**TALKING WITH POTENTIAL JURORS ABOUT RACE**

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**I. OVERVIEW**

Racial bias in the jury system is a “familiar and recurring evil that, [] left unaddressed, [] risk(s) systemic injury to the administration of justice.”[[1]](#footnote-1) Discovering the racial attitudes of potential jurors during jury selection is an “important mechanism[] for discovering bias,” and therefore a critical safeguard against this pernicious problem.[[2]](#footnote-2) In this manuscript, I will address why, when, and how defense attorneys should discuss race and racial bias with potential jurors during voir dire, and explore the legal protections applicable to voir dire on the subject of race.

**II. WHY SHOULD YOU ADDRESS RACE DURING VOIR DIRE?**

Champions of racial justice-oriented criminal defense—including ACLU Deputy Legal Director Jeffery Robinson, Jonathan Rapping of Gideon’s Promise, Dean Andrea Lyon of Valaparaiso Law School, and the late and legendary San Francisco Public Defender Jeff Adachi—agree that “[d]uring voir dire, defense counsel should [discuss] the problem of race bias and identify those jurors who appreciate its influence.”[[3]](#footnote-3) However, when I informally poll North Carolina criminal defense attorneys during sessions on this topic, I discover that very few of them have ever addressed race during voir dire. Reasons commonly cited for avoiding the topic of race during voir dire include the following:

* Concerns about making jurors uncomfortable; pessimism about jurors’ willingness to discuss race honestly;
* Lack of experience and confidence discussing race generally;
* “That won’t fly in my jurisdiction” (aka “the jurisdictional defense”);
* Concern that the lawyer’s own racial, ethnic, or gender identity will interfere with their ability to connect with jurors on this topic;
* Lack of training/encouragement by supervisors/peers, “no one else is doing it”;
* Worry that the judge will not permit this line of questioning;
* Unfamiliarity with legal protections applicable to voir dire on race;
* Perception that race is a historical phenomenon that is not relevant today;
* Impression that “color-blindness” is a norm that members of the bar are expected to uphold and a belief that all discussions of race amount to “playing the race card,” which is frowned upon/discouraged.[[4]](#footnote-4)

These worries are common, and they are real. However, they are outweighed by the critical importance of uncovering racial attitudes during voir dire, which will enable you to:

* Discover views on race that will impact potential jurors’ assessment of evidence;[[5]](#footnote-5)
* Discover which jurors appreciate that race matters and will be bold enough to discuss race thoughtfully during deliberations;[[6]](#footnote-6)
* Discover how potential jurors respond to uncomfortable topics;
* Legitimize race/racial bias as a topic worthy of consideration and give jurors implicit permission to consider and discuss race/racial bias themselves;
* Improve your ability to exercise intelligent strikes/challenges;
* Avoid relying on stereotypes yourself;
* “Make race salient” and increase the likelihood that jurors will think critically about race and avoid reliance on stereotypes/bias.[[7]](#footnote-7)

If you avoid the issue, you may increase the likelihood that bias will influence deliberation. You can build your competence in this area by reviewing the resources listed below, watching demonstrations of voir dire on race, writing out your questions ahead of time, and, of course, practicing!

**III. WHEN SHOULD YOU ADDRESS RACE DURING VOIR DIRE?**

Former CDPL Director Tye Hunter once asked a group of attorneys, “How do you know if you have a case that involves race?” We thought for a moment until we realized it was a trick question. The answer is, “If you have a case.” In other words, you should be thinking about the ways in which racial or ethnic stereotypes or biases may harm your client in *every single case*, not simply the cases with obvious racial overtones, such as an interracial crime of violence. Since implicit and explicit racial biases can influence the perceptions of guilt, you have a responsibility to keep people off your client’s jury whose decision-making is particularly susceptible to such biases. If you fail to address race during jury selection, you are hamstrung in your ability to protect your client from racial bias on her/his jury.

