

# Talking with Potential Jurors about Race

EMILY COWARD, NC REN PROJECT ATTORNEY  
PUBLIC DEFENSE EDUCATION GROUP  
UNC SCHOOL OF GOVERNMENT

1

## Road Map

- (1) Why should you address race during voir dire?
- (2) When should you address race during voir dire?
- (3) How can you defend your right to do so?
- (4) What tools do you need in your toolkit?
- (5) How can you protect jurors from challenges for cause and peremptory strikes?

2

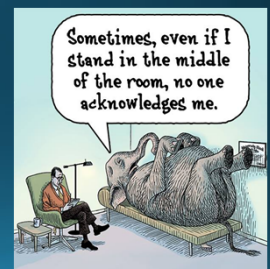
## WHY

should you address race during voir dire?

3

## Why do people avoid the elephant in the room?

- Concerns about making jurors uncomfortable
- Lack of experience and confidence discussing race
- "That won't fly in my jurisdiction"
- Concern that lawyer's own racial, ethnic, or gender identity will interfere with ability to connect with jurors on this topic
- Worry that judge will not permit this line of questioning
- Perception that race is a historical phenomenon that is not relevant today
- A belief that "color-blindness" is the preferred approach



4

Why is it important to discuss race with jurors, even if it scares you?

**FEEL THE FEAR  
AND DO IT  
ANYWAY**

5

What the heck does “making race salient” mean?

When race issues are brought to the forefront of a discussion or “made salient,” the influence of stereotypes and implicit biases on decision-making recedes.



6



7



*should you discuss race during voir dire?*

8

Do the jurors' racial attitudes matter in a case where:

**all  
of the  
above.**

9

Q: How do I know when I have a case that involves issues of race?

A: When you have a case.

-Tye Hunter, Attorney and Former Executive Director of the Center for Death Penalty Litigation

*In other words, you should identify the racial issues—both the obvious and the subtle ones—in every single case.*

10

**HOW**

*can you defend your right to do so?*

11

**The North Carolina Supreme Court has long recognized a right to voir dire on racial attitudes.**

- *State v. McAfee*, 64 NC 339, 340 (1870): Reversible error where trial judge disallowed voir dire on racial bias.
  - Early US Supreme Court opinion relies on *McAfee* holding: *Aldridge v. U.S.*, 283 U.S. 368 (1931). Known for refusing to inquire about racial bias, who was a Black and accused of interracial crime of violence.
- The NCSC has also held that the trial judge retains discretion to determine the extent of questioning on racial attitudes. *State v. Robinson*, 330 N.C. 1, 12–13 (1991).
- NCSC recently reversed a conviction where trial judge prohibited this line of questioning. *State v. Crump*, 376 N.C. 375 (2020).

12

### ***Pena-Rodriguez v. Colorado* supports your right to voir dire on race**



13

### **When is voir dire on the subject of race “constitutionally required”?**

- When “racial issues [are] inextricably bound up with the conduct of the trial.” (*Ristaino v. Ross*, 424 U.S. 589, 597 (1976)):
- Interracial capital crime of violence (*Turner v. New York*, 476 U.S. 28 (1986) (plurality))
- Defense theory of selective prosecution based on race/civil rights (*Ham v. South Carolina*, 409 U.S. 524 (1972))
- Reversible error to prevent defense counsel from asking about race in such circumstances; no showing of prejudice necessary.

14

### **What about in all other cases?**



15

### ***State v. Crump***



16

### State v. Crump – NC Court of Appeals



17

### State v. Crump - NC Supreme Court

#### REVERSED

- Holding: "court abused its discretion and prejudiced defendant by restricting all inquiry into prospective jurors' racial biases and opinions regarding police-officer shootings of black men."
- Dissent disagreed that restriction was absolute and would find no error.

