

JURY SELECTION QUESTIONS

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I. GENERAL PURPOSE OF VOIR DIRE

“Voir dire examination serves the **dual purpose** of enabling the court to **select an impartial jury and assisting counsel in exercising peremptory challenges.**” MuMin v Virginia, 500 U.S. 415, 431 (1991) (The N.C. Supreme Court explained that a **similar “dual purpose”** was to ascertain whether **grounds exist for cause challenges** and to enable the lawyers to **intelligently exercise their peremptory challenges.** State v. Simpson, 341 N.C. 316, 462 SE2d 191, 202 (1995).

“Where an adversary wishes to exclude a juror because of bias, ...it is the adversary seeking exclusion who must demonstrate, **through questioning**, that the potential juror lacks impartiality.” Wainwright v. Witt, 469 U.S. at 423 (1985).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v Thomas, 294 N.C. 105, 115 (1978).

The purpose of voir dire and the exercise of challenges “is to eliminate extremes of partiality and to assure both...[parties]...that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial.” State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror’s yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. State v Hedgepath, 66 N.C. App. 390 (1984).

II. PROCEDURAL RULES of VOIR DIRE

Overall: The trial court has the duty to control and supervise the examination of prospective jurors. Regulation of the extent and manner of questioning during voir dire rests largely in the trial court’s discretion. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995).

Group v. Individual Questions: “The prosecutor and the...defendant...may **personally question prospective jurors individually** concerning their competency to serve as jurors....” NCGS 15A-1214(c).

The trial judge has the discretion to limit individual questioning and require that certain general questions be submitted to the panel as a whole in an effort to expedite jury selection. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Same or Similar Questions: The defendant may not be prohibited from asking a

question merely because the court [or prosecutor] has previously asked the same or similar question. N.C.G.S. 15A-1214(c); State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 832 (1994).

Leading Questions: Leading questions are permitted during jury voir dire [at least by the prosecutor]. State v. Fletcher, 354 N.C. 455, 468, 555 S.E.2d 534, 542 (2001).

Re-Opening Voir Dire: N.C.G.S. 15A-1214(g) permits the trial judge to reopen the examination of a prospective juror if, at any time before the jury has been impaneled, it is discovered that the juror has made an incorrect statement or that some other good reason exists. Whether to reopen the examination of a passed juror is within the judge's discretion. Once the trial court reopens the examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse such a juror. State v. Womble, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996).

III. SUBSTANTIVE AREAS OF INQUIRY

Accomplice Liability: Prosecutor properly asked about jurors' abilities to follow the law regarding acting in concert, aiding and abetting, and felony murder rule by the following "non-stake-out" questions in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

"[I]f you were convinced, beyond a reasonable doubt, of the defendant's guilt, even though he didn't actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?"

"[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?"

"[C]ould you follow the law...under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn't actually strike the blow or pull the trigger or light the match...that caused [the victim's] death...?"

Circumstantial Evidence/Lack of Eyewitnesses:

Prosecutor informed prospective jurors that *"only the three people charged with the crimes know what happened to the victims."* He stated that *"none of the three would testify against the others and therefore the State had no eyewitness testimony to offer."* He then asked: *"Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious...to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?"* The court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2)

inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999).

It was proper in first degree murder case for State to tell the jury that they will be relying upon circumstantial evidence with no witnesses to the shooting and then ask them if that will cause any problems. State v Clark, 319 N.C. 215 (1987).

Child Witnesses: Trial judge erred in not allowing the defendant to ask prospective jurors “*if they thought children were more likely to tell the truth when they allege sexual abuse.*” State v Hatfeld, 128 N.C. App. 294 (1998)

Co-Defendant/Accomplice/Snitch Witnesses:

Proper questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify...pursuant to a plea arrangement, plea bargain, or “deal” with the State. Would the mere fact that there is a plea bargain with one of the State’s witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court’s instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant....?*

c) *After having listened to that testimony and the court’s instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

[According to the N.C. Supreme Court, **these 3 questions were proper and not stake-out questions**...They were designed to determine if jurors could follow the law and be impartial and unbiased. Jones, 347 N.C. at 204. The prosecutor accurately stated the law. An accomplice testifying for the State is considered an interested witness and his testimony is subject to careful scrutiny. The jury should analyze such testimony in light of the accomplice’s interest in the outcome of the case. If the jury believes the witness, it should give his testimony the same weight as any other credible witness. Jones, 347 N.C. at 203-204.]

You may hear testimony from a witness who is testifying pursuant to a plea agreement. This witness has pled guilty to a lesser degree of murder in exchange for their promise to give truthful testimony in this case. Do you have opinions about plea agreements that would make it difficult or impossible for you to believe the testimony of a witness who might testify under a plea agreement? The prosecutor’s inquiry merely (and properly) sought to determine whether a plea agreement would have a negative effect on prospective jurors’ ability to believe testimony from such witnesses. State v. Gell, 351 N.C. 192, 200-01 (2000).

Defendant's Prior Record: In State v Hedgepath, 66 N.C. App. 390 (1984), the trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow judge's instructions that they are to consider defendant's prior record only for purposes of determining credibility.