Many, if not all, cases tried in front of a jury risk triggering racialized responses on the part of jurors. Here is a non-exhaustive list of scenarios in which a juror’s racial attitudes or biases could influence their assessment of the evidence presented:

* All the key players in the case (the defendant, the victim, the police officers, and the witnesses) are Black;
* The defendant is married to a person of a different race;
* The defendant and the victim are White, and the arresting officer and witnesses are Black;
* The alleged crime occurred in a neighborhood that was recently the sight of a police shooting of an unarmed Black man;
* The officer stopped your client, at least in part, on the basis of her presence in a “high crime area”?
* Your client is an activist who speaks out on issues of racial justice;
* Your client is a Latinx resident of a rural area that, until recently, was nearly 100% White, and now has a growing Latinx community;
* Your client is White and lost his job at the local police department for complaining about discrimination against White officers;
* Your client is the only Black person in the courtroom.

Each of these scenarios, none of which is particularly unusual, involve racial dynamics that could trigger biased responses from jurors. While you may not decide to voir dire on race in all of these cases, you should consider doing so, and be prepared to do so, in every single case.

**IV. HOW SHOULD YOU ADDRESS RACE DURING VOIR DIRE?**

There is no one correct approach to voir dire on race. The following tips will help you to develop your own unique approach to this subject.

1. **PREPARING TO DISCUSS RACE WITH JURORS: A STEP-BY-STEP APPROACH**
2. **Reflection Questions to Use when Preparing Voir Dire**

As with all other voir dire questions, voir dire on race needs to be “tailored to your factual theory of defense in each individual case.”[[8]](#footnote-8) Before drafting your questions about race, consider asking yourself the following questions. Your answers will help you identify what information you are seeking from potential jurors and craft questions aimed at eliciting that information. Imagine, for example, that your client is a Latino man charged with sexually assaulting a White woman.

* 1. **What scares me about this case?**

*e.g. That a jury might convict my client based on stereotypes of Latino men or immigrants.*

* 1. **What biases or stereotypes could lead a juror to vote to convict my client?**

*e.g. That Latino men are more likely to sexually assault women.* *That White women who speak English are more credible than Latino men who speak Spanish.*

* 1. **What does a juror need to believe in order for us to win?**

*e.g. That eyewitness identification is unreliable and that cross-racial eyewitness identification is even more unreliable. That my client’s ethnic identity and language doesn’t make him any less credible than the victim.*

* 1. **What do I need to know about a juror to determine if they are open to our theory of the case?**

*e.g. Whether they are likely to jump to conclusions about the alleged behavior of my client because he is Latino, whether they are open to the possibility that a White victim could sincerely believe that she has identified her assailant when, in fact, she is mistaken.*

1. **Tools in your Toolkit**
	1. **Move for extra time for voir dire.** When you explore race with potential jurors, voir dire takes longer. For this reason, you may consider filing a motion for extra time to explore sensitive topics during voir dire to help prepare the court for a lengthier voir dire. Also, as you all know, feathers may get ruffled when you bring up the subject of race. As CDPL Staff Attorney Johanna Jennings has observed, if there’s going to be an argument about your plan to discuss race during voir dire, there is some value to getting that argument over with before jury selection begins. By the time the jurors enter the courtroom, the tension over the topic may have dissipated somewhat, and, hopefully, your right to discuss race with potential jurors will be recognized by both the judge and the prosecutor. *See* Jeff Adachi’s Sample [Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans](http://ncids.com/pd-core/wp-content/uploads/2013/05/Motion-to-Voir-Dire-on-Race.pdf).
	2. **Move for individual voir dire.** Potential jurors may be more willing to speak freely about a sensitive topic like race when questioned out of earshot of other jurors. Additionally, exploring race with potential jurors as a group may expose panelists to potentially disqualifying, prejudicial information. For these reasons, some attorneys who discuss race with potential jurors find it more effective to question jurors about racial attitudes individually. For an sample motion, *see* Johanna Jennings’s [Motion for Individual Voir Dire on Sensitive Subjects](http://renapply.web.unc.edu/files/2018/04/Motion-for-Individual-Voir-Dire-J-Jennings_Redacted.pdf). Again, even if this motion is denied, filing and arguing it allows you to inform the judge and the prosecutor that you intend to get into the topic of race during voir dire before jury selection begins.
	3. **Questionnaires.** Written questionnaires including questions about race may result in more revealing answers.[[9]](#footnote-9) Additionally, written answers can serve as useful jumping off points for follow up questions during voir dire. Sample questionnaire questions on race can be found in ACLU Deputy Legal Director Jeffery Robinson’s article, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf). The questionnaire used in the trial of Derek Chauvin for the killing of George Floyd can be found [here](https://www.nytimes.com/interactive/2021/03/07/us/george-floyd-derek-chauvin-jury-questions.html).
	4. **Move to Show Jurors Implicit Bias Video.** Some courts use videos to educate jurors on the subject of implicit bias during jury orientation. If the potential jurors in your client’s case see an implicit bias video, you can ask them about responses to the video during voir dire and decrease the likelihood of successful objections to your questions about race and bias. At least two North Carolina Superior Courts – Buncombe County and Durham County – now routinely show jurors an adapted version of this [implicit bias video](http://www.wawd.uscourts.gov/jury/unconscious-bias) created for jury orientation in the US District Court for the Western District of Washington. The North Carolina Task Force for Racial Equity in Criminal Justice has recommended the use of an implicit bias video in North Carolina juror orientation,[[10]](#footnote-10) and a North Carolina Implicit Bias Juror Orientation Video is currently in production at the School of Government. A sample motion to show the Western District of Washington video described above is included in the materials for this program, along with a sample order granting the motion.
2. **How to Raise the Subject**
	1. **Creating the Conditions for a Discussion of Race.** Approach the subject of race intentionally and carefully; it should not be your first topic. Potential jurors, like all other people, generally appreciate a heads up before they asked sensitive or probing questions. You may try to get the jurors to introduce the topic themselves, (for example, “other than guilt, can you think of a reason someone might panic when questioned by police?”), or explicitly state that you are shifting gears to talk about race.

