CHAPTER 5
CHALLENGES FOR CAUSE
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CHAPTER 5
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I. IN GENERAL

A. PURPOSE – PROTECT RIGHT TO IMPARTIAL JURY

The Sixth Amendment right to trial by jury guarantees the criminally accused a fair trial by a panel of impartial jurors. A criminal defendant has the right to an impartial jury under both the federal constitution and Article 1, § 13 of the Indiana Constitution. The process of challenging jurors for cause facilitates the removal of jurors who could not fulfill obligation to judge case in impartial manner and safeguards against impaneling jurors who do not meet applicable statutory requirements. Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546 (1965).

Oswalt v. State, 19 N.E.3d 241, 246 (Ind. 2014) (for-cause motions are available to exclude jurors whose views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the instructions given and the oath taken and thus violate the defendant's Sixth Amendment rights).

B. BURDEN ON CHALLENGER

Burden is on the challenger to demonstrate facts and circumstances raising presumption of partiality on part of juror. Burden more difficult when basis is implied bias of prospective juror.

Challenging party must satisfactorily demonstrate sufficient likelihood of prospective juror biased. Issue is whether juror can be impartial and find defendant not guilty if there is not sufficient evidence of guilt.

C. EITHER PARTIES OR TRIAL COURT MAY CHALLENGE JUROR

If established that prospective juror does not satisfy one of requirements, he is subject to challenge by either party or by the trial court on its own motion. Baird v. State, 604 N.E.2d 1170 (Ind. 1992).

The trial court has the authority to excuse a juror *sua sponte* for cause, but only when it exercises this discretion not in an illogical or arbitrary manner. Owens v. State, 659 N.E.2d 466 (Ind. 1995). See also Jones v. State, 540 N.E.2d 1228 (Ind. 1989).

D. CHALLENGE DISCRETIONARY WITH COURT

Trial court has discretion in deciding whether any prejudice brought to light through jury selection is severe enough to demand removal of a prospective juror by granting of challenge for cause. Trial judges are in best position to assess demeanor of prospective jurors as they answer questions proposed by counsel. Walker v. State, 607 N.E.2d 391 (Ind. 1993).

Baird v. State, 604 N.E.2d 1170 (Ind. 1992) (defendant excused because she felt some slight bias, even though her main concern about serving was absence from her teaching position).

E. WHEN PARTIES CAN MAKE CHALLENGE FOR CAUSE

Under the Indiana Jury Rules, a challenge for cause must be made before the jury is sworn or, upon a showing of good cause for the delay, before the jury retires to deliberate. Jury Rule § 17(a). See VI, Challenge For Cause During Trial, below.

F. STANDARD OF REVIEW

Whether juror's views would prevent or substantially impair juror's performance of duty in

accordance with court's instructions and juror's oath. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Underwood v. State, 535 N.E.2d 507 (Ind. 1989).

1. Decision illogical or arbitrary

Appellate courts will interfere only if decision is illogical or arbitrary. Woolston v. State, 453 N.E.2d 965 (Ind. 1983); Jackson v. State, 597 N.E.2d 950 (Ind. 1992), *appeal after remand* 625 N.E.2d 1219.

2. Abuse of discretion resulting in prejudice

Abuse of discretion resulting in prejudice must be demonstrated. Daniel v. State, 582 N.E.2d 364 (Ind. 1991).

Van Martin v. State, 535 N.E.2d 493 (Ind. 1989) (defendant waived any prejudice arising from trial court's *in camera* interview with juror by failing to object to interview at time it was conducted).

3. Under oath: presumption that juror is truthful

There is a presumption that the juror's voir dire is truthful. Ashby v. State, 486 N.E.2d 469 (Ind. 1985).

II. PRACTICE TIPS

A. PROTECTING RECORD FOR APPEAL

1. Challenge on record

It is critically important that counsel challenge for cause on the record each time there is basis for such challenge, and where counsel feels the judge has not sufficiently probed a juror.

2. Exhaust all peremptories

When challenge for cause denied, exercise all peremptory challenges or court will find harmless error. See Oswalt v. State, 19 N.E.3d 241 (Ind. 2014); Whiting v. State, 969 N.E.2d 24 (Ind. 2012); and Lambert v. State, 643 N.E.2d 349 (Ind. 1994). Case is stronger if one of the jurors who should have been excused for cause sits on deliberating panel. Reversal required even if no juror sits who should have been excused, as long as defendant was required to exercise one of peremptory challenges in order to remove that juror.

3. Watch juror's demeanor

It is important to pay attention to juror's demeanor when contemplating challenges for cause. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.

Patton v. Yount, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892 n. 14 (1984) (juror's testimony ambiguous because he answered 'yes' to almost any question put to him, but since trial judge's finding about whether particular juror may be impartial is a finding of fact, presumed to be correct; while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty).

B. SAMPLE CHALLENGE FOR CAUSE

1. Technique – close-ended questions

When attempting to establish grounds for challenge for cause, an attorney should:

(1) Use closed-ended questions with only "Yes" or "No" answers (approach as cross-

examination); and

(2) Shake your head the way you want questions to be answered by juror.

2. Sample

- It seems that you may have the idea that (Insert the name of defendant) is guilty of something or else she wouldn't be here. If that's how you feel, that's perfectly alright, I just appreciate your honesty.
- At this moment, you have some feelings or opinions that (Insert the name of defendant) is guilty, isn't that correct? There's nothing wrong with that.
- You agree with me that once you form an opinion about something, it's difficult, if not impossible, to set aside that opinion?
- Even though you agree that the law says a person is presumed innocent until proven guilty, based on the publicity you've formed some feeling or opinion (Insert the name of defendant) is probably guilty, isn't that so?
- Wouldn't you also agree with me that there isn't anything that the Prosecuting Attorney or the Court can say that would change your mind since your mind cannot be changed?
- (Insert the name of defendant) appreciates your honesty and candor. Wouldn't you agree with me that the opinion you formed about the guilt or innocence of (Insert the name of defendant) would affect your deliberations as a juror in this case?
- Seek an affirmative answer to the above question so no rehabilitation is permissible. If prosecuting attorney attempts to question the juror, defense must object. If the judge says YES, built-in reversal.
- I appreciate your honesty - and you agree with me you could be a good juror in any other case but because of the publicity, you might not be as fair a juror in this case?
- Would you mind if I ask the Court that you be excused?

