

# Chapter 23: Selection of Jury

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## Chapter 23: Selection of Jury

This chapter discusses issues that arise during jury selection. The chapter is divided into five sections. Section 23.1 addresses the fairness of the jury pool as well as the meaning of the requirement that jury selection be random. Section 23.2 discusses the process of preliminarily excusing jurors who do not meet statutory qualifications. Section 23.3 addresses the practice of voir dire—that is, the questioning of the jury panel by the attorneys for both sides. Sections 23.4 and 23.5 discuss the law on excusing jurors for cause and by peremptory challenges, respectively.

**Practice note:** Except in capital cases, jury selection is not recorded by the court reporter unless the defendant specifically requests it. As this chapter demonstrates, there are numerous errors that can occur during jury selection, and defense counsel should request that it be recorded.

### 23.1 The Jury Pool

#### A. Fair Cross-Section Requirement

**Test for fair cross-section violation.** The Sixth Amendment to the United States Constitution, as well as Article I, § 24 of the North Carolina Constitution, require that petit juries be drawn from a “fair cross-section” of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Bowman*, 349 N.C. 459, 509 S.E.2d 428 (1998) (state constitution guarantees that members of defendant’s race may not be systematically and arbitrarily excluded from the jury pool).

To establish a “fair cross-section” violation, a defendant must show three things:

1. the group alleged to be excluded or underrepresented is a “distinctive” group (racial minorities and women are examples of “distinctive” groups);
2. the representation of this group in the jury pool or venire is not fair and reasonable in relation to the numbers of people within the group in the community; and
3. the under-representation is due to systematic exclusion of the group in the jury-selection process. *See Duren v. Missouri*, 439 U.S. at 364.

There is no set percentage of under-representation that satisfies the second prong of this test. Our courts have said that the question of disproportionate representation is determined on a case-by-case basis. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168, 192 (2000) (no prima facie case of systemic under-representation shown where population was 32% black and jury pool was 17.5% black); *see also State v. Bowman*, 349 N.C. 459, 509 S.E.2d 428 (1998) (disparity of 16% not unreasonable); *but see Turner v. Fouche*, 396 U.S. 346 (1970) (23% disparity was unreasonable); *Jones v. Georgia*, 389 U.S. 24

(1967) (prima facie violation of fair cross-section requirement shown where blacks constituted 20% of community and only 5% of jury pool).

**Intentional discrimination not required.** To show “systematic exclusion” of a protected group, the defendant does not have to show that any party acted with discriminatory motive or intent. Under-representation is “systematic” if it was an “inherent” product of the jury selection mechanism that was used, or if it resulted from a rule or practice over which the state actor had control. *Duren v. Missouri*, 439 U.S. at 366. Examples of inherently problematic jury selection mechanisms might be: “redlining” neighborhoods from which jurors are drawn, or automatically excluding all homemakers on the presumption that they have child care responsibilities. If the discrimination was intentional, there may also be a violation of equal protection. *See B.* below (discrimination in selection of jury pool).

**Standing.** A defendant does not have to be a member of the excluded group to have standing to raise a Sixth Amendment fair cross-section challenge. *Taylor v. Louisiana*, *supra* (male could challenge systematic exclusion of females); *Holland v. Illinois*, 493 U.S. 474 (1990) (white person has standing to challenge exclusion of African-Americans).

**No right to proportional representation on petit jury.** The Sixth Amendment fair cross-section rule applies only to the jury pool and not to the final jury of twelve. In other words, a defendant has no right to proportional representation of racial minorities or other protected groups on his or her petit jury. *Holland v. Illinois*, 493 U.S. 474 (1990) (fair cross section does not apply to petit jury); *accord Lockhart v. McCree*, 476 U.S. 162 (1986) (exclusion of *Witherspoon* jurors—that is, those who would not vote for death penalty under any circumstances—not violation of fair cross-section requirement). The constitutional provision that protects against discrimination during the selection of the petit jury is the equal protection clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). The application of that clause to the selection of the petit jury is discussed *infra* § 23.5B.

## **B. Application of Equal Protection Clause to Jury Pool**

The equal protection clause of the Fourteenth Amendment prevents the state or any state actor, including the court, from intentionally discriminating against a distinctive group in selecting the jury pool. *Castaneda v. Partida*, 430 U.S. 482 (1977). To make out a violation of equal protection, the defendant must demonstrate a prima facie case of discrimination by showing statistical under-representation of the distinctive group. Then the burden shifts to the state actor to explain the discrepancy in a non-discriminatory manner. *Id.* Because intentional discrimination is harder to show than a fair cross-section violation, the equal protection clause is rarely invoked by defendants challenging the jury pool. However, only the equal protection clause applies to the selection of the petit jury (as opposed to the jury pool), and this clause is relied on by defendants challenging a prosecutor’s use of peremptory challenges. *See infra* § 23.5B.

### C. Random Selection Requirement

**Statutory and constitutional basis.** North Carolina law provides that the selection of jurors from the jury pool for questioning must be random. G.S. 15A-1214(a) states: “[T]he clerk, under the supervision of the presiding judge, must call jurors from the panel in a system of random selection which precludes advance knowledge of the identity of the next juror to be called” (emphasis added). The fair cross-section cases, *Taylor and Duren*, strongly imply that a randomly selected jury pool and random selection from the pool is required by both the Sixth Amendment and the equal protection clause of the Fourteenth Amendment. See *Holland v. Illinois*, 493 U.S. 474, 512 (Stevens, J. dissenting) (the logical and desirable way to impanel an impartial and representative jury is to put together a complete list of eligible jurors and select randomly from it); see also *Truesdale v. Moore*, 142 F.3d 749 (4th Cir. 1998) (random procedure for selecting jurors satisfies Sixth Amendment). For example, a jury selection process in which all the men in the pool were called into the box for questioning before any women were called would very likely be found unconstitutional.

**Practice note:** Because lack of randomness is almost certainly a constitutional requirement, always constitutionalize any objection to a randomness violation. State on the record that the nonrandom selection process violates the Sixth and Fourteenth Amendments, as well as Article I, §§ 19 and 24 of the North Carolina Constitution.

**Organizing of jury pool into panels.** The statutory randomness requirement is violated when a large jury pool is broken down into smaller panels, and each panel is exhausted before any member of the next panel is called. At the tail end of each panel—when there is only one member of the panel left—the identity of the next juror to be called is known. See, e.g., *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002) (dividing jury pool into panels violated jury randomness); accord *State v. Cummings*, 353 N.C. 281, 543 S.E.2d 849 (2001) (breaking jury into panels and then proceeding while some jurors were not present was violation of randomness). To avoid a violation of randomness, the last member or last few members of each panel have to be combined with the next panel. Of course, this procedure creates the problem that a few unlucky individuals may have to sit through panel after panel of jury selection without being called. A defendant may waive any objection to dividing the pool into panels by declining to enter an objection in writing before jury selection begins, under G.S. 15A-1211(c). *State v. Wiley, supra*; *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000).

