# ADVANCED CRIMINAL PROCEDURE

# SCHOOL OF GOVERNMENT

## MAY 7, 2014

# JURY SELECTION

**PRESENTED BY:**

**RON SPIVEY**
**RESIDENT SUPERIOR COURT JUDGE**
**FORSYTH COUNTY**

# CRIMINAL JURY SELECTION RESOURCES FOR SUPERIOR COURT JUDGES

## N.C. Superior Court Judge's Benchbook

## (Criminal Dropdown Menu – Jury Issues – Jury Selection)

### Jury Selection

Criminal >> Jury Issues >> Jury Selection

Introductory Remarks to Jurors

Remarks to Prospective Jurors after Excuses Heard

Remarks to Jurors before Selection of Jury in a Specific Case

Juror Qualifications & Challenges
**(This includes a review of Batson in "Juror Challenges")**

## NC Superior Court Judge's Benchbook – Trying a Non-Capital Criminal Case – An Outline for the Superior Court Judge by Jessica Smith (January 2013) Sections 7-10

## School of Government Website
## *Materials from Past Schools and Conferences*

## October 2006 Conference – "Jury Selection" by Judge Gentry Caudill

## June 2009 Conference – "Juries: Interfering With Jurors" by Judge Ron Spivey

## October 2011 Conference – "Efficient Jury Selection" by Judge Ron Spivey

**Other Resources**
**School of Government Website**

**Jury Management - January 2009 – Judge Catherine Eagles**

**2014 Orientation for New Superior Court Judges: Notice to Attorneys Concerning Jury Selection and Juror Responsibilities**

**Jeff Welty, NC Criminal Law Blog March 2, 2010 "Jury Selection and Attorneys as Agents of Their Clients"**

**National Center for State Courts Website**

**NCSC: Jury Selection, Trial and Deliberations – a Resource Guide (contains numerous research papers and treatises on various jury related topics)**

**If you still have access to the now ancient Trial Court Desktop, in that version of the Judge's Criminal Bench Book**
**Chapter 19 Informing the Venire**
**Chapter 20 Jury Selection,**
**Criminal Appendix Pretrial - Standard Remarks to Jurors in Criminal Cases, Sections I – IV**

# NORTH CAROLINA GENERAL STATUTES
# JURY SELECTION

**§ 9-3. Qualifications of prospective jurors.**

All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P.R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C.S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1; 1973, c. 230, ss. 1, 2; 1977, c. 711, s. 10.)

**§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.**

(a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

(b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he or any district court judge of his district court district designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedures shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed. In counties located in a district or set of districts as defined in G.S. 7A-41.1(a) which have a trial court administrator, the chief district judge may assign the duty of passing on applications for excuses from jury service to the administrator. In all cases concerning excuses, the clerk of court or the trial court administrator shall notify prospective jurors of the disposition of their excuses.

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a subsequent session of court. If required to serve subsequently, the juror shall be considered on such occasion the same as if he were a member of the panel regularly summoned for jury service at that time.

(d) A judge hearing applications for excuses from jury duty shall excuse any person disqualified under § 9-3.

(e) The judge shall inform the clerk of superior court of persons excused under this section, and the clerk within 10 days shall so notify the register of deeds, who shall note the excuse on the juror's card and file it separately from the jury list.

(f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section. (1967, c. 218, s. 1; 1969, c. 205, ss. 4, 5; 1971, c. 377, s. 30; 1979, 2nd Sess., c. 1207, s. 1; 1981, c. 430, s. 2; 1985, c. 609, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 47.)

**§ 9-6.1. Requests to be excused.**

Any person summoned as a juror who is 72 years or older and who wishes to be excused, deferred, or exempted may make the request without appearing in person by filing a signed statement of the ground of the request with the chief district court judge of that district, or the district court judge or trial court administrator designated by the chief district court judge pursuant to G.S. 9-6(b), at anytime five days before the date upon which the person is summoned to appear. A person may request either a temporary or permanent exemption under this section, and the judge or trial court administrator may accept or reject either in the exercise of discretion conferred by G.S. 9-6(b), including the substitution of a temporary exemption for a requested permanent exemption. In the case of supplemental jurors summoned under G.S. 9-11, notice may be given when summoned. In case the chief district court judge, or the judge or trial court administrator designated by the chief district court judge pursuant to G.S. 9-6(b), rejects the request for exemption, the prospective juror shall be immediately notified by the trial court administrator or the clerk of court by telephone, letter, or personally. (1979, 2nd Sess., c. 1207, s. 2; 1981, c. 9, ss. 1, 2; c. 430, ss. 4, 5; 2005-149, s. 1.)

