25.3 Voir Dire

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A. Preliminary Procedures

Generally. 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).

Defenses. 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. If the defendant does not advise the trial judge that he or she no longer intends to pursue the defense, it is not error for the trial judge to inform the jury of the affirmative defense. *Cf. State v. Clark*, 231 N.C. App. 421 (2013) (finding that trial judge did not act contrary to the statutory mandate of the discovery statute, G.S. 15A-905(c)(1), by informing the prospective jurors of defendant's affirmative defense of self-defense because the trial judge was required to inform the jury of the defense under G.S. 15A-1213, a statute addressing selecting and impaneling a

jury). Additionally, a defendant's failure to object to the trial judge's informing the jury pool of an affirmative defense will waive appellate review of the issue. *Id.*

Indictment. The judge 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).

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. For a more detailed discussion of the scope of voir dire, see *infra* § 25.3E, Scope of Permitted Questioning.

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. A defendant has a constitutional right to ask questions about race on voir dire in certain circumstances. In *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court 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 noncapital 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. *See also Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 868 (2017) (stating that "[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire.") (citations omitted).

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 . . . ?").

For an in-depth discussion about race on voir dire, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 8.3 (Jury Selection) (2014).

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); *see also* ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 8.3F (Voir Dire Preparation, Techniques, and Sample Questions) (2014). Counsel should be prepared to show how questions concerning racial attitudes are relevant to the defendant's theory of defense. *See State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415, 424 (2018) (finding that in order to allow the parties to intelligently exercise their peremptory challenges, a trial judge should permit race-related questions to potential jurors as long as a defense attorney can tie the questions to an issue in the case).

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 in the Adult Criminal Motions, scroll down to Juries, and click on Motion for Individual Voir Dire on Sensitive Subjects.

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) (no abuse of discretion or violation of G.S. 15A-1214(c) where trial judge requested defense counsel to direct questions of a general nature to whole panel). However, a blanket ban prohibiting parties from questioning jurors individually would violate G.S. 15A-1214. *See State v. Payne*, 328 N.C. 377, 387 (1991) (stating that under G.S. 15A-1214(c), a trial judge may maintain appropriate supervision of jury selection "by requiring counsel to address some generic questions to the entire jury panel" as long as "subsequent individual questioning is permitted when prompted by answers to the generic questions"); *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. If the prosecutor successfully challenges a juror for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with a panel of twelve, he or she passes the panel to the defense. Until the prosecutor indicates satisfaction with the panel of twelve, he or she can challenge a juror for cause or exercise a peremptory challenge to strike any original or replacement juror. *Id*.

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); *State v. Gurkin*, 234 N.C. App. 207 (2014) (although trial judge violated jury selection procedures mandated by G.S. 15A-1214, defendant failed to show prejudice resulting from deviation).

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).

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.

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 noncapital 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 also Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 868 (2017) (stating that "[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire.") (citations omitted).

See supra § 25.3C, Constitutional Entitlement to Voir Dire; ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 8.3E (Law Governing Voir Dire Questions about Race) (2014).

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 in the Capital Trial Motions Bank; 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) (holding trial judge properly sustained objection to defendant's "stake out" question that asked whether a certain set of circumstances would still allow prospective juror to vote for life imprisonment); *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 and Court of Appeals have 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).
- *State v. Crump*, ___ N.C. App. ___, 815 S.E.2d 415, 424 (2018) (trial judge's ruling that defense counsel's questions regarding police officer shootings of African-Americans were improper stake out questions was "not ultimately prejudicial to defendant" under the specific facts of the case but cautioning that this type of questioning should be allowed if defense counsel can tie the questions to an issue in the case).
- *State v. Broyhill*, ___ N.C. App. ___, 803 S.E.2d 832, 843 (2017) (defense counsel's line of questioning about credibility was an improper attempt to stake out prospective jurors "based on their likelihood to discredit evidence favorable to the defense upon learning that defendant had lied in the past").

See also supra §25.3H, Voir Dire in Capital Cases (discussing life qualification questions determined to be improper stake out questions).

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).

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 State v. Bond*, 345 N.C. 1 (1996) (juror who claimed he could not give an accessory a death sentence properly excused for cause; thus, State entitled to ask jurors whether they could sentence an accessory to death); *accord State v. Henderson*, 155 N.C. App. 719 (2003) (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).

