

# Chapter 9

## Sentencing

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### 9.1 Scope of Chapter

While North Carolina's sentencing laws regulate the range of sentences a judge may impose for a given offense, judges retain discretion within those ranges, such as the authority to choose, in many instances, between a probationary sentence and imprisonment, a decision with significant consequences for the defendant. The guarantees of equal protection and due process provide protection against arbitrary and discriminatory sentencing decisions. This chapter reviews the requirements for raising a constitutional challenge, recent studies in North Carolina on the question of race in sentencing, and other sources of statistical information that may be useful in addressing the potential influence of race in sentencing. Additionally, in light of the discretion that judges have at sentencing, the chapter provides guidance on sentencing advocacy to help attorneys inform the court about a client's background, identify services and resources to assist clients, and advocate for alternatives to incarceration. This chapter focuses on the sentence imposed based on the charge and conviction. For a discussion of charging and

plea decisions, see *supra* Chapter 5, Selective Prosecution: Plea Negotiations and Charging Decisions by Prosecutors.

## 9.2 Sentencing Policies and Practices

### A. History of Race in Sentencing

In the past, racially disparate criminal punishment was the law of the land. Harsher punishment of Black people supported the institution of slavery and, following the abolition of slavery, served to maintain their subjugation. For example, under slavery, rape was a capital offense when committed by a Black man when the victim was White, but not when the victim was Black. JOHN HOPE FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA 1790–1860* 98–99 (1943). North Carolina’s Black Codes, adopted in 1866, imposed different punishments for people based on their race. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–77* (1988). See also *McCleskey v. Kemp*, 481 U.S. 279, 330–33 (1987) (Brennan, J., dissenting) (discussing history of race-based criminal punishment in the United States, and arguing that the influence of that history should be considered in assessing modern evidence of racially disparate sentencing practices); Loic Wacquant, [\*Deadly Symbiosis: Rethinking Race and Imprisonment in Twenty-First-Century America\*](#), *BOSTON REV.*, Apr.–May 2002 (discussing history of slavery, Black codes, Jim Crow laws, urban ghettos, and mass incarceration).

Laws singling out Black people for greater punishment were often defended as necessary in light of perceived Black criminality. For example, when reviewing a statute criminalizing rebellious behavior by “negroes or other slaves,” an early North Carolina Supreme Court decision stated that “the more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint.” *State v. Tom, a slave*, 13 N.C. 569 (1830); see also *Luke, a slave v. State*, 5 Fla. 185, 192 (1853) (considering racially disparate schemes and determining that “there is an obvious propriety in visiting the[] offences [of African Americans] with more degrading punishment than is inflicted on the white citizens”).

Disparate criminal punishment also provided a source of cheap labor through involuntary servitude. Black people who were convicted of minor crimes could in essence be sold on the courthouse steps for inability to pay fines. “The act of 1831, directs that when a free negro or free persons of colour shall be convicted of an offence against the criminal law and sentenced to pay a fine, if it shall appear to the satisfaction of the Court that he is unable to pay the fine imposed, the Court shall direct the Sheriff of the County to hire out the free negro or free person of color so convicted to any person who will pay the fine for his services . . . . It further makes it the duty of the Sheriff . . . publicly, at the door of the Court-house to hire out the convict . . . .” *State v. Manuel*, 20 N.C. 144, 147–48 (1838).

## B. Modern Sentencing Schemes and Studies of Potential Sentencing Disparities

Over the last 30 years, most states and the federal government have adopted sentencing guidelines aimed, at least in part, at reducing racial disparities. However, studies have concluded that race continues to influence criminal sentencing. For example, in February 2013, the United States Sentencing Commission released a report concluding that, between 2007 and 2011, federal prison sentences for Black men were nearly 20% longer than those imposed on White men for similar crimes. Mark Hansen, [\*Black Prisoners are Given Longer Sentences than Whites, Study Says\*](#), ABAJOURNAL.COM (Feb. 15, 2013). This study was cited by U.S. Attorney General Eric Holder in a recent speech citing racial disparities in sentencing and announcing a plan to address them. See Eric Holder, United States Attorney General, [\*Remarks at the Annual Meeting of the American Bar Association's House of Delegates\*](#) (Aug. 12, 2013).

A review of thirty years of sentencing studies concluded that Black and Latino offenders, in both state and federal courts, face “significantly greater odds” of incarceration than similarly situated White offenders and, in some jurisdictions, longer sentences and fewer downward departures from sentencing guidelines. Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, CRIM. JUST., July 2000, at 427, 458. Another analysis of data from seventy-one studies reached similar conclusions, finding that African Americans and Latinos are generally sentenced more harshly than Whites, and that these differences are most significant in the context of: (1) drug offenses, (2) the decision whether to imprison a defendant, and (3) other discretionary sentencing decisions. Ojmarrh Mitchell, [\*A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies\*](#), 21 J. QUANTITATIVE CRIMINOLOGY 439 (2005).

In recent years, researchers examining the influence of race on criminal sentences have refined methods for examining the interaction between race and other factors, such as age, sex, offense type, and income, that may influence sentencing determinations. See, e.g., Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56 (2011). For example, one study of federal sentencing concluded that sentencing disparities between Black and White offenders were most pronounced in the context of drug trafficking offenses; on average, controlling for relevant factors, Black defendants convicted of such offenses received sentences 10.5 months longer than White defendants. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J. L. & ECON. 285, 304 (2001). Another study of sentencing data in Pennsylvania found that nonwhite offenders are most likely to face harsher punishment when they are young, male, and unemployed. See, e.g., Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998). Researchers have referred to this as “the punishment cost of being young, black, and male.” *Id.*

Extensive research has been conducted about sentencing in capital cases. Studies have concluded that the race of the victim results in disparities in the imposition of capital punishment. In the Baldus study reviewed by the U.S. Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), for example, researchers found that people convicted in Georgia of murdering White victims were approximately four times as likely to receive a death sentence as those convicted of murdering Black people. In North Carolina, a recent study examining approximately 15,000 homicides committed in the state between 1980 and 2007 concluded that the odds of a death sentence for those accused of killing White victims are around three times higher than for those accused of killing Black victims. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980–2007*, 89 N.C. L. REV. 2119, 2120 (2011); *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, 2097–2100 (2010) (discussing continuing predominance of White victims in North Carolina death sentences).

Few studies have examined whether racial disparities exist in sentencing in non-capital cases in North Carolina. A study conducted by the North Carolina Sentencing and Policy Advisory Commission in 2002 found that while extralegal factors such as age, type of defense, judicial division, mode of disposition, and sex influenced sentencing determinations, the offender's race did not have an identifiable effect on sentencing. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, [SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS](#) (2002) (noting, however, that eligible White offenders were slightly less likely to be convicted as habitual felons than non-white offenders). The study did not examine the possible link between race and socioeconomic indicators considered by criminal justice decision-makers, including "family situation and community ties, education and income, ability to make restitution, and general attitude and demeanor." *Id.* at 70. For this reason, the authors concluded that the influence of socioeconomic factors, "their impact on justice and their possible link with race are worth further exploration." *Id.*

A later student project focused on sentences of imprisonment and found that nonwhite offenders were more likely than White offenders to be sentenced to terms of imprisonment for felony convictions in the years 2008–09. Michelle L. Hall, [Disparity under Structured Sentencing in North Carolina: Do Similarly Situated Offenders Receive Different Outcomes Based on Legally Irrelevant Factors?](#) (Spring 2011) (unpublished UNC School of Government MPA Thesis). Researchers studying sentencing outcomes in an administrative drug court in a large, urban North Carolina jurisdiction (not named in the study's published results) found racial disparities in the sentencing of felony drug offenders convicted in the year 2000. White offenders received less severe punishment than both Black and Hispanic offenders, with Hispanic offenders receiving the most severe punishments. Pauline K. Brennan & Cassia Spohn, *Race/Ethnicity and Sentencing Outcomes Among Drug Offenders in North Carolina*, 24 J. CONTEMP. CRIM. JUST. 371 (2008).

