



2025 UPDATE

JURY SELECTION: THE ART OF PEREMPTORIES AND TRIAL ADVOCACY TECHNIQUES

DAVIS & DAVIS

ATTORNEYS AT LAW, PC

ALL PUBLICATIONS



RICHFIELD | SALISBURY | LEXINGTON

JAMES A. DAVIS

James is honored to present his 45th CLE at the 2025 Higher-Level Felony Defense Training.

He is a N.C. Board Certified Specialist in Federal Criminal Law, State Criminal Law, and Family Law with a trial practice in criminal, domestic, and general litigation. He is deeply committed to excellence and professionalism in the practice of law, having served on the N.C. State Bar Specialization Criminal Law Committee, the N.C. State Bar Board of Continuing Legal Education, the N.C. State Bar Disciplinary Hearing Commission, and was Issue Planning Editor of the Law Review at Regent University. James also lectures at criminal, family law, and trial practice CLE programs, and has been regularly designated by the Capital Defender as lead counsel in capital murders.

This paper is derived from my original paper entitled Modified Wymore for Non-Capital Cases utilizing many CLEs, reading many studies, consulting with and observing great lawyers, and, most importantly, trial experience in approximately 100 jury trials ranging from capital murder, personal injury, torts, to an array of civil trials. I have had various experts excluded; received not guilty verdicts in capital murder, habitual felon, rape, drug trafficking, and a myriad of other criminal trials; and won substantial monetary verdicts in criminal conversation, alienation of affection, malicious prosecution, assault and other civil jury trials. I attribute any success to those willing to help me, the courage to try cases, and God's grace. My approach to seminars is simple: if it does not work, I am not interested. Largely in outline form, the paper is crafted as a practice guide.

A few preliminary comments. First, trial is a mosaic, a work of art. Each part of a trial is important; however, jury selection and closing argument-the beginning and end-are the lynchpins to success. Clarence Darrow once claimed, “Almost every case has been won or lost when the jury is sworn.”

Second, jury selection is a critical art. Public outrage decried the Rodney King, O.J. Simpson, McDonald’s hot coffee spill, nanny Louise Woodward, and the 253-million-dollar VIOXX verdicts, all of which had juries selected using trial consultants. After three-plus decades, I now believe jury selection and closing argument decide most close cases.

Third, I am an eclectic, taking the best I have ever seen or heard from others. Virtually nothing herein is original, and I neither make any representations regarding accuracy nor claim any proprietary interest in the materials. Pronouns are in the masculine in accord with holdings of the cases referenced.

Last, like the conductor of a symphony, be steadfast at the helm, remembering the basics: Preparation spawns the best examinations. Profile favorable jurors. File pretrial motions that limit evidence, determine critical issues, and create a clean trial. Be vulnerable, smart, and courageous in jury selection. Cross with knowledge and common sense. Be efficient on direct. Perfect the puzzle for the jury. Then close with punch, power, and emotion.

I wish to acknowledge Timothy J. Readling, Esq., for his able assistance in researching, drafting, and editing this presentation.

TABLE OF CONTENTS

I.	Preliminary Observations	4
II.	Jury Pool	4
A.	Fair Cross-Section	4
B.	Prospective Juror Qualifications	5

C.	Informing Prospective Jurors	5
III.	Voir Dire: State of the Law	5
A.	Case Law	6
B.	Statutes	6
C.	Constitution	7
IV.	Selection Procedure	7
A.	Statutes	7
B.	Pattern Jury Instructions	7
C.	Case Law	9
D.	Jury Indoctrination	11
E.	Procedural Rules	11
F.	Stake-out Questions	13
G.	<i>Batson</i> Challenges	13
1.	Introduction	13
2.	History Before <i>State v. Clegg</i>	14
3.	<i>State v. Clegg</i> , 380 N.C. 127 (2022)	15
4.	<i>Batson</i> Violation Remedies	15
5.	My Practical Advice	16
H.	Implicit Bias	16
I.	Challenges for Cause	17
J.	Other Jury Selection Issues	19
V.	Theories of Jury Selection	21

VI.	The Wymore Method	22
VII.	Our Method: Modified Wymore	24
VIII.	The Fundamentals	27
IX.	Fine Art Techniques	28
X.	My Side Bar Tips	30
XI.	Subject Matter of <i>Voir Dire</i>	32
XII.	Other Important Considerations	34
XIII.	Integrating <i>Voir Dire</i> into Closing Argument	36
XIV.	Summary	37

I. Preliminary Observations (TOC)

You can try the best case ever tried, but with the wrong jury you will lose. Lawyers who espouse “Let’s go with the first twelve” are either unwilling to do the work necessary for the best chance of success or think far too highly of themselves. The trial lawyer must be aware of the world in which we live: jurors bring—besides their life experience and common sense—their individual stories, unconscious beliefs, current concerns, and society’s moods and narratives. You cannot protect your client unless you address, and undress, these issues during jury selection.

II. Jury Pool (TOC)

A. Fair Cross-Section: (TOC)

The U.S. and N.C. Constitutions require that petit juries (i.e., trial juries) be selected from a fair cross-section of the community. See U.S. Const. amend. VI; N.C. Const. art. I §§ 24 & 26; *Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Bowman*, 349 N.C. 459 (1998). A violation of the fair cross-section requirement occurs when a defendant proves: (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of such group in the jury pool is not fair and reasonable in relation to the number of such persons in the community; and (3) underrepresentation is due to the systematic exclusion of such group in the jury selection process.

See Duren, 439 U.S. at 364. Jury lists are comprised currently of citizens who are voters or licensed drivers. One study reports this practice results in the underrepresentation of minorities.¹

B. Prospective Juror Qualifications: [\(TOC\)](#)

A prospective juror is qualified to serve as a juror upon meeting the following requirements of N.C. Gen. Stat. § 9-3, summarized as follows: (1) a North Carolina citizen; (2) a resident of the county; (3) has not served as a juror in the last two years; (4) has not served a full term as a grand juror in the last six years; (5) is at least 18 years old; (6) is physically and mentally competent; (7) understands English; and (8) has not been convicted of or pled guilty or no contest to a felony (unless citizenship rights were restored). Note a prospective juror with a pending felony charge may be challenged for cause. N.C. Gen. Stat. § 15A-1212(7).

A few points to know about juror qualification. First, a juror is not considered to have served until sworn. *State v. Golphin*, 352 N.C. 364 (2000). Second, the date of swearing serves as the relevant date in calculating the juror's next lawful date of service. *Id.* Third, a defendant does not have a statutory or constitutional right to be present for District Court proceedings regarding juror qualification. *State v. McCarver*, 341 N.C. 364 (1995).

C. Informing Prospective Jurors: [\(TOC\)](#)

Prior to jury selection, prospective jurors are required to be informed by the trial court of the following: (1) the identities of the parties and counsel; (2) the defendant's charges; (3) the alleged victim's name; (4) the defendant's plea to the charge; and (5) any affirmative defense for which the defendant gave pre-trial notice. N.C. Gen. Stat. § 15A-1213.

While the defendant is required to give pre-trial notice of any affirmative defense (e.g., alibi, self-defense, etc.), this notice is inadmissible against the defendant pursuant to the reciprocal discovery statute. N.C. Gen. Stat. § 15A-905(c)(1). The conflict between the statutes is resolved by the defendant informing the trial court that he will not use a particular defense for which notice was given. *See State v. Clark*, 231 N.C. App. 421 (2013) (holding trial court did not err by informing prospective jurors of an affirmative defense when record did not show defendant informed the trial court that he would not pursue self-defense).

III. Voir Dire: State of the Law [\(TOC\)](#)

Voir dire means to speak the truth.² Our highest courts proclaim its purpose. *Voir dire* serves a dual objective of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). The North Carolina Supreme Court held jury selection has a dual purpose, both to help counsel: (1) determine whether a basis for challenge for cause exists; and (2) intelligently exercise peremptory challenges. *State v. Wiley*, 355 N.C. 592 (2002); *State v. Simpson*, 341 N.C. 316 (1995).

¹ Mary R. Rose, Raul S. Casarez & Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts* (2018).

² In Latin, *verum dicere*, meaning "to say what is true."

Counsel who wishes to exclude a potential juror for bias must demonstrate, through questioning, that the potential juror lacks impartiality. *Wainwright v. Witt*, 469 U.S. 412 (1985). If the Court attempts to limit questioning or the prosecutor objects during questioning, demonstrate how your questions relate to the dual objectives of *voir dire*. In other words, fulfilling the objectives of jury selection requires the ability to question jurors for those purposes.

A. Case Law: [\(TOC\)](#)

Case law amplifies the aim of jury selection. Each defendant is entitled to a full opportunity to face prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 105, 115 (1978). The purpose of *voir dire* and exercise of challenges “is to eliminate extremes of partiality and assure both . . . [parties] . . . 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 (1994). We all have natural inclinations and favorites, and jurors, at least on a subconscious level, give the benefit of the doubt to their favorites. Jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror’s yesterday or today that would make it difficult for a juror to view the facts, not in an abstract sense, but in a particular case, dispassionately. *State v. Hedgepath*, 66 N.C. App. 390 (1984).

B. Statutes: [\(TOC\)](#)

Statutory authority empowers defense counsel to “personally question prospective jurors individually concerning their fitness and competency to serve” and determine whether there is a basis for a challenge for cause or to exercise a peremptory challenge. N.C. Gen. Stat. § 15A-1214(c); *see also* N.C. Gen. Stat. § 9-15(a) (counsel shall be allowed to make direct oral inquiry of any juror as to fitness and competency to serve as a juror). In capital cases, each defendant is allowed fourteen peremptory challenges, and in non-capital cases, each defendant is allowed six peremptory challenges. N.C. Gen. Stat. § 15A-1217. Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. *Id.*

A peremptory challenge is a “creature of statute” and not a constitutional right. *Rivera v. Illinois*, 556 U.S. 148 (2009). The court may remove peremptory challenges as a sanction. *State v. Banks*, 125 N.C. App. 681 (1997). The court may not grant additional peremptory challenges. *State v. Hunt*, 325 N.C. 187 (1989). *But see State v. Barnes*, 345 N.C. 184 (1997) (trial court did not err by granting each defendant a peremptory challenge when a juror was dismissed due to an emergency). A peremptory challenge may be exercised without explanation with one limitation: the challenge may not be used if due to a constitutionally protected characteristic of a juror (e.g., race, gender, etc.).

Never lose sight of the purpose of a peremptory challenge: “Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified

and unbiased jury.” *Holland v. Illinois*, 493 U.S. 474 (1990). Case law approves of deselection as a central purpose of peremptory challenges.

C. Constitution: [\(TOC\)](#)

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. . . . *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.” *Voir dire* must be available “to lay bare the foundation of a challenge for cause against a prospective juror.” *Morgan v. Illinois*, 504 U.S. 719, 729, 733 (1992);³ *see also Rosales-Lopez v. U.S.*, 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 to impartially follow the court’s instructions and evaluate the evidence cannot be fulfilled.”).⁴

Now, the foundational principles of jury selection.

IV. Selection Procedure [\(TOC\)](#)

A. Statutes: [\(TOC\)](#)

Trial lawyers should review and be familiar with the following statutes. Two sets govern *voir dire*. N.C. Gen. Stat. § 15A-1211 through 1217; and N.C. Gen. Stat. §§ 9-1 through 9-18.

- N.C. Gen. Stat. §§ 15A-1211 through 1217: Selecting and Impaneling the Jury;
- N.C. Gen. Stat. § 15A-1241(b): Record of Proceedings;
- N.C. Gen. Stat. §§ 9-1 through 9-9: Preparation of Jury List, Qualifications of Jurors, Request to be Excused, *et seq.*; and
- N.C. Gen. Stat. §§ 9-10 through 9-18: Petit Jurors, Judge Decides Competency, Questioning Jurors without Challenge, Challenges for Cause, Alternate Jurors, *et seq.*

B. Pattern Jury Instructions: [\(TOC\)](#)

Recite the pattern jury instructions to jurors.

- Pattern Jury Instructions: Substantive Crime(s) and Trial Instructions⁵

³ This language was excised from a capital murder case. *See Morgan v. Illinois*, 504 U.S. 719 (1992).

⁴ *Rosales-Lopez* was a federal charge alleging defendant’s participation in a plan to smuggle Mexican aliens into the country, and defendant sought to question jurors about possible prejudice toward Mexicans.

