JURY SELECTION

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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 the NORTH CAROLINA DEFENDER MANUAL, Ch. 25, Selection of Jury (2d ed. 2012), available online at http://defendermanuals.sog.unc.edu/trial/25-selection-jury. I gratefully acknowledge the incorporation in whole or in part of excerpts from both of these publications.

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

- citizen of North Carolina and resident of the county in which the juror serves
- has not served as a juror during the past two years (see additional discussion below)
- at least eighteen years old
- physically and mentally competent
- can 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.

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 website: http://www.nccourts.org/LanguageAccess/Documents/GuidelinesdeafandHH.pdf.

C. Restoration of Felon's Citizenship. A convicted felon's citizenship is automatically restored on the unconditional discharge of an inmate, parolee, or probationer, an unconditional pardon, or the satisfaction of all the conditions of a conditional pardon. G.S. 13-1(1) through (3). Similar conditions apply to a felon who was convicted in federal court or another state court. G.S. 13-1(4), (5).

III. Selecting the Jury Pool. There is a two-step process for selecting the jury pool (also known as the "jury panel," but the term "jury pool" will be used here). First, the jury commission for each county, either annually or biannually, constructs a master jury list of potential jurors to be used for grand and trial (petit) juries from lists of registered voters and licensed drivers. G.S. 9-2(a), 9-2(b).

Second, the clerk of superior court 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. The duties of the clerk of superior court may be performed by a trial court administrator. G.S. 9-7.1.

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. 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 an unusually 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 v. Partida, 430 U.S. at 496-97 (prima facie case established), *with State v. 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 fair cross-section and equal protection issues is that to prove a fair cross-section violation, the defendant is not required to prove intentional discrimination by the State. Instead, the defendant need only show the exclusion of the alleged class was "systematic" or an inevitable result of the selection procedure that excluded the class from the process. *Taylor,* 419 U.S. at 538 (cross-section violation when state constitution and state law provided that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service; 53% of people eligible for jury service were female, but no more than 10% of people in jury pool were female); State v. Bowman*,* 349 N.C. 459, 467-69 (1998) (no prima facie case of systematic underrepresentation when black population was 39.17% and blacks in jury pool were 23%). The cross-section requirement applies only to the jury pool and not to the twelve-person jury. Holland v. Illinois, 493 U.S. 474, 480-81 (1990).

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

C. Remedy for Successful Challenge. If a challenge on either equal protection or cross section grounds is successful, the trial court must dismiss the jury pool, G.S. 15A-1211(c), and a new jury pool must be lawfully selected.

V. Supplemental Jurors to Original Jury Pool. Sometimes an original jury pool will be insufficient to meet the court's needs. To facilitate the court's business, G.S. 9-11(b) permits a trial judge, in his or her discretion, at any time before or during a court session, to direct that supplemental jurors be selected from the master jury list in the same manner as regular jurors. The judge may discharge these jurors at any time during the session and they are subject to the same challenges as regular jurors. *Id.* This statute "neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served." State v. Mebane, 106 N.C. App. 516, 524 (1992) (finding no abuse of discretion by trial judge in continuing with jury selection after the original pool had been depleted even though only four of the fifty supplemental jurors selected from the jury list had been served and had reported for jury duty).

Under G.S. 9-11, trial judges also are permitted, without using the jury list, to "order the sheriff to summon from day to day additional jurors to supplement the original venire." Supplemental jurors summoned by the sheriff must have the same qualifications as jurors selected for the regular jury list and are subject to the same challenges. G.S. 9-11(a). This type of juror is "selected infrequently and only to provide a source from which to fill the unexpected needs of the court." State v. White, 6 N.C. App. 425, 428 (1969).