It can be helpful to name the discomfort that everyone feels when discussing race in a group of strangers. Acknowledge that it often makes people uncomfortable, including yourself. You may consider answering your own question to show you’re not asking them to do something you’re unwilling to do yourself.[[11]](#footnote-11) Reassure panelists that you’re not looking for any specific answers, and that there are no wrong answers. You are simply asking questions to help you determine if they are the right juror for this case.

* 1. **What sort of questions should you ask?** Your questions will vary depending on the facts of the case and your theory of the case. It goes without saying that direct questions about bias (i.e. “will racial bias influence your decision making in this case?”) are ineffective.[[12]](#footnote-12) After you’ve created the conditions for panelists to feel comfortable opening up, focus your questions on past, analogous behavior, stick with command superlative analog method, and avoid asking questions that will provoke defensiveness. For example, you may ask, “Tell us about the worst experience you (or someone close to you) ever had because someone stereotyped you (or someone close to you) bc of race.” Additional sample questions can be found in Jeff Robinson, Jill Otake, and Corrie Yackulic, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf), and our manual, [*Raising Issues of Race in North Carolina Criminal Cases,* Chapter 8](https://defendermanuals.sog.unc.edu/sites/default/files/pdf/20140457_chap%2008_Final_2014-10-28.pdf). For a further discussion of how to construct such questions, see Ira Mickenberg, [Voir Dire and Jury Selection](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf) 10 (training material presented at 2011 North Carolina Defender Trial School).
	2. **Responding to Potential Jurors’ Statements about Race.** When a juror answers a sensitive question relating to race or racial bias, thank them with almost over-the-top expressions of gratitude. This will encourage them to continue talking and send a message to other jurors that all views on race are welcome contributions to this conversation.[[13]](#footnote-13) Only by encouraging frank comments on race will you succeed in uncovering jurors’ views on race and discovering who to deselect from your client’s jury. Your goal in jury selection is not to change juror attitudes on race. Instead, it is to discover racial attitudes that can harm your client, and to remove people who hold such attitudes from your client’s jury.[[14]](#footnote-14)

**V. LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE ON RACE**

1. **LEGAL PROTECTIONS APPLICABLE TO VOIR DIRE GENERALLY**

“[P]art of the guarantee of a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.”[[15]](#footnote-15) North Carolina appellate courts have recognized that voir dire serves two basic purposes: 1) helping counsel determine whether a basis for a challenge for cause exists, and 2) assisting counsel in intelligently exercising peremptory challenges.[[16]](#footnote-16) As you prepare your voir dire questions on the subject of race, keep these at the forefront of your mind so that you are always ready to link your questions to the purposes of voir dire.