III. STATUTORY AND JURY RULE 17 CHALLENGES

This section provides the grounds for challenging prospective jurors for cause in criminal trials. The statutory grounds contained in Ind. Code § 35-37-1-5(a) for challenges for cause appear to be included in essentially the same form in the Indiana Jury Rule 17, except for the omission of the ground that the juror was called to sit through solicitation (see Q, below).

The following is a list of the statutory grounds for challenging prospective jurors for cause in criminal trials. Most are discussed in detail in the sections that follow, but some are not.

A. Disqualified from serving as a juror as a matter of law.
   a. Indiana Jury Rule 17(a)(1).
   b. Indiana Jury Rule § 5.
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.A, below.

B. Served as a prospective juror in the same county within the prior 365 days.
   a. Indiana Jury Rule 17(a)(2).
   b. Indiana Code § 35-37-1-5(a)(15).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.B, below.

C. Prospective juror formed or expressed opinion as to the guilt or innocence of the defendant.
   a. Indiana Jury Rule 17(a)(4).
   b. Indiana Jury Rule 17(b)(4).
   c. Indiana Code § 35-37-1-5(a)(2).

d. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.C, below.

D. Where the State seeks the death penalty and the prospective juror has conscientious opinions that would preclude the prospective juror from recommending the death penalty, life without parole, or neither.
   a. Indiana Jury Rule 17(b)(3).
   b. Indiana Code § 35-37-1-5(a)(3).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.D, below.

E. Prospective juror is related to defendant, victim, or complaining witness within the fifth degree.
   a. Indiana Jury Rule 17(a)(6).
   b. Indiana Code § 35-37-1-5(a)(4).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.E, below.

F. Prospective juror previously served on sworn jury in the same case against the defendant.
   a. Indiana Jury Rule 17(a)(5).
   b. Indiana Code § 35-37-1-5(a)(5).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.F, below.

G. Mental incompetence.
   a. Indiana Jury Rule 17(a)(1).
   b. Indiana Jury Rule 5(e).
   c. Indiana Jury Rule 5(f).
   d. Indiana Code § 35-37-1-5(a)(8).
   e. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.G, below.

H. Prospective juror biased or prejudiced for or against the defendant.
   a. Indiana Jury Rule 17(a)(8).
   b. Indiana Code § 35-37-1-5(a)(11).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.H, below.

I. Prospective juror does not meet the qualifications for a juror prescribed by law.
   a. Indiana Jury Rule § 17(a)(1).
   b. Indiana Code § 35-37-1-5(a)(12).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.I, below.

J. Prospective juror cannot understand the English language, unable to comprehend the evidence and instructions of the court or has defective sight or hearing abilities.
   a. Indiana Jury Rule 17(a)(3).
   b. Indiana Code § 35-37-1-5(a)(13).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.J, below.

K. Prospective juror has a personal interest in the result of the trial.
   a. Indiana Jury Rule 17(a)(7).
   b. Indiana Code § 35-37-1-5(a)(14).
   c. For a detailed discussion, see IPDC Trial Manual, Chapter 5 § III.K, below.

L. Prospective juror is currently a defendant in a pending criminal matter.
   a. Indiana Jury Rule 17(b)(2).

M. Served as a member of the grand jury that found the present indictment.
   a. Indiana Jury Rule 17(b)(1).
   b. Indiana Code § 35-37-1-5(a)(1).

N. Prospective juror previously served as a juror in a civil case against the defendant for the same act.
   a. Indiana Jury Rule 17(a)(5).
   b. Indiana Jury Rule 17(c).
   c. Indiana Code § 35-37-1-5(a)(6).

O. Prospective juror was subpoenaed in good faith as a witness in present matter.
   a. Indiana Jury Rule 17(a)(9).

b. Indiana Code § 35-37-1-5(a)(7).

P. Prospective juror is an alien.
   a. Indiana Jury Rule 17(a)(1).
   b. Indiana Jury Rule 5(a).
   c. Indiana Code § 35-37-1-5(a)(9).

Q. Prospective juror was called to sit on the jury at the juror's own solicitation or that of another.
   a. Indiana Code § 35-37-1-5(a)(10).

A. DISQUALIFIED FROM SERVING AS JUROR AS MATTER OF LAW

Under Indiana Jury Rule 17(a)(1), a juror may be challenged for cause if juror is disqualified due to any of requirements of Indiana Jury Rule 5.

Pursuant to Indiana Jury Rule 5, a prospective juror is disqualified if they do not meet the following criteria:

(1) citizen of the United States;

(2) at least 18 years of age;

(3) resident of summoning county;

(4) able to read, speak, and understand English;

(5) not suffering from physical or mental disability that prevents him or her from rendering satisfactory jury service;

(6) not under guardianship appointment because of mental incapacity;

(7) not person who has had right to vote revoked due to felony conviction and has not had right restored; and

(8) not law enforcement officer, if the trial is for a criminal case.

B. SERVED AS PROSPECTIVE JUROR IN SAME COUNTY WITHIN 365 DAYS

A juror may be challenged for cause if the prospective juror served as a juror in the same county within the previous 365 days in a case that resulted in a verdict. Indiana Jury Rule § 17(a)(2) and Ind. Code § 35-37-1-5(a)(15).