The sheriff may use his or her discretion in determining the method of selection of the supplemental jurors, but "must act with entire impartiality." *White*, 6 N.C. App. at 428 (quotation omitted). G.S. 9-11(a) provides that if the judge finds that the sheriff is not suitable to select additional jurors because of a direct or indirect interest in the trial, the judge can appoint some other suitable person to summon the supplemental jurors (for example, the head of another law enforcement agency in the county whose agency is not involved in the trial). Challenges to the selection of the supplemental jurors are sustainable if "there is partiality or misconduct [by] the Sheriff, or some irregularity in making out the list." State v. Dixon, 215 N.C. 438, 440 (1939) (quotation omitted).

VI. Special Venire from Another County. A special venire of jurors from outside the county or the district where the case is being tried may be summoned for jury duty by the judge if he or she determines that it is necessary for a fair trial. The defendant or the State may move for special venire or the judge may do so on his or her own motion. G.S. 9-12(a); G.S. 15A-958. This motion can be made as an alternative to a motion for a change of venue. State v. Moore, 319 N.C. 645, 646 (1987). The party making a motion for a special venire has the burden of proof to establish that "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *Id.* at 650 (quotation omitted); State v. Jaynes, 342 N.C. 249, 264 (1995).

The judge can order the jurors to be brought from any county or counties in the district or set of districts in which the county of trial is located or in any adjoining district or districts as defined in G.S. 7A-41.1(a). *See* G.S. 9-12(a). These jurors are selected and serve in the same manner as supplemental jurors from master jury lists. They also are subject to the same challenges as other jurors with the exception of a challenge for non-residency in the county of trial. *Id.* Transportation may be furnished to the jurors instead of mileage. G.S. 9-12(b).

VII. 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 or the trial court administrator) 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 (2002).

The same standard applies at the superior court trial. *See* State v. Elliott, 360 N.C. 400, 406 (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.

VIII. Excusing Juror With Disability. A person summoned as a juror who has a disability that could interfere with his or her ability to serve as a juror may request in writing (rather than personally appearing in court) to be excused from jury service by filing a signed statement with the ground to support the request, including a brief description of the disability. The request must be filed with the chief district court judge or his or her

designee (a district court judge or the trial court administrator) at least five business days before the date the person is summoned to appear. G.S. 9-6.1(b).

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

If a judge needs information about resources for a prospective or trial juror who may be disabled but does not seek to be excused or is not excused, the judge should consult this AOC website: http://www.nccourts.org/Citizens/Disability.asp.

IX. 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). Hardship excuses are heard and determined in district court by a district court judge or trial court administrator before the date that a jury session or sessions of superior or district court convenes. G.S. 9-6(b). 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. 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).

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).

X. Preliminary Procedures Before Voir Dire Questioning.

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

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

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

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

G.S. 15A-1213; 15A-1221(a)(2). The judge may use N.C.P.I.—Crim. 100.20 to accomplish these duties.

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). A judge may review the questionnaire to determine whether questions should be deleted or revised. State v. Blakeney, 352 N.C. 287, 298 (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).

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.

XI. 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.,* State v. Fisher, 336 N.C. 684, 693-94 (1994) (extent and manner of voir dire subject to trial judge's close supervision and subject to reversal only on showing of abuse of discretion).

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 XV.B., below. Challenges for cause are discussed in Section XIV, 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 XV, below.

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

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

E. Order of Questioning. G.S. 15A-1214(d) requires that the prosecutor question prospective jurors first. When the prosecutor is satisfied with a panel of twelve after exercising challenges for cause and peremptory challenges, the prosecutor passes the panel to the defense for questioning and exercise of challenges for cause and peremptory challenges. Then the questioning reverts to the State to fill all vacancies and then back to the defendant. Failure to comply with the statute is error, although it may not necessarily constitute prejudicial error. *See, e.g.,* State v. Lawrence, 352 N.C. 1, 13 (2000).

Note that challenges for cause are discussed in detail in Section XIV below.

F. Order of Questioning With Co-Defendants. After the State is satisfied with a panel of twelve jurors, the panel should be passed to each co-defendant consecutively, who exercise challenges for cause and peremptory challenges, and then the questioning reverts to the State to fill all vacancies and then goes back to the co-defendants. G.S. 15A-1214(e), (f). The trial judge has the discretion to determine the order of examination among multiple defendants. G.S. 15A-1214(e).