Defenses (i.e., Specific Defenses):

A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. State v Leonard, 295 N.C. 58, 62-63 (1978).

a) **Accident:** Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

b) **Insanity:** It was reversible error for trial court to fail to dismiss juror who indicated he was not willing to return a verdict of NGRI even though defendant introduced evidence that would satisfy them that the defendant was insane at the time of the offense. State v Leonard, 295 N.C. 58,62-63 (1978); see also Vinson.

c) **Mental Health Defense:** The defendant has the right to question jurors about their attitudes about a potential insanity or lack of mental capacity defense, including questions about: "*courses taken and books read on psychiatry, contacts with psychiatrist or persons interested in psychiatry, members of family receiving treatment, inquiry into feelings on insanity defense and ability to be fair.*" U.S. v Robinson, 475 F.2d 376 (D.C. Cir. 1973); U.S. v Jackson, 542 F.2d 403 (7th Cir. 1976).

d) **Self-Defense:** Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Drug-Related Context of Non-Drug Offense: In a prosecution for common law robbery and assault, no error in allowing prosecutor (after telling prospective jurors that a proposed sale of marijuana was involved) to inquire into whether any of them would be unable to be fair and impartial for that reason. State v Williams, 41 N.C. App. 287, disc. rev. denied, 297 N.C. 699 (1979).

The following was not a "stake-out" question and was proper inquiry, to determine the impartiality of the jurors: "*Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?*" State v Teague, 134 N.C. App. 702 (1999)

Eyewitness Identification: The following prosecutor's question was upheld as proper (not a stake-out): "*Does anyone have a per se problem with eyewitness identification?*"

Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?" The prosecutor was "simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony...that is treat it no differently that circumstantial evidence." State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

Expert Witness: *"If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field."* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

Hold-Out Jurors During Deliberations: Generally, questions designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to impermissible "stake-out" questions. State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). It is permissible, however, to ask jurors *"if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the right to stand by their beliefs in the case."* [Note that if this permissible question is followed by the question, *"And would you do that?"* this crosses the line into an impermissible stake-out question.] State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

Identifying Family Members: Not error to allow the prosecutor during jury selection to identify members of the murder victim's family who are in the courtroom. State v Reaves, 337 N.C. 700 (1994).

Intoxication: Proper for Prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *"If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict."* State v McKoy, 323 N.C. 1 (1988).

Legal Principles: Defense counsel may question jurors to determine whether they completely understood the principles of **reasonable doubt** and **burden of proof**. Once counsel has fully explored an area, however, the judge may limit further inquiry. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Defendant Not Testifying: It is proper for defense counsel to ask questions concerning a defendant's failure to testify in his own defense. A court, however, may disallow questioning about the defendant's failure to offer evidence in his defense. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

Court erred in denying the defendant's challenge for cause of juror who repeatedly said that the defendant's failure to testify would stick in the back of my mind while he was deliberating (in response to question *"whether the defendant's failure to testify would affect his ability to give him a fair trial"*). State v Hightower, 331 N.C. 636 (1992); see also State v. Cunningham, 333 N.C. 744,

429 S.E.2d 718 (1993).

Pretrial Publicity: Inquiry should be made regarding the effect of the publicity upon jurors' ability to be impartial or keep an open mind. Mu'min, 500 U.S. 415, 419-421, 425 (1991). Although "Questions about the content of the publicity...might be helpful in assessing whether a juror is impartial," they are not constitutionally required. Id. at 425. The constitutional question is *whether jurors had such fixed opinions that they could not be impartial*, not whether or what they remembered about the publicity. It is not required that jurors be totally ignorant of the facts and issues involved. Id., 500 U.S. at 426 and 430.

It was deemed proper for a prosecutor to describe some of the "uncontested" details of the crime before he asked jurors whether they knew or read anything about the case. State v. Nobles, 350 N.C. 483, 497-498, 515 S.E.2d 885, 894-895 (1999) (ADA noted that defendant was charged with discharging a firearm into a vehicle occupied by his wife and three small children). It was not a "stake-out" question.

Racial/Ethnic Background: Trial courts must allow questions regarding whether any jurors might be prejudiced against the defendant because of his race or ethnic group where the defendant is accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. (If this criteria is not met, racial and ethnic questions are discretionary.) Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Such questions must be asked in capital cases involving a charge of murder of a white person by a black defendant. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1783, 90 L.Ed.2d 27 (1986).

Sexual Offense/Medical Evidence: In a sexual offense case, the prosecutor asked, "*To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?*" This was a proper, non-stake-out question. Since the law does not require medical evidence to corroborate a victim's story, the prosecutor's question was a proper attempt to measure prospective jurors' ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003).

Sexual Orientation: Proper for prosecutor to question jurors regarding prejudice against homosexuality for the purpose of determining whether they could impartially consider the evidence knowing that the State's witnesses were homosexual. State v Edwards, 27 N.C. App. 369 (1975).

IV. IMPROPER QUESTIONS OR IMPROPER PURPOSES

Answers to Legal Questions: Counsel should not “fish” for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). [Does this mean can counsel get judge to give preliminary instructions before voir dire, and then ask questions about the law?]

Confusing/Ambiguous Questions: Hypothetical questions so phrased to be ambiguous and confusing are improper. For example, “*Now, everyone on the jury is in favor of capital punishment for this offense...Is there anyone on the jury, because the nature of the offense, feels like you might be a little bit biased or prejudiced, either consciously or unconsciously, because of the type or the nature of the offense involved; is there anyone on the jury who feels that they would be in favor of a sentence other than death for rape?*” (see, Vinson); or, “*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. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Inadmissible Evidence: An attorney may not ask prospective jurors about inadmissible evidence. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Incorrect Statements of Law: Questions containing incorrect or inadequate statements of the law are improper. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

Indoctrination of Jurors: Counsel should not engage in efforts to indoctrinate jurors and counsel should not argue the case in any way while questioning jurors. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980). In order to constitute an attempt to indoctrinate potential jurors, the improper question would be aimed at indoctrinating jurors with views favorable to the [questioning party]...or...advancing a particular position. State v. Chapman, 359 N.C. 328, 346 (2005). An **example of a non-indoctrinating question** is: *Can you imagine a set of circumstances in which...your personal beliefs conflict with the law? In that situation, what would you do?* See Chapman.