> Douglas v. State, 48 N.E. 9 (Ind. Ct. App. 1897) (temporary excuse of a juror does not prevent them from afterwards serving at the same term).

However, Indiana Jury Rule 9(c) allows a prospective juror to make a written request to serve on a subsequent jury after the prospective juror has served to the completion of jury selection in a trial and is not selected to serve in that trial.

C. FORMED OR EXPRESSED OPINION AS TO GUILT OR INNOCENCE

If person has formed or expressed an opinion as to the guilt or innocence of defendant, he or she can be removed for cause. Ind. Code § 35-37-1-5(a)(2); Indiana Jury Rule 17(a)(4); and Indiana Jury Rule 17(b)(4).

Jury Rule 17(a)(4) provides that the court shall sustain a challenge for cause if the prospective juror "has formed or expressed an opinion about the outcome of the case and is unable to set that opinion aside and render an impartial verdict based on the law and the evidence." In criminal cases, the prospective juror should be excused if the opinion "appears to be founded upon…a conversation with a witness to the transaction; … [or] reading or hearing witness testimony or a report of witness testimony." Indiana Jury Rule 17(b)(4). See also Ind. Code § 35-37-1-5(b).

When some evidence is necessary to remove an opinion formed, the juror is incompetent.

Fahnestock v. State, 23 Ind. 231 (1864). However, if an opinion is hypothetically based on the truth of the information, the juror is not incompetent. Burk v. State, 27 Ind. 430 (1867).

Ward v. State, 810 N.E.2d 1042, 1050 (Ind. 2004) (new trial required where juror said she thought defendant was guilty, said "it would be very difficult to change my mind," and when asked if she could be impartial said "I don't know").

Frances v. State, 316 N.E.2d 364 (Ind. 1974) (challenge for cause properly sustained where in response to prosecutor's question, prospective juror responded that from what he had heard, he would say the defendant was probably guilty).

Taylor v. State, 515 N.E.2d 1095 (Ind. 1987) (fact that a majority of jurors have some knowledge of a case is not alone sufficient to conclude prejudice to the defense, so long as the jurors can set aside any preexisting impression or opinion and render a verdict based on the evidence).

Castor v. State, 587 N.E.2d 1281 (Ind. 1992) (trial court properly dismissed prospective juror for cause when he stated: (1) that he could not judge guilt or innocence irrespective of penalty; (2) that he might raise State's burden of proof so high as to not be able to give State fair trial; (3) that he could not take oath to render verdict based on law and evidence; and (4) that he could not accept law's definition of reasonable doubt and apply it to evidence).

Whitehair v. State, 654 N.E.2d 296 (Ind. Ct. App. 1995) (where teacher joked with his class regarding jury duty said we could find someone guilty and be back by noon, he was making a general reference, in jest, regarding jury duty, not making a comment as to the guilt or innocence of the defendant).

1. Mere recognition of defendant does not indicate opinion

Merely showing that juror recognizes the defendant is insufficient to show that he has formulated an opinion.

Criss v. State, 512 N.E.2d 858 (Ind. 1987) (denial of defendant's motion for a mistrial due to a prospective juror's indication that he thought he recognized defendant as a former inmate at the state reformatory where he worked).

Altmeyer v. State, 519 N.E.2d 138 (Ind. 1988) (denying challenge for cause against juror whose husband had sat on previous jury that had convicted defendant in another case; stated that her husband had refused to discuss former case with her, that she knew very little about it and that prior case would have no bearing on her decision).

2. Juror's response to questioning in presence of other prospective jurors

Although a prospective juror's response concerning a preconceived opinion may be heard by other prospective jurors on the panel, the panel of jurors is not necessarily tainted if the trial court properly questions and admonishes the other jurors to disregard any such comments. Sullivan v. State, 748 N.E.2d 861, 867-68 (Ind. Ct. App. 2001).

3. Rehabilitation of potential jurors who have preconceived opinions

Under Indiana Jury Rule § 17(a)(4), a juror who has otherwise formed or expressed an opinion is subject to a challenge for cause but may be rehabilitated and permitted to serve if the juror is able to set the opinion aside. This provision appears to be the same as Ind. Code § 35-37-1-5(b)(2) and (3), which requires the trial court or the parties to "proceed to examine the juror on oath as to the grounds of the opinion." If the juror states that "the juror feels able, notwithstanding the juror's opinion, to render an impartial verdict upon the law and evidence; and…the court is satisfied that the juror will render an impartial verdict; the court may admit the juror as competent to serve in the case."

Note: The process of "rehabilitation" of jurors was criticized harshly in O'Dell v. Miller, 565 S.E.2d 407 (W.Va. 2002). See also Montgomery v. Commonwealth, 819 S.W.2d 713 (Ky. 1991).

4. Defendant entitled to change of venue if pattern of prejudice in community

Although jurors with preconceived opinions are not disqualified to serve if they state that they can set aside their opinions, a defendant is entitled to a change of venue if there is a prevailing pattern of prejudice in the community.

Ward v. State, 810 N.E.2d 1042 (Ind. 2004) (pattern of prejudice in community was established by news reports, the voir dire of prospective jurors, and fact that six of the twelve jurors on the jury expressed a belief that the defendant was guilty).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (defendant failed to show a pattern of community-wide prejudice that would overcome the presumption that the jurors were sincere in saying that they could be impartial jurors when eleven of the final jury members said they had only limited knowledge of the facts in the case and none had a preconceived opinion concerning the case).

Change of venue request required more than bald assertions that jury pools will be tainted through news reports, because exposure to press coverage is not disqualifying; and, even when coverage distorts facts, unless defendant can show actual prejudice resulting from the inability of a jury to render a verdict on evidence due to the news reports, there will be no finding of jury tainting. Barnes v. State, 693 N.E.2d 520 (Ind. 1998). See also Elsten v. State, 698 N.E.2d 292 (Ind. 1998) and Specht v. State, 734 N.E.2d 239 (Ind. 2000).

