8.6 Considerations at Certain Stages of Trial

A. Motion for Change of Venue

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

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

Media accounts of crime shaped by the race of the victim and the perpetrator may support a motion for change of venue. Reports of crime often include the perpetrator's race when he or she is a person of color, and crimes committed by people of color against White victims may receive more coverage than other crimes. *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1744 (1993). Researchers have found that the way in which an issue is framed in the media influences jurors' decisions. For example, an increase in articles critical of the death penalty has been linked to fewer death sentences, while publication of positive articles about the death penalty results in more death sentences. Susan Hardy, *Death Watch: Are Capital Punishment's Days Numbered?*, ENDEAVORS.UNC.EDU (April 26, 2011) (discussing FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE (2008)); *see also* Travis L. Dixon & Cristina L. Azocar, *Priming Crime and Activating Blackness: Understanding the Psychological Impact of the Overrepresentation of Blacks as Lawbreakers on Television News*, 57 J. COMM. 229, 229 (2007). Racially disparate coverage of crimes may inject bias into a trial before it begins. For a further discussion of practical and strategic considerations concerning motions for change of venue, see 1 NORTH CAROLINA DEFENDER MANUAL § 11.3 (Change of Venue) (2d ed. 2013).

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

of racial attitudes in neighboring counties when considering moving for a change of venue in the Joan Little case).

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

B. Opening Statement

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

The opening statement provides an opportunity for counsel to "consider (1) how to prime themes based on fairness and equality, (2) how to incorporate counter-stereotypical exemplars in the narrative, and (3) what kinds of schemas might 'fit' a client while supplanting jurors' unconscious racial schemas." Pamela A. Wilkins, *Confronting The Invisible Witness: The Use Of Narrative To Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 362 (2012). *See also supra* "Reinforce norms of fairness and equality" in § 8.2B, Strategies for Addressing Race. For example, some have suggested that, in the trial of George Zimmerman, the prosecution should have explored the possibility that Zimmerman perceived a threat where no real threat existed as a result of a racial stereotype he attached to Trayvon Martin. *See, e.g.*, Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555 (2013); *see also* James E. Coleman, Jr., *Ignoring Race a Mistake in Zimmerman Trial*, NEWS AND OBSERVER (Raleigh), July 20, 2013 (arguing that the State of Florida created conditions for verdict of acquittal by failing to address the role of race in Zimmerman's perception of Martin as a threat). In a case in which the victim mistakenly believed that the defendant was carrying a gun, counsel might forecast expert testimony regarding the common implicit association between Black males and guns.

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

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

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

C. Testimony

Defense use of lay witness testimony to make race salient. Defense attorneys may use lay witness testimony to present evidence that the defendant's race played a role in the case. For example, one study found that testimony from a defense witness about racial slurs shouted at a defendant by White victims had the effect of reducing racial bias in jurors. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953, 1966 (2009). In this study, testimony that White victims surrounded the defendant's car and shouted racial slurs at the defendant and his wife before the defendant got into his car and struck the victims with his car while driving away reduced racial bias even in jurors who scored highly on tests measuring racism. *Id.* at 1959–60. *See also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1595 (2013) (discussing the Cohn study).

Objections to racially inflammatory lay witness testimony. A defendant may object to the introduction of racially inflammatory lay witness testimony on various grounds. Courts have reversed convictions based on the improper admission of irrelevant, racially inflammatory evidence where a witness was asked about sexual relations between a black defendant and a white woman that were not germane to the case. *See, e.g.*, *Johnson v. Rose*, 546 F.2d 678, 678–79 (6th Cir. 1976). A defendant may object to the admission of

racially inflammatory testimony on grounds that it is irrelevant under N.C. Evidence Rule 401, constitutes character evidence generally inadmissible under Rule 404(a), is more prejudicial than probative under Rule 403, and violates the defendant's constitutional rights. *See Calhoun v. United States*, 568 U.S. ___, 133 S. Ct. 1136 (2013) (Sotomayor, J., concurring in denial of cert.) (cross-examination of defendant suggesting connection between race and drug dealers violated equal protection and right to impartial jury; "[I]f government counsel . . . is allowed to inflame the jurors by irrelevantly arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against defendants who may be innocent." (quotation omitted)); *see also supra* § 8.4B, Improper References to Race by the State.

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

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

Expert testimony introduced by the State. At times, expert testimony introduced by the State may be racially inflammatory. For example, a psychologist who was called as an expert in approximately 150 death penalty cases repeatedly testified at the penalty phase of capital trials that "Hispanic and black men were more likely to be dangerous in the future." Brandi Grissom, *Texas Ends Deal with Psychologist Over Race Testimony*, THE TEXAS TRIBUNE, Oct. 31, 2011. Defense counsel should object and move for a mistrial if the prosecution offers expert testimony linking race and criminality.

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

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

> [The defendant] didn't have to put his culture down here with us. What this means is that anyone who is poor and black and lives in an inner city has a license to commit murder, because it's not their fault. That none of these folks can ever rise above where they start out. Because they are poor, they are black, and they come from an inner city, they have no right, they have no way, that's it.
>
> And they have a license to commit crime, because that's just what happens there, and there's nothing you can do about it. That's what their doctor says.

