



2015 Juvenile Defender Conference
August 14, 2015 / Chapel Hill, NC

ELECTRONIC MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

2015 Juvenile Defender Conference ***Delinquency, Race and the Role of Defense Counsel***

August 14, 2015 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services*

AGENDA

- 8:00 to 8:45am Check-in
- 8:45 to 9:00 Welcome
Austine Long, Program Attorney, UNC School of Government, Chapel Hill, NC
Kim Howes, Assistant Juvenile Defender,
Office of the Juvenile Defender, Raleigh, NC
- 9:00 to 10:00 **Case and Legislative Update [60 min.]**
LaToya Powell, Assistant Professor of Public Law and Government
UNC School of Government, Chapel Hill, NC
- 10:00 to 11:00 **Applying the SOG Race Manual to Delinquency Cases [60 min.]**
Julie Boyer, Assistant Capital Defender
Forsythe Regional Office of the Capital Defender
- 11:00 to 11:15 Break
- 11:15 to 12:15pm **Pre-Adjudication Advocacy: Combating Racial Disparity [60 min.]**
Aleta Ballard, Attorney, Smithfield, NC
- 12:15 to 1:15 Lunch *(provided in building)**
- 1:15 to 2:15 **It's not Me, It's Them: Implicit Bias, Structural Racialization and the Ethical Duty of Juvenile Defenders [60 min.]**
Kristin Henning, Professor & Co-Director, Juvenile Justice Clinic
Georgetown University Law Center, Washington, DC
- 2:15 to 2:30 Break *(light snack provided)*
- 2:30 to 3:30 **It's not Me, It's Them: Implicit Bias, Structural Racialization and the Ethical Duty of Juvenile Defenders, (continued) (Ethics) [60 min.]**
- 3:30 to 4:30 **Hear from the Youth We Represent [60 min.]**
Guest Speakers from SAYSO (Strong Able Youth Speaking Out)
Moderated by Nancy A. Carter, Executive Director
Independent Living Resources, Inc., Durham, NC

CLE HOURS: 6 (Includes 1 hour of ethics/professional responsibility)

* IDS employees may not claim reimbursement for lunch



ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services

<http://www.ncids.org/>

UNC School of Government

<http://www.sog.unc.edu/>

Indigent Defense Education at the UNC School of Government

<http://www.sog.unc.edu/node/117>

TRAINING

Calendar of Live Training Events

<http://www.sog.unc.edu/node/643>

Online Training

<http://www.sog.unc.edu/node/644>

MANUALS

Orientation Manual for Assistant Public Defenders

<http://www.sog.unc.edu/node/1002>

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)

<http://defendermanuals.sog.unc.edu/>

UPDATES

NC Criminal Law Blog

www.sog.unc.edu/node/487

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)

<http://www.sog.unc.edu/crimlawlistserv>



TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)

<http://ccat.sog.unc.edu/>

Motions, Forms, and Briefs Bank

<http://www.sog.unc.edu/node/657>

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)

<http://www.ncids.org/Defender%20Training/Training%20Index.htm>

**2015 JUVENILE DELINQUENCY
LEGISLATIVE AND CASE LAW UPDATE**

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Part 1: Recently Enacted Juvenile Delinquency Legislation

[S.L. 2015-41 \(H295\)](#) - **Juvenile Media Release**

- Amended G.S. 7B-3102(a) requires the Division of Juvenile Justice to release a statement about the level of threat posed by an escaped juvenile, only if deemed appropriate by the Division. Currently the statute requires the Division to release such a statement within 24 hours of a juvenile's escape without making an appropriateness determination. The level of threat posed by the escaped juvenile shall be determined by the Deputy Commissioner of Juvenile Justice or the Deputy Commissioner's designee. This Act became effective on May 29, 2015, when it was signed into law.

[S.L. 2015-47 \(H294\)](#) - **Prohibit Cell Phones to Delinquent Juveniles**

- Amended G.S. 14-258.1(d) extends the provisions of this statute to delinquent juveniles who are in the custody of the Division of Juvenile Justice. A Class H felony offense is committed by (1) directly providing a cell phone to a delinquent juvenile who is in the custody of the Division of Juvenile Justice or (2) indirectly providing a cell phone to a delinquent juvenile who is in the Division's custody by giving it to another person for delivery to the juvenile. A delinquent juvenile is in the custody of the Division for purposes of this statute when the juvenile is confined in a youth development center or detention facility or being transported to or from such confinement. This Act becomes effective on December 1, 2015, and applies to offenses committed on or after that date.

[S.L. 2015-58 \(H879\)](#) - **Juvenile Code Reform Act**

- This Act makes several changes to the Juvenile Code designed to increase due process protections for juveniles, reduce further entry of juveniles in the delinquency system, and reduce juvenile confinement. The entire Act becomes effective on December 1, 2015, and applies to offenses committed on or after that date.

Due Process Protections

- **Custodial Interrogation Age Increase** - Amended G.S. 7B-2101(b) increases from 13 to 15 the age at which a juvenile must have a parent or attorney present during a custodial interrogation in order for the juvenile's statement to be admissible. The practical effect of this change is that juveniles who are 14 or 15 may no longer waive the right to have a parent or attorney present during a custodial interrogation.
- **Bifurcated Hearing Requirement** - Amended G.S. 7B-2202(f) and G.S. 7B-2203(d) require that adjudication hearings be held separately from hearings to determine probable cause and transfer. This change will reverse several decisions by the Court of Appeals which held that entirely separate hearings for determining probable cause, transfer, and adjudication were not required by the Juvenile Code, "so long as the juvenile's constitutional and statutory rights are protected." See *In re G.C.*, __ N.C. App. __, 750 S.E. 2d 548 (2013); *In re J.J., Jr.*, 216 N.C. App. 366 (2011).

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- **Motion to Suppress Procedure** – New G.S. 7B-2408.5 establishes a procedure for filing motions to suppress in juvenile court, which is substantially similar to G.S. 15A-977 (motions to suppress in superior court). Motions to suppress may be filed before or during the adjudication hearing. If a motion is made before the adjudication hearing, it must be in writing, supported by an affidavit, and served upon the State. The State may file an answer, which must be served on the juvenile’s counsel, or the juvenile’s parent or guardian, if the juvenile has no counsel. The court must summarily grant the motion under certain conditions and may summarily deny the motion under certain other conditions enumerated in the statute. If no summary determination is made, the court must hold a hearing and state its findings of fact and conclusions of law in the record. An order denying a motion to suppress may be reviewed upon an appeal of a final order in the juvenile matter. The exclusionary rule of G.S. 15A-974 also applies to this section.

Reducing Further Entry of Juveniles in the Delinquency System

- **Petition Procedure for New Offenders** - Amended G.S. 7B-1701 requires that upon receipt of a complaint alleging a divertible offense, juvenile court counselors must “make reasonable efforts” to meet with the juvenile and the juvenile’s parent or guardian, if the Division has not previously received a complaint against the juvenile.
- **Voluntary Dismissal by Prosecutor** - New G.S. 7B-2404(b) authorizes prosecutors to voluntarily dismiss a juvenile petition with or without leave. If the prosecutor dismisses a petition with leave because the juvenile failed to appear in court, the petition may be refiled, “if the juvenile is apprehended or apprehension is imminent.” This change removes uncertainty about a prosecutor’s authority to dismiss juvenile cases (which, in practice, already occurs) and creates a uniform procedure for doing so.
- **Prior Adjudication Definition** - Amended G.S. 7B-2507 defines a “prior adjudication” as “an adjudication of an offense that occurs before the adjudication of the offense before the court.” Although not explicit in the statute, the “offense before the court” refers to the offense for which a disposition is being entered. This change reverses [In re P.Q.M.](#), 754 S.E.2d 431 (2014), which defined a prior adjudication as an adjudication that existed prior to the disposition hearing and entry of the disposition (similar to prior convictions under Structured Sentencing).
- **Extension of Probation** - Amended G.S. 7B-2510(c) provides that prior to the expiration of an order of probation, the court may extend the term for an additional period of one year, after notice and a hearing (currently, the statute only requires a hearing). The extension hearing may occur after the probation term has expired at the next regularly scheduled court date or at the court’s discretion, if the juvenile fails to appear in court. This change makes clear that a juvenile must receive notice of the extension prior to the expiration of the term. It also shortens the time period in which a court may hold the extension hearing after the term has expired, which the Court of Appeals previously described as “a reasonable time after its expiration.” [In re T.J.](#), 146 N.C. App. 605, 607 (2001).