Overbroad and General Questions: “*Would you consider, if you had the opportunity, evidence about this defendant, either good or bad, other than that arising from the incident here?*” This question was overly broad and general, and not proper for voir dire. State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973).

Rapport Building: Counsel should not visit with or establish “rapport” with jurors. State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

Repetitive Questions: The court may limit further repetitious questions. Vinson.

Stake-Out Questions: “Staking out” jurors is improper. Simpson, 341 N.C. 316, 462 S.E.2d 191, 202 (1995). “Staking out” is seen as an attempt to indoctrinate potential jurors as to the substance of

defendant's defense. State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

"Staking out" defined:

Questions that tend to commit prospective jurors to a specific future course of action in the case. Chapman, 359 N.C. 328, 345-346 (2005).

Counsel may not pose hypothetical questions designed to elicit in advance what the jurors' decision will be under a certain state of the evidence or upon a given state of facts...The 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 state of facts. State v. Vinson, 287 N.C. 326, 336-37 (1975), death sentence vacated, 428 U.S. 902 (1976)

Examples of Stake-Out Questions:

1) "Will the defendant have to prove anything to you before you would be entitled to a verdict of not guilty?" State v. Phillips, 300 NC 678, 268 SE2d 452 (1980).

2) "Is there anyone on the jury who feels that because the defendant had a gun in his hand, no matter what the circumstances might be, that if that-if he pulled the trigger to that gun and that person met their death as result of that, that simply on those facts alone that he must be guilty of something?" Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

3) What would your verdict be:

a) if the evidence were evenly balanced?

b) if you had a reasonable doubt about the defendant's guilt?

c) if you were convinced beyond a reasonable doubt of the defendant's guilt?

State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

4) Whether you would vote for the death penalty [...in a specified hypothetical situation...]? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

5) If you find from the evidence a conclusion which is susceptible to two reasonable interpretations; that is, one leading to innocence and one leading to guilt, will you adopt the interpretation which points to innocence and reject that of guilt? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

6) If it was shown...that the defendant couldn't control his actions and didn't know what was going on..., would you still be inclined to return a verdict which would cause the imposition of the death penalty? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

7) If you are satisfied from the evidence that the defendant was not conscious of his act at the time it allegedly was committed, would you still feel compelled to return a guilty verdict? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

8) If you are satisfied beyond a reasonable doubt that the defendant committed the act

but you believed that he did not intentionally or willfully commit the crime, would you still return a guilty verdict knowing that there would be a mandatory death sentence? State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975).

9) Improper Burden of Proof Questions:

a) *If the defendant chose not to put on a defense, would you hold that against him or take it as an indication that he has something to hide?*

b) *Would you feel the need to hear from the defendant in order to return a verdict of not guilty?*

c) *Would the defendant have to prove anything to you before he would be entitled to a not guilty verdict?* State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994), or

d) *Would the fact that the defendant called fewer witnesses than the State make a difference in your decision as to her guilt?* State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986).

10) Improper Insanity Questions:

a) *Do you know what a dissociative period is and do you believe that it is possible for a person not to know because some mental disorder where they actually are, and do things that they believe they are doing in another place and under circumstances that are not actually real?, or*

b) *Are you thinking, well if the defendant says he has PTSD, for that reason alone, I would vote that he is guilty?* State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

11) Improper “Hold-out” Juror Questions: A question designed to determine how well a prospective juror would stand up to other jurors in the event of a split decision amounts to an impermissible “stake-out.” State v. Call, 353 N.C. 400, 409-410, 545 S.E.2d 190, 197 (2001). For example, *“if you personally do not think that the State has proved something beyond a reasonable doubt and the other 11 jurors have, could you maintain the courage of your convictions and say, they’ve not proved that?”*

It is permissible to ask jurors *“if they understand that, while the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, they have the rights to stand by their beliefs in the case.”* If this permissible question is followed by the question, *“And would you do that?”* this crosses the line into an impermissible stake-out question. State v. Elliott, 344 N.C. 242, 263, 475 S.E.2d 202, 210 (1996).

Examples of NON-Stake Out Questions:

1) Prosecutor asked the jurors *“if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.”* The Supreme Court stated, *“This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question.”* State v. Reeves, 337 N.C. 700 (1994)

2) Prosecutor informed prospective jurors that *“only the three people charged with the crimes know what happened to the victims.”* He stated that *“none of the three would*

testify against the others and therefore the State had no eyewitness testimony to offer.” He then asked: *Knowing that this is a serious case, a first degree murder case, do you feel like you have to say to yourself, well, the case is just too serious...to decide based upon circumstantial evidence and I would require more than circumstantial evidence to return a verdict of first degree murder?* Court found that these statements properly (1) informed the jury that the state would be relying on circumstantial evidence and (2) inquired as to whether the lack of eyewitnesses would cause them problems. (Also, it was not a stake-out question.) State v. Teague, 134 N.C. App. 702 (1999)

3) *“Do you feel like you will automatically turn off the rest of the case and predicate your verdict of not guilty solely upon the fact that these people were out looking for drugs and involved in the drug environment, and became victims as a result of that?”* State v Teague, 134 N.C. App. 702 (1999).

4) *“If someone is offered as an expert in a particular field such as psychiatry, could you accept him as an expert, his testimony as an expert in that particular field.”* According to State v Smith, 328 N.C. 99, 131 (1991), this was NOT an attempt to stake out jurors.