Although you may decide to waive any objection to randomly selected small panels, you should lodge an objection if these smaller jury panels are created in a non-random manner. For example, if the judge puts all people who have transportation problems in a late panel, or groups teachers together into a late panel so that they can all attend the last day of school, the selection procedure is non-random, and you should object in writing before jury selection begins or as soon as the error occurs. See *State v. Golphin, supra* (trial judge put in last panel all people who filed unsuccessful written requests to be excused, which minimized chance that these people would be selected for jury).

**Demonstrating prejudice from randomness violation.** Our Supreme Court has held that a defendant must show prejudice from a randomness violation. *State v. Thompson*, 359 NC. 77, 604 S.E.2d 850 (2004). It is hard to know exactly what it would take to demonstrate prejudice. In *Golphin, supra*, our Supreme Court found that even if a violation of the statutory requirement of randomness occurred, the defendant could not show prejudice because he did not exhaust his peremptory challenges and expressed satisfaction with the seated jury. Thus, at the very least trial counsel will have to exhaust peremptories and object to the last seated juror. It may be necessary to put on the record an explicit objection to the randomness violation. Also try to explain how the violation will affect the jury. For example, in *Golphin, supra*, reluctant jurors (who were put in the last panel by the judge) may have been more favorable jurors from a defense standpoint.

**Practice note on preserving jury selection errors:** Preservation of most jury selection errors requires the defendant to exhaust peremptories and object to the last seated juror. From an appellate standpoint there is never a good enough last juror, and counsel should be very wary of expressing satisfaction with the jury. To ensure preservation of jury selection errors, trial counsel should: (i) exhaust peremptories; (ii) out of the presence of the jury, state on the record that defendant objects to the last seated juror, ask for an additional peremptory, and state that if defendant had another peremptory, he or she would use it on the last seated juror; (iii) if you want to express satisfaction with the jury in front of the jury, do so in a qualified way, such as “conditioned on what we stated at the bench, Your Honor, defendant is satisfied with the jury.” Failure to take these steps may act as an appellate waiver not only of denial of cause challenges but of many jury selection issues. *See also infra* § 23.4C (discussing procedure for preserving denial of cause challenge).

## 23.2 Qualifying the Jury

### A. Statutory Qualifications

**Generally.** The qualifications for prospective jurors are set forth in G.S. 9-3. People are qualified to serve as jurors if they:

- are citizens of the State (a North Carolina citizen is one who is a citizen of the United States and a resident of North Carolina)
- are residents of the county
- have not served as jurors in the previous two years
- are over 18 years of age
- are physically and mentally competent
- are able to hear and understand English
- have not been convicted of a felony or pled guilty to an indictment charging a felony, unless citizenship rights have been restored.

**Calculation of two-year requirement.** 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, 533 S.E.2d 168 (2000). The two-year exclusion is triggered only if the juror is sworn—merely receiving a jury summons is not enough. *State v. Berry*, 35 N.C. App. 128, 240 S.E.2d 633 (1978). The date for determining the end of the two-year period is the date on which jurors are first sworn at the beginning of jury selection. *State v. Golphin, supra* (two-year limit could not be avoided by moving juror to a later panel so that she would not be questioned until after two-year exclusionary period had run).

**Senior citizen status.** There is no maximum age for jury service. People over the age of 65 may request to be excused from the jury in writing (rather than personally appearing in court). See G.S. 9-6.1. However, advanced age itself is not a reason for exclusion. The older person must be unfit to serve or eligible for a hardship excuse. G.S. 9-3; *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002). A trial judge may not adopt a blanket policy of excusing all senior citizens who request to be excused. Rather, “excusing prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion.” *Rogers*, 355 N.C. at 448, 562 S.E.2d at 877; see also *supra* 1 NORTH CAROLINA DEFENDER MANUAL § 9.1B (discussing similar issue regarding grand jurors).

**English language capability.** In *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000), our Supreme Court upheld the constitutionality of the requirement that jurors speak and understand English. Also, the inquiry into whether a juror is an English speaker should be in English. *State v. Smith, supra* (error but no prejudice where prosecutor asked defendant in Spanish whether he understood English well enough to participate).

**Physical and mental competence and ability to hear.** The trial court has broad discretion to determine whether a person is physically competent to serve as a juror. See, e.g., *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984) (no error in declining to excuse juror who suffered from hearing impairment but stated he could hear and understand lawyer’s voir dire); *State v. Carter*, 338 N.C. 569, 451 S.E.2d 157 (1994) (no error in excusing juror who was eight months pregnant); *State v. Neal*, 346 N.C. 608, 487 S.E.2d 734 (1997) (no error in excusing juror with history of medical problems and valium addiction). Trial courts are not limited to excusing jurors who are disqualified under G.S. 9-3, but may excuse any person for whom jury service would constitute a “compelling personal hardship.” G.S. 9-6. Our Supreme Court has suggested that the reason the trial court gives for excusing a juror as disqualified, or for hardship (discussed in B. below), should not be pretextual. *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995) (rejecting defendant’s contention that trial judge’s actual reason for excusing juror with medical problems was her position on death penalty).

**Restoration of citizenship rights for convicted felons.** A convicted felon’s citizenship rights are automatically restored on unconditional release from the Department of Correction. G.S. 13-1. A person with a prior felony conviction who is no longer on parole or probation, or otherwise under the supervision of the Department of Correction, is eligible for jury service. Note that people charged with felonies are excusable for cause under G.S. 15A-1212(7).

## B. Hardship Excuses

**Generally.** People qualified for jury service may be excused or deferred for reasons of “compelling personal hardship.” G.S. 9-6(a), (c). Hardship excuses are heard and determined in district court, by a district court judge or trial court administrator. G.S. 9-6(b). The presiding judge in superior court also may excuse or defer prospective jurors for hardship. G.S. 9-6(f). The court has broad discretion in determining what constitutes hardship. *E.g.*, *State v. Norwood*, 344 N.C. 511, 476 S.E.2d 349 (1996) (no error in excusing last remaining African-American female venireperson where she had five children and was in community college); *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866 (1994) (no error in excusing juror who was apprehensive about leaving child in day care to perform jury service); *State v. Hedgepeth*, 350 N.C. 776, 517 S.E.2d 605 (1999) (no error in failing to excuse juror who had inoperable brain tumor where trial court was convinced that juror’s memory impairment was insufficient to disqualify juror).

**Scope of district court’s authority to excuse jurors.** The district court should excuse prospective jurors only for hardship, pursuant to G.S. 9-6, and not because of bias, opinion about the death penalty, or other grounds that might constitute the basis for a cause challenge under G.S. 15A-1212. *State v. Murdock*, 325 N.C. 522, 385 S.E.2d 325 (1989) (proper practice is for district court judges to excuse jurors only on grounds set forth in G.S. 9-6). If you suspect that the district court excused jurors on too broad of a basis, you may move to dismiss the venire. A defendant who moves to dismiss the venire because of improper conduct by the district court must show evidence of corrupt intent, systematic discrimination, or other irregularities affecting the actions of the jurors actually drawn and summoned. *State v. Murdock*, 325 N.C. at 526, 385 S.E.2d at 327; *see also State v. Leary*, 344 N.C. 109, 472 S.E.2d 753 (1996) (reaffirming *Murdock*); *State v. Hyde*, 352 N.C. 37, 530 S.E.2d 281 (2000) (evidence that district court judge was excusing jurors on basis of religious objections to death penalty did not meet *Murdock* standard; no showing of corrupt intent or prejudice to jury that was impaneled).