1. **THE NORTH CAROLINA SUPREME COURT HAS RECOGNIZED A RIGHT TO VOIR DIRE ON RACE**

The right to voir dire on race has a long history in North Carolina. In 1870, our state Supreme Court found reversible error where a trial judge disallowed voir dire on racial bias.[[17]](#footnote-17) In fact, North Carolina jurisprudence on this topic predates that of the US Supreme Court. An early US Supreme Court opinion relied in part on the *McAfee* ruling in reversing a conviction based on the court’s refusal to inquire into possible racial bias where the defendant was Black and accused of an interracial crime of violence.[[18]](#footnote-18) Both of these cases were decided before the U.S. Supreme Court cases clarifying the circumstances under which the right to voir dire on race is constitutionally protected. Those cases are discussed below.

1. **WHAT ARE THE CONTOURS OF THE CONSTITUIONAL RIGHT TO VOIR DIRE ON RACE?**

In the recent US Supreme Court case of *Pena-Rodrigruez v. Colorado*, Justice Alito summarized the court’s jurisprudence in this area as follows: “voir dire on the subject of race is constitutionally required in some cases, mandated as a matter of federal supervisory authority in others, and typically advisable in any case if a defendant requests it....Thus, while voir dire is not a magic cure, there are good reasons to think that it is a valuable tool.”[[19]](#footnote-19) This is powerful language that you should be quoting any time your attempt to address race during voir dire is met with skepticism. Practice this response in advance: *“Your honor, according to Justices Alito, Thomas, and Roberts, voir dire on race is ‘constitutionally required in some cases’ and ‘typically advisable in any case if the defendant requests it.’ In this case it’s constitutionally required because….”.* The section below will help you finish that sentence.

1. **Constitutionally Guaranteed Right to Voir Dire on Race when Case Involves “Special Factors”**

A defendant has a constitutional right to ask questions about race on voir dire when “racial issues [are] inextricably bound up with the conduct of the trial.”[[20]](#footnote-20) For example, in *Ham v. South Carolina*, 409 U.S. 524 (1973), the U.S. Supreme Court held that a Black defendant, who was a civil rights activist and whose defense was that he was selectively prosecuted for marijuana possession because of his civil rights activity, was entitled to voir dire jurors about racial bias. In *Ristaino v. Ross*, 424 U.S. 589, 597 (1976), the Court held that the Due Process Clause does not create a general right in non-capital cases to voir dire jurors about racial prejudice, but such questions are constitutionally protected when cases involve “special factors,” such as those presented in *Ham*.

In *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981), the Court held that trial courts must allow voir dire questions concerning possible racial prejudice against a defendant when the defendant is charged with a violent crime and the defendant and victim are of different racial or ethnic groups.[[21]](#footnote-21)

Any time your attempt to voir dire on race is met with objection, you should articulate the “special factors” that make such questions necessary and constitutionalize your asserted entitlement to voir dire on race. As explained in *Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion), special factors triggering constitutional protection for the right to voir dire on race are present whenever “there is a showing of a ‘likelihood’ that racial or ethnic prejudice may affect the jurors.”[[22]](#footnote-22) Given that the boundaries of the “special factors” category defy precise definition, you should be able to articulate such factors whenever you have reason to believe that racial attitudes or racial bias could influence the evaluation of the evidence in your client’s case.

1. **What About in All Other Cases?**

In other cases, courts have held that whether to allow questions about racial and ethnic attitudes and biases is within the discretion of the trial judge.[[23]](#footnote-23) Undue restriction of the right to voir dire is error.[[24]](#footnote-24) If you encounter a judge who believes the issue of race is not relevant to your client’s case, link your questions to the purposes of voir dire and present scholarly research concluding that “juror racial bias is most likely to occur in run-of-the mill trials without blatantly racial issues.”[[25]](#footnote-25)

1. **Even in the Absence of a Constitutional Claim, the North Carolina Supreme Court Recently Reversed a Conviction Based on the Court’s Improper Refusal to Permit Voir Dire on Race.**