5) Proper “non-stake-out” questions (by the prosecutor) about a **co-defendant/accomplice with a plea arrangement** from State v. Jones, 347 N.C. 193, 201-202, 204, 491 S.E.2d 641, 646 (1997):

a) *There may be a witness who will testify...pursuant to a plea arrangement, plea bargain, or “deal” with the State. Would the mere fact that there is a plea bargain with one of the State’s witnesses affect your decision or your verdict in this case?*

b) *Could you listen to the court’s instructions of how you are to view accomplice or interested witness testimony, whether it came from the State or the defendant....?*

c) *After having listened to that testimony and the court’s instructions as to what the law is, and you found that testimony believable, could you give it the same weight as you would any other uninterested witness?*

6) Proper “non-stake-out” questions asked by prosecutor about views on death penalty from State v. Chapman, 359 N.C. 328, 344-346 (2005):

a) *As you sit here now, do you know how you would vote at the penalty phase...regardless of the facts or circumstances in the case?*

b) *Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?*

c) *Can you imagine a set of circumstances in which...your personal beliefs [for or against the death penalty] conflict with the law? In that situation, what would you do?*

7) The prosecutor’s question, *“Would you feel sympathy towards the defendant simply because you would see him here in court each day...?”* was NOT a stake-out attempt to get jurors to not consider defendant’s appearance and humanity in capital sentencing

hearing. Chapman, 359 N.C. 328, 346-347 (2005).

8) Prosecutor properly asked “non-stake-out” questions about jurors’ abilities to follow the law regarding acting in concert, aiding and abetting, and felony murder rule in State v. Cheek, 351 N.C. 48, 65-68, 520 S.E.2d 545, 555-557 (1999):

a) “[I]f you were convinced, beyond a reasonable doubt, of the defendant’s guilt, even though he didn’t actually pull the trigger or strike the match or strike the blow in the murder, but that he was guilty of aiding and abetting and shared the intent that the victim be killed—could you return a verdict of guilty on that?”

b) “[T]he fact that one person may not have actually struck the blow or pulled the trigger or lit the match, but yet he could be guilty under the felony murder rule if he was jointly acting together with someone else in the kidnapping or committing an armed robbery?”

c) “[C]ould you follow the law...under the felony murder rule and find someone guilty of first-degree murder, if you were convinced, beyond a reasonable doubt, that they had engaged in the underlying felony of either kidnapping or armed robbery, and find them guilty, even though they didn’t actually strike the blow or pull the trigger or light the match...that caused [the victim’s] death...?”

9) In a sexual offense case, the prosecutor asked, “To be able to find one guilty beyond a reasonable doubt, are you going to require that there be medical evidence that affirmatively says an incident occurred?” This was NOT a stake-out question. Since the law does not require medical evidence to corroborate a victim’s story, the prosecutor’s question was a proper attempt to measure prospective jurors’ ability to follow the law. State v. Henderson, 155 N.C. App. 719, 724-727 (2003) (The court said that the following question would have been a stake-out if the ADA had asked it, “If there is medical evidence stating that some incident has occurred, will you find the defendant guilty beyond a reasonable doubt).

10) In a case involving an eyewitness identification, the prosecutor asked: “Does anyone have a *per se* problem with eyewitness identification? Meaning, it is in and of itself going to be insufficient to deem a conviction in your mind, no matter what the judge instructs you as to the law?” The Court said that this question did NOT cause the jurors to commit to a future course of action. The prosecutor was “simply trying to ensure that the jurors could follow the law with respect to eyewitness testimony...that is treat it no differently that circumstantial evidence.” State v. Roberts, 135 N.C. App. 690, 697, 522 S.E.2d 130 (1999).

JURY SELECTION IN DEATH PENALTY CASES

I. GENERAL PRINCIPLES

Both the defendant and the state have the right to question prospective jurors about their views on capital punishment...The extent and manner of the inquiry by counsel lies within the trial court's discretion and will not be overturned absent an abuse of discretion. State v. Brogden, 334 N.C. 39, 430 S.E.2d 905, 908 (1993)

A defendant on trial for his life should be given great latitude in examining potential jurors. State v. Conner, 335 N.C. 618 (1995)

[C]ounsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence....A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge's instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).

“Part of the Sixth Amendment's guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors...Voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored.” Voir dire must be available “to lay bare the foundation” of a challenge for cause against a prospective juror.

Morgan v Illinois, 504 U.S. 719, 729, 733 (1992)

We deal here with petitioner's ability to exercise intelligently his complimentary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so. Morgan, 504 U.S. at 733-34.

In voir dire, “what matters is how ...[the questions regarding capital punishment] might be understood-or misunderstood-by prospective jurors.” For example, “a general question as to the presence of reservations [against the death penalty] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.” One cannot assume the position of a venireman regarding this issue absent own unambiguous statement of his beliefs. Witherspoon, 391 U.S. at 515, n. 9.

The trial court **must allow a defendant to go beyond the standard “fair and impartial” question:** “As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed...It may be that a juror could, in good conscience, swear to uphold the law and yet be

unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception.” Morgan, 504 U.S. at 735-36.

It is not necessary for the trial court to explain or for a juror to understand the process of a capital sentencing proceeding before the juror can be successfully challenged for his answers to questions. An understanding of the process should not affect one’s beliefs regarding the death penalty. Simpson, 341 N.C. 316, 462 SE2d 191, 202, 206 (1995).

II. Death Qualification: General Opposition to Death Penalty Not Enough

Under the “impartial jury” guarantee of the Sixth Amendment, death penalty jurors may not be excused “for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction”..., or “that there are some kinds of cases in which they would refuse to recommend capital punishment. Witherspoon, 391 U.S. at 522, 512-13.

The Supreme Court recognized that “A man who opposes the death penalty...can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror.” Id., 391 U.S. at 519.