G. Alternate Jurors. The trial judge may permit the seating of one or more alternate jurors. G.S. 15A-1215(a). However, in a capital trial or a capital sentencing hearing (when the defendant has pled guilty to the offense), the judge is required to provide for the selection of at least two alternate jurors. G.S. 15A-1215(b). The judge should consider the expected length of a capital trial or sentencing hearing in deciding how many additional alternates beside the required two should be selected. And how many alternates, if any, should be selected in a non-capital case.

H. Individual Voir Dire. Individual voir dire is a process in which a single prospective juror is questioned by the parties without the presence of the other prospective jurors. A defendant does not have a right to individual voir dire. State v. Nicholson, 355 N.C. 1, 18 (2002). The trial judge in capital cases has statutory authority to permit individual voir dire of jurors. G.S. 15A-1214(j). Even absent statutory authority, it would appear that a judge also may do so in a non-capital case given a trial court's broad authority over the jury selection process. State v. Ysaguire, 309 N.C. 780, 784 (1983) (implicitly recognizing discretion to allow individual voir dire in non-capital case). A judge who permits individual voir dire may limit it to certain issues, such as death qualification, pretrial publicity, or other sensitive topics. State v. Roache, 358 N.C. 243, 274 (2004).

When conducting individual voir dire, 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).

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

The trial judge may question the juror or permit the parties to do so, and the judge may excuse the juror for cause. G.S. 15A-1214(g). Once the judge reopens examination of a juror, each party has the "absolute" right to exercise any remaining peremptory challenges to excuse the juror. G.S. 15A-1214(g)(3); State v. Womble, 343 N.C. 667, 678 (1996). Reopening occurs when the judge

allows the parties to question the juror and they do so, State v. Boggess, 358 N.C. 676, 683 (2004), State v. Hammonds*,* 218 N.C. App. 158, 165 (2012), or even if neither party asks any questions, State v. Thomas*,* ___ N.C. App. ___, 748 S.E.2d 620, 624 (2013). In *Thomas*, after the jury was impaneled a juror informed a court official that she knew a State's witness. The trial judge questioned the juror, but neither party did so even though the judge gave them the opportunity. The court held that once the trial judge allowed the parties to question the juror, it reopened examination. The defendant was not required to ask any questions in order to exercise a peremptory challenge to remove the juror. The court remanded the case for a new trial.

XII. 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 normally 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 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 under "special circumstances" (e.g., when racial issues are "inextricably bound up with the conduct of the trial," *Ristaino*, 424 U.S. at 597)), such as those presented in *Ham.*

In capital cases, however, the 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 . . . ?").

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

B. **Stakeout Questions.** Probably the most litigated voir dire question is commonly known as the stakeout question (also known as a hypothetical question). The Supreme Court has described the stakeout question as an impermissible attempt to elicit in advance what a juror's position would be under a certain state of the evidence or on a given state of facts. State v. Vinson, 287 N.C. 326, 336 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976). Jurors should not be asked to pledge themselves to a future course of action before hearing evidence and receiving instructions on the law. *Id.*

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

Cases Upholding Trial Court's Ruling Barring Defense Question

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

State v. Denny, 294 N.C. 294, 296 (1978) (defendant wanted to ask prospective jurors, "Would you be willing to be tried by one in your present state of mind if you were on trial in this case?").

State v. Phillips, 300 N.C. 678, 681 (1981) (defendant asked juror if the "defendant would have to prove anything to [you] before he would be entitled" to not guilty verdict).

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

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

State v. Jackson, 284 N.C. 321, 325 (1973) (defendant asked juror if he or she will adopt an interpretation of the evidence that points to innocence and reject that of guilt if he or she finds that the evidence is susceptible to two reasonable interpretations).

