JURY SELECTION IN CAPITAL TRIALS

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I. Orientation and Jury Excuses

A. In capital cases, defendant has *state* constitutional right to be present at all stages of trial. *State v. Buchanan,* 330 N.C. 202, 410 S.E.2d 832 (1991).

1. Art. I, Sec. 23 of North Carolina Constitution (rights of accused in criminal prosecutions).
2. *Unwaivable* right.

    a. Even if defendant consents not to be present. *State v. Huff,* 325 N.C. 1, 381 S.E.2d 635 (1989).
    b. Reversible error unless State proves harmless beyond a reasonable doubt. *State v. Lee,* 335 N.C. 244, 439 S.E.2d 547 (1994).

B. Right attaches when State calls case for trial and jury selection begins. *State v. Cole,* 331 N.C. 272, 415 S.E.2d 716 (1992).

1. District court judge's pretrial excusals/deferrals of prospective jurors under NCGS 9-6(b) does *not* violate constitutional right to be present. *State v. McCarver,* 341 N.C. 364, 462 S.E.2d 25 (1995).
2. Even if a special venire from another county. *Id.*

C. Once right attaches, judge should order recordation of all conferences with prospective jurors.

1. *State v. Moss,* 332 N.C. 65, 418 S.E.2d 213 (1992) (reversible error to conduct unrecorded conferences with prospective juror out of hearing of defendant and his counsel).

Cf.

2. *State v. Lee,* 335 N.C. 244, 439 S.E.2d 547 (1994) (no error when unrecorded bench conference with prospective juror and all counsel and defendant present in courtroom).

3. To be safe, conduct all orientation of jurors and hear all requests for excuses/deferrals on the record in the presence of defendant and all counsel.

D. Practical suggestions for hearing jury excuses:

1. Hear excuses in advance when possible.
2. Respect jurors' privacy when discussing medical issues.
3. Send jurors out of courtroom to discuss requests with counsel.
4. Discuss parameters with counsel beforehand and encourage consent.
5. Provide defense counsel opportunity to discuss requests with defendant.

II. Jury Selection Procedure

A. Individual or Group Voir Dire?

1. NCGS 15A-1214(j) gives judge discretion to permit individual voir dire in capital cases.
2. Advantages of group voir dire:

    a. Generally faster.
    b. Jurors themselves may come to a quicker and clearer understanding of the sentencing process.
    c. May cause less anxiety in jurors (comfort in numbers).

3. Advantages of individual voir dire:

    a. May result in more candid responses concerning pretrial publicity, attitudes toward death penalty, and other issues.
    b. Less danger of one juror's answers "educating" other members of panel as to "right answers."
    c. Less danger of one juror's answers "tainting" entire panel.

4. Modified or blended procedure: individual voir dire on some issues such as pretrial publicity or death penalty.

B. Jury Questionnaire?

1. Use of questionnaire is within judge's discretion. *State v. Lyons,* 340 N.C. 646, 459 S.E.2d 770 (1995).
2. Advantages of questionnaire:

    a. May help gauge jurors' literacy levels.
    b. Jurors may be more comfortable with written responses about certain issues or topics.
    c. Jurors may be more candid in written than in verbal responses.

C. Division of venire into panels.

1. Size of panels:

a. Panels of 15 work best.
b. Perhaps 20-25 in first panel if group voir dire.

2. Excuse panels other than the first with instructions to call back for times to report.
3. If divided into panels, what about the last potential juror in each panel?

    a. First sentence of NCGS 15A-1214(a) provides: " The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes knowledge of the identity of the next juror to be called."
    b. Practical suggestions to avoid possible issue on appeal:

        i. Excuse last juror in each panel when reached; OR
        ii. Mix that juror in with next panel; OR
        iii. Preferably, simply obtain consent of all parties to conduct voir dire of that juror like all other jurors.

D. Alternates and peremptory challenges.

1. Must seat at least 2 alternate jurors.

    a. NCGS 15A-1215(b).
    b. Consider greater number of alternates, especially if anticipated to be lengthy trial.