“Not all [jurors] who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors...so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.” Lockhart v. McCree, 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 149 (1986). [Nice quote of the above general principle but the Court reaffirmed its position that death-qualified juries are not conviction-prone, and it is constitutional for a death-qualified jury to decide the guilt/innocence phase. The Court rejected the “fair-cross-section” argument against death-qualified juries deciding guilt.]

General opposition to the death penalty will not support a challenge for cause for a potential juror who will “conscientiously apply the law to the facts adduced at trial.” Such a juror may be properly excluded “if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge.” State v. Brogden, 430 SE2d at 907-08 (citing Witt, Adams v. Texas, and Lockhart).

III. Death Qualification Rules: Witherspoon and Witt Standards

The State may excuse jurors who make it **“unmistakably clear” (1) that they would “automatically vote against the death penalty” no matter what the facts of the case were, or (2) that “their attitude about the death penalty would prevent them**

from making an impartial decision” regarding the defendant’s guilt. Witherspoon, 391 U.S. at 522, n. 21 (1968).

A...prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be **willing to consider all of the penalties** provided by state law, and that he **not be irrevocably committed against the penalty of death regardless of the facts and circumstances...**” that might emerge during the trial. Witherspoon v Illinois, 391 U.S. 510, 523 n.21 (1968).

The proper standard for excusing prospective jurors for cause because of his views on capital punishment is: **“Whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction or his oath.”** Wainwright v. Witt, 469 U.S. at 424.

Prospective jurors may not be excused for cause simply because of the possibility “of the **death penalty may affect** what their **honest judgment of the facts** will be or **what they may deem to be a reasonable doubt.**” The fact that the possible imposition of the death penalty would **“affect” their deliberations by causing them to be more emotionally involved or would view their task with greater seriousness** is not grounds for excusal. The same rule against exclusion for cause applies to **jurors who could not confirm or deny** that their **deliberations would be affected** by their views about the death penalty or by the possible imposition of the death penalty. Adams v. Texas, 448 U.S. 38, 49-50 (1980).

The N.C. Supreme Court has upheld removal of potential jurors **who equivocate** or who state that although they believe generally in the death penalty, they indicate that they personally **would be unable or would find it difficult to vote for the death penalty.** Simpson, 341 N.C. 316, 462 S.E.2d 191, 206 (1995); State v. Gibbs, 335 NC 1, 436 SE2d 321 (1993), cert. denied, 129 L.Ed.2d 881 (1994).

The State may excuse for cause a juror if he affirmatively answers the following question: **“Is your conviction [against the death penalty] so strong that you cannot take an oath [to fairly try this case and follow the law], knowing that a possibility exists in regard to capital punishment.”** Lockett v. Ohio, 438 U.S. 586, 595-96 (1978). This ruling was based on the impartiality prong of the Witherspoon standard (i.e., their attitudes toward the death penalty would prevent them from making an **impartial decision as to the defendant’s guilt.**)

The following questions **by the prosecutor** were found to be proper:

1) [Mr. Juror...], *how do you feel about the death penalty, sir, are you opposed to it or [do] you feel like it is a necessary law?*

2) *Do you feel that you could be part of the legal machinery which might bring it about in this particular case?* State v Willis, 332 N.C. 151, 180-81 (1992)

IV. Rehabilitation of Death Challenged Juror

It is not an abuse of for the trial court to deny the defendant the chance to rehabilitate a juror **who has expressed clear and unequivocal** opposition to the death penalty in response to questions asked by the prosecutor and judge **when further questioning by defendant would not have likely produced different answers.** Brogden, 430 SE2d at 908-09; see also State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). [In Brogden, a juror said that he could consider the evidence, was not predisposed either way, and could vote for death in an appropriate case. The same juror also said his feelings about the death penalty would “partially” or “to some extent” affect his performance as a juror. The trial court erroneously denied the defendant the opportunity to rehabilitate this juror.]

V. Life Qualifying Questions: Morgan v. Illinois

“If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts were?” Morgan, 504 U.S. at 723. A juror who will automatically vote for the death penalty in every case will fail to follow the law about considering aggravating and mitigating evidence, and has already formed an opinion on the merits of the case. Id. at 504 U.S. at 729, 738.

“Clearly, the extremes must be eliminated-i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence.” Morgan, 504 U.S. at 734, n. 7.

“General fairness and follow the law questions” are not sufficient. **A capital defendant is entitled to inquire and ascertain a potential juror’s predeterminations regarding the imposition of the death penalty.** Morgan, 504 U.S. at 507; State v. Conner, 335 N.C. 618, 440 S.E.2d 826, 840 (1994)

[For a good summary of Morgan, see U.S. v. Johnson, 366 F.Supp. 2d 822, 826-831 (N.D. Iowa 2005).]

Proper Questions:

1) As you sit here now, do you know how you would vote at the penalty phase...regardless of the facts or circumstances in the case? Chapman, 359 N.C. 328, 344-345 (2005).

2) Do you feel like in any particular case you are more likely to return a verdict of life imprisonment or the death penalty?

[According to the Supreme Court, these general questions (asked by the prosecutor, i.e., #1 and #2 herein) did not tend to commit jurors to a specific future course of action. Instead, the questions helped to clarify whether the jurors’ personal beliefs would substantially impair their ability to follow the law. Such inquiry is not only permissible, it is desirable to safeguard the integrity of a fair and impartial jury” for both parties. Chapman, 359 N.C. 328, 344-345 (2005).]

3) Can you imagine a set of circumstances in which...your personal beliefs [...for or against the death penalty...] conflict with the law? In that situation, what would you do?

