

# Chapter 8

## Addressing Race at Trial

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## 8.1 Scope of Chapter

This chapter offers guidance on issues of race that may arise at trial, and the extent to which defense attorneys can and should address racial dynamics at trial. For example, the chapter addresses voir dire, and how counsel may raise relevant issues of race in order to evaluate bias on the part of potential jurors. The chapter also addresses evidentiary matters such as impeaching a witness with evidence of bias and the admissibility of lay and expert witness opinion testimony on matters such as gang activities or the racial makeup of neighborhoods. Other topics include the legality of making references to race in opening statements and in closing arguments, and jury instructions that counsel may propose to mitigate potential racial bias.

## 8.2 Raising Race During Jury Selection and at Trial

### A. Importance of Addressing Race

The United States Supreme Court has recognized “some risk of racial prejudice influencing a jury’s decision in a criminal case. . . . The question is at what point that risk becomes constitutionally unacceptable.” *McCleskey v. Kemp*, 481 U.S. 279, 308–09 (1987) (internal quotation omitted). In recent decades, scholars have reflected on how race affects various stages of a criminal trial. “Because race is such a salient characteristic in our society, a juror will notice the race of the defendant, the witnesses, the attorneys, the judge, and other jurors.” Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1743 (1993) (footnote omitted). Jurors’ perceptions of what is “happening in the courtroom will be affected by [their] prior exposure to racial imagery.” *Id.* Whether or not defense attorneys address the racial dynamics at play in a trial, jurors notice them. John M. Conley et al., *The Racial Ecology of the Courtroom: An Experimental Study Of Juror Response To The Race Of Criminal Defendants*, 2000 WIS. L. REV. 1185, 1213–14 (2000).

While a “colorblind” approach—in which counsel acts as if race does not exist—may seem like a safer course of action than raising the subject of racial bias, such an approach may create a greater risk to clients:

The problem with colorblindness is that it ignores reality. Even if we believe that race should not matter, the fact is that it does matter. . . . Pretending that race does not matter . . . only exacerbates the problem of implicit bias. When individuals are not cognizant of their implicit biases, those biases can automatically trigger stereotypes and prejudice. It is conscious awareness of racial bias, not blindness to race, that encourages one to correct assumptions that one might otherwise make about others because of their race. If we really want to counter racial bias, we should be race-conscious, not colorblind.

Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-*

*Racial Society*, 91 N.C. L. REV. 1555, 1610 (2013) (footnotes omitted). Studies have shown that raising the subject of race may cause implicit racial biases to recede, while avoiding it may leave racial biases in place. See John Powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, 20 POVERTY & RACE, no. 3 (Poverty & Race Research Action Council), 2011, at 3, 6. By failing to confront the issue of race at trial, criminal defense attorneys risk allowing “unconscious racial bias [to] act[] as an invisible witness against the African American defendant, buttressing the prosecution’s claims concerning his incorrigibility and undermining his case.” Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 305 (2012).

Addressing race at trial involves (1) neutralizing any stereotypes that may prejudice the jury’s observations, deliberations, and verdict; and (2) challenging any racially inflammatory argument or evidence. The task of addressing race at trial poses a challenge for criminal defense attorneys: How can you address the racial dynamics in your client’s case without exacerbating biases or inviting the charge that you are “playing the race card”? See, e.g., *In re Marshall*, 191 N.C. App. 53, 56 (2008) (reviewing a case in which a judge told a defense attorney, “I’m not going to let you play that [race] card in the courtroom in front of a jury,” and vacating the judgment of criminal contempt against the defense attorney since, after several contentious exchanges between the attorney and the judge, the judge’s objectivity may reasonably have been questioned); Robin Walker Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24. Counsel must be prepared to counter such concerns and demonstrate that the issue is relevant and bears on the client’s ability to receive a fair outcome at trial based on legal authority, social science research, and data.

## B. Strategies for Addressing Race

**Analyze possible stereotypes and devise a plan for interrupting them.** When representing a person of color, you should consider the following questions in determining how to neutralize potential stereotypes and biases throughout trial:

- What stereotypes may be attached to your client? For example, could he or she be cast as a “trafficker,” “alcoholic,” or “gang banger” because of his or her race? See, e.g., *Soap v. Carter*, 632 F.2d 872, 878 (10th Cir. 1980) (Seymour, J., dissenting) (prosecutor argued in closing that “when you see an Indian that drinks liquor, you see a man that can’t handle it”).
- What do social scientists know about the implicit biases that may be triggered by people resembling your client? See, e.g., Pamela A. Wilkins, *Confronting the Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 330–32 (2012) (describing techniques for neutralizing biases that may be triggered by defendants). For example, research has found that Asians may be stereotyped as passive and unassertive (see *Chin v. Runnels*, 343 F. Supp. 2d 891, 907 (N.D. Cal. 2004) (recognizing that such implicit biases are widespread)); and that defendants with more Afrocentric facial features receive more severe criminal punishment in some contexts. See Irene V. Blair et al.,

*The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 674 n.1 (2004) (defining Afrocentric features as “those physical features that are perceived as typical of African Americans”); R. Richard Banks et al., *Discrimination and Implicit Racial Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006).

- What evidence could you introduce to interrupt the stereotypes that might otherwise be attached to your client? For example, evidence of your client’s care of an elderly grandparent or other responsibilities could serve to distinguish him from stereotypes associated with criminality. Or, if you are representing a defendant who might be stereotyped as an “illegal alien” based on his nationality, you may want to present evidence of his lawful status.

By anticipating and contesting the assumptions that might otherwise be made about your client, you may be able to counteract the operation of biases and stereotypes in jurors’ judgments about the case. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1503 n.63 (2005) (explaining that “role schemas”—associations based on a person’s occupation or other role—may trump race or gender schemas). Analyze the causes of possible stereotypes that may be at play, and obtain information about your client to effectively differentiate him or her from the negative stereotype. One study concluded that exposure to people who do not conform to stereotypes can reduce biases by more than half. *Id.* at 1558.

**Reinforce norms of fairness and equality.** Just as certain images, behavior, and references can trigger stereotypes, discussions of fairness and equality may trigger open-mindedness. “[T]here is reason to believe one can prime persons with ideals of fairness and equality that might suppress, to a degree, racial and other stereotypes.” Pamela A. Wilkins, *Confronting the Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 332 (2012). Addressing fairness and equality during voir dire, your opening statement, or your summation might stimulate thought processes that counteract the influence of stereotypes on decision-making. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1249–50 (2002). These findings suggest that reminding jurors of their obligation to apply the law fairly and without prejudice may reduce the impact of biases on their decision-making processes.

**Consider the issue of race in cases without obvious racial content.** Defenders may be under the impression that it is only necessary to formulate a plan for addressing race or racial bias in cases where race is obviously at issue. However, racial biases may influence a jury’s decision-making process in a run-of-the-mill case in which race does not appear to be a central issue and has not been highlighted:

When race is an obvious issue at trial, White jurors may be on guard against racial bias. However, in trials without salient racial issues, White jurors may be less likely to monitor their behavior for signs of prejudice, and therefore more likely to render judgments tainted by racial bias.

Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 210 (2001). For this reason, defenders should devise a plan for addressing issues of race in all cases in which race may potentially be a factor, not only those in which race appears to have played a role in the commission, investigation, or prosecution of the offense. See, e.g., James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 23 (describing the development of a five-part plan for addressing race in a self-defense trial).

**Recognize the potential impact of your behavior.** The way you relate to your client at trial—your body language and facial expressions when interacting with him, whether you display interest in his responses to the evidence, and whether you consult with him as you try the case—may communicate as much to the jury about your regard for your client as what you argue to the jury. One strategy to interrupt negative stereotypes about your client is to attempt to transfer some of the positive associations the jurors have of you, as an attorney, to your client.

For example, when representing Black clients, Seattle defense attorney Jeff Robinson asks himself:

“How do I get jurors not to look at my client as an ‘other,’ as just another thug?” One of the things I do is I try to put myself out there in a way that connects the client to me, the educated black attorney. I try to change the dynamic of how they view us. . . . If they like me or respect me when they go back to deliberate and think about whether to convict, I want them to feel a bit like they have to convict both of us—the client and me.

My basic strategy is I treat my clients with respect. Jurors see me engage with them as equals. I always put a paper and pad in front of my client, just like I have. When I finish questioning or cross-examining a witness, I walk over and speak with my client. I actually want to know what the client thinks and whether the client feels I should do anything more. However, it is rare that the client will ask me to continue a cross-examination when I think the cross should stop. It may be that all I say is “I think we’re done with this guy.” What is as important as the client’s opinion is the appearance of conversing with the client, looking at his note pad for information, including him in decisions as an equal during the trial. If they see me as a legitimate, intelligent, and good person, that rubs off on my client.

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, 1525–26 (2013) (quoting from telephone interview with Jeff Robinson).

**Failing to object to appeals to racial bias effectively precludes review.** Many North Carolina appellate opinions addressing challenges to improper statements about race by prosecutors involve trials in which defense attorneys failed to object to the statements at trial. Staples Hughes, [Curbing Prosecutorial Misconduct and Preserving the Record in Closing Argument](#) (Nov. 6, 2008) (training material presented at public defender conference). Since these challenges are reviewed for plain error, they are far less likely to succeed. *Id.* Defenders should be prepared to object to any unconstitutional or otherwise improper race-based argument to ensure that the objection will receive proper consideration, both at trial and on appeal. The manuscript cited above includes general categories of objectionable arguments. *See also* 2 NORTH CAROLINA DEFENDER MANUAL § 33.7C (Limitations on the Prosecution’s Argument) (2d ed. 2012).

**Consider the influence of your own race and possible stereotypes surrounding it on juror perceptions.** An attorney’s race may play a role in juror perceptions of the case. *See generally* 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, 1548 (2013). For example, Black criminal defense attorney Jeff Robinson concluded that, by zealously questioning a potential juror for 45 minutes about racial bias in order to get the potential juror struck for cause, he may have evoked the “angry Black man” stereotype and alienated some of the other jurors. *Id.* He speculates that some of the remaining jurors may have felt defensive and attacked, and that these reactions may have rendered them less receptive to the defendant’s theory of the case. *See id.*

Some attorneys who are aware of the stereotypes that may be triggered by their own race may attempt to connect with jurors to neutralize potential stereotypes. *See* Pamela A. Wilkins, *Confronting The Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 331 (2012). Another strategy is to explore stereotypes that jurors may hold about the attorney by addressing them explicitly during voir dire. *See generally infra* § 8.3, Jury Selection. Other attorneys may not believe it is effective or appropriate to alter their natural lawyering style or personality. Whatever approach you take, it is worthwhile to consider the impact that your own race may have on juror perceptions so that you can make considered choices. *See, e.g.,* 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, 1540 (2013) (noting that civil rights lawyers need to “think carefully about how they define their own roles and language in the courtroom, both individually and as a group”). Since racial or ethnic stereotypes can be triggered by people of all races, these considerations may be applicable to all attorneys. *See, e.g., United States v. Richardson*, 161 F.3d 728, 735 (D.C. Cir. 1998) (agreeing with defendant’s argument that “the prosecutor’s closing argument was improper and prejudicial because it interposed the issue of race into the case with the intent of disparaging [White] defense counsel [on the basis of race] and of fostering an identification of the prosecutor with the jury at the expense of defense counsel”).

**Be prepared to present statistics on racial disparities.** Another way to address race at trial is to gather evidence of any racial disparities related to the charges your client faces.

For example, in a cross-racial identification case, you may want to introduce expert testimony about the increased likelihood of misidentification in that context. *See, e.g., supra* Ch. 3, Eyewitness Identifications.

## 8.3 Jury Selection

### A. Importance of Diverse Juries

Researcher Samuel R. Sommers has examined the differences between racially diverse and all-White juries, and has concluded that “racial diversity in the jury alters deliberations . . . in a way that most judges and lawyers would consider desirable.” Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

One study concluded that more diverse juries:

- deliberate longer;
- focus more on the evidence;
- make fewer inaccurate statements;
- make fewer uncorrected statements; and
- discuss race-related topics at greater length.