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- **Probation Violation Dispositions** - Amended G.S. 7B-2510(e) provides that when a juvenile violates probation, the court may either increase the disposition level to the next higher level on the disposition chart or order up to twice the amount of detention days authorized by G.S. 7B-2508, but may not do both, as currently authorized.
 - **Notice of Right to Expunction** - New G.S. 7B-2512(b) requires the trial judge to inform the juvenile, either orally or in writing, about the juvenile's right to expunction under G.S. 7B-3200, if relevant to the juvenile's case, at the time of entering the disposition.

Reducing Juvenile Confinement

- **Secure Custody Review Hearings** - Amended G.S. 7B-1903(c) codifies the holding of *In re D.L.H.*, 198 N.C. App. 286 (2009), and requires custody review hearings be held at least every 10 calendar days when a juvenile is placed in secure custody pending disposition or out-of-home placement, unless the juvenile waives the right to a hearing through counsel. Review hearings may be waived for no more than 30 calendar days with the juvenile's consent, and the custody order must be in writing with appropriate findings of fact.
- **Restraint of Minors Under 10** - New G.S. 7B-1903(f) prohibits the use of physical restraints to transport a juvenile under the age of 10, who is in secure custody for the purpose of evaluating the juvenile's need for medical or psychiatric treatment under G.S. 7B-1903(b), if the juvenile does not have a pending delinquency charge, unless "reasonably necessary for the safety of the officer, authorized person, or the juvenile."
- **Imposition of Intermittent Confinement Days** - Amended G.S. 7B-2506(12) and G.S. 7B-2506(20) require the court to determine the timing and imposition (currently, only timing) of intermittent confinement days. This change appears to codify long-standing case law stating that the court may not delegate its authority to court counselors to impose dispositional options. See *In re S.R.S.*, 180 N.C. App. 151, 158 (2006).

S.L. 2015-72 (H552) – Graffiti Vandalism Offense

- This Act creates a new statute, G.S. 14-127.1, which defines the crime of graffiti vandalism. The first offense is punishable as a Class 1 misdemeanor and carries a mandatory minimum fine of \$500, and if a community or intermediate punishment is imposed, up to 24 hours of community service. The offense is elevated to a Class H felony, if the person has two or more convictions under this section, the current offense was committed after the second conviction, and the second offense was committed after the first conviction. The Act also amends G.S. 14-132(d) to clarify that the offense of defacing a public building, statue, or monument is a Class 2 misdemeanor, unless the conduct is covered by the new G.S. 14-127.1 or another provision of law providing greater punishment. The Act becomes effective on December 1, 2015, and applies to offenses committed on or after that date.

HB 134 - Soliciting Prostitution/Immunity for Minors (**awaiting Governor's signature)

- If enacted, this bill will amend G.S. 14-205.1 to prohibit the prosecution of minors for solicitation of prostitution. Instead, minors suspected of soliciting prostitution would be treated as undisciplined juveniles and taken into protective custody, pursuant to Article 19 of Chapter 7B. In 2013, a similar law was passed to make minors immune from prosecution for prostitution under G.S. 14-204 (see [Session Law 2013-368](#)).

Part 2: Recent North Carolina Appellate Court Decisions

I. Adjudication Orders

Findings of Fact

[*In the Matter of K.M.M.*](#), __ S.E.2d __ (N.C. App. 2015). The trial court included sufficient findings of fact in the adjudication order to comply with G.S. 7B-2411, which requires the court to find, at a minimum, that the allegations in the petition have been proved beyond a reasonable doubt. The trial court found in its written order that it was proved beyond a reasonable doubt “that on or about the date of 10-16-2013, the juvenile did unlawfully and willfully steal, take, and carry away a White Apple [iP]hone with a pink and gray otter box case, the personal property of [Ms.] Nguyen having a value of \$300.00.” G.S. 7B-2411 does not require the trial court to state in writing the evidence which satisfies each element of the offense. Therefore, the trial court made sufficient findings of fact to support the adjudication of delinquency.

II. Criminal Offenses

Sex Offense and Crime Against Nature

[*In the Matter of J.F.*](#), 766 S.E.2d 341 (N.C. App. 2014). (1) In a case involving first-degree sex offense and crime against nature petitions, the State was not required to present evidence of “sexual purpose.” Sexual purpose is not an element of first-degree sex offense and crime against nature. Noting that the legislature intentionally included sexual purpose as an element of indecent liberties between children but omitted it from other sex offenses, the court held the omission was intentional, and it had no authority to add an additional element to an unambiguous criminal statute. (2) However, the court reversed the crime against nature adjudications for insufficient evidence of penetration. Penetration is not an element of a sex offense involving fellatio; but, it is an essential element of crime against nature. Therefore, evidence was insufficient to prove crime against nature because the victim testified that he “licked” but did not suck the juvenile’s penis, and likewise, the juvenile “licked” his penis. The court distinguished *In re Heil*, 145 N.C. App. 24 (2001) (where it inferred penetration in a crime against nature case involving a 4-year-old victim who performed fellatio on an 11-year-old juvenile because the size difference between juvenile and victim and the fact that incident occurred in the close quarters of a closet suggested there was some penetration, however slight, of the juvenile’s penis into the victim’s mouth), and rejected the State’s argument that penetration could be inferred from the surrounding circumstances.

III. Jurisdiction

Jurisdiction Pending Appeal

In the Matter of J.F., 766 S.E.2d 341 (N.C. App. 2014). In a sex offense case, the trial court lacked jurisdiction to conduct a dispositional hearing after the juvenile appealed the adjudication order under G.S. 7B-2602, which allows a juvenile to appeal the adjudication order when no disposition has been entered within 60 days. Unless a statute provides otherwise, an appeal stays further proceedings in the trial court until the cause is remanded by mandate of the appellate court.

IV. Juvenile Petitions

Sufficiency of Allegations

In the Matter of J.F., 766 S.E.2d 341 (N.C. App. 2014). (1) Two juvenile petitions alleging first-degree sex offense under G.S. 14-27.4(a)(1) and two petitions alleging crime against nature under G.S. 14-177 provided sufficient notice because the allegations followed the statutory language of both offenses. The petitions charging first-degree sex offense allege the juvenile “did unlawfully, willfully and feloniously . . . [e]ngage in a sexual act with [M.H.], a child under the age of thirteen (13) years,” identifying M.H. by his full name and stating that the “victim was 7.” One petition further alleges that the “juvenile performed fellatio on victim,” while the other alleges that the “victim performed fellatio on juvenile.” The petitions charging crime against nature allege the juvenile “did unlawfully, willfully and feloniously . . . commit the abominable and detestable crime against nature with [M.H.],” identifying M.H. by his full name and stating that the “victim was 7.” Likewise, one petition alleges that the “juvenile performed fellatio on victim,” while the other alleges that the “victim performed fellatio on juvenile.” The State was not required to identify the particular sex acts involved or describe the manner in which they were performed, and if the juvenile required more detail about whether the petitions alleged the same or multiple acts of fellatio, the juvenile should have moved for a bill of particulars. (2) The court rejected the juvenile’s argument that the two petitions alleging the victim performed fellatio on the juvenile were defective because the victim was the “actor.” First-degree sex offense and crime against nature do not require that the accused perform a sex act *on* the victim but rather that he “engage[] in a sexual act *with*” the victim.

V. Motions to Dismiss

Juvenile As Perpetrator

In the Matter of K.M.M., ___ S.E.2d ___ (N.C. App. 2015). There was substantial evidence identifying the juvenile as the perpetrator of a misdemeanor larceny such that the trial court did not err by denying his motion to dismiss. On October 16, 2013, at approximately 5:30 p.m., three African-American males stole the victim’s iPhone from her table at a Wendy’s restaurant and then ran away. The victim chased after them and encountered a man, Mr. Wall, who had just

driven past three African-American males down the street. Mr. Wall drove back to the same location and saw the males again, and they ran. Both the victim and Mr. Wall reported to police officers that the juvenile was wearing a red jacket and that another suspect was wearing gray. Mr. Wall identified the juvenile and one of his companions in a showup later that same day, and the victim identified the juvenile at the adjudication hearing. When the juvenile was apprehended, he was wearing a red hoodie jacket and had a Wendy's spoon in his back pocket, along with two Wendy's receipts that were time-stamped 5:29 p.m. and 5:33 p.m., despite his denial that he had been at Wendy's that day.