**§ 9-14. Jury sworn; judge decides competency.**

The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any juror; and if by reason of such challenge any juror is withdrawn from a jury being selected to try a case, his place on that jury shall be taken by another qualified juror. The presiding judge shall decide all questions as to the competency of jurors. (1790, c. 321, P.R.; 1822, c. 1133, s. 1, P.R.; R.C., c. 31, s. 34; Code, s. 405; Rev., s. 1966; C.S., s. 2324; 1967, c. 218, s. 1.)

**§ 9-15. Questioning jurors without challenge; challenges for cause.**

(a) The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(b) It shall not be a valid cause for challenge that any juror, regular or supplemental, is not a freeholder or has not paid the taxes assessed against him.

(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1806, c. 694, P.R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; 1913, c. 31, ss. 5, 6, 7; C.S., ss. 2316, 2325, 2326; 1933, c. 130; 1967, c. 218, s. 1; 1973, c. 95; 1977, c. 711, s. 11.)

**§ 9-18. Alternate jurors.**

(a) Civil Cases. Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

(b) Criminal Cases. Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1931, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1; 1977, c. 406, ss. 3-5; c. 711, s. 13; 1979, c. 711, s. 2.)

## Article 3.
## Peremptory Challenges.

**§ 9-19. Peremptory challenges in civil cases.**

The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court. (1796, c. 452, s. 2, P.R.; 1812, c. 833, P.R.; R.C., c. 31, s. 35; Code, s. 406; Rev., s. 1964; C.S., s. 2331; 1935, c. 475, s. 1; 1965, c. 1182; 1967, c. 218, s. 1.)

**§ 9-20. Civil cases having several plaintiffs or several defendants; challenges apportioned; discretion of judge.**

(a) When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in the judge's discretion apportion among the defendants the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest.

(b) When there are two or more plaintiffs in a civil action, the presiding judge, if it appears that there are antagonistic interests between the plaintiffs, may, in the judge's discretion, apportion among the plaintiffs the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each plaintiff or class of plaintiffs representing the same interest.

(c) Whenever a judge exercises the discretion authorized by subsection (a) or (b) of this section to increase the number of challenges for either the plaintiffs or the defendants, the judge may, in the judge's discretion, increase the number of challenges for the opposing side, not to exceed the total number given to the other side. (1905, c. 357; Rev., s. 1965; C.S., s. 2332; 1967, c. 218, s. 1; 2007-210, s. 1.)

**§ 9-21. Peremptory challenges in criminal cases governed by Chapter 15A.**

Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P.R.; 1801, c. 592, s. 1, P.R.; 1812, c. 833, P.R.; 1826, c. 9; 1827, c. 10; R.S., c. 35, ss. 19, 21; R.C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C.S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75; 1977, c. 711, s. 14.)

# NORTH CAROLINA GENERAL STATUTES
# 15A: CRIMINAL PROCEEDURE ACT

Article 72.
Selecting and Impaneling the Jury.

**§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.**

(a) The provisions of Chapter 9 of the General Statutes, Jurors, pertinent to criminal cases apply except when this Chapter specifically provides a different procedure.

(b) The trial judge must decide all challenges to the panel and all questions concerning the competency of jurors.

(c) The State or the defendant may challenge the jury panel. A challenge to the panel:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.
(2) Must be in writing.
(3) Must specify the facts constituting the ground of challenge.
(4) Must be made and decided before any juror is examined.

If a challenge to the panel is sustained, the judge must discharge the panel.

(d) The judge may excuse a juror without challenge by any party if he determines that grounds for challenge for cause are present. (1977, c. 711, s. 1.)

**§ 15A-1212. Grounds for challenge for cause.**

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.
(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.
(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. (1977, c. 711, s. 1.)

**§ 15A-1213. Informing prospective jurors of case.**

Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury. (1977, c. 711, s. 1.)