*Id.* Additionally, “[s]imply by knowing that they would be serving on diverse juries . . . White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.” *Id.* The Sommers study suggests that selecting a diverse jury may be the most effective way to minimize the impact of racial bias in jury deliberations.

There may be a greater risk of explicit biases in jury deliberations when juries are not diverse, as illustrated by the following letter from a White juror to the judge who presided over a trial involving a civil rights complaint filed by Black plaintiffs:

During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about “those people” rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). Had just one African-American been sitting in that room, the content of discussion would have been quite different. And had the case been more balanced—one that hinged on fine distinction or subtle nuances

—a more diverse jury might have made a material difference in the outcome.

I pass these thoughts onto you in the hope that the jury system can some day be improved.

Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror).

## B. Orientation Sessions before Jury Service

Because juror bias jeopardizes a defendant's constitutional right to a fair trial, many scholars and practitioners have considered possible steps before jury service to address potential juror bias. One proposal is to conduct orientation sessions for potential jurors to educate them about implicit bias and the importance of rendering verdicts free from bias. See Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012). See also 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”); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012). Attorneys may suggest incorporating implicit bias training into juror orientation sessions to the county's Jury Commission, Judicial Committee, or Chief Resident Superior Court Judge.

## C. Why Ask Questions about Race during Voir Dire

People generally avoid discussing the subject of race with strangers. Reasons for this may include general discomfort with the subject; fear of being labeled biased; fear of offending others; concern that expression of one's views may provoke hostility, defensiveness, or anger; perception that race is a historical phenomenon that is not relevant to today's society; or a belief that “color-blindness” is a preferred approach and requires avoiding discussions of race. See, e.g., Jeff Robinson & Jodie English, [Confronting the Race Issue During Jury Selection](#), THE ADVOCATE, May 2008, at 57.

Despite these challenges, there are a number of reasons why it is important for defense attorneys to address the subject of race during voir dire:

- Discussing the subject allows attorneys to “discover [jurors' views on race], and how strongly they are held, and how they may impact [the] verdict.” *Id.*
- Fortright exchanges about race during voir dire enhance the defense attorney's ability “to intelligently exercise preemptory challenges and challenges for cause.” *Id.*
- Attorneys who do not engage in a frank discussion of racial attitudes may be more likely to rely on their own “generalized stereotypes” of the jurors and “make assumptions based on jurors' race.” Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012)

(also observing that if criminal defense attorneys use a “process of elimination based on stereotypes, jurors will know it”).

- A growing body of evidence indicates that when issues of race are brought to the forefront of a discussion or “made salient,” individuals tend to think more critically about the issues, and the influence of stereotypes and implicit biases on decision-making recedes. For this reason, having an open and honest conversation about race during voir dire may enable jurors to avoid reliance on stereotypes during trial and in deliberations. NATIONAL CENTER FOR STATE COURTS, [HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS](#); *see also* 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).
- 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); *see also* Jonathan Rapping, *The Role of the Defender in a Racially Disparate System*, THE CHAMPION, July 2013, at 46, 50 (suggesting that “[d]uring voir dire defense counsel should work to make jurors aware of the problem of race bias and identify those jurors who appreciate its influence”).

**Case study: Discussing race during voir dire.** In the case study below, an Assistant Public Defender in North Carolina reflects on the experience of discussing race with jurors during voir dire:

In 2013, I represented a client charged with Driving While Impaired and Possession of a Stolen Firearm. After I received discovery in the case, I reviewed the DRE (drug recognition expert) paperwork. In that paperwork I noticed that under the section for the race of the suspect, the DRE expert wrote “mulatto,” a dated and derogatory term for a person of mixed Black and White ancestry. At that moment, I realized that I would need to explore the officer’s use of this term on cross to impeach his credibility.

I also realized that because I would be exploring race issues as a part of my impeachment of the DRE expert, I would also need to talk about race during jury selection. My goal was two-fold: first, to learn if any of the prospective jurors were racially biased, and second, to educate the jurors why I was raising this issue during my cross-examination. Although I was apprehensive about talking about race during jury selection, I knew that if I did not talk about it then my client would be even more detrimentally impacted.

When it was time to begin talking about race during jury selection, I introduced the topic in terms of how we see or hear about race issues in society. I kept a very calm, affirming, and open demeanor in order to project that it was okay to share their views in this very public forum and no one would judge them for doing so. I started by saying something akin to “Sometimes in our society we’ve seen circumstances where someone might have been treated badly or just differently because of their race.” Then, I asked an open-ended question, such as, “Tell me about the most serious time you saw,

or just knew about, someone being treated differently or badly because of their race.” To my surprise, one juror raised her hand and volunteered a response about how society treats people differently because their race. I noted which other jurors were listening and responding with their body language about what this juror was sharing. I followed up by asking those jurors questions like “Juror B, what do you think about what Juror A just shared?” “Do you agree that people can be treated differently because of their race?” “How do you feel about that?” I kept my questions as open as possible to keep the jurors talking. Also, I followed their lead in talking about race in terms of societal expectations because I felt that I was able to learn their views that way without making them too uncomfortable. I sensed that they were a little nervous at first but the more naturally and comfortably I spoke about race, the easier it became for them to discuss the issues they encountered in the media and even in their own neighborhoods.

To my relief, I didn’t have anyone say that race issues don’t exist, or that we live in a post-racism society. Thus, I did not end up using the responses I heard to make a challenge for cause or a peremptory strike. But the discussion we had during jury selection was important. It made the jurors start thinking about race and disparate treatment, which prepared them for when I cross-examined the DRE expert.

As for the cross-examination, I ended up addressing the mulatto issue last to make the most of its impact. In the end, the officer admitted that he was not trained or instructed to use that term by his office. Although my client was convicted of the Possession of a Stolen Firearm, he was acquitted of the DWI.

#### **D. Purpose of Voir Dire**

North Carolina appellate courts recognize that jury 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. *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.”). The N.C. Supreme Court has stated that the purpose of voir dire examination and the exercise of challenges, both peremptory and for cause, “is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial.” *State v. Conner*, 335 N.C. 618, 629 (1994).

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**Practice note:** A proposed voir dire question is legitimate if the question is necessary to determine whether a juror is excludable for cause or to assist you in intelligently exercising your peremptory challenges. If the State objects to a particular line of questioning, defend your proposed questions by linking them to one or both of the purposes of voir dire.

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#### **E. Law Governing Voir Dire Questions about Race**

**Generally.** Criminal defendants have a constitutional right under the Sixth and Fourteenth Amendments to voir dire jurors adequately. “[P]art of the guarantee of a

defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992) (holding that capital defendant constitutionally entitled to ask specific "life qualifying" questions to the jury); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) ("Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."). *But cf. Mu'Min v. Virginia*, 500 U.S. 415, 425 (1991) (emphasizing extent of trial judge's discretion in controlling voir dire and holding that voir dire questions about the content of pretrial publicity to which jurors might have been exposed are not constitutionally required).

North Carolina statutes likewise give the parties the right to "personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." G.S. 15A-1214(c); *see also* G.S. 15A-1212(9) recognizing right to challenge for cause an individual juror who is unable to render a fair and impartial verdict). For a further discussion of voir dire, *see* 2 NORTH CAROLINA DEFENDER MANUAL § 25.3 (Voir Dire) (2d ed. 2012).

**Voir dire about race.** A defendant has a constitutional right to ask questions about race on voir dire in certain circumstances. 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. *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).

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. *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 . . . ?"). Undue restriction of the right to voir dire is error. *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).

The N.C. Supreme Court has recognized that voir dire questions aimed at ensuring that “racially biased jurors [will] not be seated on the jury” are proper. *State v. Williams*, 339 N.C. 1, 18 (1994). In *Williams*, a capital case involving a Black defendant and a White victim, the court found no error when, during jury selection, the prosecutor asked whether the jurors could “put the issue of race completely out of [their minds].” The court’s conclusion that “[t]he mere mention of race in a trial such as this is not evidence of racial animus” may provide support for a defendant’s effort to explore the question of racial bias during jury selection. *Id.*

Defenders should be prepared to show how questions concerning racial attitudes are relevant to the case, the defendant’s theory of defense, and the purposes of voir dire, by raising considerations such as the following:

- Is your client charged with an interracial crime of violence? If so, you have a constitutionally protected right to inquire into racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981).
- Do you intend to demonstrate that your client was subjected to unconstitutional selective enforcement or selective prosecution on account of his or her race or ethnicity? If so, you have a constitutionally protected right to inquire into racial bias. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973).
- Does your theory of defense involve consideration of racial issues, such as cross-racial misidentification, racial epithets, or racial biases held by a witness for the prosecution? If so, you may have a constitutionally protected right to inquire into racial bias. *See Ristaino*, 424 U.S. 589, 597.
- If the case does not involve one of the above grounds specifically giving a defendant the right to inquire into racial bias, argue that your inquiry is nevertheless necessary given the constitutional and statutory purposes of voir dire.

When your case is not one with unique racial dimensions, you may want to highlight empirical findings suggesting that “juror racial bias is most likely to occur in run-of-the-mill trials without blatantly racial issues.” 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).

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**Practice note:** If the inquiry is particularly sensitive, counsel may request individual voir dire. A sample motion can be found on the Office of Indigent Defense Services website, <http://www.ncids.org>. *See* Motion for Individual Voir Dire on Sensitive Subjects in the Motions Bank, Non Capital (select “Training and Resources”).

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## F. Voir Dire Preparation, Techniques, and Sample Questions

**Know your judge.** Before voir dire begins, determine the practices of the judge presiding over the trial. Does he or she typically allow for questions about racial attitudes and racial bias when not constitutionally required? Generally, how extensive is the questioning the

judge allows about race? How has the judge responded to motions for individual voir dire on sensitive topics in previous cases? *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.

**Recognize the role that bias may play in a juror’s evaluation of the case.** One experienced attorney summarized the body of research on juror prejudice in the following manner:

- People who come to jury duty bring with them prejudices, biases, and preconceived notions about crime, trials, and criminal justice.
- Jurors are individuals. There is little correlation between the stereotypical aspects of a juror’s makeup (race, gender, age, ethnicity, education, class, hobbies, reading material) and whether a particular juror may have biases or preconceived notions in an individual case.
- The prejudices and ideas jurors bring to court affect the way they decide cases even if they honestly believe they will be fair and can set preconceived notions aside.
- Jurors may decide cases based on their biases and preconceived notions regardless of what the judge may instruct them.
- Rehabilitation and curative instructions are not necessarily effective.
- Jurors may have made up their minds about the defendant’s guilt before they hear any evidence.

Ira Mickenberg, [Voir Dire and Jury Selection](#) 2 (training material presented at 2011 North Carolina Defender Trial School).

**Formulate voir dire questions ahead of time.** Exploring racial attitudes often requires moving outside of your comfort zone. Andrea D. Lyon, *Naming the Dragon: Litigating Race Issues During a Death Penalty Trial*, 53 DEPAUL L. REV. 1647 (2004). If you intend to ask questions regarding racial attitudes, develop your questions ahead of time and consider practicing them with others to ensure that they are unlikely to evoke defensive responses, that you are comfortable asking them, and that you’re prepared to respond to the answers you receive. You will not be able to use the same questions in every case; your voir dire should be “tailored to your factual theory of defense in each individual case.” Ira Mickenberg, [Voir Dire and Jury Selection](#) 6 (training material presented at 2011 North Carolina Defender Trial School). Sample questions can be found below under “Sample Questions.”

