9.4 Effective Sentencing Advocacy

The rules of evidence do not apply to sentencing hearings—any evidence that a court deems to have probative value may be received, including evidence of racial disparities. N.C. R. EVID. 1101(b)(3). Relevant information may include the client's cultural background; his or her experience with prejudice, racial profiling, or other forms of disadvantage; statistics reflecting racial disparities in the justice system; and social science evidence on the influence of implicit bias. In short, the door is open at sentencing in a way that it may not be at trial for defenders to place the full context of a client's life experience before the court and advocate for a just result. This section is not a comprehensive treatment of sentencing advocacy, but instead an outline of possibilities.

A. Early Advocacy

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

1. An understanding of your client's life will strengthen your relationship with your client, particularly if he or she differs from you in terms of racial, ethnic, cultural, or socioeconomic background.

2. An early understanding of your client's background, community, and individual challenges and opportunities will strengthen your argument for pretrial release. Pretrial release may decrease the chances that your client will receive a sentence of incarceration. *See supra* Chapter 4, Pretrial Release.

3. Early understanding of your client's struggles, needs, and assets provides an opportunity to help the client get engaged in beneficial activities, employment, or programs that may serve as mitigating factors in plea negotiations and at the sentencing hearing. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9.

4. Implicit bias research indicates that bias is most pronounced when individuals are unwilling to consider the possibility that they may be influenced by bias. In contrast, humility about the possible influence of bias causes people to think more carefully

and deliberately and may minimize the influence of bias. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007). In the context of indigent representation, this research suggests that listening carefully and making an effort to avoid prejudgments about the conditions of your client's life will minimize the risk that you will make race-based assumptions about his or her circumstances.

B. Data and Record Collection

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

1. **Sentencing patterns in your district.** The biographical data collected on intake forms, including the client's charges, prior record level, and racial and ethnic identity, may be entered into a database with the client's identity removed, so that defense counsel can track outcomes received by various categories of clients. For example, during plea negotiations, defense counsel may present the prosecutor with any data showing that Black defendants disproportionately received active sentences for the charge in question over the previous year in comparison with White defendants at the same prior record level. Sentences may be influenced by decisions that occur at earlier stages of the criminal justice process; therefore, it is important to record relevant data from all stages of a case, including the original charges, plea offers, plea entered, and sentences as well as any presentencing report or sentencing plan prepared before sentencing. *See infra* "Presentence reports and sentencing plans" in § 9.4E, Sentencing Hearing Advocacy.

2. **Favorable outcomes.** The office may maintain a file containing favorable plea offers and sentences that clients have received, including departures from presumptive ranges, deferred prosecutions, opportunities to receive substantial assistance departures pursuant to G.S. 90-95(h)(5), and charge dismissals, to use in plea negotiations and sentencing hearings. This data should include the race and ethnic background of the clients and the identity of the prosecutors and judges involved. The paralegal, administrative assistant, intern, or investigator tasked with collecting such information should make note of cases in which prosecutors declined to habitualize clients or declined to pursue trafficking charges.

3. **Sentencing patterns of judges.** Defenders may collect data on the sentencing patterns of judges, including which judges have found extraordinary mitigation pursuant to G.S. 15A-1340.13(g), which judges have a record of granting community-based sentences, and which judges have been receptive to arguments about implicit biases or sentencing disparities.

4. **Statewide averages.** In addition to collecting data, defenders may make use of available data sources reflecting the racial composition of those convicted of various offenses and the average sentences received for the charges your client faces. The

