## 8.5 Examples of Improper Appeals to Racial Prejudice

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

### A. Animal Imagery

**Generally.** Prosecutors may not degrade or compare criminal defendants to animals. *State v. Roache*, 358 N.C. 243, 297 (2004) (improper for prosecutors to characterize defendants as a pack of wild dogs "high on the taste of blood and power over their victims"); *State v. Jones*, 355 N.C. 117, 133 (2002) (court vacated death sentence for, among other reasons, prosecutor's prejudicial argument that defendant was "lower than the dirt on a snake's belly"); *State v. Richardson*, 342 N.C. 772, 792 (1996) (court does not condone comparisons between defendants and animals, but isolated reference to defendant as "animal" not prejudicial); *State v. Smith*, 279 N.C. 163, 165 (1971) (awarding new trial to defendant after prosecutor described him as "lower than the bone belly of a cur dog"); *State v. Ballard*, 191 N.C. 122, 124 (1926) (reference to "human hyena" improper, but cured by court's immediate intervention). Such imagery violates the defendant's right to a fair, impartial jury, as it "improperly [leads] the jury to base its decision not on the evidence relating to the issue submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *Jones*, 355 N.C. 117, 134.

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

- In *State v. Sims*, 161 N.C. App. 183 (2003), the State devoted several paragraphs of its closing argument to explaining how the defendant and his coconspirators, all of whom were Black, were "[j]ust like the predators of the African plane [sic]," like a "pack of wild dogs or hyenas in a group attack[ing] a herd of wildebeests" on

"Discovery Channel [or] Animal Planet." The prosecutor described how a wild African predator would grasp "its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal." He stated that the defendant and his coconspirators "stalked their prey. They chased after their prey. They attacked their prey. Ultimately, they fell their prey." While the court found it permissible to use the phrase "he who hunts with the pack is responsible for the kill" to explain the theory of acting in concert, the court found that the prosecutor acted improperly by making such a close association between the defendant and the animal kingdom, especially where the prosecutor discussed hunting on the African plane at length and the defendant was Black. The court concluded, however, that, "although improper, the district attorney's comments did not deny defendant due process entitling him to a new trial."

- In *State v. McCail*, 150 N.C. App. 643 (2002), the prosecutor compared the Black defendant to Curious George, a monkey in a series of children's books. The judge intervened ex mero motu and instructed the jury to disregard the characterization of the defendant. The Court of Appeals held that the prosecutor's statement was improper but did not require reversal in light of the substantial evidence of the defendant's guilt and the curative instruction.

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

**Historical reliance on animal imagery.** Reliance on animal imagery plays into a long and brutal history of dehumanizing Black people. The "Black brute" caricature dates back at least to the era of Reconstruction, and "portrays black men as innately savage, animalistic, destructive, and criminal—deserving punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace. Black brutes are depicted as hideous, terrifying predators who target helpless victims, especially white women." David Pilgrim, *The Brute Caricature*, FERRIS.EDU (last visited Sept. 12, 2014). This caricature

continues to appear in prominent trials of the post-civil rights era. *See* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic, or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 336 n.96 (2001) (recounting officers' testimony that Rodney King "groaned like a wounded animal" and gave out a "bear-like yell").

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

---

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

---

### B. Racial Demographics of Geographic Areas

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

This type of improper appeal may take the form of evidence concerning neighborhood demographics, as in *Russell*, or argument that a defendant had "no reason . . . to be [at the scene of the crime] except to cause trouble." *People v. Johnson*, 581 N.E.2d 118, 126 (Ill. App. Ct. 1991) (prosecutor pointed out that the Black defendant lived on south side of

Chicago and crime occurred in North Lincoln Park; defendant argued that the implication was that "a public park on the north side of Chicago is or should be off limits to a black man from the south side of Chicago"; court concluded that prosecutor's comment was not an improper appeal to racial prejudice but an attempt to counter defendant's theory that his presence at the scene of the crime was a coincidence). Courts have reversed convictions when a prosecutor argued that the Black-on-Black crime problem faced by Detroit should not be permitted to reach the neighboring town of Joliet, *People v. Lurry*, 395 N.E.2d 1234, 1237 (Ill. App. Ct. 1979), and when a prosecutor lambasted a defendant for committing a crime in "our streets" and not in "some ghetto." *People v. Nightengale*, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988).