VI. Probation Violation Hearings

Revocation Based on Hearsay Evidence

In the Matter of Z.T.W., 767 S.E.2d 660 (N.C. App. 2014). Relying upon a recent decision by the North Carolina Supreme Court, the court held that the trial court did not err by revoking the juvenile's probation based solely upon the admission of hearsay evidence. *See State v. Murchison*, 367 N.C. 461 (2014) (holding that, since the formal Rules of Evidence do not apply in probation revocation hearings, the trial court did not err by revoking the defendant's probation and activating his suspended sentence based solely on hearsay evidence). Also, the trial court's failure to advise the juvenile about the consequences of testifying at his probation revocation hearing did not affect the validity of the probation revocation because the holding of *In re J.R.V.*, 212 N.C. App. 205 (2011) (requiring the trial court to advise a juvenile of his right against self-incrimination under G.S. 7B-2405(4), if the juvenile chooses to testify at his own adjudication hearing) applies only to adjudication hearings.

Sufficiency of Notice

In the Matter of D.S.B., 768 S.E.2d 922 (N.C. App. 2015). (1) Despite a clerical error referencing a previously expired term of probation for a "minor" offense, the motion for review provided adequate notice to the juvenile that he might receive a Level III disposition for violating his probation because the motion accurately stated the expiration date of the current probation term, which was for a Class H felony, and listed violations that occurred after the juvenile was placed on probation with the specified expiration date. (2) Assuming *arguendo*, that the motion for review failed to provide adequate notice, the record established the juvenile had *actual* notice that a Level III disposition was possible, in part, because his counsel acknowledged at the hearing that a YDC commitment "was on the table," and the juvenile did not object when the trial court expressly confirmed that he was on probation for committing the Class H felony of larceny from the person.

Willfulness of Violation

In the Matter of Z.T.W., 767 S.E.2d 660 (N.C. App. 2014). The trial court did not err by finding the juvenile to be in willful violation of his probation by not attending school regularly and violating school rules by communicating threats to a teacher. (1) The juvenile failed to preserve his argument that the trial court did not consider his disability and Individualized Education Plan

(IEP) in determining whether the probation violations were willful because no evidence was presented at the hearing to show the juvenile lacked the ability to comply with these conditions of his probation. *See* N.C. R. App. P. 10(a)(1). Also, the trial court explicitly found that the “Juvenile was able to control his behavior and comply with the applicable school rules.” Thus, although not preserved, the argument had no merit. (2) Even if the juvenile did not willfully violate the school rules by threatening his teacher, the juvenile’s numerous unexcused absences provided an independent basis for his probation revocation.

VII. Secure Custody Orders

Validity of Secure Custody Order

***In the Matter of Z.T.W.*, 767 S.E.2d 660 (N.C. App. 2014).** The trial court did not err by ordering, under G.S. 7B-1903(c), that the juvenile be held in secure custody pending his transfer to an out of home placement. (1) G.S. 7B-1906(g), which requires a written order with appropriate findings of fact regarding the evidence relied upon and the purposes for continued custody, applies to secure custody following an initial accusation of delinquency, rather than when the trial court orders secure custody pending disposition or pending an out-of-home placement under G.S. 7B-1903(c). (2) There was ample justification for the court’s decision to place the juvenile in secure custody pending his out-of-home placement, including the juvenile court counselor’s recommendation, which was based on the juvenile’s school suspensions, anger-related difficulties, and disobedience at home, as well as the testimony of the juvenile, the juvenile’s mother, and a school resource officer.

Juvenile Case Law and Legislative Update
 2015 Juvenile Defender Conference



UNC
 SCHOOL OF GOVERNMENT
 www.sog.unc.edu

LaToya Powell
 Assistant Professor

Agenda




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Giving Cell Phones to Delinquent Juveniles
 S.L. 2015-47

- New Offense
 - G.S. 14-258.1(d)
 - Class H felony to directly or indirectly give cell phone to a juvenile in DJJ custody
- No violation for possession by juvenile



UNC

Graffiti Vandalism

S.L. 2015-72



- New Offense
 - G.S. 14-127.1
 - Class 1 misdemeanor
- Elevated to Class H felony:
 - 2 or more non-overlapping prior convictions
 - current offense committed after 2nd conviction
- G.S. 14-132 (injury to public bldg) is a separate offense

UNC

Minors Immune from Prosecution for Solicitation of Prostitution

(HB 134)

- Minors (<18) cannot be prosecuted under G.S. 14-205.1
 - must be treated as undisciplined juveniles
 - same as S.L. 2013-368 (no prosecution of minors for prostitution under G.S. 14-204)
- LEO must report to DSS for investigation

UNC

Juvenile Code Reform

S.L. 2015-58

- 3 Policy Goals:
 - Increase due process protections
 - Reduce further entry into JJS
 - Reduce number of juveniles in confinement
- Effective: December 1, 2015
 - For crimes committed on or after that date

UNC

S.L. 2015-58

DUE PROCESS PROTECTIONS



Custodial Interrogation Age Change

G.S. 7B-2101(b)

Parent/Guardian/Attorney required during custodial interrogation of juvenile

Currently

- If juvenile is under 14

New Law

- If juvenile is under 16




Motion to Suppress Procedure

7B-2408.5

- Pre-Hearing Motions
 - Must be in writing w/ affidavit attached
 - Served on prosecutor, who can file answer
 - Summary rulings required/allowed per statute
- Record must include findings and conclusions
 - Supersedes *In re N.J., 221 N.C. App. 427 (2012)*
- Juvenile may appeal with final order
- §15A-974 (statutory exclusionary rule) applies



Bifurcated Hearing Requirement
7B-2202(f) and 7B-2203(d)

- Mandates separate hearings for probable cause, transfer, and adjudication
- Reverses Court of Appeals
 - *In re J.J.*, 216 N.C. App. 366 (2011)
 - *In re G.C.*, 750 S.E.2d 548 (N.C. App. 2013)

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S.L. 2015-58

REDUCE FURTHER ENTRY

UNC

Intake – Preliminary Inquiry
7B-1701

- Court counselors shall make “reasonable efforts” to meet with juvenile & parent, if:
 - Offense is divertible
 - Juvenile has no prior complaints with DJJ
- Purpose
 - Increase diversion, reduce filing of petitions

UNC

Dismissal by Prosecutor

G.S. 7B-2404(b)



- With or without leave
- Open court or written
- Can re-file if juvenile is apprehended or "apprehension is imminent"

Prior Adjudication Definition

G.S. 7B-2507(a)

New Definition:

An adjudication of an offense that occurs before the adjudication of the offense before the court.

- Reverses *In re P.Q.M., 754 S.E.2d 431 (N.C. App., 2014)*
 – See blog post at <http://civil.sog.unc.edu/>

Prior Adjudication Definition

G.S. 7B-2507(a)

Under P.Q.M.	Under New Law
<p><u>Adjudications:</u></p> <p>Comm. Threats 1/5/12 RWDW 11/29/12 Larceny of Firearm 12/3/12</p> <p>➤ If RWDW is before the court for disposition, juvenile has 2 prior adjudications</p>	<p><u>Adjudications:</u></p> <p>Comm. Threats 1/5/12 RWDW 11/29/12 Larceny of Firearm 12/3/12</p> <p>➤ If RWDW is before the court for disposition, juvenile has 1 prior adjudication</p>

Disposition Orders
G.S. 7B-2512(b)

Court must include relevant information about juvenile expunction under §7B-3200, either verbally or in writing.