**§ 15A-1214. Selection of jurors; procedure.**

(a) The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called. When a juror is called and he is assigned to the jury box, he retains the seat assigned until excused.

(b) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213. He may briefly question prospective jurors individually or as a group concerning general fitness and competency to determine whether there is cause why they should not serve as jurors in the case.

(c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question.

(d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

(e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. The judge in his discretion must determine order of examination among multiple defendants.

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

(g) 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:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) 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.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror. Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) Exhausted the peremptory challenges available to him;

(2) Renewed his challenge as provided in subsection (i) of this section; and (3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

(j) In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection. (1977, c. 711, s. 1.)

**§ 15A-1215. Alternate jurors.**

(a) The judge may permit the seating of one or more alternate jurors. Alternate jurors must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. They must attend the trial at all times with the jury, and obey all orders and admonitions of the judge. When the jurors are ordered kept together, the alternate jurors must be kept with them. If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury.

(b) In all criminal actions in which one or more defendants is to be tried for a capital offense, or enter a plea of guilty to a capital offense, the presiding judge shall provide for the selection of at least two alternate jurors, or more as he deems appropriate. The alternate jurors shall be retained during the deliberations of the jury on the issue of guilt or innocence under such restrictions, regulations and instructions as the presiding judge shall direct. In case of sequestration of a jury during deliberations in a capital case, alternates shall be sequestered in the same manner as is the trial jury, but such alternates shall also be sequestered from the trial jury. In no event shall more than 12 jurors participate in the jury's deliberations. (1977, c. 711, s. 1; 1979, c. 711, s. 1.)

**§ 15A-1216. Impaneling jury.**

After all jurors, including alternate jurors, have been selected, the clerk impanels the jury by instructing them as follows: "Members of the jury, you have been sworn and are now impaneled to try the issue in the case of State of North Carolina versus _____. You will sit together, hear the evidence, and render your verdict accordingly." (1977, c. 711, s. 1.)

**§ 15A-1217. Number of peremptory challenges.**

(a) Capital cases.

(1) Each defendant is allowed 14 challenges.

(2) The State is allowed 14 challenges for each defendant. (b) Noncapital cases.

(1) Each defendant is allowed six challenges.

(2) The State is allowed six challenges for each defendant.

(c) Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges. (1977, c. 711, s. 1.)

**CASELAW: THREE CASES, THREE NEW TRIALS**
**A COUNTERINTUITIVE TRAP FOR TRIAL JUDGES**

## State vs. Thomas 195 N.C App 593 (2009)

Defendant argues that the trial court committed reversible error by failing to grant Defendant's request to remove a juror with his remaining peremptory challenge after the trial court reopened jury voir dire. Defendant contends that parties have an absolute right to exercise any remaining peremptory challenges to excuse a juror once the trial court reopens the examination of a juror and requests a new trial. We agree.

After the jury was impaneled and the trial was underway, the trial court learned that one of the seated jurors attempted to contact an employee in the District Attorney's Office prior to impanelment. The juror visited **[***4]** the District Attorney's Office with the intention of greeting a friend, but was unsuccessful in his attempts to speak with her. Voir dire was reopened, the trial court questioned the juror, and allowed the parties to do so as well. After questioning, defense counsel **[*595]** requested that the juror be removed. The trial court denied this request and found that there would be no prejudice to either party to keep the juror seated. Defendant argues that his counsel informed the trial court that he had a peremptory challenge left and wished to use it to remove the juror.

The following was the exchange between the trial court and defense counsel:

The Court: [Defense Counsel], do you wish to be heard at all?

[Defense Counsel]: Well, obviously a relationship with someone in the D.A.'s office and actually going up there while we're selecting the jury, and I think that I know Your Honor, having been in front of you just a short period of time, know that you had admonished them and told them, and I think even had talked to them even at that point about the problem you had with a juror. Or maybe you told us about somebody talking to somebody. But, you know, he had those admonitions I think when -- even **[***5]** though he hadn't been in the box, he was sitting out here with other jurors and expected to listen and follow the Court's orders. You know, obviously if he'd come back and said I did this, then I could have questioned him about it and maybe removed him from the jury. I think I still had one challenge left or could have even challenged him for cause. And now here we sit. So I'm asking that you remove him.