D. WHERE STATE SEEKS DEATH PENALTY AND JUROR HAS CONSCIENTIOUS OPINIONS THAT WOULD PRECLUDE PERSON RECOMMENDING DEATH PENALTY, LIFE WITHOUT PAROLE, OR NEITHER

Please also see IPDC's "Defending a Capital Case," Section XV.

Ind. Code § 35-37-1-5(a)(3) provides that a juror can be struck for cause if the State is seeking a death sentence, [and the person] entertains such conscientious opinions as would preclude the person from recommending that the death penalty be imposed. See also Jury Rule 17(b)(3) and Davis v. State, 487 N.E.2d 817 (Ind. 1986). Indiana Code § 35-37-1-5(a)(3) arguably sets a higher bar than the federal standard adopted in Wainright v. Witt, 469 U.S. 412 (1985), discussed below. Dye v. State, 717 N.E.2d 5, 17 (Ind. 1999).

Exclusion by means of peremptory challenges of jurors who have conscientious objections to the death penalty does not violate the defendant's rights. Adams v. State, 271 N.E.2d 425 (Ind. 1971). Although a potential juror's opinions may not preclude a recommendation of death in every hypothetical case, where the prospective juror precludes such a recommendation in the present matter, exclusion may be proper. Dye v. State, 717 N.E.2d 5 (Ind. 1999).

1. Federal Constitutional Standard

Test for exclusion for cause of juror opposed to capital punishment is whether juror's views would prevent or substantially impair performance of his or her duties as juror in accordance with his or her instructions and oath. Benirschke v. State, 577 N.E.2d 576 (Ind. 1991).

Adams v. Texas, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526 (1980) ("[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide facts impartially and conscientiously apply law as charged by

the court."). *Approved in* Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) and Davis v. State, 598 N.E.2d 1041, 1046 (Ind. 1992).

Dye v. State, 717 N.E.2d 5, 17 (Ind. 1999) ("The basic logic of Witt is that it is proper to excuse jurors who are unable to carry out their duties in the case before them. A juror's willingness to recommend a death sentence under other circumstances is irrelevant to that inquiry").

Baer v. State, 942 N.E.2d 80 (Ind. 2011) (prosecutor acted properly when asking prospective jurors if they had the strength of character to impose the death penalty if they thought it was appropriate and to stand by the sentence during polling by the court after the announcement of the sentence).

Uttecht v. Brown, 127 S.Ct. 2218, 2231 (2007) (trial court properly removed prospective juror who made equivocal statements about his ability to impose the death penalty). See also Ritchie v. State, 875 N.E.2d 706 (Ind. 2007).

2. Constitution Requires "Life-Qualification" As Well As "Death-Qualification"

At the other end of the spectrum of juror beliefs, the constitutional requirement of jury impartiality entitles a capital defendant to remove for cause any juror who would automatically vote to impose the death penalty upon a finding of guilt. Morgan v. Illinois, 504 U.S. 719, 727, 112 S.Ct. 2222, 2229-30 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating **and mitigating circumstances** as the instructions require him to do"). See also State v. Dye, 784 N.E.2d 469, 476 (Ind. 2003).

Just as jurors must be able to consider imposing the death penalty in the case before them, they must be able to consider imposing Life Without Parole or even a term of years in the case before them, with its aggravating **and mitigating** factors.

Baer v. State, 942 N.E.2d 80, 101 n.6 (Ind. 2011) (defense attorney not ineffective for engaging in a process of "stripping" during voir dire; in this technique, defense counsel expressly told jurors the specific facts of the case, stated that defendant had committed the crimes as charged, and then asked the jurors if they thought that death was the only appropriate sentence based on the facts as stated).

Gibson v. State, 43 N.E.3d 231 (Ind. 2015) (no abuse of discretion in refusing to allow defense to set out facts of case and ask jurors "how they would vote"; does not specifically prohibit Colorado Method "stripping question," or back away from holding in Dye).

Compare by analogy:

Clark v. Mattar, 148 N.E.3d 988 (Ind. 2020) (in medical malpractice action, patient's estate was prejudiced by trial court's failure to strike reluctant prospective juror for cause based on juror's bias against anyone seeking noneconomic damages).

E. RELATED WITHIN FIFTH DEGREE

Ind. Code § 35-37-1-5(a)(4) provides juror's relationship within fifth degree of victim, complainant, or defendant constitutes good cause to challenge. See also Indiana Jury Rule 17(a)(6).

Whicker v. State, 511 N.E.2d 1062 (Ind. 1987) (even if juror was distant relative of defendant, defendant was not prejudiced where relationship between juror and defendant was not within fifth degree and, in any event, juror was as likely to be biased in defendant's favor as prejudiced against him).

Johnston v. State, 155 N.E.2d 129 (Ind. 1958) (juror who was second cousin of the victim was wholly disqualified to sit as juror in a first-degree murder prosecution).

"Relationship" includes blood or marriage. White v. State, 756 N.E.2d 1057 (Ind. Ct. App. 2001). A relationship created by marriage ceases upon the dissolution of the marriage. Gillespie v. State, 80 N.E. 829 (Ind. 1907).

1. Related to prosecutor or law enforcement

Although the statute does not include a juror's relationship with a prosecutor, it is sufficiently analogous. Scott v Scott, 140 Ind. App. 320, 209 N.E.2d 518 (1965). The relationship must exist at the time of the trial, and the juror must be aware of such relationship in order to disqualify the juror. Klink v. State, 179 N.E. 549 (Ind. 1932); Barnes v. State, 330 N.E.2d 743 (Ind. 1975).

Wheeler v. State, 505 N.E.2d 496 (Ind. Ct. App. 1987) (where prosecutor and juror were second cousins once removed by the fact that prosecutor's great-grandfather was brother of juror's grandfather, which is seventh degree of consanguinity, neither Ind. Code § 35-37-1-5(a)(4) nor Ind. Code § 1-1-4-1(11) applies and juror was not subject to being challenged as a matter of law).