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Probation Hearings
G.S. 7B-2510

7B-2510(c)

- Extension of probation requires notice and a hearing (current statute says hearing)
- Hearing may occur after probation has expired:
 - At next regularly scheduled court session, or
 - At court's discretion, if juvenile fails to appear

UNC

Probation Violations
G.S. 7B-2510(e)

Current Law	New Law
<ul style="list-style-type: none"> • Court may order a new disposition at next higher level, <ul style="list-style-type: none"> – which may <u>include</u> confinement up to twice the term authorized by 7B-2508 	<ul style="list-style-type: none"> • Court may either: <ul style="list-style-type: none"> – Order new disposition at next higher level <p style="text-align: center; margin: 5px 0;">Or</p> <ul style="list-style-type: none"> – Order confinement up to twice the term authorized by 7B-2508, along with any other Level 2 option

UNC

S.L. 2015-58

REDUCE JUVENILE CONFINEMENT



Secure Custody Pending Disposition

G.S. 7B-1903(c)

- Secure custody pending disposition or out-of-home placement must be reviewed every 10 days, unless juvenile waives.
 - Waiver may occur for no more than 30 calendar days, with juvenile's consent.
 - Order must be in writing, with appropriate findings.



Restraint During Transport

G.S. 7B-1903(f)

- No physical restraints during transport of juvenile for medical/psych. assessment under §7B-1903(b), if juvenile:
 - is less than 10, and
 - has no pending delinquency charge

Unless "reasonably necessary" for safety of LEO or other authorized person or juvenile.



Dispositional Alternatives
G.S. 7B-2506(12) & (20)

- Amendment clarifies that trial court must determine both the timing and imposition of intermittent confinement days.
 - JCC cannot independently place juvenile in detention, without court's approval.
 - Even if disposition order includes IC days as part of the disposition.

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Recent Case Law
PROBATION VIOLATIONS & ADJUDICATION ORDERS

UNC

Revocation Based on Hearsay
Z.T.W.

- Revocation of probation may be based solely upon admission of hearsay evidence.
 - Formal Rules of Evidence don't apply



UNC

Willfulness of Violation

Z. T. W.

- Juvenile's failure to present evidence waived appellate review of whether trial court erred by failing to consider his disability and IEP in determining willfulness of violations.
 - Even if preserved,
 - Court found “Juvenile was able to control his behavior and comply with the applicable school rules.”



Secure Custody Order

Z. T. W.

- The secure custody order placing juvenile in secure custody pending his out-of-home placement was supported by the record.
 - JCC's report detailed school suspension, anger issues & disobedience at home
 - Juvenile's mother & SRO also testified



Secure Custody Order

Z. T. W.

- Trial court did not err by failing to include detailed findings of fact to support secure custody pending out-of-home placement.

But See
 S.L. 2015-58 amends G.S. 7B-1903(c) to require a written order with appropriate findings of fact when court orders secure custody pending disposition or out-of-home placement. Effective 12/1/15



Sufficiency of Notice
D.S.B.

- A clerical error referencing an expired term of probation in the motion for review did not show juvenile lacked notice of possible Level 3 disposition.
- Even if motion failed to provide notice, juvenile had actual notice he was subject to a Level 3 disposition based on the record.

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Adjudication Order – Findings of Fact
K.M.M.

- G.S. 7B-2411 does not require written findings on the evidence which satisfies each element of the offense.
- M. Larceny upheld where trial court found:
 - "on or about the date of 10-16-2013, the juvenile did unlawfully and willfully steal, take, and carry away a White Apple [iP]hone with a pink and gray otter box case, the personal property of [Ms.] Nguyen having a value of \$300.00."

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Questions?

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Applying the SOG Race Manual to Delinquency Cases

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What is racial disparity?

- Racial Disparity in the criminal justice system exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population. ... *Illegitimate or unwarranted* racial disparity in the criminal justice system results from the dissimilar treatment of similarly situated people based on race.
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 1-2, (1st Ed. 2014).

What is bias?

- Describes a mental state which refers to positive or negative racial preferences, either conscious or unconscious.
 - Explicit bias is conscious
 - Implicit bias is unconscious
- "I'm not racist, but..."
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 1-4, (1st Ed. 2014).

Explicit Bias

- A conscious preference, either positive or negative, for a social category
- A person who expresses explicit bias does so knowingly
 - Mark Fuhrman
 - North Carolina's 'Black Code'
 - *Miller-El v. Dretke*, 545 U.S. 231 (2005)
 - "[I]f they're Hispanic and they're driving, they're probably drunk."
- Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 1-5, (1st Ed. 2014).

Calhoun v. United States, 568 U.S. ___, 133 S.Ct. 1136 (2013)

- "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?"
 - Justice Sotomayor, citing the transcript in concurring in denial of cert.

Implicit Bias

- Attitudes and stereotypes that people may not be aware of, but that can influence their thoughts and behaviors
 - Associating black with guilty
 - An African-American male is more likely to have started the fight than to have responded in self-defense
 - Putting her hand on her purse when an African-American walks by
- May even conflict with a consciously held belief
- Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 1-6, 1-7, (1st Ed. 2014).

Equal Protection.... And Juveniles

Equal Protection and Searches

- Utilizing the protections of both the Fourth and Fourteenth Amendments to the United States Constitution
- Combining claims...
 - Using subjective intentions of law enforcement to bolster the 14th Amendment Claim which may cast doubt on the necessary legal justification needed under the 4th Amendment
 - Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-4, (1st Ed. 2014).

Guarantees of Equal Protection

- State v. Ivey, 360 N.C. 562 (2006)
- North Carolina Constitution, Art. I § 19
- United States v. Avery, 137 F.3d 343 (6th Cir. 1997)
- United States Constitution, 14th Amendment
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-5, (1st Ed. 2014).

Selective Enforcement

Elements:

1. A law or policy contains an express racial classification that singles out members of the person's race for disfavored treatment, *Wayte v. United States*, 470 U.S. 598 (1985); or
2. A facially neutral law or policy was selectively enforced against members of the defendant's race in an intentionally discriminatory manner, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-6, (1st Ed. 2014).

Showing a Discriminatory Purpose

- “‘Discriminatory purpose’ ... implies more than ... intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”
- “that in the exercise of ... discretion there has been intentional or deliberate discrimination by design.”

• *Wayte v. United States*, 470 U.S. 598, 610 (1985)
 • *In re Register*, 84 N.C. App. 336, 341 (1987)
 • Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-7, (1st Ed. 2014)

Consensual Encounters with Law Enforcement

First... remember what a seizure is...

- “A person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not “free to leave.” *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person’s freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer’s requests or terminate the encounter)”

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 2-20, (1st Ed. 2014)

Race and ‘Free to Leave’

- In determining if a reasonable person would have felt free to leave an encounter with law enforcement, Courts consider the totality of the circumstances
- A person’s characteristics, such as race or immigration status, may be a factor for the Court to consider

• See *INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992)

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 2-20, (1st Ed. 2014)

U.S. V. Washington, 490 F.3d 765 (9th Cir. 2007)

- an encounter between two White police officers and an African American defendant was not consensual, as a reasonable person in the defendant’s circumstances would not have felt free to leave
- In that case, the court relied on, among other things, the strained relations between police and the African American community and the reputation of police among African Americans

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 2-20, (1st Ed. 2014)

Consensual Encounters ...

- *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989)
- *United States v. Black*, 675 F.2d 129, 134–35 (7th Cir. 1982)
- *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009)
- *Santos v. Frederick County Bd. of Comm’rs*, 884 F. Supp. 2d 420, 427 n.5 (D. Md. 2012) (unpublished), *aff’d in part, vacated in part* by 725 F.3d 451 (2013)
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-20, 2-21, (1st Ed. 2014)

Equal Protections...