⁵ The North Carolina pattern jury instructions are sample instructions for criminal, civil, and motor vehicle negligence cases used by judges as guidance for juries for reaching a verdict. Created by the Pattern Jury Instruction Committee, eleven trial judges, assisted by the School of Government and supported by the Administrative Office of the Courts,

- N.C.P.I. – Crim. 100.21: Remarks to Prospective Jurors After Excuses Heard (parties are entitled to jurors who approach cases with open minds until a verdict is reached; free from bias, prejudice or sympathy; must not be influenced by preconceived ideas as to facts or law; lawyers will ask if you have any experience that might cause you to identify yourself with either party, and these questions are necessary to assure an impartial jury; being fair-minded, none of you want to be tried based on what was reported outside the courtroom; the test for qualification for jury service is not the private feelings of a juror, but whether the juror can honestly set aside such feelings, fairly consider the law and evidence, and impartially determine the issues; we ask no more than you use the same good judgment and common sense you used in handling your own affairs last week and will use in the weeks to come; these remarks are to impress upon you the importance of jury service, acquaint you with what will be expected, and strengthen your will and desire to discharge your duties honorably).
- N.C.P.I. – Crim. 100.22: Introductory Remarks (this call upon your time may never be repeated in your lifetime; it is one of the obligations of citizenship, represents your contribution to our democratic way of life, and is an assurance of your guarantee that, if chance or design brings you to any civil or criminal entanglement, your rights and liberties will be regarded by the same standards of justice that you discharge here in your duties as jurors; you are asked to perform one of the highest duties imposed on any citizen, that is to sit in judgment of the facts which will determine and settle disputes among fellow citizens; trial by jury is a right guaranteed to every citizen; you are the sole judges of the weight of the evidence and credibility of each witness; any decision agreed to by all twelve jurors, free of partiality, unbiased and unprejudiced, reached in sound and conscientious judgment and based on credible evidence in accord with the court’s instructions, becomes a final result; you become officers of the court, and your service will impose upon you important duties and grave responsibilities; you are to be considerate and tolerant of fellow jurors, sound and deliberate in your evaluations, and firm but not stubborn in your convictions; jury service is a duty of citizenship).
- N.C.P.I. – Crim. 100.25: Precautionary Instructions to Jurors (Given After Impaneled) (all the competent evidence will be presented while you are present in the courtroom; your duty is to decide the facts from the evidence, and you alone are the judges of the facts; you will then apply the law that will be given to you to those facts; you are to be fair and attentive during trial and must not be influenced to any degree by personal feelings, sympathy for, or prejudice against any of the parties involved; the fact a criminal charge has been filed is not evidence; the defendant is innocent of any crime unless and until the state proves the defendant’s guilt beyond a reasonable doubt; the only place this case may be discussed is in the jury room after you begin your deliberations; you are not to form an opinion about guilt or innocence or express an

produce supplemental instructions yearly based on changes in statutory and case law. While not mandatory, the pattern jury instructions have been cited as the “preferred method of jury instruction” at trial. *State v. Sexton*, 153 N.C. App. 641 (2002).

- opinion about the case until you begin deliberations; news media coverage is not proper for your consideration; television shows may leave you with improper, preconceived ideas about the legal system as they are not subject to rules of evidence and legal safeguards, are works of fiction, and condense, distort, or even ignore procedures that take place in real cases and courtrooms; you must obey these rules to the letter, or there is no way parties can be assured of absolute fairness and impartiality).
- N.C.P.I. – Crim. 100.31: Admonitions to Jurors at Recesses⁶ (during trial, jurors should not talk with each other about the case; have contact of any kind with parties, attorneys or witnesses; engage in any form of electronic communication about the trial; watch, read or listen to any accounts of the trial from any news media; or go to the place where the case arose or make any independent inquiry or investigation, including the internet or other research; if a verdict is based on anything other than what is learned in the courtroom, it could be grounds for a mistrial, meaning all the work put into trial will be wasted, and the lawyers, parties and a judge will have to retry the case).

C. Case Law: [\(TOC\)](#)

Harbison and IAC Issues

Counsel must not concede guilt without client approval on the record as a best practice. Under *Harbison*, the defendant must knowingly and voluntarily consent to concessions of guilt made by counsel after a full appraisal of the consequences and before any admission. *State v. Harbison*, 315 N.C. 175 (1985). *Harbison* is broader than you may think.

1. The defendant receives *per se* IAC when counsel concedes guilt to the offense or a lesser-included offense without consent. *State v. Berry*, 356 N.C. 490 (2002).
2. *Harbison* error may exist when counsel “impliedly—rather than expressly—admits the defendant's guilt to a charged offense” and remanding for an evidentiary hearing whether: (1) *Harbison* was violated; or (2) the defendant knowingly consented in advance to his counsel’s admission of guilt to the Assault on a Female charge when counsel stated that “things got physical . . . he did wrong . . . God knows he did” during closing argument. *State v. McAlister*, 375 N.C. 455 (2020).
3. *Harbison* inquiry applies when counsel concedes an element of a crime. *State v. Arnett*, 276 N.C. App. 106 (2021). Counsel conceded the defendant committed the physical act of the offense. The trial court conducted two *Harbison* inquiries of the defendant regarding the concession, finding he knowingly and voluntarily agreed to the same. That said, this form of a concession does not necessarily amount to IAC when counsel maintains the defendant’s innocence. *State v. Wilson*, 236 N.C. App. 472 (2014).

⁶ N.C. GEN. STAT. § 15A-1236 (addresses admonitions that must be given to the jury in a criminal case, typically at the first recess and at appropriate times thereafter).

4. *Harbison* inquiry applies to defenses when they constitute an admission to elements or lesser-included offenses, such as intoxication or insanity defenses to First Degree Murder under a premeditation and deliberation theory. *State v. Johnson*, 161 N.C. App. 68 (2003); *State v. Berry*, 356 N.C. 490 (2002). Certain defenses are not complete defenses and expose the defendant to lesser-included offenses (e.g., voluntary intoxication, diminished capacity, self-defense [perfect to imperfect], etc.).
 - Remember: The defendant must give pre-trial notice to the prosecution of an intent to offer certain defenses at trial (e.g., self-defense, intoxication, etc.). N.C. Gen. Stat. § 15A-905(c)(1). Such defenses are required to be read to prospective jurors before jury selection. N.C. Gen. Stat. § 15A-1213. However, the same is not read to the jury when counsel informs the Court that the defendant will not pursue the noticed defense. *State v. Clark*, 231 N.C. App. 421 (2013).
5. Appellate courts “urge[] both the bar and the trial bench to be diligent in making a full record of a defendant’s consent when a *Harbison* issue arises at trial.” *State v. Berry*, 356 N.C. 490 (2002).
6. Practice Pointers: Counsel should ensure the record reflects the defendant’s express consent prior to any admission. *State v. Maready*, 205 N.C. App. 1 (2010). A lack of objection by or silence from the defendant is insufficient under *Harbison*. *Id.* Additionally, counsel should ensure the record reflects whether consent is contingent upon presentation of a certain defense. *State v. Berry*, 356 N.C. 490 (2002).
 - My Tip: I now conduct *Harbison* inquiries before jury selection to address admissions (fact, element, etc.) made by the defense throughout trial to include, *inter alia*, jury selection, opening statement, and closing argument. I often have the client sign a document authorizing the same for my file.

Helpful Language in Voir Dire

1. *State v. Call*, 353 N.C. 400, 409–10 (2001) (after telling jurors the law requires them to deliberate with other jurors in order to try to reach a unanimous verdict, it is permissible to ask jurors “if they understand they have the right to stand by their beliefs in the case”); *see also State v. Elliott*, 344 N.C. 242, 263 (1996).
2. *State v. Cunningham*, 333 N.C. 744 (1993) (Defendant’s challenge for cause was proper when juror repeatedly said defendant’s failure to testify “would stick in the back of my mind”); *see also State v. Hightower*, 331 N.C. 636 (1992) (although juror stated he “could follow the law,” his comment that Defendant’s failure to testify “would stick in the back of [his] mind” while deliberating mandated approval of a challenge for cause).

3. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (held the Fourteenth Amendment guarantees a right of jury trial in all criminal cases and comes within the Sixth Amendment's assurance of a trial by an impartial jury; that trial by jury in criminal cases is fundamental to the American system of justice; that fear of unchecked power by the government found expression in the criminal law in the insistence upon community participation in the determination of guilt or innocence; and a right to trial by jury is granted to criminal defendants in order to prevent oppression by the government; providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge).

D. Jury Indoctrination: (TOC)

It is axiomatic that counsel should not engage in efforts to indoctrinate jurors, argue the case, visit with, or establish rapport with jurors. *State v. Phillips*, 300 N.C. 678 (1980). You may not ask questions which are ambiguous, confusing, or contain inadmissible evidence or incorrect statements of law. *State v. Denny*, 294 N.C. 294 (1978) (holding ambiguous or confusing questions are improper); *State v. Washington*, 283 N.C. 175 (1973) (finding a question containing potentially inadmissible evidence improper); *State v. Vinson*, 287 N.C. 326 (1975) (holding counsel's statements contained inadequate or incorrect statements of the law and were thus improper). The court may also limit overbroad, general or repetitious questions. *Id.* But see N.C. Gen. Stat. § 15A-1214(c) (defendant not prohibited from asking the same or a similar question previously asked by the prosecution).

E. Procedural Rules: (TOC)

A primer on procedural rules⁷: The scope of permitted *voir dire* is largely a matter of the trial court's discretion. See, e.g., *State v. Knight*, 340 N.C. 531 (1995) (trial judge properly sustained State's objection to questions asked about victim's HIV status); see generally *State v. Phillips*, 300 N.C. 678 (1980) (opinion explains boundaries of *voir dire*; questions should not be overly repetitious or attempt to indoctrinate jurors or "stake them out"). The trial court has the duty to control and supervise the examination of jurors, and regulation of the extent and manner of questioning rests largely in the court's discretion. *State v. Wiley*, 355 N.C. 592 (2002). The prosecutor and defendant may personally question jurors individually concerning their competency to serve. N.C. Gen. Stat. § 15A-1214(c). The defendant is not prohibited from asking a question merely because the court or prosecutor has previously asked the same or a similar question. *Id.*; *State v. Conner*, 335 N.C. 618, 628–29 (1994). Leading questions are permitted. *State v. Fletcher*, 354 N.C. 455, 468 (2001).

⁷ MICHAEL G. HOWELL, STEPHEN C. FREEDMAN & LISA MILES, JURY SELECTION QUESTIONS (2012).

The court has discretion under statute to reopen examination of a juror previously accepted if, at any time before the jury is impaneled, it is discovered the juror made an incorrect statement or other good reasons exists. N.C. Gen. Stat. § 1214(g).

HYPOTHETICAL

Imagine the following circumstances during jury selection.

1. The prosecution and defense accepted 12 prospective jurors.
2. The prosecution and defense accepted 2 of 3 prospective alternates.
3. Prospective juror 7 was excused for cause when his wife went into labor.
4. No jury was empaneled at the time.

Question: Who fills seat 7? The first prospective alternate or someone from the jury pool?

Answer: Someone from the jury pool. *State v. Griffin*, ___ N.C. App. ___, 914 S.E.2d 8 (March 5, 2025). *Griffin* holds that N.C. Gen. Stat. § 15A-1214(g) controls. The statute provides, “If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists . . . If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made . . . Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.” N.C. Gen. Stat. § 15A-1214(g).

This issue was important because Defendant had no remaining peremptory challenges for prospective jurors and only one remaining peremptory challenge for prospective alternates.

Even after the jury is impaneled, case law gives the court discretion to reopen examination of a juror and allow for cause and peremptory challenges. *State v. Johnson*, 161 N.C. App. 68 (2003). Although undefined by statute, “reopening” occurs when the court allows counsel to question a juror directly at any time. *State v. Boggess*, 358 N.C. 676 (2004). Once the court reopens examination of a juror, each party has the absolute right to use any remaining peremptory challenges to excuse the juror. *State v. Womble*, 343 N.C. 667, 678 (1996).

Note that the court has the power to direct counsel ask particular questions to the entire jury panel rather than a single juror. *State v. Campbell*, 340 N.C. 612 (1995). However, the court does not have the power to completely ban questions to individual jurors. N.C. Gen. Stat. § 1214(c); see *State v. Payne*, 328 N.C. 377 (1991).

Also note that the order of jury selection is complicated by co-defendants. Statute requires the prosecutor to accept 12 jurors before tendering the panel to the defendant. N.C. Gen. Stat. § 1214(d). After the defendant exercises his or her desired peremptory or for cause challenges, the

2025 Update to Jury Selection:

panel is to be tendered to the co-defendant for the same exercise. N.C. Gen. Stat. § 1214(e) and (f). The process continues until a final jury panel is selected.