North Carolina Sentencing and Policy Advisory Commission prepares annual reports reflecting the type of and length of sentences imposed for all convictions. *See* North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors,* NCCOURTS.ORG (last visited Sept. 19, 2014); *see also* Jamie Markham, *Sentencing Commission Annual Statistical Report*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (Sept. 19, 2013) (discussing the content and utility of the Commission's annual reports). Another useful compilation of North Carolina criminal justice data disaggregated by race can be found at the North Carolina Advocates for Justice Racial Justice Task Force page. For example, if your client is facing marijuana charges in Durham County, you may consider obtaining statistics of overall enforcement of marijuana laws in Durham County. *See, e.g.*, Ian Mance, Southern Coalition for Social Justice, *Durham Police Department Stop-and-Search Data* (on file with authors) (reporting that, in Durham, "African-Americans . . . are approximately four times as likely as whites to be arrested on a misdemeanor marijuana possession charge, despite strong evidence that both whites and blacks use the drug at roughly the same rate (11.7% v. 12.7%)"). While some of the data sources listed above reflect arrest and/or conviction rates rather than sentencing patterns, the information may be useful to reference in plea negotiations and at sentencing hearings.

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

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

Record collection. It is critical to gather records relevant to potential mitigating factors, any alleged aggravating factors, and the sentence proposed. When a defense attorney fails to present evidence reflecting factors that may improve a defendant's prospects at sentencing, she leaves an opening for assumptions about the defendant, potentially based

on racial or ethnic stereotypes, that may influence the discretionary process of sentencing. The following is a non-exclusive list of the type of records that may be useful:

- Employment history: paychecks, attendance history, W-2 forms, letter from employer
- Proof of education: transcript, class schedule, letter from registrar
- Medical/mental health records
- Any certifications and licenses
- Any evaluation and treatment documents
- Military documents
- Client's financial documents

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

C. Pretrial Strategies

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

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

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

2. Ensuring that the programs under consideration are culturally appropriate for your client. For example, if your client is Spanish-speaking, ensure that the drug treatment program under consideration provides programs in Spanish.

3. Developing a specialized sentencing advocate or advocates in your office to investigate and develop mitigation evidence and address extralegal needs of clients.

4. Considering whether to seek funding for a mitigation specialist. In serious cases—including Class A, B1, and B2 felonies—defense attorneys should consider seeking funding to hire a mitigation specialist. Though these specialists typically work on capital cases, because of the stiff penalties attached to serious, non-capital felonies, you may be able to persuade a judge to approve funding for a mitigation specialist. Mitigation specialists are trained and experienced in obtaining evidence that may be difficult or time-consuming for a lawyer to obtain, including school records, and affidavits from teachers, neighbors, church officials, or others who can reflect on the struggles faced by your client.

5. Considering whether it is in your client's interest to seek a presentence report or sentencing plan. *See infra* § 9.5E, Sentencing Hearing Advocacy.

D. Sentence Negotiation Strategies

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

1. By addressing the subject of race with the prosecutor when pertinent, you may be able to reduce the likelihood that either of you will allow implicit biases to affect decision-making in the sentence negotiation process. *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (summarizing research findings indicating that open discussions of race can reduce the operation of implicit biases).

2. In negotiating a sentence, it may be useful to describe to the prosecutor what you have learned about the client's circumstances and the pressures he or she confronts, e.g., the influence of poverty, racial profiling, mental illness, or family circumstances. *See* James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 9; *see also* Rebecca Ballard DiLoreto, *Disparate Impact: Racial Bias in the Sentencing and Plea Bargaining Process*, THE ADVOCATE, May 2008, at 15, 20 (describing plea negotiations as a time when the prosecutor may be persuaded to "see helping your client as part of a larger systemic effort to do justice"). If defense counsel has a mitigation video about the client (*see infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy (discussing mitigation videos)), counsel may consider sharing the video with the prosecutor during plea negotiations.

3. Present the prosecutor with any statistics, disaggregated by race and ethnicity, of disparate sentencing and/or enforcement associated with the charges your client faces. *See supra* § 9.4B, Data and Record Collection. Even where such evidence may be insufficient to support a successful equal protection claim, prosecutors may be persuaded to reduce charges in light of such information. *See supra* "Case study: Pretextual traffic stops" in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops (describing case in which public defender presented evidence of disparate enforcement to a prosecutor, who thereafter agreed to drop charges against her client).