- *Whren v. U.S.*, 517 U.S. 806, 813 (1996)
- *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997)
- *U.S. v. Travis*, 62 F.3d 170 (6th Cir. 1995)
- *U.S. v. Taylor*, 956 F.2d 572 (6th Cir. 1992)
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-21, (1st Ed. 2014)

And remember AGE in the analysis

- “a child’s age is a relevant factor to consider in determining whether the child was in custody for *Miranda* purposes, even though whether a suspect is in custody is an objective inquiry”
- *J.D.B. v. North Carolina*, 131 S. Ct. 2394; 180 L. Ed. 2d 310; 2011 U.S. LEXIS 4557 (2011)
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 2-21, (1st Ed. 2014)

Eyewitness Identification – Risks of Misidentification

Mistaken Identification

- “the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967);
- see also *Perry v. New Hampshire*, 565 U.S. ___, 132 S.Ct. 716, 738–39 (2012) (Sotomayor, J., dissenting) (“[A] staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.”)
- Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 3-2, (1st Ed. 2014)

Factors affecting the accuracy of eyewitness identification:

- 1. Problems of Acquisition
- 2. Problems of Retention
- 3. Problems of Retrieval

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 3-5, (1st Ed. 2014)

Acquisition

- When the eyewitness memory is formed
- Factors influencing the accuracy of the witness' perception:
 - Lighting conditions
 - Duration of the event
 - Violence
 - Stress
 - Fear
 - Age
 - Sex
 - Race
 - Expectations
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-5, (1st Ed. 2014)

Retention

- The time between the memory formation and the description of the memory
- Memory is malleable
- Factors influencing accuracy:
 - Length of retention interval
 - Post-event experiences
 - Suggestive pretrial identification procedure
 - Positive feedback after an identification procedure
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-5, (1st Ed. 2014)

Retrieval

- When the witness is testifying about the identification
- Susceptible to how the information is solicited:
 - Frequent review of the event
 - Questioning
 - Identification Procedures
 - Preparation to testify
 - May artificially increase witness confidence in the identification
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-6, (1st Ed. 2014)

Eyewitness Identification – Cross-Racial Impairment

Misidentifications when cross-racial identification is involved

- ‘Among White eyewitnesses, cross-racial impairment leads more often to false positives (the erroneous identification of a person as the perpetrator) than to false negatives (the erroneous failure to identify the perpetrator)’
- ‘Among wrongful convictions uncovered by DNA analysis, 36% occurred in cases where white witnesses mistakenly identified innocent black defendants’

• Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-10, (1st Ed. 2014)

Causes of cross-racial impairment

- Extent, Frequency and Quality of a witness’ contact with members of another race play a role in the witness’ ability to make accurate cross-racial identifications
 - Family members of another race
 - Working with members of another race
 - Friends with members of another race
 - Living in a neighborhood consisting of members of another race

• Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-11, 3-12, (1st Ed. 2014)

Eyewitness Identification Reform Act and Due Process

Due Process

- 'State and federal guarantees of due process, under the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the NC Constitution, protect defendants from suggestive eyewitness identification procedures that create a substantial likelihood of irreparable mistaken identification'

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 3-12, (1st Ed. 2014)

Cases that address this...

- *Manson v. Brathwaite*, 432 U.S. 98 (1977)
- *Neil v. Biggers*, 409 U.S. 188 (1972)
- *State v. Harris*, 308 N.C. 159 (1983)
- *State v. Pigott*, 320 N.C. 96 (1987)
- *State v. McCraw*, 300 N.C. 610 (1980)
- *State v. Breeze*, 130 N.C. App. 344 (1998)

• Grine and Coward, *Raising Issues of Race in North Carolina Criminal Cases*, 3-12, (1st Ed. 2014)

Two step process:

- 1. Whether the identification procedures were impermissibly suggestive
- 2. If the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-12, (1st Ed. 2014)

Impermissibly or unnecessarily suggestive

- "A procedure is unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime." *Satcher v. Pruett*, 126 F.3d 561, 566 (4th Cir. 1997). "To determine whether a pretrial identification procedure is suggestive, the court should consider: (1) whether the accused is somehow distinguished from others in the line-up or in a set of photographs; and (2) whether the witness is given some extraneous information by the police which leads her to identify the accused as the perpetrator of the offense." *State v. Rainey*, 198 N.C. App. 427, 435 (2009) (internal quotations omitted).
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-13, (1st Ed. 2014)

Substantial likelihood of irreparable misidentification

- Totality of the circumstances:
 - the opportunity to view the perpetrator at the time of the crime;
 - the witness's degree of attention;
 - the accuracy of the witness's prior description of the perpetrator;
 - the certainty of the witness at the time of confrontation;
 - the time elapsed between the crime and the confrontation.
- *State v. Harris*, 308 N.C. 159 (1983)
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-13, 3-14, (1st Ed. 2014)

Eyewitness Identification Reform Act (EIRA)

- NC Gen Stat §§ 15A-284.50 -15A-284.53 (2007)
- Rules governing pretrial eyewitness identification lineups, whether live or by photo array
- ‘The law reflects best practices developed to prevent suggestive pretrial identification procedures, including a requirement that lineups must be “double-blind”, i.e., conducted by someone who is not participating in the investigation and does not know which person is the suspect; that individuals or photographs should be presented to witnesses sequentially rather than simultaneously; and that lineups should include at least five fillers resembling the suspect at the time of the crime. G.S. 15A-284.52(b) and (c).’
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-18, (1st Ed. 2014)

Remedies if an EIRA violation is found:

- Failure to comply with EIRA shall be considered by the court in adjudicating motions to suppress eyewitness identification
- Failure to comply with the requirements of EIRA is admissible in support of claims of misidentification, so long as the evidence is otherwise admissible
- When evidence of compliance or noncompliance with EIRA is presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance in determining the reliability of eyewitness identifications.
- G.S. 15A-284.52(d).
- Grine and Coward, Raising Issues of Race in North Carolina Criminal Cases, 3-18, 3-19, (1st Ed. 2014)

Raising Issues of Race in North Carolina Criminal Cases
 • By Alyson Grine and Emily Coward

Manual can be downloaded at:

- <http://defendermanuals.sog.unc.edu/defender-manual/16>

- As this presentation is on the use of the Race Manual in juvenile delinquency proceedings, the portions of the Race Manual duplicated herein were done so with the permission of the author.

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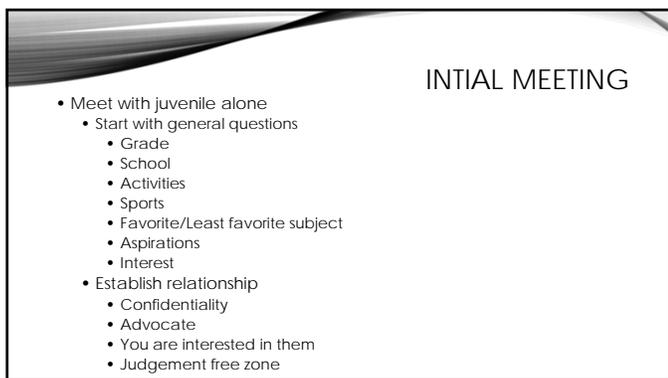
PRE-ADJUDICATION ADVOCACY

COMBATING RACIAL DISPARITY



INITIAL APPOINTMENT

- Reach out to the parent/guardian to make an appointment to meet with you
- Be flexible and consider obstacles
 - Phone conference
 - Extended hours
 - Alternative locations
- Start building a relationship
 - You reaching out shows you care
 - They want you to know they are interested



INITIAL MEETING

- Meet with juvenile alone
 - Start with general questions
 - Grade
 - School
 - Activities
 - Sports
 - Favorite/Least favorite subject
 - Aspirations
 - Interest
 - Establish relationship
 - Confidentiality
 - Advocate
 - You are interested in them
 - Judgement free zone

MODERN SLANG QUIZ

- Bae
- THOT
- Ratchet
- On Fleek
- Basic
- Take several seats
- Bye Felicia
- Turnt
- Slay
- Zero chill
- Cray
- Swerve

HOW TO DEAL WITH PARENTS



- Explain attorney client privilege
- Explain their role
- Tell them you encourage the juvenile to share but respect their wishes
- You are there to help not hurt their child
- You are advocating for them not against them
- They will be part of the process

PARENT'S ROLE IN INTIAL MEETING

- Bring important documents
 - Current report cards
 - IEPs
 - List of any diagnosis and medications
 - Any award received
- To give a better ideas of family dynamics
 - Sibling interactions
 - Any issues with home behavior
 - Good to see interactions with juvenile and parent/guardian
 - Adults are typically better historians
- Prior juvenile involvement
- Prior suspensions or behavioral issues at school

TAKE INTO ACCOUNT CULTURAL DIFFERENCES

- Everyone lives differently
 - Education v. Working
 - Government names v. Street names
 - Different family structures
 - Different ways to parent
 - Religious differences
 - Social morals/values
- Take time to learn about what's important
- Be able to advocate why these cultural differences should be taken into account