**[**374]** The Court: Well, the Court will find that the admonitions were not to have any contact with any of the attorneys or participants in the case. The Court will find that prior to being called up to the jury box that juror number eight, . . . , while in the jury pool of prospective jurors apparently went by the District Attorney's Office to say hello to a friend of his, did not speak with that person, did not talk about the case, and nothing else took place. The Court will find that even though it makes common sense that you not go visit the District Attorney's Office, the Court would find after a voir dire of the witness that there was nothing spoken of about this case, that he apparently did not realize until later that this was an error, which he does realize now. The Court will find **[***6]** there would be no prejudice to either party and the Court will deny the motion to strike at this point. . . .

HN1 "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to **[*596]** the accused. . . ." *State v. Freeman*, 314 N.C. 432, 438, 333 S.E.2d 743, 747 (1985) (internal quotation marks omitted). HN2 N.C. Gen. Stat. § 15A-1217(b)(1) (2007) governs the number of peremptory challenges that a defendant in a non-capital case is allotted. Each defendant is allowed six challenges. The record indicates that Defendant only utilized five of the six peremptory challenges, making it clear that he had one remaining.

It is established that HN3 after a jury has been impaneled, further challenge of a juror is a matter within the trial court's discretion. *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985). However, "'[o]nce the trial court reopens the examination of a juror, each party has the *absolute* right to exercise any remaining peremptory challenges to excuse such a juror.'" *State v. Holden*, 346 N.C. 404, 429, 488 S.E.2d 514, 527 (1997) (quoting *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996))(emphasis added). It is undisputed **[***7]** in this case that the trial court, did in fact, reopen voir dire.

Stating Defendant's concerns about the juror's conduct, he sufficiently communicated the grounds upon which he was requesting to exercise his remaining peremptory challenge. Defense counsel stated, "I think I still had one challenge left or could have even challenged him for cause. And now here we sit. So I'm asking that you remove him." Subsequently, Defendant's motion was improperly denied. As a matter of law, Defendant was entitled to exercise his remaining peremptory challenge.

For the foregoing reasons, we conclude that the trial court committed reversible error by failing to permit Defendant to use his remaining peremptory challenge. Defendant is entitled to a new trial.

New Trial.

## State v. Hammons 720 S.E. 2nd 820 (2012)

Turning to the merits of the appeal, defendant first contends that the **trial court** erred in refusing to allow him to exercise an unused **peremptory** challenge after the **trial court** reopened voir dire following the impanelling of the jury. At trial, just after the lunch break, defendant's trial counsel reported to the **trial court** that he had seen **juror** number 8 having lunch with a lawyer from the district attorney's office. Defendant's counsel explained that if he had known of **juror** number 8's connection with an attorney with the district attorney's office, he "probably would have used one of [his] strikes against them."

The **trial court** had the bailiff return the **jurors** to the courtroom and asked them whether any of them had lunch with a member of the district attorney's office. **Juror** number 8 indicated that he had, but that they had not discussed defendant's case in any way. The **trial court** then asked the jury to leave and allowed both defendant and the State to ask any questions **[**10]** that they had of **juror** number 8. Both defendant and the State questioned **juror** number 8.

After the **juror** was returned to the jury room, defendant made the following request to the **trial court:**

[DEFENSE COUNSEL]: Judge, I certainly didn't want to cause any inconvenience, but I think I have a duty to ask that he be excluded because certainly that is a question, and given that he knew the attorney that intimately to have lunch with **[*824]** them, Judge, I think most of the attorneys would certainly have him removed, and that's a question he was aware of. I'm not saying that he had any conversation, but certainly, Judge, I had two strikes left. I certainly would have removed him. There's no doubt about that had I known that. So I would ask that the Court consider excluding him, and I say that with all due respect, Judge. I certainly understand the inconvenience, but I would ask that he be removed.

The State, however, argued that defendant should have specifically questioned the **jurors** regarding any relationship with the district attorney's office during voir dire and that defendant had ample opportunity to question the **juror** regarding his impartiality.