The North Carolina Sentencing and Policy Advisory Commission also publishes annual statistics regarding felony and misdemeanor convictions; however, only the conviction

data is disaggregated by race, not the sentencing data. *See* North Carolina Sentencing and Policy Advisory Commission, [\*Structured Sentencing Statistical Report for Felonies and Misdemeanors-Fiscal Year 2011/12 \(July 1, 2011 - June 30, 2012\)\*](#), 9 Fig. D (2013) (showing that, in FY 2011/2012, 50% of people convicted of felonies were Black, 44% were White, 3% were Hispanic, 2% were Native American, and 1% were Other/Unknown).

### C. Causes of Potential Sentencing Disparities

**Potential for racially disparate effects from race-neutral policies.** Disparities in sentencing may occur from sentencing laws and policies that, while facially race-neutral, have disparate effects. *See, e.g.,* Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 CRIME & DELINQ. 56 (2011). The most familiar example of this phenomenon is the 100:1 crack/cocaine drug quantity differential established by Congress in 1986. Before the ratio was modified to 18:1 in 2010, the sale of 5 grams of crack triggered a mandatory minimum prison term of five years, while a sale of 500 grams of powder cocaine triggered the same term. This law had a disproportionate impact on Black people, who were vastly overrepresented among those convicted of crack-cocaine violations. The U.S. Sentencing Commission reported that 88.3% of those convicted of crack offenses in federal courts in 1994 were Black. *See* U.S. SENTENCING COMMISSION, [\*SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY\*](#) Ch. 7 (1995).

Laws that increase penalties for drug activity conducted within a school zone have also been found to produce racial disparities. The Sentencing Project's Marc Mauer posits that these effects are largely a result of housing patterns. "Since urban areas are much more densely populated than rural or suburban areas, it is more likely that any given drug offense will take place within a school zone district. And since persons of color disproportionately reside in urban areas, a drug offense committed by an African American or Latino person will be more likely to incur these enhanced penalties." Marc Mauer, [\*Addressing Racial Disparities in Incarceration\*](#), 91 PRISON J. 87S, 95S (2011). A recent review of criminal sentencing in New Jersey discovered that 96% of offenders incarcerated for violations of school zone laws were African American or Latino. *Id.* As a result of this discovery, the New Jersey legislature eliminated the mandatory sentencing enhancement for school zone violations in 2010. *Id.*

Additionally, laws that increase penalties based on an offender's prior record may result in greater punishment for racial minorities, who are more likely to have prior convictions. In North Carolina, African Americans are 2.46 times more likely than Whites to be incarcerated as habitual felons. *See, e.g.,* [\*North Carolina Advocates for Justice: Task Force on Racial and Ethnic Bias Executive Summary\*](#), NCAJ.COM (African Americans represent 21.5% of the population of North Carolina but 69.6% of those incarcerated as habitual felons) (last visited Sept. 18, 2014).

**Potential for bias.** Studies have shown that bias tends to arise when actors are making discretionary decisions. *See generally* TONY FABELO ET AL., *BREAKING SCHOOLS' RULES, A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* (Council for State Gov'ts Justice Ctr. 2011) (finding that racial disparities in school discipline were most pronounced when disciplinary action was discretionary: African American students had a 31 percent higher likelihood of a school discretionary action as compared to otherwise identical White and Hispanic students); FRANK BAUMGARTNER & DEREK EPP, [NORTH CAROLINA TRAFFIC STOP ANALYSIS](#) (2012) (observing in an analysis of over 13 million North Carolina traffic stops that “disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues”).

In evaluating jury sentencing in capital cases, the U.S. Supreme Court has observed that the discretion afforded jurors provides “a unique opportunity for racial prejudice to operate but remain undetected.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). More broadly, some researchers have concluded that biases may cause decision-makers unwittingly to ignore the positive aspects of a non-White person’s employment record, while crediting the same attributes of a White person’s employment record. *See* GEOFFREY BEATTIE, *OUR RACIST HEART? AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE* 241 (2013); *see also* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

Researchers examining the influence of biases on sentencing decisions have found that facial features associated with Black people (sometimes referred to as “Afrocentric” features) activate negative associations and stereotypes that lead to longer sentences. One study found that defendants whose facial features were more Afrocentric received longer sentences than similarly situated offenders with less Afrocentric features. Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCH. SCI. 674 (2004). Researchers examining death-eligible cases from 1979–99 in Philadelphia concluded that, in capital cases involving Black defendants and White victims, defendants with more Afrocentric facial features were more likely to be sentenced to death than those with less Afrocentric ones. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

**Poverty.** Black and Latino people are more likely to live in poverty, which can negatively affect them at the sentencing phase in various ways. *See infra* § 9.4C, *Pretrial Strategies*. For example, under the impaired driving sentencing scheme, Level One and Level Two offenders can reduce or avoid otherwise mandatory periods of imprisonment if they can verify abstinence from alcohol using Continuous Alcohol Monitoring, a costly device for which there is not state funding. G.S. 20-179(g), (h).

#### **D. Impact of Incarceration Rates**

Nationwide, it is estimated that nearly one out of three Black men in their twenties is currently under correctional control, either in jail, prison, or under a community

supervision program such as probation or parole. Equal Justice Initiative, [Our Work: Race and Poverty](#), EJI.ORG (last visited Sept. 18, 2014). In North Carolina in 2012, Black inmates comprised 57% of the prison population, more than double their representation in the general population. North Carolina Department of Public Safety, [Prison Statistics Fact Card, 2012](#), DOC.STATE.NC.US (last visited Sept. 18, 2014); The Henry J. Kaiser Family Foundation, [Population Distribution by Race/Ethnicity](#), KFF.ORG (last visited Sept. 18, 2014) (reporting that in 2012 Black people comprised 21% of the general population of North Carolina). Disparities in sentencing may be a contributing factor. See Traci Schlesinger, [The Cumulative Effects of Racial Disparities in Criminal Processing](#), THE ADVOCATE, May 2008, at 22 (racial disparities may influence various stages of a criminal proceeding and produce a cumulative effect on outcomes, making it difficult to isolate the influence of sentencing decisions); see also *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998) (recognizing the possible influence of racially disparate policing practices on defendant's criminal history and ultimate sentence).

Incarceration often triggers consequences such as loss of employment, housing, or child custody. Black children are far more likely than other children to have an incarcerated parent: one in nine Black children has an incarcerated parent, compared to one in 28 Latino children and one in 57 White children. BRUCE WESTERN & BECKY PETTIT, THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010); see also Rebecca Ballard DiLoreto, [Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process](#), THE ADVOCATE, May 2008, at 15 (discussing impact on children and non-incarcerated parent trying to raise children alone).

The psychological effects of higher imprisonment rates on communities of color are difficult to quantify. One scholar has observed that “[w]hole generations have already accepted prison as the norm. This is the destructive effect of mass incarceration on community consciousness and personal aspirations.” TANYA E. COKE, CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 22 (2012) (quoting Dr. Divine Pryor, Executive Director of the NuLeadership Center for Urban Solutions).

