

# Chapter 25

## Selection of Jury

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This chapter discusses issues that arise during jury selection. The chapter is divided into five sections. Section 25.1 addresses the fairness of the jury pool, the meaning of the requirement that jury selection be random, and the procedures for procuring regular and supplemental jurors. Section 25.2 discusses the process of preliminarily excusing jurors who do not meet statutory qualifications. Section 25.3 addresses the practice of voir dire—that is, the questioning of the jury panel by the attorneys for both sides. Sections 25.4 and 25.5 discuss the law on excusing jurors for cause and by peremptory challenges.

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**Practice note:** Except in capital cases, jury selection is not recorded by the court reporter unless the defendant specifically requests it. There are numerous errors that can occur during jury selection. Defense counsel *always* should request that it be recorded. If requested, the trial judge must order complete recordation. *See* N.C. GEN. STAT. § 15A-1241(b) (hereinafter G.S.).

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## 25.1 The Jury Pool

### A. Fair Cross-Section Requirement

**Test for fair cross-section violation.** The Sixth Amendment to the U.S. Constitution, as well as Article I, sections 24 and 26 of the N.C. Constitution, require that petit juries be drawn from a “fair cross-section” of the community. *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *State v. McNeill*, 326 N.C. 712 (1990); *see also Duren v. Missouri*, 439 U.S. 357 (1979) (Sixth Amendment’s jury trial provision is applicable to the states through the Fourteenth Amendment; violation found where Missouri’s jury-selection process systematically excluded women from the jury pool); *State v. Bowman*, 349 N.C. 459 (1998) (state constitution guarantees that members of defendant’s race may not be systematically and arbitrarily excluded from the jury pool). The U.S. Supreme Court in *Taylor* accepted the fair cross-section requirement as a fundamental part of the jury trial guarantee of the Sixth Amendment, stating:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. “Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a

diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.”

419 U.S. 522, 530–31 (citations omitted).

To establish a “fair cross-section” violation in the selection of the jury pool, 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 number of people within the group in the community; and
3. the underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*See Duren*, 439 U.S. 357, 364; *State v. Williams*, 355 N.C. 501, 549 (2002). If the defendant makes a prima facie showing of a violation of his or her Sixth Amendment right to a jury drawn from a fair cross-section of the community, the government bears the burden of justifying the systematic exclusion “by showing attainment of a fair cross section to be incompatible with a significant state interest.” *Duren*, 439 U.S. at 368.

There is no set percentage of underrepresentation 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, 393 (2000) (no prima facie case of systemic underrepresentation shown where population was 32% black and jury pool was 17.5% black); *see also Williams*, 355 N.C. 501, 549 (12.13% disparity not unreasonable); *Bowman*, 349 N.C. 459 (disparity of 16.17% not unreasonable). *But see Duren*, 439 U.S. 357 (systematic exclusion of women violated the fair cross-section requirement where women made up 54% of the jury-eligible population but accounted for less than 15% of jury venires); *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); 6 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 22.2(d), at 60 (3d ed. 2007) (observing that while disagreement exists, an absolute disparity of 10% between the group’s representation on the panel and among those eligible for jury service is typically sufficient to show underrepresentation).

In *Berghuis v. Smith*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1382 (2010), the defendant argued that the fair cross-section requirement of the Sixth Amendment was violated because only three of the sixty to one-hundred prospective jurors in his jury pool were African-American. The U.S. Supreme Court reversed the Sixth Circuit Court of Appeals’ finding that African-Americans were underrepresented in the defendant’s jury pool as a result of systematic exclusion. After reviewing the statistical methods by which the defendant had measured the disparity, the Court declined to adopt any particular method for measuring underrepresentation. The Court noted that each of the three methods used by lower federal courts was imperfect.

**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. Underrepresentation 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. 357, 366 (1979). 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 also may be a violation of equal protection. *See infra* § 25.1B, Application of Equal Protection Clause to 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*, 419 U.S. 522 (1975) (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. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The application of that clause to the selection of the petit jury is discussed *infra* in § 25.5C, Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny.

**Statistical evidence.** Generally, to demonstrate a fair cross-section violation, the defendant will need to use statistical evidence to show that a distinctive group has been systematically excluded. *See Berghuis v. Smith*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1382 (2010) (discussing methods used in lower federal courts to measure underrepresentation of distinctive groups in jury pools, including absolute disparity, comparative disparity, and standard deviation). It is not sufficient for the defendant simply to state that the percentage of the excluded population is larger in the county than in the current jury venire. *See State v. Jackson*, \_\_\_ N.C. App. \_\_\_, 716 S.E.2d 61 (2011) (fact that only three out of sixty potential Orange County jurors were African-Americans was insufficient, standing alone, to support the second and third prongs required by the *Duren* test to establish a prima facie violation for disproportionate representation in a jury venire; defense counsel’s statement that the African-American population was “certainly greater than . . . five percent” was insufficient where no demographic data was presented to the court to show the racial composition of the county). The defendant must show the percentage of the distinctive group in the jury pool *and* in the community. Information regarding the percentage of distinctive groups in the community may be available in the

most recent report for the county from the U.S. Census Bureau.

Usually, the defendant also will need to show the percentage of the group in question in past jury pools because, to satisfy the third prong of the *Duren* test, the defendant must show that the cause of the distinctive group's underrepresentation is systematic. See *Duren v. Missouri*, 439 U.S. 357 (1979) (defendant successfully showed that women were underrepresented as a result of Missouri's automatic exemption of women from jury service); *State v. Bowman*, 349 N.C. 459 (1998) (statistics concerning one jury pool, standing alone, were insufficient to show a systematic exclusion of a distinctive group); *State v. McNeill*, 326 N.C. 712, 717–18 (1990) (assuming that the defendant met his burden with regard to the first and second prongs of the *Duren* test, he failed to prove that the procedure establishing the jury pool was not racially neutral or that there was a history of relatively few blacks serving on Harnett County juries; statistics regarding his jury pool alone were not sufficient to establish a systematic exclusion of blacks from the jury pool); see also 3 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW § 14.07 (2011); 6 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 22.2(d), at 63 (3d ed. 2007).

**Expert assistance.** Because of the statistics needed to satisfy the *Duren* test, an indigent defendant may have grounds to request funds to hire a statistician. Compare *State v. Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991), with *State v. Massey*, 316 N.C. 558 (1986) (finding that the defendant did not make an adequate showing to warrant funds for a statistician). In noncapital cases, requests for funds for expert assistance go to the court; in capital cases, they go to the Office of Indigent Defense Services. For a further discussion of requesting funds for expert assistance, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5 (Experts and Other Assistance) (May 1998).

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**Practice note:** To raise a fair cross-section violation claim about selection of the petit jury, counsel should move to discharge the venire before the start of the jury selection process. You must strictly comply with the requirements set out in G.S. 15A-1211(c). See *infra* § 25.1G, Preserving Denial of Challenges to the Panel. You should specifically state the grounds for your challenge.

Be sure the record reveals the race of each juror by using a juror questionnaire or by asking each member of the jury to state his or her personal information, including race. The record also must show the race of the defendant and of the alleged victim.

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

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution 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); *State v. Hough*, 299 N.C. 245 (1980). To establish a violation of equal protection, the defendant must demonstrate a prima facie case of discrimination by showing

statistical underrepresentation of the distinctive group. The burden then shifts to the state actor to explain the discrepancy in a non-discriminatory manner. *Castaneda*, 430 U.S. at 494–95. 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, the Equal Protection Clause also applies to the selection of the petit jury from the jury pool and provides a basis for challenging a prosecutor’s use of peremptory challenges. *See infra* § 25.5C, Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny.

### 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: “The clerk, under the supervision of the presiding judge, must call jurors from the panel by 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 n.10 (1990) (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” (citation omitted)); *see also Truesdale v. Moore*, 142 F.3d 749 (4th Cir. 1998) (random procedure for selecting jurors satisfies Sixth and Fourteenth Amendments). 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.

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**Practice note:** Because randomness is almost certainly a constitutional requirement, always constitutionalize any objection to a randomness violation in addition to making your objection on statutory grounds. State on the record that the nonrandom selection process violates the Sixth and Fourteenth Amendments to the U.S. Constitution as well as article I, sections 19 and 24 of the N.C. Constitution.

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**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, 606–07 (2002) (defendant argued that dividing the jury pool into panels violated jury randomness; court did not review merits of the argument, finding that defendant failed to properly preserve the issue for appellate review); *accord State v. Cummings*, 353 N.C. 281 (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. This procedure creates the problem that a few unlucky individuals may have to sit through panel after panel of jury selection without being called. Under G.S. 15A-1211(c), a defendant may waive any objection to dividing the pool into panels by declining to enter an objection in writing before jury selection

begins. *See Wiley*, 355 N.C. at 607; *State v. Golphin*, 352 N.C. 364, 411–12 (2000); *see also State v. Tirado*, 358 N.C. 551 (2004) (defendants waived review of randomness issue based on trial judge’s division of the jury pool into smaller panels because defendants failed to challenge the jury panel using the statutory procedure mandated by G.S. 15A-1211(c)).

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**Practice note:** 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 nonrandom 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 nonrandom, and you should object in writing before jury selection begins or as soon as the error occurs. *See* G.S. 15A-1211 (setting forth procedure defendants must follow to preserve issue for appellate review); *see also Golphin*, 352 N.C. 364, 413 (trial judge grouped in last panel all people who filed unsuccessful written requests to be excused, which minimized chance that these people would be selected for jury).