**No right to presence when district court excuses jurors.** Our courts have held that a defendant’s right to be present at all critical stages of his or her trial applies only after the defendant’s trial is called in superior court. A defendant has no right to be present during the preliminary qualification of jurors by the district court because this occurs before the defendant’s trial begins. *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. McCarver*, 341 N.C. 364, 462 S.E. 2d 25 (1995).

**Right to presence when superior court excuses jurors.** A defendant has a constitutional right to be present after his or her case is called, when jurors are being selected for his or her case. Superior court judges may not excuse jurors for hardship in unrecorded bench conferences and must conduct all jury selection proceedings on the record and in the presence of the defendant. *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). If a defendant is not present during any part of jury selection, there is reversible error. *State v. Smith, supra*.

## 23.3 Voir Dire

### A. Constitutional Entitlement to Voir Dire

**Generally.** Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to voir dire jurors adequately. “[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.” *Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992) (holding that capital defendant constitutionally entitled to ask specific “life qualifying” questions to the jury); *but see Mu’Min v. Virginia*, 500 U.S. 415, 425 (1991) (emphasizing extent of trial judge’s discretion in controlling voir dire and holding that voir dire questions about the content of pretrial publicity to which jurors might have been exposed are not constitutionally required).

**Voir dire on racial prejudices of jurors.** *Ham v. South Carolina*, 409 U.S. 524 (1973), held that an African-American defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. *Ristiano v. Ross*, 424 U.S. 589 (1976), limited *Ham* by holding that the due process clause creates no general right in non-capital cases to voir dire jurors about racial prejudice. Such questions are constitutionally mandated only under “special circumstances,” such as those presented in *Ham*. *Turner v. Murray*, 476 U.S. 28 (1986), held in capital cases that defendants have a right under the Eighth Amendment to voir dire jurors about racial biases. Even in situations where the defendant is entitled to question jurors about racial attitudes, the trial court has the discretion to determine how extensive the voir dire on race will be. *See State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991) (no error in trial court’s sustaining of prosecutor’s objection to 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 . . . ?”).

In light of these cases, counsel should be prepared to show how questions concerning racial attitudes are relevant to the defendant’s theory of defense.

### B. North Carolina Law Governing Voir Dire

**Generally.** Two sets of North Carolina statutes govern jury voir dire, G.S. 9-14 and -15, and G.S. 15A-1211 through -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, 445 S.E.2d 866 (1994) (extent and manner of voir dire subject to close supervision of trial judge and subject to reversal only on showing of abuse of discretion).

**Parties’ entitlement 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. 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 statutorily entitled to repeat the judge's questions. G.S. 15A-1214(c) (prosecution or defense not foreclosed from asking question merely because court has previously asked same question); *State v. Jones*, 336 N.C. 490, 445 S.E.2d 23 (1994) (trial court violated statute governing jury voir dire when, at outset of jury selection process, it indicated that it would not permit counsel for either side to ask any question of prospective juror that had been asked previously and had been answered).

To expedite voir dire, the trial judge may require the parties to direct certain questions to the panel as a whole. *State v. Campbell*, 340 N.C. 612, 460 S.E.2d 144 (1995) (no error where counsel allowed to question jurors individually if group question produced no response); *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980). However, a blanket ban prohibiting parties from questioning jurors individually would violate 15A-1214, *State v. Phillips*, *supra*; see also *infra* § 23.3E.

**Order of questioning.** G.S. 15A-1214 provides that the prosecutor questions prospective jurors first. When the prosecutor is satisfied with a panel of twelve, he or she passes the panel to the defense. Our Supreme Court recently upheld the statute against constitutional challenge. *State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002) (within the province of the legislature to prescribe the method by which jurors are selected, challenged, impaneled, and seated). Failure to comply with the statute is error, but our courts typically have not found the error prejudicial. *E.g.*, *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (defendant ended up conducting voir dire of jurors before state was required to pass on them; violation of statute but no prejudicial error); *State v. Lawrence*, 352 N.C. 1, 530 S.E.2d 807 (2000) (where state passed panel of ten not twelve jurors to defense, violation of statute but not prejudicial error); *State v. Thompson*, 359 N.C. 77, 604 S.E.2d 850 (2004) (no error where defendant consented to out of order voir dire of two replacement jurors).

**Order of questioning in cases involving co-defendants.** G.S. 15A-1214 states that after the state is satisfied with a panel, the panel should be passed to each co-defendant consecutively, and then back to the state to fill any vacancies. Typically, the co-defendants will alternate with respect to which one exercises his or her peremptory challenges first. In a recent case that went to trial involving co-defendants, the judge effectively held two consecutive jury selections, filling vacancies and passing the panel back to the state after defendant 1 had exercised his peremptory challenges, and not passing the jury to defendant 2 until both the state and defendant 1 had exhausted peremptories or expressed that they were satisfied with twelve jurors. This method of selection appears to be prejudicial to defendant 1—effectively, the state and defendant 2 pick the jury after defendant 1 has no further opportunity for input. If faced with this situation, inform the trial judge that the provisions of G.S. 15A-1214 are mandatory and put an objection and explanation of the prejudice to defendant 1 on the record.

To preserve the error and/or demonstrate prejudice regarding the order of questioning, the defendant must exhaust his or her peremptory challenges and object to the last seated juror. See also *supra* § 23.1C (discussing method for preserving error) and *infra* § 23.4C (discussing procedure for preserving denial of cause challenge).

### C. Scope of Permitted Questioning

**Generally.** The scope of permitted voir dire is largely a matter of trial court discretion. *E.g.*, *State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995) (trial court properly sustained state’s objection to question about victim’s HIV status); *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994) (court properly sustained state’s objection to questions about whether jurors believed death penalty had deterrent effect); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990) (no abuse of discretion shown when trial court sustained objections to defendant’s questions to venire persons about whether they would be comfortable with the defense questioning police procedure during trial); *see generally State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980) (explaining boundaries on voir dire—questions should not be overly repetitious or attempt to indoctrinate jurors or “stake them out.”)

If the state objects to a particular line of questioning, you may defend your proposed questions by linking them to the purposes of voir dire. Voir dire serves two purposes: (i) helping counsel determine whether a basis for a challenge for cause exists, and (ii) assisting counsel in intelligently exercising peremptory challenges. *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002); *State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296 (1999). A proposed voir dire question is legitimate if the question is necessary to determine whether a juror is excludable for cause or to assist you in intelligently exercising your peremptory challenges.