### C. Associations Between Race and Criminality

A statement or suggestion that a defendant's actions, motivations, or beliefs can be inferred from the defendant's race or ethnicity violates the guarantees of equal protection and due process, deprives a defendant of a fair trial, and violates North Carolina Rules of Evidence 401, 402, 403, and 404(a). *See, e.g.*, *United States v. Doe*, 903 F.2d 16, 24–25 (D.C. Cir. 1990). For example, the First Circuit Court of Appeals held that the admission of an identification card showing the defendant's Columbian nationality in a case in which his alleged co-conspirators were Colombian was reversible error. *United States v. Rodriguez Cortes*, 949 F.2d 532, 540–43 (1st Cir. 1991). Similarly, in a case involving a Jamaican defendant, the D.C. Circuit held that the admission of expert testimony on the role of Jamaicans in the local market for illegal drugs constituted reversible error. *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990) (observing that "[r]acial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice," and concluding that "[a]ppeals to racial passion can distort the search for truth and drastically affect a juror's impartiality" (footnotes omitted)).

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

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

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

> [The prosecutor] tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation. . . Such

> conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice.

*Id.* at 1138.

### D. Racial Slurs or Stereotypes

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

> Detective Rilee asked Runyon: "[Y]ou're Asian, right, Asian–American? You're an honorable Asian man, aren't you?" "Yes sir," he answered. Imploring Runyon to be honest, Rilee continued, "You know, if you're an honorable Asian man and your integrity is intact and you have any respect for anybody at all, then you'll do the right thing today, okay?" The officers proceeded to invoke Runyon's "honor" on multiple occasions during the interrogation.

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

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

*Id.*

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

In two recent cases, courts found reversible error where the prosecutor argued that Black people do not "snitch" to police about crimes committed by other Black people. In Washington state, a prosecutor questioned Black witnesses, who had recanted their original testimony, about a "code" allegedly adhered to by Black people that prohibits "snitching" to police. *State v. Monday*, 257 P.3d 551 (Wash. 2011). The prosecutor then argued in his closing argument that "black folk don't testify against black folk. You don't snitch to the police." The Washington Supreme Court concluded that the conduct deprived the defendant of his right to a fair trial and reversed the conviction. In Illinois, a prosecutor spoke at length about the Black community's hostility toward the police: "[The] black community here in Marion . . . most of these people were raised to believe that the police and prosecutors are the enemy . . . In their mindset, the biggest sin that you could-that you can commit is to be a snitch in the community." *People v. Marshall*, 995 N.E.2d 1045, 1047–48 (Ill. App. Ct. 2013). The prosecutor argued to the all-White jury that this attitude was foreign to "our white world," but that the jury should "keep in the back of your mind how many people in [the Black] community feel about law enforcement." *Id.* The appellate court reversed the conviction, noting that the prosecutor improperly urged the jury to rely on these race-based generalizations when assessing witness credibility, and concluded that the "prosecutor improperly aligned himself with the jury [by] contrast[ing] the [distrust of police in the] 'black community' with [the respect for police in] 'our white world.'" *Id.* at 1050.

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

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

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

concurrence, one justice found no impropriety in the argument, finding the assertions a matter of common knowledge and criticizing the "tidal wave of civil rights fanaticism" that "has swept over this nation" and "washed into judicial opinions." *Id.* at 605.

The Fourth Circuit Court of Appeals overturned the conviction:

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

*Id.* at 708. *See also State v. Richmond*, 904 P.2d 974 (Kan. 1995) (improper for prosecutor to ask jury to "[t]hink about having to divulge to your husband that you were raped by a black male. . . . Both of the females are white."); *State v. Reynolds*, 580 So. 2d 254 (Fla. Dist. Ct. App. 1991) (in sexual battery case involving Black male defendant and White female victim, conviction reversed as a result of prosecutor's racialized language throughout case, including voir dire questions as to whether any potential White jurors had dated or married "a person of the black race," and a closing argument in which the prosecutor asked jurors "to think about how embarrassing it is for an 18-year-old white girl from Crestview to admit she was raped by a black man. It is humiliating").