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

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

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

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

Cases Reversing Trial Court's Ruling Barring Defense Question

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

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

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

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

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

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

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

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

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

State v. Roberts, 135 N.C. App. 690, 697 (1999) (prosecutor asked whether jurors would believe eyewitness identification).

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

C. Other Voir Dire Questions

1. **Confusing Statements About Law.** Parties may not ask questions that incorporate incorrect or misleading statements of law. *See* State v. Bryant, 282 N.C. 92, 95 (1972) (improper to ask jurors if after hearing the evidence "you thought that [defendant] was probably guilty, and if you were not convinced absolutely that he was not guilty," would you be able to return a verdict of not guilty); State v. Wood, 20 N.C. App. 267, 269 (1973) (improper to ask if juror should have "one single reasonable doubt" would juror vote to find the defendant not guilty).
2. **Verdict Inquiry.** Parties may not ask questions that attempt to determine how a juror would vote under a given set of circumstances or what factors would affect a juror in reaching a verdict. *See* State v. Vinson, 287 N.C. 326, 336 (1975) (court "should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote" under a given set of facts), *vacated in part on other grounds*, 428 U.S. 902 (1976); State v. Bracey, 303 N.C. 112, 119 (1981) (improper to ask if "simply because eleven other jurors held a different opinion" would cause juror to change opinion); State v. Bryant, 282 N.C. 92, 96 (1972) (question regarding jurors' willingness to return verdict of not guilty if jurors thought defendant was probably guilty was improper because it was confusing and contained an incorrect and inadequate statement of law); State v. Briggs, 20 N.C. App. 61, 61-62 (1974) (improper to ask if jurors would be able to return a verdict of not guilty if they thought defendant was *probably* guilty); State v. Hunt, 37 N.C. App. 315, 318 (1978) (improper to ask if juror was firmly convinced defendant was not guilty, would juror permit anything to change mind or influence decision as to how to vote); State v. Phillips, 300 N.C. 678, 681 (1980) (trial judge properly barred defendant from asking juror if defendant would have to prove anything to her before he would be entitled to a verdict of not guilty; court stated that jurors should not be asked what kind of verdict they would render under certain named circumstances).
3. **Defendant's Failure to Testify or Offer Evidence.** Generally, parties may not question jurors about the effect on their verdict if the defendant fails to testify or to offer evidence. *See* State v. Campbell, 359 N.C. 644, 665 (2005) (no abuse of discretion for trial judge to "refus[e] to allow defendant to ask prospective jurors whether, given that defendant had made a confession, defendant's election not to testify would adversely

influence their decision"); State v. Blankenship, 337 N.C. 543, 554 (1994) (trial judge properly sustained State's objection to defendant's question whether the juror would hold it against defendant if he chose not to put on a defense; it is improper because it asks a juror an abstract question that cannot be answered before hearing the evidence against the defendant; court noted that this kind of question is distinguishable from question concerning defendant's failure to testify in his or her defense, citing *State v. Hightower,* 331 N.C. 636, 641 (1992) (error not to allow defendant's challenge for cause when juror indicated he might have trouble being fair to defendant if defendant did not testify)); 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).

4. **Jurors' Personal Lives, Experiences, and Beliefs**. Generally, trial judges have the discretion to bar parties from questioning the jurors about their private beliefs and experiences except when otherwise permitted, such as racial bias in certain cases (see Section XII.A. above) or capital punishment in a capital trial. *See* 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 their affiliations and beliefs espoused by others in their churches); State v. Mash, 328 N.C. 61 (1991) (trial judge properly prohibited defendant from questioning jurors about their "difficulty" in considering expert mental health testimony and the jurors' personal experiences with alcohol; neither the State nor defense has right to delve without restraint into matters concerning prospective jurors' private lives; court noted that trial judge allowed sufficient inquiry in this case about jurors' inability 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. Lloyd, 321 N.C. 301, 307 (1988) (trial judge properly barred defendant's inquiry into jurors' religious denominations and extent of their participation in church activities), *vacated on other grounds*, 488 U.S. 807 (1988); 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).