**Certain topics permitted.** Criminal defendants are constitutionally entitled to explore certain topics in voir dire, including: (i) a juror’s ability to consider a life sentence as a possible punishment (*Morgan v. Illinois*, 504 U.S. 719 (1992)); and (ii) jurors’ racial prejudices in capital cases, or, in non-capital cases, where “special circumstances” require it. (*Turner v. Murray*, 476 U.S. 28 (1986)). *See supra* § 23.3A.

**Voir dire on parole eligibility.** One topic that our courts consistently have prohibited the parties from covering in voir dire is the defendant’s parole eligibility. *E.g.*, *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995); *State v. Price*, 337 N.C. 756, 448 S.E.2d 827 (1994). However, in *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court held that where life imprisonment without parole is the statutory alternative punishment to death, a capital sentencing jury must be informed of that fact. Since 1999, life without parole has been the statutory alternative punishment to death for first-degree murder in North Carolina. G.S. 15A-2002 requires trial judges to instruct capital sentencing juries that life imprisonment means life without parole. In light of *Simmons* and G.S. 15A-2002, defense counsel should be able to voir dire jurors in capital cases as to whether they could understand and follow an instruction that life imprisonment means life without parole. *E.g.*, *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984) (defendant entitled to ask jurors about their ability to follow law on limited relevance of defendant’s prior record); *but see State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2001) (court continuing to adhere to rule that voir dire about parole is impermissible); *accord State v. Jones*, 358 N.C. 330, 595 S.E.2d 124 (2004). In lieu of voir dire by the attorneys, counsel can ask the court to give the 15A-2002 instruction and then ask the jurors whether they can follow that instruction.

**“Staking out.”** Parties are not permitted to use voir dire to “stake out” jurors. Staking out jurors means asking jurors what their decision would be under a specific factual scenario. Jurors should not be asked to “pledge” themselves to a future course of action before hearing the evidence and receiving instructions on the law. *E.g.*, *State v. Fletcher*, 354 N.C. 455, 555 S.E.2d 534 (2001); *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975) (explaining “staking out” doctrine), *sentence vacated*, 428 U.S. 902 (1976). As the following cases illustrate, applying this rule consistently has proved difficult:

*State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002) (question posed by defense counsel, “Have you ever heard of a case where you thought that life without the possibility of parole should be the punishment?” was improper stake out question)

*State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994) (question posed by prosecutor whether any juror could conceive of any first-degree murder case where the death penalty would be the right punishment not a stake out question)

*State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998) (question posed by defense counsel as to whether jurors could return life sentence knowing that defendant had prior conviction for first-degree murder was improper stake-out question)

*State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996) (question posed by prosecutor as to whether jurors could return a death sentence knowing that the defendant was an accessory, and not present at the scene of the shooting, not improper)

*State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (question posed by defense counsel regarding which specific circumstances would cause jurors to consider life sentence was improper stake out question)

*State v. Roberts*, 135 N.C. App. 690, 522 S.E.2d 130 (1999) (question posed by prosecutor as to whether jurors would believe eye witness identification not stake out question)

*State v. Henderson*, 155 N.C. App. 719, 574 S.E.2d 700 (2003) (question asked by prosecutor as to whether jurors would expect the state to provide medical evidence that the crime occurred permissible)

*State v. Johnson*, 164 N.C. App. 1, 595 S.E.2d 176 (2004) (permissible for state to ask jurors whether they would consider accomplice’s testimony where accomplice was testifying pursuant to plea bargain)

*State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *rev’d on other grounds*, 494 U.S. 433 (1990) (question posed by prosecutor as to whether jurors would be sympathetic toward a defendant who was intoxicated at the time of the offense not improper)

There are two arguments you can make at trial in defending a proposed inquiry against an objection by the state that it is a “stake out” question. First, if a question is necessary to

determine the jurors' fitness to serve, it should be allowed. If a particular answer to the proposed question would render the juror excludable for cause, then the question is required to ensure the impartiality of the jury. *See State v. Bond, supra* (juror who claimed he could not give an accessory a death sentence properly excused for cause; thus, state entitled to ask jurors whether they could sentence an accessory to death); *accord State v. Henderson, supra* (questions about importance to jurors of medical testimony were necessary to secure an impartial jury). Second, you are permitted to explain aspects of the law to jurors to ensure that they can follow the law. *See State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984) (defendant entitled to ask jurors about their ability to follow law on limited relevance of defendant's prior record).

**Practice note on preserving error:** As with most jury selection issues, if the trial court sustains the state's objection to a line of questioning on voir dire, the defendant must exhaust his or her peremptory challenges, and object to the last seated juror. *E.g., State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995); *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). *See also supra* § 23.1C (discussing method for preserving error) and *infra* § 23.4C (discussing procedure for preserving denial of cause challenge).

#### D. Reopening Voir Dire

After a juror has been passed 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. The trial judge may permit the parties to question the juror and may excuse the juror for cause. G.S. 15A-1214(g) (permitting reopening voir dire before jury is impaneled); *see also State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997) (trial court has discretion to reopen examination of juror after jury is impaneled); *accord State v. Waddell*, 289 N.C. 19, 220 S.E.2d 293 (1975), *sentence vacated*, 428 U.S. 904 (1976). Where a juror appears to have changed his or her mind since being examined by the state, or where the juror's answers to defense questions appear inconsistent with his or her answers to the state's inquiries, there likely is "good cause" for reopening voir dire. *State v. Womble*, 343 N.C. 667, 473 S.E.2d 291 (1996) (trial court 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 sentence of death); *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996) (same). If the trial court reopens examination of a juror, each party has the right to exercise any remaining peremptory challenges to excuse the juror. *State v. Womble, supra*.

In *State v. Boggess*, 358 N.C. 676, 600 S.E.2d 453 (2004), a seated juror returned to court after an overnight recess and informed the court that she had learned that one of her close friends was a friend of the victim's mother. The court then questioned the juror, but declined to state that it was "reopening voir dire" and declined to permit the defendant to exercise a peremptory against the juror. Our supreme court found reversible error and held that prior to impaneling the jury the judge should resolve any doubts in favor of reopening voir dire. Once voir dire is reopened, either party may exercise any remaining peremptories against the juror or jurors for whom voir dire is reopened.

## E. Right to Individual Voir Dire

**Capital cases.** In capital cases, the trial judge may permit individual voir dire of jurors. G.S. 15A-1214(j). Our courts have held that a defendant does not have an absolute right to individual voir dire and that the decision to permit it is within the trial court's discretion. *E.g.*, *State v. Nicholson*, 355 N.C. 1, 558 S.E.2d 109 (2002); *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998). It is a common practice for a trial court to permit partial individual voir dire on death qualification, exposure to pretrial publicity, or other sensitive topics. Our Supreme Court has approved this practice. *E.g.*, *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (noted with approval in *Nicholson*); *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988) (no error in denying motion for complete individual voir dire where judge allowed selective partial individual voir dire).

**Non-capital cases.** Although there is no case law directly on point, the trial court's duty to oversee jury selection almost certainly implies that the court has the authority to order individual voir dire (or partial individual voir dire) in a non-capital case if necessary to select an impartial jury. *Cf.* *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (court has inherent authority to order change of venue if necessary to ensure selection of impartial jury); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979) (same).

