JURY MANAGEMENT IN CAPITAL TRIALS

Thomas H. Lock
Senior Resident Superior Court Judge, District 11-B

I. Orientation and Jury Excuses

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

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

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

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

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

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

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

Cf.

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

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

D. Orientation of jurors in capital cases.

1. General orientation remarks common to all cases. (See Bench Book or online Survival Guide for Superior Court Judges)
2. Hear requests for excusal/deferment.
3. Additional orientation remarks specific to capital trials. (See handout)

D. Practical suggestions for hearing jury excuses:

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

II. Jury Selection Procedure

A. Individual or Group Voir Dire?

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

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

3. Advantages of individual voir dire:

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

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

B. Jury Questionnaire?

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

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

C. Division of venire into panels.

1. Size of panels:

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

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

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

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

D. Alternates and peremptory challenges.

1. Must seat at least 2 alternate jurors.

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

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

    a. Unused challenges during seating of the 12 may be carried over to the seating of the alternates. NCGS 15A-1217(c).
    b. Judge has no authority to increase the number of peremptory challenges. *State v. Dickens,* 346 N.C. 26, 484 S.E.2d 553 (1997).

Exception: See NCGS 15A-1214(i) (under certain circumstances, if a party has exhausted peremptory challenges, and judge determines that a juror should have been excused for cause)

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

3. If judge for good reason reopens voir dire of juror both parties have accepted, both parties have right to use any remaining peremptory challenges to excuse juror if no basis for challenge for cause. NCGS 15A-1214(g).

III. Voir Dire

A. Scope of voir dire.

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

What about . . .

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

a. Inquiry into religious denominations and extent of church participation properly barred. *State v. Lloyd,* 321 N.C. 301, 364 S.E.2d 316 (1988).
b. Inquiry about beliefs espoused by church leaders properly barred. *State v. Huffsterler,* 312 N.C. 92, 322 S.E.2d 110 (1984).
c. Impermissible to ask if jurors believed in literal interpretation of Bible. *State v. Laws,* 325 N.C. 81, 381 S.E.2d 609 (1989).
d. **BUT SEE** *State v. Anderson,* 350 N.C. 152, 513 S.E.2d 296 (1999) (appears to approve inquiry into jurors' personal religious beliefs with regard to death penalty).

e. **SEE ALSO** *State v. Mitchell,* 353 N.C. 309, 543 S.E.2d 830 (2001) (defendant allowed to ask prospective juror whether any teachings of her church would interfere with ability to perform her duties as juror).

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

B. "Death qualification" of jurors.

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

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

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

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

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

   a. "Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?" *and*
   b. "If the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would

feel that the death penalty was the only appropriate punishment?"

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

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

7. Open-ended questions may be best in determining prospective jurors' attitudes toward death penalty. (For example: "In you own words, would you please tell me your attitudes, opinions, or beliefs about the death penalty as a punishment for first degree murder?")

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

C. "Stakeout" questions.

1. Definition: a question posed to determine in advance what a prospective juror's decision would be under a certain state of evidence or given set of facts. *State v. Richmond,* 347 N.C. 412, 495 S.E.2d 677 (1998). Also, a question that tends to commit prospective juror to a specific course of action in the case. *State v. Chapman,* 359 N.C. 328, 611 S.E.2d 794 (2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Questions that ask whether a juror *could find* (as opposed to *would*

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

D. "Rehabilitation" of Jurors.

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

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

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

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

E. Batson Challenges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTE: Step one of *Batson* analysis not intended to be a high hurdle for defendants. *State v. Hoffman,* 348 N.C. 548, 500 S.E.2d 718 (1998).

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

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

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

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

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

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

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

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

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

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

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

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

11. Must allow surrebuttal, showing by claimant of discrimination that proferred reasons were inadequate or pretextual. Factors to consider include:

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

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

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

d. The judge's assessment of the "entire milieu of the voir dire," including comparing "his observations and assessments of veniremen with those explained by the State, guided by his personal experiences with voir

dire, trial tactics, and the prosecutor, and by any surrebuttal evidence offered by the defendant. *Id.*

12. Considering and ruling on *Batson* objections.

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

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

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

13. What if you find a *Batson* violation has occurred?

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

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

IV. Juror Misconduct.

A. Admonitions to Jury.

1. Early and often.

2. Include prohibitions against:

    a. Researching facts and law on internet.
    b. Talking about case in social media.