2. State and *each defendant* has 14 peremptory challenges plus one for each alternate. NCGS 15A-1217(a) and (c).

    a. Unused challenges during seating of the 12 may be carried over to the seating of the alternates. NCGS 15A-1217(c).
    b. Judge has no authority to increase the number of peremptory challenges. *State v. Dickens,* 346 N.C. 26, 484 S.E.2d 553 (1997). **Exception: See NCGS 15A-1214(i) (under certain circumstances, if a party has exhausted peremptory challenges, and judge determines that a juror should have been excused for cause)**

    c. Provide defense counsel opportunity to discuss exercise of peremptory challenges with defendant.

3. If judge for good reason reopens voir dire of juror both parties have accepted, both parties have right to use any remaining peremptory challenges to excuse juror if no basis for challenge for cause. NCGS 15A-1214(g); See also *State v. Thomas,* 230 N.C. App. 127, 748 S.E. 2d 620 (2013)

III. Voir Dire

A. Scope of voir dire.

1. Regulation of manner and extent of voir dire within sound discretion of trial judge. See *State v. Wiley,* 355 N.C. 592, 565 S.E.2d 22 (2002).
2. Neither side has right to "delve without restraint" into matters concerning prospective jurors' private lives. *State v. Marsh,* 328 N.C. 61, 399 S.E. 307 (1991).

   What about . . .

   - Membership in civic or fraternal organizations?
   - Newspapers or magazines read?
   - Hobbies?
   - Bumper stickers?
   - Political activities or party affiliations?
   - Church membership or religious beliefs?

   a. Inquiry into religious denominations and extent of church participation properly barred. *State v. Lloyd,* 321 N.C. 301, 364 S.E.2d 316 (1988).
   b. Inquiry about beliefs espoused by church leaders properly barred. *State v. Huffsterler,* 312 N.C. 92, 322 S.E.2d 110 (1984).
   c. Impermissible to ask if jurors believed in literal interpretation of Bible. *State v. Laws,* 325 N.C. 81, 381 S.E.2d 609 (1989).
   d. **BUT SEE** *State v. Anderson,* 350 N.C. 152, 513 S.E.2d 296 (1999) (appears to approve inquiry into jurors' personal religious beliefs with regard to death penalty).
   e. **SEE ALSO** *State v. Mitchell,* 353 N.C. 309, 543 S.E.2d 830 (2001) (defendant allowed to ask prospective juror whether any teachings of her church would interfere with ability to perform her duties as juror).

3. Defendant on trial for his life should be given "great latitude" in examining potential jurors. *State v. Conner,* 335 N.C. 618, 440 S.E.2d 826 (1994).

B. "Death qualification" of jurors.

1. State's challenge for cause is proper against prospective jurors whose views against death penalty would "prevent or substantially impair" their performance of duties as jurors. *State v. Cummings,* 326 N.C. 298, 389 S.E.2d 66 (1990) (adopting standard for challenges for cause established by *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), a federal *habeas corpus* review).

NOTE: *Wainwright v. Witt, supra,* modified the more stringent standard of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (to sustain prosecution's challenge for cause, prospective juror must express unmistakable commitment to automatically vote against death penalty, regardless of evidence).

2. State may still peremptorily challenge juror who has reservations about death penalty, even though reservations insufficient to sustain challenge for cause. *State v. Fullwood,* 323 N.C. 371, 373 S.E.2d 518 (1988).

3. Defendant has federal constitutional right to ask prospective jurors if they would automatically impose death penalty if defendant convicted of capital murder; as to those jurors who would, judge must sustain defendant's challenge for cause. *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992).

4. Citing *Morgan v. Illinois, supra,* the N.C. Supreme Court held, in *State v. Conner,* 335 N.C. 618, 440 S.E.2d 826 (1994), that judge erred by barring defendant from asking prospective jurors:

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

5. Challenge for trial judge is to determine whether prospective jurors' views in favor of or against death penalty are such that those views would "substantially impair" their performance of duties as jurors.

6. Considerable confusion regarding the law on the part of prospective juror could amount to "substantial impairment." *Uttecht v. Brown,* 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007).

7. Judge has no authority to order a non-death qualified jury to try guilt-innocence phase of first degree murder trial, and then order a death qualified jury to determine sentence if defendant convicted of first degree murder. *State v. Berry,* 356 N.C. 490, 573 S.E. 2d 132 (2002).