[While a party may not ask questions that tend to “stake out” the verdict a prospective juror would render on a particular set of facts..., **counsel may seek to identify whether a prospective juror harbors a general preference for a life or death sentence or is resigned to vote automatically for either sentence.**...A juror who is predisposed to recommend a particular sentence without regard for the unique facts of a case or a trial judge’s instruction on the law is not fair and impartial. State v. Chapman, 359 N.C. 328, 345 (2005) (citation omitted).....The Supreme Court said that, although the prosecutor’s questions (numbered 1-3 above) were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).]

4) 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? Approved in State v Conner, 335 N.C. 618 (1994)

5) Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first-degree murder? Approved in State v Conner, 335 N.C. 618 (1994). [The gist of the above two questions (numbered 4 and 5) was to determine whether the juror was willing to consider a life sentence in the appropriate circumstances or would automatically vote for death upon conviction. Conner, 440 SE2d at 841.]

6) If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned a verdict of guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?

In State v Conner, 335 N.C. 618, 643-45 (1994), the Court recognized that questions (numbered here as 6-8) that were deemed inappropriate in State v Taylor, 304 N.C. at 265, would now be acceptable.

7) If you had sat on the jury and had returned a verdict of guilty, would you then presume that the penalty should be death? State v Conner, 335 N.C. 618, 643-45 (1994) (referring to questions used in State v Taylor, 304 N.C. at 265, would now be acceptable). Also approved in State v. Ward, 354 N.C. 231, 254, 555 S.E.2d 251, 266 (2001) when asked by the prosecutor.

8) If at the first stage of the trial you voted guilty for first-degree murder, do you think that you could at sentencing consider a life sentence or would your feelings about the death penalty be so strong that you could not consider a life sentence? State v Conner, 335 N.C. 618, 643-45 (1994) (referring to State v Taylor)

Improper Questions:

1) Improper questions due to “**form**” (according to Simpson, 341 N.C. 316, 462 S.E.2d 191, 203 (1995)): a) *Do you think that a sentence to life imprisonment is a*

sufficiently harsh punishment for someone who has committed cold-blooded, premeditated murder?; and

b) *Do you think that before you would be willing to consider a death sentence for someone who has committed cold-blooded, premeditated murder, that they would have to show you something that justified that sentence?*

2) Examples of improper questions that were **argumentative, incomplete statement of the law, and “stake-outs”** are found in Simpson, 462 SE2d at 203-04 (Although “some of the questions” listed on pp. 203-04 were proper under Morgan and Conner, the Court found it harmless error.)

3) The following question was properly disallowed under Morgan because it was **overly broad and called for a legislative/policy decision**: *Do you feel that the death penalty is the appropriate penalty for someone convicted of first-degree murder?* Conner, 335 N.C. at 643.

Case-Specific Questions under Morgan:

The court in United States v. Johnson, 366 F.Supp. 2d 822 (N.D. Iowa 2005) addressed the issue of whether Morgan allows for case-specific questions (i.e., questions that ask whether jurors can consider life or death in a case involving stated facts). “Morgan questions” can be divided into 5 categories: 1) **abstract questions**, i.e., would a juror always impose death without consideration of the specific facts, 2) **defendant’s status questions** do not raise facts about the alleged crime but they address the defendant’s status separate and apart from the crime such as race, 3) **case categorization questions** ask jurors about their ability to consider life or death for a particular category of capital case such as murder-for-hire, rape-murder, or felony-murder, 4) **case-specific questions**, and 5) **stake-out questions** seek to ask jurors how they would precommit to a decision under certain facts. 366 F.Supp. 2d at 834-844.

The court in Johnson decided that, while the Morgan decision approved of the abstract question “...would you automatically vote to impose the death penalty no matter what the facts are?,” the Supreme Court did not preclude (or even address) case-specific questions. 366 F.Supp. 2d at 844-845. *The essence of the Supreme Court’s decision in Morgan was that, in order to empanel a fair and impartial jury, a defendant must be afforded the opportunity to question jurors about their ability to consider life and death sentences based on the facts and law in a particular case rather than automatically imposing a particular sentence no matter what the facts were.* Therefore, the court in Johnson found that case-specific questions (other than stake-out questions) are appropriate under Morgan since they provide the parties with an adequate opportunity to question jurors and secure a fair and impartial jury. 366 F.Supp. 2d at 845-846. The Johnson court speculated that case-specific questions may be constitutionally required since a prohibition on such questions could impede a party’s ability to determine whether jurors are unwaveringly biased for or against a death sentence. 366 F.Supp. 2d at 848.

The Johnson court explained how to avoid improper stakeout questions in framing

proper case-specific questions. A proper question should address the juror's ability to consider both life and death instead of seeking to secure a juror's pledge vote for life or death under a certain set of facts. 366 F.Supp. 2d at 842-844. For example, questions about *1) whether a juror could find (instead of would find) that certain facts call for the imposition of life or death, or 2) whether a juror could fairly consider both life and death in light of particular facts* are appropriate case-specific inquiries. 366 F.Supp. 2d at 845, 850. Case-specific questions should be prefaced on "if the evidence shows," or some other reminder that an ultimate determination must be based on the evidence at trial and the court's instructions. 366 F.Supp. 2d at 850.

VI. Consideration of MITIGATION Evidence

General Principles:

"Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty." Morgan, 504 U.S. at 738, 119 L.Ed.2d at 508.