B. Misconduct during trial.

1. Try to salvage case by replacing offending juror with alternate.
2. Instruct remaining jurors as appropriate.
3. Invoke contempt powers if necessary and/or appropriate.

C. Misconduct during deliberations.

1. Much more difficult to address.
2. If report of misconduct during deliberations:

a. Investigate to extent possible by questioning juror(s) in open court.

b. reinstruct jurors as appropriate.

D. Mistrial.

1. Chapter 15A, Article 62.

a. NCGS 15A-1061: Mistrial for prejudice to defendant.
b. NCGS 15A-1062: Mistrial for prejudice to State.
c. NCGS 15A-1063: Mistrial for impossibility of proceeding.
d. NCGS 15A-1064: Finding of fact required.
e. NCGS 15A-1065: Procedure following mistrial.

2. *In capital case,* defendant's consent required absent showing of "manifest necessity." *State v. Sanders,* 347 N.C. 587, 496 S.E.2d 568 (1998), citing *State v. Lachat,* 317 N.C. 73, 343 S.E.2d 872 (1986).

a. "physical necessity." *Id.*
b. "necessity of doing justice." *State v. Birckhead,* 256 N.C. 494, 124 S.E.2d 838 (1962).

REFERENCES:

Robert L. Farb, *North Carolina Capital Case Law Handbook* (Chapel Hill, North Carolina: School of Government, The University of North Carolina at Chapel Hill, Second Edition, 2004).

Michael G. Howell, Stephen Freedman, and Lisa Miles, *Jury Selection Questions* (Durham, North Carolina: North Carolina Capital Defender's Office, Pamphlet, 14 February 2012).

Thomas H. Thornburg, Batson v. Kentucky's *Impact on Peremptory Challenges in North Carolina Courts* (Chapel Hill, North Carolina: School of Government, The University of North Carolina at Chapel Hill, Special Series No. 7, August 1992).

JURY MANAGEMENT IN CAPITAL TRIALS

Thomas H. Lock
Senior Resident Superior Court Judge, District 11-B

I. Orientation and Jury Excuses

A. Defendant's right to be present at all stages of capital trial
B. Attachment of right to be present
C. Recordation of conferences with prospective jurors
D. Orientation of jurors in capital trials

1. General orientation common to all cases
2. Hearing requests for excusal/deferment
3. Additional orientation remarks specific to capital trials (Handout)

E. Practical Suggestions

1. Hear excuses in advance when possible
2. Dealing with medical issues
3. Discussion of requests with counsel
4. Making the determination
5. Discussions between defense counsel and defendant

II. Jury Selection Procedure

A. Individual or group voir dire?

1. NCGS 15A-1214(j)
2. Advantages of group voir dire
3. Advantages of individual voir dire
4. Modified or blended procedure

B. Jury questionnaire?

1. Within judge's discretion
2. Advantages of questionnaire

C. Division of venire into panels

1. Size of panels
2. Release of panels not being questioned
3. Last juror in each panel?

a. NCGS 15A-1214(a)
b. Practical suggestions

D. Alternates and peremptory challenges

1. Number of alternates
2. Number and exercise of peremptory challenges

III. Voir Dire

A. Scope of voir dire
B. "Death qualification" of jurors
C. "Stakeout questions"

1. Definition of stakeout questions
2. Proper questions
3. Improper questions

D. "Rehabilitation" of jurors
E. *Batson* challenges

1. *Batson v. Kentucky* holding
2. Challenges under North Carolina state constitution
3. Recording race of prospective jurors
4. Three-step analysis
5. Factors in determining prima facie case of discrimination
6. Rebuttal (showing of race-neutral reasons)
7. Surrebuttal (inadequate or pretextual proferred reasons)
8. Remedy by trial court for *Batson* violation

IV. Juror Misconduct

A. Admonitions to jury
B. Misconduct during trial
C. Misconduct during deliberations
D. Mistrial

1. Chapter 15A, Article 62
2. Capital cases

CAPITAL CASE
INTRODUCTORY REMARKS

Ladies and Gentlemen, as you have been informed, the Defendant is accused of murder in the first degree. This is a crime for which the death penalty may be imposed. In the event that the Defendant is convicted of first degree murder, the Court will conduct a separate sentencing proceeding to determine whether the Defendant should be sentenced to death or to life imprisonment (without parole).