After hearing arguments, the **trial court** made **[**11]** the following ruling:

THE COURT: I'll make these findings on the record. **Juror** No. 8 . . . has been inquired about out of the presence of the other **jurors**. It appears that [**Juror** No. 8] had lunch with a member of the district attorney's office, apparently a district attorney that is not associated with the supreme [sic] court division but is associated with the district court division who hasn't had any participation in this case. The **juror** also indicated he did not talk about this case. The **juror** also indicated after informing counsel that he did know two attorneys, he did not indicate either of those attorneys were with the district attorney's office. **Jurors**, by their very nature, generally respond to only what they are asked directly, and it does not appear any further inquiry was made about the practice of the attorneys that this **juror** knew in particular.

The **juror** has indicated that he can remain fair and impartial and that his acquaintance would not affect his decision in this case. Only the **juror** can know whether or not something like that's going to affect their ability to decide this case. Therefore, this court will conclude that the **juror** is yet fair and impartial and the Court, **[**12]** in its discretion, will deny the motion to remove this **juror** and replace the same with the alternate.

This Court addressed almost identical facts in *Thomas.* In that case, after the jury was impanelled,

the **trial court** learned that one of the seated **jurors** attempted to contact an employee in the District Attorney's Office prior to impanelment. The **juror** visited the District Attorney's Office with the intention of greeting a friend, but was unsuccessful in his attempts to speak with her. Voir dire was reopened, the **trial court** questioned the **juror**, and allowed the parties to do so as well.

195 N.C. App. at 594, 673 S.E.2d at 373. At the end of the voir dire, defense counsel reminded the **trial court** that he had an unused **peremptory** challenge remaining that he wished to use to excuse the **juror**. *Id.* at 595, 673 S.E.2d at 373. The **trial court** refused the defendant's request on the grounds that because the **juror** did not speak to his friend in the district attorney's office and did not talk about the case, "'there would be no prejudice to either party'" by allowing the **juror** to sit. *Id.*

On appeal, this Court explained that although "[i]t is established that after a jury has been **impaneled,** further **[**13]** challenge of a **juror** is a matter within the **trial court's** discretion," a different rule applies when the **trial court reopens** voir dire: "However, '[o]nce the **trial court reopens** the examination of a **juror**, each party has the ***absolute right*** to exercise any remaining **peremptory** challenges to excuse

such a **juror**.'" *Id.* at 596, 673 S.E.2d at 374 (emphasis added) (quoting *Holden*, 346 N.C. at 429, 488 S.E.2d at 527). Because it was undisputed that the **trial court** did in fact **reopen** voir dire, this Court held: "As a matter of law, Defendant was entitled to exercise his remaining **peremptory** challenge," and "the **trial court** committed reversible error by failing to permit Defendant to use his remaining **peremptory** challenge." *Id.* The Court, therefore, granted the defendant a new trial. *Id.*

In *Holden*, the authority relied upon by the *Thomas* panel, our Supreme Court concluded that the **trial court** did not err in allowing the State to exercise a **peremptory** challenge after the jury had already been impanelled — indeed, the State did not seek excusal of the **juror** until after the close of **[*825]** the evidence. 346 N.C. at 428, 488 S.E.2d at 526. The Court first pointed out that HN6 "the **trial court** may **reopen** the **[**14]** examination of a **juror** after the jury is **impaneled** and that this decision is within the sound discretion of the **trial court.**" *Id.* at 429, 488 S.E.2d at 527. If, however, the **trial court** decides to exercise its discretion to **reopen** voir dire of a **juror**, then, at that point, "'each party has *the* ***absolute right*** to exercise any remaining **peremptory** challenges to excuse such a **juror**." *Id.* (emphasis added) (quoting *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996)). The Court concluded that the **trial court** had not abused its discretion in allowing further examination of the **juror** and, therefore, the State was entitled to exercise its **peremptory** challenge. *Id.*

Here, as in *Holden* and *Thomas*, it is undisputed that the **trial court** exercised its discretion to **reopen** voir dire and allow further questioning of **juror** number 8 after the jury had been impanelled. Defendant had **peremptory** challenges remaining, and he sought to exercise one of those challenges to remove **juror** number 8. Under *Holden* and *Thomas*, because the **trial court** chose to **reopen** voir dire, defendant had an **absolute right** to do so. Consequently, the **trial court** committed reversible error in refusing to excuse **juror** number **[**15]** 8, and *Holden* and *Thomas* mandate that defendant is entitled to a new trial.