5. **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). The defendant has the burden to prove that prejudice from the pretrial publicity prevented the defendant from receiving a fair trial. *State v. Boykin,* 291 N.C. 264, 269 (1980). Parties may question prospective jurors whether they have knowledge of the case and, if so, whether they could set aside that knowledge and base their verdict solely on the evidence introduced at trial and the judge's instructions on the law. State v. Moseley, 338 N.C. 1, 18 (1994). The trial judge in his or her discretion may allow individual voir dire on the pretrial publicity issue, particularly if the judge finds it appropriate to allow the parties to question the prospective jurors about the content of their knowledge of the case, even though such inquiry is not necessarily constitutional required (see *Mu'Min v. Virginia*, discussed below). Individual voir dire on pretrial publicity was noted in *State v. Boykin* and utilized by the trial judge in *State v. Moseley*. See also Section XI.H. above, for a discussion of individual voir dire.

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

   When a defendant makes a motion for a change of venue based on pretrial publicity, the judge conducts a full hearing, and the record fails to show that any juror objectionable to the defendant was permitted to sit on the jury or fails to show the defendant exhausted his or her peremptory challenges before accepting the jury, the denial of the motion for a change of venue is not error. State v. Harding, 291 N.C. 223, 227 (1976); State v. Harrill, 289 N.C. 186, 191 (1976), *vacated on other grounds*, 428 U.S. 904.

XIII. Capital Case Issues.

A. Death Qualification of Jury.

Death Qualification of Jury. Under *Wainwright v. Witt*, 469 U.S. 412 (1985), a prospective juror in a capital case is subject to a challenge for cause if his or her views about capital punishment would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and . . . oath." *Wainwright,* 469 U.S. at 424 (footnote, 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." The process of removing prospective jurors whose opposition to capital punishment meets this standard is sometimes called "death qualification" of the jury.

The mere fact that a prospective juror is opposed to capital punishment is not enough. *Wainwright,* 469 U.S. at 421. 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. Furthermore, the juror's bias need not be "unmistakably clear" to justify removal; it is enough that the trial judge is left with the "definite impression" that the juror would not be impartial. *Id.* 425-26.

The North Carolina Supreme Court has rejected the argument that a death-qualified jury will be more inclined to convict than a jury that has not been death qualified. State v. Taylor, 332 N.C. 372, 390 (1992). The United States Supreme Court has held that even if this were so, death qualification would not violate a defendant's Sixth Amendment right to a fair and impartial jury. Lockhart v. McCree*,* 476 U.S. 162, 183 (1986). Therefore, a defendant is not entitled to two different juries—one that has not been death qualified to consider guilt or innocence and a second that has been death qualified to consider punishment. North Carolina statutory law provides that the same jury should be used for both the guilt/innocence and sentencing stages of a capital trial, unless the trial jury is unable to reconvene for sentencing. G.S. 15A-2000(a)(2); State v. Bondurant, 309 N.C. 674, 682 (1983) (holding that G.S. 15A-2000 "contemplates that the same jury which determines guilt will recommend the sentence"). Likewise, it is permissible to death qualify a jury for a joint trial that is capital as to one defendant but noncapital as to another. Buchanan v. Kentucky*,* 483 U.S. 402, 419-20 (1987).

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

When the State challenges a prospective juror under *Witt*, the defense may ask the judge for the opportunity to question the juror. This request is commonly known as the opportunity to rehabilitate, because the defendant wants to show that the juror's purported opposition to capital punishment would not substantially impair his or her performance of duties as juror and that the State's challenge for cause should therefore be denied. A trial judge may not automatically deny the defendant's request but instead must exercise his or her discretion in deciding whether to allow a defendant to rehabilitate a prospective juror. State v. Brogden*,* 334 N.C. 39, 44 (1993). 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. State v. Kemmerlin, 356 N.C. 446, 462 (2002); State v. Nicholson, 355 N.C. 1, 27 (2002); State v. Reeves, 337 N.C. 700, 739 (1994).