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**Demonstrating prejudice from randomness violation.** This topic is discussed *infra* in § 25.1G, Preserving Denial of Challenges to the Panel.

#### D. Statutory Requirements for Preparation of Jury Lists

G.S. 9-1 through 9-7 describe the statutory requirements for preparing lists of prospective jurors for trial (petit) and grand juries. *See also* G.S. 9-10 (describing procedure for summoning prospective jurors from jury list). As a general rule, prospective jurors are drawn from a list of registered voters and people with driver’s license records in the county, although a jury commission may use another source of names if it deems that source to be reliable. *See* G.S. 9-2(b).

While mere “technical and insubstantial violations of the statutes regulating jury selection procedure” are not “sufficient to vitiate a jury list or afford a challenge to the array” (*State v. Massey*, 316 N.C. 558, 570 (1986)), a defendant is entitled to have a bill of indictment quashed if he or she can show that:

1. the jury list was compiled with a corrupt intent;
2. there was systematic discrimination in the compilation of the list; or
3. irregularities in the compilation of the list affected the actions of the jurors actually drawn and summoned,

*State v. Johnson*, 317 N.C. 343, 379 (1986).

For a further discussion of the procedures used in preparing jury lists and in drawing panels, see JAMES C. DRENNAN & MIRIAM S. SAXON, *A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS* (UNC School of Government, 4th ed. 2007). *See also* 1 NORTH CAROLINA DEFENDER MANUAL § 9.1 (Composition of Grand Jury) (Jan. 2009).

## E. Supplemental Jurors

**Generally.** Sometimes an original jury venire summoned in accordance with G.S. 9-10 will be insufficient to meet the needs of the court. To facilitate the business of the court, G.S. 9-11(b) permits a trial judge, in his or her discretion, at any time before or during a court session, to direct that supplemental jurors or a special venire be selected from the jury list in the same manner as regular jurors. These jurors may be discharged at any time during the session by the judge and they are subject to the same challenges as regular jurors. *Id.* This statute “neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served.” *State v. Mebane*, 106 N.C. App. 516, 524 (1992) (finding no abuse of discretion by trial judge in continuing with jury selection after the original panel had been depleted even though only four of the fifty supplemental jurors selected from the jury list had been served and reported for jury duty).

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

Historically, supplemental jurors were known as “talesmen” or “tales jurors” and were selected from the bystanders in or about the courtroom to serve as jurors when the original panel had become deficient. *See* Thomas L. Fowler, *Filling The Box: Responding to Jury Duty Avoidance*, 23 N.C. CENT. L.J. 1 (1997/1998) [hereinafter Fowler]; *see also State v. Benton*, 19 N.C. 196 (1836); BLACK’S LAW DICTIONARY 1592 (9th ed. 2009). This practice is authorized in North Carolina by G.S. 9-11, although the sheriff is no longer restricted to selecting bystanders found “in and about the court-house.” Fowler at 4. A sheriff now “appears to be free to locate appropriate jurors ‘from the body of the county,’ whether in or near the courthouse, at the mall, or elsewhere.” *Id.* (footnotes omitted); *see also Sheriff Apologizes for Searching for Jurors at Wal-Mart*, S.F. CHRON., Dec. 4, 2003 (discussing North Carolina judge’s order to Wayne County sheriff to send deputies to a public place to search for jurors the day before Thanksgiving and ensuing confrontations between deputies and Goldsboro Wal-mart shoppers looking for Christmas gifts), available at [www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2003/12/04/MNjurorhunt.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2003/12/04/MNjurorhunt.DTL).

**Potential for discrimination.** There is no set method prescribed by the statute or case law by which supplemental jurors must be selected. *See White*, 6 N.C. App. 425. The sheriff may use his or her discretion in determining the method of selection of the supplemental jurors; however, he or she “must act with entire impartiality.” *Id.* at 428 (citation omitted); *see also State v. Nolen*, 144 N.C. App. 172, 180 (2001) (finding that G.S. 9-11, on its face, was not violative of the right to an impartial jury, and finding no error where sheriff selected supplemental jurors by contacting people in the county that he and his senior staff members “knew that [jury duty] wouldn’t cause a financial hardship for”).

*But see Russell v. Wyrick*, 736 F.2d 462 (8th Cir. 1984) (noting that several dangers are present when sheriffs are permitted to select jurors, including the chance that the sheriff will choose people who are favorable to the prosecution, the likelihood of which is heightened if the sheriff or deputies were involved in investigating the case or if they choose only people that they know).

As noted by the court in *White*, it obviously “would be possible for a sheriff, sent out to execute . . . an order of the court [to summon supplemental jurors], to discriminate in the selection of persons to be summoned.” *White*, 6 N.C. App. 425, 427 (citation omitted). Challenges to the selection of the supplemental jurors are sustainable if “there is partiality or misconduct in the Sheriff, or some irregularity in making the list.” *State v. Dixon*, 215 N.C. 438, 440 (1939) (citation omitted); *see also Bass v. State*, 368 So. 2d 447, 449 (Fla. Dist. Ct. App. 1979) (reversing defendant’s conviction and stating that “[t]he choice of a special venire from an all-Caucasian church body, or from one’s Caucasian friends, is a systematic, if unintended, exclusion of blacks”; the selection of supplemental jurors “must be administered in such a way as not to exclude identifiable segments of the populace systematically”).

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**Practice note:** If the supplemental jurors selected by the sheriff do not represent a fair cross-section of the community, you should consider moving to discharge the jurors. You likely will need a recess or a continuance to get the statistical information you need to support your claim of a fair cross-section violation. *See supra* “Statistical evidence” and “Expert assistance” in § 25.1A, Fair Cross-Section Requirement. If your motion is denied, you also will need to take the necessary steps to preserve the issue for appellate review. *See infra* § 25.1G, Preserving Denial of Challenges to the Panel; *see also State v. Wilson*, 313 N.C. 516 (1985) (defendant could not complain about the judge’s order requiring the sheriff to recruit supplemental jurors, allegedly in excess of the judge’s statutory authority, because the defendant failed to exhaust his last peremptory challenge to remove the twelfth juror who was one of the supplemental jurors); *State v. Shaw*, 284 N.C. 366, 369 (1973) (no error in trial judge’s denial of defendant’s motion to allow defense counsel or his representative to be present during the summoning of the jury by the sheriff; defendant failed to challenge array or “offer any proof that the Sheriff violated the trust placed in him as an elected official”).

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**Potential conflict of interest.** A special venire is not necessarily rendered invalid because the sheriff who summoned it (or his or her deputy) is a witness for the State. *State v. Wiggins*, 272 N.C. 147 (1967). In discussing this issue in *State v. Yancey*, 58 N.C. App. 52 (1982), the Court of Appeals found that although sheriffs and deputy sheriffs testify in many cases, it was not the intent of the General Assembly to disqualify sheriffs from summoning extra jurors in all of those cases. If it were, the General Assembly “would have designated some other official to summon extra jurors.” *Id.* at 60; *see also State v. Barnard*, 346 N.C. 95 (1997). However, if the judge finds that the sheriff is not suitable to select additional jurors because of a direct or indirect interest in the action to be tried, the judge can appoint some other suitable person to summon the supplemental jurors. G.S. 9-11(a).

## F. Supplemental Jurors from Outside the County

A special venire of jurors from outside the county or the district where the case is being tried may be summoned for jury duty by the judge if he or she determines that it is necessary for a fair trial. The defendant or the State may move for “outside” jurors, or the judge can order them summoned on his or her own motion. G.S. 9-12(a); G.S. 15A-958. This motion can be made as an alternative to a motion for a change of venue. *See, e.g., State v. Moore*, 319 N.C. 645 (1987) (defendant moved for a change of venue or for a special venire due to extensive inflammatory media coverage of the case, pervasive county-wide discussion of it, and the social prominence of the alleged victim and her family).

If the judge determines that “outside” jurors are needed, he or she can order them to be brought to court from any county or counties in the district or set of districts in which the county of trial is located or in any adjoining district or set of districts as defined in G.S. 7A-41.1(a). *See* G.S. 9-12(a). These jurors are selected and serve in the same manner as supplemental jurors selected from jury lists. They also are subject to the same challenges as other jurors with the exception of a challenge for non-residency in the county of trial. *Id.*

In ruling on a defendant’s motion for a special venire, as with a motion for a change of venue, the trial judge must determine whether there is a reasonable likelihood that the defendant will not receive a fair trial. *See Moore*, 319 N.C. 645. In other words, a defendant’s motion should be granted if he or she can show “that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed.” *Id.* at 650 (citations omitted) (granting defendant a new trial where the trial judge applied an incorrect standard when ruling on defendant’s motion for a change of venue or for a special venire and defendant had presented substantial affirmative evidence tending to show that he could not receive a fair trial because jurors would be reasonably likely to base verdict on outside influences). The burden of proof is on the defendant. *See State v. Jaynes*, 342 N.C. 249, 264 (1995). A decision on a motion for a special venire from outside the county lies within the discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *See State v. Walters*, 357 N.C. 68 (2003); *State v. Edwards*, 286 N.C. 140 (1974).

For a discussion of motions to change venue, see 1 NORTH CAROLINA DEFENDER MANUAL § 11.3 (Change of Venue) (Nov. 2008).

## G. Preserving Denial of Challenges to the Panel

If a challenge to the jury panel is sustained, the trial judge is required to discharge the panel. G.S. 15A-1211(c). However, if a challenge is denied, the issue must be properly preserved or the appellate court may find waiver. To obtain relief on appeal for some violations, the defendant also may need to show prejudice by exhausting all of his or her

peremptory challenges. The cases do not always distinguish clearly between the requirements for preserving error and for showing prejudice.