**Create conditions for jurors to speak openly about race.** Discussing the subject of race will not help you identify juror bias unless you are able to elicit open responses from potential jurors. Consider beginning the conversation by explaining why you need to address the subject and acknowledging that it can be a difficult or uncomfortable topic to discuss. It is generally not effective to jump into a conversation about race by asking potential jurors if they harbor racial prejudice. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555

(2013). This approach may provoke defensiveness, seem patronizing or insulting, and reveal little about the jurors' views.

One trial attorney suggests that a productive approach may be to inform jurors about the concept of implicit bias and then solicit their views on it. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1032–35. For example, the attorney might say, “Some researchers have found that people have implicit biases, which are stereotypes that people are not aware of that can influence their thoughts and behavior. For example, an employer might pass over a Black applicant for a job based on lack of relevant experience and consider a White applicant with a similar experience level, even though that employer does not consciously believe in discriminating against people based on their race. While research suggests that implicit biases arise from the brain's natural tendency to associate categories, the concern is that they may result in unequal treatment when they go unexamined.” Then, the attorney can follow up to determine the jurors' reactions:

You have just learned about the concept of [implicit racial bias]. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I'd like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making.

*Id.* at 1032.

**Consider sharing an example about recognizing biases to jumpstart the discussion.**

One method for starting a conversation about race is to share a brief example about a judgment shaped by a racial stereotype. For example, some defense attorneys share and discuss the famous Jesse Jackson admission that “there is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery. Then look around and see somebody white and feel relieved.” Bob Herbert, [\*In America: A Sea of Change on Crime\*](#), N.Y. TIMES, Dec. 12, 1993 (quoting Jackson). Criminal defense attorney Jeff Robinson sometimes talks with potential jurors about his assuming that a “black kid with cornrows” blasting rap music and driving a new BMW must be a drug dealer before catching himself and recognizing that his assumption was based on a racial stereotype. 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, 1551 (2013); see also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

Such examples illustrate that people of all races and occupations possess implicit biases, “diffuse[] the emotional content of the race discussion,” give prospective jurors “permission to admit their own [biased] thinking,” and may help to begin a conversation in which potential jurors are comfortable discussing racial bias. James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 23. Sharing an example about your own bias shows that

you are not asking jurors to do anything that you are not willing to do yourself. Ira Mickenberg, [Voor Dire and Jury Selection](#) 10 (training material presented at 2011 North Carolina Defender Trial School). Of course, attorneys should avoid expressions of overt racism, which are inappropriate and may constitute ineffective assistance of counsel. *See State v. Davis*, 872 So. 2d 250 (Fla. 2004) (holding that defense attorney was ineffective when he made explicit expressions of racial prejudice in an effort to bring jurors' latent biases out into the open); *see infra* § 8.4C, Improper References to Race by the Defense.

**Avoid expressing judgments.** Generally speaking, if a juror reveals something personal or potentially embarrassing, a good strategy is to acknowledge how difficult it must have been to share that information and thank the juror for his or her honesty. Ira Mickenberg, [Voor Dire and Jury Selection](#) (training material presented at 2011 North Carolina Defender Trial School). This response may encourage other potential jurors to share their views openly. Defense counsel might follow up by saying, "I appreciate that Mrs. Jones was willing to share [sensitive topic or viewpoint]. Has anyone else had a similar experience/Does anyone else have an opinion on this topic?"

When a juror reveals information suggestive of racial bias, the attorney's instinct may be to change the subject, recharacterize the response to something more palatable, try to help the juror overcome his bias, or avoid the juror's statement altogether. These responses are typically aimed at putting everyone at ease and ensuring that the other panelists are not influenced by the biased statement. This intuitive response may be counterproductive. *Id.* A better strategy is to restate the juror's statement and ask an open-ended question to learn more about the juror's opinion. The additional exchange with the juror may provide a basis for a challenge for cause or, at least, additional information to evaluate the use of a peremptory challenge. *Id.* at 14–15 (discussing how to establish basis for challenge for cause).

Criminal defense attorney Jeff Robinson offers his insights into effective responses to admissions of racial bias:

Now if someone makes a racist statement during jury selection, I say "Thank you very much for your comment! You have a First Amendment right to express your views openly! We all have those rights and should feel free to state what we think. And besides, I kind of think that view is not so unusual. Does anyone else have similar views?" Then, I see what other jury pool members have to say. It is strange, but by rewarding the worst possible answer you can imagine, I am trying to get other people in the pool to reveal themselves as people who hold like-minded racial views. My goal is to create an atmosphere where people can admit to their racially tinged thoughts. I want to create an environment where people feel free to say what they really are thinking.

Even if I cannot get the person excluded, it is still good because they have now "outed" themselves to the rest of the jury. I can ask all the

other jurors later, “What are you going to do if you notice that some of the arguments in the jury room are being influenced by racism?” That person has outed themselves, and their credibility with everyone may be compromised.

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).

**Focus questions on past, analogous behavior.** Many attorneys have concluded that “the best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.” *See, e.g.*, Ira Mickenberg, [Voir Dire and Jury Selection](#) 6 (training material presented at 2011 North Carolina Defender Trial School). When asked to share opinions on sensitive topics, “jurors will usually avoid the possibility of public humiliation by giving the socially acceptable answer—even if that answer is false.” *Id.* at 3. When asked to predict how they will behave in hypothetical situations, “jurors will usually give an aspirational answer. This means they will give the answer they hope will be true, or the answer that best comports with their self-image. These jurors are not lying. Their answers simply reflect what they hope (or want to believe or want others to believe) is the truth, even if they may be wrong.” *Id.* The influence of implicit bias may make it more difficult for individuals to predict their own future behavior.

**Sample questions.** Some questions that may be useful in eliciting views and reactions about past experiences involving race are identified below. For a further discussion of how to construct such questions, see Ira Mickenberg, [Voir Dire and Jury Selection](#) 10 (training material presented at 2011 North Carolina Defender Trial School).

- “Tell us about the most serious incident you [or someone close to you] ever saw where someone was treated badly because of their race.” *Id.* at 11.
- “Tell us about the worst experience you or someone close to you ever had because someone stereotyped you because of your [race].” *Id.*
- “Tell us about the most significant interaction you have ever had with a person of a different race.” *Id.*
- “Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of their [race] and turned out to be wrong.” *Id.*
- Tell us about the most diverse environment you have ever worked in.
- Tell us about the most diverse neighborhood you have ever lived in.
- Tell us about the most memorable story you have heard, either in the news or from a friend or family member, of a White person experiencing discrimination on the basis of his or her race.
- Tell us about the last time you heard other people express racially prejudiced beliefs or opinions. How did you respond?

Another voir dire technique for encouraging potential jurors to express themselves is the “show of hands technique” recommended by jury selection expert Robert Hirschhorn. Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57, 60. This technique allows attorneys to identify jurors to follow up with on opinions expressed by raised or unraised hands. Some yes-or-no questions about race that may elicit useful responses with this technique include:

- Is racism against Black people a thing of the past?
- Do affirmative action programs discriminate against Whites?
- Do Black people commit more crimes per capita than Whites?
- Have any of you ever seen an example of racism?

*Id.* at 60–61. You will need to proceed slowly with this technique, ideally with the assistance of a fast note-taker, in order to capture responses.

**Questionnaires.** In cases involving particularly sensitive race issues, Robert Hirschhorn suggests petitioning the court for use of a questionnaire. Potential jurors may be more willing to provide honest but potentially embarrassing responses to questions about race in writing. *Id.* at 61. In one mock jury simulation, those who completed a questionnaire that prompted potential jurors to consider their own racial attitudes were less likely to find the defendant guilty than those who completed a pretrial juror questionnaire that did not address any issues of race. 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). Sample questions for such a questionnaire may be found on pages 61–62 of Jeff Robinson & Jodie English, *Confronting the Race Issue During Jury Selection*, THE ADVOCATE, May 2008, at 57.

### G. Role of Client in Devising Voir Dire Strategy

Where the defendant and defense attorney reach an absolute impasse about how to conduct jury selection, the defendant’s wishes control unless they are unlawful. *State v. Ali*, 329 N.C. 394, 404 (1991) (noting principal-agent nature of the attorney-client relationship). In *State v. Williams*, 191 N.C. App. 96, 104–05 (2008), the North Carolina Court of Appeals held that, even if there was an absolute impasse as to jury selection tactics, defense counsel could not defer to the defendant’s wishes to engage in racially discriminatory jury selection where the defendant did not want White people on his jury.

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**Practice note:** Before voir dire, make sure to discuss the purposes of voir dire with your client and incorporate the client’s input into your voir dire strategy. Especially when you plan to address sensitive issues such as race or ethnicity during voir dire, it is important for the client to understand the subjects you plan to discuss with potential jurors and why you intend to discuss them. Pretrial discussions with your client allow you to respond to client concerns, devise a strategy that reflects your client’s objectives, and avoid catching your client off guard if discussions during voir dire become challenging or sensitive. *See*

generally John Pray & Byron Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School's Remington Center*, 75 MISS. L.J. 795, 815–16 (2006) (discussing “client-centered” approach to advocacy in which “communication with, and input from, the client are essential to achieve optimal results and client satisfaction”); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 720 (1987) (describing a “client-centered practice” as one which takes seriously client input and the principle of client decision-making).

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## 8.4 References to Race at Trial

### A. Is the Reference Relevant?

References to race in the presentation of evidence and argument at trial are not necessarily improper if relevant to the issues in the case. For example, race may be relevant to the question of intent when the crime was allegedly motivated by racial animus. “Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate.” *State v. Diehl*, 353 N.C. 433, 436 (2001); *see also State v. Williams*, 339 N.C. 1, 18 (1994) (“[t]he mere mention of race . . . is not evidence of racial animus”).

[When a] prosecutorial reference to race has its basis in other evidence, it may serve a valuable role in the criminal justice system. When it appeals to passion and prejudice rather than facts and law, it compromises the fundamental guarantees of equal protection and an impartial trial. The problem for courts lies not in recognizing this distinction, but in determining into which category a racial reference fits.

Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1222; *see also* Stephen A. Saltzburg, *Race: Fair and Unfair Use*, CRIM. JUST., Summer 1999, at 36, 40 (“There are permissible and impermissible uses of race in the trial of a criminal case.”).

### B. Improper References to Race by the State

**Generally.** The United States Supreme Court has recognized that statements capable of inflaming jurors’ racial or ethnic prejudices “degrade the administration of justice.” *Battle v. United States*, 209 U.S. 36, 39 (1908). “Where such references are legally irrelevant, they violate a defendant’s rights to due process and equal protection of the laws—whether the remarks occur during the prosecution’s presentation of evidence or argumentation.” *United States v. Runyon*, 707 F.3d 475, 494 (4th Cir. 2013); *see also United States v. Doe*, 903 F.2d 16, 24–25 (D.C. Cir.1990); *McCleskey v. Kemp*, 481 U.S. 279, 309 & n.30 (1987).

North Carolina appellate courts generally hold that “[n]onderogatory references to race are permissible . . . if material to issues in the trial and sufficiently justified to warrant ‘the risks inevitably taken when racial matters are injected into any important decision-making.’” *State v. Williams*, 339 N.C. 1, 24 (1994) (citation omitted). However, attorneys may not make statements that appear “calculated to mislead or prejudice the jury.” *State v. Jordan*, 149 N.C. App. 838, 843 (2002) (quotation omitted) (where prosecutor compared defense counsel to Joseph McCarthy throughout his closing argument, reversible error to deny defendant’s motion for mistrial); *see also infra* § 8.6E, Closing Argument. The same rule prohibits defense attorneys from making derogatory references about race. *See infra* § 8.4C, Improper References to Race by the Defense.