F. Stake-out Questions: (TOC)

A common issue is an improper stake-out question. *State v. Simpson*, 341 N.C. 316 (1995) (holding staking-out jurors is improper). Our highest court defines stake-out questions as those which tend to commit jurors to a specific course of action in the case. *State v. Chapman*, 359 N.C. 328, 345–46 (2005). Counsel may not pose hypothetical questions designed to elicit what a juror’s decision will be under a certain state of the evidence or a given state of facts. *State v. Vinson*, 287 N.C. 326, 336–37 (1975). Counsel should not question prospective jurors as to the kind of verdict they would render, how they would be inclined to vote, or what their decision would be under a certain state of evidence or given state of facts. *State v. Richmond*, 347 N.C. 412 (1998). My synthesis of the cases suggests counsel is in danger of an objection on this ground when the question refers to a verdict or encroaches upon issues of law. A proposed *voir dire* question is legitimate if the question is necessary to determine whether a juror is excludable for cause or assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to: (1) the purposes of *voir dire*⁸ or (2) whether jurors will follow the law in a certain area. *State v. Hedgepeth*, 66 N.C. App. 390 (1984).

G. Batson Challenges: (TOC)

1. Introduction: (TOC)

Race, gender, and religious discrimination in the selection of trial jurors is unconstitutional. *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race discrimination violates the Equal Protection Clause of the Fourteenth Amendment); *State v. Locklear*, 349 N.C. 118 (1998) (holding Native Americans are a racial group under *Batson*); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding gender discrimination violates the Equal Protection Clause of the Fourteenth Amendment); U.S. Const. amends. V and XIV (providing for equal protection and due process); N.C. Const. art. I § 26 (no person may be excluded from jury service on account of sex, race, color, religion, or national origin). *Batson* does not require trait alignment between jurors and litigants. *See Powers v. Ohio*, 499 U.S. 400 (1991).

The U.S. Supreme Court established a three-step test for *Batson* challenges: (1) the defendant must make a *prima facie* showing the prosecutor’s strike was discriminatory (i.e., producing evidence sufficient to permit an “inference” that discrimination occurred). *State v. Hobbs*, 374 N.C. 345 (2020). This is merely a burden of production for the defendant. *Johnson v. California*, 545 U.S. 162 (2005); (2) the burden shifts to the prosecutor to offer a race-neutral explanation for the strike; and (3) the trial court decides whether the defendant has proven purposeful discrimination (i.e., whether it is “more likely than not” that the strike was motivated in substantial part by an unlawful

⁸ See N.C. DEFENDER MANUAL 25-17 (John Rubin ed., 2d. ed. 2012).

factor). *State v. Hobbs*, 374 N.C. 345 (2020). The defendant carries the burden of proof at this step. *Johnson v. California*, 545 U.S. 162 (2005).

Under step one (determining whether the prosecutor's strikes were discriminatory), the U.S. Supreme Court has considered, *inter alia*, a prosecutor's history of striking and questioning black jurors in deciding a *Batson* case. *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228 (2019) (holding that, in defendant's sixth trial, the prosecutor's historical use of peremptory strikes in the first four trials, 145 questions for five black prospective jurors contrasted with only 12 questions for 11 white jurors, and misstatement of the record were motivated in substantial part by discriminatory intent). Conversely, *Batson* also prohibits criminal defendants from race, gender, or religious-based peremptory challenges, known as a reverse *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42 (1992).

2. History Before *State v. Clegg*, 380 N.C. 127 (2022): [\(TOC\)](#)

Historically, *Batson* challenges have proven burdensome. Between 1986 and 2021, North Carolina appellate courts reviewed over 160 cases with *Batson* challenges raised by defendants, never finding a single instance of juror discrimination.⁹ During this period, the N.C. Supreme Court reviewed evidence at step one in 32 published opinions, finding the burden was satisfied in only three cases although the law provides step one is “not intended to be a high hurdle.”¹⁰ Also during this period, studies examining North Carolina juries concluded that prosecutors were striking black jurors at nearly twice the rate of white jurors. Even in a death penalty case, no *Batson* violation was found despite the prosecutor's admission to striking two black women for reasons including their race and gender.¹¹

Defense counsel should remain vigilant in making a *Batson* challenge. See *State v. Bennett*, 374 N.C. 579 (2020) (holding, although the State “excused two but kept three African-Americans,” Defendant met his burden of a *prima facie* showing at the first step; that the Court further held a numerical analysis of strike patterns for race was not necessarily dispositive as, in this case, all of the State's peremptory challenges were used to exclude black prospective jurors). Appellate courts are increasingly receptive to *Batson* reviews. See, e.g., *State v. Hobbs*, 374 N.C. 345 (2020) (“*Hobbs I*”) (holding, *inter alia*: (1) because the trial court analyzed all three *Batson* steps—although ruling against the defendant at the first step—a full *Batson* review was required; and (2) a defendant meets the first step by showing the totality of the relevant facts gives rise to an inference of racial discrimination—a burden not intended to be a high hurdle and only of production, not persuasion); *State v. Hobbs*, 384 N.C. 144 (2023) (“*Hobbs II*”) (without disturbing the logic of *Hobbs I*, holding the trial court must show its work when reviewing evidence relevant to a *Batson* challenge, that historical evidence and comparative juror analysis are important, and that strikes by the objecting party are irrelevant).

⁹ See Thirty Years at 1986-1990, Tables A-D. No other state in the region shared this appellate *Batson* record of zero reversals on the merits. See James E. Coleman, Jr., and David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, The N.C. State Bar Journal, Fall 2017. (“Among other southern states, appellate courts in South Carolina have found a dozen *Batson* violations since 1989, and those in Virginia have found six. As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.”).

¹⁰ *State v. Waring*, 364 N.C. 443, 478 (2010) (internal quotations omitted).

¹¹ *State v. White*, 131 N.C. App. 734, 740 (1998).

3. *State v. Clegg*, 380 N.C. 127 (2022): [\(TOC\)](#)

On February 11, 2022, the N.C. Supreme Court held—for the first time ever in any appellate opinion—that a *Batson* violation occurred, reversing the trial court. *State v. Clegg*, 380 N.C. 127 (2022). In *Clegg*, the defendant was an African-American male who was charged with Armed Robbery and Possession of Firearm by Felon. During jury selection, the prosecutor used peremptory strikes against two African-American jurors. Thereafter, defense counsel made a *Batson* challenge.

The prosecutor proffered the following four race-neutral reasons for the strikes: (1) for both jurors, their body language, (2) for both jurors, their failure to look at the prosecutor during questioning, (3) for Juror One, allegedly stating “I suppose” when asked whether she could be fair and impartial, and (4) for Juror Two, having been employed as a nurse for mental health patients. The first two reasons for strikes were not considered since the trial court failed to make findings as to the jurors’ body language or eye contact. The third reason was not accurate as Juror One stated “I suppose” when asked if she could focus on the case rather than if she could be fair and impartial. Hence, the trial court refused to have this reason serve in the analysis as it was not articulated by the prosecutor. For Juror One, the prosecution failed to offer a race-neutral reason to strike. Nonetheless, the trial court ruled that the defendant did not prove purposeful discrimination on the basis of race as to Juror One. For Juror Two, the trial court accepted as a race-neutral reason she had been employed as a nurse for mental health patients (relevant to the defendant’s history). The trial court ruled that the defendant did not prove purposeful discrimination on the basis of race as to Juror Two.

On appeal, as to Juror One, the N.C. Supreme Court held that the trial court erred by not finding purposeful discrimination at the third step of the *Batson* analysis since there was no valid race-neutral reason articulated by the prosecution, remarking that if “the prosecutor’s proffered race-neutral justifications are invalid,” it is the functional equivalent of offering no race-neutral justifications at all, leading to the conclusion that the prosecutor’s peremptory strike was “motivated . . . by discriminatory intent.”

As to Juror Two, the N.C. Supreme Court also held that the trial court erred by (1) misapplying the standard of purposeful discrimination by looking for “smoking gun” evidence, (2) considering race-neutral reasons not articulated by the prosecutor, and (3) not adequately considering—via side-by-side, comparative juror analysis—the disparate questioning and disparate acceptance of comparable prospective white and African-American jurors.

4. *Batson* Violation Remedies: [\(TOC\)](#)

If a *Batson* violation occurs, the court should dismiss the venire and begin jury selection again. *State v. McCollum*, 334 N.C. 208 (1993). Additionally, the court may seat the improperly struck juror. *Id.* Case law further allows the prosecutor to withdraw the strike and pass on the juror rather than dismissing the venire. *State v. Fletcher*, 348 N.C. 292 (1998).

5. My Practical Advice: [\(TOC\)](#)

As a preliminary matter, counsel should request the Court to ask jurors to state their race and gender on the record. See *State v. Mitchell*, 321 N.C. 650 (1988) (holding counsel's statements alone were insufficient to show discriminatory use of peremptory challenges). If the Court defers to counsel, ask jurors, "How do you identify yourself according to race and gender?" Counsel should use terms like "underrepresented groups" in lieu of other references.

Counsel should conduct a robust hearing for the record by raising well-supported objections to purported juror discrimination, requesting reinstatement of improperly stricken jurors, and moving for a complete recordation of jury selection. Some authorities believe *Batson* hearings will become similar to suppression hearings. Remember the remedy: the judge may either dismiss the entire venire or seat the improperly struck juror. See *State v. McCollum*, 334 N.C. 208 (1993).

Beware of reverse *Batson* challenges. North Carolina appellate courts have twice upheld prosecutors' reverse *Batson* challenges on the ground the defendant engaged in purposeful discrimination against white jurors. *State v. Hurd*, 246 N.C. App. 281 (2016) (holding trial court did not err in sustaining a reverse *Batson* challenge; Defendant exercised eleven peremptory challenges, ten against white and Hispanic jurors; Defendant's acceptance rate of black jurors was eighty-three percent in contrast to twenty-three percent for white and Hispanic jurors; the one black juror challenged was a probation officer; Defendant accepted jurors who had strikingly similar views); see also *State v. Cofield*, 129 N.C. App. 268 (1998). Finally, should a judge find the State has violated *Batson*, the venire should be dismissed and jury selection should begin again. *State v. McCollum*, 334 N.C. 208 (1993). But cf. *State v. Fletcher*, 348 N.C. 292 (1998) (following a judge's finding the prosecutor made a discriminatory strike, he withdrew the strike, passed on the juror, the trial court found no *Batson* violation, and the N.C. Supreme Court affirmed). In defending a reverse *Batson* challenge, counsel should, if applicable, note the racial makeup of the jury for the record (e.g., if the defendant is given a jury which is 95% white, then it is unsurprising that his or her challenges would apply to a white juror. Notably, reverse *Batson* challenges may be risky for the prosecution as an appellate court may find structural error and grant a new trial.

Counsel must preserve an objection to discrimination during jury selection. Failure to do so will likely prevent relief on appeal or under a motion for appropriate relief. See *State v. Sims*, 387 N.C. 349 (2025) (holding a motion for appropriate relief was procedurally barred by N.C. Gen. Stat. § 15A-1419 when the Defendant, for the first time, asserted gender discrimination during jury selection when not objected to at trial or argued on direct appeal).

H. Implicit Bias: [\(TOC\)](#)

N.C. Supreme Court precedent acknowledges implicit bias questions are proper. See *State v. Crump*, 376 N.C. 375 (2020) (holding the trial court abused its discretion when it "flatly prohibited" questions about racial bias and "categorically denied" Defendant the opportunity to ask prospective jurors about police officer shootings of black men, particularly in a case with a black male defendant involved in a shooting with police officers).

Methods for raising implicit bias include: (1) disclosing a personal story (e.g., about wrong assumptions); (2) sharing the greatest concern in your case (e.g., nervous talking about race); (3) expressing concerns about pre-conceived ideas and beliefs (e.g., address implicit bias); and (4) using scaled questions (e.g., asking, on a scale of one to ten, if one strongly agrees or disagrees that there is more racial prejudice today than forty years ago, racism is a thing of the past, or you get what you deserve in life). If you receive an objection, cite the research and return to the basic proposition that you are entitled to a full opportunity to make diligent inquiry about fitness and competency to serve, intelligently exercise peremptory challenges, and determine whether a basis for challenge for cause exists.