**Constitutional challenges.** To preserve a challenge to the jury panel based on the right to a fair and impartial jury under the state and federal constitutions, you must object and state the constitutional basis for the objection. Failure to challenge the jury panel on constitutional grounds at the trial level will waive review of the constitutional issue on appeal. *See State v. Tirado*, 358 N.C. 551, 571 (2004); *State v. Wiley*, 355 N.C. 592, 606 (2005).

**Statutory challenges.** To preserve a statutory challenge to a jury panel for appellate review, including challenges to the method in which individual jurors are called and selected, counsel must follow the mandates of G.S. 15A-1211(c). *See State v. Johnson*, 161 N.C. App. 68 (2003). This statute requires that challenges to the panel:

1. be made on the grounds that the jurors were not lawfully selected or drawn;
2. be in writing;
3. specify the facts supporting the grounds for the challenge; and
4. be made and decided before the examination of any juror.

G.S. 15A-1211(c). *See State v. Smith*, 359 N.C. 199 (2005) (defendant failed to preserve his challenge to the randomness of the jury where he did not comply with G.S. 15A-1211(c)); *Johnson*, 161 N.C. App. 68, 75 (although a trial judge's failure to follow a statutory mandate usually preserves an error without an objection, the defendant waived appellate review because he failed to follow the procedures outlined in G.S. 15A-1211(c) for challenging a jury panel).

If you consent to the jury procedures used by the trial judge, appellate review of the issue will be waived. *See, e.g., State v. Meyer*, 353 N.C. 92 (2000) (not only did defendant never object to the jury selection process or follow the statutory procedures for challenging the jury panel, he expressly approved of the reassignment of a prospective juror; court concluded that defendant failed to preserve the issue for appellate review).

Counsel also should be wary of expressing satisfaction with the jury once jury selection has concluded. *See State v. Bell*, 359 N.C. 1 (2004) (denying appellate review where defendant failed to follow the procedures set out in G.S. 15A-1211(c) and noting that defendant answered in the affirmative when asked if he approved of the panel).

**Demonstrating prejudice from randomness violation.** The N.C. Supreme Court has held that a defendant must show prejudice from a randomness violation occurring from a deviation from the procedures mandated by G.S. 15A-1214(a). *State v. Thompson*, 359 N.C. 77 (2004). It is hard to know exactly what it would take to demonstrate prejudice. In *State v. Golphin*, 352 N.C. 364 (2000), the N.C. Supreme Court found that even if a violation of the statutory requirement of randomness occurred, the defendants failed to show prejudice because they did not exhaust their peremptory challenges, which the court considered to be evidence of the defendants' satisfaction with the seated jury. *See also*

*State v. Tirado*, 358 N.C. 551 (2004) (even assuming that G.S. 15A-1214(a) was violated by the placing of a hearing-impaired prospective juror into the last panel, defendants could show no prejudice when they did not show that they were forced to accept an undesirable juror and, in fact, consented to her excusal). In light of these cases, trial counsel will have to exhaust peremptories to show prejudice and may need to object to the last seated juror (which counsel should do outside the presence of the jury). See “Recommended approach,” below. Counsel also should try to explain on the record how the violation will affect the jury and prejudice the defendant. For example, in *Golphin*, reluctant jurors (who were put in the last panel by the judge) may have been more favorable jurors from a defense standpoint.

**Recommended approach.** To ensure preservation of jury panel selection errors and to show prejudice from any deviation from procedure, trial counsel should take the following steps:

1. Object to the erroneous procedure on the applicable statutory and constitutional grounds. This is a basic principle of preserving error for appeal.
2. Strictly follow the mandates of G.S. 15A-1211(c). These requirements may apply to statutory violations only but, to minimize the risk of waiver, counsel should follow the steps for constitutional violations as well.
3. Exhaust peremptory challenges. This step may not be required for constitutional violations such as fair cross-section violations. Among other things, the exercise of peremptories would do little to give the defendant a meaningful opportunity to select a representative jury from a jury pool that is constitutionally unrepresentative; therefore, it would be a fiction to suggest that the failure to exhaust peremptories shows the defendant’s satisfaction with the seated jury. See generally *State v. Golphin*, 352 N.C. 364, 392–95, 410–14 (2000) (court based rejection of randomness claim, in part, on defendants’ failure to exhaust their peremptories, but court did not mention that reason in rejecting defendants’ fair cross-section claim).
4. Out of the presence of the jury and on the record, state that the defendant objects to the last seated juror, ask for an additional peremptory, and state that if the defendant had another peremptory, he or she would use it on the last seated juror. This action reinforces that the defendant was not satisfied with the seated jury and therefore was prejudiced, but it may no longer be legally required. Compare *infra* § 25.4C, Preserving Denial of Cause Challenges (Official Commentary to G.S. 15A-1214, which governs preservation of denial of cause challenges, states that this step is not required; however, some cases have continued to suggest that this step is required).
5. 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 earlier regarding the selection process, Your Honor, defendant is satisfied with the jury.” If you unqualifiedly express satisfaction with the jury, you may undo your efforts to show prejudice.

## 25.2 Qualifying the Jury

### A. Statutory Qualifications

**Generally.** “[T]he law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law.” *Hinton v. Hinton*, 196 N.C. 341, 343 (1928). In giving effect to this constitutional guarantee, the General Assembly’s purpose was to ensure “that all those and only those citizens who possess the proper qualifications of character and intelligence should be selected to serve on the juries.” *State v. Ingram*, 237 N.C. 197, 204 (1953).

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 18 years of age or older;
- are physically and mentally competent;
- are able to understand English;
- have not been convicted of a felony or pled guilty or no contest to an indictment charging a felony, unless citizenship rights have been restored; and
- have not been adjudged non compos mentis (not of sound mind).

**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, 424–25 (2000) (no error in judge’s excusal of potential juror; two years had not passed from the time of her service on a federal jury until the time jury selection in defendant’s case commenced). 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 (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. *Golphin*, 352 N.C. 364, 425 (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 who are 72 years old or older may request to be excused from the jury in writing (rather than by personally appearing in court). The signed statement of the grounds for the request for excusal must be filed with the chief district court judge or his or her designee at least five business days before the date the person is summoned to appear. *See* G.S. 9-6.1(a). “The judge has the option of allowing or denying the request.” *State v. Rogers*, 355 N.C. 420, 447 (2002).

Once the older person is in the venire in the courtroom, he or she may request to be

excused on the basis of age. The request may be granted if he or she is unfit to serve, if there are reasons of compelling personal hardship, or if his or her service would be contrary to the public welfare, health or safety. *See* G.S. 9-3, 9-6(a); *Rogers*, 355 N.C. 420, 447–49 (also finding no violation of fair cross-section requirement of Sixth Amendment or Equal Protection Clause by statutory scheme for excusal of jurors in light of age). A trial judge may not adopt a blanket policy of excusing all senior citizens who request to be excused, however. Rather, “excusing prospective jurors present in the courtroom who are over the age of sixty-five [now seventy-two] must reflect a genuine exercise of judicial discretion.” *Rogers*, 355 N.C. at 448; *see also State v. Elliott*, 360 N.C. 400 (2006) (trial judge did not abuse his discretion in refusing to excuse an elderly prospective juror where the record revealed that she had no hardship other than advanced age; four elderly prospective jurors that were excused each had a compelling personal hardship). For a discussion of a similar issue involving grand jurors, see 1 NORTH CAROLINA DEFENDER MANUAL § 9.1B (Qualifications of Individual Grand Jurors) (Jan. 2009).

**English language capability.** In *State v. Smith*, 352 N.C. 531 (2000), the N.C. 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. *Id.* at 546–47 (error but no prejudice where prosecutor asked defendant in Spanish whether he understood English well enough to participate).

**Physical and mental competence, disabilities, and hearing.** The trial judge has broad discretion to determine whether a person is physically competent to serve as a juror. *See, e.g., State v. Neal*, 346 N.C. 608 (1997) (no error in excusing juror with history of medical problems and Valium addiction); *State v. Carter*, 338 N.C. 569 (1994) (no error in excusing juror who was eight months pregnant); *State v. King*, 311 N.C. 603 (1984) (no error in declining to excuse juror who suffered from hearing impairment but stated he could hear and understand lawyer’s voir dire); *see also* G.S. 9-3 (effective July 1, 2011, statute requires that prospective jurors be able to understand English language but no longer requires that they be able to hear English language). A person summoned as a juror who has a disability may request to be excused from the jury in writing (rather than personally appearing in court); a signed statement of the grounds for the request for excusal, including a brief description of the disability, must be filed with the chief district court judge or his or her designee at least five business days before the date the person is summoned to appear. *See* G.S. 9-6.1(b).

Trial judges are not limited to excusing jurors who are disqualified under G.S. 9-3 and may excuse any person for whom jury service would constitute a “compelling personal hardship.” G.S. 9-6; *see also infra* § 25.2B, Hardship Excuses. The N.C. Supreme Court has suggested that the reason the trial judge gives for excusing a juror as disqualified or for hardship should not be pretextual. *State v. Alston*, 341 N.C. 198 (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 discharge from the Department of Correction. G.S. 13-1(1). A person with a prior felony conviction who is no longer on parole or probation is eligible for jury service. *Id.* Likewise, a person convicted of a federal crime or a crime in another state may serve on the jury if he or she has been unconditionally discharged by the agency having jurisdiction of him or her. G.S. 13-1(4), (5).