If the trial judge sustains the State's "stake out" objection to a line of questioning propounded to a particular juror who has expressed a opinion in open court in response to an attorney's questions 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). However, if the judge categorically prohibits an entire line of questioning, there is no requirement that the defendant exhaust his or her peremptory challenge in order to show prejudice on appeal. *See 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"). *See also supra* § 25.1G, Preserving Denial of Challenges to the Panel, and *infra* § 25.4C, Preserving Denial of Cause Challenge.

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

Generally. 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, in his or her discretion, may reopen voir dire of the juror. *State v. Womble*, 343 N.C. 667 (1996). A trial judge has the discretion, even after the jury is impaneled, to reopen examination of a juror and excuse that juror upon challenge, whether for cause or peremptory, as a product of the court's "'power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury.'" *State v. Johnson*, 161 N.C. App. 68, 76 (2003) (citations omitted). The trial judge may question the juror or permit the parties to do so. 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. *Womble*, 343 N.C. 667, 678 (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). Other illustrative examples of "good reasons" to reopen voir dire include a juror discovering that he or she knows a victim, or a juror having contact with a member of the prosecutor's office. *See, e.g., State v. Boggess*, 358 N.C. 676 (2004) (juror informed court after overnight recess that victim's mother (who was also a State's witness) was staying with one of the juror's friends during the trial); *State v. Thomas*, 230 N.C. App. 127 (2013) (trial judge reopened voir dire when juror told court official she knew State's witness from high school); *State v. Hammonds*, 218 N.C. App. 158 (2012) (voir dire reopened after defense counsel saw juror having lunch with an attorney from the District Attorney's Office).

If the trial judge exercises his or her discretion and reopens examination of a juror, either before or after impanelment, each party has the absolute right to exercise any remaining peremptory challenges to excuse the juror. *See* G.S. 15A-1214(g)(3); *Holden*, 346 N.C. 404; *Womble*, 343 N.C. 667; *Thomas*, 230 N.C. App. 127; *Hammonds*, 218 N.C. App. 158; *State v. Thomas*, 195 N.C. App. 593 (2009).

What constitutes "reopening." The specific term "reopening" is not found in G.S. 15A-1214(g). *State v. Boggess*, 358 N.C. 676 (2004). After reviewing case law in conjunction with the statute, the court in *Boggess* determined that "a trial judge has leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening voir dire under N.C.G.S. § 15A-1214(g)." *Id.* at 683. As part of the initial inquiry, the trial judge may question the juror and may consult with counsel outside of the juror's presence. The trial judge then has the discretion, based on the information developed, to reopen voir dire to take other steps suggested by the circumstances. If the trial judge allows the attorneys to question the juror directly at any time, voir dire has been "reopened" and the parties' absolute right to exercise any remaining peremptory challenges has been triggered. *Id.* Although the jury had not yet been impaneled in the *Boggess* case, the same bright line rule appears to apply in cases where the allegations about a juror occur after impanelment. *See State v. Shelley*, 204 N.C. App. 371 (2010) (unpublished).

If the trial judge has reopened voir dire, a defendant does not have to actually question the juror in order to be entitled to exercise a peremptory challenge. *See State v. Thomas*, 230 N.C. App. 127 (2013) (rejecting State's contention that voir dire had not been reopened because defendant failed to accept the trial judge's invitation to question a juror after the trial judge had questioned the juror about the nature of her relationship with a State's witness); *see also State v. Kirkman*, 293 N.C. 447, 453 (1977) (finding no error in trial judge's decision to allow prosecutor's request to reopen voir dire and exercise a peremptory challenge of juror who had previously been called back for examination regarding her realization that a co-worker was related to a defendant; prosecutor exercised challenge without further questioning "in the interest of time").

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).

Noncapital 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 noncapital 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. Ysaguire*, 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). 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 jurors, excludable under *Witherspoon v. Illinois*, 391 U.S. 510 (1968), 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 noncapital 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 Michael G. Howell, Stephen C. Freedman, and Lisa Miles, *Jury Selection Questions* (North Carolina Defender Trial School, Feb. 2012). 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, Feb. 2012). Additional materials addressing jury voir dire can be found on the N.C. Office of Indigent Defense Services website in the Training and Reference Materials Index (under the "Juries" heading).