C. "Stakeout" questions.

1. Definition: a question posed to determine in advance what a prospective juror's decision would be under a certain state of evidence or given set of

facts. *State v. Richmond,* 347 N.C. 412, 495 S.E.2d 677 (1998). Also, a question that tends to commit prospective juror to a specific course of action in the case. *State v. Chapman,* 359 N.C. 328, 611 S.E.2d 794 (2005).

2. Stakeout questions not necessarily improper. See, *e.g., State v. Conner, supra.*

3. State *may* ask (not an improper stakeout question):

    a. Whether fact that there were no eyewitnesses and that State was relying on circumstantial evidence would bother prospective jurors. *State v. Clark,* 319 N.C. 215, 353 S.E.2d 205 (1987).

    b. Whether prospective juror would be "strong enough" to recommend death penalty, *State v. Smith,* 328 N.C. 99, 400 S.E.2d 712 (1991), or has the "backbone" to impose death penalty. *State v. Hinson,* 310 N.C. 245, 311 S.E.2d 256 (1984).

4. Defendant may *not* ask about particular mitigating circumstances (improper stakeout questions) such as:

    a. Whether, if evidence showed that defendant was an abused and neglected child, could juror consider that in sentencing phase of trial. *State v. Johnson,* 317 N.C. 343, 346 S.E.2d 596 (1986).

    b. Whether juror could consider that defendant had no significant history of criminal record in sentencing phase. *State v. Davis,* 325 N.C. 607, 386 S.E.2d 418 (1989).

    c. Whether juror could consider defendant's drug abuse in sentencing phase. *State v. Miller,* 339 N.C. 663, 445 S.E.2d 137 (1995).

5. Defendant *may* ask (not improper stakeout question):

    a. Whether juror could consider court's instructions about considering mitigating circumstances. *Id.*

    b. Whether defendant's failure to testify would affect juror's ability to give defendant a fair trial. *State v. Hightower,* 331 N.C. 636, 417 S.E.2d 237 (1992).

BUT SEE, *State v. Blankenship,* 337 N.C. 543, 447 S.E.2d 727 (1994) (judge properly barred defendant from asking whether prospective juror would "hold it against" defendant if he chose not to put on a defense).

c. Whether juror understands that, while law requires him to deliberate with other jurors in attempt to reach unanimous verdict, he has right to stand by his beliefs in the case. *State v. Elliot,* 344 N.C. 242, 474 S.E.2d 202 (1997).

BUT, asking "And would you do that?" is improper stakeout. *Id.*

d. About juror's personal involvement in situations involving domestic violence, child abuse, alcohol and drug abuse, etc. *State v. Cummings,* 361 N.C. 438, 648 S.E.2d 788 (2007).

6. Questions that ask whether a juror *could find* (as opposed to *would find*) that certain facts call for imposition of life or death, or whether juror *could fairly consider* both life and death in light of particular facts are generally appropriate. *United States v. Johnson,* 366 F.Supp.2d 822 (N.D. Iowa 2005).

D. "Rehabilitation" of Jurors.

1. After State's challenge for cause, defendant may request opportunity to question juror and show that his purported opposition to death penalty would not substantially impair his performance of duties as juror. *State v. Brogden,* 334 N.C. 39, 430 S.E.2d 905 (1993).

2. Judge may not automatically deny request, but should exercise discretion in deciding whether to allow. *Id.*

3. Opportunity to rehabilitate not required if juror's responses in opposition to death penalty are clear and unequivocal. *State v. Davis,* 340 N.C. 1, 455 S.E.2d 627 (1995).

4. State may also be permitted opportunity to rehabilitate juror challenged for cause by defendant. *State v. Lane,* 334 N.C. 148, 431 S.E.2d 7 (1993).