People with pending felony charges are excusable for cause under G.S. 15A-1212(7).

## B. Hardship Excuses

**Generally.** The General Assembly has declared the public policy of the state to be that jury service is a solemn obligation of all qualified citizens and that people qualified for jury service should be excused or deferred only for reasons of “compelling personal hardship” or because service would be “contrary to the public welfare, health, or safety.” G.S. 9-6(a), (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 judge has broad discretion in determining what constitutes hardship. *E.g.*, *State v. Hedgepeth*, 350 N.C. 776 (1999) (no error in failing to excuse juror who had inoperable brain tumor where trial judge was convinced that juror’s memory impairment was insufficient to disqualify juror); *State v. Norwood*, 344 N.C. 511 (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 (1994) (no error in excusing juror who was apprehensive about leaving child in day care to perform jury service). Nevertheless, the judge’s power to excuse jurors must be exercised within constitutional constraints. *See. e.g.*, *State v. Cole*, 331 N.C. 272 (1992) (violation of capital defendant’s constitutional right to presence found where after the trial had commenced, the trial judge deferred service for some jurors at a bench conference outside defendant’s presence).

**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 (1989) (proper practice is for district court judges to excuse jurors only on grounds set forth in G.S. 9-6). If the district court excuses jurors on too broad of a basis, the defendant may have grounds to 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. *Murdock*, 325 N.C. at 526; *accord State v. Leary*, 344 N.C. 109 (1996) (reaffirming *Murdock*); *see also State v. Hyde*, 352 N.C. 37 (2000) (evidence that district court judge excused jurors on basis of “religious scruples” [presumably, about death penalty] did not entitle defendant to new trial; defendant failed to show corrupt intent or that he was prejudiced by jury that was impaneled).

**No right to presence when district court excuses jurors.** The North Carolina 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. McCarver*, 341 N.C. 364 (1995); *State v. Cole*, 331 N.C. 272 (1992).

**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. Once a defendant’s case is called for trial, a superior court judge may not excuse jurors for hardship in unrecorded bench conferences; he or she must conduct all jury selection proceedings on the record and in the presence of the defendant. *State v. Cole*, 331 N.C. 272 (1992); *State v. Smith*, 326 N.C. 792 (1990). If a defendant is not present during any part of jury selection, there is reversible error. *Smith*, 326 N.C. at 794. For further discussion of a defendant’s right to be present during jury selection, see *supra* § 21.1C, Trial Proceedings (discussing right to presence at different proceedings).

## 25.3 Voir Dire

### A. Preliminary Procedures

Before the jurors are selected, the judge is required to identify the parties and their attorneys. He or she also must briefly inform the prospective jurors of:

- the charges of each defendant,
- the dates of the alleged offenses,
- the name of any alleged victim, and
- the defendant’s plea.

G.S. 15A-1213; G.S. 15A-1221(a)(2).

G.S. 15A-1213 also states that the trial judge must inform the prospective jurors of any affirmative defense of which the defendant has given pretrial notice. Amendments to G.S. 15A-905(c)(1) enacted in 2004, however, require the defendant, as part of reciprocal discovery, to give notice of all potential defenses identified in the statute. In recognition that the defendant may decide before trial not to pursue a particular defense, G.S. 15A-905(c)(1) states that “[n]otice of defense as described in this subdivision is inadmissible against the defendant.” In light of this provision, if the defendant advises the trial judge that he or she does not intend to pursue a defense for which he or she has given notice as part of discovery, the trial judge would appear to be prohibited from informing the jury of the defense.

The judge also is prohibited from reading the indictment to the jury. G.S. 15A-1213; *see also* G.S. 15A-1221(b). The purpose of G.S. 15A-1213 “when read contextually and considered with the Official Commentary to the statute is to avoid giving jurors a distorted view of a case because of the stilted language of most indictments.” *State v.*

*Elkerson*, 304 N.C. 658, 663 (1982) (citation omitted); *see also* G.S. 15A-1213 Official Commentary (stating that the “procedure is designed to orient the prospective jurors as to the case”).

## B. Purposes of Voir Dire

Jury voir dire serves two basic purposes:

1. helping counsel determine whether a basis for a challenge for cause exists, and
2. assisting counsel in intelligently exercising peremptory challenges.

*State v. Wiley*, 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”). The N.C. Supreme Court also has stated that the purpose of voir dire examination and the exercise of challenges, both peremptory and for cause, “is to eliminate extremes of partiality and to assure both the defendant and the State 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, 629 (1994).

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**Practice note:** 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. 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.

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## C. 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, 729–30 (1992) (holding that capital defendant constitutionally entitled to ask specific “life qualifying” questions to the jury); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) (“Without an adequate voir dire the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.”). *But cf. 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. *Ham* was later

limited by *Ristaino v. Ross*, 424 U.S. 589 (1976), which held 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 under “special circumstances,” such as those presented in *Ham. Turner v. Murray*, 476 U.S. 28 (1986), held that defendants in capital cases have a right under the Eighth Amendment to voir dire jurors about racial biases. In situations in which the defendant is entitled to question jurors about racial attitudes, the trial judge has the discretion to determine how extensive the voir dire on race will be. *See State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed defendant to ask questions of prospective white jurors about their associations with blacks; trial judge did not err in sustaining prosecutor’s objection to other questions, such as “Do you belong to any social club or political organization or church in which there are no black members?” and “Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?”).

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**Practice note:** Considerations of race can be critical in capital and noncapital cases, and voir dire on such matters, whether or not constitutionally guaranteed, is often appropriate and permissible to determine potential bias that may make a juror unsuitable to hear the case. *See generally* G.S. 15A-1212(9) (challenge for cause may be made by any party on ground that juror is unable to render a fair and impartial verdict). Counsel should be prepared to show how questions concerning racial attitudes are relevant to the defendant’s theory of defense. If the inquiry is particularly sensitive, counsel may request individual voir dire. A sample motion can be found on the Office of Indigent Defense Services website, [www.ncids.org](http://www.ncids.org). Highlight “Training & Resources,” click on “Motions Bank, Non-Capital” and then “Trial Motions (Non-Capital),” scroll down to “Juries,” and click on “Motion for Individual Voir Dire on Sensitive Subjects.”

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#### D. Statutory Law Governing Voir Dire

**Generally.** Two sets of North Carolina statutes govern jury voir dire, G.S. 9-14 and 9-15, and G.S. 15A-1211 through 15A-1217. These statutes grant the trial judge broad discretion to determine the extent and manner of voir dire. *See, e.g., State v. Fisher*, 336 N.C. 684 (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(c); *see also* G.S. 9-15(a). The trial judge “may briefly question prospective jurors individually or as a group concerning general fitness and competency . . .” G.S. 15A-1214(b). However, both parties are statutorily entitled to repeat the judge’s questions. G.S. 15A-1214(c) (prosecution and defense not foreclosed from asking question merely because judge has previously asked same question); *State v. Jones*, 336 N.C. 490 (1994) (trial judge violated statute governing jury voir dire when, at outset of jury selection process, he indicated that he 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 (1995) (no error where counsel allowed to question jurors individually if group question produced no response); *State v. Phillips*, 300 N.C. 678 (1980). However, a blanket ban prohibiting parties from questioning jurors individually would violate G.S. 15A-1214. *Phillips*, 300 N.C. 678; *see also infra* § 25.3G, Right to Individual Voir Dire.

**Order of questioning.** G.S. 15A-1214(d) requires that the prosecutor question prospective jurors first. When the prosecutor is satisfied with a panel of twelve, he or she passes the panel to the defense. The N.C. Supreme Court has upheld this statute against constitutional challenge. *State v. Anderson*, 355 N.C. 136, 147 (2002) (finding it “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 the courts may not necessarily find the error to be prejudicial. *E.g.*, *State v. Thompson*, 359 N.C. 77 (2004) (no error where defendant consented to out of order voir dire of two replacement jurors); *State v. Jaynes*, 353 N.C. 534 (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 (2000) (where State passed panel of ten, not twelve, jurors to defense, violation of statute but defendant failed to show prejudicial error where he failed to object, questioned and passed the one new prospective juror, failed to exhaust his peremptory challenges, and did not request removal of juror for cause).

**Order of questioning in cases involving co-defendants.** 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. *See* G.S. 15A-1214(e), (f); *State v. Rogers*, 316 N.C. 203 (1986) (finding no merit to defendant’s argument that her rights to examine a full jury panel were infringed because her examination of potential jurors came after the State and the co-defendant had examined them; procedure used by judge followed the provisions of G.S. 15A-1214).

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**Practice note:** In a trial involving co-defendants, it would be inappropriate under G.S. 15A-1214 for the trial judge to pass the jury back to the State after Defendant 1 exercises his or her peremptory challenges and not pass the jury to Defendant 2 until both the State and Defendant 1 have exhausted their peremptories or expressed satisfaction with twelve jurors. This method of selection would appear prejudicial to Defendant 1—effectively, the State and Defendant 2 would 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, if the judge nevertheless uses this method, put an objection and explanation of the prejudice on the record.

To preserve the error and/or demonstrate prejudice regarding the order of questioning, the defendant also may need to exhaust his or her peremptory challenges. *See generally supra* § 25.1G, Preserving Denial of Challenges to the Panel and *infra* § 25.4C Preserving Denial of Cause Challenges.