Jury diversity matters. A 2012 study of 102 jury trials and 10 bench trials in North Carolina demonstrated African-Americans and Latinos had the lowest favorable verdict outcomes.¹² Implicit bias research¹³ indicates racial bias is pervasive among people. Implicit bias originates in the mental processes over which people have little knowledge or control and includes the formation of perceptions, impressions, and judgments, which impacts how people behave.¹⁴ Literature supports counsel raising issues of race and unconscious bias during jury selection helps jurors guard against implicit bias during trial proceedings.¹⁵ Studies show diverse juries perform fact-finding tasks more effectively, lessen individual biases, and provide more fair and impartial results.¹⁶

Be aware there is no general right in non-capital cases to *voir dire* jurors about racial prejudice. *Ristaino v. Ross*, 424 U.S. 589 (1976). However, such questions are allowed under “special circumstances,” including capital cases and contextually appropriate circumstances. *See, e.g., Ham v. South Carolina*, 409 U.S. 524 (1973); *State v. Robinson*, 330 N.C. 1 (1991).

Remember, you must make a record of relevant jury traits. *See State v. Brogden*, 329 N.C. 534, 545 (1991). Consider asking the judge to instruct jurors to (1) state how they identify by race, gender, or ethnicity, or (2) complete a questionnaire inclusive of same.

I. Challenges for Cause: [\(TOC\)](#)

Grounds for challenge for cause are governed by N.C. Gen. Stat. § 15A-1212:

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

- (1) Does not have the qualifications required by G.S. 9-3.
- (2) Is incapable by reason of mental or physical infirmity of rendering jury service.

¹² Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209 (Jan. 2012).

¹³ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 956 (2006).

¹⁴ *Id.* at 946.

¹⁵ Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1026-27 (2003).

¹⁶ Edward S. Adams, *Constructing a Jury That is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 709 (1998).

- (3) Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant.
- (4) Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
- (5) Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. See [Exhibit A](#).
- (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.
- (7) Is presently charged with a felony.
- (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
- (9) For any other cause is unable to render a fair and impartial verdict.

For example, a prospective juror who is unable to accept a particular defense recognized by law is not a competent juror and should be removed when challenged for cause. *State v. Leonard*, 296 N.C. 58, 62-63 (1978). Defense counsel is free to inquire into jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420 (1989).

Practically speaking, counsel should draw the sting of uncontroverted facts to determine an appropriate jury.

Certain phrases are determinative in challenges for cause. For example, you may ask if a prospective juror would “automatically vote” for either side or a certain sentence or if a juror’s views or experience would “prevent or substantially impair” his ability to hear the case. *State v. Chapman*, 359 N.C. 328, 345 (2005) (holding counsel may ask, if based on a response, if a juror would vote automatically for either side or a particular sentence); *see also State v. Teague*, 134 N.C. App. 702 (1999) (finding counsel may ask if certain facts cause jurors to feel like they “will automatically turn off the rest of the case”); *see also Morgan v. Illinois*, 504 U.S. 719, 723 (1992) (Court approved the question “would you automatically vote [for a particular sentence] no matter what the facts were?”); *Wainright v. Witt*, 469 U.S. 412 (1985) (established the standard for challenges for cause, that being when the juror’s views would “prevent or substantially impair” the performance of his duties in accord with his instructions and oath, modifying the more stringent language of *Witherspoon*¹⁷ which required an unmistakable commitment of a juror to automatically vote against the death penalty, regardless of the evidence); *State v. Cummings*, 326 N.C. 298 (1990) (holding State’s challenge for cause is proper against jurors whose views against the death penalty would “prevent or substantially impair” their performance of duties as jurors). Considerable confusion about the law could amount to “substantial impairment.” *Uttecht v. Brown*, 551 U.S. 1 (2007). A juror may be removed for cause due to inability to follow the law. *State v. Cunningham*, 333 N.C. 744 (1993) (trial court erred by not removing juror for cause who

¹⁷ *Witherspoon v. Illinois*, 39 U.S. 510 (1968).

would not grant the presumption of innocence to the defendant). A juror may also be removed for cause due to bias. *State v. Allred*, 275 N.C. 554 (1969) (trial court erred by not removing a juror for cause who stated that he was related to the witnesses and would likely believe them); *State v. Lee*, 292 N.C. 617 (1977) (trial court erred by not removing a juror for cause who was married to a police officer and stated that she may believe law enforcement more than others).

It is reversible error per se when the court excludes a qualified juror for cause. *Gray v. Mississippi*, 481 U.S. 648 (1987). Counsel should articulate a constitutional objection (e.g., under the Sixth and Fourteenth Amendment rights to an impartial jury).

A juror can have prior knowledge of case facts and still serve. Knowledge alone will not justify a challenge for cause. The relevant inquiry remains whether the juror can render an impartial verdict. *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

SCENARIO: FOR CAUSE CHALLENGE

Imagine the following voir dire during an Armed Robbery case:

Defense Counsel: Mr. Smith (Juror #1), you *shared* that your brother was a victim of a robbery last year. Can you *tell us more* about that experience?

Juror #1: Yes, it was very traumatic for my family. My brother was hurt really bad. It is something that has really stuck with me.

Defense Counsel: Given that experience, do you think it would *substantially impair* your ability to serve on this jury?

Juror #1: I am not sure. I would try to be fair. I know it would be difficult.

Defense Counsel: Thank you for your honesty. We all appreciate your circumstances. Saying it differently, do you believe it would *stick in the back of your mind* as you deliberate?

Juror #1: Um. I'm not sure. I think it probably would.

Defense Counsel: Your Honor, the defense thanks and respectfully moves to excuse Mr. Smith for cause.

Judge: Mr. Smith, thank you for your time today. You are excused.

J. Other Jury Selection Issues: [\(TOC\)](#)

Other issues may include *voir dire* with co-defendants, order of questioning, challenging a juror, preserving denial of cause challenges and prosecutor objection to a line of questioning, right to

2025 Update to Jury Selection:

individual *voir dire*, and right to rehabilitate jurors.¹⁸ In cases involving co-defendants, the order of questioning begins with the State and, once it is satisfied, the panel should be passed to each co-defendant consecutively, continuing in this order until all vacancies are filled, including alternate juror(s). N.C. Gen. Stat. § 15A-1214(e). For order of questioning, the prosecutor is required to question prospective jurors first and, when satisfied with a panel of twelve, he passes the panel to the defense. This process is repeated until the panel is complete. N.C. Gen. Stat. § 15A-1214(d); *see also State v. Anderson*, 355 N.C. 136, 147 (2002) (holding the method by which jurors are selected, challenged, selected, impaneled, and seated is within the province of the legislature). Regarding challenges, when a juror is challenged for cause, the party should state the ground(s) so the trial judge may rule. No grounds need be stated when exercising a peremptory challenge. Direct oral inquiry, or questioning a juror, does not constitute a challenge. N.C. Gen. Stat. § 9-15(a). Preserving a (1) denial of cause challenge or (2) sustained objection to your line of questioning requires exhaustion of peremptory challenges and a showing of prejudice from the ruling. *See, e.g., State v. Billings*, 348 N.C. 169 (1998); *State v. McCarver*, 341 N.C. 364 (1995). After exhaustion of peremptory challenges, counsel must also renew the challenge for cause against the juror at the end of jury selection as required by statute. N.C. Gen. Stat. § 15A-1214(i). The right to individual voir dire is found in the trial judge's duty to oversee jury selection, implying that the judge has authority to order individual *voir dire* in a non-capital case if necessary to select an impartial jury. *See State v. Watson*, 310 N.C. 384, 395 (1984) ("The trial judge has broad discretion in the manner and method of jury *voir dire* in order to assure that a fair and impartial jury is impaneled . . ."). As to the right to rehabilitate jurors, the trial judge must exercise his discretion in determining whether to permit rehabilitation of particular jurors. Issues include whether a juror is equivocal in his response, clear and explicit in his answer, or if additional examination would be a "purposeless waste of valuable court time." *State v. Johnson*, 317 N.C. 343, 376 (1986). A blanket rule prohibiting rehabilitation is error. *State v. Brogden*, 334 N.C. 39 (1993); *see also State v. Enoch*, 261 N.C. App. 474 (2018) (holding no error when the trial court denied the defendant's request to rehabilitate two jurors when, although initially misapprehending that rehabilitation was impermissible in non-capital cases, the court later allowed for the possibility of rehabilitation, thus not establishing a blanket rule against all rehabilitation).

A recent case discussed other issues which could occur during jury selection. *See State v. Joyner*, ___ N.C. App. ___, 917 S.E.2d 297 (2025) (unpublished) (holding trial court did not make an improper expression of judicial leaning when, *inter alia*, at the end of the first day of jury selection, the trial court introduced the Sheriff to potential jurors, "Before y'all leave, the High Sheriff has come to the courtroom. Sheriff, stand up . . . I'm sure all of you know him" and later thanked the jurors for their service "on behalf of the Sheriff" on 16 occasions).

¹⁸ *See generally* N.C. DEFENDER MANUAL, *supra* note 8, at 25-1, *et seq.*

V. Theories of Jury Selection (TOC)

There are countless articles on and ideas about jury selection. A sampling includes:

- Traditional approach: lecture with leading and closed questions to program the jury about law and facts and establish authority and credibility with the jury; a prosecutor favorite.
- Wymore (Colorado) method: *See infra text at IV*. The Wymore Method.
- Scientific jury selection: employs demographics, statistics, and social psychology to examine juror background characteristics and attitudes to predict favorable results.
- Game theory: uses mathematical algorithms to decide the outcome of trial.
- Command Superlative Analogue (New Mexico Public Defender's) method: focus on significant life experiences relating to the central trial issue.
- Psychodramatic (Trial Lawyers College) method: identify the most troubling aspects of the case, tell jurors and ask about the concerns, and validate jurors' answers.
- Reptilian theory: focus on facts and behavior to make the jury angry by concentrating on the opponent's failures and resulting injuries, all intended to evoke a visceral, subliminal reaction.
- Demographic theory¹⁹: stereotype jurors based on race, gender, ethnicity, age, income, occupation, social status, socioeconomic status/affluence, religion, political affiliation, avocations, urbanization, experience with the legal system, and other factors.
- Listener method: learn about jurors' experiences and beliefs to predict their views of the facts, law, and each other.

Strategies abound for jury selection methods. Jury consultants and trial lawyers use mock trials, focus groups, and telephone surveys to profile community characteristics and favorable jurors. Research scientists believe—and most litigators have been taught—demographic factors predict attitudes which predict verdicts, although empirical data and trial experience militate against this approach.²⁰ Many lawyers believe our experience hones our ability to sense and discern favorable jurors, although this belief has marginal support in practice and is speculative at best.

I use a blend of the above models. However, I focus upon one core belief illustrated in the ethical and moral dilemma of an overcrowded lifeboat lost at sea. As individuals weaken, starve, and become desperate, who is chosen to survive? Do we default to women, children, or the elderly? Who lives or dies? In panic, most people abandon rules in order to save themselves, although

¹⁹ Research on the correlation of demographic data with voting preferences is conflicted. *See* Professor Dru Stevenson's article in the 2012 George Mason Law Review, asserting the "Modern Approach to Jury Selection" focuses on biases related to factors such as race and gender; *see also Glossy v. Gross*, 576 U.S. 863 (2015) (racial and gender biases may reflect deeply rooted community biases either consciously or unconsciously). *But see* Ken Broda-Bahm, *Don't Select Your Jury Based on Demographics: A Skeptical Look at JuryQuest*, PERSUASIVE LITIGATOR (April 12, 2012), <https://www.persuasivelitigator.com/2012/04/dont-select-your-jury-based-on-demographics.html> (for at least three decades, researchers have known that demographic factors are very weak predictors of verdicts).

²⁰ *See* Ken Broda-Bahm, *supra* note 19.

some may act heroically in the moment.²¹ Using this behavioral principle in the courtroom, I believe the answer is **jurors save themselves**.²² The basic premise is that jurors, primarily on a subconscious level, choose who they like the most and connect to parties, witnesses, and court personnel who are characteristically like them. Therefore, the party—or attorney—whom the jury likes the most, feels the closest to, or has some conscious or subconscious relationship with typically wins the trial. This concept is the central tenet of our jury selection strategies.

VI. The Wymore Method (TOC)

David Wymore, former Chief Trial Deputy for the Colorado Public Defender system, revolutionized capital jury selection. The Wymore method, or Colorado method of capital *voir dire*, was created to combat “death qualified” juries²³ by utilizing a non-judgmental, candid, and respectful atmosphere during jury selection which allows defense counsel to learn jurors’ views about capital punishment and imposition of a death sentence, employ countermeasures by life qualifying the panel, and thereafter teach favorable jurors how to get out of the jury room.