COMBAT THE RISK NEED ASSESSMENT

- Inherently biased
 - Single parent household v. Two parent households
 - Middle class v. Lower class
 - Employed v. Unemployed
 - Family with legal involvement
 - "Good" grades v. "Bad" grades
 - Suspensions at school

NEGOTIATIONS WITH THE STATE

- Use the information provided by parents
- Use examples of juveniles in similar situations and the differences in punishment
- Compare adult punishment v. Juvenile
 - Especially in marijuana cases
- Give them an idea of who your client is as a person not just their crime



ALTERNATIVES TO ADJUDICATION

- Teen Court
- Informal Deferred
 - Counseling
 - Rehabilitation
 - Community Service
 - Mentoring programs
 - In-Home Services

WHY ALTERNATIVES TO ADJUDICATION ARE IMPORTANT

- We are the great equalizers
- Minorities have disproportionate contact with the legal system
 - They are less likely to be offered diversions based on risk needs assessment
- Once a juvenile enters the juvenile system there chances for continued contact increase
- Adjudication can lead to serious consequences
 - YDC
 - Days confined in detention
 - Employment opportunities
 - Military service
 - Can be used for bond purposes as an adult

Juvenile Training Immersion Program:

Lesson 8a – Raising Race

ANNOTATED BIBLIOGRAPHY

IMPLICIT BIAS STUDIES

Extensive research has been done on the presence of implicit bias in the American population against black people. The nature of implicit bias is that it is predominately subconscious and consequently is often uncorrelated with explicit commitment to egalitarian values. As defenders, we must be conscious of our own bias, conscious of how implicit bias affects our client as they move through the system, and work to overcome it. The following implicit bias studies are intended to expand our knowledge of implicit bias, both for self-education and to better understand the forces working against our clients of color. The descriptions of studies are pulled virtually verbatim from the articles cited.

In addition to the empirical studies listed here, **Jerry Kang et al.**,’s law review article *Implicit Bias in the Courtroom*, **59 UCLA L. Rev. 1124 (2012)** provides a very useful summary of implicit bias research in the criminal justice system.

I. Establishing the presence of, nature of and extent of implicit bias

George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554 (1998)

Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psychol. Sci. 640 (2003)

Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004)

Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law & Hum. Behav. 483 (2004)

Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004)

Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 Psychol. Sci. 342 (2004)

Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007)

Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psychol. 292, 302 (2008)

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Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. Experimental Soc. Psychol. 1322, 1322 (2008)

Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009)

Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav. 413 (2011)

Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526 (2014)

II. Overcoming Implicit Bias

Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. Personality & Soc. Psychol. 800 (2001)

Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 Personality & Soc. Psychol. Bull. 512 (2010)

Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. of Experimental Psych. 1267 (2012)

Jennifer T. Kutoba & Tiffany A. Ito, *The Role of Expression and Race in Weapons Identification*, 14 Emotion 1115 (2014)

I. Establishing the Presence of, Nature of and Extent of Implicit Bias

George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 561 (1998)

Purpose

- To determine if court officials perceive and judge minority offenders as compared to white counterparts.
- To determine if court officials perceive minorities as more likely than white youths to commit future crimes.
- To determine the perceived causes of crime by youth by the court officials making decisions.

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Methodology

- The study analyzed 233 narrative reports written by probation officers in 3 counties in a western state.
- Compared narratives based on age, race and sex of the juvenile offenders; and severity of offense, pretrial detention and prior offenses to control for those variables.

Results

- Reports on black youths were more likely to include negative internal attributions (negative personality assessments) than reports for white youth, whereas reports on white youth included more environmental attributions (blaming behavior on negative environmental factors).
- Black youths were judged to have a higher risk of reoffending than white youths.
- Probation officers were more likely to recommend sentences beyond the normal sentencing range when the report included negative internal attributions.

Relevance

- Provides evidence that probation officers are also affected by implicit bias, and offers some hints as to how to frame issues (based on environmental attributions) that may sway a probation officer's disposition recommendation.

Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psychol. Sci. 640 (2003)

STUDY 1

Purpose

- To determine if stereotypes influence perceptions of facial affect.

Methodology

- 24 white university students participated in the study.
- Researchers constructed a brief movie clip in which a target's facial expression morphed from unambiguous hostility to unambiguous happiness. Participants watched four movies and indicated when the hostile expression was no longer perceivable.
- Participants also took an explicit bias test and an implicit bias test.

Results

- Participants with higher levels of implicit bias took longer to perceive the black face change from hostile to friendly, but not for white faces.

Relevance

- Implicit bias means people may be more likely to interpret black clients' facial

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expressions as hostile.

STUDY 2

Purpose

- To test the hypothesis in Study 1 by reversing the order of change from hostile to friendly to friendly to hostile, ensuring that people with implicit bias were not just more indecisive when it came to the black faces.

Methodology

- Same methodology as in Study 1, but instead of morphing from unhappy to happy, the faces morphed from happy to unhappy.

Results

- Individuals high in implicit prejudice perceived the onset of hostility much earlier for black faces than did low-prejudice participants. However, response times for white faces were unrelated to implicit-prejudice scores.

Relevance

- Confirms the conclusions in study 1.

Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 886 (2004)

STUDY 1

Purpose

- To test whether stereotypes about certain groups are “bidirectional”—*i.e.*, that is not only that thinking of a stereotyped group “black Americans” conjures up ideas about crime, but also that thinking about crime conjures up images of black Americans.
- Study 1: to establish that exposure to black faces can decrease the perceptual threshold for recognizing crime-relevant objects.

Methodology

- Subjects were 41 white male UC- Berkley and Stanford students.
- Subjects were primed with 50 black male or 50 white male faces, and then asked to complete an “unrelated” task of looking at objects, both crime-related and neutral, on a computer screen that initially were severely degraded and became less degraded in small increments (in 41 picture frames). The participants’ task was to

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indicate (with a button push) the moment at which they could detect what the object was.

Results

- In comparison with white face primes, black face primes dramatically reduced the number of frames needed to accurately detect crime-relevant objects, and exposure to black primes facilitated the detection of crime-relevant objects compared with the no-prime condition. In contrast, exposure to white primes inhibited the detection of crime-relevant objects compared with the no-prime condition. As predicted, there was no significant effect of race prime on crime-irrelevant objects.

Relevance

- People are more likely to see “crime-related” objects when associating the object with a black face than with a white face.

STUDY 2

Purpose

- To examine the extent to which the association between black people and crime would produce an attentional bias toward black male faces.

Methodology

- 52 white male Stanford students participated.
- Researchers activated the concept of crime by subliminally priming participants with crime-relevant objects. Immediately following this priming procedure, participants were introduced to the dot-probe task. During this task, two faces (one black and the other white) were simultaneously displayed on the computer screen. These faces quickly disappeared and were replaced by a dot probe in the visual location of either face. The participants’ task was to locate the dot probe as quickly as possible.

Results

- When the dot probe was in the black face location, participants primed with the crime-relevant images were found the dot faster than participants who were not primed. Whereas, when the dot was in the white face location, the crime prime caused the dot detection to be slower than those who had not been primed.

Relevance

- This study further supports that stereotypes associate black people with crime subconsciously.

STUDY 3

Purpose

- To test whether attentional biases stayed consistent even when the content of the prime was positive associations with black faces.

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Methodology

- Participants were 75 white male Stanford students.
- Participants were primed with words associated with basketball, and then two faces (one black and the other white) were simultaneously displayed on the computer screen. These faces quickly disappeared and were replaced by a dot probe in the visual location of either face. The participants' task was to locate the dot probe as quickly as possible.

Results

- Though participants showed no significant attentional bias toward either face when they were not primed, they were significantly faster to find the dot in the black face location than in the white face location when primed with basketball-relevant words. However, priming did not negatively affect the speed at which the dot was located behind the white faces as compared to no-prime.
- The participants also were screened for explicit bias, and differences in explicit racial attitudes did not affect the results.

Relevance

- Stereotypic associations other than crime can lead to visual tuning effects.

STUDY 4

Purpose

- To test whether stereotypical associations may cause police officers' attention to linger on a black face when primed with words associated with crime, how attentional bias affects the memory of faces displayed, and to establish if stereotypes cause peoples' memories to remember faces as more "stereotypically black" when primed with words associated with crime.