This proceeding will be conducted, if necessary, as soon as practical after any verdict of first degree murder is returned.

If that time comes, the sentencing jury will receive separate sentencing instructions. However, prior to that time, the only concern of the trial jury is to determine whether the Defendant is guilty of the crime charged or of any lesser included offenses or is Not Guilty.

Ladies and Gentlemen, the State contends that the Defendant will be convicted by the jury of first degree murder; the State contends that the same jury that is being selected now will thereafter be required to participate in a sentencing hearing to recommend punishment.

On the other hand, the Defendant asserts that he is not guilty of this charge of first degree murder; that he will not be convicted of this charge of first degree murder; and that the jury will NOT be required to participate in a sentencing hearing.

As I have instructed you, the Defendant is presumed innocent. At this point, no one can know what the outcome of this case will be. Therefore, the entire procedure must be explained to you during jury selection.

Because the jury selected in this case MAY be called upon to take part in a sentencing proceeding if a verdict of guilty of first degree murder is returned, I must explain to you at this point in very general terms the procedures that would be involved at such a hearing. And you will be asked about your ability and willingness to follow the legal procedures that I will outline, in the event you sit on the jury and those procedures become necessary.

If a sentencing proceeding becomes necessary, the law would require that you give consideration to BOTH penalties, notwithstanding your personal views regarding capital punishment. Please feel free to answer these questions honestly, openly and freely. There are no right or wrong answers to these questions and as far as jury selection is concerned, there is no right way or wrong way to feel about the subject of the death penalty.

The law does not compel any citizen to have any specific opinion on any subject, including this one.

The purpose of any question that will be asked of you will be to determine whether or not you can be entirely fair to both sides in this trial and whether or not you will impartially apply the law to the facts of this case.

In responding to the questions which will be asked of you concerning the death penalty or life imprisonment (without parole) as potential punishment in this matter in the event, but only in the event, that the defendant is found guilty of first degree murder, you should keep in mind your duty as jurors as I have explained it to you.

At this point I would like to discuss with you in somewhat greater detail the proceeding that will be commenced if, but only if the Defendant is found guilty of first degree murder.

If that occurs, the Court will conduct a proceeding to determine the sentence which will be imposed. That proceeding will be commenced as soon as practicable after any verdict of guilty of first degree murder is returned, and that proceeding will be conducted before the same jury that heard the first stage of the trial.

At that proceeding, both the State and the Defendant will have the opportunity to present evidence as to the appropriate sentence to be imposed, and both the State and the Defendant will have the opportunity to present their arguments and contentions as to what the appropriate sentence should be.

After the evidence and the arguments of counsel, the Court will give detailed instructions to the jury as to how they should proceed to make their determination as to what sentence to enter.

The Court will instruct the jury at that time that the State continues to have the burden of proof to prove to the jury that three issues have been proved. The State much prove each and every one of those issues beyond a reasonable doubt. The Court will

further instruct the jury that if the State does prove each and every one of those issues beyond a reasonable doubt, then the jury has the duty under the law to recommend that the Defendant be sentenced to death. Such recommendation is binding on the Court. The Court would then sentence the Defendant to death.

The jury would be instructed at any such proceeding that if the State fails to prove any one or more of those three issues beyond a reasonable doubt, then the jury's duty would be to recommend that the Defendant be sentenced to life imprisonment (without parole). Such recommendation is binding on the Court, and in that event, I would sentence the Defendant to life imprisonment (without parole).

