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 a 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.