Methodology

- 57 police officers practicing in an urban area volunteered to be part of the study.
- Police officers were primed with words associated with enforcing the law against violent criminals. 10 faces, 5 black and 5 white, were rated by another group for "stereotypicalness." The participants were then asked to participate in a dot-probe task.
- After performing the dot-probe task, participants were given the surprise face-recognition memory task. Participants were exposed to a black face lineup and a White face lineup. For each lineup, participants were asked to identify the face that had been displayed during the dot-probe task. For each lineup, all five faces of one race—the target and four distracters— were presented on the computer screen simultaneously. The order in which participants saw the black and white lineups was randomly determined, as was the location of each face on the screen. Participants were asked to indicate their choice in the first lineup, then the second lineup, and were then debriefed.

Results

Juvenile Training Immersion Program:

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- When the dot probe was in the location of the black face, officers primed with the crime-relevant words were faster to find the dot than officers who were not primed and were also faster to find the dot than behind white face locations.
- Officers primed with crime were slower to find the dot behind the white face than officers who had not been primed with crime-related words.
- When unprimed, participants found the dot faster when it was in the White face location than the black face location.
- During the facial recognition task, participants were more likely to falsely identify a face that was more stereotypically black than the target when they were primed with crime than when they were not primed. Thus, thoughts of violent crime led to a systematic distortion of the black image.

Relevance

- This study suggests that not only do stereotypes bring attention to black subjects when officers are primed with crime-related words, they are also likely to misidentify a face, especially to remember the face as more stereotypically black. This supports the conclusion that black people who appear most stereotypically black may be most vulnerable to false identifications in real criminal lineups. This type of false identification may be likely even when the actual perpetrator is present in the lineup and even when the eyewitness was visually drawn to the perpetrator's face at the time of the crime.

STUDY 5

Purpose

- To test the hypothesis that police officers view more stereotypically black faces as more criminal.

Methodology

- 182 police officers from the same police department as in Study 4 voluntarily participated in the study.
- In small groups, officers were shown a series of faces (of Stanford students or employees) of the same race. One third of the officers were asked to participate in a stereotypicality measure, rating each face as more or less stereotypical as white or black. Another third of the officers were told that some of the faces they would be shown would be criminals and were asked to determine whether the face they were shown “looked criminal.” The final third undertook an attractiveness test, rating how attractive each picture was in order to control the fact that black and white faces used in the study were rated similarly.

Results

- Black and white faces rated similarly attractive.
- More black faces rated high in stereotypicality were judged as criminal than black faces rated low in stereotypicality. This did not occur in the white face groups.
- Additionally, significantly more black faces rated high in stereotypicality were judged as criminal than white faces rated high in stereotypicality.

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- Highly stereotypical black faces were more likely to be judged criminal than any other group in the study.

Relevance

- These results provide additional evidence that police officers associate black people with the specific concept of crime.
- Moreover, these results shed light on the face- recognition memory errors made by police officers in Study 4. In that study, police officers were more likely to falsely identify a black face that was more stereotypically black than the target when primed with crime than when not primed with crime. Thinking of crime may have led officers to falsely identify the more stereotypically black face because more stereotypically black faces are more strongly associated with the concept of crime than less stereotypically black faces.

Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 *Law & Hum. Behav.* 483 (2004)

STUDY 1

Purpose

- To illustrate how unconscious racial stereotypes affect police officers in their interactions with juvenile offenders.

Methodology

- 105 ethnically diverse police officers participated in the study.
- The officers were initially primed with words related to the category *Black* or neutral with respect to ethnicity. Then they were asked to read a police report in which the ethnicity of the defendant was not given in two scenarios in which the circumstances of low-level offense property and assault crimes were given. They were then asked a series of questions about their impressions of the alleged suspect, inferences about suspect culpability and likelihood of reoffending, and judgments about how they would handle the situation if they were called to the scene.

Results

- Police officers in the race prime condition were less likely to judge the offender as immature (by virtue of adolescence) and more likely to perceive him as culpable and deserving of punishment.
- In contrast, consciously held beliefs and attitudes about race did not influence attribution-related judgments, suggesting that researchers were successful in activating implicit racial bias outside of the respondent's conscious awareness.

Relevance

- Police officers are affected by implicit bias, which has a deep impact on the juvenile justice system as they have wide discretion regarding the involvement of a youth in the juvenile justice system to begin with.

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STUDY 2

Purpose

- To study the effect of implicit bias on probation officers in their interactions with juvenile offenders.

Methodology

- Researchers repeated the methodology used in Study 1 with police officers, however changed the options for punishment severity to be options available to probation officers.

Results

- Probation officers in the race prime condition judged the alleged offender to be less immature and more violent, and their global trait ratings were more negative. Those primed with the racial category also viewed the offender as more culpable, more likely to reoffend, and more deserving of punishment.
- Consciously held racial attitudes had negligible effects on attribution-related judgments about hypothetical adolescent offenders.

Relevance

- Probation officers are affected by implicit bias.
-

Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004)

Purpose

- To establish the extent to which capital defense attorneys are affected by implicit biases.

Methodology

- Administered a paper version of the IAT to habeas lawyers, capital defense trial lawyers, and law students.

Results

- Results in this population mirrored the results found in the general population, indicating that capital defense attorneys are affected by implicit bias just like everyone else.

Relevance

- Defense attorneys are also affected by implicit bias, despite explicit commitment to egalitarian values.

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Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 Psychol. Sci. 342 (2004)

STUDY 1

Purpose

- To test if racial bias resulted in people identifying racially ambiguous faces as African American when they were making hostile faces, but as Caucasian when they were making happy faces.

Methodology

- 20 white university students participated.
- Participants were shown a series of racially ambiguous computer-generated faces and were asked to categorize each target as either Caucasian or African American. Each of the 15 faces was presented twice: once with a clearly happy facial expression and once with a clearly angry facial expression. Participants then completed measures of their explicit attitudes toward Caucasians and African Americans and finally completed an implicit association task.

Results

- The study found that the relationship between prejudice and categorization as African American was most strongly related when the faces were making a hostile expression, and much less likely to categorize as African American when making a happy face.

Relevance

- Biased people, both implicit and explicitly so, associate blackness with hostility.

STUDY 2

Purpose

- To replicate and extend the findings of Study 1.

Methodology

- Same as Study 1, but 57 white university students participated.
- The implicit and explicit biases were measured in a separate session, and the study included not only a speed dichotomous categorization test but also a non-speed categorization task.

Results

- “As implicit prejudice increased, categorization decisions were more powerfully

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influenced by targets' facial affect.”

Relevance

- “Blackness” is associated with perceived hostility, which works bi-directionally in terms of interpreting ambiguous behavior as hostile when faced with a person raced as black, while also more likely to identify someone as black when we interpret behavior as hostile.

Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psychol. 1006 (2007)

STUDY 1

Purpose

- To establish if police officers are better at the shoot-don't shoot task of identifying suspects who pose actual threats or not in a simulated game. The researchers hypothesized that the race of a suspect would affect the speed but not the accuracy of police decisions in the game.

Methodology

- Three samples of participants completed a 100-trial video game simulation in which armed and unarmed white and black men appeared in a variety of background images. Participants were instructed that any armed target posed an imminent threat and should be shot as quickly as possible. Unarmed targets posed no threat and should be flagged accordingly by pushing the don't-shoot button, again as quickly as possible. The speed and accuracy with which these decisions were made served as our primary dependent variables, and performance was compared across three samples: officers from the Denver Police Department, civilians drawn from the communities those officers served, and a group of officers from across the country attending a 2-day police training seminar.

Results

- On average, officers were simply quicker to make correct shoot/ don't-shoot decisions than were civilians.
- Second, they were better able to differentiate armed targets from unarmed targets.
- Officers may show less bias than civilians in their final decisions.
- Participants seemed to have greater difficulty (indexed by longer latencies) responding to stereotype-incongruent targets (unarmed black targets and armed white targets), rather than to stereotype- congruent targets. The magnitude of this bias did not differ across the three samples.
- Bias increased as a function of the community's size, crime rate, and the proportion of black residents and other ethnic minority residents. Police in larger, more dangerous and more racially diverse environments are presumably much more likely to encounter black criminals, reinforcing the stereotypic association between race and crime. By contrast, officers with little exposure to black people may be less likely to rehearse this association.