18

### Why did the NCSC reverse?

- Three rejected questions = rejected line of questioning
- Prejudicial error
  - COA – narrow/technical
  - NCSC – broad account of context
- No substitute for questions on race/implicit bias/shootings
- Racial bias raises unique concerns



19

### Key Takeaways from State v. Crump

Case highlights importance of competency in this area.

Post- *Pena-Rodriguez* and *Crump*, IAC for failure to explore racial bias?

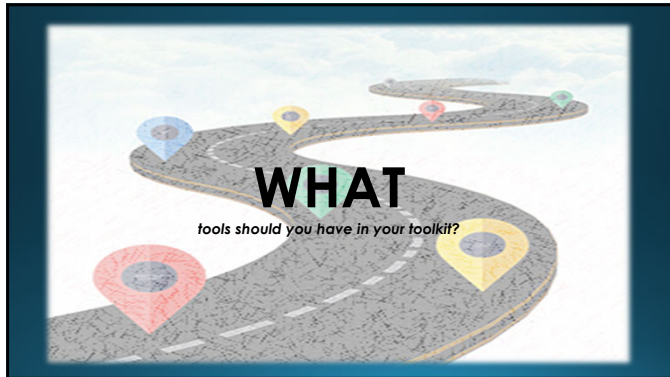
More reversals if constitutional protections are invoked?

Value of "making race salient"

- Second time in 2020 the NCSC highlighted this concept.
- Both cases cited scholarship of Georgetown Law Professor Cynthia Lee.

Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 93 N.C. L. REV. 1555, 1563 (2013)

20



21

**Prepare questions ahead of time! Reflection questions to help you prepare to discuss race during voir dire:**

- What scares me about this case?
  - That a jury might convict my client because of a racial stereotype
- What does a juror need to believe in order for us to win?
  - That people make implicit assumptions based on race
  - People "see" weapons in the hands of Black men even when they're not there
- What do I need to know about a juror to determine if they are open to our theory of the case?
  - Do they understand the concept of implicit bias?

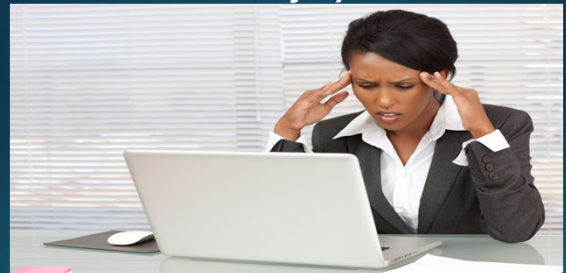
22

Preparing to discuss issues of race during voir dire:

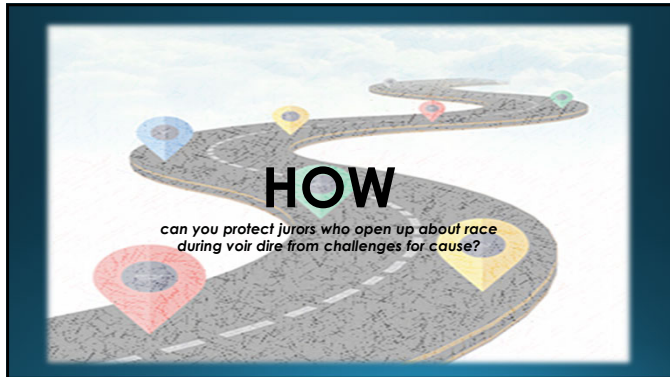


23

**But what do I actually SAY when I'm in front of the jury???**



24

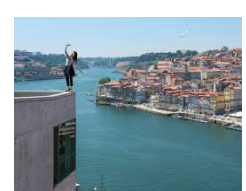


25



26

**Still think it's too risky? The real risk lies in avoiding the subject.**



- Goal is to prevent convictions based on stereotypes.
- Voir dire on race:
  - Allows you to de-select jurors whose responses suggest that they would not be open to your theory of the case.
  - Makes race salient and cues seated jurors to guard against reliance on bias/stereotypes.
- I can assist in developing your plan for addressing race during voir dire – don't hesitate to reach out!

27