## F. Voir Dire in Capital Cases

**No right to bifurcated jury.** The United States Supreme Court has held that there is no Sixth Amendment or other constitutional violation where the same jury determines guilt and innocence, and decides the defendant's sentence. *Lockhart v. McCree*, 476 U.S. 162 (1986) (exclusion of *Witherspoon* excludables from guilt phase jury did not violate Sixth Amendment); *accord State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Berry*, 356 N.C. 490, 573 S.E.2d 132 (2002). North Carolina law provides that the same jury should be used for both guilt/innocence and sentencing phases of a capital trial, unless the trial jury is unable to reconvene for sentencing. G.S. 15A-2000(a)(2).

While a bifurcated jury is not an entitlement, defense counsel may still request it. The strongest argument in favor of bifurcation is efficiency. If there is a real chance that the case will not go to a sentencing phase because the defendant will be acquitted, or found guilty of a non-capital offense, then a significant amount of court time can be saved by bifurcating. Selecting a death qualified jury, where individual voir dire may be necessary and cause challenges will be much more numerous, is a tedious and time-consuming process that may be avoided by bifurcation.

**Death qualification.** Jurors whose personal or religious opposition to the death penalty would preclude them from ever returning a sentence of death are excludable for cause. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The trial judge may not exclude jurors on any broader of a basis than *Witherspoon* allows. *Adams v. Texas*, 448 U.S. 38 (1980) (*Witherspoon* limits the state's power to exclude jurors—only those jurors who are not able to follow the law may be excused for cause). The test for determining whether a juror is excludable under *Witherspoon* is whether the juror's views on the death penalty

would prevent or substantially impair the performance of his or her duties as a juror. *Wainwright v. Witt*, 469 U.S. 412 (1985). Jurors are qualified to serve on a capital jury even if they are personally opposed to the death penalty, as long as they are capable of setting aside their personal opinions in deference to the law. *Lockhart v. McCree*, 476 U.S. 162 (1986).

**Life qualification.** Jurors whose personal or religious beliefs would preclude them from considering a sentence of life imprisonment are also excludable for cause. *Morgan v. Illinois*, 504 U.S. 719 (1992). A defendant is constitutionally entitled to “life qualify” the jury by questioning jurors about their beliefs on capital punishment. *State v. Powell*, 340 N.C. 674, 459 S.E.2d 219 (1995) (defendant in murder prosecution may use voir dire to determine whether prospective jurors would automatically vote for death sentence). Our Supreme Court has approved the following life qualification questions:

- Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder?
- Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder?
- Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?

*State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994) (reversible error not to permit defendant to ask above questions).

Life qualification questions that ask jurors if they could consider particular types of mitigating evidence, or whether they could consider a life sentence in light of certain aggravating facts, often have been struck down as improper “stake out” questions. *E.g.*, *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (question posed by defense counsel regarding which specific circumstances would cause jurors to consider life sentence improper stake out question); *State v. Robinson*, 339 N.C. 263, 451 S.E.2d 196 (1994) (inquiry as to whether juror could return life sentence where defendant had prior murder conviction stake out question); *but see State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996) (question posed by prosecutor as to whether jurors could return death sentence knowing that defendant was an accessory and not present at scene of shooting, not improper). You should be entitled to ask whether jurors understand the concept of mitigation and can follow the law by giving consideration to mitigating evidence. *See State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984) (defendant entitled to ask jurors about their ability to follow law on limited relevance of defendant’s prior record).

**Right to rehabilitate jurors.** If a juror is equivocal in his or her responses to death qualification questions posed by the state, the defendant is entitled to question the juror and attempt to demonstrate that the juror is competent. *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993); *accord State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994). The defendant has no right to attempt to rehabilitate jurors whose inability to impose a sentence of death is unequivocal. *State v. Johnson*, 317 N.C. 343, 376, 346 S.E.2d 596, 614 (1986) (“when a potential juror has expressed a clear and unequivocal refusal to

impose the death penalty under all the circumstances, any additional cross-examination by defense counsel . . . would be a purposeless waste of valuable court time”). The trial court must exercise its discretion in determining whether to permit rehabilitation of particular jurors. *See State v. Brogden, supra* (error for judge to issue a blanket rule prohibiting rehabilitation).

## 23.4 Excusing Jurors for Cause

### A. Constitutional Basis

Under the Sixth Amendment and the Fourteenth Amendment 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. *Irwin v. Dowd*, 366 U.S. 717 (1961). A defendant does not have a right to any particular juror, but he or she is entitled to twelve jurors who are competent and qualified to serve. *E.g., State v. McKenna*, 289 N.C. 668, 224 S.E.2d 537, *sentence vacated*, 429 U.S. 912 (1976).

The Sixth and Fourteenth Amendments are also violated when the trial court erroneously excludes a qualified juror in response to a cause challenge by the state. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (only those jurors who cannot follow the law may be excused); *Gray v. Mississippi*, 481 U.S. 648 (1987) (excusing a qualified juror is reversible error per se even if state does not exhaust peremptory challenges); *accord State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). *See also infra* § 23.4D.

In *State v. Harris*, 338 N.C. 211, 449 S.E.2d 462 (1994), a capitally tried case where the defendant was not sentenced to death, our Supreme Court found that the trial judge’s improper exclusion of jurors under *Witherspoon, supra*, was harmless error because the state did not fully exhaust its peremptories. *See also State v. Exum*, 128 N.C. App. 647, 497 S.E.2d 98 (1998) (emphasizing discretion of trial judge in excusing for cause; defendant has no right to seat a particular juror); *accord State v. Jones*, 151 N.C. App. 317, 566 S.E.2d 112 (2002). The reasoning in these cases cannot be easily reconciled with *Gray v. Mississippi, supra*, which rests not on the Eighth but on the Sixth and Fourteenth Amendments and should apply to all criminal cases. Be sure to constitutionalize any objection to an improper denial or the improper granting of a cause challenge, and remind the trial judge that either error violates the defendant’s right to an impartial jury.

### B. Statutory Law on Excusing Jurors for Cause

**Grounds for cause challenge.** 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 supra* § 23.2A);
- 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;
- is related to the defendant by blood or marriage within the sixth degree<sup>1</sup>;
- has formed or expressed an opinion on the guilt or innocence of the defendant;
- stands charged with a felony;
- as a matter of conscience is unable to render a verdict in accordance with the law;
- for any other reason is unable to render a fair and impartial verdict.

The above statute leaves the trial judge with considerable discretion. *See, e.g., State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (whether to grant a challenge for cause under G.S. 15A-1212 is a matter left to the sound discretion of the trial court); *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997) (“The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial.”).

**Prior knowledge of case not sufficient by itself to support cause challenge.** Our courts have consistently held that a juror is not disqualified simply because he or she 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. *See Mu’min v. Virginia*, 500 U.S. 415, 430 (1991) (relevant inquiry regarding pretrial publicity is not whether jurors remember facts about case, but whether they have fixed opinions regarding defendant’s guilt); *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993) (prior knowledge about case not sufficient to require granting of cause challenge); *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (juror who knew of defendant’s prior sentence of death not disqualified; she stated she could set her knowledge aside and base her sentencing decision on evidence presented in court); *accord State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994) (mere knowledge of prior death sentence does not necessarily demonstrate prejudice to defendant).