Woolston v. State, 453 N.E.2d 965 (Ind. 1983) (where a juror has a close relationship with the state police, is familiar with the officers who are to testify for the State, and knows his wife worked on some of the evidence in defendant's case, cause for challenge exists).

F. PREVIOUSLY SERVED ON SWORN JURY IN SAME CASE AGAINST DEFENDANT

Challenge for cause is proper where prospective juror has served on a trial jury which was sworn in the same case against the same defendant where the jury was discharged after: (1) hearing the evidence; or (2) rendering a verdict later set aside. Ind. Code § 35-37-1-5(a)(5) and Indiana Jury Rule 17(a)(5).

G. MENTAL INCOMPETENCE

If the person is mentally incompetent, he or she may be challenged for cause. Ind. Code § 35-37-1-5(a)(8); Indiana Jury Rule 17(a)(1); Indiana Jury Rule 5(e); and Indiana Jury Rule 5(f).

Before a conviction will be reversed due to a juror's incompetency, however, the defendant must show that he made an effort to discover the incompetency before the juror was sworn. Woolston v. State, 453 N.E.2d 965 (Ind. 1983).

Blevins v. State, 259 Ind. 618, 291 N.E.2d 84 (1973) (Ind. Code § 35-37-1-5(b) does not require trial judge to conduct a hearing to determine incompetency or to determine probable length of absence of a juror who becomes ill during the course of a trial).

H. BIASED OR PREJUDICED FOR OR AGAINST DEFENDANT

Juror biased for or against party may be removed for cause. Ind. Code **§** 35-37-1-5(a)(11). A juror's bias needs not be proven with unmistakable clarity in order to excuse jurors for cause. Indiana Jury Rule 17(a)(8). Davis v. State, 598 N.E.2d 1041 (Ind. 1992). A defendant is entitled to a jury of people free from any bias against him. Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009).

Baird v. State, 604 N.E.2d 1170 (Ind. 1992) (no abuse of discretion in *sua sponte* excusing prospective juror for cause after she suggested that she felt some slight bias, even if her main concern about serving as juror in capital murder trial was her absence from her teaching position).

Rondon v. State, 534 N.E.2d 719 (Ind. 1989) (potential juror in capital case who stated an opposition to death penalty and also stated he was biased against police department because he felt his son was treated unfairly when he was convicted of burglary was properly excused).

Pinkston v. State, 821 N.E.2d 830 (Ind. Ct. App. 2004) (record supported trial court's conclusion that excused juror was biased in favor of defendant on account of his race).

Ross v. State, 844 N.E.2d 537 (Ind. Ct. App. 2006) (juror had a long-time relationship with defendant and stated that he would have a hard time sitting as a juror in the case).

Reynolds v. State, 142 N.E.3d 928 (Ind. Ct. App. 2020) (jurors' equivocal responsive statements to whether they could remain impartial if counsel questioned witnesses aggressively appeared to indicate potential concern for defense counsel's litigation style rather than bias against defendant; trial judge was in the best position to assess the jurors' demeanor and reactions to counsel's questions, and jurors had also earlier indicated they understood that sometimes it was necessary for children to testify at trial).

1. Actual or Implied Bias

Bias may be actual (factual bias for/against party is shown to exist). Smith v. State, 477 N.E.2d 311 (Ind. Ct. App. 1985). Bias may also be implied. Implied bias is attributable by law to a prospective juror, regardless of actual partiality, because a relationship exists between the juror and a party. Alvies v. State, 795 N.E.2d 493, 495 (Ind. Ct .App. 2003); Haak v. State, 275 Ind. 415, 417 N.E.2d 321 (1981).

Woolston v. State, 453 N.E.2d 965 (Ind. 1983) (relationship supports presumption of implied bias where juror's wife employed by state police).

Implied bias does not include relatives of persons no longer employed by law enforcement agency.

Whitehead v. State, 500 N.E.2d 149, 153 (Ind. 1986) (juror dismissed for cause in murder trial where victim killed by relative because her daughter had killed man she was living with; nature of events and juror's past experiences are such that trial judge could infer bias on part of juror irrespective of her statement that her judgment would not be affected).

Porter v. State, 271 Ind. 180, 391 N.E.2d 801 (1979)*, rev'd on other grounds*; Fleener v. State, 274 Ind. 473, 412 N.E.2d 778, 781 (1980) (relationship does not support presumption of bias where juror no longer employed by sheriff's department, even though he is volunteer reserve deputy).

Smith v. State, 477 N.E.2d 311 (Ind. Ct. App. 1985) (after first witness testified, juror informed court her brother was retired town marshal who had investigated crime; link between town marshal's department and relative of former deputy without existing employment relationship too weak to support presumption of bias, interest after retirement could not operate to automatically disqualify juror who had no other connection with law enforcement).

2. Knowledge of defendant's reputation

Juror's knowledge that defendant's general reputation for morality was bad was not grounds for a challenge for cause. Leach v. State, 177 Ind. 234, 97 N.E. 792 (1912).

McElroy v. State, 553 N.E.2d 835 (Ind. 1990) (assuming defendant had in the past visited juror's home, as juror had allegedly been informed by his sister after trial, this fact alone did not disqualify juror absent indication in record that juror was cognizant thereof or that relationship between juror and defendant, if any, was close enough to question juror's

competency to sit).

3. Familiarity with witness

Juror's relationship with State's witness is not per se disqualifying. However, disqualification depends on critical role of firsthand observation in determining whether juror - irrespective of relationships with expected witnesses - may be able to reach decision free from extraneous considerations. Barnes v. State, 693 N.E.2d 520 (Ind. 1998).