The North Carolina Supreme Court recently confronted this issue in *State v. Crump*, 376 N.C. 375 (2020), where a Black man was involved in a shootout and car chase with police officers and convicted on charges including armed robbery, kidnapping, assault with a deadly weapon with intent to kill, and assault of law enforcement officer with a firearm. During jury selection, the trial judge sustained objections to the defense attorney’s questions about race and bias, ruling that they were impermissible “stake out” questions. The defendant preserved an objection to the judge’s ruling but did not constitutionalize his objection. For this reason, the appellate courts reviewed the judge’s refusal to permit these questions for abuse of discretion and prejudice rather than as a constitutional question. Nevertheless, even under this standard, the majority in *Crump* concluded that the trial “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,” and reversed the defendant’s conviction. *Crump*, 376 N.C. at 393.

There are several key takeaways from *State v.* *Crump*. Again, in this case, the defendant did not argue that, because of the presence of “special factors,” he had a constitutional right to explore racial bias during voir dire. For this reason, the appellate court did not engage consider whether such factors gave rise to a constitutional right to voir dire on race. In future cases, defendants should constitutionalize these objections to invoke even greater protection of the right to voir dire on race. Also, the majority held that by rejecting three questions on race, implicit bias, and officer shootings of civilians, the court demonstrated a total refusal to allow appropriate inquiry on a relevant topic. In the prejudice analysis, the North Carolina Supreme Court departed from the narrow approach taken by the Court of Appeals, treating the question as a broad one that accounted for the number of ways in which potential jurors’ racial biases could “fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty.” The court held that questions regarding attitudes toward law enforcement officers were no substitute for the missed opportunity to explore attitudes on race and officer shootings of Black men. Finally, the court held that the defendant does not need to exhaust his peremptory strikes to preserve this claim.

1. **How Can you Protect Jurors Who Open up About Race During Voir Dire from Challenges for Cause?**

What should you do if a juror opens up on the subject of race, expresses opinions that make you think they’d be a great juror in your client’s case (for example, “I do have concerns about the practice of racial profiling”), and the prosecutor attempts to strike them for cause? In such a case, you can work to elicit a commitment on the part of the juror to keep an open mind, put their biases aside, and follow the law. Several North Carolina appellate opinions confirm that jurors expressing biases are competent to serve, so long as they commit to basing their judgments on the facts of the case. “The operative question is not whether the prospective juror is biased but whether that bias is surmountable with discernment and an obedience to the law…”.[[26]](#footnote-26) Additional support for the argument that this principle should also apply to jurors who express concerns about law enforcement can be found in [*Commonwealth v. Quinton K. Williams*](https://www.mass.gov/files/documents/2019/02/13/12549.pdf), in which the Massachusetts Supreme Judicial Court recently held that a juror cannot be struck for cause for expressing her belief that “the system is rigged against young, African American males.”

**V. TALKING TO JURORS ABOUT RACE: ADDITIONAL RESOURCES AND PUBLICATIONS**

[*Jury Selection and Race: Discovering the Good, the Bad, and the Ugly*](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf) by Jeff Robinson. In this piece, ACLU Deputy Legal Director and veteran criminal defense attorney Jeff Robinson explains the importance of discussing race with jurors and includes several pages of specific questions and techniques that have proven effective at getting jurors to share opinions about this sensitive subject. It also contains a memorandum of law in support of a motion for individual voir dire, sample jury instructions on racial bias, and a sample legal argument in opposition to the introduction of a defendant’s immigration status.

The Northwestern Law Review published three articles addressing the subject of discussing race with jurors. [*Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1011&context=nulr_online) was written by St Louis County Deputy District Public Defender Patrick C. Brayer. In it, he reflects on discussing race during voir dire in a trial that occurred just days after the killing of Michael Brown against the backdrop of protests on the streets and at the courthouse. In [*Race Matters in Jury Selection*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1013&context=nulr_online), Peter A. Joy argues that lawyers need to discuss the topics they fear the most – including race – during voir dire, and provides practical tips for doing so. He explains why it was essential for Patrick C. Brayer to talk about race with his jury and why it is important for all defense attorneys: “If the defense lawyer does not mention race during jury selection when race matters in a case, racial bias can be a corrosive factor eating away at any chance of fairness for the client.” In [*The #Ferguson Effect: Opening the Pandora's Box of Implicit Racial Bias in Jury Selection*](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1012&context=nulr_online), Sarah Jane Forman sounds a cautionary note by examining the uncertain state of research into the efficacy of discussing implicit bias with jurors and argues that “unless done with great skill and delicacy,” this approach may backfire. Her piece reinforces the importance of careful preparation before diving into this challenging subject with potential jurors.