**Jurors’ opinion on own impartiality not dispositive.** A juror’s subjective or expressed belief that he or she can set aside prior information and decide the case on the basis of the evidence presented does not necessarily render the juror qualified. “Jurors could in all truth and candor respond affirmatively [to a question about their fairness or impartiality] personally confident that [their biased] views are fair and impartial.” *Morgan v. Illinois*, 504 U.S. 719, 735 (1992). The trial judge must make an independent, objective evaluation of the juror’s impartiality. *See State v. Brogden*, 334 N.C. 39, 53, 430 S.E.2d 905, 913 (1993) (Frye J. concurring) (“While the potential juror should be asked questions regarding his [impartiality], whether he is or is not a qualified juror is a question of law to be decided by the court.”).

**Inability to follow law.** Jurors who are unable to follow certain provisions of law must be excused for cause. *E.g., State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993)

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1. G.S. 15A-1212 states that jurors should not be related to the defendant 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 cousins.

(error to fail to excuse juror who could not afford defendant presumption of innocence); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992) (error to fail to excuse juror who expected defendant to testify); *State v. Leonard*, 296 N.C. 58, 248 S.E.2d 853 (1978) (error to fail to excuse three jurors who stated they would not acquit even if defendant proved insanity defense); compare *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991) (no error where trial court failed 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).

**Other sources of bias.** The following cases deal with other possible sources of juror bias. The key inquiry is always whether the juror can be impartial.

Cases in which the reviewing court found error in failure to excuse juror for cause:

*State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977) (error not to remove for cause juror whose husband was police officer and who stated her connection with police would bias her).

*State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969) (error not to remove juror who was related to accomplice witnesses and said he would likely believe these witnesses).

Cases where reviewing court found no error in failure to remove juror for cause:

*State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001) (no error in failing to remove juror who had business relationship with homicide victim and had visited victim at home).

*State v. House*, 340 N.C. 187, 456 S.E.2d 292 (1995) (no error in failing to remove juror whose friend had been murdered but who stated she could separate facts of defendant's case from friend's case).

*State v. McNeil*, 99 N.C. App. 235, 393 S.E.2d 123 (1990) (juror's job as assistant Attorney General did not automatically disqualify him from service).

*State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159 (1978) (being former police officer not sufficient grounds to require removal of juror).

### **C. Preserving Denial of Cause Challenges**

**Importance of exhausting peremptories.** If the defendant challenges a juror for cause and the trial court declines to remove the juror, the defendant must follow precise steps to preserve the error for appellate review. The steps are set out in G.S. 15A-1214(h). To preserve the denial of a cause challenge the defendant must:

1. remove the challenged juror by a peremptory challenge (if the defendant has peremptories left);
2. exhaust his or her peremptory challenges;

3. renew his motion for cause against the juror at the end of jury selection;
4. have the renewed motion denied. *See State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993) (explaining procedure).

Any deviation from this procedure may result in a waiver of appellate review. *E.g.*, *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1 (2000) (defendant who exhausted peremptories and moved unsuccessfully for additional peremptory challenges still waived review of denial of cause challenge because he failed to renew challenge for cause at the end of jury selection).

Further, our courts often have found no prejudicial error in jury selection where the defendant expresses satisfaction with the seated jury. *E.g.*, *State v. Hartman*, 344 N.C. 445, 476 S.E.2d 328 (1996) (exhausting peremptories not sufficient to demonstrate prejudice; defendant must show he or she was forced to seat an unsatisfactory juror); *accord State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). In addition to complying with G.S. 15A-1214(h), you should also challenge for cause the last seated juror and/or request an additional peremptory to remove at least one seated juror. *See supra* § 23.1C (discussing method for objecting to last juror).

**Where alternates are selected.** N.C. Gen. Stat. 15A-1217(c) provides that for each alternate selected, each defendant receives an additional peremptory, and the state receives an equal number. Thus, in a non-capital prosecution where the judge decides to seat one alternate, each defendant effectively has 7 peremptory challenges. To properly exhaust, it is important to use up your first six challenges in selecting the first 12 jurors. If you use two of your seven challenges in choosing the alternate, the appellate courts may find that you failed to exhaust your peremptories, especially if the alternate ends up not participating in deliberations.

#### **D. Excusing a Qualified Juror**

Just as it is error for the trial court to decline to excuse an unqualified juror, it is also erroneous for the court to exclude a juror who is qualified to serve. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (only those jurors who cannot follow the law may be excused). If the trial court excuses a qualified juror, the error is reversible *per se* on appeal, even if the state does not exhaust its peremptories. *Gray v. Mississippi*, 481 U.S. 648 (1987) (improperly excusing qualified juror under *Witherspoon* reversible *per se*). Make sure you enter an objection to the dismissal for cause of any juror whom you believe was improperly excused, and be sure to constitutionalize your objection. *See supra* § 23.4A. You can also request to rehabilitate, or ask the judge to question any juror challenged by the state, to try to establish that the juror is impartial and can follow the law. *See State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993) (defendant has right to attempt to rehabilitate equivocal juror).

## 23.5 Peremptory Challenges

### A. Statutory Right to Peremptory Challenges

There is no constitutional right to peremptory challenges. *Ross v. Oklahoma*, 487 U.S. 81 (1988). The right to peremptory challenges is statutory. *See* G.S. 15A-1217 (entitling both state and defendant to peremptory challenges in criminal case).

**Number of peremptory challenges.** The state and each defendant in a non-capital case are entitled to six peremptory challenges. In a capital case, each party is entitled to fourteen peremptories. Parties are entitled to one additional peremptory challenge for every alternate selected. G.S. 15A-1217. Our Supreme Court has said that the trial court has no authority to grant additional peremptory challenges. *State v. Hunt*, 325 N.C. 187, 198, 381 S.E.2d 453, 460 (1989). The court has found no error, however, where the trial court granted each defendant an additional peremptory challenge because one juror who had been accepted by all parties was dismissed because of a family emergency. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997); *see also State v. Banks*, 125 N.C. App. 681, 482 S.E.2d 41 (as sanction for failure to preserve evidence, trial court stripped state of two peremptory challenges), *aff'd per curiam*, 347 N.C. 390, 493 S.E.2d 58 (1997).

**Purpose of peremptory challenges.** Peremptory challenges allow the parties to excuse jurors on the basis of the party's own criteria, generally without inquiry or required explanation. *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984) (any reason except race is an acceptable reason for peremptory challenge; case decided before *Batson*); *accord State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977); *see also State v. Wooten*, 344 N.C. 316, 474 S.E.2d 360 (1996) (permissible for prosecutor to strike juror because of juror's hesitancy about death penalty). 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. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987) (prosecutor may not challenge juror solely on account of race).

