



PROTECTING JURORS FROM STATE CHALLENGES FOR CAUSE

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AGENDA

1. Whitewashing: Losing Jurors at the Cause Stage
2. Statutory Framework & Cause Standard
3. Putting Unfavorable Case Law to Use
4. Rehabilitation & Objection
5. Final Tips & Takeaways

SOME CONTEXT

- We are talking about the moment in trial where the **judge** or the **prosecutor** is attempting to remove a juror for cause
- We will go over best practices to make the state use a peremptory or give yourself a chance to talk to that juror
- Empirically, diverse juries are better juries
 - longer deliberations
 - discussed more case facts
 - made fewer inaccurate statements
 - more likely to correct inaccurate statements

PROSECUTORS' PROBLEMATIC RECORD

FIGURE 2: RACIAL DISPARITIES IN PROSECUTORS' USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (LOUISIANA)

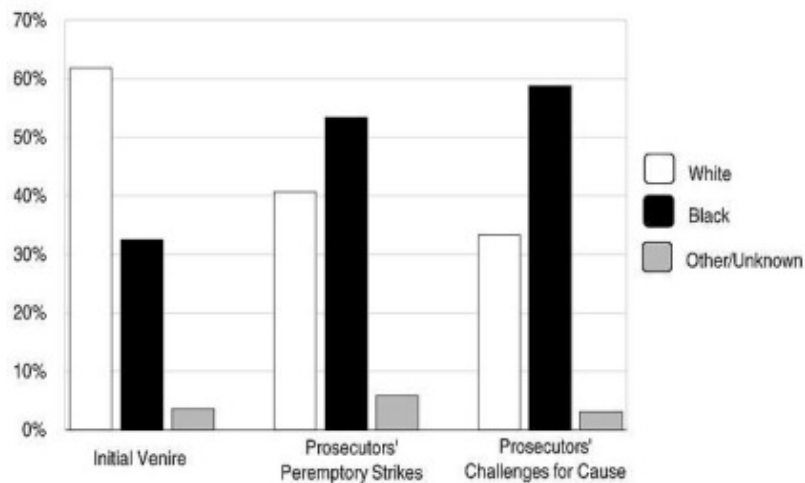
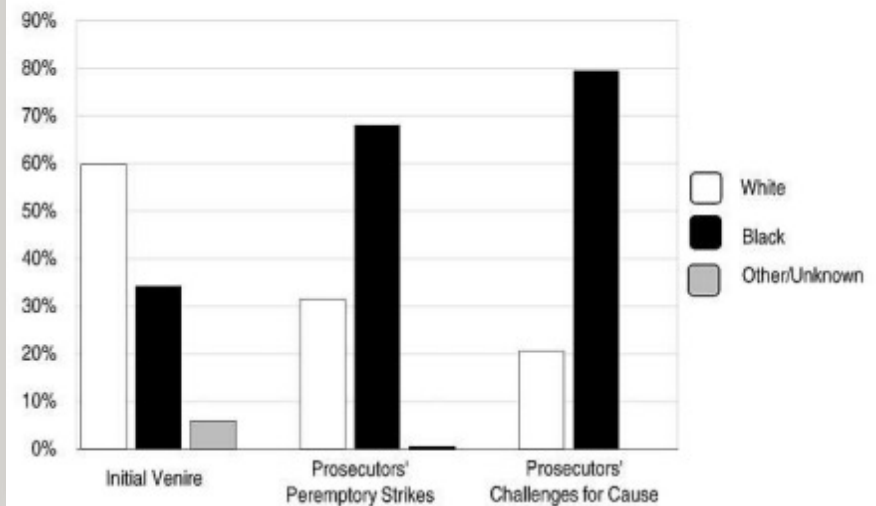


FIGURE 4: RACIAL DISPARITIES IN PROSECUTORS' USE OF PEREMPTORY STRIKES AND CHALLENGES FOR CAUSE (MISSISSIPPI)



Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785 (2020).

Available at: <https://repository.law.umich.edu/mlr/vol118/iss5/3>

U.S. CONSTITUTION REMEDY?

Unfair Cause Challenge Practices →

~~6th A Fair Cross Section~~

~~14th A Equal Protection Clause~~

~~6th A Impartial Jury + 14th A Due Process Clause~~

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LITIGATION TOOL

Protecting Jurors from State Challenges for Cause

THE MECHANICS

- The State moves to challenge Juror X for cause
- "What say the defense?"
- Ask to question the juror
 - If yes, rehabilitate using step 1
 - If no, prepare objection using step 2
- Ask to be heard outside the presence of the jury AND ask the Court to retain juror X in the jury room until your objection has been heard
- Take a moment to form your argument
- "The defense objects to the cause challenge under 6th and 14th Amendments to the U.S. Constitution, Article I, Sections 19, 24, and 26 of the N.C. Constitution, and N.C. Gen. Stat. Section 15A-1212. The statute is one of inclusion, allowing N.C. citizens the right to serve. Here, [use facts of your case and analogize to pro-state case law below]."