---

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

- Suggestions that White people generally find Black people sexually undesirable. *See, e.g., Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978); *People v. Richardson*, 363 N.E.2d 924, 926, 927 (Ill. App. Ct. 1977) (prosecutor argued that a White male witness must be telling the truth because his story included admitting to sexual intercourse with a Black woman, and "[i]f he is going to lie about anything else, he wouldn't admit having intercourse with a black woman"; court found that prosecutor's statements "so prejudiced and inflamed the jury against Richardson's defense that he was deprived of a fair trial.").
- Attempts to inflame jurors' fear by suggesting that, while the victim of sexual assault in the present case is Black, the next victim could be a White person. *See, e.g., Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (comment that "maybe the next time it won't be a little Black girl from the other side of the tracks; maybe it will be somebody that you know" constituted appeal to prejudice over evidence, and in combination with other inflammatory remarks, denied defendant a fair trial).
- Derogatory references to interracial relationships. *See, e.g., State v. Deas*, 25 N.C. App. 294 (1975) (prosecutor argued that interracial relationships "don't happen in

- Transylvania County"; however, court found no abuse of discretion and no prejudicial error).

## F. Emphasis on Victim's Race

Emphasis on the race of the victim poses a risk to the impartiality of the jury. Recent studies in capital cases, for example, have found that the race of the victim is a significant factor in imposition of the death penalty in North Carolina. Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119 (2011) (statewide from 1980 to 2007, homicides of White victims faced odds of resulting in a death sentence that were nearly 3.0 times higher than cases involving homicides of Black victims); Affidavit of Catherine M. Grosso & Barbara O'Brien Regarding MSU Study at 35 in the Race Materials Bank at www.ncids.org (select "Training and Resources") (statewide from 1990 through 2009, death eligible cases with at least one White victim were 2.59 times more likely to result in a death sentence than all other cases); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2097 (2010) (describing the "continuing heavy predominance of white victims in death sentences").

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

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

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

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

## H. Defendant's Racial Conduct or Remarks

Defense counsel may object where the State seeks to introduce evidence of a defendant's racist or racially inflammatory remarks on the grounds that they are irrelevant under N.C. Rules of Evidence 401 and 402, constitute inadmissible character evidence under Rule 404(a), violate the defendant's constitutional right to a fair trial, and are more prejudicial than probative under Rule 403. Courts may admit such evidence only if it is probative of a disputed issue and its probative value is not substantially outweighed by the danger of unfair prejudice. For example, a White defendant's reference to a Black victim as a "damn n*****," along with evidence that the Black victim was seen driving through a predominantly White area, was admissible and sufficient to support a jury argument that the crime by the White defendant was racially motivated. *State v. Moose*, 310 N.C. 482, 492 (1984).

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

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

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

inhabited by his Black client (and, by extension, the predominantly Black jury), and his characterization of his client's life should therefore be discounted.

## J. Challenging Improper References to Race

Given the difficulty of measuring a jury's impartiality following exposure to appeals to racial prejudice, defendants should object and consider moving for a mistrial any time racially inflammatory rhetoric threatens the fairness of the defendant's trial. G.S. 15A-1061; *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (observing in the grand jury context that "[w]hen constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm"); *State v. Warren*, 327 N.C. 364, 376 (1990) (mistrial warranted where the "improprieties in the trial [are] so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict" (quotation omitted)). If you fail to object, your client will have to show on appeal that the prosecutor "stray[ed] so far from the bounds of propriety" that the trial court should have intervened ex mero motu. *See State v. Smith*, 351 N.C. 251, 269 (2000). If your motion for a mistrial is not made in a timely manner, i.e., "at some time sufficiently close to the occurrence of the error to permit its correction," then denial of the motion may not be preserved for appellate review. *See* G.S. 15A-1446 Official Commentary, *see also State v. Smith*, 96 N.C. App. 352 (1989) (defendant waived appellate review where his motion for mistrial based on the prosecutor's alleged improper opening statement was not made until after the jury began deliberating); N.C. Rule of Appellate Procedure 10 (requiring a timely objection or motion to preserve the error for appellate review). Other remedies include proposing a curative jury instruction and moving to prohibit racially inflammatory language before it is used where circumstances suggest that it might be introduced. Consider proffering some of the empirical studies cited earlier to explain the impact of racially inflammatory language on the jury in support of your objection, motion for a mistrial, or motion in limine. *See supra* "Practice note" in § 8.5A, Animal Imagery; *infra* "Practice note" in § 8.6E, Closing Argument.