Many North Carolina appellate opinions review challenges to racial references at trial without clearly identifying the source or sources of law governing the issue. *See, e.g., State v. Williams*, 339 N.C. 1, 24 (1994) (observing that prosecutor may not make statements intended to inflame passion or prejudice, use racial slurs, or emphasize race gratuitously, but not identifying the constitutional, statutory, evidentiary, or ethical provisions such statements violate). As one court has observed, improper references to race by the prosecution mark “the point where the due process and equal protection clauses overlap or at least meet.” *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 159 (2d Cir. 1973) (holding that guarantees of equal protection and due process were violated when “prosecutor’s remarks introduced race prejudice into the trial”); *see also* Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1218 n.38, 1223 n.73 (1992) (concluding that Sixth and Fourteenth Amendments overlap in analyzing prosecutorial appeals to race). What is clear is that “[t]he Constitution prohibits racially biased prosecutorial arguments.” *McCleskey v. Kemp*, 481 U.S. 279, 309, n.30 (1987). Defenders concerned that prosecutorial references to race are improper should raise all potential constitutional protections.

**Constitutional guarantee of an impartial jury.** The Sixth Amendment to the United States Constitution and article I, section 24 of the N.C. Constitution guarantee a defendant’s right to a fair and impartial jury. *See State v. Garcell*, 363 N.C. 10 (2009). “Nothing is more fundamental to the provision of a fair trial than the right to an impartial jury.” *Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978). This guarantee mandates that the jury be “indifferent” to considerations of race and other immutable characteristics “regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Racially inflammatory statements, questions, or arguments, “by threatening to cultivate bias in the jury . . . offend[] the defendant’s right to an impartial jury.” *Calhoun v. United States*, 568 U.S. \_\_\_, 133 S. Ct. 1136, 1137 (2013) (Sotomayor, J., concurring in denial of cert.); *see also*, Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1215–18 (1992).

**Substantive and procedural due process.** The North Carolina Supreme Court has recognized that “[t]he substantive and procedural due process requirements of the Fourteenth Amendment mandate that every person charged with a crime has an absolute

right to a fair trial before an impartial judge and an unprejudiced jury.” *State v. Miller*, 288 N.C. 582, 598 (1975), *rev’d sub nom. on other grounds, Miller v. North Carolina*, 583 F.2d 701 (1978). “It is the duty of both the court and the prosecuting attorney to see that this right is protected.” *Id.* A conviction will be reversed where a prosecutor’s improper appeal to racial prejudice “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (quoted in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Substantive and procedural due process challenges to a prosecutor’s appeal to racial prejudice should also be raised under the law of the land clause in article I, section 19 of the North Carolina Constitution.

**Equal protection guarantees.** A prosecutor’s appeal to racial prejudice also violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment and article I, section 19 of the N.C. Constitution. *See, e.g., Calhoun v. United States*, 568 U.S. \_\_\_, 133 S.Ct. 1136, 1137 (2013) (Sotomayor, J., concurring in denial of cert.) (racially biased prosecutorial argument “is an affront to the Constitution’s guarantee of equal protection of the laws”). As the Fourth Circuit explained when condemning a prosecutor’s argument that a White woman would never consent to sexual intercourse with a Black man, “an appeal to racial prejudice impugns the concept of equal protection of the laws. One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings.” *Miller v. North Carolina*, 583 F.2d 701, 707 (1978); *see also* Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1218 (1992).

**Evidentiary rules.** Various rules of evidence may apply to exclude evidence about race. If evidence about race is irrelevant to a disputed issue, it is inadmissible under N.C. Rules of Evidence 401 and 402. If evidence is improperly offered to show the defendant’s character to commit an offense, it is inadmissible under N.C. Rule of Evidence 404(a).

N.C. Rule of Evidence 403 provides that relevant, otherwise admissible evidence should be excluded where its probative value is outweighed by its prejudicial effect. “The meaning of ‘unfair prejudice’ in the context of Rule 403 is ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.’” *State v. Rainey*, 198 N.C. App. 427, 433 (2009) (quoting *State v. DeLeonardo*, 315 N.C. 762, 772 (1986)). Evidence regarding, for example, racial demographics of the area in which a crime occurred, elicited for the apparent purpose of demonstrating that a Black defendant went to a “White neighborhood” with the intention of committing a crime, may violate Rule 401 because it is irrelevant, Rule 404(a) because it suggests that the defendant was more likely to have committed the crime because of his race, and Rule 403 because the prejudicial effect of the evidence outweighs its probative value.

**Professional ethics.** In addition to the constitutional prohibitions on appeals to racial prejudice, which serve the purpose of ensuring a fair and impartial jury and the integrity of the criminal justice system, various professional standards prohibit prosecutors from exploiting race to a defendant’s disadvantage. For example, the American Bar

Association Criminal Justice Standards provide that “[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury.” [ABA Standards for Criminal Justice \(1992\) 3-5.8\(c\)](#). Additionally, Comment 1 to N.C. Rule of Professional Conduct 3.8 provides that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . . A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.”

**Removal of District Attorney from office.** G.S. 7A-66 provides that “[c]onduct prejudicial to the administration of justice which brings the office into disrepute” may provide grounds for suspension or removal of a district attorney from office. In *In re Spivey*, 345 N.C. 404 (1997), the North Carolina Supreme Court upheld a district attorney’s removal from office following his verbal attack on a Black man in bar, involving repeated use of the word “n\*\*\*\*\*.” For a discussion of the procedures governing removal, see G.S. 7A-66.

### C. Improper References to Race by the Defense

While defense counsel may raise the subject of race when relevant, defense attorneys are prohibited from appealing to racial prejudice at trial. See [ABA Standards for Criminal Justice \(1992\) 4-7.7C](#) (“Defense counsel should not make arguments calculated to appeal to the prejudices of the jury”). “Neither the prosecution nor the defense is entitled to offer irrelevant evidence or to argue improperly to the jury about race.” Stephen A. Saltzburg, *Race: Fair and Unfair Use*, CRIM. JUST., Summer 1999, at 36, 40 (“Both prosecutors and defendants have a right to complain about the misuse of race to prejudice a jury.”). Since the State cannot appeal acquittals, reported accounts of prosecutorial objections to defense appeals to prejudice are rare. In one example, in the trial of former U.S. Secretary of Agriculture Mike Espy for receiving improper gifts, the prosecution filed a motion to preclude irrelevant evidence and a request for a corrective instruction. The prosecution argued that the defense planned to pursue a jury nullification strategy, arousing the sympathy of the predominantly Black jury by introducing testimony about the racially hostile nature of the defendant’s workplace. See *id.* at 36–38. The court denied the State’s motion, finding that the evidence was relevant to the defendant’s theory of the case.

In extreme cases, a defense attorney’s appeals to racial prejudice may violate a defendant’s right to effective assistance of counsel, guaranteed by the Sixth Amendment to the U.S. Constitution. See, e.g., *State v. Davis*, 872 So. 2d 250, 252 (Fla. 2004) (defense attorney who stated during voir dire “[s]ometimes black people make me mad just because they’re black” rendered ineffective assistance of counsel). For example, when a defense attorney stated during his closing argument that he had previously told the defendants “Y’all n\*\*\*\*\* 40 or 50 years ago would be lynched for something like this,” the Georgia Court of Appeals reversed the defendants’ convictions on the ground that, “[r]acial prejudice being a highly volatile and incipient and cancerous factor, its deliberate introduction rendered counsel’s performance deficient.” *Kornegay v. State*, 329 S.E.2d 601, 603, 605 (Ga. Ct. App. 1985) (observing that “[a]ppeals to the prejudice

engendered by belief in racial inferiority have no place in our system of criminal justice, even if the theory is that the prejudice would work in defendants' favor" (internal citation omitted)).

These cases should not discourage defense attorneys from addressing considerations of race in appropriate cases, including exploring potential biases during voir dire, but instead reinforce that neither side may make gratuitous, degrading, or inflammatory racial remarks. "The issue is not that [defendant's] trial counsel chose to question jurors on their feelings about race but rather what counsel stated about his own racial prejudices. The manner in which counsel approached the subject unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . . or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004); *see also infra* "Avoiding the invited response doctrine" in § 8.6E, Closing Argument.

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**Practice note:** Because evidence and argument concerning race can be inflammatory, "counsel who rely upon it should be prepared to articulate clearly the theory that justifies the use of the evidence or the making of the argument." Stephen A. Saltzburg, *Race: Fair and Unfair Use*, CRIM. JUST., Summer 1999, at 36, 56. For example, in the Espy case described above, the prosecution's objection to the defendant's evidence was rejected because the defense attorney clearly articulated how evidence concerning the defendant's race—in particular his status as the first African American Secretary of Agriculture and the difficulties, pressures, and hostilities this entailed—was relevant to the question of intent. *Id.*

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## 8.5 Examples of Improper Appeals to Racial Prejudice

"Appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality." *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990). In order to challenge the improper exploitation of race at trial, defenders must be alert to racial imagery and appeals to racial prejudice, both subtle and overt. "Racial imagery can be conveyed in pictures, stories, examples, and generalizations." Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1743 (1993). The following non-exhaustive list identifies categories of evidence or argument that run the risk of inflaming jury prejudice and bias and may constitute grounds for a corrective jury instruction, mistrial, or other remedy.

### A. Animal Imagery

**Generally.** Prosecutors may not degrade or compare criminal defendants to animals. *State v. Roache*, 358 N.C. 243, 297 (2004) (improper for prosecutors to characterize defendants as a pack of wild dogs "high on the taste of blood and power over their victims"); *State v. Jones*, 355 N.C. 117, 133 (2002) (court vacated death sentence for, among other reasons, prosecutor's prejudicial argument that defendant was "lower than the dirt on a snake's belly"); *State v. Richardson*, 342 N.C. 772, 792 (1996) (court does

not condone comparisons between defendants and animals, but isolated reference to defendant as “animal” not prejudicial); *State v. Smith*, 279 N.C. 163, 165 (1971) (awarding new trial to defendant after prosecutor described him as “lower than the bone belly of a cur dog”); *State v. Ballard*, 191 N.C. 122, 124 (1926) (reference to “human hyena” improper, but cured by court’s immediate intervention). Such imagery violates the defendant’s right to a fair, impartial jury, as it “improperly [leads] the jury to base its decision not on the evidence relating to the issue submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal.” *Jones*, 355 N.C. 117, 134.

**Animal imagery with racial content.** Animal imagery may have subtle or overt racial overtones, both of which run the risk of inflaming jurors’ biases. For example, researchers studying capital sentencing found that as the number of references to apes by prosecutors during closing arguments increased, “so too did the likelihood of that defendant being sentenced to death.” CHERYL STAATS, ET AL., OHIO STATE KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, [STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013](#) 44–45 (2013) (citing Phillip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008)). In the following examples of overtly racialized animal imagery, North Carolina prosecutors compared Black defendants to predatory, violent African animals:

- In *State v. Sims*, 161 N.C. App. 183 (2003), the State devoted several paragraphs of its closing argument to explaining how the defendant and his coconspirators, all of whom were Black, were “[j]ust like the predators of the African plane [sic],” like a “pack of wild dogs or hyenas in a group attack[ing] a herd of wildebeests” on “Discovery Channel [or] Animal Planet.” The prosecutor described how a wild African predator would grasp “its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal.” He stated that the defendant and his coconspirators “stalked their prey. They chased after their prey. They attacked their prey. Ultimately, they fell their prey.” While the court found it permissible to use the phrase “he who hunts with the pack is responsible for the kill” to explain the theory of acting in concert, the court found that the prosecutor acted improperly by making such a close association between the defendant and the animal kingdom, especially where the prosecutor discussed hunting on the African plane at length and the defendant was Black. The court concluded, however, that, “although improper, the district attorney’s comments did not deny defendant due process entitling him to a new trial.”
- In *State v. McCail*, 150 N.C. App. 643 (2002), the prosecutor compared the Black defendant to Curious George, a monkey in a series of children’s books. The judge intervened ex mero motu and instructed the jury to disregard the characterization of the defendant. The Court of Appeals held that the prosecutor’s statement was improper but did not require reversal in light of the substantial evidence of the defendant’s guilt and the curative instruction.