STEP 1: REHABILITATE

- Tell the juror about SCT language about the **role of the jury**:
 - "The diverse and representative character of the jury must be maintained 'partly as an assurance of diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'" Justice Kennedy in *J.E.B. v. Alabama*, 511 U.S. 127, 134 (1994).
 - "[T]he jury is a necessary check on governmental power." *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 860 (2017).
- Tell the juror having different perspectives and opinions is ok!
 - We all come with biases and perspectives. Our differences and perspectives make the jury system function.
- Walk the juror toward questions about the **verdict** being fair and impartial. Step by step. Be patient.
 - Ex: Knowing that it's individual citizens like you that make the jury system work, could you listen to the evidence in this case? Could you determine what the facts are based on what you see and hear? Could you listen to the judge explain the law? Could you deliberate with other jurors? And, if or when you and your other jurors reach a verdict, would your participation in with your jurors render that verdict unfair or unjust?*

STEP 2: OBJECT

- The 6th & 14th Amendments of the U.S. Constitution (due process, impartial jury)
- Article I, Sections 19, 24, and 26 of the N.C. Constitution (law of the land, equal protection, right to jury trial, right to jury service)
 - (1) Does not qualify under NCGS § 9-3
 - (2) Mental or physical infirmity
- NCGS 15A-1212: Grounds for Challenge for Cause →
 - (6) Formed opinion on guilt/innocence
 - (7) Presently charged with a felony
 - (8) "As a matter of conscience," unable to render a verdict
 - (9) "For any other cause is unable to render a fair and impartial verdict"
- Relevant NC case law (see below)

Protecting Jurors from State Challenges for Cause

- Any other unfairness you see (disparate questioning, degree of vigor, structural unfairness)
- Bias/opinion is ok, so long as juror can participate in rendering fair and impartial verdict.
 - "The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and obedience to the law..." *State v. Smith*, 352 N.C. 531, 545 (2000)

BLACK LIVES MATTER JUROR

Law

Carolina Beach Chief of Detectives, Lt. Goodson, was properly retained on the jury where the Lt. said he:

- "attach[ed] a great deal of credibility to law enforcement officers"
- Felt "a closeness to law enforcement officers" in his "bones"
- Would "be more inclined to assign more credibility to the officer over...the civilian"

State v. Cummings, 361 N.C. 438, 453-56 (2007)

Argument

The State's cause challenge is properly denied even where:

- A juror is skeptical of the credibility of law enforcement officers
- A juror feels aligned with racial justice issues including BLM and criminal legal reform
- A juror is more inclined to assign credibility to a civilian over an officer.

So long as the juror will participate in reaching a fair and impartial verdict by listening to the evidence in *this* case and apply the law in *this* case.

DISTRACTED-BY-CIRCUMSTANCE JUROR

Law

Juror seated despite repeatedly voicing concerns that finances would be on his mind such that it would interfere with his ability to pay attention, to take his time, and to listen to the evidence.

State v. Reed, 355 N.C. 150, 151-60 (2002)

Argument

Juror who repeatedly expresses concerns about circumstances (finances, job, caretaking, etc.) is still qualified where the juror can follow the law, listen to the evidence, and be fair to both sides.

HONEST-ABOUT-BIAS JUROR

Law

Two jurors (a police officer and a relative of an ADA) were retained where both:

- Could not positively rule out having a pro-prosecution bias, but
- Ultimately "indicated that [they] would render a fair and impartial decision."

Because:

The jurors' responses "represent nothing more than total honesty and their import is characteristic of any prospective juror whose individual biases are not instantly shed upon being summoned for jury duty."

State v. Whitfield, 310 N.C. 608, 612 (1984)

Argument

Whitfield directs that a juror who has expressed a bias or preference, but ultimately indicates they can participate in coming to a fair and impartial verdict, should be seated.

Research indicates jurors' self-assessment of their biases is unrelated to jurors' ability to determine facts and "largely independent of their final verdict preferences"

Thomas Ward Hampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 813 (2020).

JUROR WHO KNOWS THE CASE, CLIENT, OR PLACE

Law

State v. Grooms: Juror knew victim and attended a pretrial protest of delay in bringing case to trial. 353 N.C. 30, 49 (2000)

State v. Lashier: Juror had "several personal and social" ties to LEOs and courthouse personnel, her husband was a bailiff, and she knew the ADA trying the case. 361 N.C. 299, 301-05 (2007)

State v. Hunt: Juror/officer knew the testifying officers and had heard the defendant's case discussed by other LEOs. 37 N.C. App. 313, 319-20 (1978)

Argument

Juror who knows your client and expresses concern about the prosecution of the case should be allowed to serve.