4. Alert the prosecutor where there is evidence or data to suggest that your client's prior criminal history may have been influenced by improper racial considerations. *See supra* § 9.4B, Data and Record Collection.

5. Ensure that the opportunity to provide substantial assistance does not differ depending on the race of the defendant. For example, in cases involving drug trafficking charges, research from the federal criminal justice system indicates that Black and Latino offenders were significantly less likely to be recommended for substantial assistance departures, even when offense severity, criminal history, and the tendencies of the sentencing judge were taken into consideration. David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J.L. & ECON. 285, 308–09 Table 10 (2001). It has been suggested that these disparities result from the tendency to assign qualities such as "sympathetic" or "salvageable" disproportionately to White offenders. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992) (introducing the concept of a "salvageable" or "sympathetic" defendant into the analysis of substantial assistance departures). The discretionary decision regarding a substantial assistance departure is a crucial one in North Carolina, as it is essentially the only way that people convicted under drug trafficking statutes in North Carolina (carrying mandatory minimum terms of imprisonment and fines) can receive a mitigated sentence. Jamie Markham, *Options to Mitigate Sentences for Drug Trafficking*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (August 15, 2013).

6. Be prepared with any data showing that White defendants facing similar charges have received more lenient sentences than faced by your minority client. *See supra* § 9.4B, Data and Record Collection.

7. Know your client well enough before plea negotiations to distinguish him or her from potential racial or ethnic stereotypes. For example, counter possible stereotypes of your client as a gang member because he is a young, Latino male who lives in an area where the Latin Kings gang is active. Evidence such as school attendance records, work records, or a letter from a local leader such as a pastor may assist in individualizing the client. Testimony from such character witnesses could also be included in a mitigation video. *See infra* "Practice note" in § 9.4E, Sentencing Hearing Advocacy.

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

E. Sentencing Hearing Advocacy

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

Practice note: In recent years, some defense attorneys have created mitigation or sentencing videos to show during sentencing hearings and plea negotiations. *See* Joe Palazzolo, *Leniency Videos Make a Showing at Criminal Sentencings: Some Lawyers Supplement Letters of Support with Mini-Documentaries, Effectiveness is Debated*, WALL STREET JOURNAL, May 29, 2014 (quoting assistant federal defender Doug Passon as stating that, when sentencing videos are introduced, "[t]he sentences are almost always

better than they would otherwise be"). Mitigation video pioneer and assistant federal public defender Doug Passon, who made his first sentencing video in 1995, observes that such videos can be effective at bridging cultural gaps between defendants and court actors. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 981 (Linda Friedman Ramirez ed., 3d ed. 2010) (stating that criminal defense attorneys should make empathy the focus of sentencing presentations to "bridge the chasm of the cultural divide" and effectively convey the client's circumstances to the judge, which may include poverty, abuse, mental illness, addiction, and other suffering;); *see also* Regina Austin, "Not Just a Common Criminal": The Case for Sentencing Mitigation Videos (April 15, 2014) (University of Pennsylvania Law School Faculty Scholarship Paper). These videos may be particularly useful at illustrating circumstances such as the impoverished conditions of a defendant's home or neighborhood, and may be a good way of introducing the voices of character witnesses who face difficulties coming to court or preparing a written statement on behalf of the defendant. While some film-makers charge between $5,000 and $20,000 for producing such videos, it is possible for defenders or investigators to produce modest videos on their own. *See* Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap at Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979, 996 (Linda Friedman Ramirez, ed., 3d ed. 2010). Examples of sentencing videos may be viewed online. *See, e.g.*, *Don Ayala Sentencing Documentary*, NEW ORLEANS TIMES-PICAYUNE, Sept. 1, 2010 (sentencing video shown to a federal judge who ultimately imposed a term of probation on a defendant facing eight years in prison under federal sentencing guidelines for voluntary manslaughter).