Consistent with the general principles governing the reopening of voir dire, discussed in Section XI above, there are limited circumstances in which it is permissible to revisit the death qualification of a seated juror. For example, the court held in *State v. Barts,* 316 N.C. 666, 680 (1986), that it was proper to reopen voir dire of a juror who reported that after she was seated, she became so agitated and emotional when contemplating the prospect of deciding whether to impose the death penalty that she sought medical attention, then stated emphatically that she would never be able to vote for the death penalty. In *State*

v. Holden, 321 N.C. 125, 153 (1987), the court held that it was also proper for the court to reopen voir dire immediately before the sentencing phase of a capital case when the court learned that a juror had expressed to a third party her inability to follow the law and to consider returning a sentence of death.

If a prospective juror expresses reservations about the death penalty that are not serious enough to justify a *Witt* challenge, the State may use a peremptory strike to remove the juror. *See, e.g.,* State v. Fullwood*,* 323 N.C. 371, 383 (1988), *vacated on other grounds*, 494 U.S. 1022 (1990).

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

B. Jurors Who May Be Biased in Favor of Death Penalty. In *Morgan v. Illinois,* 504 U.S. 719 (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.

Morgan at 729.

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

C. Questions About Life Imprisonment in Capital Trial. The Court in *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994), held that when life imprisonment without parole is the alternative punishment to a death sentence, a capital sentencing jury must be informed of that fact when future dangerousness is an issue. G.S. 15A-2002 complies with this ruling by requiring the judge to instruct a capital sentencing jury that a sentence of life imprisonment means a sentence of life without parole. In addition, the judge may give N.C.P.I.—Crim. 106.10 to the prospective jurors that briefly explains the trial and sentencing proceedings, which includes a statement that a defendant convicted of first-degree murder will be sentenced to death or life imprisonment without parole. The North Carolina Supreme Court in *State v. Williams*, 355 N.C. 501, 544 (2002), made clear that it

adhered to its prior rulings that a defendant is not entitled to ask prospective jurors whether they could understand and follow an instruction that life imprisonment means life without parole. Whether the trial court could allow such questioning in its discretion has not been decided.

XIV. Challenges for Cause.

A. Constitutional Basis. Under the Sixth Amendment and the Fourteenth Amendment's Due Process Clause, jurors who are biased against the defendant and cannot decide the case based on the trial evidence and the law must be excused. Irvin v. Dowd, 366 U.S. 717, 722 (1961). A defendant does not have a right to any particular juror, but the defendant is entitled to twelve jurors who are competent and qualified to serve. State v. McKenna, 289 N.C. 668, 681, *vacated on other grounds*, 429 U.S. 912 (1976). The method for excusing a juror who is biased or is not qualified to serve is referred to as a challenge for cause.

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

- is not qualified under G.S. 9-3 (see Section II above);
- is incapable of rendering jury service due to mental or physical infirmity;
- is, or has been previously, involved in the case against the defendant as a party, a witness, a grand juror, or a trial juror;
- has sued the defendant or been sued by him or her 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 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.

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

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

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

   - a juror's husband was police officer and juror stated her connection with police would bias her, State v. Lee*,* 292 N.C. 617, 625 (1977); and
   - a juror was related to accomplice witnesses and said he would likely believe these witnesses, State v. Allred*,* 275 NC. 554, 563 (1969).

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

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

1. exhaust all peremptory challenges;
2. renew the motion for cause against the juror at the end of jury selection as set out in G.S. 15A-1214(i); and

3. have the renewal motion denied.

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

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

G.S. 15A-1214(i); *see also* State v. Johnson, 317 N.C. 417, 433 (1986) (G.S. 15A-1214(h) and (i), read together, require a defendant who has peremptory challenges available when a challenge for cause is denied must exercise a peremptory to remove the unwanted juror)).

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

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

XV. 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 XI.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 sex discrimination in *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994). The state constitution also prohibits discrimination in jury selection. State v. Waring, 364 N.C. 443, 474 (2010).