### B. Equal Protection Limitation on Peremptory Challenges (*Batson*)

**Generally.** The United States Supreme Court has held that racial discrimination in the exercise of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). Discrimination in jury selection also violates Article I, § 26 of the North Carolina Constitution, which states that no person may be excluded from jury service on account of sex, race, color, religion, or national origin. *See State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998) (racial discrimination in jury selection violates both state and federal constitution).

**Recent U.S. Supreme Court *Batson* decisions.** In 2005, the United States Supreme Court issued two opinions decided under *Batson v. Kentucky*. The first, *Miller-El v. Dretke*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2317 (2005), addresses the issue of what sort of evidence a defendant can rely upon to show intentional discrimination in the exercise of a peremptory strike. The opinion is most useful with respect to step 3, explained below,

where the defendant is trying to rebut proffered “race neutral” reasons for a strike articulated by a prosecutor.

One important kind of rebuttal evidence is comparisons between black and white panelists. If a prosecutor accepts a white juror with certain characteristics, and then uses those characteristics to strike a black juror, discrimination can be inferred. For example in *Miller-El*, the prosecutor stated that he struck a black venireman who expressed the opinion that he would vote against the death penalty if he believed the defendant could be rehabilitated. That was not a race neutral reason, the court found, where the prosecutor accepted white jurors with comparable views. *Miller-El* also found to be pretextual an explanation for a strike where the prosecutor did not fully inquire into the issue. Where a black juror was struck ostensibly because his brother had prior convictions, but the prosecutor did not ask about the juror’s relationship with his brother, the court found the prosecutor’s reason unconvincing. It is also improper for a reviewing court to substitute a better reason than the prosecutor offers. If you find that the trial court is doing this—“saving” the prosecutor’s explanations—you should object and make a record of the difference between the reason advanced by the prosecutor and the reason accepted by the court.

In another part of the opinion, *Miller-El* holds that intentional discrimination can be shown by patterns of questioning or other conduct. If a prosecutor starts asking questions of black jurors that he or she is not asking of white jurors, such as whether they think the criminal justice system is fair, then discrimination is more likely to be present. In *Miller-El*, the court found discrimination where the prosecutor described the death penalty vividly and explicitly to black jurors but very blandly to white jurors.

Texas, where *Miller El* originates, allows any party to “shuffle” the venire cards during jury selection. The U.S. Supreme Court criticized the prosecutor’s practice of shuffling the cards when there were several black jurors in the next group of jurors to be called into the box. The effect of the shuffling was often to move those jurors back in line. A North Carolina equivalent might occur where jurors are divided into panels. If at the end of a panel there are two black venirepersons left and no whites, and the prosecutor chooses that moment to suggest merging the remaining members of the panel with the next panel, this would tend to show discrimination.

A final part of the decision emphasizes patterns of discrimination shown by the district attorney’s office over time. This part of the decision reinforces the need for the defense bar to keep track of patterns in particular offices or with respect to particular prosecutors.

The other *Batson* decision decided this term was *Johnson v. California*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2410 (2005). Johnson addressed the standard of proof needed to meet step 1 in *Batson*—establishing a prima facie case of discrimination. *Johnson* makes clear that at step 1, the party alleging discrimination does not carry a burden of proof, but merely a burden of production. In order to establish a prima facie case of discrimination, and require the state to proceed to step 2, a defendant need only produce sufficient evidence to “permit the trial court to draw an inference of discrimination.” The defendant does not

have to show a “strong likelihood” of discrimination, or even that it is more likely than not that the prosecutor is acting in a racially discriminatory manner. The defendant does carry the burden of proof at step 3. *Johnson* can be cited both at the trial court to encourage the court to ask the prosecutor to place his or her reasons for strikes on the record, and on appeal to request a *Batson* remand, where a trial court erroneously failed to find a prima facie case of discrimination.

**Three-prong *Batson* test.** *Batson v. Kentucky*, 476 U.S. 79 (1986), established the following three-part test for demonstrating an equal protection violation in the exercise of peremptory challenges.

First, a defendant making a *Batson* challenge must establish a prima facie case of discrimination. *E.g.*, *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991)). The trial court must consider all relevant circumstances, including the defendant’s race, the victim’s race, the race of key witnesses, discriminatory questions or statements made by the prosecutor, a pattern of strikes against minority jurors, or the relative acceptance rate of whites and blacks. *State v. Golphin*, *supra*; *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998); *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991) (one of the most important considerations for whether a *prima facie* case is established is whether prosecutor uses disproportionate number of peremptory challenges to strike African-American jurors). “Step one of the *Batson* analysis, a prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross.” *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718 (1998). *Hoffman* found that the trial court erred in failing to find that the defendant had made out a prima facie case where the defendant was black, the victim white, and the prosecutor had filled eleven seats with white jurors and struck the three black prospective jurors not excused for cause. The case was remanded so that the prosecutor could place his or her reasons for the strikes on the record. *See also State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989) (remanding for *Batson* hearing after trial court erroneously failed to find prima facie case); *accord State v. McCord*, 140 N.C. App. 634, 538 S.E.2d 633 (2000).

Second, if the defendant is successful in establishing a prima facie showing of discrimination, the burden shifts to the state to proffer a race-neutral reason for the strike. *Hernandez v. New York*, 500 U.S. 352 (1991); *Purkett v. Elem*, 514 U.S. 765 (1995). “The [state’s] explanation must be clear and reasonably specific, but need not rise to the level of justifying exercise of a challenge for cause.” *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563 (1998). In *Purkett*, the United States Supreme Court held that the proffered race-neutral explanation does not have to be persuasive or even plausible, as long as it is facially non-discriminatory. *Purkett*, 514 U.S. at 768 (1995); *see also State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998) (following *Purkett*); *State v. Bonnett*, 348 N.C. at 433, 502 S.E.2d at 574-575 (“unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral”). When the state proffers explanations for its challenges, the defendant is entitled to an opportunity to rebut the proffered reason for excusing the juror. *E.g.*, *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997); *State v. Peterson*, 344 N.C. 172, 472 S.E.2d 730 (1996).

Third, the trial court assesses the state’s proffered reason and determines whether the defendant has proved purposeful discrimination. If the court finds that the prosecutor’s proffered reasons are disingenuous, or “pretextual,” and the real reason for the strike is discriminatory, then the court must find a violation of the equal protection clause. *Hernandez*, 500 U.S. at 359; *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997). “At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” *Purkett*, 514 U.S. at 768; *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir. 1987) (trial court “has a duty to satisfy itself that the prosecutor’s challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination”). Factors the court should consider in determining whether a proffered explanation is pretextual include: the susceptibility of the particular case to racial discrimination; the race of the defendant, the victims, and key witnesses; the prosecutor’s demeanor, and the credibility of the explanation itself. *State v. Porter*, 326 N.C. 489, 391 S.E.2d 144 (1990). The court should also consider whether similarly situated white venirepersons were passed by the state. *Id.*

**Practice note:** Because it is so easy for the state to meet the second prong of the *Batson* test, defense counsel needs to focus on the third step—namely, convincing the trial judge that the state’s proffered explanations for strikes are not credible. Implausible reasons unrelated to the juror’s fitness to serve, such as hair style, gum chewing, or a remote connection to a minor state witness, may well be pretextual. Try to identify and bring to the court’s attention white jurors with characteristics similar to the characteristic identified by the state as its reason for striking a juror. For example, if the prosecutor claims he struck a black juror because she was young, list for the court the young white jurors passed by the prosecutor. If the reason proffered is simply false—if, for example, the prosecutor asserts that a perfectly forthright juror was “hesitant,” or “seemed defiant”—inform the trial court that you noticed no hesitation or defiance.