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**Challenging a juror.** G.S. 9-15(a) states that making “direct oral inquiry” of a juror—that is, questioning a juror—does not itself constitute a challenge to the juror. A trial judge is not to consider a juror challenged by a party until that party formally states that the juror is challenged for cause or peremptorily. *Id.* If a juror is challenged for cause, the party should state the grounds for the challenge so that the trial judge can make his or her ruling. Generally, no grounds need be stated when a party exercises a peremptory challenge. *But see infra* § 25.5C, Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny (*Batson* line of cases requires a party to state reason for peremptory challenge if opposing party establishes a prima facie case of discrimination).

### E. 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 (1995) (trial judge properly sustained State’s objection to question about victim’s HIV status); *State v. Lee*, 335 N.C. 244 (1994) (judge properly sustained State’s objection to questions about whether jurors believed death penalty had deterrent effect); *State v. Brown*, 327 N.C. 1 (1990) (no abuse of discretion shown when trial judge sustained objections to defendant’s questions to prospective jurors about whether they would be comfortable with the defense questioning police procedure during trial); *see generally State v. Phillips*, 300 N.C. 678 (1980) (explaining boundaries on voir dire—questions should not be overly repetitious or attempt to indoctrinate jurors or “stake them out”).

**Certain topics constitutionally guaranteed.** Criminal defendants are constitutionally entitled to explore certain topics in voir dire, including:

- A juror’s ability to consider a life sentence as a possible punishment. *See Morgan v. Illinois*, 504 U.S. 719 (1992).
- Jurors’ racial prejudices in capital cases, or, in non-capital cases, where “special circumstances” require it. *See Turner v. Murray*, 476 U.S. 28 (1986); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (plurality opinion).

*See supra* § 25.3C, Constitutional Entitlement to Voir Dire.

**Voir dire on parole eligibility.** One topic that the North Carolina 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 (1995); *State v. Price*, 337 N.C. 756 (1994). However, in *Simmons v. South Carolina*, 512 U.S. 154 (1994), the U.S. 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 (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 (2002) (court continued to adhere to rule that voir dire about parole is impermissible); *accord State v. Jones*, 358 N.C. 330 (2004).

In lieu of voir dire by the attorneys, counsel can ask the court to give the G.S. 15A-2002 instruction and then ask the jurors whether they can follow that instruction. A sample motion requesting pre-selection instructions to potential jurors (including informing them that life imprisonment is an alternative to capital punishment) can be found on the Office of Indigent Defense Services website, [www.ncids.org](http://www.ncids.org). Highlight “Training & Resources,” click on “Capital Trial Motions,” scroll down to “Guilt Phase,” and click on “Motion for Pre-Selection Instructions to Potential Jurors.”

**“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 (2001); *State v. Vinson*, 287 N.C. 326 (1975) (explaining “staking out” doctrine), *vacated in part on other grounds*, 428 U.S. 902 (1976). As the following cases illustrate, applying this rule consistently has proved difficult.

The N.C. Supreme Court has found the questions in the following cases to be improper “stake out” questions:

- *State v. Maness*, 363 N.C. 261 (2009) (defense counsel improperly attempted to stake out capital juror by asking whether the juror could, if convinced that life imprisonment was the appropriate penalty, return such a verdict even if the other jurors were of a different opinion).
- *State v. Wiley*, 355 N.C. 592, 610–13 (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. Jaynes*, 353 N.C. 534 (2001) (question posed by defense counsel regarding which specific circumstances would cause jurors to consider life sentence was improper stake out question).
- *State v. Richmond*, 347 N.C. 412 (1998) (defense counsel’s inquiry as to whether jurors could return life sentence knowing that defendant had prior conviction for first-degree murder was improper stake-out question).

The N.C. Supreme Court and Court of Appeals have found the questions in the following cases were not improper “stake out” questions:

- *State v. Bond*, 345 N.C. 1 (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. Green*, 336 N.C. 142 (1994) (prosecutor’s inquiry into 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. McKoy*, 323 N.C. 1 (1988) (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), *vacated on other grounds*, 494 U.S. 433 (1990).
- *State v. Johnson*, 164 N.C. App. 1 (2004) (permissible for prosecutor to ask jurors whether they would consider accomplice’s testimony where accomplice was testifying pursuant to plea bargain).
- *State v. Henderson*, 155 N.C. App. 719 (2003) (prosecutor’s question as to whether jurors would expect the State to provide medical evidence that the crime occurred permissible).
- *State v. Roberts*, 135 N.C. App. 690 (1999) (question posed by prosecutor as to whether jurors would believe eyewitness identification not stake out question).

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**Practice note:** 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 Bond*, 345 N.C. 1 (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 Henderson*, 155 N.C. App. 719 (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 (1984) (defendant entitled to ask jurors about their ability to follow law on limited relevance of defendant’s prior record).

As with most jury selection issues, if the trial judge sustains the State’s objection to a line of questioning on voir dire, the defendant must exhaust his or her peremptory challenges to preserve the error for appellate review and to show prejudice from the trial judge’s ruling. *E.g.*, *State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995); *State v. Avery*, 315 N.C. 1 (1985). *See also supra* § 25.1G, Preserving Denial of Challenges to the Panel, and *infra* § 25.4C, Preserving Denial of Cause Challenge.

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**Permissible and impermissible questions.** This chapter does not review in detail the many possible questions that may be asked during jury selection. For papers reviewing permissible and impermissible questions in capital and noncapital cases, and possible approaches to voir dire in different kinds of cases, see *infra* § 25.3I, Additional Resources.

## F. Reopening Voir Dire

After a juror has been accepted by one or both parties, if the trial judge discovers that a juror has made a misrepresentation during voir dire or for other “good reason,” the judge may reopen voir dire of the juror. The trial judge may question the juror or permit the parties to do so, and he or she 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 (1997) (trial judge has discretion to reopen examination of juror after jury is

impaneled); *accord State v. Waddell*, 289 N.C. 19 (1975), *vacated in part on other grounds*, 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 may be “good cause” for reopening voir dire. *State v. Womble*, 343 N.C. 667, 678 (1996) (trial judge had “good reason” to reopen voir dire of juror whose answers to questions posed by defense counsel indicated that he might be unable to return sentence of death); *State v. Bond*, 345 N.C. 1 (1996) (same). If the trial judge reopens examination of a juror, each party has the right to exercise any remaining peremptory challenges to excuse the juror. G.S. 15A-1214(g)(3); *Womble*, 343 N.C. 667; *State v. Hammonds*, \_\_\_ N.C. App. \_\_\_, 720 S.E.2d 820 (2012); *State v. Thomas*, 195 N.C. App. 593 (2009).

In *State v. Boggess*, 358 N.C. 676 (2004), a seated juror returned to court after an overnight recess and informed the judge that she had learned that one of her close friends was a friend of the victim’s mother. The judge then questioned the juror but declined to state that he was “reopening voir dire” and declined to permit the defendant to exercise a peremptory against the juror. The N.C. Supreme Court found reversible error and held that before impaneling the jury the judge should resolve any doubts in favor of reopening voir dire.

### G. 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). The North Carolina 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 judge’s discretion. *E.g.*, *State v. Nicholson*, 355 N.C. 1 (2002); *State v. Bonnett*, 348 N.C. 417 (1998). It is a common practice for a trial judge to permit partial individual voir dire on death qualification, exposure to pretrial publicity, or other sensitive topics. The N.C. Supreme Court has approved this practice. *E.g.*, *State v. Jaynes*, 353 N.C. 534 (2001) (noted with approval in *Nicholson*); *State v. Hunt*, 323 N.C. 407 (1988) (no error in denying motion for complete individual voir dire where judge allowed selective partial individual voir dire), *vacated on other grounds*, 494 U.S. 1022 (1990).

**Non-capital cases.** Although there is little case law on the issue, the trial judge’s duty to oversee jury selection almost certainly implies that the judge 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. *See State v. Watson*, 310 N.C. 384, 395 (1984) (“The trial judge has broad discretion in the manner and method of jury voir dire in order to assure that a fair and impartial jury is impaneled . . .” (citation omitted)); *State v. Ysaguirre*, 309 N.C. 780, 784 (1983) (stating that whether to allow individual voir dire is within trial judge’s discretion); *see also* Jeff Welty, *Individual Voir Dire*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Nov. 28, 2011), <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=3086>. The need for individual voir dire may be particularly compelling on sensitive issues. *See State v. Roache*, 358 N.C. 243, 274 (2004) (discussing individual voir dire procedures in capital cases but noting that “nothing in [the court’s discussion of capital cases] should be interpreted to infringe upon the trial court’s inherent authority to permit individual voir

dire as to specific sensitive issues in any given case”).

## H. Voir Dire in Capital Cases

**No right to bifurcated jury.** The U.S. 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) (removal of *Witherspoon* excludables from guilt phase jury did not violate Sixth Amendment); accord *State v. Berry*, 356 N.C. 490 (2002); *State v. Bondurant*, 309 N.C. 674 (1983). 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. An 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 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 in accordance with his or her instructions and oath. *Wainwright v. Witt*, 469 U.S. 412 (1985) (reaffirming the standard set out in *Adams v. Texas*). 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); cf. *State v. Benson*, 323 N.C. 318 (1988) (excusal of juror was proper where her responses to the trial judge’s questions about the death penalty, while ambivalent, clearly indicated that she was unwilling or unable to follow the law and her oath as a juror).

**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 (1995) (defendant in murder prosecution may use voir dire to determine whether prospective jurors would automatically vote for death sentence). The N.C. Supreme Court has specifically approved life qualification questions, such as:

- 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?