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

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. Instead, the prospective juror should be asked to state his or her race for the record. 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); 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; statements of counsel alone or a court reporter's notations are insufficient). Presumably the juror may do so in a questionnaire or in open court.

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

Each of these steps are discussed below.

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

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

State v. Quick, 341 N.C. 141, 145 (1995).

Presumably, similar factors would be relevant when considering a defendant's claim of sex discrimination or a claim by the State that the defendant exercised a peremptory challenge in a discriminatory manner.

If the trial judge finds that the party has failed to make a prima facie showing, the judge may terminate the inquiry at that stage. The judge also has the option of proceeding to the second and third steps in the *Batson* process, a procedure that may facilitate appellate review if the judge's ruling on the adequacy of the prima facie case is rejected on appeal. State v. Cofield, 129 N.C. App. 268, 278 n.2 (1998).

If the judge rules that the party has made a prima facie showing, the remaining steps in the three-step process must be completed. If a party offers, or the trial judge requests, a neutral justification before the trial judge has ruled on the sufficiency of the prima facie case, the sufficiency of the prima facie case becomes moot, and the issue becomes the validity of the neutral justification. Hernandez v. New York, 500 U.S. 352, 359 (1991); State v. Williams, 343 N.C. 345, 359 (1996).

Case Summaries: Prima Facie Showing

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

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

State v. Maness, 363 N.C. 261, 275 (2009). When the prosecutor struck prospective juror A, who was black, the prosecutor had used five of eight peremptory challenges to remove black jurors and had accepted only three of eight black prospective jurors. Nonetheless, the trial court correctly rejected the defendant's *Batson* claim for lack of a prima facie

case. Numerical analysis, "while often useful, is not necessarily dispositive," and the court noted that race was not a factor in the trial and that the State had questioned prospective jurors in a consistent manner regardless of race.

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

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

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

State v. Hoffman, 348 N.C. 548, 553 (1998). A black defendant was tried for the murder of a white person. The State successfully challenged the first black prospective juror for cause based on her death penalty views. The State exercised a peremptory challenge to the second black prospective juror. The trial judge ruled that the defendant had not yet established a prima facie showing. The State initially accepted the third black prospective juror but was allowed the next day to excuse this juror for cause based on her death penalty views that had been revealed that

next day. The State exercised a peremptory challenge on the fourth black prospective juror, who twice had been represented by defendant's trial counsel. The court held that the trial judge did not err in ruling that the defendant had not yet established a prima facie case. Eleven white jurors had been seated when the State then exercised a peremptory challenge against another prospective African-American juror. The trial judge again ruled that the defendant had not yet established a prima facie case. The supreme court determined that this ruling was error. It noted that the State had peremptorily challenged every black prospective juror who was not excused for cause. Later, during the selection of the alternate jurors, the state peremptorily challenged the next prospective black juror. The court held that the trial judge again erred in his ruling that the defendant had not yet established a prima facie case.

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

State v. McCord, 140 N.C. App. 634 (2000). The defendant was convicted of first-degree murder and other offenses. The defendant was black and the victim was white. The initial panel of prospective jurors consisted of ten white jurors and two black jurors, A and B. The defendant objected on *Batson* grounds to the State's use of peremptory challenges of A and B. Before ruling on whether the defendant had established a prima facie case to require the State to give reasons for the challenges, the trial judge allowed the State to offer reasons. The judge considered the reasons and ruled that they were nondiscriminatory. (The court upheld the trial judge's ruling concerning jurors A and B.) Later during the voir dire, the State exercised peremptory challenges of two additional African-American jurors, C and D, and the defendant again objected on *Batson* grounds. The trial judge ruled that the defendant had failed to establish a prima facie case, but the court of appeals held, relying on *State v. Hoffman*, 348 N.C. 548 (1998), discussed in detail above, that the defendant had established a prima facie case concerning jurors C and D. The court noted that the defendant was black and the victim was white, that the State used its peremptory challenges to excuse four of the six black jurors in the jury pool, and that the composition of the jury panel was eleven white jurors and one black juror.