In another jurisdiction, a defendant's conviction was reversed based on the prosecutor's racially prejudicial analogy between the defendant's case and the story depicted in the movie "Gorillas in the Mist." *State v. Blanks*, 479 N.W.2d 601 (Iowa Ct. App. 1991). In that case, the Black male defendant faced charges of attacking and beating his White girlfriend at a party in the presence of his Black friends. The court found that the racially inflammatory comparison to "Gorillas in the Mist" constituted reversible error because (1) the movie tells the story of a White woman who is brutally murdered by a group of Black poachers; and (2) the prosecutor referred to the defendant and his friends as apes and animals. *See also* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 1753 (1993) (noting that in the trial of the officers charged with beating Rodney King, one of the testifying officers had previously described an incident involving Black people as "right out of 'Gorillas in the Mist'"). In another case involving both indirect and direct appeals to racial prejudice in the prosecutor's closing argument to an all-White jury, references to the Black defendants as animals were so prejudicial that a mistrial should have been granted. *State v. Wilson*, 404 So. 2d 968 (La. 1981). *Cf. Allen v. State*, 871 P.2d 79 (Okla. Crim. App. 1994) (in the capital trial of Wanda Jean Allen, a Black lesbian whose intelligence was near the threshold of mental retardation, the court found no racial content where the prosecutor made references to a snake and a gorilla in his closing argument).

**Historical reliance on animal imagery.** Reliance on animal imagery plays into a long and brutal history of dehumanizing Black people. The "Black brute" caricature dates back at least to the era of Reconstruction, and "portrays black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace. Black brutes are depicted as hideous, terrifying predators who target helpless victims, especially white women." David Pilgrim, *The Brute Caricature*, FERRIS.EDU (last visited Sept. 12, 2014). This caricature continues to appear in prominent trials of the post-civil rights era. *See* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic, or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 336 n.96 (2001) (recounting officers' testimony that Rodney King "groaned like a wounded animal" and gave out a "bear-like yell").

Counsel should remain vigilant for references to such images. "[T]he stereotype of the Black brute [remains] current within American society, [and] in all its iterations, including those that serve to 'racially construct' Latino and other minority youth, it has been proven to be one of the most enduring and powerful stereotypes in the nation's history." Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 346 (2006). "Since [the Black brute] stereotype is associated with fear and loathing, it is likely to be a strong motivating force, motivating a fear response when activated by external stimuli, such as a racist summation during a criminal trial." *Id.* at 345.

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**Practice note:** In support of a motion for a mistrial based on a prosecutor's use of animal imagery, emphasize the inherently prejudicial nature of such stereotypes. You may also consider presenting the research described above to demonstrate that, by drawing the

jury's attention to a racial caricature, the prosecutor has dangerously "call[ed] forth the [stereotype] in the minds of the listeners." *Id.* at 347. Link the comment to any other racially inflammatory evidence or arguments in the case. *See infra* "When objecting to improper remarks, link all improper references to race" in § 8.6.E., Closing Argument. If your motion for a mistrial is denied, seek curative instructions that inform the jury of the historical caricature of Black people as subhuman, the continuing power of such stereotypes on both conscious and subconscious levels, and the jury's role in deciding the case fairly without regard to the inflammatory racial imagery. *See Animal Imagery Curative Instruction in the Race Materials Bank at [www.ncids.org](http://www.ncids.org)* (select "Training and Resources").

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## **B. Racial Demographics of Geographic Areas**

It is improper to suggest that the defendant, because of his race, had no business being in the area where the crime occurred. For example, in *State v. Russell*, 163 N.C. App. 785 (2004) (unpublished), the North Carolina Court of Appeals considered a defendant's objection to a detective's testimony concerning the racial demographics of south Smithfield. In that case, the court "recognize[d] the apparent inference that the prosecutor sought to convey in eliciting testimony that Defendant [and codefendants], who are African-American, were apprehended in an area 'predominantly occupied by white residents,'" but declined to consider whether this testimony was improper because it found that any error would be harmless in light of the evidence against the defendant. *Id.*

This type of improper appeal may take the form of evidence concerning neighborhood demographics, as in *Russell*, or argument that a defendant had "no reason . . . to be [at the scene of the crime] except to cause trouble." *People v. Johnson*, 581 N.E.2d 118, 126 (Ill. App. Ct. 1991) (prosecutor pointed out that the Black defendant lived on south side of Chicago and crime occurred in North Lincoln Park; defendant argued that the implication was that "a public park on the north side of Chicago is or should be off limits to a black man from the south side of Chicago"; court concluded that prosecutor's comment was not an improper appeal to racial prejudice but an attempt to counter defendant's theory that his presence at the scene of the crime was a coincidence). Courts have reversed convictions when a prosecutor argued that the Black-on-Black crime problem faced by Detroit should not be permitted to reach the neighboring town of Joliet, *People v. Lurry*, 395 N.E.2d 1234, 1237 (Ill. App. Ct. 1979), and when a prosecutor lambasted a defendant for committing a crime in "our streets" and not in "some ghetto." *People v. Nightengale*, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988).

## **C. Associations Between Race and Criminality**

A statement or suggestion that a defendant's actions, motivations, or beliefs can be inferred from the defendant's race or ethnicity violates the guarantees of equal protection and due process, deprives a defendant of a fair trial, and violates North Carolina Rules of Evidence 401, 402, 403, and 404(a). *See, e.g., United States v. Doe*, 903 F.2d 16, 24–25 (D.C. Cir. 1990). For example, the First Circuit Court of Appeals held that the admission of an identification card showing the defendant's Columbian nationality in a case in

which his alleged co-conspirators were Colombian was reversible error. *United States v. Rodriguez Cortes*, 949 F.2d 532, 540–43 (1st Cir. 1991). Similarly, in a case involving a Jamaican defendant, the D.C. Circuit held that the admission of expert testimony on the role of Jamaicans in the local market for illegal drugs constituted reversible error. *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990) (observing that “[r]acial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice,” and concluding that “[a]ppeals to racial passion can distort the search for truth and drastically affect a juror's impartiality” (footnotes omitted)).

Recently, a prosecutor’s injection of race into the trial was condemned by United States Supreme Court Justice Sotomayor, joined by Justice Breyer, concurring in a denial of certiorari. *Calhoun v. United States*, 568 U.S. \_\_\_, 133 S. Ct. 1136 (2013). When cross-examining a Black defendant in a drug case, the prosecutor challenged the defendant’s statement that he was unaware of the drug transaction going on in the hotel room in the following manner:

You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This is a drug deal?

*Id.* at 1136. For procedural reasons, Justice Sotomayor concurred with the denial of certiorari. However, she stated that the prosecutor’s question should never have been posed and constituted a violation of both the Equal Protection Clause and the Sixth Amendment right to an impartial jury.

[The prosecutor] tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. . . Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice.

*Id.* at 1138.

#### **D. Racial Slurs or Stereotypes**

Reliance on racial slurs or stereotypes has been found to violate a defendant’s constitutional right to a fair trial and equal protection of the laws. *United States v. Runyon*, 707 F.3d 475, 494 (4th Cir. 2013). For example, a prosecutor’s reference to the defendant as a “chola punk” during closing argument was improper. *State v. Martinez*, 658 P.2d 428, 430 (N.M. 1983). In a federal death penalty trial, it was improper to allow the State to introduce an interrogation video into evidence containing the following exchange:

Detective Rilee asked Runyon: “[Y]ou’re Asian, right, Asian–American? You’re an honorable Asian man, aren't you?” “Yes sir,” he answered. Imploring Runyon to be honest, Rilee continued, “You

know, if you're an honorable Asian man and your integrity is intact and you have any respect for anybody at all, then you'll do the right thing today, okay?" The officers proceeded to invoke Runyon's "honor" on multiple occasions during the interrogation.

*United States v. Runyon*, 707 F.3d 475, 494 (2013). The court found the exchange improper for four reasons:

One, the references came directly from the mouths of law enforcement. Two, they directly alluded to the defendant himself. Three, they bore no relevance to the particular issues that the jury was being asked to resolve. And four, they conveyed what were, frankly, stereotyping and insulting notions about how "an honorable Asian man" is supposed to act.

*Id.*

The discussion above illustrates the importance of context in analyzing the admissibility and constitutionality of racial references. For example, in *State v. Moose*, 310 N.C. 482 (1984), a case in which the State's evidence was sufficient to raise an inference that a murder was racially motivated, the North Carolina Supreme Court found no error in the prosecutor's references to the victim as an "old black gentleman" and a "black man" and the admission into evidence of the defendant's reference to the victim as a "damn n\*\*\*\*\*," to which the defendant did not object. However, in a Florida case in which irrelevant testimony that a defendant used a racial slur was introduced, the court found that failure to grant a mistrial was an abuse of discretion. *McBride v. State*, 338 So. 2d 567, 568–69 (Fla. Dist. Ct. App. 1976).

In two recent cases, courts found reversible error where the prosecutor argued that Black people do not "snitch" to police about crimes committed by other Black people. In Washington state, a prosecutor questioned Black witnesses, who had recanted their original testimony, about a "code" allegedly adhered to by Black people that prohibits "snitching" to police. *State v. Monday*, 257 P.3d 551 (Wash. 2011). The prosecutor then argued in his closing argument that "black folk don't testify against black folk. You don't snitch to the police." The Washington Supreme Court concluded that the conduct deprived the defendant of his right to a fair trial and reversed the conviction. In Illinois, a prosecutor spoke at length about the Black community's hostility toward the police: "[The] black community here in Marion . . . most of these people were raised to believe that the police and prosecutors are the enemy . . . In their mindset, the biggest sin that you could—that you can commit is to be a snitch in the community." *People v. Marshall*, 995 N.E.2d 1045, 1047–48 (Ill. App. Ct. 2013). The prosecutor argued to the all-White jury that this attitude was foreign to "our white world," but that the jury should "keep in the back of your mind how many people in [the Black] community feel about law enforcement." *Id.* The appellate court reversed the conviction, noting that the prosecutor improperly urged the jury to rely on these race-based generalizations when assessing witness credibility, and concluded that the "prosecutor improperly aligned himself with

the jury [by] contrast[ing] the [distrust of police in the] ‘black community’ with [the respect for police in] ‘our white world.’” *Id.* at 1050.

### **E. Improper Invocations of Race in Sex Offense Cases**

While appeals to racial prejudice are unlawful in all cases, “[c]oncern about fairness should be especially acute where a prosecutor’s argument appeals to race prejudice in the context of a sexual crime, for few forms of prejudice are so virulent.” *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978); *see also* David Pilgrim, [The Brute Caricature](#), FERRIS.EDU (last visited Sept. 12, 2014) (explaining that the stereotype of the “Black brute” depicts Black men “as hideous, terrifying predators who target helpless victims, especially white women”); JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1860* at 98–99 (1943) (during the slave period, rape was a capital offense when committed by a Black man when the victim was White, but not when the victim was Black).

In one North Carolina case in which a Black defendant and two other Black men were charged with raping a White woman, the prosecutor argued that “[d]on’t you know and I argue if that [i.e., consent] was the case she could not come in this courtroom and relate the story that she has from this stand to you good people, because I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us.” *State v. Miller*, 288 N.C. 582, 597 (1975). The majority opinion for the North Carolina Supreme Court expressed disapproval of these remarks but found that they did not constitute prejudicial error requiring a new trial. *Id.* at 601. An opinion by three concurring justices found the majority’s “mild disparagement” of the language insufficient, stating that it was “both improper and prejudicial” and “deserves censure”; however, the concurrence found the evidence of the defendant’s guilt so decisive that “there was no way for the State to have lost this case.” In a separate concurrence, one justice found no impropriety in the argument, finding the assertions a matter of common knowledge and criticizing the “tidal wave of civil rights fanaticism” that “has swept over this nation” and “washed into judicial opinions.” *Id.* at 605.

