8.4 References to Race at Trial

A. Is the Reference Relevant?

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

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

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

B. Improper References to Race by the State

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

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

Argument. The same rule prohibits defense attorneys from making derogatory references about race. *See infra* § 8.4C, Improper References to Race by the Defense.

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

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

Substantive and procedural due process. The North Carolina Supreme Court has recognized that "[t]he substantive and procedural due process requirements of the Fourteenth Amendment mandate that every person charged with a crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury." *State v. Miller*, 288 N.C. 582, 598 (1975), *rev'd sub nom. on other grounds*, *Miller v. North Carolina*, 583 F.2d 701 (1978). "It is the duty of both the court and the prosecuting attorney to see that this right is protected." *Id.* A conviction will be reversed where a prosecutor's improper appeal to racial prejudice "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (quoted in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Substantive and procedural due process challenges to a prosecutor's appeal to racial prejudice should also

be raised under the law of the land clause in article I, section 19 of the North Carolina Constitution.

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

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

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

Professional ethics. In addition to the constitutional prohibitions on appeals to racial prejudice, which serve the purpose of ensuring a fair and impartial jury and the integrity of the criminal justice system, various professional standards prohibit prosecutors from exploiting race to a defendant's disadvantage. For example, the American Bar Association Criminal Justice Standards provide that "[t]he prosecutor should not make arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice (1992) 3-5.8(c). Additionally, Comment 1 to N.C. Rule of Professional Conduct 3.8 provides that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . . A systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4."

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

C. Improper References to Race by the Defense

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

In extreme cases, a defense attorney's appeals to racial prejudice may violate a defendant's right to effective assistance of counsel, guaranteed by the Sixth Amendment to the U.S. Constitution. *See, e.g.*, *State v. Davis*, 872 So. 2d 250, 252 (Fla. 2004) (defense attorney who stated during voir dire "[s]ometimes black people make me mad just because they're black" rendered ineffective assistance of counsel). For example, when a defense attorney stated during his closing argument that he had previously told the defendants "Y'all n****** 40 or 50 years ago would be lynched for something like this," the Georgia Court of Appeals reversed the defendants' convictions on the ground that, "[r]acial prejudice being a highly volatile and incipient and cancerous factor, its deliberate introduction rendered counsel's performance deficient." *Kornegay v. State*, 329 S.E.2d 601, 603, 605 (Ga. Ct. App. 1985) (observing that "[a]ppeals to the prejudice engendered by belief in racial inferiority have no place in our system of criminal justice, even if the theory is that the prejudice would work in defendants' favor" (internal citation omitted)).

These cases should not discourage defense attorneys from addressing considerations of race in appropriate cases, including exploring potential biases during voir dire, but instead reinforce that neither side may make gratuitous, degrading, or inflammatory racial remarks. "The issue is not that [defendant's] trial counsel chose to question jurors on their feelings about race but rather what counsel stated about his own racial prejudices. The

manner in which counsel approached the subject unnecessarily tended either to alienate jurors who did not share his animus against African Americans . . . or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004); *see also infra* "Avoiding the invited response doctrine" in § 8.6E, Closing Argument.

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