### 9.3 Constitutional Limits

The constitution forbids the consideration of race in the determination of criminal punishment, and Congress has prohibited explicit race-based punishment since the passage of the Civil Rights Act of 1866. Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27-30 (1866). As one court observed, differential punishment based on an improper factor such as race “obviously would be unconstitutional.” *U.S. v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986). In considering challenges to sentences based on unlawful consideration of race, ethnicity, national origin, or immigration status, some courts have applied an equal protection framework, while others have focused on due process guarantees. A number of opinions do not specify the constitutional provision protecting defendants against race-based punishment, but nevertheless recognize that such punishment is constitutionally prohibited. As the following discussion suggests, any time

a defendant's sentence appears to have been influenced by race, defendants should raise challenges to the sentence based on both equal protection and due process grounds.

### A. Equal Protection

**General principles.** Criminal sentences based on a defendant's race violate state and federal guarantees of equal protection. U.S. CONST. amend. XIV; N.C. CONST. art. I, § 19; *U.S. v. Smart*, 518 F.3d 800, 804 n.1 (8th Cir. 2008) (a sentence based on race “would violate the Equal Protection Clause of the Fourteenth Amendment, which makes the specific characteristic of race an impermissible government consideration in the absence of compelling reasons to the contrary”); *see also U.S. v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (differential treatment at sentencing based on race, nationality, or immigration status would violate due process and equal protection guarantees). A sentencing decision will violate equal protection when similarly situated defendants are subjected to disparate treatment based on race; any proffered justification for such disparate treatment must meet strict scrutiny. *U.S. v. Roberts*, 915 F.2d 889 (4th Cir. 1990).

No North Carolina appellate decisions have addressed race-based equal protection challenges to criminal sentences, but the courts have provided a framework for such a challenge in opinions reviewing other types of equal protection challenges to criminal sentences. In an early ruling based on both former N.C. Constitution article I, section 7 (which is substantially similar to current article I, section 32) and the Fourteenth Amendment to the U.S. Constitution, the North Carolina Supreme Court declared that “every valid enactment of a general law applicable to the whole state shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security, and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions.” *State v. Fowler*, 193 N.C. 290, 292 (1927) (statute immunizing residents of five counties from prison sentence applicable to residents in all other counties violated equal protection). In a case addressing an equal protection challenge to punishment without parole eligibility, the North Carolina Supreme Court explained that “equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of a crime, unless it prescribes different punishments for the same acts committed under the same circumstances by persons in like situations.” *State v. Dunlap*, 298 N.C. 725, 735–36 (1979) (quoting *State v. Benton*, 276 N.C. 641, 660 (1970)).

More recently, the North Carolina Court of Appeals rejected an equal protection challenge by a defendant claiming that he was sentenced differently from other defendants who, like him, had no aggravating or mitigating factors present. *State v. Streeter*, 146 N.C. App. 594, 599 (2001). However, the defendant in *Streeter* did not claim that his sentence was based on an unconstitutional factor such as race. In an earlier case addressing an equal protection challenge to a criminal sentence, the North Carolina Supreme Court held that the mere fact that a statute grants the trial court wide discretion in determining a criminal sentence is not a violation of equal protection. *See State v.*



*Jenkins*, 292 N.C. 179, 191 (1977). As in *Streeter*, the defendant in *Jenkins* did not allege that the trial judge improperly considered race in determining his criminal sentence.

In other jurisdictions, constitutional claims based at least in part on the Equal Protection Clause have succeeded where:

- A judge, in sentencing a defendant from Guinea for heroin trafficking, explained that the sentence was designed in part to send a message to the people of the defendant's background that heroin trafficking isn't tolerated in the United States. The Court of Appeals for the Second Circuit concluded that, even if the judge was not biased, the appearance of a sentence based on race or national origin was unlawful. *U.S. v. Kaba*, 480 F.3d 152 (2d Cir. 2007).
- In sentencing a Chinese-born Canadian citizen, the judge asserted that "[w]e have enough home-grown criminals in the United States without importing them," and expressed hope that the defendant's sentence would send a message to the "Asiatic community . . . that we don't permit dealing in heroin . . . and if people want to come to the United States they had better abide by our laws." *U.S. v. Leung*, 40 F.3d 577, 585 (2d Cir. 1994). The appellate court observed that "[a] defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing," and held that, while it did not believe that the judge was biased against the defendant because of her ethnic origin, "even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing." *Id.* at 586.
- A judge based his sentence of a drug trafficker, at least in part, on the defendant's country of origin, Columbia. His statements during two different sentencing hearings reflected his belief that the defendant deserved greater punishment because of his country of origin, which he described as "the total scourge of this country right now, and I am not going to tolerate it, and I want the message to go to Colombia that we are not going to accept this kind of thing." The defense attorney objected at sentencing, noting that the judge had sentenced an "Anglo" codefendant to seven years imprisonment while her Columbian client was sentenced to twelve years imprisonment, to which the judge replied in part, "importantly, he was not from a source country, and I want people in Colombia to know it is not going to be tolerated." *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989).
- A judge stated, in reference to the Columbian defendants before him for sentencing, "[t]hey don't have too much regard for Judges [in Columbia]" and "they should have stayed where they were. Nobody told them to come here." *U.S. v. Eduardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989). In vacating the sentence, the appellate court concluded that the defendant's "plaintive request that she be sentenced 'as for my person, not for my nationality' mirrors what would be the objective reaction of anyone familiar with the above-quoted comments of the district court, namely that ethnic prejudice somehow had infected the judicial process in the instant case." *Id.*
- A judge, "who is Caucasian, use[d] words such as 'ghetto,' 'jungle,' 'animals,' and 'people like Mr. Jackson' who come 'from the city' in describing an African-American defendant," and thereby "called into question, whether his comments might

also have constituted racial bias, or the appearance of racial bias.” *Jackson v. State*, 772 A.2d 273, 278 (Md. 2001). Maryland’s highest court vacated the defendant’s sentence and remanded the case for resentencing, concluding that “matters of race and matters of a defendant’s place of residence or origins are inappropriate sentencing considerations.” *Id.* at 279.

These cases suggest the following bases for equal protection challenges to sentences:

**Defendant received more punitive sentence than co-defendant based on race.** An equal protection challenge may lie when a non-white defendant receives a harsher sentence than a White codefendant, especially where the defendants are similarly situated in terms of culpability, prior record level, and other factors. *See, e.g., U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989).

Before the sentencing hearing, defense counsel may present a memorandum detailing any disparate treatment the defendant experienced at an earlier stage in the case or in past cases. *See, e.g., U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998) (judge granted downward departure to sentencing range based on the possible impact of racial profiling on defendant’s criminal history). For example, if you are representing a Black defendant detained pretrial, and a similarly situated White codefendant was released pretrial and consequently had the opportunity to find and secure employment, thereby improving his position at sentencing, you may wish to bring this disparate treatment to the court’s attention and request that the sentencing judge correct for it to avoid violating equal protection guarantees. Due process grounds should also be raised. *See infra* § 9.3B, Due Process.

**Defendant punished pursuant to statute that produces racial disparities.** Courts have generally rejected facial challenges to race-neutral statutes that produce racially disparate sentences. *See, e.g., U.S. v. Rogers*, 409 Fed. Appx. 607, 612 (4th Cir. 2010) (unpublished) (“We have repeatedly rejected claims that the crack-to-powder ratio violates either the Equal Protection Clause or a defendant’s due process rights.”). However, the U.S. Supreme Court has held that the unwarranted disparities produced by the crack-cocaine ratio constitute a proper consideration at sentencing and a justifiable basis for a downward departure from federal sentencing guidelines. *See Spears v. United States*, 555 U.S. 261 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. 85 (2007). In a sentencing memorandum, or orally during a sentencing hearing, a defendant may argue that, as applied, statutory schemes that produce racially disparate outcomes violate state and federal guarantees of equal protection. Counsel may ask, in the alternative, that the court correct for disparities caused by the statutes by imposing a sentence in the mitigated range. *See also* G.S. 15A-1340.13(g) (authorizing extraordinary mitigation in some circumstances).