The Fourth Circuit Court of Appeals overturned the conviction:

Where the jury is exposed to highly prejudicial argument by the prosecutor’s calculated resort to racial prejudice on an issue as sensitive as consent to sexual intercourse in a prosecution for rape, we think that the prejudice engendered is so great that automatic reversal is required. In such a case, the impartiality of the jury as a fact-finder is fatally compromised. Because that contamination may affect the jury’s evaluation of all of the evidence before it, speculation about the effect of the error on the verdict is fruitless. Reversal must be automatic.

*Id.* at 708. *See also State v. Richmond*, 904 P.2d 974 (Kan. 1995) (improper for prosecutor to ask jury to “[t]hink about having to divulge to your husband that you were

raped by a black male. . . . Both of the females are white.”); *State v. Reynolds*, 580 So. 2d 254 (Fla. Dist. Ct. App. 1991) (in sexual battery case involving Black male defendant and White female victim, conviction reversed as a result of prosecutor’s racialized language throughout case, including voir dire questions as to whether any potential White jurors had dated or married “a person of the black race,” and a closing argument in which the prosecutor asked jurors “to think about how embarrassing it is for an 18-year-old white girl from Crestview to admit she was raped by a black man. It is humiliating”).

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**Practice note:** Inflammatory remarks or implications that lie at the volatile intersection of race and sex may take the form of:

- Suggestions that White people generally find Black people sexually undesirable. *See, e.g., Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978); *People v. Richardson*, 363 N.E.2d 924, 926, 927 (Ill. App. Ct. 1977) (prosecutor argued that a White male witness must be telling the truth because his story included admitting to sexual intercourse with a Black woman, and “[i]f he is going to lie about anything else, he wouldn’t admit having intercourse with a black woman”; court found that prosecutor’s statements “so prejudiced and inflamed the jury against Richardson’s defense that he was deprived of a fair trial.”).
  - Attempts to inflame jurors’ fear by suggesting that, while the victim of sexual assault in the present case is Black, the next victim could be a White person. *See, e.g., Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (comment that “maybe the next time it won’t be a little Black girl from the other side of the tracks; maybe it will be somebody that you know” constituted appeal to prejudice over evidence, and in combination with other inflammatory remarks, denied defendant a fair trial).
  - Derogatory references to interracial relationships. *See, e.g., State v. Deas*, 25 N.C. App. 294 (1975) (prosecutor argued that interracial relationships “don’t happen in Transylvania County”; however, court found no abuse of discretion and no prejudicial error).
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## F. Emphasis on Victim’s Race

Emphasis on the race of the victim poses a risk to the impartiality of the jury. Recent studies in capital cases, for example, have found that the race of the victim is a significant factor in imposition of the death penalty in North Carolina. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119 (2011) (statewide from 1980 to 2007, homicides of White victims faced odds of resulting in a death sentence that were nearly 3.0 times higher than cases involving homicides of Black victims); Affidavit of Catherine M. Grosso & Barbara O’Brien Regarding MSU Study at 35 in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training and Resources”) (statewide from 1990 through 2009, death eligible cases with at least one White victim were 2.59 times more likely to result in a death sentence than all other cases); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031,

2097 (2010) (describing the “continuing heavy predominance of white victims in death sentences”).

Defense counsel should be prepared to object to any irrelevant reference to the race of the victim and to move for mistrial in appropriate cases. *See, e.g., Wallace v. State*, 768 So. 2d 1247 (Fla. Dist. Ct. App. 2000) (prosecutor’s repeated reference to the race of the Black male defendant and the White female café patron allegedly harassed by him was not harmless error where race of café patron was irrelevant to the question of guilt and all jurors hearing the case were White).

### **G. Derogatory References to Defense Witnesses Based on Race**

Another category of appeals to racial prejudice involves racially inflammatory statements attacking the credibility of Black defense witnesses. For example, in the closing argument of a trial involving a Black defendant, a federal prosecutor emphasized that “not one White witness” had been produced in the case contradicting the victim’s testimony, implying that the testimony of non-White witnesses was not credible. *Withers v. United States*, 602 F.2d 124 (6th Cir. 1979). Prosecutors have argued that the testimony of a racial or ethnic minority should be discredited when it reflects favorably on someone of the same race or ethnicity. *See State v. Monday*, 257 P.3d 551 (Wash. 2011) (reversing conviction where prosecutor suggested and then argued that Black people don’t testify against Black people); *State v. Thompson*, 654 P.2d 453 (Kan. 1982); *People v. Richardson*, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977) (prosecutor referred to Black defendant and Black defense witnesses as “street people” and said “they lie every day”); *People v. Kong*, 517 N.Y.S.2d 71, 72 (N.Y. App. Div. 1987); *State v. Kamel*, 466 N.E.2d 860, 866 (Ohio 1984) (reviewing case in which prosecutor argued that defense witnesses, natives of Syria, were biased because they were originally from the defendant’s country of origin and “unreliable by reason of their foreign birth”).

Referring to witnesses who are racial minorities by their first name may improperly diminish a witness’s stature. In *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam), the Supreme Court reversed the judgment of contempt imposed on a Black witness who refused to answer when a lawyer insisted on calling her by her first name. *See also State v. Torres*, 554 P.2d 1069, 1071 (Wash. Ct. App. 1976) (noting that prosecutor repeatedly referred to defendants as Mexicans or Mexican Americans while referring to the complaining witness with title “Ms.” or “Mrs.”). Defenders should be alert to such efforts to undermine defense witnesses’ credibility or standing, and raise challenges when appropriate.

### **H. Defendant’s Racial Conduct or Remarks**

Defense counsel may object where the State seeks to introduce evidence of a defendant’s racist or racially inflammatory remarks on the grounds that they are irrelevant under N.C. Rules of Evidence 401 and 402, constitute inadmissible character evidence under Rule 404(a), violate the defendant’s constitutional right to a fair trial, and are more prejudicial than probative under Rule 403. Courts may admit such evidence only if it is probative of

a disputed issue and its probative value is not substantially outweighed by the danger of unfair prejudice. For example, a White defendant's reference to a Black victim as a "damn n\*\*\*\*\*," along with evidence that the Black victim was seen driving through a predominantly White area, was admissible and sufficient to support a jury argument that the crime by the White defendant was racially motivated. *State v. Moose*, 310 N.C. 482, 492 (1984).

Two unpublished decisions of the North Carolina Court of Appeals illustrate the importance of clear, immediate objections to the introduction of evidence concerning a defendant's racial comments when irrelevant to the issues in the case. In both cases, the defendants failed to convince the court that admission of racial slurs uttered by the defendants constituted reversible error. *See State v. Bell*, 164 N.C. App. 228 (2004) (unpublished) (reviewing case in which defendant uttered racial slurs to a police officer); *State v. Valentine*, 200 N.C. App. 436 (2009) (unpublished) (reviewing case in which defendant referred to a magistrate as a "f\*\*\*ing white cracker"). Both arguments were rejected in large part because of defense counsel's failure to object clearly and consistently to the evidence at trial.

### **I. References to Race of Defense Counsel or Jurors**

It is improper for a prosecutor to incorporate the race of the jurors or defense counsel into closing argument. "Indeed, it is difficult to envision a criminal trial in which the *jurors'* race would constitute a proper matter for argument." *State v. Diehl*, 353 N.C. 433, 439 (2001) (Martin, J., dissenting) (emphasis in original); *see also id.* at 437 (trial judge sustained defendant's objection to prosecutor's reference to "twelve white jurors in Randolph county"; however, denial of defendant's motion for a mistrial was not abuse of discretion). In *United States v. Richardson*, 161 F.3d 728 (D.C. Cir. 1998), the defendant's conviction was reversed on the basis of an improper prosecutorial argument suggesting that, because defense counsel was White, he was out of touch with the world inhabited by his Black client (and, by extension, the predominantly Black jury), and his characterization of his client's life should therefore be discounted.

### **J. Challenging Improper References to Race**

Given the difficulty of measuring a jury's impartiality following exposure to appeals to racial prejudice, defendants should object and consider moving for a mistrial any time racially inflammatory rhetoric threatens the fairness of the defendant's trial. G.S. 15A-1061; *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (observing in the grand jury context that "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm"); *State v. Warren*, 327 N.C. 364, 376 (1990) (mistrial warranted where the "improprieties in the trial [are] so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict" (quotation omitted)). If you fail to object, your client will have to show on appeal that the prosecutor "stray[ed] so far from the bounds of propriety" that the trial court should have intervened *ex mero motu*. *See State v. Smith*, 351 N.C. 251, 269 (2000). If your motion for a mistrial is not

made in a timely manner, i.e., “at some time sufficiently close to the occurrence of the error to permit its correction,” then denial of the motion may not be preserved for appellate review. *See* G.S. 15A-1446 Official Commentary, *see also State v. Smith*, 96 N.C. App. 352 (1989) (defendant waived appellate review where his motion for mistrial based on the prosecutor’s alleged improper opening statement was not made until after the jury began deliberating); N.C. Rule of Appellate Procedure 10 (requiring a timely objection or motion to preserve the error for appellate review). Other remedies include proposing a curative jury instruction and moving to prohibit racially inflammatory language before it is used where circumstances suggest that it might be introduced. Consider proffering some of the empirical studies cited earlier to explain the impact of racially inflammatory language on the jury in support of your objection, motion for a mistrial, or motion in limine. *See supra* “Practice note” in § 8.5A, Animal Imagery; *infra* “Practice note” in § 8.6E, Closing Argument.

## 8.6 Considerations at Certain Stages of Trial

### A. Motion for Change of Venue

A defendant may obtain a change of venue by filing a motion pursuant to G.S. 15A-957. This motion must allege that there exists such great prejudice against the defendant in the county where the prosecution was initiated that the defendant would be unable to receive a fair trial. Any motion under G.S. 15A-957 should allege that failure to change venue would deny the defendant his or her due process rights under the Fourteenth Amendment.

When a “pattern of deep and bitter prejudice [is] shown to be present throughout the community,” the defendant is entitled to a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961); *see also McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (“[w]idespread bias in the community can make a change of venue constitutionally required”); *State v. Moore*, 319 N.C. 645 (1987) (defendant moved for a change of venue or for a special venire due to extensive inflammatory media coverage of the case, pervasive county-wide discussion of it, and the social prominence of the alleged victim and her family). Exposure of the jury to excessive and prejudicial news coverage may violate due process. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that extensive media coverage denied due process right to fair trial); *see also State v. Jerrett*, 309 N.C. 239 (1983) (due process requires that defendant be tried by jury free from outside influences).

Media accounts of crime shaped by the race of the victim and the perpetrator may support a motion for change of venue. Reports of crime often include the perpetrator’s race when he or she is a person of color, and crimes committed by people of color against White victims may receive more coverage than other crimes. *See Sheri Lynn Johnson, Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1744 (1993). Researchers have found that the way in which an issue is framed in the media influences jurors’ decisions. For example, an increase in articles critical of the death penalty has been linked to fewer death sentences, while publication of positive articles about the death penalty results in more death sentences. Susan Hardy, [\*Death Watch: Are Capital Punishment’s Days\*](#)

*Numbered?*, ENDEAVORS.UNC.EDU (April 26, 2011) (discussing FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* (2008)); *see also* Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. COMM. 229, 229 (2007). Racially disparate coverage of crimes may inject bias into a trial before it begins. For a further discussion of practical and strategic considerations concerning motions for change of venue, see 1 NORTH CAROLINA DEFENDER MANUAL § 11.3 (Change of Venue) (2d ed. 2013).

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**Practice note:** When moving for a change of venue, it is advisable to have a preferred venue in mind. (G.S. 15A-957 specifies the counties to which venue may be transferred.) Defense attorneys should consider researching the racial demographics and attitudes of people residing in possible alternative venues to ensure that the defendant will receive a fair trial in the alternative venue. *See, e.g.*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1768 (1993) (describing attorneys' investigation of racial attitudes in neighboring counties when considering moving for a change of venue in the Joan Little case).