In summary form, the Wymore method is as follows: Defense counsel focuses upon jurors’ death penalty views, learns as much as possible about their views, rates their views, eliminates the worst jurors, educates both life-givers and killers separately, and teaches respect for both groups—particularly the killers. In other words, commentators state Wymore places the moral weight for a death sentence onto individual jurors, making it a deeply personal choice.²⁴ Wymore himself has stated he tries to: (1) find people who will give life; (2) personalize the kill question; and (3) find other jurors who will respect that decision.²⁵

In short, jurors are rated on a scale of one to seven using the following guidelines:

1. *Witt* excludable: The automatic life adherent. One who will never vote for the death penalty and is vocal, adamant, and articulate about it.
2. One who is hesitant to say he believes in the death penalty. This person values human life and recognizes the seriousness of sitting on a capital jury. However, this person says he can give meaningful consideration to the death penalty.

²¹ DENNIS HOWITT, MICHAEL BILLIG, DUNCAN CRAMER, DEREK EDWARDS, BROMELY KNIVETON, JONATHAN POTTER & ALAN RADLEY, *SOCIAL PSYCHOLOGY: CONFLICTS AND CONTINUITIES* (1996).

²² *Id.*

²³ Jurors must express their willingness to kill the defendant to be eligible to serve in a capital murder trial. In one study, a summary of fourteen investigations indicates a favorable attitude toward the death penalty translates into a 44% increase in the probability of a juror favoring conviction. Mike Allen, Edward Mabry & Drew-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW AND HUMAN BEHAVIOR 715 (1998).

²⁴ John Ingold, *Defense Jury Strategy Could Decide Aurora Theater Shooting Trial*, THE DENVER POST (March 29, 2015), <https://www.denverpost.com/2015/03/28/defense-jury-strategy-could-decide-aurora-theater-shooting-trial>.

²⁵ *Id.*

3. This person is quickly for the death penalty and has been for some time. However, he is unable to express why he favors the death penalty (e.g., economics, deterrence, etc.). He may wish to hear mitigation or be able to make an argument against the death penalty if asked, and is willing to respect views of those more hesitant about the death penalty.
4. This person is comfortable and secure in his death penalty view. He is able to express why he is for the death penalty and believes it serves a good purpose. His comfort level and ability to develop arguments in favor of the death penalty differentiates him from a number three. However, he wants to hear both sides and straddles the fence with penalty phase evidence, believing some mitigation could result in a life sentence despite a conviction for a cold-blooded, deliberate murder.
5. A sure vote for death, he is vocal and articulate in his support for the death penalty. He is not a bully, however, and, because he is sensitive to the views of other jurors, can think of two or three significant mitigating factors which would allow him to follow a unanimous consensus for life in prison. This person is affected by residual doubt.
6. A strong pro-death juror, he escapes an automatic death penalty challenge because he can perhaps consider mitigation. A concrete supporter of the death penalty who believes it not used enough, he is influenced by the economic burden of a life sentence and believes in death penalty deterrence. Essentially, he nods his head with the prosecutor.
7. The automatic death penalty proponent. He believes in the *lex talionis* principle of retributive justice, or an eye for an eye. Mitigation is manslaughter or self-defense. Hateful and proud of it, he must be removed for cause or peremptory challenge. If the defendant is convicted of capital murder, this juror will impose the death penalty.

Wymore teaches the concepts of isolation and insulation. Isolation means that each juror makes an individual, personal judgment. Insulation means each juror understands he makes his decision with the knowledge and comfort it will be respected, he will not be bullied or intimidated by others, and the court and parties will respect his decision. In essence, every juror serves as a jury, and his decision should by right be treated with respect and dignity. These concepts are intended to equip individual jurors to stick with and stand by their convictions.

Wymore also teaches stripping, a means of culling extraneous issues and circumstances from the jurors' minds. In essence, you strip the venire of misconceptions they may have about irrelevant facts, law, defenses, or punishments as they arise. You simply strip away topics broached by jurors which are inapplicable to the case and could change a juror's mind. In a capital murder, you use a hypothetical like the following: "Ladies and gentlemen, I want you to imagine a hypothetical case, not this case. After hearing the evidence, you were convinced the defendant was guilty of premeditated, deliberate, intentional murder. He meant to do it, and he did it. It was neither an accident nor self-defense, defense of another, heat of passion, or because he was insane. There was no legal justification or defense. He thought about it, planned it, and did it. Now, can you

consider life in prison?” Note the previous question incorporates case specific facts disguised as elements which avoids pre-commitment or staking out objections.

When adverse jurors offer any extraneous reason to consider life in prison, Wymore teaches to continue the process of re-stripping jurors. For example, if a juror says he would give life if the killing was accidental, thank the juror for his honesty and tell him that an accidental killing would be a defense, thus eliminating a capital sentencing hearing. Recommit the juror to his position, keep stripping, and then challenge for cause. Frankly, this process is unending and critical to success.

Wymore emphasizes the importance of recording the exact language stated by jurors. Not only does this assist with the grading process, but it serves as an important tool when you dialogue with jurors, mirroring their language back to them, whether to educate or remove.

Finally, Wymore eventually transcends jury selection from information gathering to record building, or the phase when you are developing challenges for cause by reciting their words, recommitting them to their position, and moving for removal.

VII. Our Method: Modified Wymore [\(TOC\)](#)

Our approach is a modified version of Wymore, merging various strategies including: (1) using select statutory language²⁶ originating in part from the old *Allen* charge;²⁷ (2) using studies on the psychology of juries;²⁸ (3) identifying individual and personal characteristics of the defendant, victim, and material witnesses; (4) profiling our model jury; and (5) using a simple rating system for prospective jurors. One other fine trial lawyer has recently written, at least in part, on a non-capital, modified Wymore version of jury selection as well.²⁹

²⁶ N.C. GEN. STAT. §§ 15A-1235(b)(1), (2), and (4). These subsections have language which insulate and isolate jurors, including phrases addressing the duty to consult with one another with a view to reaching an agreement if it can be done without violence to individual judgment, each juror must decide the case for himself, and no juror should surrender his honest conviction for the mere purpose of returning a verdict.

²⁷ *Allen v. United States*, 164 U.S. 492 (1896) (approving a jury instruction to prevent a hung jury by encouraging jurors in the minority to reconsider their position; some of the language in the instruction included the verdict must be the verdict of each individual juror and not a mere acquiescence to the conclusion of others, examination should be with a proper regard and deference to the opinion of others, and it was their duty to decide the case if they could conscientiously do so).

²⁸ Part of my approach includes strategies learned from David Ball, one of the nation’s leading trial consultants. Mr. Ball is the author of two best-selling trial strategy books, “David Ball on Damages” and “Reptile: The 2009 Manual of the Plaintiff’s Revolution,” and he lectures at CLE’s, teaches trial advocacy, and has taught at six law schools.

²⁹ See Jay Ferguson’s CLE paper on “Transforming a Mental Health Diagnosis into Mental Health Defense,” presented at the 2016 Death Penalty seminar on April 22, 2016, wherein Mr. Ferguson, addressing Modified Ball/Wymore *Voir Dire* in non-capital cases, asserts, among other points, the only goal of jury selection is to get jurors who will say not guilty, listen with an open mind to mental health evidence, not shift the burden of proof, apply the fully satisfied/entirely convinced standard of reasonable doubt, and discuss openly their views of the nature of the charge(s) and applicable legal elements and principles.

Our case preparation process is as follows. First, we start by considering the nature of the charge(s), the material facts, whether we will need to adduce evidence, and assess candidly prosecution and defense witnesses. Second, we identify personal characteristics of the defendant, victim, family members, and other important witnesses, all in descending order of priority. We do the same for prosecution witnesses. Individual characteristics include age, education, occupation, marital status, children, means, residential area, socioeconomic status, lifestyle, criminal record, and any other unique, salient factor. Third, we bear in mind typical demographics like race, age, gender, ethnicity, and so forth. Fourth, we review the jury pool list, both for individuals we may know and for characteristic comparison. Finally, we prepare motions designed to address legal issues and limit evidence for hearing pretrial.³⁰

We incorporate multiple theories and our own strategies in jury selection. At the beginning, I spend a few minutes utilizing the **traditional** approach, educating the jury about the criminal justice system, emphasizing the jury's preeminent role, magnifying the moment, and simplifying the process.³¹ I often tell them I am afraid they will think my client did something wrong by his mere presence, thereafter underscoring they are at the pinnacle of public service, serve as the conscience of the community, and must protect and preserve the sanctity of trial.³² In a sense I am using the **lecture** method to establish leadership and credibility. I then transition to the dominant method, the **listener** method, asking many open-ended group questions followed by precise individual questions. I speak to every juror—even if only to greet and acknowledge them—to address their specific backgrounds, comments, or seek disclosure of significant life experiences relating to key trial issues. We look closely at jurors, including their family and close friends, to discern identified characteristics, favorable or unfavorable. I always address concerning issues, stripping and re-stripping per **Wymore**. We strip by using uncontroverted facts (e.g., “my client blew a .30”) and by addressing extraneous issues and circumstances (i.e., inapplicable facts and defenses like “this is not an accident case”) as they arise to find jurors who do not have the ability to be fair and impartial or hear the instant case. In a sense, **stripping** is accomplished by drawing the sting: we tell bad facts to strip bad jurors. During the entire process I am **profiling** jurors, searching for select characteristics previously deemed favorable or unfavorable. We also focus on **juror receptivity** to our presentation, looking at their individual responses, physical reactions, and exact comments. For jurors of which I am simply unsure, I fall back on **demographic** data, using social psychology and my **gut** as additional filters. Last, we **isolate and insulate** each juror per Wymore, attempting to create **twelve individual juries** who will respect each other in the process.

³⁰ As a practice tip, ask to hear all motions pre-trial and before jury selection. Knowledge of the judge's rulings may be central to your jury selection strategy, often revealing damaging evidence which should be disclosed during the selection process. Motions must precisely address issues and relevant facts within a constitutional context. If a judge refuses to hear, rule upon, or defers a ruling on your motion(s), recite on the record the course of action is not a strategic decision by the defense, thereby alerting the court of and protecting the defendant's recourse for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668 (1984).

³¹ Tools that can help jurors frame the trial, remain engaged, and retain information received include the use of a “mini-opening” at the beginning of *voir dire*, or delivering preliminary instructions of the process, law, and relevant legal concepts. See Susan J. MacPherson & Elissa Krauss, *Tools to Keep Jurors Engaged*, TRIAL (Mar. 2008), at 33.

³² Trial by a jury of one's peers is a cornerstone of the principle of democratic representation set out in the U.S. Constitution. U.S. CONST. amend. VI.

I use a simple grading scale as time management is always paramount during jury selection. As a parallel, the automatic life juror (or Wymore numbers one through three) gets a plus symbol (+), the automatic death juror (or Wymore numbers four through seven) gets a negative symbol (x), and the undetermined juror get a question mark (?). While every jury is different, I try to deselect no more than three on the first round and strive to leave one peremptory challenge, if possible, never forgetting I am one killer away from losing the trial.

I commonly draw the sting by telling the jury of uncontroverted facts, thereafter addressing their ability to hear the case. Prosecutors may object, citing an improper stake-out question as the basis. In your response, tie the uncontroverted fact to the juror's ability to follow the law or be fair and impartial. Case law supports my approach. *See State v. Nobles*, 350 N.C. 483, 497–98 (1999) (finding it proper for the prosecutor to describe some uncontested details of the crime before he asked jurors whether they knew or read anything about the case; ADA told the jury the defendant was charged with discharging a firearm into a vehicle “occupied by his wife and three small children”); *State v. Jones*, 347 N.C. 193, 201–02, 204 (1997) (holding a proper non-stake-out question included telling the jury there may be a witness who will testify pursuant to a deal with the State, thereafter asking if the mere fact there was a plea bargain with one of the State's witnesses would affect their decision or verdict in the case); *State v. Williams*, 41 N.C. App. 287, *disc. rev. denied*, 297 N.C. 699 (1979) (finding prosecutor properly allowed, in a common law robbery and assault trial, to tell prospective jurors a proposed sale of marijuana was involved and thereafter inquire if any of them would be unable to be fair and impartial for that reason). Another helpful technique is to ask the jury “if [they] can consider” all the admissible evidence, again linking the bad facts you have revealed to the juror's ability to be fair and impartial or follow the law. *State v. Roberts*, 135 N.C. App. 690, 697 (1999); *see also U.S. v. Johnson*, 366 F. Supp. 2d 822, 842–44 (N.D. Iowa 2005) (finding case specific questions in the context of whether a juror could consider life or death proper under *Morgan*). In sum, a juror who is predisposed to vote a certain way or recommend a particular sentence regardless of the unique facts of the case or judge's instruction on the law is not fair and impartial. You have the right to make a diligent inquiry into a juror's fitness to serve. *State v. Thomas*, 294 N.C. 105, 115 (1978). When you are defending a stake-out issue, argue to the extent a question commits a juror, it commits him to a fair consideration of the accurate facts in the case and to a determination of the appropriate outcome. The prime directive: Adhere to the profile, suppressing what my gut tells me unless objectively supported.