**Judge states or implies that race was a factor at sentencing.** If the trial judge refers to the race of the defendant, the race of the victim, or makes other statements suggesting that race played a role in the sentencing determination, the defendant should raise an equal protection claim challenging the sentencing process and the sentence imposed. *See,*

*e.g.*, *People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (remanding for new sentencing hearing where trial judge implied that the cross-racial nature of the sexual offense played a role in his sentencing determination). This circumstance should also be challenged on due process grounds. *See infra* § 9.3B, Due Process.

**Defendant denied equal protection based on inequitable availability of alternatives to incarceration.** An equal protection claim may arise if, for example, English-speaking defendants can be sentenced to a residential treatment facility but there is no such facility available for Spanish-speaking defendants. *See, e.g.*, Jamie Markham, [New Substance Abuse Treatment Center for Female Probationers](#), N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 11, 2010) (noting that, before the establishment of Black Mountain Residential Substance Abuse Treatment Center for Women, some wondered if the availability of a residential treatment facility for men but not for women violated equal protection).

## B. Due Process

The substantive and procedural due process requirements of the Fourteenth Amendment, along with the parallel provisions of the North Carolina Constitution, require that all defendants have an “absolute right to a fair trial before an *impartial judge* and unprejudiced jury.” *State v. Wright*, 172 N.C. App. 464, 468–71 (2005) (emphasis in original) (quoting *State v. Miller*, 288 N.C. 582, 598 (1975)), *aff'd per curiam*, 360 N.C. 80 (2005); *In re Murchison*, 349 U.S. 133, 136 (1955). This includes the right to criminal proceedings untainted by racial bias. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (Marshall, J., concurring).

Due process guarantees have specifically been held applicable to sentencing proceedings. *U.S. v Onwuemene*, 933 F.2d 650 (8th Cir. 1991) (sentence based on race, national origin, or alienage violates due process); *People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (in cross-racial rape case, appellate court vacated defendant’s sentence on due process grounds where “defendants’ race was considered by the judge when he imposed these long, consecutive sentences[;] [i]f it is on his tongue, it most assuredly must be on his mind”).

Even if a judge’s statements regarding a defendant’s race, ethnicity, or national origin do not establish that the defendant’s sentence was based on one of these impermissible factors, due process may be violated on the ground that such statements do not satisfy “the appearance of justice.” *Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) (vacating and remanding for resentencing where trial judge observed at sentencing, “[t]here’s something that heightens the nature of an offense when people come from foreign lands to do offenses in another land”). Defendants should raise a due process challenge when there are indications that the judge is considering the defendant’s race, ethnicity, immigration status, or national origin in making the sentencing determination. *See also supra* § 9.3A, Equal Protection.

### C. Prohibitions Against Cruel and/or Unusual Punishment

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Similarly, article I, section 27 of the North Carolina Constitution prohibits cruel or unusual punishment. North Carolina courts have “analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.” *State v. Green*, 348 N.C. 588, 603 (1998).

Both state and federal constitutional provisions guarantee proportionality in sentencing. The U.S. Supreme Court has held that the right to proportionality in sentencing is violated only when a comparison between the offense gravity and the sentence severity reveals “gross disproportionality.” In cases where a court finds gross disproportionality, the court must review both sentences received within the state for more and less serious crimes, and sentences received in other states for the same crime. *Solem v. Helm*, 463 U.S. 277 (1983); *State v. Hensley*, 156 N.C. App. 634, 639 (2003). “Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment’s proscription of cruel and unusual punishment.” *State v. Ysaguirre*, 309 N.C. 780, 786 (1983); *State v. LaPlanche*, 349 N.C. 279, 284 (1998).

Drug trafficking penalties and those based on an offender’s status as a habitual felon have been the subject of Eighth Amendment proportionality challenges in North Carolina. To date, neither of these challenges has succeeded on appeal. *See, e.g., State v. Ford*, 71 N.C. App. 748 (1984) (punishment of 35 years imprisonment and \$200,000 fine not disproportionate to the crime of possessing more than 10,000 pounds of marijuana); *State v. Smith*, 112 N.C. App. 512, 514–15 (1993) (sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment); *accord State v. Todd*, 313 N.C. 110, 117–19 (1985); *State v. McDonald*, 165 N.C. App. 237, 241–42 (2004); *State v. Clifton*, 158 N.C. App. 88, 95–96 (2003); *State v. Hensley*, 156 N.C. App. 634, 638–39 (2003).

While not a race-based challenge, a proportionality challenge may be a viable option for challenging a “grossly disproportionate” sentence in an extreme case, and may have a greater chance of success when raised alongside an equal protection or due process claim. For example, in two superior court cases involving Black defendants charged with drug possession as habitual felons, trial court judges have found that the prohibition against cruel and unusual punishment as well as the guarantees of due process and equal protection prohibited the imposition of the sentence mandated by the habitual felon statute. *See State v. Griffin*, 215 N.C. App. 391 (2011) (unpublished) (finding appellate court had no jurisdiction to hear State’s appeal of granting of motion for appropriate relief in defendant’s favor); *State v. Starkey*, 177 N.C. App. 264 (2006) (same). In both cases, the trial court imposed the sentence mandated by the habitual felon statute before, sua sponte, entering an order granting its own motion for appropriate relief. In the *Starkey* case, the judge explained that sentencing a defendant with no prior crimes involving drugs or violence to 70 to 93 months for possession of a tenth a gram of cocaine, the smallest quantity measurable by the State’s lab, shocked the conscience: “It’s unfair. It’s

inequitable, and it's wrong." See Order and Excerpt of Sentencing Transcript in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select "Training and Resources") (trial judge noted that defendant's punishment was as harsh as it would have been had his substantive offense been trafficking in 399 grams of cocaine, terrorism by contaminating a public water supply, armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, malicious castration, second degree rape, voluntary manslaughter, or first degree kidnapping).

#### **D. Raising Constitutional Challenges**

The defendant may raise constitutional challenges in a sentencing memorandum or during a sentencing hearing. Constitutional challenges to a sentence that has been imposed also may be raised in a motion for appropriate relief or on appeal. *State v. Curmon*, 171 N.C. App. 697 (2005).

Generally, "constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410 (2004) (quotation omitted). However, a defendant does not appear to waive his right to object to the constitutionality of his sentence if the constitutional challenge is not raised at the trial level. The North Carolina Court of Appeals stated in *State v. Curmon* that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) [of the N.C. Rules of Appellate Procedure]." 171 N.C. App. 697, 703 (citing *State v. Hargett*, 157 N.C. App. 90, 93 (2003)). This approach reflects the practical difficulties that may be involved in objecting to the conduct of the judge at the time of sentencing. See *U.S. v. Kaba*, 480 F.3d 152, 158 (2d Cir. 2007) (concluding that defendant did not waive her argument on appeal because she was "understandably reluctant to suggest to a judge that an ambiguous remark reveals bias just as the judge is about to select a sentence" (quotation omitted)).

Nevertheless, it is important that the defense attorney object if race appears to influence a sentencing determination, both to allow the judge an opportunity to take the objection into consideration and to ensure the issue is preserved for appeal. Defense attorneys may feel reluctant to raise challenges to the improper influence of race at sentencing to avoid appearing to level a charge of racism against the judge. By couching objections in constitutional form, however, counsel may alert the judge to objectionable considerations without jeopardizing the client's interests. For example, where a judge makes a racial comment in sentencing, defense counsel may object that the statement introduced an unconstitutional factor into the sentencing hearing and determination.

