

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

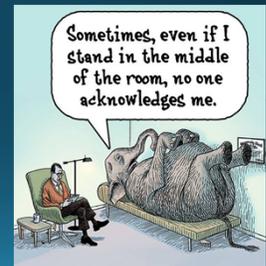
WHY

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



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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



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. 306 (1931). *Kipps* refused to inquire about racial bias, where defendant was 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. Murray*, 476 U.S. 28 (1986) (plurality))
- Defense theory of selective prosecution based on race/civil rights violation (*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?

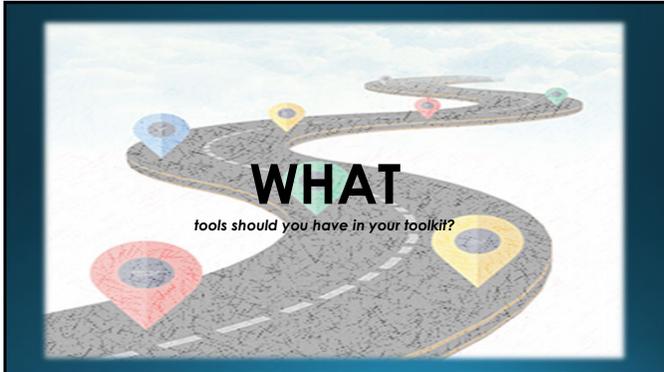
More reversals if constitutional protections are invoked?

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