

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

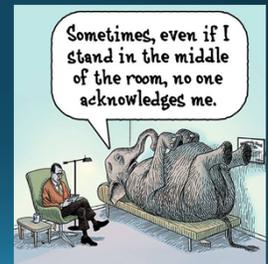
WHY

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



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



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). Relying on *McAfee* to refuse to inquire about racial bias, where the 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?

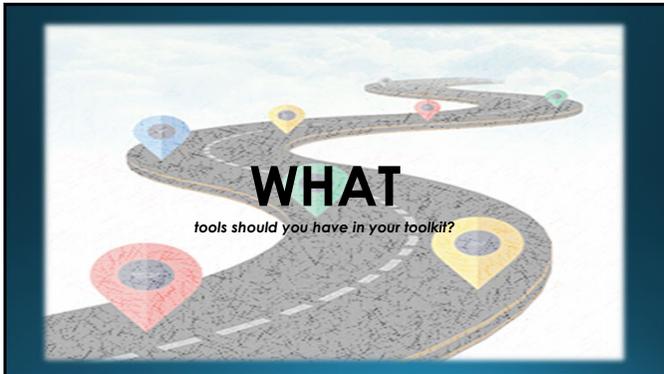
More reversals if constitutional protections are invoked?

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