### **9.4 Effective Sentencing Advocacy**

The rules of evidence do not apply to sentencing hearings—any evidence that a court deems to have probative value may be received, including evidence of racial disparities. N.C. R. EVID. 1101(b)(3). Relevant information may include the client's cultural background; his or her experience with prejudice, racial profiling, or other forms of

disadvantage; statistics reflecting racial disparities in the justice system; and social science evidence on the influence of implicit bias. In short, the door is open at sentencing in a way that it may not be at trial for defenders to place the full context of a client's life experience before the court and advocate for a just result. This section is not a comprehensive treatment of sentencing advocacy, but instead an outline of possibilities.

### **A. Early Advocacy**

Sentencing advocacy begins at the outset of representation and lasts until the conclusion of your client's case. Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15. In the initial client interview, counsel should begin to seek information not only about the charged offense, but also about the client's life, including his or her immigration status, children, public benefits, experiences with the police, cultural background, family obligations, mental health, substance abuse history, employment, housing, and educational background. Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, July 2013, at 51, 52; see also [The Bronx Defenders Arraignment Checklist](#), BRONXDEFENDERS.ORG (last visited Sept. 19, 2014). Such a "holistic" approach to advocacy may help to reduce potential racial disparities at sentencing and other stages of the case, and may have additional benefits, including:

1. An understanding of your client's life will strengthen your relationship with your client, particularly if he or she differs from you in terms of racial, ethnic, cultural, or socioeconomic background.
2. An early understanding of your client's background, community, and individual challenges and opportunities will strengthen your argument for pretrial release. Pretrial release may decrease the chances that your client will receive a sentence of incarceration. See *supra* Chapter 4, Pretrial Release.
3. Early understanding of your client's struggles, needs, and assets provides an opportunity to help the client get engaged in beneficial activities, employment, or programs that may serve as mitigating factors in plea negotiations and at the sentencing hearing. See James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9.
4. Implicit bias research indicates that bias is most pronounced when individuals are unwilling to consider the possibility that they may be influenced by bias. In contrast, humility about the possible influence of bias causes people to think more carefully and deliberately and may minimize the influence of bias. See generally Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007). In the context of indigent representation, this research suggests that listening carefully and making an effort to avoid prejudgments about the conditions of your client's life will minimize the risk that you will make race-based assumptions about his or her circumstances.

## B. Data and Record Collection

**Data collection.** Defense attorneys can benefit from gathering data concerning the individuals and communities they serve. Defender offices may rely on interns, volunteers, paralegals, or investigators to collect the following information.

- 1. Sentencing patterns in your district.** The biographical data collected on intake forms, including the client's charges, prior record level, and racial and ethnic identity, may be entered into a database with the client's identity removed, so that defense counsel can track outcomes received by various categories of clients. For example, during plea negotiations, defense counsel may present the prosecutor with any data showing that Black defendants disproportionately received active sentences for the charge in question over the previous year in comparison with White defendants at the same prior record level. Sentences may be influenced by decisions that occur at earlier stages of the criminal justice process; therefore, it is important to record relevant data from all stages of a case, including the original charges, plea offers, plea entered, and sentences as well as any presentencing report or sentencing plan prepared before sentencing. *See infra* "Presentence reports and sentencing plans" in § 9.4E, Sentencing Hearing Advocacy.
- 2. Favorable outcomes.** The office may maintain a file containing favorable plea offers and sentences that clients have received, including departures from presumptive ranges, deferred prosecutions, opportunities to receive substantial assistance departures pursuant to G.S. 90-95(h)(5), and charge dismissals, to use in plea negotiations and sentencing hearings. This data should include the race and ethnic background of the clients and the identity of the prosecutors and judges involved. The paralegal, administrative assistant, intern, or investigator tasked with collecting such information should make note of cases in which prosecutors declined to habitualize clients or declined to pursue trafficking charges.
- 3. Sentencing patterns of judges.** Defenders may collect data on the sentencing patterns of judges, including which judges have found extraordinary mitigation pursuant to G.S. 15A-1340.13(g), which judges have a record of granting community-based sentences, and which judges have been receptive to arguments about implicit biases or sentencing disparities.
- 4. Statewide averages.** In addition to collecting data, defenders may make use of available data sources reflecting the racial composition of those convicted of various offenses and the average sentences received for the charges your client faces. The North Carolina Sentencing and Policy Advisory Commission prepares annual reports reflecting the type of and length of sentences imposed for all convictions. *See* North Carolina Sentencing and Policy Advisory Commission, [Structured Sentencing Statistical Report for Felonies and Misdemeanors](#), NCCOURTS.ORG (last visited Sept. 19, 2014); *see also* Jamie Markham, [Sentencing Commission Annual Statistical Report](#), N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (Sept. 19, 2013) (discussing the content and utility of the Commission's annual reports). Another useful compilation

of North Carolina criminal justice data disaggregated by race can be found at the [North Carolina Advocates for Justice Racial Justice Task Force page](#). For example, if your client is facing marijuana charges in Durham County, you may consider obtaining statistics of overall enforcement of marijuana laws in Durham County. *See, e.g.*, Ian Mance, Southern Coalition for Social Justice, *Durham Police Department Stop-and-Search Data* (on file with authors) (reporting that, in Durham, “African-Americans . . . are approximately four times as likely as whites to be arrested on a misdemeanor marijuana possession charge, despite strong evidence that both whites and blacks use the drug at roughly the same rate (11.7% v. 12.7%)”). While some of the data sources listed above reflect arrest and/or conviction rates rather than sentencing patterns, the information may be useful to reference in plea negotiations and at sentencing hearings.

5. **“School-to-prison pipeline.”** You may consider collecting information about whether Black students are more likely to have school disciplinary problems referred to court, which leads to the development of criminal records at a young age. ASHLEY M. NELLIS, JUVENILE JUSTICE EVALUATION CENTER, SEVEN STEPS TO DEVELOP AND EVALUATE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT (DMC) 16 (2005). If your client’s criminal history was a result of a “school to prison pipeline” phenomenon, counsel can share the client’s experience with the prosecutor along with data reflecting such disparities. *See, e.g.*, Matt Cregor & Damon Hewitt, [Dismantling the School-to-Prison Pipeline: A Survey from the Field](#), POVERTY AND RACE (Poverty & Race Research Action Council, Washington D.C.), Jan.–Feb. 2011, at 5; SUSAN MCCARTER & JASON BARNETT, [THE SCHOOL-TO-PRISON PIPELINE: IMPLICATIONS FOR NORTH CAROLINA SCHOOLS AND STUDENTS](#) 15 (2013) (according to the N.C. Department of Public Safety, Division of Juvenile Justice, for students aged 15 and younger, “there were a total of 16,000 school-based delinquency complaints filed in 2011 and of this total, 46.2% of the complaints were filed against African-American students,” who made up 26.8% of the student population).

The recently formed North Carolina Public Defender Committee on Racial Equity (NC PDCORE) may be able to assist in creating a standardized collection process for aggregating and analyzing this data for public defender offices. *See* [NC PDCORE Website](#), NCIDS.COM (last visited Sept. 19, 2014).

**Record collection.** It is critical to gather records relevant to potential mitigating factors, any alleged aggravating factors, and the sentence proposed. When a defense attorney fails to present evidence reflecting factors that may improve a defendant’s prospects at sentencing, she leaves an opening for assumptions about the defendant, potentially based on racial or ethnic stereotypes, that may influence the discretionary process of sentencing. The following is a non-exclusive list of the type of records that may be useful:

- Employment history: paychecks, attendance history, W-2 forms, letter from employer
- Proof of education: transcript, class schedule, letter from registrar
- Medical/mental health records
- Any certifications and licenses



- Any evaluation and treatment documents
- Military documents
- Client's financial documents

See Robert C. Kemp, III, [Art of Sentencing](#) (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013).