State v. Locklear, 349 N.C. 118, 141 (1998). The court held that under *Powers v. Ohio*, 499 U.S. 400 (1991), the defendant, a Native American, had standing to contest the state's peremptory challenges of prospective black jurors. The court rejected the defendant's argument that it was a violation of the Equal Protection Clause for the trial judge to consider his *Batson* motion separately as to challenged Native American and black prospective jurors. The court noted that racial identity between the defendant and some of the challenged jurors in this case was a legitimate factor that the trial judge could consider in ruling on the defendant's

motion. Likewise, the fact that the defendant and the challenged black jurors were of different races was also a relevant circumstance that the trial judge could consider.

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

2. **Neutral Justification.** If the party making a *Batson* claim presents a prima facie case, the other side must come forward with a neutral justification for its use of its peremptory strikes. 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). Because it will rarely, if ever, be the case that a party admits purposeful discrimination at this stage, the second step in the process is not normally dispositive. It can be, however, if a party fails to present a neutral justification for the dismissal of each prospective juror when several are at issue, *State v. Wright,* 189 N.C. App. 346, 352 (2008), or if "a discriminatory intent is inherent in the explanation" offered by a party. State v. Fletcher, 348 N.C. 292, 313 (1998). Rather, the second step is typically a prelude to the third step, when the judge assesses the validity of the proffered justification.

3. **Pretext for Purposeful Discrimination.** In the final step of the process, the court must determine whether the party whose conduct is at issue engaged in purposeful discrimination—that is, whether the party's neutral justification is a mere pretext. The burden of showing discrimination rests with the party making a *Batson* claim. Rice v. Collins, 546 U.S. 333, 338 (2006). Accordingly, the party making the claim must be given an opportunity to rebut the neutral justification offered by the other party. State v. Green, 324 N.C. 238, 240-41 (1989). This opportunity does not include cross-examining the prosecutor about his or her use of peremptory challenges. State v. Jackson, 322 N.C. 251, 258 (1988).

   The party making the claim need not show that the other party used its peremptory challenge based solely or exclusively on the race or sex of the prospective juror. It is sufficient to show that the juror's race or sex 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.

   Determining whether a party has engaged in intentional discrimination requires consideration of all relevant circumstances. *Waring*, 364 N.C. at 475. The factors that are relevant at the prima facie case stage are also relevant here. For example, if the party accepted some jurors of the same race or sex 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.

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 sex 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); *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").

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 . . . .").

Case Summaries: Pretext for Purposeful Discrimination

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

race-neutral reasons for its strikes were pretexts for purposeful discrimination.

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

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

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

State v. Jackson, 322 N.C. 251, 257 (1988). The court held that the criteria prosecutors used in selecting jurors were valid: they wanted a jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures." The court upheld the trial judge's conclusion that the State did not discriminate in exercising its peremptory challenges based on such criteria used in this case.

State v. Porter, 326 N.C. 489, 501 (1990). Disparate treatment or questioning of prospective jurors does not necessarily show discrimination in selecting jurors. *See also* State v. Williams, 339 N.C. 1, 18 (1994); State v. Lyons, 343 N.C. 1, 13-14 (1996).

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

State v. Cofield, 129 N.C. App. 268, 279 (1998). During jury selection the State accepted a jury of six black and six white jurors and passed them to

the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The State challenged the exercise of these challenges as racially discriminatory under *Batson*. The court held that the trial judge did not err in finding, based on the evidence before the judge, that the defendant's explanations for the challenges were merely pretextual excuses for purposeful racial discrimination.

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

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

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

Appellate courts review trial judges' *Batson* rulings deferentially. Snyder v. Louisiana, 552 U.S. 472, 477 (2008) ("On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.") If an appellate court nonetheless 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.

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.

XVI. Impanelment 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.

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