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

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

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

- in a case where a Black defendant claims that he was mistakenly identified as the offender, evidence of implicit associations between Black people and criminality;
- in a case in which a Black defendant claims he didn't have a weapon on him but the assault victim claims he did, evidence of shooter/weapon bias (discussed *supra* in § 8.6B, Opening Statement); or
- the tendency of jurors to "automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways." Justin D. Levinson & Danielle Young, *Different*

Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W.VA. L. REV. 307, 309 (2010).

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

D. Jury Instructions

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

Pre-voir dire jury instructions on bias. Some scholars have suggested that juror instructions on implicit bias may be given to jurors before the case begins in order to alert them to the possibility of biased judgments before they are exposed to evidence and argument. *See, e.g.*, Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1599 (2013). While jury instructions are typically given at the end of a trial, early delivery serves to focus jurors' attention on judging fairly and not allowing racial stereotypes to influence their decision-making. *Id.*

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

police. *Id.* at 1182 n.250. Judge Bennett then gives the following juror instruction on implicit bias before attorneys present opening statements:

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

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

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

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

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

Race-switching instruction. In cases that run the risk of triggering implicit biases—such as an interracial sexual assault case, a self-defense case in which the defendant is Black and the victim White, or any case involving a defendant who is a racial minority—defenders should consider seeking a "race-switching" instruction. This instruction asks jurors to examine the possible influence of implicit bias on their decision-making by imagining how they would respond if the race of the defendant and/or victim were different. *See* Cynthia Kwei Yung Lee, *Race And Self-Defense: Toward A Normative Conception Of Reasonableness*, 81 MINN. L. REV. 367, 488 (1996). While defense attorneys themselves may be able to ask jurors to perform a race-switching exercise

during voir dire or closing argument, a race-switching instruction is generally preferable, as jury instructions, “coming as [they do] from the court [rather than from the defense attorney], . . . [help] diffuse any reactions from the jury that the defense [i]s ‘playing the race card.’” James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24. Law Professor Cynthia Lee suggests the following model race-switching instruction:

> It is natural to make assumptions about the parties and witnesses in any case based on stereotypes. Stereotypes constitute well-learned sets of associations or expectations correlating particular traits with members of a particular social group. You should try not to make assumptions about the parties and witnesses based on their membership in a particular racial group.
>
> If you are unsure about whether you have made any unfair assessments based on racial stereotypes, you may engage in a race-switching exercise to test whether stereotypes have colored your evaluation of the case before you. Race-switching involves imagining the same events, the same circumstances, the same people, but switching the races of the parties. For example, if the defendant is White and the victim is Latino, you could imagine a Latino defendant and a White victim. In intraracial cases in which both the defendant and the victim are persons of color, you may simply assign a different race to these actors. For example, if both the defendant and victim are Black, you may imagine that both are White. If your evaluation of the case before you is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You may then wish to reevaluate the case from a neutral, unbiased perspective.

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

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

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

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

The certification statement is as follows:

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

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

E. Closing Argument

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

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

Practice note: "It is not impolite to interrupt opposing counsel's summation—it is mandatory to preserve error and stop the prejudice." Ira Mickenberg, Preserving the Record and Making Objections at Trial: A Win-Win Proposition for Client and Lawyer 4 (training material presented at 2005 North Carolina Defender Trial School). Assert both statutory and constitutional grounds for the objection. State on the record that the improper appeal to racial prejudice violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as article I, sections 19 and 24 of the N.C. Constitution. If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also consider whether further remedy is necessary or whether it would only draw further attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to: admonish the prosecutor to refrain from that line of argument; require the prosecutor to retract the improper argument; repeat the curative instruction during the jury charge; or grant a mistrial. *See State v. Jones*, 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

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

Avoiding the invited response doctrine. The invited response doctrine comes into play when defense counsel presents an improper closing argument that is "out of bounds" of

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

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

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

When objecting to improper remarks, link all improper references to race. Convictions might be upheld despite improper appeals to racial prejudice if the references to race are viewed as isolated rather than thematic or widespread. *See, e.g.*, *People v. Ali*, 551 N.Y.S.2d 54, 55 (N.Y. App. Div. 1990) (defendant must show "thematic reference to . . . race" to warrant reversal (citation omitted)); *Thomas v. Gilmore*, 144 F.3d 513 (7th Cir. 1998) (prosecutor's isolated remark, in opening argument of capital trial, that detective would testify that one or both of defendant's prior sexual offenses involved young White women, did not deprive defendant of a fair trial); *Russell v. Collins*, 944 F.2d 202, 204 n.1 (5th Cir. 1991) (habeas petition rejected in part because prosecutor's

improper argument concerning race was “isolated”); *see also* Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic, or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 326 (2001) (noting this approach by some courts).

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

Address racial dynamics in defendant’s closing argument. It is often said that a central task of a defender is to humanize his or her client. “In part this means conveying the multidimensional complexity of human beings who may otherwise be understood by reference to one label or group.” Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1279 (2002); *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1185 (2012) (studies have shown that “actively contemplating others’ psychological experiences weakens the automatic expression of racial biases” (citing Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011))). Closing argument provides a powerful opportunity to humanize your client and reduce the influence of implicit bias by differentiating him or her from stereotypes and reinforcing antidiscrimination norms. *See supra* § 8.2B, Strategies for Addressing Race.

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