### C. Pretrial Strategies

Poverty can negatively affect defendants at multiple stages of the case, including the sentencing phase. Poor defendants, the majority of whom are racial or ethnic minorities, are less likely to be released pretrial, more likely to be convicted, more likely to be sentenced to a term of incarceration, and more likely to receive lengthier sentences than similarly situated offenders with greater financial resources. See, e.g., Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 897 (2003) (finding that Black and Latino defendants are “significantly less able to post bail”); GERARD RAINVILLE & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000 24 & Table 24 (2003) (concluding that defendants detained pretrial achieve worse outcomes).

Defenders can play an important role in connecting indigent clients to services that address their extralegal needs and may lead to mitigating evidence for sentencing. Assessing clients' needs and helping to identify appropriate community-based programs, activities, and services is an important aspect of client advocacy. See Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, THE CHAMPION, JULY 2013, at 51, 52 (observing that “[s]eamless access to legal and nonlegal services . . . is crucial for clients from historically disenfranchised Black and Latino communities” and that lack of access to needed services has contributed to “instability, poverty, and criminal justice involvement”); see also ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 15 (2d ed. 2008) (noting that, in assessing how racial minorities may be disadvantaged at the sentencing stage of a case, court actors should consider whether a “range of community-based alternatives to detention [are] available in the lower and superior courts [and whether] this range [is] offered at the same rate to minorities and nonminorities with similar offenses and offense histories”). Pretrial efforts by defenders may include:

1. Staying informed of available community-based programs, including those that may be particularly effective at serving racial or ethnic minorities, such as programs offered in multiple languages. To the extent possible, determine the record of success of the programs under consideration, and your client's history, if any, with similar programs. One useful compilation of such programs is the [Community Treatment and Resource Provider Directory](#) an online directory maintained by the Office of Indigent Defense Services. See also Jamie Markham, [County Resource Guide](#), N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013).

2. Ensuring that the programs under consideration are culturally appropriate for your client. For example, if your client is Spanish-speaking, ensure that the drug treatment program under consideration provides programs in Spanish.
3. Developing a specialized sentencing advocate or advocates in your office to investigate and develop mitigation evidence and address extralegal needs of clients.
4. Considering whether to seek funding for a mitigation specialist. In serious cases—including Class A, B1, and B2 felonies—defense attorneys should consider seeking funding to hire a mitigation specialist. Though these specialists typically work on capital cases, because of the stiff penalties attached to serious, non-capital felonies, you may be able to persuade a judge to approve funding for a mitigation specialist. Mitigation specialists are trained and experienced in obtaining evidence that may be difficult or time-consuming for a lawyer to obtain, including school records, and affidavits from teachers, neighbors, church officials, or others who can reflect on the struggles faced by your client.
5. Considering whether it is in your client’s interest to seek a presentence report or sentencing plan. *See infra* § 9.5E, Sentencing Hearing Advocacy.

#### **D. Sentence Negotiation Strategies**

Nationwide, approximately 95% of all felony convictions in state courts result from guilty pleas. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, [FELONY SENTENCES IN STATE COURTS, 2004](#) 1 (2004). For this reason, few stages of the criminal process are more crucial than plea negotiations. Since plea agreements in North Carolina may include a specific negotiated sentence, negotiations with prosecutors require the same knowledge, skills, and preparation required to handle a sentencing hearing. The following techniques may be helpful in addressing considerations of race during plea negotiations:

1. By addressing the subject of race with the prosecutor when pertinent, you may be able to reduce the likelihood that either of you will allow implicit biases to affect decision-making in the sentence negotiation process. *See Cynthia Lee, Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (summarizing research findings indicating that open discussions of race can reduce the operation of implicit biases).
2. In negotiating a sentence, it may be useful to describe to the prosecutor what you have learned about the client’s circumstances and the pressures he or she confronts, e.g., the influence of poverty, racial profiling, mental illness, or family circumstances. *See James Tibensky, What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9; *see also* Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15, 20 (describing plea negotiations as a time when the prosecutor may be persuaded to “see helping your client as part of a larger systemic effort to do

- justice”). If defense counsel has a mitigation video about the client (*see infra* “Practice note” in § 9.4E, Sentencing Hearing Advocacy (discussing mitigation videos)), counsel may consider sharing the video with the prosecutor during plea negotiations.
3. Present the prosecutor with any statistics, disaggregated by race and ethnicity, of disparate sentencing and/or enforcement associated with the charges your client faces. *See supra* § 9.4B, Data and Record Collection. Even where such evidence may be insufficient to support a successful equal protection claim, prosecutors may be persuaded to reduce charges in light of such information. *See supra* “Case study: Pretextual traffic stops” in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops (describing case in which public defender presented evidence of disparate enforcement to a prosecutor, who thereafter agreed to drop charges against her client).
  4. Alert the prosecutor where there is evidence or data to suggest that your client’s prior criminal history may have been influenced by improper racial considerations. *See supra* § 9.4B, Data and Record Collection.
  5. Ensure that the opportunity to provide substantial assistance does not differ depending on the race of the defendant. For example, in cases involving drug trafficking charges, research from the federal criminal justice system indicates that Black and Latino offenders were significantly less likely to be recommended for substantial assistance departures, even when offense severity, criminal history, and the tendencies of the sentencing judge were taken into consideration. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 308–09 Table 10 (2001). It has been suggested that these disparities result from the tendency to assign qualities such as “sympathetic” or “salvageable” disproportionately to White offenders. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (introducing the concept of a “salvageable” or “sympathetic” defendant into the analysis of substantial assistance departures). The discretionary decision regarding a substantial assistance departure is a crucial one in North Carolina, as it is essentially the only way that people convicted under drug trafficking statutes in North Carolina (carrying mandatory minimum terms of imprisonment and fines) can receive a mitigated sentence. Jamie Markham, [Options to Mitigate Sentences for Drug Trafficking](#), N.C. CRIM. L., UNC SCHOOL OF GOV’T BLOG (August 15, 2013).
  6. Be prepared with any data showing that White defendants facing similar charges have received more lenient sentences than faced by your minority client. *See supra* § 9.4B, Data and Record Collection.
  7. Know your client well enough before plea negotiations to distinguish him or her from potential racial or ethnic stereotypes. For example, counter possible stereotypes of your client as a gang member because he is a young, Latino male who lives in an area where the Latin Kings gang is active. Evidence such as school attendance records,

work records, or a letter from a local leader such as a pastor may assist in individualizing the client. Testimony from such character witnesses could also be included in a mitigation video. *See infra* “Practice note” in § 9.4E, Sentencing Hearing Advocacy.

8. If you present evidence of racial disparities to the prosecutor in negotiating a suggested plea and sentence, avoid stating or implying that the prosecutor is responsible for the disparities; doing so misstates the possible causes of disparities and may provoke defensiveness. Instead, frame the sentence you seek as an opportunity to offset factors that may have contributed to racial disparities (*see supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System), stressing that the sentencing stage provides the court system with a unique opportunity to achieve a just result for all involved.