Under the Sixth Amendment to the United States Constitution and article I, sections 24 and 26 of the North Carolina Constitution, a criminal defendant is entitled to a jury venire drawn from a fair cross-section of the community where the offense occurred. *See, e.g.*, *Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Bowman*, 349 N.C. 459 (1998). The U.S. Supreme Court has yet to decide whether a change of venue to a county that is demographically dissimilar to the county where the offense occurred violates the fair cross-section requirement. *See Mallett v. Missouri*, 494 U.S. 1009 (1990) (Marshall, J., dissenting from denial of cert.) (two of the three justices dissenting from denial of certiorari would have reached this issue). Counsel should rely on the fair cross-section requirement in requesting a change of venue to a demographically similar county.

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## B. Opening Statement

**Defendant's Opening Statement.** Opening statements are a critical part of trial. *See* Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 565 (1991) (arguing that "winning the battle of stories" in opening statements may influence how evidence is considered, interpreted, and remembered). Opening statement is counsel's first uninterrupted opportunity to communicate the defendant's theory of the case to the jury, and to counter any harmful stereotypes that jurors may harbor. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) ("[I]f an attorney is concerned that implicit racial bias may adversely affect the verdict, he may wish to tell a story that makes race salient in his opening statement.").

The opening statement provides an opportunity for counsel to "consider (1) how to prime themes based on fairness and equality, (2) how to incorporate counter-stereotypical exemplars in the narrative, and (3) what kinds of schemas might 'fit' a client while supplanting jurors' unconscious racial schemas." Pamela A. Wilkins, *Confronting The*

*Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 362 (2012). See also *supra* “Reinforce norms of fairness and equality” in § 8.2B, Strategies for Addressing Race. For example, some have suggested that, in the trial of George Zimmerman, the prosecution should have explored the possibility that Zimmerman perceived a threat where no real threat existed as a result of a racial stereotype he attached to Trayvon Martin. See, e.g., Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); see also James E. Coleman, Jr., *Ignoring Race a Mistake in Zimmerman Trial*, NEWS AND OBSERVER (Raleigh), July 20, 2013 (arguing that the State of Florida created conditions for verdict of acquittal by failing to address the role of race in Zimmerman’s perception of Martin as a threat). In a case in which the victim mistakenly believed that the defendant was carrying a gun, counsel might forecast expert testimony regarding the common implicit association between Black males and guns.

Various studies show many persons draw a strong association between black males and guns. For example, in one well-known study, persons were faster to recognize guns and frequently mistook tools for guns when primed with pictures of black male faces. This was true without regard to the conscious prejudice of the subject of the test. Scholars have opined that “the stereotype of African-Americans as violent and criminally inclined is one of the most pervasive, well-known, and persistent stereotypes in American culture. Where other negative cultural stereotypes about Blacks have significantly diminished, this one has remained strong and influential, particularly among Whites.”

Pamela A. Wilkins, *Confronting The Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 323 (2012) (footnotes omitted). It is proper to include a discussion of implicit or explicit biases in your opening statement where you have a reasonable expectation that you will be able to introduce expert or lay testimony about the influence of such biases on the victim’s or other witness’s perceptions.

**Prosecutor’s opening statement.** While most challenges to racially inflammatory prosecutorial language occur during closing argument, defenders should also be alert to the possibility that such language may creep into opening statements as well. Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1746 (1993). If a prosecutor’s opening statement includes racially inflammatory language, imagery, or stereotypes, counsel should object and consider moving for a mistrial.

### C. Testimony

**Defense use of lay witness testimony to make race salient.** Defense attorneys may use lay witness testimony to present evidence that the defendant’s race played a role in the case. For example, one study found that testimony from a defense witness about racial slurs shouted at a defendant by White victims had the effect of reducing racial bias in jurors. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and*

*Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1966 (2009). In this study, testimony that White victims surrounded the defendant's car and shouted racial slurs at the defendant and his wife before the defendant got into his car and struck the victims with his car while driving away reduced racial bias even in jurors who scored highly on tests measuring racism. *Id.* at 1959–60. See also Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1595 (2013) (discussing the Cohn study).

**Objections to racially inflammatory lay witness testimony.** A defendant may object to the introduction of racially inflammatory lay witness testimony on various grounds. Courts have reversed convictions based on the improper admission of irrelevant, racially inflammatory evidence where a witness was asked about sexual relations between a black defendant and a white woman that were not germane to the case. See, e.g., *Johnson v. Rose*, 546 F.2d 678, 678–79 (6th Cir. 1976). A defendant may object to the admission of racially inflammatory testimony on grounds that it is irrelevant under N.C. Evidence Rule 401, constitutes character evidence generally inadmissible under Rule 404(a), is more prejudicial than probative under Rule 403, and violates the defendant's constitutional rights. See *Calhoun v. United States*, 568 U.S. \_\_\_, 133 S. Ct. 1136 (2013) (Sotomayor, J., concurring in denial of cert.) (cross-examination of defendant suggesting connection between race and drug dealers violated equal protection and right to impartial jury; “[I]f government counsel . . . is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent.” (quotation omitted)); see also *supra* § 8.4B, Improper References to Race by the State.

**Impeachment with evidence of racial bias.** A witness may be impeached with evidence that the witness is biased. Extrinsic evidence may be used to impeach regarding bias. ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS 6-35 (2d ed. 2006).

**Evidence of immigration status.** “The terms ‘illegal alien,’ ‘illegal immigrant,’ and ‘undocumented worker’ now more than ever create a great deal of fear and distress in our society.” Benny Agosto, Jr. et al., “*But Your Honor, He’s an Illegal!*” Ruled Inadmissible and Prejudicial: Can the Undocumented Worker’s Alien Status be Introduced at Trial?, 17 TEX. HISP. J. L. & POL’Y 27 (2011). A defendant should object to any mention of his or her undocumented status and consider seeking a pretrial order preventing the State from introducing such evidence. As with all other evidence, evidence of a defendant’s status as undocumented should be admitted only if it is relevant to a disputed fact and more probative than prejudicial. N.C. R. EVID. 401, 402, 403, 404; see also, e.g., *Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995) (concluding, under parallel Federal Rules of Evidence, that prosecutor should not have mentioned defendant’s status as undocumented to jurors because it was irrelevant and prejudicial).

**Expert testimony introduced by the State.** At times, expert testimony introduced by the State may be racially inflammatory. For example, a psychologist who was called as an expert in approximately 150 death penalty cases repeatedly testified at the penalty phase

of capital trials that “Hispanic and black men were more likely to be dangerous in the future.” Brandi Grissom, [Texas Ends Deal with Psychologist Over Race Testimony](#), THE TEXAS TRIBUNE, Oct. 31, 2011. Defense counsel should object and move for a mistrial if the prosecution offers expert testimony linking race and criminality.

**Cultural experts for the defense.** Where community norms or cultural mores are relevant to the case, defense counsel may seek a “cultural expert.” For example, the San Francisco Public Defender’s Office has worked with cultural experts to provide information to the court about Asian youth and families, and to provide contextual information that may exculpate the client. See Robin Walker Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24. For example, if among Hmong immigrants in a particular community, it is a common practice to share cars among a large group of extended family and friends, a defendant’s argument that he didn’t know he was driving a stolen car may be more persuasive when placed in this cultural context.

The use of cultural experts raises some concerns. First, a defense expert’s cultural testimony may open the door to race-based argument. In *State v. Robinson*, 336 N.C. 78, 129–30 (1994), a prosecutor argued to the jury:

[The defendant] didn’t have to put his culture down here with us. What this means is that anyone who is poor and black and lives in an inner city has a license to commit murder, because it’s not their fault. That none of these folks can ever rise above where they start out. Because they are poor, they are black, and they come from an inner city, they have no right, they have no way, that’s it.

And they have a license to commit crime, because that’s just what happens there, and there’s nothing you can do about it. That’s what their doctor says.

The N.C. Supreme Court found that the prosecutor’s argument was not improper, as it was a response to the defense expert’s testimony that the “defendant’s inner-city upbringing was, in part, a cause of his criminal behavior.” *Id.* One way to avoid this pitfall is to limit the scope of the expert testimony. If the testimony you present does not suggest that a defendant’s race or culture reduces his or her culpability, but rather explains a fact in dispute (as in the example about Hmong immigrants in Fresno, above), you may avoid opening the door to this type of race-based argument. See also *infra* “Avoiding the invited response doctrine” in § 8.6E, Closing Argument.

Second, some judges may resist the introduction of cultural expert testimony because of uncertainty about how to qualify someone as an expert or how to establish a link between the defendant and the expert’s testimony. See Robin Walker Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 24, 29. “[When] arguing in favor of admission of the cultural expert’s testimony, defense attorneys can offer that the expert’s background and qualifications go to weight and not admissibility.” *Id.* at 29. Even if the evidence does not influence the jury’s determination of guilt or innocence, the judge may learn “about

cultural differences of that individual client, may rely on it in the sentencing disposition, and may apply this knowledge to other cases.” *Id.*

**Experts on implicit bias.** Defense counsel may seek to introduce expert testimony from a social scientist concerning empirical findings on implicit biases. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1595–96 (2013). Examples include:

- in a case where a Black defendant claims that he was mistakenly identified as the offender, evidence of implicit associations between Black people and criminality;
- in a case in which a Black defendant claims he didn’t have a weapon on him but the assault victim claims he did, evidence of shooter/weapon bias (discussed *supra* in § 8.6B, Opening Statement); or
- the tendency of jurors to “automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways.” Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W.VA. L. REV. 307, 309 (2010).

In support of the admissibility of such evidence, defenders may explain that the proffered testimony “will provide the jury with helpful ‘information about the social and psychological context in which contested . . . facts occurred and . . . the context will help the jury interpret the . . . facts.’” Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1595–96 (2013) (quoting Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 133 (1989)). If the judge does not admit your expert testimony on implicit bias on the basis that it is within the common knowledge of the jury, you may consider asking the judge to take judicial notice of the influence of implicit bias on cognitive processes and decision-making.

#### **D. Jury Instructions**

Jury instructions present a key opportunity to inform the ultimate decision-makers in your client’s case about issues related to race and bias. For example, California has a model jury instruction instructing jurors in criminal cases that they may “not let bias, sympathy, prejudice, or public opinion influence [their] decision.” California Criminal Jury Instruction No. 101 (2014). In North Carolina, if a party requests a special instruction that is legally correct in itself and is pertinent to the evidence and the issues in the case, the judge “must give the instruction at least in substance.” *State v Lamb*, 321 N.C. 633, 644 (1988) (quotation omitted); *State v Craig*, 167 N.C. App. 793 (2005). The judge need not give the instruction in the exact language of the request, but he or she may not change the sense of it or so qualify it “as to weaken its force.” *State v Puckett*, 54 N.C. App. 576, 581 (1981).

**Pre-voir dire jury instructions on bias.** Some scholars have suggested that juror instructions on implicit bias may be given to jurors before the case begins in order to alert them to the possibility of biased judgments before they are exposed to evidence and

argument. *See, e.g.,* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1599 (2013). While jury instructions are typically given at the end of a trial, early delivery serves to focus jurors' attention on judging fairly and not allowing racial stereotypes to influence their decision-making. *Id.*

For example, Judge Mark Bennett, U.S. District Judge for the Northern District of Iowa, spends about twenty-five minutes during jury selection addressing implicit bias. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181–82 (2012). He starts by screening a clip from *What Would You Do?*, a show produced by ABC that catches bystanders' responses to staged events. The episode shows the reactions of bystanders to three different people—a casually dressed young White man, a similarly dressed young Black man, and an attractive young White woman—each of whom use a hammer, saw, and bolt cutter to try to break a chain securing a bicycle to a pole. No one says anything to the White man and several men attempt to assist the White woman. In contrast, a crowd starts shouting angrily at the Black man and some people call the police. *Id.* at 1182 n.250. Judge Bennett then gives the following juror instruction on implicit bias before attorneys present opening statements:

Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

*Id.* at 1182–83. Defenders may inform local judges of this approach to educating jurors on implicit bias, and suggest using similar materials in juror orientation sessions or during jury selection to illustrate the ways in which bias can influence decision-making. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1598–99 (2013) (quoting instruction given by Judge Bennett).