(a) Conversations

Opinions formed from conversations with witnesses to merely incidental matters do not necessarily disqualify the juror. Walker v. State, 102 Ind. 502, 1 N.E. 856 (1885).

Creek v. State, 523 N.E.2d 425 (Ind. 1989) (trial court properly denied motion for mistrial after discovery of relationship between juror and nonparty state's witness, where individuals only casually knew each other through employment and had no conversation whatsoever concerning merits of the case).

(b) Friend of / related to

Threats v. State, 582 N.E.2d 396 (Ind. Ct. App. 1991) (replacement of jury foreman with alternate juror due to foreman's failure to reveal to court at time a witness appeared that he knew witness was not error; juror's silence placed his impartiality in question, even though relationship between himself and the witness was one of "casual contact").

Hurt v. State, 553 N.E.2d 1243 (Ind. Ct. App. 1990) *disapproved in part on other grounds,* 826 N.E.2d 240 (Ind. 2005) (trial court did not abuse discretion in releasing and replacing juror where juror was trial judge's brother-in-law, friend of testifying police officer, and uncle by marriage to other witness, and such relationships could easily have created appearance of impropriety).

Alvies v. State, 795 N.E.2d 493 (Ind. Ct. App. 2003) (mere fact that juror was distantly related to victim did not entitle defendant to new trial; two other jurors had only casual working relationship with two State witnesses, but nothing in record supported defendant's claim of implied bias. Jurors made it clear that their knowledge of these witnesses would not affect their ability to serve as jurors).

McHenry v. State, 820 N.E.2d 124 (Ind. 2005) (fact that a prospective juror was a depositor in the bank that was the alleged victim of a forgery and theft was not sufficient to establish a presumption of implied bias for a challenge for cause).

Oswalt v. State, 19 N.E.3d 241 (Ind. 2014) (juror's familiarity with one of the detectives was not a sufficient challenge for cause).

(c) Familiar with due to occupation

A juror's casual working relationship with a witness does not render the juror biased even where that relationship exists at the time of trial. Creek v. State, 523 N.E.2d 425, 427 (Ind. 1988).

Woolston v. State, 453 N.E.2d 965, 968 (Ind. 1983) (court did not abuse discretion in refusing request to remove juror who knew expert witness, doctor who was to testify regarding defendant's insanity defense - even though doctor had treated juror's father and he "had little respect for the doctor" - because juror said he could be fair and impartial).

Woolston v. State, 453 N.E.2d 965 (Ind. 1983) (where a juror has a close relationship with the state police, is familiar with the officers who are to testify for the state, and

knows his wife has worked on some of the evidence in the defendant's case, cause for challenge exists).

Alvies v. State, 795 N.E.2d 493, 502 (Ind. Ct. App. 2003) (no abuse of discretion where juror knew witness, who would testify as coroner, because he had installed carpet in her house - juror made it clear that knowledge of witness would not affect her ability to serve as juror).

Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009) (no abuse of discretion in refusing to dismiss juror who worked with victim more than 30 years before trial and stated that she could still be impartial during the trial).

Barnes v. State, 693 N.E.2d 520 (Ind. 1998) (just before opening statements, juror told trial court that he knew defendant's brother, who was also witness, from work; although juror asserted several times that he believed he could render verdict based on evidence and indicated that he and defendant's brother never discussed case, trial court dismissed juror because he appeared hesitant in spite of repeated assertions; trial court was reasonably concerned that juror feared reprisal in light of defendant's brother's pending battery charge).

4. Family relationship

Richardson v. State, 717 N.E.2d 32, 39 (Ind. 1999) (relationship created by marriage ceased on dissolution of the marriage).

Atkinson v. State, 181 Ind. App. 396, 391 N.E.2d 1170 (1979) (where juror became aware of relationship to defendant during trial, a possibility for bias existed and case was remanded to trial court for evidentiary hearing to determine: (1) whether juror knew defendant at time of trial; (2) whether juror's knowledge biased or prejudiced him in any manner; and (3) whether defendant knew of relationship prior to verdict, in which case error would be waived).

Johnston v. State, 239 Ind. 77, 155 N.E.2d 129 (1958) (juror who was second cousin of victim was wholly disqualified to sit as juror in a first-degree murder prosecution).

Smith v. State, 477 N.E.2d 311 (Ind. Ct. App. 1985) (though juror was brother of former town marshal who had investigated case and testified at trial, no error in denying defendant's challenge of juror for cause because juror testified that she had no prior knowledge of case and could be fair and impartial).

5. Former victims

State v. Dye, 784 N.E.2d 469 (Ind. 2003) (post-conviction court did not err in ordering a new trial when a juror in a murder trial that involved evidence indicating sexual assault did not admit during voir dire that she had been raped by her uncle as a child).

Williams v. State, 275 Ind. 434, 417 N.E.2d 328 (1981) (although defendant was charged with burglary and robbery, fact that juror had once been victim of a burglary or robbery was not cause for challenge where juror swore that she would be able to give defendant a fair trial).

6. Formed opinion regarding criminals

Morse v. State, 413 N.E.2d 885 (Ind. 1980) (where juror was asked if she thought it was possible that defendant murdered her husband and she answered, "why else would she be here?" it was not an expression of bias).

Campbell v. State, 547 N.E.2d 843 (Ind. 1989) (although prospective juror indicated no personal prejudice to defendant, juror's attitude can be interpreted to be prejudicial to all

persons charged with crime of rape; even though juror did respond he was willing to give defendant a fair trial and listen to evidence, this was less than convincing considering his very strong personal feelings and philosophies on the subject–he spoke so strongly of his disdain for those convicted of a crime that there was reason to fear he would visit these feelings on his guilt or innocence determination). See also Jackson v. State, 597 N.E.2d 950 (Ind. 1992).