### E. Sentencing Hearing Advocacy

Effective sentencing advocacy involves the development of a sentencing theory that counsel can present to the judge in a sentencing hearing and/or sentencing memorandum. A sentencing theory serves to convince the court that the sentence you are asking the court to impose serves the interests of all relevant stakeholders, including the victim, the community, and the defendant. For example, if your theory is that your client suffers from drug addiction and the sentence you seek is an intermediate sentence at a drug treatment facility, be prepared to explain to the court how this result is in the best interests of all relevant stakeholders. *See* THE SENTENCING PROJECT, [TEN PRINCIPLES OF SENTENCING ADVOCACY](#) (2003) (listing, among other principles, that sentencing advocacy is “an exercise in problem-solving” and “opposes racial disparity and cultural bias”); *see also* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9 (problem-solving advocacy views the offense as “a problem for society, for the community, for the victim, for the court and for the defendant,” and attempts to craft a sentencing recommendation that benefits as many of those parties as possible).

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**Practice note:** In recent years, some defense attorneys have created mitigation or sentencing videos to show during sentencing hearings and plea negotiations. *See* Joe Palazzolo, [Leniency Videos Make a Showing at Criminal Sentencings: Some Lawyers Supplement Letters of Support with Mini-Documentaries, Effectiveness is Debated](#), WALL STREET JOURNAL, May 29, 2014 (quoting assistant federal defender Doug Passon as stating that, when sentencing videos are introduced, “[t]he sentences are almost always better than they would otherwise be”). Mitigation video pioneer and assistant federal public defender Doug Passon, who made his first sentencing video in 1995, observes that such videos can be effective at bridging cultural gaps between defendants and court actors. *See* Doug Passon, [Using Mitigation Videos to Bridge the Cultural Gap at Sentencing](#), in CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 981 (Linda Friedman Ramirez ed., 3d ed. 2010) (stating that criminal defense attorneys should make empathy the focus of sentencing presentations to “bridge the chasm of the cultural divide” and effectively convey the client’s circumstances to the judge, which may include poverty,

abuse, mental illness, addiction, and other suffering); *see also* Regina Austin, “Not Just a Common Criminal”: The Case for Sentencing Mitigation Videos (April 15, 2014) (University of Pennsylvania Law School Faculty Scholarship Paper). These videos may be particularly useful at illustrating circumstances such as the impoverished conditions of a defendant’s home or neighborhood, and may be a good way of introducing the voices of character witnesses who face difficulties coming to court or preparing a written statement on behalf of the defendant. While some film-makers charge between \$5,000 and \$20,000 for producing such videos, it is possible for defenders or investigators to produce modest videos on their own. *See* Doug Passon, [Using Mitigation Videos to Bridge the Cultural Gap at Sentencing](#), in CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 996 (Linda Friedman Ramirez, ed., 3d ed. 2010). Examples of sentencing videos may be viewed online. *See, e.g., Don Ayala Sentencing Documentary*, NEW ORLEANS TIMES-PICAYUNE, Sept. 1, 2010 (sentencing video shown to a federal judge who ultimately imposed a term of probation on a defendant facing eight years in prison under federal sentencing guidelines for voluntary manslaughter).

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**Presenting evidence aimed at obtaining a favorable sentence.** Defendants are entitled to sentencing hearings, during which the formal rules of evidence do not apply. G.S. 15A-1334. In a sentencing hearing, any evidence that a court deems to have probative value may be received. N.C. R. EVID. 1101(b)(3); *see also State v. Brown*, 320 N.C. 179, 203 (1987) (“the touchstone for propriety in sentencing arguments is whether the argument relates to the character of the [defendant] or the nature [or circumstances of the crime]”). The court must consider any evidence presented by the defendant of mitigating factors. Mitigating factors must be proven to the court by a preponderance of the evidence. G.S. 15A-1340.16(a); *see State v. Knott*, 164 N.C. App. 212 (2004) (refusal to allow defense counsel an opportunity to present evidence of mitigating factors constitutes plain error). Twenty specific mitigating factors are set forth in G.S. 15A-1340.16(e), and the statute also allows judges to find “[a]ny other mitigating factor reasonably related to the purposes of sentences.” G.S. 15A-1340.16(e)(21); *see also* G.S. 15A-1340.12 (describing the purposes of sentencing). This “catch-all” provision gives defense attorneys creative freedom to raise concerns about race that may be related to sentencing, including the potential impact of structural racialization and implicit bias (discussed *supra* in Chapter 1) and any disparity that may have affected an earlier stage of the case (for example, the inability of the client to obtain pretrial release). The following are possible strategies for addressing at sentencing the cumulative effects of any racial disparities:

1. Explain how any hardships associated with the defendant’s racial, ethnic, or cultural background may support a reduced punishment. Some of the statutory mitigating factors, including successful completion of a drug treatment program, a positive employment history, or a defendant’s support of his or her family, may carry more weight when presented alongside the defendant’s struggles against racial barriers, poverty, or disadvantage. For example, in *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999) and *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993), the extreme difficulties of life on an Indian reservation, viewed alongside the defendants’ records,

which included attributes such as community support, limited criminal history, and educational accomplishment, supported reduced sentences.

2. In cases in which you are concerned that racial stereotypes may influence the sentence under consideration, incorporate a race-switching exercise into your argument at the sentencing hearing or invite the court to engage in a race-switching exercise. A race-switching exercise is a mental exercise that involves switching the race of the parties to determine whether race may have played a role in assessing the evidence. *See supra* § 8.6D, Jury Instructions; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing race-switching jury instruction); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24 (describing a case in which a judge noted “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”). To avoid suggesting that the judge alone may be affected by implicit bias, counsel may wish to present this as an exercise for the entire courtroom. For example, counsel may posit: “All of us who work in the court system, the prosecutor and myself included, need to ask ourselves whether we would be doing or thinking anything different today if the defendant were White and/or the victim were Black; as members of the bar sworn to uphold the Constitution, we can’t allow race to play a role at sentencing.”
3. Inform the judge of any cultural factors that may be relevant to an evaluation of defendant’s blameworthiness. For example, in one case, a Korean man argued for a downward departure from the federal sentencing guidelines on the basis that his upbringing in Korea caused him to believe that the money he provided to an Internal Revenue Service agent in the form of a bribe was legally and socially obligatory. *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992).
4. Explain to the court how race may have affected earlier stages of the process in your client’s case, and that sentencing provides an opportunity to redress any taint. *See, e.g.*, Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (arguing that race should be considered as a mitigating factor where it is likely that racial discrimination occurred at an earlier stage of the case); *see also* Traci Schlesinger, [\*The Cumulative Effects of Racial Disparities in Criminal Processing\*](#), THE ADVOCATE, May 2008, at 22. For example, if you are able to show that a similarly situated White co-defendant was released pretrial, completed drug treatment, and based on that treatment, received a reduced sentence, while your Black client was detained pretrial with no such opportunity to engage in productive activities, the judge may consider this as mitigating evidence. *See also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988) (arguing that “to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender’s race as a mitigating factor”).

