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## 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.

***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.

### 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;[1]
- 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.** 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).

**Juror's 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.*

1. G.S. 15A-1212(5) 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.

*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, *see State v. Leonard*, 296 N.C. 58 (1978) (trial judge erred in denying defendant's motion to excuse three potential jurors for cause where they stated they would not acquit defendant even if

her insanity was proven to them), it is also erroneous for the judge to exclude a juror who is qualified to serve. *See 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 in a capital case, 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, e.g.*, *State v. Brogden*, 334 N.C. 39 (1993) (defendant had right to attempt to rehabilitate equivocal juror in a capital case).

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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).