Using the current state of the law with my “Modified Wymore” approach, please see the outline I use for jury selection attached hereto as [Exhibit B](#).

VIII. The Fundamentals (TOC)

“While the lawyers are picking the jury, the jurors are picking the lawyer.”³³

Voir dire is distilled into three objectives: Deselect those who will hurt you or are leaning against you;³⁴ educate jurors about the trial process and your case; and be more likeable than your counterpart, concentrating on professionalism, honesty, and a smart approach.

I share a three-tier approach to jury selection: threshold principles, fine art methods, and my personal tips and techniques.

Now for foundational principles:

- Deselect those who will hurt your client. Move for cause, if possible. Identify the worst jurors and remove them.
- Jurors bring personal bias and preconceived notions about crime, trials, and the criminal justice system. You must find out whether they lean with you or the prosecution.
- Jurors who honestly believe they will be fair will decide cases based on personal bias and preconceived ideas. Bias or prejudice can take many forms: racial, religious, national origin, ageism, sexism, class (including professionals), previous courtroom experience, prior experience with a certain type of case, beliefs, predispositions, emotional response systems,³⁵ and more.
- Jurors decide cases based on bias and beliefs, regardless of the judge’s instructions.
- There is little correlation between demographic similarities of a juror and defendant and the manner in which jurors vote (e.g., race, gender, age, ethnicity, education, employment, class, hobbies, or the like).

³³ RAY MOSES, JURY SELECTION IN CRIMINAL CASES (1998).

³⁴ I have heard skilled lawyers espouse a view in favor of accepting the first twelve jurors seated. It is difficult to comprehend a proper *voir dire* in which no challenges are made as chameleons are lurking within. As a rule of thumb, never pass on the original panel seated.

³⁵ Recent research has highlighted the important role of emotions in moral judgment and decision-making, particularly the emotional response to morally offensive behavior. June P. Tangnet, Jeff Stuewig & Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 ANNUAL REVIEW OF PSYCHOLOGY 345 (2007).

- Traditional *voir dire* is meaningless.³⁶ Social desirability and pressure to conform inhibits effective jury selection when using traditional or hypothetical questions.³⁷ Asking jurors if they can put aside bias, be fair and impartial, and follow the judge’s instructions are ineffective. Traditional questions grossly underestimate and fail to detect the degree of anti-defendant bias in the community.³⁸
- Hypothetical questions about the justice system result in aspirational answers and have little meaning.
- You can neither change a strongly held belief nor impose your will upon a juror in the time you have in *voir dire*.³⁹
- Demonstrate and teach respect for the court, the trial process, and other jurors.
- As Clarence Darrow provides, “Almost every case has been won or lost when the jury is sworn.”

IX. Fine Art Techniques (TOC)

“The evidence won’t shape the jurors. The jurors will shape the evidence.”⁴⁰

The higher art form:⁴¹

- Make a good first impression. Remember primacy and recency⁴² at all phases, even jury selection. There is only one first impression. Display warmth, empathy, and

³⁶ Post-trial interviews reveal jurors lose interest and become disengaged with the use of technical terms and legal jargon, without an early and simple explanation of the case, and during a long trial. See MacPherson & Krauss, *supra* note 31, at 32. Studies by social scientists on non-capital felony trials reveal the following findings: (1) On average, jury selection took almost five hours, yet jurors as a whole talked only about thirty-nine percent of the time; (2) lawyers spent two percent of the time teaching jurors about their legal obligations and, in post-trial interviews assessing juror comprehension, many jurors were unable to distinguish between or explain the terms “fair” and “impartial”; and (3) one-half the jurors admitted post-trial they could not set aside their personal opinions and beliefs, although they had agreed to do so in *voir dire*. Cathy Johnson & Craig Haney, *Felony Voir Dire, an Exploratory Study of its Content and Effect*, 18 LAW AND HUMAN BEHAVIOR 487 (1991).

³⁷ James Lugembuhl, *Improving Voir Dire*, THE CHAMPION (Mar. 1986).

³⁸ *Id.*

³⁹ Humans have a built-in mechanism called scripting for dealing with unfamiliar situations like a trial. This mechanism lessens anxiety by promoting conforming behavior and drawing on bits and pieces of one’s life experience – whether movies, television, friends or family – to make sense of the world around them. Unless you intercede, the script will be that lawyers are not to be trusted, trials are boring, people lie for gain, judges are fair and powerful, and the accused would not be here if he did not do something wrong. OFFICE OF THE STATE PUBLIC DEFENDER, JURY SELECTION (2016).

⁴⁰ MOSES, *supra* note 33.

⁴¹ Ask about the trial judge and how he handles *voir dire*. Consider informing the trial judge in advance of jury selection about features of your *voir dire* which may be deemed unusual by the prosecutor or the court, thus allowing the judge time to consider the issue, preventing disruption of the selection process, and affording you an opportunity to make a record.

⁴² The law of primacy in persuasion, also known as the primacy effect, was postulated by Frederick Hansen Lund in 1926 and holds the side of an issue presented first will have greater effect in persuasion than the side presented subsequently. Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 JOURNAL OF COMMUNICATION

respect for others and the process. Show the jurors you are fair, trustworthy, and know the rules.

- Understand trial is an unknown world to lay persons or jurors. They feel ignored and are unaware of their special status, the rules of propriety, and that soon almost everyone will be forbidden to speak with them.
- Tell jurors they have a personal safety zone. Be careful of and sensitive to a juror's personal experience. When jurors share painful or emotional experiences, acknowledge their pain and express appreciation for their honesty.
- Comfortable and safe *voir dire* will cause you to lose. Ask for their opinion of the defendant's guilt or innocence at this time. Do not fear bad answers. Embrace them. They reveal the juror's heart which will decide your case.
- When a juror expresses bias, counsel should not stop, redirect them, or segue. Simply address and confront the issue. Mirror the answer back, invite explanation, reaffirm the position, and then remove for cause. Use the moment to teach the jury the fairness of your position.
- Tell jurors about incontrovertible facts or your affirmative defense(s).⁴³ Be prepared to address the law on staking-out the jury for a judge who restricts your approach to this area. Humbly make a record.
- Ask jurors about important topics in your case. Ask jurors about analogous situations in their past. This will help profile jurors.
- Listen. Force yourself to listen more. Open-ended questions keep jurors talking (e.g., "Tell us about..., Share with us..., Describe for us...", etc.) and reveal life experiences, attitudes, opinions, and views. Have a conversation. Spend time discussing their personal background, relevant experiences, and potential bias. Make it interesting to them by making the conversation about them. Use the ninety-ten rule with jurors talking ninety percent of the time.
- Consider what the juror needs to know to understand the case and what you need to know about the juror.
- Seek first to understand, then to be understood.
- Personal experiences shape juror's views and beliefs and best predict how jurors view facts, law, and each other.
- Do not be boring, pretentious, or contentious.
- Look for non-verbal signals like nodding, gestures, or expressions.

239 (1969). The principle of recency states things most recently learned are best remembered. Also known as the recency effect, studies show we tend to remember the last few things more than those in the middle, assume items at the end are of greater importance, and the last message has the most effect when there is a delay between repeated messages. The dominance of primacy or recency depends on intrapersonal variables like the degree of familiarity and controversy as well as the interest of a particular issue. Curtis T. Haughtvedt & Duane T. Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 JOURNAL OF CONSUMER RESEARCH 205 (1994).

⁴³ Prior to the selection of jurors, the judge must inform prospective jurors of any affirmative defense(s) for which notice was given pretrial unless withdrawn by the defendant. N.C. GEN. STAT. § 15A-1213; N.C. GEN. STAT. § 15A-905(c)(1) (notice of affirmative defense is inadmissible against the defendant); N.C.P.I. – Crim. 100.20 (instructions to be given at jury selection).

2025 Update to Jury Selection:

- Spot angry jurors. “To the mean-spirited, all else becomes mean.”⁴⁴
- Refer back to specific answers. Let them know you were listening. Then build on the answers. Remember, a scorpion is a scorpion, regardless of one’s appearance (i.e., presentation or words).
- When a juror expresses concern with employment, tell them the law prohibits discharging or demoting citizens for jury service. N.C. Gen. Stat. § 9-32.
- Deselect delicately. Tell them they sound like the kind of person who thinks before forming an opinion and the law is always satisfied when a juror gives an honest opinion, even if it is different from that of the lawyers or the judge. All the law asks is that jurors give their honest opinions and feelings. Stand and say, “We thank and respectfully excuse juror number”
- Juror personalities and attitudes are far more predictive of juror choices.
- Jury selection is about jurors educating us about themselves.

X. My Side Bar Tips ^(TOC)

“We don’t see things as they are. We see them as we are.”⁴⁵

My personal palette of jury selection techniques:

- At the very outset, tell the jury the defendant is innocent (or not guilty), be vulnerable, and tell the jury about yourself. Become one of them.
- You must earn credibility in jury selection.⁴⁶ Many jurors believe your client is guilty before the first word is spoken. Aligned with the accused, you are viewed with suspicion, serving as a mouthpiece. Start sensibly and strong. Be a lawyer, statesman, and one of them—a caring, community member. Earn respect and credibility when it counts—right at the start.
- We develop a relationship with jurors throughout the trial. Find common ground, mirroring back the intelligence and social level of the individual jurors. Be genuine. Become the one jurors trust in the labyrinth of trial.
- Encourage candor. Tell jurors there are no right or wrong answers, and you are interested in them and their views. Tell them citizens have the right to hold different views on topics, and so do jurors. Tell them you will be honest with them, asking for honest and complete answers in return. Assure them honest responses are the only thing expected of them. Reward the honest reply, even if it hurts.

⁴⁴ MOSES, *supra* note 33.

⁴⁵ ANAIS NIN, *SEDUCTION OF THE MINOTAUR* (1961).

⁴⁶ According to the National Jury Project, sixty-seven percent of jurors are unsympathetic to defendants, thirty-six percent believe it is the defendant’s responsibility to prove his innocence, and twenty-five percent believe the defendant is guilty or he would not have been charged. Now known as National Jury Project Litigation Consulting, this trial consulting firm publicizes its use of social science research to improve jury selection and case presentation.

- Listen to and observe opposing counsel. Purposefully contrast with the prosecutor. If he is long-winded, be precise and efficient. If he misses key points, spend time educating the jury. Entice jurors early to choose you.
- Humanize the client. Touch, talk with, and smile at him.
- Remind the client continually of appropriate eye contact, posture, and perceived interest in the case.
- Beware of a reverse *Batson* challenge when there is an appearance by the defense to use peremptory challenges on race, gender, or religion.
- Propensity is the worst evidence.
- If jurors fear or do not understand your client or his actions, whether due to violence, mental health, or the unexplained, they will convict your client. Quickly.
- Pick as many leaders⁴⁷ as possible, creating as many juries as possible. Do not pick followers: you shrink the size of the jury. In general, avoid young, uneducated, and apparently weak, passive, or submissive jurors. Target and engage them to sharpen your view. Remember, you only need one juror to exonerate, hang, or persuade the jury to a lesser-included verdict.
- Look for jurors who are resistant to social pressure (e.g., piercings, tattoos, etc.).
- The best predictor of human behavior is past behavior.
- Let the client exhibit manners. Typically, my paralegal is present during much of the trial, most importantly in jury selection. When it is our turn to deselect or dismiss jurors, she approaches, the defendant stands and relinquishes his chair, and we discuss and decide who to deselect. My paralegal also interacts with the defendant regularly during trial, recesses, and other opportunities, communicating perceived respect and a genuine concern for the client.
- Use the phrase “fair and impartial” when engaging the jaundiced juror, skewed in beliefs or positions. Talk about the highest aim of a jury.
- Older women will exonerate your client in a rape or sex offense case, particularly if a young female victim has credibility issues. Conversely, beware of the grandfatherly, white knight.⁴⁸
- Fight the urge to use your last peremptory challenge. You may be left with the equivalent of an automatic death penalty juror.
- Draw the sting (i.e., strip). Tell the jury incontrovertible bad facts and your affirmative defenses. Ask if they will “fairly and conscientiously deliberate and give meaningful consideration” to defenses as instructed by the Court. If irrelevant issues are raised, inform the jurors of the same. Inform them of gut-wrenching, graphic evidence. Some jurors will react verbally, some visibly. Let the bad facts sink in. Engage the juror who

⁴⁷ Leaders include negotiators and deal-makers, all of whom wield disproportionate power within the group. See MOSES, *supra* note 33.