*State v. Conner*, 335 N.C. 618 (1994) (reversible error not to permit defendant to ask certain life qualification 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 (2001) (question posed by defense counsel regarding which specific circumstances would cause jurors to consider life sentence was an improper stake out question); *State v. Elliott*, 344 N.C. 242 (1996) (asking prospective juror whether he could think of any situation where he could vote to impose a sentence other than death for first-degree murder was an impermissible attempt to stake him out); *State v. Robinson*, 339 N.C. 263 (1994) (inquiry as to whether juror could return life sentence where defendant had prior murder conviction was a stake out question). *But see State v. Bond*, 345 N.C. 1 (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). The defense 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 (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 (1993); *accord State v. Rouse*, 339 N.C. 59 (1994). The defendant has no right to attempt to rehabilitate jurors whose inability to impose a sentence of death is unequivocal. *State v. Kemmerlin*, 356 N.C. 446, 469 (2002) (no error in judge’s denial of defendant’s request to rehabilitate two jurors because although both were initially equivocal, ultimately both “explicitly told the court that their views on the death penalty would prevent or substantially impair the performance of their duties as a juror”); *State v. Johnson*, 317 N.C. 343, 376 (1986) (“[W]hen 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.” (citation omitted)). The trial judge must exercise his or her discretion in determining whether to permit rehabilitation of particular jurors. *See Brogden*, 334 N.C. 39 (error for judge to issue a blanket rule prohibiting rehabilitation).

## I. Additional Resources

For a detailed review of permissible and impermissible questions in capital and noncapital cases, see Steve Freedman and Mike Howell, *Jury Selection Questions* (North Carolina Defender Trial School, June 2006), available at [www.ncids.org/Defender%20Training/2011DefenderTrialSchool/JurySelectionQuestions.pdf](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/JurySelectionQuestions.pdf). For a discussion of

possible approaches to voir dire in different cases, see Ira Mickenberg, *Voir Dire and Jury Selection* (North Carolina Defender Trial School, July 2011), available at [www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf).

## 25.4 Excusing Jurors for Cause

### A. Constitutional Basis

Under the Sixth Amendment and the Fourteenth Amendment Due Process Clause of the U.S. Constitution, jurors who are biased against the defendant and cannot decide the case based on the trial evidence and the law must be excused. *Irvin v. Dowd*, 366 U.S. 717 (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 (1976), *vacated in part on other grounds*, 429 U.S. 912 (1976).

The Sixth and Fourteenth Amendments also are violated when the trial judge erroneously excludes a *qualified* juror in response to a cause challenge by the State. *See 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 (1993); *see also infra* § 25.4D, Excusing a Qualified Juror.

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**Practice note:** Be sure to constitutionalize any objection to an improper denial or the improper granting of a cause challenge. Remind the trial judge that either error violates the defendant's right to an impartial jury.

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### 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* § 25.2A, Statutory Qualifications);
- is incapable of rendering jury service due to mental or physical infirmity;
- is, or has been previously, involved in the case against the defendant as a party, a witness, a grand juror, or a trial juror;
- has sued the defendant or been sued by him or her in a civil action;
- has complained against or been accused by the defendant in a criminal prosecution;
- is related to the defendant or alleged victim of the crime by blood or marriage within the sixth degree;<sup>1</sup>

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1. G.S. 15A-1212 states that jurors should not be related to the defendant or alleged victim of the crime 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.

- 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; or
- 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 (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 (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.”). The judge’s decision will be upheld on appeal unless there is an abuse of discretion. *See State v. Kennedy*, 320 N.C. 20 (1987).

**Prior knowledge of case not sufficient by itself to support cause challenge.** The North Carolina 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. Jaynes*, 353 N.C. 534 (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); *State v. Yelverton*, 334 N.C. 532 (1993) (prior knowledge about case not sufficient to require granting of cause challenge); *State v. Hunt*, 37 N.C. App. 315, 320 (1978) (no error in denial of defendant’s challenge for cause of prospective juror employed as a police officer who had heard defendant’s case discussed by other officers; “the prospective juror clearly indicated that he could base his determination solely upon the evidence and the law *without being swayed by anything else*” (emphasis added)). *But cf. Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (due process violation found where trial judge refused to change venue in a case with extensive pretrial publicity; two-thirds of the jurors admitted to having already formed an opinion that the defendant was guilty; jurors’ statements asserting their own ability to be impartial could “be given little weight” under the circumstances of that case).

**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. “[J]urors 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 (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 (1993) (error to fail to excuse juror who could not afford defendant presumption of innocence); *State v. Hightower*, 331 N.C. 636 (1992) (error to fail to excuse juror who expected defendant to testify); *State v. Leonard*, 296 N.C. 58 (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 (1991) (no error where trial judge refused to excuse juror who initially stated that she would want defendant to present evidence on his behalf; juror later agreed to abide by proper burden of proof).

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

Error to fail to excuse juror for cause:

*State v. Lee*, 292 N.C. 617 (1977) (juror's husband was police officer and juror stated her connection with police would bias her)

*State v. Allred*, 275 N.C. 554 (1969) (juror was related to accomplice witnesses and said he would likely believe these witnesses)

No error in failing to remove juror for cause:

*State v. Jaynes*, 353 N.C. 534 (2001) (juror had business relationship with homicide victim and had visited victim at home)

*State v. House*, 340 N.C. 187 (1995) (juror had a friend who had been murdered but juror stated she could separate facts of defendant's case from friend's case)

*State v. Benson*, 323 N.C. 318 (1988) (juror's mere acquaintance with four police officers who were prospective witnesses for the State was insufficient to require removal)

*State v. Whitfield*, 310 N.C. 608 (1984) (first juror challenged was father of an assistant district attorney who was not participating in defendant's trial; second juror challenged was a member of the police department but the officers who handled the case and testified were sheriff's deputies)

*State v. Simmons*, 205 N.C. App. 509 (2010) (juror was employed with a university police department as a traffic officer; although he worked closely with the prosecutor's office and had never testified for the defense, the court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement)

*State v. McNeil*, 99 N.C. App. 235 (1990) (juror's job as assistant attorney general did not automatically disqualify him from service)

*State v. Hunt*, 37 N.C. App. 315, 319 (1978) (being a police officer who had heard the case discussed by other officers was not sufficient grounds to require removal of juror;

court declined “to hold that any individual must be excused for cause *solely* by virtue of the nature of his employment” (emphasis in original))

### C. Preserving Denial of Cause Challenges

**Importance of exhausting peremptories.** If the defendant challenges a juror for cause and the trial judge 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 or her motion for cause against the juror at the end of jury selection as described in G.S. 15A-1214(i); and
4. have the renewed motion denied.

*See State v. Cunningham*, 333 N.C. 744 (1993) (reviewing procedure and ordering new trial where defendant followed procedure to preserve issue; juror should have been excused for cause where she stated that she believed that the defendant would need to prove his innocence).

Regarding the third step—renewing a motion for cause—a party who has exhausted his or her peremptory challenges may move orally or in writing to renew a previously denied challenge for cause if he or she:

- had peremptorily challenged the juror; or
- states in the motion that he or she would have challenged that juror if his or her peremptory challenges had not already been exhausted.

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

Any deviation from the procedures set out in G.S. 15A-1214 will likely result in a waiver of appellate review. *E.g.*, *State v. Roseboro*, 351 N.C. 536 (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); *State v. Ball*, 344 N.C. 290 (1996) (same); *State v. McNeil*, 324 N.C. 33 (1989) (defendant failed to exhaust all peremptory challenges), *vacated on other grounds*, 494 U.S. 1050 (1990).

The defendant no longer appears to be required to challenge another juror after his or her peremptories are exhausted in order to preserve the right to appeal. *See* G.S. 15A-1214 Official Commentary (noting that this requirement was undesirable since, in most cases,

the juror attempted to be challenged remained on the jury); *see also State v. Sanders*, 317 N.C. 602 (1986) (common law rule for preserving error in denial of challenges for cause, which required a defendant to exhaust all peremptories and then challenge another juror to show his or her dissatisfaction with the jury, has been replaced by G.S. 15A-1214; common law rule does not offer an alternative method of preserving the error for appeal).

Notwithstanding the specific statutory requirements, some cases have restated the common rule that the defendant must challenge an additional juror after exhausting his or her peremptories. *E.g.*, *State v. Hartman*, 344 N.C. 445, 459–60 (1996) (stating this principle in dicta, but then finding that the defendant’s compliance with G.S. 15A-1214 preserved for appeal the denial of defendant’s challenge of a juror for cause). In light of this ambiguity, in addition to complying with G.S. 15A-1214(h), defense counsel may want to state that the defendant objects to the last seated juror, ask for an additional peremptory, and state that if the defendant had another peremptory, he or she would use it on the last seated juror. Defense counsel should do so out of the presence of the jury.

Some cases also suggest that to be able to argue prejudice from the trial judge’s failure to excuse a juror for cause, the defendant must not have expressed satisfaction with the seated jury. *E.g.*, *Hartman*, 344 N.C. 445, 459–60 (exhausting peremptories not sufficient to demonstrate prejudice; defendant must show he or she was forced to seat an unsatisfactory juror). If you want to express satisfaction with the jury in front of the jury, do so in a qualified way, such as “conditioned on my renewed motion for cause, Your Honor, defendant is satisfied with the jury.”

**When alternates are selected.** G.S. 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 noncapital prosecution where the judge decides to seat one alternate, each defendant effectively has seven peremptory challenges. To properly exhaust your challenges, it is important to use up your first six challenges in selecting the first twelve 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 judge to decline to excuse an unqualified juror, it is also erroneous for the judge 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 judge 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 error per se).