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

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

2. In cases in which you are concerned that racial stereotypes may influence the sentence under consideration, incorporate a race-switching exercise into your argument at the sentencing hearing or invite the court to engage in a race-switching exercise. A race-switching exercise is a mental exercise that involves switching the race of the parties to determine whether race may have played a role in assessing the evidence. *See supra* § 8.6D, Jury Instructions; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 482 (1996) (proposing race-switching jury instruction); James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, THE CHAMPION, Aug. 1999, at 22, 24 (describing a case in which a judge noted "that he personally engaged in a race-switching exercise whenever he was called upon to impose sentence on a member of a minority race, to insure that he was not being influenced by racial stereotypes"). To avoid suggesting that the judge alone may be affected by implicit bias, counsel may wish to present this as an exercise for the entire courtroom. For example, counsel may posit: "All of us who work in the court system, the prosecutor and myself included, need to ask ourselves whether we would be doing or thinking anything different today if the defendant were White and/or the victim were Black; as members of the bar sworn to uphold the Constitution, we can't allow race to play a role at sentencing."

3. Inform the judge of any cultural factors that may be relevant to an evaluation of defendant's blameworthiness. For example, in one case, a Korean man argued for a downward departure from the federal sentencing guidelines on the basis that his upbringing in Korea caused him to believe that the money he provided to an Internal Revenue Service agent in the form of a bribe was legally and socially obligatory. *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992).

4. Explain to the court how race may have affected earlier stages of the process in your client's case, and that sentencing provides an opportunity to redress any taint. *See, e.g.*, Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 380 (1994) (arguing that race should be considered as a mitigating factor where it is likely that racial discrimination occurred at an earlier stage of the case); *see also* Traci Schlesinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, THE ADVOCATE, May 2008, at 22. For example, if you are able to show that a similarly situated White co-defendant was released

pretrial, completed drug treatment, and based on that treatment, received a reduced sentence, while your Black client was detained pretrial with no such opportunity to engage in productive activities, the judge may consider this as mitigating evidence. *See also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1960 (1988) (arguing that "to help remedy the pervasive racial discrimination in our criminal justice system, judges should be given discretion to take into account an offender's race as a mitigating factor").

5. Explain to the court whether your client's prior criminal history may have been influenced by race. For example, in *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998), a federal judge imposed a reduced sentence on a Black defendant based on a finding that most of the defendant's prior convictions arose out of traffic stops conducted by the Boston police, and that the unlawful practice of racial profiling may have contributed to his prior record. *See supra* § 2.2, Overview of Racial Profiling Concerns (discussing recent studies regarding racial disparities in traffic stops in North Carolina).

6. Forecast for the judge—based on available statistics, your client's history, and familiar anecdotes—the likely future your client faces if he or she receives the non-incarcerative, community-based, or reduced sentence you seek, and contrast it with decreased life chances he or she faces if sentenced to lengthy incarceration. *See* Robert C. Kemp, III, Art of Sentencing (Feb. 15, 2013) (training material presented at New Felony Defender Training, 2013). For example, you could explain to the judge that a prison sentence will result in the loss of your client's job, while a community or intermediate sentence will allow him to continue working and providing for his family. Additionally, you could present the court with evidence showing that recidivism rates are generally lower for probationers than for prisoners in North Carolina. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2008/09 27 (2012) (finding that probationers in FY 2008/2009 were less likely than people released from prison to be rearrested during both one-year and two-year follow up periods). Explain to the judge any concerns about any contemplated sentences that are in conflict with your client's cultural values and individual characteristics. For example, a devout Muslim client may not succeed in a drug treatment facility that includes mixed gender treatment groups.