⁴⁸ White knights are individuals who have a compulsive need to be a rescuer. See MARY C. LAMIA & MARILYN J. KRIEGER, *THE WHITE KNIGHT SYNDROME: RESCUING YOURSELF FROM YOUR NEED TO RESCUE OTHERS* (2009).

- reacts badly.⁴⁹ Reaffirm his commitment to your client's presumed innocence. Then tell them there is more to the story. The sting fades and loses its impact during trial.
- Use the language of the former highest aim Pattern Jury Instruction, telling jurors they have no friend to reward, no enemy to punish, but a duty to let their verdict speak the everlasting truth.
 - Mirror the judge's instructions to the jury, early and often, using phrases from the judge's various instructions including fair and impartial, the same law applies to everyone, they are not to form an opinion about guilt or innocence until deliberations begin, and so forth.⁵⁰ Forecast the law for them. Clothe yourself with vested authority.
 - Commit the jury, individually and as a whole, to principles of isolation and insulation. Ask them if they understand and appreciate they are not to do violence to their individual judgment, must decide the case for themselves, and are not to surrender their honest convictions merely for the purpose of returning a verdict.⁵¹ Extract a group commitment that they will respect the personal judgment of each and every juror. Target an oral commitment from unresponsive or questionable jurors. Seek twelve individual juries. If done well, you increase your chances of a not guilty verdict, lesser-included judgment, hung jury, or a successful motion to poll the jury post-trial.
 - Tell the jury the law never requires a certain outcome. Inform them that the judge has no interest in a particular outcome and will be satisfied with whatever result they decide. Emphasize the law recognizes that each juror must make his own decision.

XI. Subject Matter of *Voir Dire* (TOC)

Case law on proper subject matter for *voir dire*⁵² follows.

Accomplice Culpability: *State v. Cheek*, 351 N.C. 48, 65–68 (1999) (prosecutor properly asked about jury's ability to follow the law regarding acting in concert, aiding and abetting, and felony murder rule).

Circumstantial Evidence: *State v. Teague*, 134 N.C. App. 702 (1999) (prosecutor allowed to ask if jurors would require more than circumstantial evidence, that is eyewitnesses, to return a verdict of first degree murder).

⁴⁹ To deselect jurors, commit the juror to a position (e.g., "So you believe . . ."), normalize the impairment by acknowledging there are no right or wrong answers and citizens are free to have different opinions, and recommit the juror to his position (e.g., "So because of . . . , you would feel somewhat partial . . ."), thus immunizing him from rehabilitation.

⁵⁰ N.C. GEN. STAT. § 15A-1236(a)(3), *et al.*; see also *supra* text at III. Selection Procedure.

⁵¹ N.C. GEN. STAT. §§ 15A-1235(b)(1) and (4).

⁵² See MICHAEL G. HOWELL, STEPHEN C. FREEDMAN, & LISA MILES, JURY SELECTION QUESTIONS (2012).

Child Witnesses: *State v. Hatfield*, 128 N.C. App. 294 (1998) (trial judge erred by not allowing defendant to ask prospective jurors “if they thought children were more likely to tell the truth when they allege sexual abuse”).

Defendant’s Prior Record: *State v. Hedgepath*, 66 N.C. App. 390 (1984) (trial court erred in refusing to allow counsel to question jurors about their willingness and ability to follow the judge’s instructions they are to consider the defendant’s prior record only for the purpose of determining credibility).

Defendant Not Testifying: *State v. Blankenship*, 337 N.C. 543 (1994) (proper for defense counsel to ask questions concerning a defendant’s failure to testify in his own defense; however, the court has discretion to disallow the same).

Expert Witness: *State v. Smith*, 328 N.C. 99 (1991) (asking the jury if they could accept the testimony of someone offered in a particular field like psychiatry was not a stake-out question).

Eyewitness Identification: *State v. Roberts*, 135 N.C. App. 690, 697 (1999) (prosecutor properly asked if eyewitness identification in and of itself was insufficient to deem a conviction in the juror’s minds regardless of the judge’s instructions as to the law)

Identifying Family Members: *State v. Reaves*, 337 N.C. 700 (1994) (no error for prosecutor to identify members of murder victim’s family in the courtroom during jury selection).

Intoxication: *State v. McKoy*, 323 N.C. 1 (1988) (proper for prosecutor to ask prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Legal Principles: *State v. Parks*, 324 N.C. 420 (1989) (defense counsel may question jurors to determine if they completely understood the principles of reasonable doubt and burden of proof; however, once fully explored, the judge may limit further inquiry).

Pretrial Publicity: *Mu’Min v. Virginia*, 500 U.S. 415, 419–21 (1991) (inquiries should be made regarding the effect of publicity upon a juror’s ability to be impartial or keep an open mind; questions about the content of the publicity may be helpful in assessing whether a juror is impartial; it is not required that jurors be totally ignorant of the facts and issues involved; the constitutional question is whether jurors had such fixed opinions they could not be impartial).

Racial/Ethnic Background⁵³: *Ristaino v. Ross*, 424 U.S. 589 (1976) (although the due process clause creates no general right in non-capital cases to *voir dire* jurors about racial prejudice, such

⁵³ Considerations of race can be critical in any case, and *voir dire* may be appropriate and permissible to determine bias under statutory considerations of one’s fitness to serve as a juror. *See generally* N.C. GEN. STAT. § 15A-1212(9) (challenges for cause may be made . . . on the ground a juror is unable to render a fair and impartial verdict). Strategically, try to show how questions on racial attitudes are relevant to the theory of defense. If the inquiry is particularly sensitive, request an individual *voir dire*. *See* N.C. DEFENDER MANUAL, *supra* note 8, at 25-18.

questions are constitutionally mandated under “special circumstances” like in *Ham*); *Ham v. South Carolina*, 409 U.S. 524 (1973) (“special circumstances” were present when the defendant, an African-American civil rights activist, maintained the defense of selective prosecution in a drug charge); *Rosales-Lopez v. U.S.*, 451 U.S. 182 (1981) (trial courts must allow questions whether jurors might be prejudiced about the defendant because of race or ethnic group when the defendant is accused of a violent crime and the defendant and victim were members or difference races or ethnic groups); *see also Turner v. Murray*, 476 U.S. 28 (1986) (such questions must be asked in capital cases in charge of murder of a white victim by a black defendant).

Sexual Offense/Medical Evidence: *State v. Henderson*, 155 N.C. App. 719, 724–27 (2003) (prosecutor properly asked in sex offense case if jurors would require medical evidence “that affirmatively says an incident occurred” to convict as the question measured jurors’ ability to follow the law).

Sexual Orientation: *State v. Edwards*, 27 N.C. App. 369 (1975) (proper for prosecutor to question jurors regarding prejudice against homosexuality to determine if they could impartially consider the evidence knowing the State’s witnesses were homosexual).

Specific Defenses: *State v. Leonard*, 295 N.C. 58, 62–63 (1978) (a juror who is unable to accept a particular defense recognized by law is prejudiced to such an extent he can no longer be considered competent and should be removed when challenged for cause).

XII. Other Important Considerations (TOC)

It is axiomatic you must know the case facts, theory of defense, theme(s) of the case, and applicable law to conduct an effective *voir dire*. An example of a theory of defense—a short story of reasonable and believable facts—follows: “Ms. Jones was robbed . . . but not by [the Defendant] who was at work eight miles away. This is a case of mistaken identity.”

My Practice Tips

Beyond these fundamentals, I offer a few practice tips.

1. Every jury selection is different, tailored to the unique facts, law, and individuals before you.
2. Meet with the defendant and witnesses on the eve of trial for a last review. Often, we learn new facts, good and bad, as witnesses are sometimes impressive but more commonly afraid, experience memory loss, present poorly, or will not testify. We re-cover the material points of trial, often illuminating important facts that require disclosure in the selection process.

3. Use common sense analogies and life themes to which we can all relate in conversation with jurors.
4. Look, act, and dress professionally. Make sure your client and witnesses dress neatly and act respectfully. Of all the things you wear, your expression is most important. A pleasant expression adds face value to your case.⁵⁴
5. Use plain language. Distill legal concepts into simple terms and phrases.
6. At the outset, tell the jury they have nothing to fear. Inform them the judge, the governor⁵⁵ of the trial, will tell them everything they need to know, and the bailiffs are there for their assistance, security, and comfort. Instruct the jury they need only tell the bailiffs or judge of any needs or concerns they may have.
7. Be respectful of opposing counsel, not obsequious. You reap what you sow. Promote respect for the process. Be mindful of how you address opposing counsel. He is the prosecutor, not the State of North Carolina (or the government). If the prosecution invokes such authority, tell the jury you represent the citizens of this state, protecting the rights of the innocent from the power of the government.

Sun Tzu: Timeless Lessons

Sun Tzu, author of *The Art of War*, provides timeless lessons on how to defeat your opponent. A fellow lawyer, Michael Waddington, in *The Art of Trial Warfare*, applies Sun Tzu's principles to the courtroom. I share a sampling for your consideration. Trial is war. To the trial warrior, losing can mean life or death for the client. Therefore, the warrior constantly learns, studies, and practices the art of trial warfare, employing the following principles: Because no plan survives contact with the enemy, he is always ready to change his strategy to exploit a weakness or seize an opportunity. He strikes at bias, arrogance, and evasive answers. He prepares quietly, keeping the element of surprise. He makes his point efficiently, knowing juries have limited attention spans and dislike rambling lawyers. He impeaches only the deserving and when necessary. He is self-disciplined, preparing in advance, capitalizing on errors, and maintaining momentum. He is unintimidated by legions of lawyers or a wealth of witnesses, knowing they are bloated prey. He sets up the hostile witness, luring misstatements and exaggerations for the attack. He does not become defensive, make weak arguments, or present paltry evidence. He focuses on crucial points, attacking the witnesses in his opponent's case. He neither moves nor speaks without reflection or consideration. He never trusts co-defendants or their counsel, for danger looms. He remains calm and composed,

⁵⁴ MOSES, *supra* note 33.

⁵⁵ Judges are sometimes referenced as the governor or gatekeeper of the trial, particularly when deciding admissibility of expert evidence. See *State v. McGrady*, 368 N.C. 880 (2016) (amended Rule 702(a) implements the standards set forth in *Daubert*); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (defines the judge's gatekeeping role under FED. R. EVID. 702).

unflinching when speared. He neither takes tactical advice nor allows his client to dictate the trial,⁵⁶ recognizing why his client sits next to him. He is not reckless, cowardly, hasty, oversensitive, or overly concerned what others think. He prepares for battle, even in the midst of negotiation. He keeps his skills sharp with constant practice and strives to stay in optimal physical and emotional shape – for trial requires the stamina of a warrior. The trial lawyer understands mastery of the craft is an ongoing, lifetime journey.

Power-Packed Themes

We summarize life experiences and belief systems via themes which are used to deliver core facts or arguments. An example of a core argument follows: “This is a case of an untrained employee” The best themes are succinct, memorable, and powerful emotionally. We motivate and lure jurors to virtuosity— or difficult verdicts—through life themes. Consider the powerful themes within this argument:

The first casualty of war— or trial—is innocence. Fear holds you prisoner; faith sets you free. How many wars have been fought and lives lost because men have dared to insist to be free? Did you ever think you would have the opportunity to affect the life of one person so profoundly while honoring the principles for which our forefathers fought? Stand up for freedom today; for many, freedom is more important than life itself. Partial or perverted justice is no justice; it is injustice. Stop at nothing to find the truth. You have no friend to reward and no enemy to punish. Your duty is to let your verdict speak the everlasting truth. His triumph today will trigger change tomorrow. Investigations will improve, and justice will have meaning. Trials will no longer be a rush to judgment but instead a road to justice.

A trial lawyer without a theme is a warrior without a weapon.⁵⁷

XIII. Integrating *Voir Dire* into Closing Argument (TOC)

At the end of closing argument, I return to central ideas covered in *voir dire*. I remind the jury the defendant is presumed innocent even now, walk over to my client and touch him – often telling the jury this is the most important day of my client’s life. I then remind them they are not to surrender their honest and conscientious convictions or do violence to their individual judgment merely to return a verdict, purposefully re-isolating and re-insulating the jury before stating my theme and asking for them to return a verdict of not guilty.