E. Batson Challenges.

1. The State may not exercise peremptory challenge against prospective black jurors in a racially discriminatory manner. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

2. White defendant may raise *Batson* challenge. *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

3. State may raise *Batson* challenge against defendant. *Georgia v. McCollum,* 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

4. *Batson* ruling applies to discrimination based on gender. *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

5. *Batson* claims are based on equal protection clause of Fourteenth Amendment to U.S. Constitution and protect rights of jurors as well as parties. *Powers v. Ohio, supra.*

6. Defendant may also raise similar claim based on N.C. Constitution.

    a. "Law of the land" clause of Art. I, Sec. 19 ("functional equivalent" of the equal protection clause, *White v. Pate,* 308 N.C. 759, 304 S.E.2d 199 (1983).

    b. Art. I, Sec. 26 of N.C. Constitution: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." See *State v. Crandell,* 322 N.C. 487, 369 S.E.2d 579 (1988).

7. Preserve for the record the race of all prospective jurors in advance in case a *Batson* challenge raised during voir dire!

    a. Have each juror either state race on record during voir dire or indicate his or her race on questionnaire if one is used. See *State v. Mitchell,* 321 N.C. 650, 375 S.E.2d 554 (1988).

    b. Subjective impressions of court reporter, clerk, or counsel as to race are unacceptable. See *State v. Mitchell, supra; State v. Payne,* 327 N.C. 194, 393 S.E.2d 158 (1990).

8. If objection to exercise of peremptory challenge is raised under either *Batson* or state constitution, then judge should apply same 3-step analysis in ruling. *State v. Floyd,* 343 N.C. 101, 468 S.E.2d 46 (1996):

    a. Party making the objection must make a prima facie showing that party exercising peremptory challenge was motivated by discrimination.

b. Upon such a prima facie showing, party exercising peremptory challenge is entitled to rebuttal, presenting reasons that challenge not motivated by discrimination.

c. Party alleging discrimination entitled to surrebuttal, showing that reasons offered were inadequate or pretextual.

9. Factors in determining whether a prima facie case of discrimination in exercise of peremptory challenges has been made. See *State v. Quick,* 341 N.C. 141, 462 S.E.2d 186 (1995); *State v. Ross,* 338 N.C. 280, 449 S.E.2d 556 (1994); *State v. Spruill,* 338 N.C. 612, 452 S.E.2d 279 (1994):

a. Defendant's race, victim's race, race of key witnesses.

b. Questions and statements of the prosecutor which tend to support or refute inference of discrimination.

c. Repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire.

d. Prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case.

e. State's acceptance rate of potential black jurors (perhaps the best evidence, see *State v. Ross, supra*).

NOTE: Step one of *Batson* analysis not intended to be a high hurdle for defendants. *State v. Hoffman,* 348 N.C. 548, 500 S.E.2d 718 (1998). Defendant only required to produce evidence sufficient to permit court to draw inference that discrimination has occurred. *Johnston v. California,* 545 U.S. 162 (2005).

10. Showing of race-neutral reasons for the peremptory challenges.

a. *May* allow party exercising peremptory challenge the opportunity to offer for the record race-neutral reasons for doing so after ruling of no prima facie case of discrimination. *State v. Hoffman, supra.*

b. *Must* allow party exercising peremptory challenge the opportunity to demonstrate race-neutral reasons after ruling of prima facie showing of discrimination. *State v. Floyd, supra.*

c. Burden is on party exercising peremptory challenge to provide race-neutral reason for strike. Reason must be clear and reasonably specific. Unless discriminatory intent inherent in the explanation, reason offered will be deemed race-neutral. *State v. Golphin,* 352 N.C. 364 (2000).

d. Sufficiency of race-neutral reasons for peremptory challenge:

i. State's statement that it wanted jury that was "stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime-solving problems and pressures" held to be valid, race-neutral criteria. *State v. Jackson,* 322 N.C. 251, 368 S.E.2d 838 (1988).

ii. Unemployed university student "too liberal." *Id.*

iii. Juror's age or that of his children close to defendant's age. *State v. Davis,* 325 N.C. 607, 386 S.E.2d 418 (1990).

iv. Criminal record of juror. *State v. Robinson,* 330 N.C. 1, 409 S.E.2d 288 (1991).

v. Juror's knowledge of case or lack of maturity. *State v. Thomas,* 329 N.C. 423, 407 S.E.2d 141 (1991).

vi. Juror's history of unemployment or belief that criminal justice system operates unfairly. *State v. Porter,* 326 N.C. 489, 391 S.E. 2d 144 (1990).