New trial.

## State v. Thomas 748 SE 2nd 620 (2013)

Jury *voir dire* was conducted, and the jury was **impaneled** on 20 April 2011. Heather Hinson (Hinson) was **juror** number eight. On the third day of the evidentiary portion of the trial, during a break in the testimony of the State's ninth witness, Centia Wilson (Wilson), Hinson informed a court official that she knew Wilson from high school. Hinson had not recognized Wilson's name, partly because it had changed since high school. The **trial court** informed Defendant and the State, and Hinson was called for questioning outside **[**2]** the presence of the other **jurors**.

The **trial court** asked Hinson a number of questions concerning the nature of her relationship with Wilson. Hinson testified that Wilson was a high school acquaintance, but they were not true friends in high school, and had not kept in touch after graduation from high school in 1993. Hinson testified she could remain fair and impartial, and that her past acquaintance with Wilson would not affect her ability to serve as a **juror**. The **trial court** then asked both the Assistant District Attorney and Defendant's counsel if they had any questions for Hinson. Both the State and Defendant declined to question Hinson further, but Defendant moved to excuse Hinson for cause or, failing that, to be allowed to use a remaining **peremptory**

challenge to remove Hinson from the jury. The **trial court** denied Defendant's motions and the trial continued with Hinson on the jury. Defendant was convicted on all charges. Defendant appeals.

I.

The relevant issue on appeal is whether the **trial court** erred in refusing to allow Defendant to use a remaining **peremptory** challenge to remove Hinson from the jury. We are compelled to hold that there was error.

Allowing, as an **absolute right,** the removal of a **juror** with a **peremptory** challenge before the jury has been **impaneled** serves legitimate goals and results in limited disruption in the trial process. However, serious questions arise when this "right" is removed from the context in which it was established in N.C.G.S. § 15A-1214(g), and applied after the jury has been **impaneled**.

Possible troubling scenarios include: (1) near the end of a trial the defense believes is going against the defendant, a concern is raised about the conduct of multiple **jurors**. The **trial court** allows *voir dire* of those **jurors** and determines no improprieties **[**7]** were involved. The **trial court** refuses to excuse those **jurors** for cause, but the defendant has three remaining **peremptory** challenges and uses them all. The trial must start anew; (2) or the State believes a **juror** has appeared sympathetic to the defendant during trial. An unnamed officer of the court tells the prosecutor that the **juror** may have violated an instruction from the judge. The **trial court** allows *voir dire* to investigate, but finds no cause to remove the **juror**. The State uses a **peremptory** challenge to remove the one **juror** who could have prevented a conviction.

Further, it seems likely that, after a trial has started, a **trial court** will be reluctant to allow questioning of **jurors** whose actions are in question in order to avoid the opportunity for the use of **peremptory** challenges. However, **trial courts** should be encouraged to allow thorough investigations of **jurors**, when needed, to determine if there is reason to excuse them for cause.

C.

In this case, after the jury had been **impaneled** and trial had started, Hinson informed the **trial court** that she had attended high school with the State's witness, Wilson, who was currently testifying. The **trial court** stated: "I need to - consistent **[**8]** with what I did with the last **juror** who knew a witness, we need to talk with her on the record outside the presence of the other **jurors**." The **trial court** further stated that "when we return from lunch, we'll send for Ms. Hinson first, and chat with her about the nature of her acquaintance with this witness, Ms. Wilson. After we've done that and heard you on that, we'll bring Ms. Wilson back to the stand and resume her testimony."

The **trial court** questioned Hinson outside the presence of the remainder of the jury concerning her relationship with the State's witness. Hinson testified that she was little more than a friendly acquaintance of Wilson in high school, that she had not really spoken to Wilson since graduating from high school in 1993, and that she felt her prior acquaintance with Wilson would not influence her ability to consider Defendant's case fairly at trial. The **trial court** then asked if there were any questions by the State or the defense "concerning this limited area of inquiry[.]"

Both the State and Defendant indicated they did not need to question Hinson beyond the questioning already conducted by the **trial court.**

Hinson left the courtroom, and the **trial court** asked **[**9]** if the State or Defendant had anything to say outside Hinson's presence. The State answered "no," but Defendant challenged Hinson for cause, which was denied. Defendant then requested to use a **peremptory** challenge to exclude Hinson:

MR. PAYNE: We move to **reopen** voir dire on [Hinson], and that we would have used a **peremptory** challenge had we known that [Hinson's relationship to Ms. Wilson].