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**Practice note:** Make sure you enter an objection to the dismissal for cause of any juror whom you believe was improperly excused. Be sure to constitutionalize your objection. *See supra* § 25.4A, Constitutional Basis. You also can 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 (1993) (defendant has right to attempt to rehabilitate equivocal juror).

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### E. Additional Resources

For practical considerations in challenging a juror for cause, see Mike Howell, *Jury Selection: Challenges for Cause* (North Carolina Defender Trial School, July 2010), available at [www.ncids.org/Defender%20Training/2011DefenderTrialSchool/ChallengesForCause.pdf](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/ChallengesForCause.pdf).

## 25.5 Peremptory Challenges

### A. In General

In her concurrence in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), Justice Sandra Day O'Connor described peremptory challenges as follows:

The peremptory challenge is “a practice of ancient origin” and is “part of our common law heritage.” The principal value of the peremptory is that it helps produce fair and impartial juries. “Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.” The peremptory’s importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States.

*Id.* at 147 (citations omitted).

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 (1984) (any reason except race is an acceptable reason for peremptory challenge) (case decided before *Batson*); accord *State v. Smith*, 291 N.C. 505 (1977); see also *Swain v. Alabama*, 380 U.S. 202, 220 (1965) (“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”(citation omitted)); *State v. Wooten*, 344 N.C. 316 (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. These limitations are discussed in detail *infra* in § 25.5C, Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny.

## B. Statutory Right to Peremptory Challenges

The right to peremptory challenges is statutory. *See* G.S. 15A-1217 (entitling both State and defendant to peremptory challenges in criminal case). There is no constitutional right to peremptory challenges. *See Rivera v. Illinois*, 556 U.S. 148, 157 (2009) (peremptory challenges are “creature[s] of statute” and states “may decline to offer them at all”); *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (peremptory challenges reinforce a defendant’s right to trial by an impartial jury but the challenges are “auxiliary,” not constitutional); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (“peremptory challenges are not of constitutional dimension”).

**Number of peremptory challenges.** Peremptory challenges are allotted to the parties based on the number of defendants, not on the number of charges lodged against any one defendant. *State v. Boyd*, 287 N.C. 131 (1975). The State and each defendant in a non-capital case are entitled to six peremptory challenges. If there are co-defendants, the State gets six additional peremptory challenges per co-defendant. G.S. 15A-1217(b). In a capital case, each party is entitled to fourteen peremptories. If there are co-defendants, the State gets fourteen additional peremptory challenges per co-defendant. G.S. 15A-1217(a). Parties are entitled to one additional peremptory challenge for every alternate selected in capital or non-capital cases. G.S. 15A-1217(c).

The N.C. Supreme Court has said that the trial judge has no authority to grant additional peremptory challenges. *State v. Hunt*, 325 N.C. 187, 198 (1989). The court has found no error, however, where the trial judge 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, 208 (1997); *see also State v. Banks*, 125 N.C. App. 681 (as sanction for failure to preserve evidence, trial judge stripped State of two peremptory challenges), *aff’d per curiam*, 347 N.C. 390 (1997).

## C. Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny

**Generally.** The U.S. 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, section 26 of the N.C. 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 (1998) (racial discrimination in jury selection violates both state and federal constitution).

**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 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991)). The trial judge 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. *See Golphin*, 352 N.C. at 426; *White*, 349 N.C. 535, 548; *see also State v. Smith*, 328 N.C. 99, 121 (1991) (one of the most important considerations for whether a prima facie case is established is whether prosecutor uses a 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 (1998). *Hoffman* found that the trial judge 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 (1989) (remanding for *Batson* hearing after trial judge erroneously failed to find prima facie case); *accord State v. McCord*, 140 N.C. App. 634 (2000). For a further discussion of this first step, see *infra* “U.S. Supreme Court decisions after *Batson*” in this subsection C. (discussing *Johnson v. California*).

**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. *Purkett v. Elem*, 514 U.S. 765 (1995); *Hernandez v. New York*, 500 U.S. 352 (1991). “The [State’s] explanation must be clear and reasonably specific, but ‘need not rise to the level justifying exercise of a challenge for cause.’” *State v. Bonnett*, 348 N.C. 417, 433 (1998) (citations omitted). In *Purkett*, the U.S. Supreme Court held that at step two 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 (but recognizing that implausible reason probably will fail step three); *see also State v. Fletcher*, 348 N.C. 292 (1998) (following *Purkett*); *Bonnett*, 348 N.C. at 433 (“[U]nless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.” (citation omitted)).

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, 668 (1997); *State v. Peterson*, 344 N.C. 172 (1996). The defendant does not have the right to call as a witness and examine the prosecutor in the effort to show that his or her proffered explanations are a pretext. *State v. Porter*, 326 N.C. 489, 497 (1990); *State v. Jackson*, 322 N.C. 251 (1988).

**Third**, the trial judge assesses the State’s proffered reason and determines whether the defendant has proved purposeful discrimination. If the judge finds that the prosecutor’s proffered reasons are disingenuous, or “pretextual,” and the real reason for the strike is discriminatory, then he or she must find a violation of the Equal Protection Clause. *Hernandez*, 500 U.S. 352, 359; *Gaines*, 345 N.C. 647, 668. “At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful

discrimination.” *Purkett*, 514 U.S. 765, 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 judge 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 the key witnesses is relevant to this determination.
- The prosecutor’s demeanor.
- The credibility of the explanation itself. The evaluation of the explanation involves objective and subjective criteria, such as whether similarly situated white venirepersons were passed by the State and whether the State’s justification is relevant to this case. The prosecutor’s explanation also should be evaluated “‘in light of the explanations offered for the prosecutor’s other peremptory strikes’ and ‘the strength of the prima facie case.’”

*State v. Porter*, 326 N.C. 489, 498–99 (1990) (citation omitted).

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**Practice note:** Because it is relatively easy for the State to proffer a race-neutral reason for a strike and meet the second prong of the *Batson* test, defense counsel needs to focus on the third step—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 hairstyle, gum chewing, or a remote connection to a minor State witness, may well be pretextual. Try to identify and bring to the judge’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 he or she was young, list for the judge 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 judge that you noticed no hesitation or defiance.

For a further discussion of this step, see *infra* “U.S. Supreme Court decisions after *Batson*” (discussing *Miller-El v. Dretke*) and “Suspect reasons for strikes” (discussing reasons found unacceptable by some courts) in this subsection C.

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**Importance of getting jurors’ race on record.** To preserve a *Batson* challenge for appellate review, the record must be clear as to the race of the jurors peremptorily challenged by the State as well as the race of the other members of the jury panel (prospective and selected); otherwise, the appellate court will find insufficient evidence in the record to support the defendant’s claim. See *State v. Brogden*, 329 N.C. 534 (1991) (defendant failed to carry his burden of establishing an adequate record for appellate review because he did not elicit the race of the jurors by means of questioning or other proper evidence); *State v. Payne*, 327 N.C. 194 (1990) (affidavit submitted by defense counsel containing counsel’s perceptions concerning the races of the excused potential jurors was not adequate to support defendant’s claim of improper use of peremptory challenges under *Batson*); *State v. Mitchell*, 321 N.C. 650, 654 (1988) (statements of

counsel, standing alone, are not sufficient to support a finding that peremptory challenges were used discriminatorily).

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**Practice note:** Before jury selection begins, counsel should request that the trial judge have each prospective juror state his or her race for the record during the judge’s initial questioning. *See Brogden*, 329 N.C. 534 (notations by the court reporter of defense counsel’s subjective impressions concerning race were not acceptable); *Payne*, 327 N.C. 194 (no error in trial judge’s denial of the defendant’s motion for the clerk to record the race of the prospective jurors made after they had been excused and the jury had been selected; clerk’s perception of a particular person’s race is inappropriate); *Mitchell*, 321 N.C. 650, 656 (inappropriate for court reporter to note the race of the jurors based on his or her perception; “if there is any question as to the prospective juror’s race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence”).

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**U.S. Supreme Court decisions after *Batson*.** In 2005, the U.S. Supreme Court issued two opinions applying *Batson v. Kentucky*. The first, *Miller-El v. Dretke*, 545 U.S. 231 (2005), addressed the issue of what sort of evidence a defendant can rely on to show intentional discrimination in the exercise of a peremptory strike. The opinion is most useful with respect to step three, explained above, 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 side-by-side 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 an explanation for a strike to be pretextual 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.

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**Practice note:** It is improper for the reviewing judge to substitute a better reason than the prosecutor offers. If you find that the trial judge 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 judge.

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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, allowed 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. *See supra* § 25.1C, Random Selection Requirement.

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.

In *Johnson v. California*, 545 U.S. 162 (2005), the Court addressed the standard of proof needed to meet step one in *Batson*—establishing a prima facie case of discrimination. *Johnson* makes clear that at step one, the party alleging discrimination does not carry a burden of proof but merely a burden of production. To establish a prima facie case of discrimination and require the State to proceed to step two, a defendant need only produce sufficient evidence to permit the trial judge 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 three. *Johnson* can be cited both at the trial court level to encourage the judge 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 judge erroneously failed to find a prima facie case of discrimination.

