing alone, is legal ground for 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 juror challenged was father of assistant district attorney who was not participating in defendant's trial. 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); *see also* State v. Perkins, 345 N.C. 254, 275 (1997) (similar ruling).

c. **Bias from Juror's Employment.** In *State v. McNeil*, 99 N.C. App. 235 (1990), the trial court did not err by refusing to excuse a juror who was employed by the Attorney General's Office. *Id*. at 241-42 ("The fact that the prosecutor and the juror are both employed by the State is insufficient to show prejudice."); *see also* State v. Whitfield, 310 N.C. 608, 612 (1984) (trial court did not err by refusing to excuse juror employed by police department in a case investigated by the sheriff's office). The *McNeil* court noted, however, that "employment will disqualify a juror if the position is such that the juror is 'subject to strong influences which [run] counter to defendant's right to a trial by an impartial jury.'" 99 N.C. App. at 242 (quoting State v. Lee, 292 N.C. 617, 625 (1977)).

d. **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).

C. **Opportunity to Rehabilitate.** Even if a juror "initially voices sentiments that would normally make him or her vulnerable to a challenge for cause, that prospective juror may nevertheless serve if the prospective juror later confirms that he or she will put aside prior knowledge and impressions, consider the

evidence presented with an open mind, and follow the law applicable to the case." *Rogers*, 355 N.C. at 430 (2002) (death qualification in capital case); State v. Corbett, 309 N.C. 382, 390 (1983) (preexisting knowledge of case and expressed opinion on guilt or innocence in noncapital case). Questioning a juror challenged for cause to further explore whether the juror can decide the case impartially on the evidence and the law sometimes is referred to as rehabilitating the juror. The trial court must exercise its discretion as to whether to allow an opportunity for rehabilitation, assessing the likelihood that further questioning would produce answers that would change the court's ruling on excusal for cause. State v. Crummy, 107 N.C. App. 305, 323 (1992) (trial court did not err by refusing to allow opportunity to rehabilitate various jurors excused for cause on basis of their existing opinion on guilt or innocence, personal relationship with the defendants, personal relationship with a defendant's relative, or personal relationship with State's witnesses); State v. Jones, 151 N.C .App. 317, 323 (2002) (trial court did not err by refusing to allow opportunity to rehabilitate juror who indicated inability to follow any law differing from her religious practice). *See also* Section XII. (discussing cases holding that it is error for a trial court to fail to exercise discretion and instead impose blanket prohibition on rehabilitation of jurors who express bias against death penalty in a capital case). Some appellate cases involve situations where a trial court's own questioning shows a juror's ability to be impartial despite earlier contrary sentiments. *See, e.g.*, State v. Wallace, 351 N.C. 481, 521 (2000) (upon questioning from trial court, juror confirmed his ability to set aside his previously expressed opinion concerning defendant's guilt that was formed based on pretrial publicity); *Perkins*, 345 N.C. at 275 (upon questioning from trial court, juror confirmed his ability to apply the law as instructed).

D. 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 to exercise a peremptory challenge 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).

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 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. Step One: 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.

a. Factors Relevant to Prima Facie Showing. 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 *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).

b. **Procedure When Prima Facia Showing is Made.** If the judge rules that the party has made a prima facie showing, the remaining steps in the three-step process must be completed.

c. **Procedure When Prima Facie Showing is not Made.** 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.

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. State v. Wilson, ___ N.C. ___, ___, 920 S.E.2d 832, 839 (2025). Thus, 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 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").

In the situation where a trial court finds that no prima facie case has been established yet the challenged party nevertheless volunteers neutral reasons for a strike, the initial finding of no prima facie case will be mooted if the trial court considers the volunteered reasons and rules on the ultimate issue of purposeful discrimination. *See Hobbs I*, 374 N.C. at 354 (stating that "the question of whether a defendant has established a prima facie case of discrimination in a *Batson* challenge becomes moot after the State has provided purportedly race-neutral reasons for its peremptory challenges and those reasons are considered by the trial court"). When that occurs, the trial court must 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. Note that step one is only mooted when the trial court and both parties proceed to fully complete the three-step *Batson* process as if the trial court had found a prima facie showing at step one. *Wilson*, ___ N.C. at ___, 920 S.E.2d at 840. Thus, where the striking party voluntarily provides race neutral justifications at step one, the trial court is not required to engage in a full analysis of the arguments that the party employed its peremptory strike in a racially discriminatory manner if the trial court rules, after hearing the justifications, that the objecting party did not establish a prima facie case. *Id*. at ___, 920 S.E.2d at 844. In addition, 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 for the strike. *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). It is "entirely appropriate" for a trial court to solicit the challenged party's response at step one of the *Batson* process, and the party may argue that a prima facie showing of discrimination has not been established. *Wilson*, ___ N.C. at ___, 920 S.E.2d at 842 (internal quotation omitted).

2. **Step Two: 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. **Step Three: 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.

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).

a. **Factors Relevant to Purposeful Discrimination Analysis.** 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, 588 U.S. 284, 302 (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. That guidance is discussed in the following subsections.

i. **Party's History of Peremptory Strikes.** 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. 588 U.S. at 304-05. *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. 588 U.S. at 306-07.

ii. **Disparate Questioning and Investigation.** 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 307-08. 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).

iii. **Comparison of Jurors.** 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*, 588 U.S. at 312; *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).

iv. **Misrepresentation of the Record.** *Flowers* also addressed the issue of a party misrepresenting the record when offering race-neutral reasons for a peremptory challenge, stating 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." 588 U.S. at 314. 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.

b. **Basis for Trial Court's Ultimate Determination on Purposeful 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*, 588 U.S. at 303 (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.

4. Remedies. In *Batson*, 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).