In [*A New Approach to Voir Dire on Racial Bias*](http://www.law.uci.edu/lawreview/vol5/no4/Lee.pdf) Cynthia Lee argues “that in light of the social science research on implicit bias and race salience, it is best for an attorney concerned about racial bias to confront the issue of race head on during jury selection.” Her law review article on the value making race salient at trial, [*Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*](https://scholarship.law.gwu.edu/faculty_publications/728/), was cited twice by the North Carolina Supreme Court in cases addressing attempts to raise race with jurors.

Chapter Eight of the SOG’s Indigent Defense manual, [*Raising Issues of Race in North Carolina Criminal Cases*](http://defendermanuals.sog.unc.edu/race/82-raising-race-during-jury-selection-and-trial)*,* contains a section on addressing race during jury selection and at trial, with subsections on identifying stereotypes that might be at play in your trial, considering the influence of your own language and behavior on jurors’ perceptions of your client, and reinforcing norms of fairness and equality.

Alyson Grine’s North Carolina Bar Journal Article, [*Questioning Prospective Jurors about Possible Racial or Ethnic Bias: Lessons From* Pena-Rodriguez v. Colorado](http://www.ncids.org/defender%20training/2018HighLevelFelony/QuestioningJurors.pdf), explores the Pena-Rodriguez decision in greater depth and helpfully dissects the case law governing the right to voir dire on race.

Mikah K. Thompson’s [*Bias on Trial: Toward and Open Discussion of Racial Stereotypes in the Courtroom*](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316402), helpfully collects resources and analysis related to discussions of race and racial bias during jury selection and during other stages of the criminal process.