Juror who knows anyone associated with the client or the defense should be allowed to serve.

Juror who knows testifying witnesses and has heard others discussing the case should be allowed to serve.

STEP 3: PRESERVE

Where it make sense for your case strategy, preserve the issue by:

- Exhaust your peremptories;
- Renew the objection to the cause challenge(s);
- Request an additional peremptory;
- Put on the record that, were you granted an additional peremptory, you would strike the juror; and
- Always condition your acceptance of the jury, noting your continued objection to any overruled objections:

"The defense is satisfied but for our continued objection to the challenge for cause of juror [name]."

NCGS § 15A-1212

GROUND FOR CHALLENGE FOR CAUSE

7

- (1) Does not qualify under NCGS § 9-3
- (2) Mental or physical infirmity
- (6) Formed opinion on guilt/innocence
- (7) Presently charged with a felony
- (8) “As a matter of conscience,” unable to render a verdict
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RENDER A FAIR AND IMPARTIAL VERDICT

- It is ok for the juror to have biases!
 - “The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and obedience to the law . . .” *State v. Smith*, 352 N.C. 531, 545 (2000)
- The standard is not “can you be fair and impartial?”
- Be prepared to educate the judge on the case law.



CASE LAW TRANSLATOR*

Case law
protecting
the right of a
juror with
pro-state bias



Protect the
right of the
juror with a
[insert state's
complaint] bias

*Credit to Elizabeth Gerber of the Mecklenburg County Defender's Office

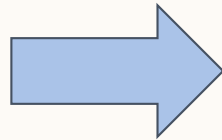
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HONEST-TO-A-FAULT JUROR

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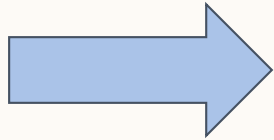
Q. Do you think it [would] impair your ability to listen to the evidence in the case [fairly]?

A. Yes, I do.

Q. You do?

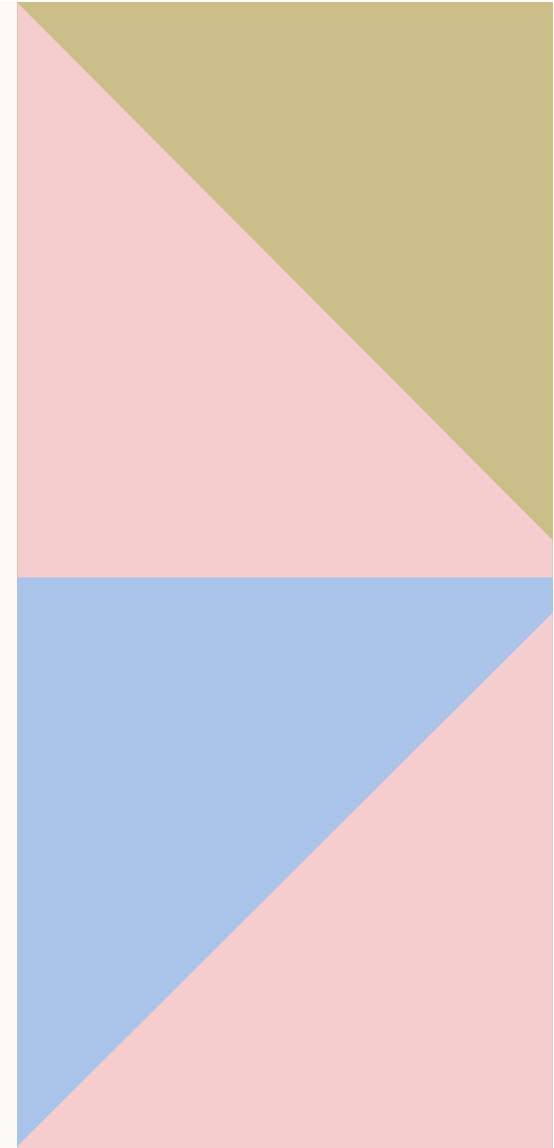
A. Yes.

***State v. Reed, 355 N.C. 150, 151-60
(2002)***



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REHABILITATION

14

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HOW TO OBJECT

- Use your quick guide!
- State the legal basis
- Translate the case law
- Point out any other relevant unfairness you see

PRESERVATION

- Mechanics are on the quick guide
- Focus on the impact at your trial
 - Possible to win the issue
 - Stem the unfair actions of the prosecutor/judge
 - Ripple effects

FINAL TIPS & TAKEAWAYS

- Expand the notion of who is a qualified juror
- If you see unfairness, say something
 - Disparate questioning
 - Different degree of vigor
 - Structural issues - childcare, low juror pay
- Consider:
 - A pretrial motion alerting the court to the data/issue
 - Bring copies of the case law and Frampton article



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