7. Inform the judge of community-based alternative sentences that meet the needs of your client and address the problems underlying the crime of conviction. *See* North Carolina Office of Indigent Defense Services, Community Treatment and Resource Provider Directory, NCIDS.COM (last visited Sept. 22, 2014). Some judges may be reluctant to impose probationary sentences because they do not know of local programs for which the defendant is eligible. *See* Jamie Markham, *County Resource Guide*, N.C. CRIM. L., UNC SCHOOL OF GOV'T BLOG (September 26, 2013). You can preliminarily evaluate your client's eligibility for programs and services and provide

information to the judge regarding such matters as the proximity of the proposed community-based program to the client's home, available modes of transportation, and available spots for new participants. Knowledge of available, appropriate programs for which your client is eligible may, "in a close case, inform the judge's decision between an active and probationary sentence." *Id.*

8. Stress to the judge the importance of taking into account the defendant's resources to avoid penalizing defendants who are poor, the majority of whom are racial minorities. For example, you may want to inform the judge of cases in which similarly situated defendants with private counsel have been able to craft desirable sentences funded by their own financial assets and argue that your client's sentence should not depend on his or her resources. Additionally, if your case is one in which your client may be ordered to pay restitution, present records regarding financial hardship, e.g. foreclosure records, a spreadsheet reflecting income vs. expenses, bankruptcy documents, etc., since the judge must take the defendant's ability to pay into consideration in ordering restitution. G.S. 15A-1340.36.

9. Explain to the judge the particular concerns about disparities in certain contexts, such as marijuana charges, drug trafficking charges, habitual felon charges, and substantial assistance departures. Sources for such data include your own collected reports of offender data as well as statistics collected by the NCAJ's Racial Justice Task Force, the Governor's Crime Commission, and the Department of Public Safety. This type of information has been referred to as "social framework evidence," and has been recognized as an important tool in mitigating the effects of race on criminal justice outcomes. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013). Argue that evidence of disparities provides support for a reduced sentence, as recognized by the U.S. Supreme Court in *Kimbrough v. United States*, 552 U.S. 85 (2007) (upholding district court's consideration of sentencing disparities as a basis for imposing a reduced sentence in a crack-cocaine case).

10. Make a formal presentation of mitigating evidence—which may include testimony from the client and witnesses, school or employment records, and a defense sentencing memorandum—aimed at constructing an individualized narrative supporting your sentencing recommendation. This approach may counter the potential effects of implicit bias by distinguishing your client from potential stereotypes, promoting a closer examination of your client's circumstances, and averting automatic or "snap" judgments. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012).

11. Provide the sentencing judge with evidence about implicit racial bias. Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions* 1040 (Working Paper, January 16, 2014). Because of the wide range of permissible considerations at sentencing, defense attorneys should use the opportunity to point out "how subconscious bias can affect how judges sentence." *Id.* This can be done by

directing judges to social science research on implicit biases and their potential influence on judges. *Id.; see, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (study that involved administering the Implicit Association Test to trial judges concluded that judges do, in fact, harbor implicit racial bias).

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

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

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

When a probation officer prepares a presentence report, defense attorneys should be involved in the preparation of the report to the extent possible. Defendants and defense attorneys have a right to view any presentence report prepared by probation. G.S. 15A-1333(b). Defendants should request to see any report before it is presented to a judge, and to have an opportunity to advocate to the preparer of the report for changes to any irrelevant or inaccurate content. While the preparation of presentence reports by

probation is permitted by statute, in practice, it rarely happens. NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, PRESENTENCE INVESTIGATIONS FEASIBILITY STUDY REPORT: SESSION LAW 2009-451, SECTION 19.14 (2010) (reporting that probation officers are rarely asked to prepare presentence reports, and that some superior and district court judges were unaware that existing law allowed for their preparation).

When reviewing a presentence report, be alert to any depictions of your client in an unflattering or racially stereotypical manner. For example, in a qualitative study performed in a northwestern city, researchers found that probation officers' assessments of motivations for offending differed by race in presentence reports in juvenile cases. In particular, the delinquency of Black youth was typically explained "as stemming from negative attitudinal and personality traits," while delinquent behavior of White youth "stressed the influence of the social environment." ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 14 (2d ed. 2008). "Black youth were judged to be more dangerous, which translated into harsher sentences than for comparable white youth." *Id*.

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

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