1. *Pena-Rodriguez v. Colorado*, 580 U.S. \_\_\_, 2017 WL 855760 (2017). [↑](#footnote-ref-1)
2. *Id.*, slip op. at 16. [↑](#footnote-ref-2)
3. Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, The Champion, July 2013, at 46, 50; *see also* Jeff Robinson & Jodie English, Confronting the Race Issue During Jury Selection, The Advocate, May 2008; Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755 (2012); Jeff Adachi’s Sample [Motion to Allow Reasonable & Effective Voir Dire on Issues of Race, Implicit Bias & Attitudes, Experiences and Biases Concerning African Americans](http://ncids.com/pd-core/wp-content/uploads/2013/05/Motion-to-Voir-Dire-on-Race.pdf). [↑](#footnote-ref-3)
4. *See* Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, The Advocate, May 2008, at 57 (discussing some of these concerns). [↑](#footnote-ref-4)
5. Ira Mickenberg, [Voir Dire and Jury Selection](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf) 2 (training material presented at 2011 North Carolina Defender Trial School). [↑](#footnote-ref-5)
6. Discussing race during voir dire allows defenders to explore whether individuals are comfortable discussing issues of race and to consider striking “jurors who ignored the issue or who asserted that race did not matter.” Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 Yale L.J. 1484, 1526 (2013) (quoting L. Song Richardson, Professor of Law, Univ. of Iowa Coll. Of Law). [↑](#footnote-ref-6)
7. Implicit bias researchers have found that when race issues are brought to the forefront of a discussion or “made salient,” the influence of stereotypes and implicit biases on decision-making recendes. *See, e.g.,* Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009) (voir dire regarding racial bias appeared to diminish racial bias from assessments of guilt)l; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L.Rev. 1555 (2013; Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U. C. Irvine L. Rev. 843, 861 (2015); Jerry Kang, Implicit Bias: A Primer For Courts, National Center For State Courts 4–5 (National Center for State Courts 2009) (collecting evidence that “implicit biases are malleable and can be changed”). [↑](#footnote-ref-7)
8. Ira Mickenberg, [Voir Dire and Jury Selection](file:///C%3A%5CUsers%5CRaphael%5CAppData%5CLocal%5CTemp%5CIra%20Mickenberg%2C%20Voir%20Dire%20and%20Jury%20Selection%206%20%28training%20material%20presented%20at%202011%20North%20Carolina%20Defender%20Trial%20School%29) 6 (training material presented at 2011 North Carolina Defender Trial School). [↑](#footnote-ref-8)
9. Robert Hirschhorn. Jeff Robinson & Jodie English, [*Confronting the Race Issue During Jury Selection*](http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf), THE ADVOCATE, May 2008, at 57, 60. [↑](#footnote-ref-9)
10. *See* [North Carolina Task Force for Racial Equity in Criminal Justice 2020 Report](https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf) at 103, Recommendation #93. [↑](#footnote-ref-10)
11. Ira Mickenberg, [Voir Dire and Jury Selection](http://www.ncids.org/Defender%20Training/2011DefenderTrialSchool/VoirDire.pdf) 10 (training material presented at 2011 North Carolina Defender Trial School). [↑](#footnote-ref-11)
12. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L.Rev. 1555 (2013). [↑](#footnote-ref-12)
13. Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 Yale L.J. 1484, 1549 (2013) (quoting from telephone interview with Jeff Robinson). [↑](#footnote-ref-13)
14. “Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person’s lifetime, could be changed in the time allowed for jury selection in a criminal case? If we cannot change people’s opinions, we’d better get busy finding out what those opinions are, how strongly they are held, and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.” Jeff Robinson, Jill Otake, and Corrie Yackulic, [Jury Selection and Race: Discovering the Good, the Bad, and the Ugly](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/ls_sclaid_summit_01_jpr_race_and_jury_selection_materials.authcheckdam.pdf), Materials accompanying 2015 ABA Event. [↑](#footnote-ref-14)
15. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). [↑](#footnote-ref-15)
16. *State v. Wiley,* 355 N.C. 592 (2002); *State v. Anderson*, 350 N.C. 152 (1999); *State v. Brown*, 39 N.C. App. 548 (1979); *see also Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”). [↑](#footnote-ref-16)
17. *State v. McAfee*, 64 NC 339, 340 (1870); *see also State v. Williams*, 339 N.C. 1, 18 (1994) (voir dire questions aimed at ensuring that “racially biased jurors [will] not be seated on the jury” are proper); *State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge retains discretion to determine the scope of questioning on racial bias). [↑](#footnote-ref-17)
18. *Aldridge v. U.S*.,283 U.S. 308 (1931). [↑](#footnote-ref-18)
19. Slip op at 13 n.9, Alito, J., dissenting, (citing authorities) (emphasis added). [↑](#footnote-ref-19)
20. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976). [↑](#footnote-ref-20)
21. *See also Turner v. Murray*, 476 U.S. 28 (1986) (plurality opinion) (defendants in capital cases involving interracial crime have a right under the Eighth Amendment to voir dire jurors about racial biases). [↑](#footnote-ref-21)
22. *Id.*, (Brennan, J., concurring in part, dissenting in part). [↑](#footnote-ref-22)
23. *See State v. Robinson*, 330 N.C. 1, 12–13 (1991) (trial judge allowed defendant to question prospective jurors about whether racial prejudice would affect their ability to be fair and impartial and allowed the defendant to ask questions of prospective White jurors about their associations with Black people; trial judge did not err in sustaining prosecutor’s objection to other questions, such as “Do you belong to any social club or political organization or church in which there are no black members?” and “Do you feel like the presence of blacks in your neighborhood has lowered the value of your property . . . ?”). [↑](#footnote-ref-23)
24. *See State v. Conner*, 335 N.C. 618, 629 (1994) (holding that pretrial order limiting right to voir dire to questions not asked by court was error). [↑](#footnote-ref-24)
25. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 601 (2006). [↑](#footnote-ref-25)
26. *State v. Smith*, 352 N.C. 531, 545 (2000). *See also State v. Cummings*, 361 N.C. 438, 453-56 (2007); *State v. Moses*, 350 N.C. 741, 757 (1999); *State v. McKinnon*, 328 N.C. 668, 676-77 (1991) *State v. Whitfield*, 310 N.C. 608 (1984). [↑](#footnote-ref-26)