Timberlake v. State, 690 N.E.2d 243 (Ind. 1997) (no abuse of discretion in denying capital defendant's challenge for cause to prospective juror who stated she would prefer to hear defendant testify, that she might have difficult time considering mitigation, and that she might have bias against anyone who has committed murder; juror also stated that, although she might not like the way that the law is, she would follow law as instructed, and that there might be circumstances she would take into account in determining whether to recommend death penalty).

7. Formed opinion regarding police

Lindsey v. State, 916 N.E.2d 230 (Ind. Ct. App. 2009) (trial court properly sustained prosecutor's challenge for cause against a Black prospective juror who was unable to say that he would be able to ignore the way that the police had treated him as a Black man). See also Rondon v. State, 534 N.E.2d 719 (Ind. 1989).

Walker v. State, 607 N.E.2d 391 (Ind. 1993) (prospective juror who indicated that he thought defendant was more than likely guilty and that when a person is arrested, police are correct about 99% of time, was not required to be excused for cause in murder prosecution; defendant elicited further testimony from prospective juror that he understood that he would listen to testimony and could be a fair and impartial juror).

I. UNQUALIFIED

When persons state they cannot perform their duties as required by law because of their personal convictions, they cannot qualify for jury service in that particular case. Lambert v. State, 643 N.E.2d 349 (Ind. 1994); Ind. Code 35-37-1-5(a)(12); and Indiana Jury Rule 17(a)(1).

A deputy prosecuting attorney, or a deputy sheriff is not a competent juror. Block v. State, 100 Ind. 357 (Ind. 1885); Zimmerman v. State, 17 N.E. 258 (Ind. 1888); and Gaff v. State, 58 N.E. 74 (Ind. 1900).

J. UNABLE TO COMPREHEND EVIDENCE AND INSTRUCTIONS; DEFECTIVE SIGHT OR HEARING; IGNORANCE OF ENGLISH LANGUAGE

If the person is unable to comprehend the evidence and the instruction of the court due to defective sight or hearing, ignorance of the English language, or other cause, then he or she may be challenged for cause. Ind. Code § 35-37-1-5(a)(13) and Indiana Jury Rule § 17(a)(3). Jurors who do not understand the English language are not qualified to serve. Lafayette Plankroad Co. v. New Albany & S.R. Co., 13 Ind. 81 (Ind. 1859).

Owens v. State, 659 N.E.2d 466 (Ind. 1995) (no abuse of discretion where trial court *sua sponte* excused juror for cause because it believed juror could not grasp legal issues to be decided; juror's frequently unresponsive answers to questions implied that he might not follow instructions).

K. PERSONAL INTEREST IN OUTCOME OF CASE

A person may be challenged for cause if that the person has a personal interest in the result of the trial. Ind. Code 35-37-1-5(a)(14); Indiana Jury Rule 17(a)(7); and Fleming v. State, 11 Ind. 234 (Ind. 1858).

Andrews v. State, 529 N.E.2d 360, 363 (Ind. Ct. App. 1988) (prospective juror who had been

a deputy sheriff for two years at a time five years prior to trial and was a special volunteer reserve deputy at time of trial was not challengeable for cause absent any evidence that he had any interest or any feeling one way or another about the case).

IV. NON-STATUTORY GROUNDS – EXCUSING JURORS

The statutory list of grounds for challenging jurors for cause is not exhaustive. Byers v. State, 709 N.E.2d 1024, 1026 n.1 (Ind. 1999).

A. RELATION TO COUNSEL

Jackson v. State, 597 N.E.2d 950 (Ind. 1992) (trial court's decision to excuse for cause a juror who contacted defendant's attorney after she had been tentatively selected as a juror was neither illogical nor arbitrary).

Byers v. State, 709 N.E.2d 1024 (Ind. 1999) (existence of a prior attorney-client relationship between prospective juror and defense attorney is a sufficient basis for challenge for cause).

Lamar v. State, 366 N.E.2d 652 (Ind. 1977) (juror properly excused for cause where defense attorney had recently drawn wills for juror and her husband).

B. RELATION TO POLICE

Andrews v. State, 529 N.E.2d 360 (Ind. Ct. App. 1988) (no abuse of discretion in refusing to excuse for cause prospective juror whose brother-in-law was deputy sheriff; juror testified on voir dire that she seldom saw brother-in-law, and there was no evidence to indicate that brother-in-law was involved in investigation of defendant's case).

C. ON PUBLIC AID AND NO RELIABLE BABY-SITTER

Roach v. State, 624 N.E.2d 524 (Ind. Ct. App. 1993) (although trial court denied State's challenge juror for cause because she was single mother with six month old baby who was living on public aid and had no reliable babysitter, court noted in dicta that many courts might grant challenge under same circumstances).

D. HARDSHIP ON EMPLOYMENT/WORK DISTRACTIONS

Andrews v. State, 529 N.E.2d 360, 363 (Ind. Ct. App. 1988) (no abuse of discretion in refusal to excuse for cause prospective juror who stated that it would be difficult for her to sit because of her business and indicated that if trial lasted 10 to 15 days she would be very concerned about her business, but who stated that she would be able to set aside such concerns and would not hold the length of trial against defendants and would be able to be a fair and impartial juror).

Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009) (trial court properly sustained State's challenge for cause against a prospective juror who said he was too distracted by job-related issues to concentrate on evidence during the trial).

E. HIGH SCHOOL OR COLLEGE STUDENTS

Smedley v. State, 561 N.E.2d 776 (Ind. 1990) (permissible to excuse persons on jury list prior to impaneling venire because they were high school or college students where defendant demonstrated no prejudice from court's excusal).

F. FAMILY PROBLEMS

Creek v. State, 523 N.E.2d 425 (Ind. 1988) (no fundamental error in trial court dismissing juror after jury was impaneled, based upon telephone conversations with juror and her husband indicating that juror's presence on the jury was causing great marital strife and that juror felt she could not emotionally continue to serve under circumstances).