vii. Juror's relatives charged with crime similar to defendant's. *State v. Burge,* 100 N.C. App. 671, 397 S.E.2d 760 (1990)(1991).

e. Explanation, if race-neutral, need not be "persuasive, or even plausible." *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (prosecutor's explanation that black juror had long, unkempt hair, a mustache, and a beard was race-neutral)

11. Must allow surrebuttal, showing by claimant of discrimination that profferred reasons were inadequate or pretextual. Burden on claimant to establish that it is more likely than not that strike motivated in substantial part by

discriminatory intent. *State v. Hobbs,* 384 N.C. 144 (2023) (*Hobbs I).* Factors to consider include:

a. The susceptibility of the particular case to racial discrimination. *State v. Porter,* 326 N.C. 489, 391 S.E.2d 144 (1990).

b. The prosecutor's demeanor. *Id.*

c. Whether "similarly situated white veniremen escaped the State's challenge." *State v. Smith,* 328 N.C. 99, 400 S.E.2d 712 (1991).

d. Statistical evidence about peremptory strikes *in the case. Hobbs I, supra.*

e. The judge's assessment of the "entire milieu of the voir dire," including comparing "his observations and assessments of veniremen with those explained by the State, guided by his personal experiences with voir dire, trial tactics, and the prosecutor, and by any surrebuttal evidence offered by the defendant. *Id.*

NOTE: Defendants may want to introduce results of Michigan State University study purporting to show racial discrimination by State in exercise of peremptory strikes. The N.C. Supreme Court rejected that study in jurisdiction involved in *State v. Hobbs,* 384 N.C. 144 (2023).

12. "Reverse" Batson Challenges (that is, by white defendant).

a. Allowed by *Georgia v. McCollum,* 505 U.S. 42 (1992).

b. See *State v. Hurd,* 246 N.C. App. 281, 784 S.E.2d 528 (2016), *cert. denied,* 246 N.C. 281, 792 S.E.2d 521 (2016). Court of Appeals affirmed the trial judge in sustaining State's objection to defendant's peremptory strike of white juror; trial court found:

i. Of the 11 peremptory challenges used by defendant, 10 were used against white or Hispanic jurors.

ii. Defendant's acceptance rate of black jurors was 83%; his acceptance rate of white and Hispanic jurors was 23%.

iii. Defendant struck a white, but not a black juror, both of whom rated themselves a "4" on a scale of 1 to 7 in describing the strength of their support of death penalty.

13. Considering and ruling on *Batson* objections.

    a. Rule on each objection individually in a rigid step-by-step approach (if ruling is that objecting party has made no prima facie showing, inquiry stops); **OR**

    b. Merge the prima facie, rebuttal, and surrebuttal analysis with each individual objection; **OR**

    c. Note each objection, wait until several are made, and then merge the three-step analysis on the objections.

14. What if court finds a *Batson* violation has occurred?

    a. Best remedy is to begin jury selection again with a new panel of prospective jurors. *State v. McCollum,* 334 N.C. 208, 433 S.E.2d 144 (1993).

    b. Reseating prospective jurors who had been improperly excluded discouraged because it "would require near superhuman effort" for those jurors to remain impartial. *Id.*

IV. Racial Challenges to Entire Jury Venire

A. Defendant's 6th Amendment right to trial by jury includes right to jury pool drawn from fair cross section of the community.

    1. Defendant may establish prima facie violation of this 6th Amendment right by showing that a "distinctive" group significantly underrepresented in pool as the result of "systematic exclusion."

    2. State may rebut prima facie violation by showing that discrepancy is the result of eligibility requirements that "manifestly and primarily advance a significant state interest."

    3. Unless State can rebut prima facie violation, likely must draw an entirely new jury pool.

B. See *Burghuis v. Smith,* 559 U.S. 314 (2010); *Duran v. Missouri,* 439 U.S. 364 (1979).

C. In North Carolina, statistics alone generally insufficient to show a systematic exclusion of a racial group. See *State v. Williams,* 355 N.C. 501 (2002).

D. Racial makeup of special venire drawn from nearby county need not mirror that of population of county where trial held. See *State v. Golphin,* 352 N.C. 364 (2000).

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