In 2008, the U.S. Supreme Court decided *Snyder v. Louisiana*, 552 U.S. 472 (2008), in which it reiterated that it is unconstitutional to strike even a single prospective juror based on a discriminatory purpose. In *Snyder*, the Court found that the trial judge committed clear error in overruling the defendant’s *Batson* objection to the State’s use of a peremptory challenge to remove a prospective black juror. The State had offered two race-neutral explanations for striking the juror: (1) the juror looked very nervous during the questioning; and (2) the juror was a student teacher and was concerned about missing class. As a result of the juror’s concerns, the prosecutor asserted that he felt that the juror might agree to a lesser verdict in order to bypass the penalty phase and finish quickly. The Court declined to rule based on the first proffered explanation since the record did not show that the trial judge actually made a determination regarding the juror’s demeanor. The Court noted in dicta, however, that great deference is due a trial judge’s ruling on demeanor since “determinations of credibility and demeanor lie ‘peculiarly within a trial judge’s province.’” *Id.* at 477 (citation omitted); *see also Thaler v. Haynes*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1171 (2010) (per curiam) (holding that although a judge must take into account, among other things, his or her observations of a juror’s demeanor when a challenge is based thereon, neither *Batson* nor *Snyder* require that a demeanor-based explanation be rejected if the judge did not observe or cannot recall the juror’s

demeanor).

The Court then found the prosecutor's second explanation implausible and highly speculative because the prospective juror had not seemed overly concerned about the student-teaching situation once his dean was contacted and gave assurances that the class time could be made up. The Court compared the testimony of the juror who was struck with that of two white jurors who also were concerned about conflicting obligations. Although one of those jurors had asked to be excused based on a hardship and related obligations that seemed "substantially more pressing" than the struck juror's concerns, the prosecutor did not strike him. *Snyder*, 552 U.S. at 484. A second white prospective juror also expressed concern about serving, stating that he would "'have to cancel too many things,' including an urgent appointment at which his presence was essential." *Id.* Despite these concerns, the prosecutor nevertheless failed to strike this juror. Based on these circumstances, the Court held that discriminatory intent was a substantial or motivating factor in the actions taken by the prosecutor and reversed the lower court's decision upholding the validity of the peremptory strike.

**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. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"); accord *State v. Gaines*, 345 N.C. 647 (1997); *State v. Bates*, 343 N.C. 564 (1996). The N.C. Constitution likewise prohibits discrimination in jury selection based on gender. *See State v. Maness*, 363 N.C. 261 (2009) (gender discrimination prohibited by article I, section 26 of N.C. Constitution). The procedure for establishing gender discrimination, and the factors the court should consider in evaluating a defendant's prima facie showing and deciding the ultimate question of whether there is intentional discrimination, are the same as under *Batson*. *See Gaines*, 345 N.C. 647; *Bates*, 343 N.C. 564.

Article I, section 26 of the N.C. 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 (1994), the defendant contended that the prosecutor had violated article I, section 26 by striking a juror because the juror was a Jehovah's Witness. While recognizing the potential legitimacy of the claim, the court held that the particular juror was struck because of her beliefs about the death penalty. The legitimacy of a federal constitutional claim of discrimination based on religion has not been determined by the U.S. Supreme Court. In *Davis v. Minnesota*, 511 U.S. 1115 (1994), the U.S. Supreme Court refused to grant certiorari to review the propriety of the use of peremptory challenges to exclude a Jehovah's Witness from jury service on the ground that the members of that religion are reluctant to exercise authority over other human beings. Justice Thomas dissented from the denial of certiorari, stating that after the Court's decision in *J.E.B.* extending *Batson* to cover gender-based discrimination, "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Id.* at 1115.

Native Americans are recognized as “a racial group cognizable for *Batson* purposes.” *State v. Locklear*, 349 N.C. 118, 136 (1998) (quoting *State v. Porter*, 326 N.C. 489, 499 (1990)); see also *United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

**Subgroups.** The U.S. Supreme Court has not decided whether subgroups, such as African-American women, are a cognizable group under *Batson*. 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 (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.

**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, 385 (Ala. Crim. App. 1991) (age as reason for peremptory strikes is “highly suspect because of its inherent susceptibility to abuse” (citation omitted)); *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000) (“[c]ertainly age was not a sufficient reason to strike a 43-year-old man”). But see *State v. Caporasso*, 128 N.C. App. 236, 244 (1998) (no error by trial judge in allowing the prosecutor to peremptorily challenge a black juror based on the prosecutor’s explanation that the juror was excused based on his “young age and lack of maturity”; the prosecution is allowed to “seek jurors who are stable and mature”).
- 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 judge 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 (Ga. Ct. App. 1994) (case reversed where prosecutor struck juror because she had gold tooth); *People v. Bennett*, 206 A.D.2d 382, 383 (N.Y. App. Div. 1994) (prosecutor struck an African-American juror who was wearing a headscarf because it showed “a certain disrespect for the proceedings”; pretextual basis found and conviction reversed); *Roundtree v. State*, 546 So.2d 1042, 1044–45 (Fla. 1989) (prosecutor’s reasons for striking two African-American jurors were an “obvious pretext” where prosecutor asserted that he struck the jurors based on their clothing, “specifically commenting that the first juror was wearing maroon socks and ‘pointy New York shoes’”).

**Challenges by white defendant of strikes against African-Americans.** In *Powers v. Ohio*, 499 U.S. 400 (1991), the U.S. 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 (1998) (explaining *Powers*); *State v. Williams*, 343 N.C. 345 (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 (1987) (“Even a single act of invidious discrimination may form the basis for an equal protection violation.”); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (“[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.”(citation omitted)).

**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 judge or the reviewing court is whether the proffered reasons are acceptable or discriminatory. *Hernandez v. New York*, 500 U.S. 352, 359 (1991). The N.C. Supreme Court has not fully followed *Hernandez*. The 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 judge’s finding of no prima facie case was erroneous. *E.g.*, *State v. Fletcher*, 348 N.C. 292 (1998); *State v. Smith*, 347 N.C. 453 (1998). Only when the trial judge does not explicitly rule on whether the defendant made a prima facie case, or when the judge makes an explicit ruling but before doing so the State articulates 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, 426 (2000); *State v. Williams*, 343 N.C. 345 (1996). This approach appears to be contrary to *Hernandez*. The constitutional requirement 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.

**Remedy for *Batson* violation.** *Batson* itself does not specify the proper trial remedy for a violation. In *Foster v. State*, 111 P.3d 1083 (Nev. 2005), the Nevada Supreme Court observed:

In implementing *Batson*, the states have generally followed one of three different approaches. Some jurisdictions require the trial courts to disallow a peremptory strike made in violation of *Batson* or to reseal the improperly stricken juror. Other jurisdictions require the trial courts to discharge the venire and commence jury selection anew from an entirely new venire. “The majority of courts, however, have delegated to the discretion of the trial judge the determination of the appropriate remedy for a *Batson* violation.”

*Id.* at 1089 (footnotes omitted).

In *State v. McCollum*, 334 N.C. 208 (1993), the N.C. Supreme Court held that if the trial judge finds that the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. However, the court has not been absolutely consistent on this approach. In *State v. Fletcher*, 348 N.C. 292 (1998), the prosecutor initially struck a juror because the juror was a member of the NAACP. When the trial judge found the prosecutor's reason to be discriminatory, the prosecutor withdrew his strike and passed the juror. The trial judge then found no *Batson* violation, and the N.C. Supreme Court affirmed. Chief Justice Mitchell, dissenting in *Fletcher*, would have ordered a new trial, emphasizing that dismissing the venire is the better practice where the prosecutor makes an invalid strike.

**Application of *Batson* to defendants.** The *Batson* rule applies to defendants as well as to the State. 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 (1998) (citing *McCollum*); *State v. Cofield*, 129 N.C. App. 268 (1998) (same).

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.

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**Practice note:** 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.

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Reverse *Batson* claims have rarely been made in North Carolina, possibly as a result of a fear by prosecutors that if the trial judge is deemed to have erred in disallowing a defendant's peremptory challenge, the appellate court will find structural error and grant the defendant a new trial. See Jeff Welty, *Rivera v. Illinois and "Reverse Batson,"* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 7, 2009), <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=226>.

Although the question of the remedy available for improperly denied challenges has not been directly answered, the U.S. Supreme Court discussed it in *Rivera v. Illinois*, 556 U.S. 148 (2009). In *Rivera*, the judge, based on his own concerns about discrimination, required the defendant to explain his peremptory challenge of a black female juror. After hearing the explanation, the judge denied the defendant's peremptory challenge and required that the juror be seated on the jury. That juror later became the jury foreperson. On appeal, the defendant argued that the trial judge's error in denying his peremptory challenge violated his rights under the Due Process Clause and amounted to structural error—that is, the defendant was entitled to a new trial without having to show prejudice. The Illinois Supreme Court found that the defendant was deprived of his state right to exercise his peremptory challenges but determined that the error was harmless beyond a

reasonable doubt in light of the overwhelming evidence against him.

The U.S. Supreme Court affirmed the decision of the lower court, holding that “the loss of a peremptory challenge due to a state court’s good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.” *Id.* at 157. The Court noted that structural errors requiring automatic reversal are typically reserved for the type of error that “necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* at 160 (citations omitted). The Court held that the mistaken denial of a state-provided peremptory challenge, under the circumstances presented in *Rivera*, did not constitute an error of that magnitude.

No North Carolina decision has addressed the issue.

**Additional resources.** A collection of materials on dealing with race in jury voir dire can be found on the Office of Indigent Defense Services website, [www.ncids.org](http://www.ncids.org). Highlight “Training & Resources,” click on “Training Materials” and then on “Training Materials—Indexed by Subject,” and scroll down to “Juries.” For a comprehensive article on litigating *Batson* claims, see the article within those materials entitled *Litigating Race in Voir Dire* by Susan Jackson Balliet and Bruce Hackett. Although written for attorneys who represent indigent clients in Kentucky, the article offers a wealth of practical information and advice.