V. WAIVER OF CHALLENGE OF JUROR FOR CAUSE

A. FAILURE TO EXAMINE

Failure to examine jurors as to their qualifications would be deemed a waiver of the right to challenge for such cause. Croy v. State, 32 Ind. 384 (1869); Douthitt v. State, 144 Ind. 397, 42 N.E. 907 (1895).

B. FAILURE TO TIMELY CHALLENGE

Parties could lose the right to challenge jurors by failing to comply with the rules of court as to the time for making challenges. McDonald v. State, 172 Ind. 393, 88 N.E. 673, 139 Am. St. R. 383 (1909).

1. Must challenge before jury sworn

Ind. Code § 35-37-1-6 provides: "All challenges for cause shall be made before the jury is sworn to try the cause and shall be summarily tried by the court on the oath of the party challenged or other evidence."

2. Acceptance of jury as chosen

Where the record shows no objection to the composition of the jury, but rather that defense counsel specifically accepted the jury as chosen, the issue of juror bias is waived on appeal. Boone v. State, 267 Ind. 493, 371 N.E.2d 708 (1978).

> Bohnman v. State, 644 N.E.2d 1223, 1228 (Ind. 1994) (issue of whether juror's ability to hear and comprehend proceedings should have been raised during voir dire where juror had indicated hearing impairment on juror questionnaire and was questioned during voir dire; defense accepted juror for service and is precluded from raising the question on appeal).

3. Not promptly challenging juror prior to verdict where defendant knows grounds for challenge exists

If defendant or his attorney, at any time prior to the verdict, knew of existence of juror's relationship with prosecutor or witness and failed to promptly inform court and challenge juror, then challenge for cause would be waived. Haak v. State, 417 N.E.2d 321, 324, 275 Ind. 415, 421 (1981).

> Nix v. State, 240 Ind. 392, 166 N.E.2d 326 (1960) (case was remanded to trial court to determine whether at any time prior to verdict defendant or his attorney knew of relationship; court stated that if within the knowledge of defendant or his counsel, then challenge waived).

C. FAILURE TO EXHAUST PEREMPTORY CHALLENGES

Where defense counsel has failed to exhaust his peremptory challenges, any error occasioned by the trial court's refusal to excuse a juror for cause is waived. Whiting v. State, 969 N.E.2d 24 (Ind. 2012); Foresta v. State, 413 N.E.2d 889 (Ind. 1980).

> Lambert v. State, 643 N.E.2d 349 (Ind. 1994) (defendant failed to exhaust his peremptory challenges as required to show that he had been subjected to biased panel).

Defendant satisfies the exhaustion rule the moment he or she uses the final peremptory challenge, whether he or she strikes an allegedly incompetent juror or a merely an objectionable one. Even where a defendant preserves a claim by striking the challenged juror peremptorily, an appellate court will find reversible error only where the defendant eventually exhausts all peremptories and is forced to accept either an incompetent or an objectionable juror.

Oswalt v. State, 19 N.E.3d 241 (Ind. 2014) (defendant preserved for appeal the trial court's denial of his challenges for cause by exhausting his peremptory strikes even if he used his last peremptory strike on a juror other than the challenged juror. Defendant challenged trial court's denial of for-cause challenges to Jurors 7, 13 and 28. After being denied challenges for cause on Jurors 7 and 13, defendant used peremptory strikes on both. However, after being denied a for-cause challenge on Juror 28, defendant had to choose between using his last preemptory strike on Juror 28 or 25. Defendant vacillated and chose to strike Juror 25, and stated, "I've got a record that says...I'm out of preempts and I'm not getting who I want." The fact that the defendant chose not to use his last strike on the challenged juror does not matter. He still satisfied the exhaustion rule).

VI. CHALLENGE FOR CAUSE DURING TRIAL

Under the Indiana Jury Rules, a challenge for cause that is discovered during the course of a trial may be made before the jury retires to deliberate, and the parties are not required to ask for a mistrial. Indiana Jury Rule 17(a).

A. HEARING REQUIRED

When the possibility of juror bias arises after voir dire but prior to jury deliberations, defendant is entitled to evidentiary hearing on matter out of presence of remainder of jury to determine whether bias actually exists. Van Martin v. State, 535 N.E.2d 493, 495 (Ind. 1989).

B. DEFENDANT ENTITLED TO MAKE CHALLENGE FOR CAUSE

Defendant is entitled to challenge the juror for cause for bias or other juror misconduct. Van Martin v. State, 535 N.E.2d 493, 495 (Ind. 1989).

C. DEFENDANT BEARS BURDEN OF PROOF

Defendant bears the initial burden to make a prima facie showing of the juror's bias, prejudice, or misconduct. Once defendant meets his/her burden of proof, the burden of going forward shifts to the State to attempt to refute the defendant's evidence. Stevens v. State, 265 Ind. 296, 354 N.E.2d 727 (1976).

D. DISPOSITION OF CHALLENGE FOR CAUSE WITHIN TRIAL COURT'S DISCRETION

The disposition of a challenge for cause during trial is within the trial court's discretion, which will be reversed only for an abuse of that discretion. Jarvis v. State, 441 N.E.2d 1 (Ind. 1982).

E. REMEDY

Under Indiana Jury Rule 17(a), when a challenge for cause is discovered during the course of a trial, the parties are not required to ask for a mistrial.

Van Martin v. State, 535 N.E.2d 493, 495 (Ind. 1989) (in case decided before adoption of Jury Rules, Court held that trial judge should excuse the juror and declare a mistrial if bias is determined to exist).

Joyner v. State, 736 N.E.2d 232, 237-39 (Ind. 2000) (trial court questioned a juror and acted properly in denying a challenge for cause after the juror reported a threat from a coworker who said he would tell the judge that the juror had been discussing the case unless the juror would vote for an acquittal).