THE COURT: Well, now, I gave you the opportunity to **reopen** voir dire. That's what I was doing.

. . . .

MR. PAYNE: Judge, we don't wish to ask any further questions. The request for the reopening of voir dire is to exercise a **peremptory** challenge -

THE COURT: I see. Procedural.

**[*624]** MR. PAYNE: — that we would have used if we had known that.

The **trial court** denied Defendant's motion to "**reopen** voir dire" and use a remaining **peremptory** challenge to remove Hinson from the jury. However, as held in *Holden*:

While not addressed by statute, this Court has held that the **trial court** may **reopen** the examination of a **juror** after the jury is **impaneled** and that this decision is within the sound discretion of the **trial court.** *State v. McLamb*, 313 N.C. 572, 575-76, 330 S.E.2d 476, 479 (1985); *State v. Kirkman*, 293 N.C. 447, 452-54, 238 S.E.2d 456, 459-60 (1977). **[**10]** "[O]nce the **trial court reopens** the examination of a **juror**, each party has the **absolute right** to exercise any remaining **peremptory** challenges to excuse such a **juror**." *Womble*, 343 N.C. at 678, 473 S.E.2d at 297.

*Holden*, 346 N.C. at 429, 488 S.E.2d at 527.

In the present case, we hold that, once the **trial court** allowed Defendant and the State to re-question Hinson, it reopened examination of Hinson for the purpose of *Holden*. At that point, Defendant was not required to ask any questions in order to preserve his right to use a remaining **peremptory** challenge to remove Hinson. We are compelled by *Holden* and *Kirkman* to reverse and remand for a new trial. *See also State v. Hammonds*, N.C. App. , , 720 S.E.2d 820, 821 (2012) ("Under [*Holden* and *State v. Thomas*, 195 N.C. App. 593, 673 S.E.2d 372, *disc. review denied*, 363 N.C. 662, 685 S.E.2d 800 (2009)], because the **trial court** reopened voir dire [after the jury was **impaneled**] and because defendant had not **[**12]** exhausted all of his **peremptory** challenges, the **trial court** was required to allow defendant to exercise a **peremptory** challenge to excuse the **juror**. Defendant is, under *Holden* and *Thomas*, entitled to a new trial.").

New trial.

**STATE OF NORTH CAROLINA** **IN THE GENERAL COURT OF JUSTICE**
**SUPERIOR COURT DIVISION**

**COUNTY OF FORSYTH**

| | | |
|---|---|---|
| **STATE OF NORTH CAROLINA** | **)** | |
| | **)** | |
| **VS.** | **)** | **INSTRUCTIONS TO JURORS** |
| | **)** | |
| | **)** | |
| | **)** | |

**You have now been selected as a juror in the above captioned matter. You are hereby instructed to abide by the following rules during the balance of this trial.**

**I INSTRUCT YOU AS FOLLOWS:**

1. **It is your duty not to talk among yourselves about the case at any time before deliberations.**
2. **It is your duty not to talk to parties, witnesses, counsel or observer about *anything*.**
3. **It is your duty not to talk to anyone else or to allow anyone else to talk with you or in your presence about the case.**
4. **If anyone attempts to communicate with you about the case, you must report it to me immediately.**
5. **It is your duty not to form an opinion about the outcome of the case or to express any opinion to anyone about the case or the outcome during the trial.**
6. **It is your further duty to avoid reading, watching, or listening to any media accounts of the trial that may exist**
7. **You should not participate in any social media that talks about the case or your role in the case until your duties are complete.**
8. **Finally, it is your duty not to make any independent investigation or conduct any supplemental research into any matter, or visit any place discussed during the course of the trial. Please understand that a violation of any of these duties will subject a violating juror to the contempt powers of the Court.**

**RECEIVED: This _____ day of May, 2014.**

**_____**
**RONALD E. SPIVEY**
**SUPERIOR COURT JUDGE PRESIDING**

**JUROR # _____**

**JUROR'S SINGATURE _____**

**CONTACT PHONE_____**