If a sentencing proceeding does become necessary in this case, I will give the jury much more detailed instruction as to how it should consider the issues, but for our present purposes, I will tell you briefly that the three things the State must prove beyond a reasonable doubt before you would recommend that the Defendant be sentenced to death are these:

First, that one or more aggravating circumstance or circumstances exist. An aggravating circumstance is one of a very specific number of circumstances which our law recognizes might make any murder more deserving of the death penalty. Under our law, not every murder is deserving of the death penalty. If the State does prove the existence of one or more such circumstances to the jury beyond a reasonable doubt, the

jury would proceed to a consideration of the second issue. But if the State fails to prove that such a circumstance exists, the jury would cease its deliberation at that point and recommend that the Defendant be sentenced to life imprisonment (without parole).

Secondly, the State must prove beyond a reasonable doubt that any mitigating circumstances found by the jury, or by any single member of the jury, are insufficient to outweigh any aggravating circumstance. A mitigating circumstance is any circumstance of the Defendant's life, or character, or record, or any circumstance of the offense, which any juror finds may make the murder less deserving of the ultimate punishment. If the State proves this to the jury beyond a reasonable doubt, the jury would then be required to go on to a consideration of issue number three. If the State fails to prove this beyond a reasonable doubt, the jury must cease its deliberations at that point and recommend that the Defendant be sentenced to life imprisonment (without parole).

Third, the State must prove beyond a reasonable doubt that the aggravating circumstance or circumstances found, when considered with any mitigating circumstance or circumstances found, is, or are, sufficiently substantial to call for the imposition of the death penalty. If the State fails to prove this beyond a reasonable doubt, the jury must recommend that the Defendant be sentenced to life imprisonment (without parole).

If the State does prove this third issue, as well as the previous two, the jury MUST recommend that the Defendant be sentenced to death. I will then sentence the Defendant to death.

I want to emphasize that if a sentencing proceeding does become necessary in this case, the Court will deliver much more detailed instructions about the law to the sentencing jury. These preliminary instructions are given in the hope that you will have some general understanding of what may be involved, so you in turn can answer our questions about your ability to take part in this trial as a fair and impartial juror.

You will understand that if a sentencing proceeding does become necessary, the law would require any juror selected to take part in that proceeding, be able to fairly consider both possible penalties, both the death penalty and the sentence of life imprisonment (without parole), and apply the law properly to determine the appropriate punishment.

I say again, there is no right way or wrong way to answer about the issue of capital punishment. But I do need to emphasize that we must be able to determine what your position on this issue is—whatever it is—in order to make a determination of your service in this case.

So please think about those matters, and answer the questions on this issue the attorneys and the court will be asking of you when you are in the jury box.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF COLUMBUS	FILE NO: 06 CRS 6250-51; 6256-67

STATE OF NORTH CAROLINA	)	
	)	
V.	)	ORDER REGARDING
	)	JURY EXCUSES
DANNY LAMONT THOMAS	)	

This matter having been considered by the undersigned judge of the superior court of Columbus County and it appearing to the court: that the defendant stands charged *inter alia* with four counts of capital first degree murder that have been joined for trial; that this trial is scheduled for a special session of Columbus County Criminal Superior Court beginning 28 February 2011; that the jury selected in this cause shall be chosen from those jurors summoned to appear on 28 February 2011, 14 March 2011, 28 March 2011, and, if needed, 11 April 2011; and that no potential juror for this special session should be excused or deferred except by the trial court in the presence of the defendant and his attorneys;

It is therefore ORDERED:

1. No judge or other judicial official other than the undersigned shall excuse or defer any potential juror summoned for this trial on those dates set forth above.

2. Excuses and requests for deferment from those jurors summoned to appear on 28 February 2011 shall be heard before the undersigned in the presence of defendant and all counsel in the Superior Court of Columbus County on 18 February 2011 at 9:30 am.

3. Excuses and requests for deferment from those jurors summoned to appear on other dates shall be heard at other times to be scheduled by this court after conferring with all counsel.

4. The Clerk of the Superior Court of Columbus County shall forward a copy of this order to the Judges of the District Court of the 13th Judicial District, to the Sheriff of Columbus County, and to all counsel in this cause.

This the 14th day of January entered *nunc pro tunc* this _____day of January 2011.