**Suspect reasons for strikes.** North Carolina appellate courts have been extraordinarily deferential in reviewing *Batson* issues. Other states have regularly found certain types of reasons for strikes unacceptable. These reasons include:

- Age. *See, e.g., Richmond v. State*, 590 So. 2d 384 (Ala. Crim. App. 1991) (age as reason for peremptory strikes is “inherently susceptible to abuse”); *accord Floyd v. State*, 590 So. 2d 384 (Ala. Crim. App. 1991) (state must demonstrate why age is relevant).
- Facial expressions or other non-verbal behaviors. *Bernard v. State*, 659 So. 2d 1346 (Fla. Dist. Ct. App. 1995) (that juror made facial expression during another juror’s comment insufficient reason for strike where expression not observed by trial court and not confirmed by judge in record); *Somerville v. State*, 792 S.W.2d 265 (Tex. Ct. App. 1990) (reversing conviction where state inappropriately struck juror who prosecutor thought had muttered under his breath, showing disrespect for judge, and who was member of NAACP); *Avery v. State*, 545 So. 2d 123 (Ala. Crim. App. 1988) (reasons such as looks, body language, and negative attitude are susceptible to abuse and must be closely scrutinized by courts).

- Clothing or jewelry. *See Rector v. State*, 444 S.E.2d 862, 863 (Ga. Ct. App. 1994) (case reversed where prosecutor struck juror because she had gold tooth); *Bradley v. State*, 562 So. 2d 1276 (Miss. 1990) (juror improperly excused for wearing overalls and African-American T-shirt).

**Challenges by white defendant of strikes against African-Americans.** In *Powers v. Ohio*, 499 U.S. 400 (1991), the United States Supreme Court held that the defendant does not have to be of the same race as the improperly excluded jurors to raise a *Batson* challenge. Any defendant has standing to assert the equal protection rights of jurors. *See also State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998) (explaining *Powers*); *State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996) (same).

**Improper strike of one juror sufficient.** If even one juror is struck for racial reasons, there is constitutional error in the jury selection. *State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295 (1987) (“a single act of invidious discrimination may form the basis for an equal protection violation”).

**Remedy for *Batson* violation.** *Batson* itself does not specify the proper trial remedy for a violation. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), held that if the trial judge finds that the state has violated *Batson*, the venire should be dismissed and jury selection should begin again. Our Supreme Court has not been absolutely consistent on this approach. In *State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998), the prosecutor initially struck a juror because the juror was a member of the NAACP. When the trial court found the prosecutor’s reason to be discriminatory, the prosecutor withdrew his strike and passed the juror. The trial court then found no *Batson* violation, and our Supreme Court affirmed. The dissenters in *Fletcher* would have ordered a new trial, emphasizing that dismissing the venire is the better practice where the prosecutor makes an invalid strike.

**Review of failure to find prima facie case of discrimination.** Under U.S. Supreme Court law, once the prosecutor puts his or her reasons for strikes against minority jurors on the record, the issue of whether there is a prima facie case of discrimination becomes moot. The only issue before either the trial court or the reviewing court is whether the proffered reasons are acceptable or discriminatory. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Our Supreme Court has not fully followed *Hernandez*. Our court has held that when a trial judge explicitly rules that a defendant failed to make out a prima facie case, even where the prosecutor’s reasons for strikes are on the record, appellate review is limited to the question of whether the trial court’s finding of no prima facie case was erroneous. *E.g., State v. Fletcher*, 348 N.C. 292, 500 S.E.2d 668 (1998); *State v. Smith*, 347 N.C. 453, 496 S.E.2d 357 (1998). Only when the trial court does not explicitly rule on whether the defendant made a prima facie case, and the state proceeds to articulate explanations for its challenges, does the question of whether the defendant established a prima facie case become moot. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000); *State v. Williams*, 343 N.C. 345, 471 S.E.2d 379 (1996). This approach appears to violate *Hernandez*. The federal rule is that whenever there is a record of the prosecutor’s reasons for striking jurors, the question of whether there is a prima facie

case of discrimination is moot. This point should be pressed on appeal and may ultimately be remedied by a federal habeas court.

**Other groups cognizable under *Batson*.** In addition to prohibiting racial discrimination in the exercise of peremptory strikes, the Equal Protection Clause of the Fourteenth Amendment prohibits gender discrimination in the exercise of peremptories. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); accord *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997); *State v. Bates*, 343 N.C. 564, 473 S.E.2d 269 (1996). The procedure for establishing gender discrimination, and the factors the court should consider in evaluating a defendant's prima facie showing and in deciding the ultimate question of whether there is intentional discrimination are the same as under *Batson*. *State v. Gaines, supra*; *State v. Bates, supra*.

Article I, § 26 of the North Carolina Constitution explicitly prohibits discrimination against jurors on the basis of religion (as well as prohibiting race and gender discrimination). In *State v. Eason*, 336 N.C. 730, 445 S.E.2d 917 (1994), the defendant contended that the prosecutor had violated Article I, § 26 by striking a juror because the juror was a Jehovah's Witness. While recognizing the potential legitimacy of the claim, our Supreme Court held that the particular juror was struck because of his beliefs about the death penalty.

**Subgroups.** The United States Supreme Court has not decided whether subgroups, such as African-American women, are a cognizable group under *Batson*. That is, if the only African-Americans being passed by the state are men, arguably there is a *Batson/J.E.B.* violation. In *State v. Best*, 342 N.C. 502, 467 S.E.2d 45 (1996), the defendant argued that the prosecutor had discriminated against African-American women, but the court found the claim had not been preserved and did not reach it.

**Application of *Batson* to defendants.** The *Batson* rule applies to defendants, too. The Equal Protection Clause prohibits criminal defendants from exercising peremptory strikes in a manner that discriminates on the basis of race, gender, or other suspect characteristic. *Georgia v. McCollum*, 505 U.S. 42 (1992); accord *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998) (citing *McCollum*); *State v. Cofield*, 129 N.C. App. 268, 498 S.E.2d 823 (1998). A reverse *Batson* claim is established just like a *Batson* claim. First, the state must show a prima facie case of discrimination. The burden then shifts to the defendant to explain his or her strikes in a race neutral manner. In defending against a prima facie case of discrimination, be sure to note for the record how many African-American or other minority jurors are being passed to you for questioning. It may be that you are exercising 90% of your strikes against white jurors, but that 95% of the jurors being passed to the defense are white, because most of the black or other minority jurors have been excused for cause or struck by the state.

