25.1 The Jury Pool

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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 74 (4th ed. 2015) (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*, 559 U.S. 314 (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. For further discussion of this case, see Jeff Welty, *Fair Cross-Section*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 31, 2010).

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 requirement 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*, 559 U.S. 314 (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*, 215 N.C. App. 339 (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. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.2(d), at 66 (4th ed. 2015).

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 (2d ed. 2013).

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.

Additional resources. For further discussion of the fair cross-section requirement, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.3 (Fair Cross-Section Challenges) (2014)**,** and Alyson Grine, *A Jury of One's Peers*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 21, 2016) (offering a quick primer on fair cross-section claims and a link to a helpful guide for considering a fair cross-section claim). A collection of materials dealing with race in the composition of

grand juries and trial juries can also be found in Race Materials Bank on the Office of Indigent Defense Services website.

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 nondiscriminatory 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. For a detailed discussion of challenges to the jury pool under the Equal Protection Clause, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.4, Equal Protection Challenges (2014).

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 v. Louisiana*, 419 U.S. 522 (1975) and *Duren v. Missouri*, 439 U.S. 357 (1979), 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.

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.

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)).

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 State v. Golphin*, 352 N.C. 364, 413 (2000) (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).

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 9-7.1 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 (2d ed. 2013).

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 Walmart shoppers looking for Christmas gifts); Michael Hewlett, *Glitch results in no jurors this week; Forsyth County deputies ordered to find volunteers*, W-S JOURNAL, Feb. 27, 2018 (discussing county's response to its failure to mail out juror notices; local television station was asked to recruit people willing to volunteer and trial judge ordered deputies to round up qualified jurors in the county, including Hanes Mall, to volunteer for jury duty).

Potential for discrimination. There is no set method prescribed by the statute or case law by which supplemental jurors must be selected. *See State v. White*, 6 N.C. App. 425 (1969). 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").

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").

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 nonresidency 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 (2d ed. 2013).

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); *cf. State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415, 422 (2018) (reviewing defendant's contention that the trial judge erred in disallowing race-related inquiries even though defendant failed to exhaust his peremptory challenges; the "exhaustion" requirement "is a meaningless exercise where, as here, a defendant has been precluded from inquiring into jurors' potential biases on a relevant subject, leaving the defendant to assume or guess about those biases without being permitted to probe deeper").

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.