5. Explain to the court whether your client's prior criminal history may have been influenced by race. For example, in *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of the defendant's prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record. *See supra* § 2.2, Overview of Racial Profiling Concerns (discussing recent studies regarding racial disparities in traffic stops in North Carolina).
6. Forecast for the judge—based on available statistics, your client's history, and familiar anecdotes—the likely future your client faces if he or she receives the non-incarcerative, community-based, or reduced sentence you seek, and contrast it with decreased life chances he or she faces if sentenced to lengthy incarceration. *See* Robert C. Kemp, III, [Art of Sentencing](#) (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013). For example, you could explain to the judge that a prison sentence will result in the loss of your client's job, while a community or intermediate sentence will allow him to continue working and providing for his family. Additionally, you could present the court with evidence showing that recidivism rates are generally lower for probationers than for prisoners in North Carolina. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, [CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09](#) 27 (2012) (finding that probationers in FY 2008/2009 were less likely than people released from prison to be rearrested during both one-year and two-year follow up periods). Explain to the judge any concerns about any contemplated sentences that are in conflict with your client's cultural values and individual characteristics. For example, a devout Muslim client may not succeed in a drug treatment facility that includes mixed gender treatment groups.
7. Inform the judge of community-based alternative sentences that meet the needs of your client and address the problems underlying the crime of conviction. *See* North Carolina Office of Indigent Defense Services, [Community Treatment and Resource Provider Directory](#), NCIDS.COM (last visited Sept. 22, 2014). Some judges may be reluctant to impose probationary sentences because they do not know of local programs for which the defendant is eligible. *See* Jamie Markham, [County Resource Guide](#), N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013). You can preliminarily evaluate your client's eligibility for programs and services and provide information to the judge regarding such matters as the proximity of the proposed community-based program to the client's home, available modes of transportation, and available spots for new participants. Knowledge of available, appropriate programs for which your client is eligible may, "in a close case, inform the judge's decision between an active and probationary sentence." *Id.*
8. Stress to the judge the importance of taking into account the defendant's resources to avoid penalizing defendants who are poor, the majority of whom are racial minorities. For example, you may want to inform the judge of cases in which similarly situated

- defendants with private counsel have been able to craft desirable sentences funded by their own financial assets and argue that your client's sentence should not depend on his or her resources. Additionally, if your case is one in which your client may be ordered to pay restitution, present records regarding financial hardship, e.g. foreclosure records, a spreadsheet reflecting income vs. expenses, bankruptcy documents, etc., since the judge must take the defendant's ability to pay into consideration in ordering restitution. G.S. 15A-1340.36.
9. Explain to the judge the particular concerns about disparities in certain contexts, such as marijuana charges, drug trafficking charges, habitual felon charges, and substantial assistance departures. Sources for such data include your own collected reports of offender data as well as statistics collected by the [NCAJ's Racial Justice Task Force](#), the [Governor's Crime Commission](#), and the [Department of Public Safety](#). This type of information has been referred to as "social framework evidence," and has been recognized as an important tool in mitigating the effects of race on criminal justice outcomes. THE SENTENCING PROJECT, [REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM](#) (2013). Argue that evidence of disparities provides support for a reduced sentence, as recognized by the U.S. Supreme Court in *Kimbrough v. United States*, 552 U.S. 85 (2007) (upholding district court's consideration of sentencing disparities as a basis for imposing a reduced sentence in a crack-cocaine case).
  10. Make a formal presentation of mitigating evidence—which may include testimony from the client and witnesses, school or employment records, and a defense sentencing memorandum—aimed at constructing an individualized narrative supporting your sentencing recommendation. This approach may counter the potential effects of implicit bias by distinguishing your client from potential stereotypes, promoting a closer examination of your client's circumstances, and averting automatic or "snap" judgments. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).
  11. Provide the sentencing judge with evidence about implicit racial bias. Jonathan Rapping, [Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions](#) 1040 (Working Paper, January 16, 2014). Because of the wide range of permissible considerations at sentencing, defense attorneys should use the opportunity to point out "how subconscious bias can affect how judges sentence." *Id.* This can be done by directing judges to social science research on implicit biases and their potential influence on judges. *Id.*; see, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (study that involved administering the Implicit Association Test to trial judges concluded that judges do, in fact, harbor implicit racial bias).
  12. Inform the judge about the connection between discretion and the operation of biases, including in evaluation of mitigating and aggravating factors. In the context of capital sentencing by juries, the U.S. Supreme Court recognized how the discretion involved



in determining a criminal sentence provides “a unique opportunity for racial prejudice to operate but remain undetected.” *Turner v. Murray*, 476 U.S. 28, 35 (1986). For example, the Court explained that someone “who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved . . . aggravating factors . . . [and] . . . might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case.” *Id.* Risks of implicit biases may be present when a defendant is subject to a discretionary sentencing determination by a judge. *See, e.g.*, David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012) (finding that judges differ in the degree to which race influences their decisions regarding whether to incarcerate a defendant); *see also People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (just as the trial judge must “shield the jury from considering racially prejudicial remarks by the participants during trial, so also must the judge at sentencing safeguard against racial considerations”).

13. Learn the prosecutor’s sentencing position before the sentencing hearing and devise a plan for responding to the aspects with which you disagree. If the prosecutor offers improper evidence during a sentencing hearing, object to the evidence as irrelevant to the purposes of sentencing. *See* G.S. 15A-1340.12; *see also People v. Riley*, 33 N.E.2d 872, 875 (Ill. 1941) (sentencing judge “owes the same duty to the defendant to protect his own mind from the possible prejudicial effect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence”).

**Presentence reports and sentencing plans.** Where the preparation of a presentence report by a probation officer or a sentencing plan by a sentencing specialist is an option, defense attorneys should consider whether one of these options may benefit the client. *See* Jamie Markham, [Presentence Reports and Sentencing Plans](#), N.C. CRIM. L., UNC SCHOOL OF GOV’T BLOG (August 27, 2010).

When a probation officer prepares a presentence report, defense attorneys should be involved in the preparation of the report to the extent possible. Defendants and defense attorneys have a right to view any presentence report prepared by probation. G.S. 15A-1333(b). Defendants should request to see any report before it is presented to a judge, and to have an opportunity to advocate to the preparer of the report for changes to any irrelevant or inaccurate content. While the preparation of presentence reports by probation is permitted by statute, in practice, it rarely happens. NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, [PRESENTENCE INVESTIGATIONS FEASIBILITY STUDY REPORT: SESSION LAW 2009-451, SECTION 19.14](#) (2010) (reporting that probation officers are rarely asked to prepare presentence reports, and that some superior and district court judges were unaware that existing law allowed for their preparation).

When reviewing a presentence report, be alert to any depictions of your client in an unflattering or racially stereotypical manner. For example, in a qualitative study performed in a northwestern city, researchers found that probation officers’ assessments

of motivations for offending differed by race in presentence reports in juvenile cases. In particular, the delinquency of Black youth was typically explained “as stemming from negative attitudinal and personality traits,” while delinquent behavior of White youth “stressed the influence of the social environment.” ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 14 (2d ed. 2008). “Black youth were judged to be more dangerous, which translated into harsher sentences than for comparable white youth.” *Id.*

As a result of the elimination of the statewide Sentencing Services program, which evaluated defendants for possible non-incarcerative sentences at the request of the defendant or the court, independent sentencing specialists are available to produce sentencing plans only in certain counties. Where such specialists are available, counsel must cite specific grounds for preparation of a plan and a judge must determine whether one is warranted, at a cost of \$500 (paid by the Office of Indigent Defense Services). To find out if there is a sentencing specialist in or near your area who is available to be appointed by the court to prepare a sentencing plan, consult the [Community Treatment and Resource Provider Directory](#), an online directory maintained by the Office of Indigent Defense Services. Regardless of whether a sentencing specialist is available in your area, you may apply to the court for funds to hire a mitigation specialist and offer information obtained by such a specialist to the court during sentencing. *See* Ex Parte Motion to Hire Mitigation Investigator, available at [www.ncids.org](http://www.ncids.org) (select “Training and Resources,” then “Motions Bank, Non-Capital”).

Anecdotal evidence suggests that, in counties where sentencing specialists are available, defense attorneys tend to seek their services when the sentencing grid calls for an active or intermediate sentence, for assistance in structuring an appropriate intermediate sentence. The sentencing specialist’s plan generally will include detailed background information about the client, a risk assessment, and available treatment options. In some cases, the most useful function a sentencing specialist can serve is getting the client into a treatment program, which may be difficult for the defense attorney to arrange. Consult with the sentencing specialist for further details about the process and requirements for obtaining a sentencing plan.