⁵⁶ But see *State v. Ali*, 329 N.C. 304 (1991) (when defense counsel and a fully informed criminal defendant reach an absolute impasse as to tactical decisions, the client’s wishes must control).

⁵⁷ Charles L. Becton, *Persuading Jurors by Using Powerful Themes*, TRIAL 63 (July 2001).

XIV. Summary [\(TOC\)](#)

Prepare, research, consult, and try cases. Be objective about your case. Be courageous. Stand up to prosecutors, judges and court precedent, if you believe you are right. Make a complete record. I leave you with words of hope and inspiration from Joe Cheshire, an icon of excellence, and one of many to whom I esteem and aspire. Hear the message. Go make a difference.

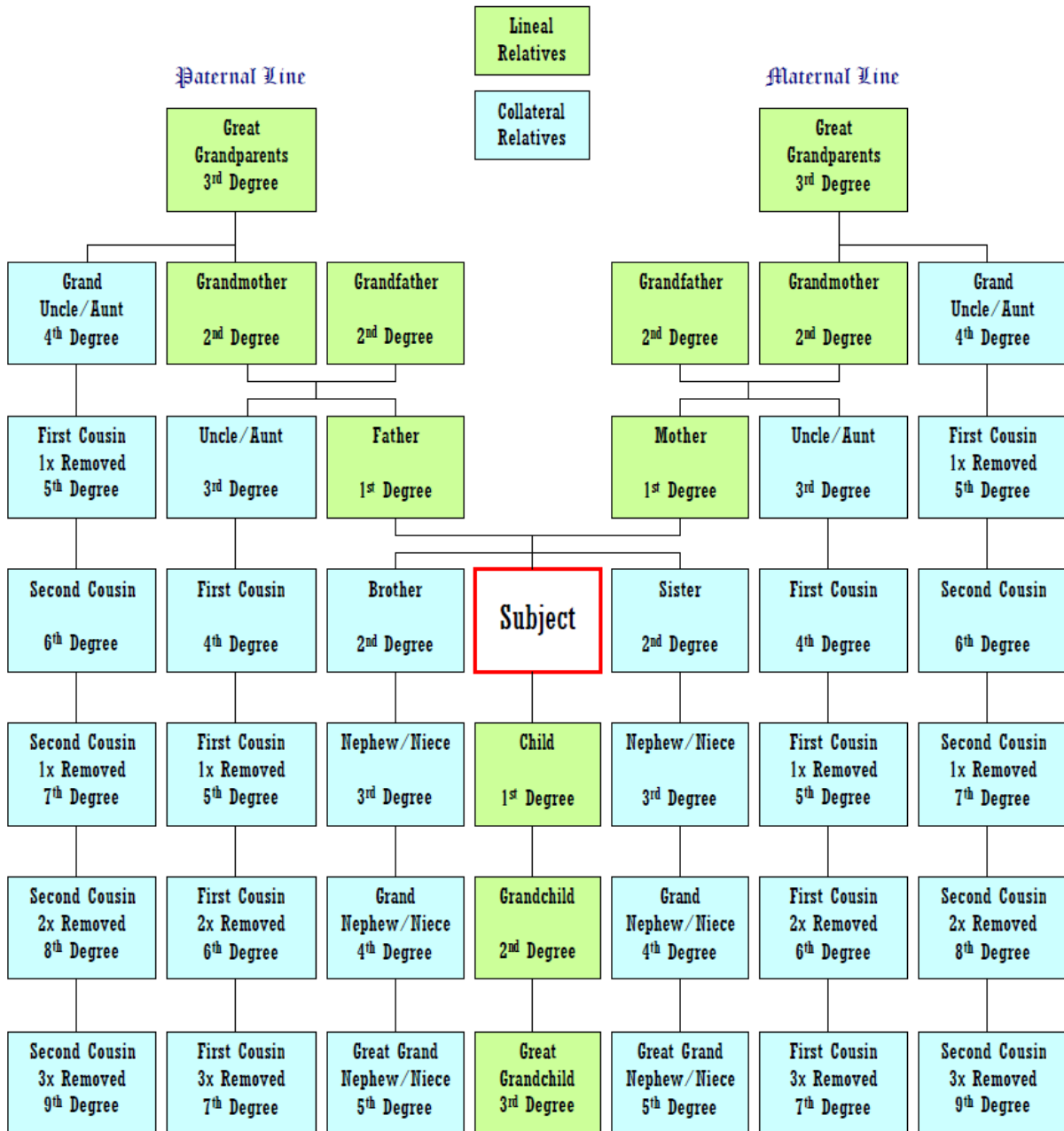
“A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength, and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end.”

“The day may come when we are unable to muster the courage to keep fighting ... but it is not this day.”⁵⁸ ■

⁵⁸ THE LORD OF THE RINGS: RETURN OF THE KING (New Line Cinema 2003).

2025 Update to Jury Selection: The Art of Peremptories and Trial Advocacy

Exhibit A



2025 Update to Jury Selection:

The Art of Peremptories and Trial Advocacy

Exhibit B

REFERENCES

1. *Voir Dire*: 15A-1211 to 1217
2. Jury Trial Procedure: 15A-1221 to 1243
3. Bifurcation: 15A-928
4. Jury Instruction Conference: Gen. R. of Prac. 21; 15A-1231

NEED

1. Witness List
2. Jury Profile
3. Jury Pool List
4. 12 Leaders/They save themselves

VOIR DIRE

(7/23/2024)

(Humble/vulnerable; Introduce/tell about self/firm/Defendant; Charge; Innocent/Not Guilty; Represent Citizens against Govt.; Insist on community participation as a safeguard in the process)

EXPLAIN THE PROCESS

Are you able to . . . ? Do you believe . . . ? Do you appreciate . . . ? Are you willing . . . ? Do you know . . . ?

1. Search for truth: Meaning of voir dire. Not CSI; often slow and deliberate.
2. Ideal jury: fair and impartial cross section of community.
3. Juror service: Pinnacle of public service; conscience of community; protect/preserve process.
4. You bring life experience and common sense.
5. May be a great juror in one case but not another.
6. Judge: gatekeeper/governor of trial. Will tell us all we need to know.
7. You are safe (only life experience/common sense, judge will instruct, jurors rights).
8. Length of trial.
9. Defendant is not on trial. State's case is on trial.

GROUP QUESTIONS

(You, close friend, family member)

10. News accounts?
11. Ever employed us? Other side of legal proceeding? DLF adverse to you?
12. Ever been on a jury or a witness in a trial where I was the lawyer?
13. Ever associate with DA's? (Know/served with/visit in home/relationship to favor/disfavor?)
14. Know Defendant?
15. Know victim/family?
16. Know any witnesses?
17. Ever serve on jury? Foreperson? (different civil/criminal burdens of proof) Verdict? Respected?
18. Ever testified as witness/participant in legal proceeding?
19. You/family/close friends in law enforcement? Working for law enforcement (C.I.)?
20. You/family/close friends been victims of a crime/had similar experience?
21. Any strong opinions regarding this type of charge; "touched" by this type of crime; be fair and impartial?
22. Examples: MADD, Leadership Rowan, believe any use is wrong, gun owners, NRA, CCP vs. Prison Ministry, LGBT, reluctant juror.

INDIVIDUAL QUESTIONS

23. Where live? Employment? Spouse? Family/children?
24. Any disability/physical/medical problems? Covid?
25. Any personal/business commitments?
25. Any specialized medical/psychological, legal/law enforcement, scientific/forensic training?

KEY POINTS

26. Supervise any employees?
27. Know anyone else on the jury panel/pool?
28. Ever serve as sworn LEO or similar capacity?
29. Military service?
30. Rescue squad/EMS/Fire Dept. service?
31. Teacher/Pastor/Church member/Government employee?
32. Serve on another jury this week?

UNCONTROVERTED FACTS

- 1.
- 2.
- 3.
- 4.

PROCESS OF TRIAL

33. State goes first; defense goes last; do not decide; address judge's instruction.
34. Will be objections/interruptions based on rules of evidence/procedure? Matters of law.
35. Draw the Sting/Strip. Cover Bad/Undisputed Facts/Affirmative Defenses or Irrelevant Issues/Facts (weapons, bad injuries, criminal record, drugs, alcohol, relationships, etc.). The law recognizes certain defenses. Not every death, injury, or questionable act is a crime.
36. Race/gender/religion issues? (white victim/black defendant); Batson; *Prima facie* case (raise inference?)/Race-neutral reasons/Purposeful discrimination? Judge elicit?
37. Some witnesses are everyday folks. Will anyone give testimony of LEO any greater weight solely because he wears a uniform? Judge will charge on credibility of witnesses. Promise to follow law?
38. You may hear from expert witnesses. Can you consider?
39. The charge is _____. Judge will explain the law/not us. Burden of proof is "beyond a reasonable doubt" (fully satisfies/entirely convinces). State must prove each and every element beyond burden. Promise to hold to burden? Same burden as Capital Murder.
40. A charge is not evidence.
41. Defendant presumed innocent. Defendant may choose, or not choose, to take the stand. He remains clothed with the presumption of innocence now and throughout this trial. Not a blank chalk board or level playing field. Will you now conscientiously apply the presumption of innocence to the Defendant?
42. Must you hear from the Defendant to follow the law? Must the Defendant "prove his innocence?" You are "not to consider" whether defendant testifies. PJI - Crim. 101.30

CONCLUSION/JUROR'S RIGHTS

Do you know . . . ? Do you understand . . . ? Do you appreciate . . . ?

43. Highest aim: You have no friend to reward, no enemy to punish, but a duty to let your verdict speak the everlasting truth.
44. You have the right to hear and see all the evidence, voice your opinion, and have it respected by others.
45. You are to "reason together...but not surrender your honest convictions" as deliberate toward the end of reaching a verdict. You are "not to do violence to your individual judgment." "You must decide the case for yourself." N.C. Gen. Stat. § 15A-1235.
46. After telling jurors the law requires them to deliberate to try to reach a verdict, it is permissible to ask "if they understand they have the right to stand by their beliefs in the case." *State v. Elliott*, 344 N.C. 242 (1996).
47. Use your "sound and conscientious judgment." Be "firm but not stubborn in your convictions." PJI - Crim. 101.40.
48. Believe the opinions of other jurors are worthy of respect? Will you?
49. No crystal ball. Do you know of any reason this case may not be good for you? Any questions I haven't asked that you believe are important?
50. The law never demands a certain outcome. The judge has no interest in a particular outcome and will be well-satisfied with your individual decision. The law recognizes that each juror must make his or her own decision.

CHALLENGES FOR CAUSE

1. Grounds. N.C. Gen. Stat. § 15A-1212.
 - a. Is incapable by reason of mental or physical infirmity.
 - b. Has been or is a party, witness, grand juror, trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge.
 - c. Has been or is a party adverse to the Defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.
 - d. Is related by blood or marriage within the sixth degree to the Defendant or victim of the crime.
 - e. Has formed or expressed an opinion as to the guilt or innocence of Defendant.
 - f. Is presently charged with a felony.
 - g. As a matter of conscience, would be unable to render a verdict with respect to the charge in accord with the law.
 - h. For any other cause is unable to render a fair and impartial verdict.

BUZZ PHRASES

1. Substantially impair? Automatically vote? *State v. Cummings*, 326 N.C. 298 (1990); *State v. Chapman*, 359 N.C. 328 (2005).
2. Juror statement he could follow the law but Defendant's failure to testify would "stick in the back of his mind" while deliberating should have been excused for cause. *State v. Hightower*, 331 N.C. 636 (1992).
3. Be Alert for "Stake-out" questions (asking "how will vote under particular fact/set of facts?"): Can you convict without physical evidence/witnesses? A question that tends to commit jurors to a specific future course of action. Defense has a right to a full opportunity to make diligent inquiry into "fitness and competency to serve" and "determine whether there is a basis for a challenge for cause or a peremptory challenge." N.C. Gen. Stat. § 15A-1214(c). Ask: Can you consider? *State v. Roberts*, 135 N.C. App. 690 (1999). Can you set aside your opinion and reach decision solely upon evidence?
4. "A juror can believe a person is guilty and not believe it beyond a reasonable doubt." Hence, it is error for D.A. to argue if a juror believes the defendant is guilty then he necessarily believes it BRD. *State v. Corbin*, 48 N.C. App. 194 (1980).