**Pre-voir dire pledge on bias.** During jury selection in Judge Bennett's courtroom, all jurors are required to sign the following pledge:

I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1182 (2012). Defenders may consider requesting that jurors be required to sign such a pledge before serving. Even when such a request is denied, it brings concerns about the role that racial bias may play in jury decision-making to the judge's attention, and may cause the judge to allow counsel more latitude to explore biases during voir dire.

**Race-switching instruction.** In cases that run the risk of triggering implicit biases—such as an interracial sexual assault case, a self-defense case in which the defendant is Black and the victim White, or any case involving a defendant who is a racial minority—defenders should consider seeking a “race-switching” instruction. This instruction asks jurors to examine the possible influence of implicit bias on their decision-making by imagining how they would respond if the race of the defendant and/or victim were different. See Cynthia Kwei Yung Lee, *Race And Self-Defense: Toward A Normative Conception Of Reasonableness*, 81 MINN. L. REV. 367, 488 (1996). While defense attorneys themselves may be able to ask jurors to perform a race-switching exercise during voir dire or closing argument, a race-switching instruction is generally preferable, as jury instructions, “coming as [they do] from the court [rather than from the defense attorney], . . . [help] diffuse any reactions from the jury that the defense [i]s ‘playing the race card.’” James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24. Law Professor Cynthia Lee suggests the following model race-switching instruction:

It is natural to make assumptions about the parties and witnesses in any case based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group.

If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you could imagine a Latino defendant and a White victim. In intraracial cases in which both the defendant and the victim are persons of color, you may simply assign a different race to these actors. For example, if both the defendant and victim are Black, you may imagine that both are White. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

Cynthia Kwei Yung Lee, *Race And Self-Defense: Toward A Normative Conception Of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996).

In at least one case, a trial judge agreed to give a race-switching instruction substantially similar to the above instruction, “noting that he personally engaged in a race-switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes.” James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24. The case in which the instruction was given involved a 16 year-old Black male charged with assaulting an 18 year-old White male; the defendant claimed self-defense. The defense attorneys employed a “five-part plan for addressing the racial dynamics of the case,” involving (1) testing the case in front of a mock jury; (2) proposing a written jury questionnaire addressing issues of race; (3) devising a strategy for dealing with race during voir dire; (4) preparation of an expert research psychologist to testify regarding the effect of racial stereotypes on memory and perception; and (5) a written jury instruction requiring the race-switching exercise. *Id.* at 22. The defendant was acquitted on all counts. *Id.* at 24.

**Certification or pledge to render bias-free judgment.** Following closing arguments, Judge Mark Bennett again instructs jurors to reach a verdict free from biases:

Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant’s race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement is as follows:

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1183 n.252 (2012). This certification is similar to the one shown to all potential jurors in jury selection, discussed in “Pre-voir dire pledge on bias,” above. North Carolina defenders may want to ask judges to consider this innovative method of addressing juror bias. *See generally id.* at 1179–86.

## E. Closing Argument

**Challenge improper references to race in prosecutor’s closing argument.** Racially biased closing arguments are prohibited by the constitution. *See supra* § 8.4B, Improper References to Race by the State. “Closing argument may properly be based upon the evidence and the inferences drawn from that evidence” (*State v. Diehl*, 353 N.C. 433, 436 (2001)), and “[p]rosecutors are granted wide latitude in the scope of their [closing] argument.” *State v. Zuniga*, 320 N.C. 233, 253 (1987). However, “our courts have consistently refused to tolerate . . . remarks calculated to . . . prejudice the jury.” *State v. Jordan*, 149 N.C. App. 838, 842 (2002) (quoting *State v. Smith*, 352 N.C. 531, 560 (2000)); *see also State v Matthews*, 358 NC 102, 111 (2004) (closing argument, “no matter how effective, must . . . be premised on logical deductions, not on appeals to passion or prejudice” (quoting *State v. Jones*, 355 N.C. 117, 135 (2002))). For example, describing a Black defendant and his Black accomplices as “wild dogs or hyenas” hunting on the “African plain” has been found to constitute an improper closing argument. *State v. Sims*, 161 N.C. App. 183 (2003).

The risk of improper appeals to race may be greatest at closing argument. *See* Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & LAW 325, 329 (2006) (noting that closing argument “is relatively unencumbered by formal restraints”). Improper summations may activate implicit biases and influence trial outcomes. CHERYL STAATS, ET AL., OHIO STATE KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, [STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013](#) 45 (2013). For example, one study found that, as the number of references to apes by prosecutors during closing arguments increased, “so too did the likelihood of that defendant being sentenced to death.” *Id.* at 44–45 (citing Phillip A. Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008)).

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**Practice note:** “It is not impolite to interrupt opposing counsel’s summation—it is mandatory to preserve error and stop the prejudice.” Ira Mickenberg, [Preserving the Record and Making Objections at Trial: A Win-Win Proposition for Client and Lawyer](#) 4 (training material presented at 2005 North Carolina Defender Trial School). Assert both statutory and constitutional grounds for the objection. State on the record that the improper appeal to racial prejudice violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as article I, sections 19 and 24 of the N.C. Constitution. If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also consider whether further remedy is necessary or whether it would only draw further attention to the comments. If you decide that the prejudice resulting from a prosecutor’s improper argument was severe and in need of further remedy, you may ask the judge to: admonish the prosecutor to refrain from that line of argument; require the prosecutor to retract the improper argument; repeat the curative instruction during the jury charge; or grant a mistrial. *See State v. Jones*, 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, “to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections”); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473

(1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

If the judge does not allow you to explain the grounds for your objection during the prosecutor's closing argument, make notes of the improper argument and ask for a hearing outside of the presence of the jury to "flesh out the basis of your objection" after argument and before jury instruction. Staples Hughes, [Curbing Prosecutorial Misconduct and Preserving the Record in Closing Argument](#) 5 (Nov. 6, 2008) (training material presented at public defender conference). Additionally, if you have concerns that the prosecutor may make improper arguments, consider filing a motion asking the judge to prohibit such arguments, tailored to the specific facts of the case (e.g., to prohibit the prosecutor from referencing animal imagery). Whether you win or lose the motion, to preserve the issue for appeal you must object during the argument to any improper references to race. *See id.*

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**Avoiding the invited response doctrine.** The invited response doctrine comes into play when defense counsel presents an improper closing argument that is "out of bounds" of zealous advocacy. *U.S. v. Young*, 470 U.S. 1, 11, 13 (1985) (noting that the doctrine applies to cases involving "two improper arguments-two apparent wrongs"). Defenders should be prepared to respond to a prosecutor's assertion that, by raising race during closing argument, defense counsel opened the door to the prosecutor's otherwise improper discussion of race during closing argument. *See, e.g., State v. Oliver*, 309 N.C. 326 (1983) (finding no reversible error where the prosecutor made biblical references during closing argument because defense counsel argued that the New Testament teaches forgiveness and mercy); *see generally* 2 NORTH CAROLINA DEFENDER MANUAL § 33.7D (Invited Response) (2d ed. 2012).

Defense counsel may argue that the invited response doctrine cannot excuse or justify the prosecutor's inappropriate discussion of race where the defendant's references to race were proper. *See, e.g., United States v. Doe*, 903 F.2d 16, 22–23 (D.C. Cir. 1990) (holding that the "[defendant's] questions [about racial bias] on voir dire calculated to obtain a qualified and impartial jury [do not] open the door to introduction of evidence harboring a decided penchant for harm," and reasoning that "[a]n accused cannot be compelled to sacrifice this means to an impartial jury in order to assure the evidentiary fairness of the trial"); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 160–61 (2d Cir. 1973) (where prosecutor failed to identify alleged "blatant racial appeals" by defense counsel, prosecutor's appeals to racial prejudice "went beyond the bounds of propriety, passing those of due process"). *Cf. Darden v. Wainwright*, 477 U.S. 168 (1986) (improper references to defendant as an animal who "shouldn't be out of his cell unless he has a leash on him" did not deprive defendant of a fair trial in part because arguments were invited by defense attorney's argument that, among other things, referred to the alleged actual perpetrator as an "animal"). Any time you make explicit or implicit references to race, you should be prepared to explain the relevance of the evidence and the theory that justifies including it. *See* Stephen A. Saltzburg, *Race: Fair and Unfair Use*, CRIM. JUST., Summer 1999, at 36, 56. You are more likely to neutralize an invited response argument if your closing argument focuses on the evidence presented, warns

against the operation of stereotypes and itself avoids stereotypes, and reinforces norms of fairness and equality.

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**Practice note:** When you anticipate that you will raise an issue of race at trial, consider filing a motion in limine to prevent improper references to race in response. Forecast in the motion your proposed evidence and its purpose, and ask for a ruling that it does not open the door to the injection of a harmful or improper discussion of race.

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**When objecting to improper remarks, link all improper references to race.**

Convictions might be upheld despite improper appeals to racial prejudice if the references to race are viewed as isolated rather than thematic or widespread. *See, e.g., People v. Ali*, 551 N.Y.S.2d 54, 55 (N.Y. App. Div. 1990) (defendant must show “thematic reference to . . . race” to warrant reversal (citation omitted)); *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998) (prosecutor’s isolated remark, in opening argument of capital trial, that detective would testify that one or both of defendant’s prior sexual offenses involved young White women, did not deprive defendant of a fair trial); *Russell v. Collins*, 944 F.2d 202, 204 n.1 (5th Cir. 1991) (habeas petition rejected in part because prosecutor’s improper argument concerning race was “isolated”); *see also* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic, or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 326 (2001) (noting this approach by some courts).

Challenges to the improper use of race will be strengthened if you are able to link your objection to other incidents that occurred at trial. For example, if you object to the prosecutor’s reference to what “twelve White jurors” should conclude (*see, e.g., State v. Diehl*, 353 N.C. 433 (2001)), you might support your objection by linking it to other objectionable matters involving race, such as the use of peremptory strikes to eliminate eligible Black jurors, disrespectful treatment of a Black witness, or an argument that the Black defendant did not belong in the White neighborhood where the crime occurred. Linking your objection to other improper appeals to racial prejudice in this manner may make your objection more persuasive both at trial and on appeal. *See, e.g., People v. Marshall*, 995 N.E.2d 1045, 1049–50 (Ill. App. Ct. 2013) (conviction reversed where “[t]he prosecutor’s [racially inflammatory] remarks were not an isolated event in this case”; instead, “[t]he State’s use of race was an egregious and consistent theme throughout the trial”).

**Address racial dynamics in defendant’s closing argument.** It is often said that a central task of a defender is to humanize his or her client. “In part this means conveying the multidimensional complexity of human beings who may otherwise be understood by reference to one label or group.” Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002); *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1185 (2012) (studies have shown that “actively contemplating others’ psychological experiences weakens the automatic expression of racial biases” (citing Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011))). Closing argument provides a powerful opportunity to humanize your

client and reduce the influence of implicit bias by differentiating him or her from stereotypes and reinforcing antidiscrimination norms. *See supra* § 8.2B, Strategies for Addressing Race.

In addition to other arguments in closing, you may suggest that jurors engage in a race-switching exercise. *See, e.g.*, James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, *The CHAMPION*, Aug. 1999 at 22, 23; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1600–01 (2013). While a race-switching instruction from the court is generally preferable, *see supra* “Race-switching instruction” in § 8.6D, Jury Instructions, you may want to present the exercise to the jury whether or not the court has given such an instruction.