Not only must the defendant be allowed to offer all relevant mitigating circumstance, "the sentencer [must] listen-that is the sentencer must consider the mitigating circumstances when deciding the appropriate sentence. Eddings v Oklahoma, 455 U.S. 104, 115 n.10 (1982)

[Jurors] may determine the weight to be given relevant mitigating evidence...[b]ut they may not give it no weight by excluding such evidence from their consideration. Eddings v Oklahoma, 455 U.S. 104, 114 (1982)

Decision to impose the death penalty is a reasoned moral response to the defendant's background, character and crime...Jurors make individualized assessments of the appropriateness of the death penalty. Penry v. Lynaugh, 109 S.Ct. 2934, 2948-9 (1988)

Procedure must require the sentencing body to consider the character and record of the individual offender and the circumstances of the particular offense. Woodsen v North Carolina, 428 U.S. 280, 304 (1976)

In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique individualized judgment regarding the punishment that a particular person deserves. Turner v Murray, 476 U.S. 23, 33-34 (1985) (quoting Caldwell v Mississippi, 472 U.S. 320, 340 n.7 (1985)).

Possible Introductory Question for Mitigation:

“Can you imagine a set of circumstances in which...your personal beliefs [about __?] conflict with the law? In that situation, what would you do?”

The Supreme Court had the following to say about the above question and 2 others originally asked by a prosecutor: Although the prosecutor’s questions were hypothetical, they did not tend to commit jurors to a specific future course of action in this case, nor were they aimed at indoctrinating jurors with views favorable to the State. These questions do not advance any particular position. In fact, the questions address a key criterion of juror competency, i.e., ability to apply the law despite of their personal views. In addition, the questions were simple and clear. Chapman, 359 N.C. 328, 345-346 (2005).

Note, however, the following questions were deemed improper because 1) they “fished” for answers to legal questions before the judge instructed the jury about the applicable law, and 2) the questions “staked-out” jurors about what kind of verdict they would render under certain named circumstances:

a) *“If the State is able to prove that the defendant premeditatedly and deliberately killed three people..., would you be able to fairly consider things like sociological background, the way he grew up, if he had an alcohol problem, things like that in weighing whether he should get death or LWOP?”*;

b) *“Assuming the State proves three cold-blooded P&D murders, can you conceive in your own mind the mitigating factors that would let you find your ability for a penalty less than death?”* State v. Mitchell, 353 N.C. 309, 318-319 543 S.E.2d 830, 836-837 (2001).

The following question was allowed by the trial court: ***“Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don’t count because of the severity of the crime.”*** State v Jones, 336 N.C. 229, 241 (1994)

See, Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995) for list of improper questions about whether jurors could consider certain aggravating and mitigating circumstances due to form or staking out. But some of the questions were proper, i.e., *Whether any prospective juror had a latent bias against any type of evidence which the defendant proposed to present in mitigation ?* 462 S.E.2d at 205.

See discussion of U.S. v. Johnson, 366 F.Supp. 822 (N.D. Iowa 2005) above for authority or argument that case-specific inquiry about mitigation should be allowed under Morgan.

VII. Specific Areas of Inquiry

Accomplice Liability: It was proper for prosecutor to ask prospective juror if he would

be able to recommend the death penalty for someone who did not actually pull the trigger since it was uncontroverted that the defendant was an accessory. The State could inquire about the jurors' ability to impose the death penalty for an accessory to first-degree murder. State v Bond, 345 N.C. 1, 14-17, 478 S.E.2d 163 (1996):

a) *"The evidence will show [the defendant] did not actually pull the trigger. Would any of you feel like simply because he did not pull the trigger, you could not consider the death penalty and follow the law concerning the death penalty."*

b) *"Regardless of the facts and circumstances concerning the case, you could not recommend the death penalty for anyone unless it was the person who pulled the trigger."*

Age of Defendant:

The following question was asked by defense counsel: *"[T]he defendant will introduce things that he contends are mitigating circumstances, things like his age at the time of the crime...Do you feel like you can consider the defendant's age at the time the crime was committed ...and give it fair consideration?"* The Supreme Court assumed it was error for the trial court to sustain the State's objection to this question. In finding it harmless, however, the Court stated, *"[i]n the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant."* State v Jones, 336 N.C. 229, 241 (1994)

Note, however, the question *"Would you consider the age of the defendant to be of any importance in this case [in deciding whether the death penalty is appropriate]?"* was found to be a "stake-out" question in State v. Womble, 343 N.C. 667, 682 473 S.E.2d 291, 299 (1996).

Course of Conduct Aggravator:

Prosecutor was not staking out juror when asking: *"If the State satisfied you... that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two humans to death with a hammer, is that correct?"* State v Laws, 325 N.C. 81 (1989).

Felony Murder Defined:

Prosecutor properly defined felony murder as *"a killing which occurs during the commission of a violent felony, such as _____"* (the felony in this case was discharging a firearm into an occupied vehicle). State v. Nobles, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999).

Forecast of Aggravating (and Mitigating?) Circumstance(s):

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: **[I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show**, provided the statements are made in good faith and are reasonably grounded

in the evidence available to the prosecutor.

Foster Care:

It was proper to ask, *Whether any jurors have had any experience with foster care?* Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995);

Gender of Defendant [or Victim?]:

Prosecutor properly asked, “*Would the fact that the Defendant is a female in any way affect your deliberations with regard to the death penalty?*” This was not a stake-out question. It was appropriate to inquire into the possible sensitivities of prospective jurors toward a female defendant facing the death penalty in an effort to ferret out any prejudice arising out of defendant’s gender. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

HAC Aggravator:

In State v Payne, 328 N.C. 377, 391 (1991), the defendant argued it was improper for the prosecutor to forecast to the jury during voir dire that they might consider HAC as an aggravating factor. The Court found no error and stated: [I]t is permissible for a prosecutor during voir dire to state briefly what he or she anticipates the evidence may show, provided the statements are made in good faith and are reasonably grounded in the evidence available to the prosecutor.