_____

THOMAS H. LOCK
Superior Court Judge

NOTE: The procedures described in this order **ARE NOT** required by case law (See *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995)), but may prove useful in a high-profile case in a rural or small county.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF COLUMBUS	FILE NO: 06 CRS 6250-51; 6256-67

STATE OF NORTH CAROLINA	)	
	)	AMENDED
V.	)	ORDER REGARDING
	)	JURY EXCUSES
DANNY LAMONT THOMAS	)	

With the consent of the defendant and all counsel expressed in open court on 27 January 2011, the prior order of this court entered on or about 20 January 2011 regarding the hearing of jury excuses from those jurors summoned to appear on 28 February 2011, 14 March 2011, 28 March 2011, and, if needed, 11 April 2011 for the defendant's trial scheduled for the special session of Columbus County Criminal Superior Court beginning 28 February 2011 hereby is amended as follows:

1. Excuses and requests for deferment from those jurors summoned to appear on 14 March 2011 shall be heard before the undersigned in the presence of defendant and all counsel on 4 March 2011 at 9:30 am.

2. Excuses and requests for deferment from those jurors summoned to appear on 28 March 2011 shall be heard before the undersigned in the presence of defendant and all counsel on 18 March 2011 at 9:30 am.

3. Excuses and requests for deferment from those jurors summoned to appear on 11 April 2011 shall be heard before the undersigned in the presence of defendant and all counsel on 1 April 2011 at 9:30 am.

4. The Honorable Jerry A. Jolly, Chief District Court Judge of the 13th Judicial District, may excuse persons summoned for jury duty in this cause who are disqualified to serve pursuant to the provisions of NCGS 9-3.

5. Judge Jolly shall keep a record of the excuses he grants under this order so that those excuses and the reasons therefor may be entered into the record in this cause.

6, The Clerk of the Superior Court of Columbus County shall forward a copy of this order to the Judges of the District Court of the 13th Judicial District, to the Sheriff of Columbus County, and to all counsel in this cause.

This the 27th day of January entered *nunc pro tunc* this _____day of January 2011.

_____
THOMAS H. LOCK
Superior Court Judge

NOTE: The procedures described in this order **ARE NOT** required by case law (See *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995)), but may prove useful in a high-profile case in a rural or small county.

CHAPTER 15-A
ARTICLE 62, GENERAL STATUTES OF NORTH CAROLINA

15A-1061. Mistrial for prejudice to defendant.

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not make or join in the motion.

15A-1062. Mistrial for prejudice to the State.

Upon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State's case and the misconduct was by a juror or the defendant, his lawyer, or someone acting at the behest of the defendant or his lawyer. If there are two or more defendants, the mistrial may not be declared as to a defendant who does not join in the motion of the State if:

(1) Neither he, his lawyer, nor a person acting at his or his lawyer's behest participated in the misconduct; or
(2) The State's case is not substantially and irreparably prejudiced as to him.

15A-1063. Mistrial for impossibility of proceeding.

Upon motion of a party or upon his own motion, a judge may declare a mistrial if:

(1) It is impossible for the trial to proceed in conformity with law; or
(2) It appears there is no reasonable probability of the jury's agreement upon a verdict.

15A-1064. Mistrial; finding of facts required.

Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

15A-1065. Procedure following mistrial.

When a mistrial is ordered, the judge must direct that the case be retained for trial or such other proceedings as may be proper.

Courts
exhibit 15

Your Honor,

I have concerns about a Juror who will not deliberate at all. This Juror is not willing to apply the law to weigh items in Issue 3. Thought you should know before deliberations end.

Anonymous

Courts
exhibit 14

Your Honor,

I have no idea if anything can be done at this point but, we have 1 juror who will not verbally deliberate with us. I have asked this juror "how do you see that this outweighs that" and the response was "I can't do like you people & weigh this, this is my decision & I'm not changing it". It is my understanding that as a juror that is what the law tells me to do. o weigh. I have asked this juror also to "just tell me how you see this situation, maybe I'm missing something you didn't" the juror replied "this is my decision & I'm not changing it". I also thought according to the law that we were to verbally deliberate & I don't feel this juror is doing that, so much so that this person slept in the chair Saturday. If there is anything you can do to help us I would appreciate it very much. Thank you for your time.