Impaired Capacity (f)(6):

It was proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. (*If it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to affect your verdict.*) State v McKoy, 323 N.C. 1 (1988)

Could the juror consider impaired capacity due to intoxication by drugs or alcohol as a mitigating circumstance and give the evidence such weight as you believe it is due ? Would your feelings about drugs or alcohol prevent you from considering the evidence ? State v Smith, 328 N.C. 99, 127 (1991) (See, where Court found that the following was a stake-out question: “*How many of you think that drug abuse is irrelevant to punishment in this case.*” State v. Ball, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996).

Prosecuting attorney asked the jurors *if they would consider that the defendant voluntarily consumed alcohol in determining whether the defendant was entitled to diminished capacity mitigating factor.* The Supreme Court stated: “This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question.” State v. Reeves, 337 N.C. 700 (1994)

Life Sentence:

During jury selection, a prospective juror indicated that he did not feel that a life sentence actually meant life. (Prior to LWOP statute) The trial court then instructed the

jury that they should consider a life sentence to mean that defendant would be imprisoned for life and that they should not take the possibility of parole into account in reaching a verdict. The juror indicated that he would have trouble following that instruction and was excused for cause. Defense counsel requested that he be allowed to ask the other prospective jurors whether they could follow the court's instructions on parole. The trial court erroneously refused to allow the question. The Supreme Court held that **the defendant has a right to inquire as to whether a prospective juror will follow the court's instruction (i.e., life means life)**. State v Jones, 336 N.C. 229, 239-40 (1994)

Mental or Emotional Disturbance:

If the court instructs you that you should consider whether or not a person is suffering from mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow the instruction? State v Robinson, 339 N.C. 263 (1994) (using an example from State v Skipper, 337 N.C. 1, 23 (1994)).

The following were proper mental health related questions as found in Simpson, 341 N.C. 316, 462 S.E.2d 191, 205 (1995):

1) *Whether the jurors had any background or experience with mental problems in their families ?; and*

2) *Whether the jurors have any bias against or problem with any mental health professionals ?*

Murder During Felony Aggravator:

Prosecutor informed jury about aggravating factors and indicated that the State is relying upon...*the capital felony was committed while the defendant was engaged, or was an aider and abettor in the commission of, or attempt to commit...any homicide, robbery, rape....* Supreme Court said that the prosecutor during jury voir dire should limit reference to aggravating factors, including the underlying felonies listed in G.S. 15A-2000(e)(5), to those of which there will be evidence and upon which the prosecutor intends to rely. Payne, 328 N.C. 377 (1991)

No Significant Criminal Record:

The following question was deemed improper as hypothetical and an impermissible attempt to indoctrinate a juror: *“Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?”* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989).

Personal Strength:

Prosecutor asked: *“Are you strong enough to recommend the death penalty ?”* State v Smith, 328 N.C. 99, 128 (1991). This repeated inquiry by prosecutor is not an attempt to see how jurors would be inclined to vote on a given state of facts. State v. Fleming, 350 N.C. 109, 125, 512 S.E.2d 720, 732 (1999).

Religious Beliefs:

The defendant's "right of inquiry" includes "the right to make appropriate inquiry concerning a prospective juror's moral or religious scruples, morals, beliefs and attitudes toward capital punishment. State v. Vinson, 287 N.C. 326, 337, 215 S.E.2d 60, 69 (1975), death sentence vacated, 428 U.S. 902, 49 L.Ed.2d 1206 (1976). This right of inquiry does not extend to all aspects of the jurors' private lives or of their religious beliefs. In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625 (1989).

Questions about jurors' "church affiliations and the beliefs espoused by others [about the death penalty] representing their churches" fell outside of appropriate questions regarding "the specific jurors' moral or religious views" [of capital punishment]. State v. Anderson, 350 N.C. 152, 171-172, 513 S.E.2d 296, 308 (1999). (See, State v. Fletcher, 354 N.C. 455, 467, 555 S.E.2d 534, 542 (2001), where defense counsel was allowed to inquire into a juror's religious affiliation and his activities with a Bible distributing group.)

General questions about the effect of a juror's religious views on his ability to follow the law are favored over detailed questions about Biblical concepts or doctrines. It was held improper to ask about a juror's "*understanding of the Bible's teachings on the death penalty.*" State v. Mitchell, 353 N.C. 309, 318, 543 S.E.2d 830, 836 (2001) (The Defendant, however, was allowed to ask the juror about her religious affiliation and whether any teachings of her church would interfere with her ability to perform her duties as a juror). In State v. Laws, 325 N.C. 81, 109, 381 S.E.2d 609, 625-626 (1989), sentence vacated on other grounds, 494 U.S. 1022, 110 S.Ct. 1465, 108 L.Ed.2d 603 (1990), the trial court did not abuse its discretion by not allowing defense counsel to ask a juror "*whether she believed in a literal interpretation of the Bible.*"

Sympathy for the Defendant [or the Victim?]:

An inquiry into the sympathies of prospective jurors is part of the exercise of [the prosecutor's] (or the defendant's?) right to secure an unbiased jury. State v. Anderson, 350 N.C. 152, 170-171, 513 S.E.2d 296, 307-308 (1999).

Prosecutor properly asked, "*Would you feel sympathy towards the defendant simply because you would see him here in court each day...?*" Jurors may consider a defendant's demeanor in recommending a sentence. The question did not "stake out" jurors so that they could not consider the defendant's appearance and humanity. The question did not address definable qualities of the defendant's appearance and demeanor. It addressed jurors' feelings toward the defendant, notwithstanding his courtroom appearance or behavior. Chapman, 359 N.C. 328, 346-347.

LIST OF CASES

Federal Courts

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Eddings v Oklahoma, 455 U.S. 104 (1982)

Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)

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