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- The expertise that police bring to a shoot/don't-shoot situation may not eliminate the difficulty of interpreting a stereotype-inconsistent target, but it does seem to minimize the otherwise robust impact of target race on the decision to shoot.

Relevance

- The race of a suspect does affect a police officer's decision making, although they are very accurate in their shoot or don't shoot decisions given enough time.

STUDY 2

Purpose

- To study whether police officers maintain their accuracy in the shoot-don't shoot simulation game when they are given much less time in which to make the decision in order to facilitate and analyze more errors.

Methodology

- Officers and civilians underwent the shoot-don't shoot simulation and were given much less time in which to make a decision. Failure to make a decision in time resulted in a 20 point deduction.

Results

- Civilians consistently set a lower threshold for the decision to shoot (c) than did the officers, and this difference was particularly evident for black targets.
- Officers and community members both experienced difficulty processing stereotype-incongruent targets.
- Community members showed a clear tendency to favor the shoot response for black targets (relative to both white targets and relative to a neutral or balanced criterion of zero). Police, however, showed no bias in their criteria.

Relevance

- The race of a suspect does affect a police officer's decision making, although they are very accurate in their shoot-don't shoot decisions given enough time.

STUDY 3

Purpose

- To study if training helps reduce inaccuracies in shoot-don't shoot simulations through allowing participants to practice, to confirm the theory that training is what differentiates officers from civilians in accuracy rates.

Methodology

- 58 student civilian participants played the shoot-don't shoot game twice on 2 days separated by 48 hours.

Results

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- Although civilians still exhibited shooter bias, bias decreased in the latter round each day.
- There appeared to be no carry over in bias reduction from Day 1 to Day 2.
- Across repeated plays of the video game simulation, these developing “experts” continued to struggle with the stereotype-incongruent targets, responding more slowly on incongruent (compared with congruent) trials.

Relevance

- Police training and on-the-job experience in complex encounters may allow officers to more effectively exert executive control in the shoot-don’t-shoot task, essentially overriding response tendencies that stem from racial stereotypes.

Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psychol. 292, 302 (2008)

STUDY 1

Purpose

- To test the hypothesis that there is an implicit association between black people and apes and to establish how widely that implicit association is held.

Methodology

- 121 male undergraduates participated in the study.
- Participants were subliminally primed with black faces, white faces, or a nonface control image. Next, they were presented with degraded images of animals (line drawings of apes and non-apes), which they were asked to identify as quickly as possible. For each animal, image quality was improved in small increments (frame by frame), making the animal increasingly easy to identify. For both white and non-white study participants, researchers predicted that exposure to the black male faces would facilitate identification of the ape images, whereas exposure to the white male faces would not.

Results

- Simple exposure to black faces reduced the number of frames participants required to accurately identify ape images. This black–ape facilitation effect was observed among white and non-white participants alike. And this effect was not moderated by participants’ explicit racial attitudes or their motivation to control prejudice. Surprisingly, participants not only exhibited a black–ape facilitation effect but also exhibited a white–ape inhibition effect as well.

STUDY 2

Purpose

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- To establish if priming participants with apes would result in an attentional bias to black faces, establishing that black people and apes are bi-directionally associated.

Methodology

- Participants were presented with two faces on the computer screen simultaneously (one black and one white face). These faces disappeared, and a dot probe appeared in the place where one of the faces used to be. The participant was asked to locate the dot probe as quickly as possible on the computer and to use one of two response keys to indicate whether it was on the left or the right of a centered focus dot. Researchers used the time it took participants to locate the dot probe as a proxy for visual attention. Researchers predicted the participants would be especially fast at finding the dot probe when it was in the location of the Black face and they had been primed with apes.

Results

- When white participants were not primed, they appeared to display an in-group preference—that is, their attention was directed to white faces more so than black faces. When subliminally primed with ape images, however, black faces captured their attention.

STUDY 3

Purpose

- To test whether the bias shown associating apes and black faces in the previous two studies had to do with out-group bias rather than a subconscious association between black people and apes.

Methodology

- 49 white male college students participated.
- Participants were presented with the same dot-probe task as in Study 2. They were presented, however, with a black male face and an Asian male face (rather than black and white faces). Second, to ensure that any arresting properties of color were removed, the faces were converted to line drawings. Again, it was hypothesized that participants' attention would be diverted to the black male face when primed with apes. However, in the absence of an ape prime, given the lack of an in-group member, it was hypothesized that participants' attention would be equally distributed.

Results

- The attentional bias toward black faces observed in the ape-prime condition did not appear to be driven by a generalized out-group bias. Rather, results indicated an association between black people in particular and apes that is determining where people look.

STUDY 4

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Purpose

- To test whether the black–ape association is driven by implicit anti-black attitudes or explicit knowledge of the association rather than by implicit knowledge.

Methodology

- 69 white male college students participated.
- Participants took two modified Implicit Association Tests. Half the participants were randomly assigned to first take a personalized IAT (Olson & Fazio, 2004). The other half first took an IAT that required them to categorize stereotypically black and white names by race at the same time they categorized animal names as either great apes or big cats. After completing one or the other IAT, participants left the lab and returned no less than 24 hours later to complete the second IAT (*i.e.*, whichever IAT they had not taken previously).

Results

- As predicted, participants were faster to categorize target words when *Black* was paired with *ape* than when *Black* was paired with *feline*. This bias toward pairing *Black* and *ape* was virtually unchanged when covarying for participants' scores on the personalized IAT, indicating that individuals' implicit anti-black bias was not responsible for the black–ape association.

STUDY 5

Purpose

- To establish if the activation of the association between black people and apes in contemporary society lead people to condone violence against black targets, despite individual differences in anti-black prejudice?

Methodology

- 121 white male college students participated.
- Researchers subliminally primed participants with words associated with apes or big cats, and were asked them to view a videotape of a group of police officers beating a suspect whom the participants were led to believe was black or white. Researchers predicted that the participants primed with the ape words would be the most likely to condone violence directed at the suspect, but only when they thought the suspect was black.

Results

- Participants who believed the suspect to be white perceived the police as no more justified in using violence when primed with apes than when primed with big cats. However, participants who believed the suspect to be black perceived the police as more justified in using violence when they had been primed with apes.
- Participants who had been primed with big cats did not think the police more justified in beating the white or the black suspect, participants who were primed with apes thought that the police were more justified in beating the black suspect than the white suspect.

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STUDY 6

Purpose

- To examine whether metaphorical representations comparing black people to apes in the public media impacts the way people conceive black people and issues surrounding black people.

Methodology

- Researchers examined death-eligible cases between 1979 and 1999 in Philadelphia, Pennsylvania. From this data set, they extracted 153 cases for which we had both mug shots of the defendant and press coverage of the case in the *Philadelphia Inquirer*.
- Each article was coded for the presence of 54 words that connoted bestial or subhuman qualities. The words were presented to raters who read each word in context (taken from sentences in the newspaper articles). Raters were asked to “think of an animal” that was associated with the target word in each sentence, in order to establish the presence of words associated with apes.
- Each death-eligible case was then given a score for the total number of ape words used to describe it in the press and a score for the total number of articles that covered the case.

Results

- Black defendants were described in the press with more ape-relevant words than were white defendants.
- When controlling for the total number of articles, defendant socioeconomic status, victim socioeconomic status, aggravating circumstances, mitigating circumstances, and crime severity, black defendants who were put to death were more likely to have apelike representations in the press than were those whose lives were spared.

Relevance

- Establishes that in the press an association is drawn between black people and apes; and explains the impact of this dehumanization on the tolerance for and seeking of punishment.

Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. Experimental Soc. Psychol. 1322, 1322 (2008)

STUDY 1

Purpose

- To investigate whether the association between black men and threat would result in biased patterns of selective attention, such that black male targets would capture the attention of white social perceivers more than white male targets.

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- To determine whether the stereotypical association between young black men and danger become so robust that photographs of black men are attentionally privileged, similar to other threatening stimuli (e.g., spiders, snakes, angry faces).

Methodology

- 24 White college students participated in the study.
- Participants underwent a dot-probe task that juxtaposed faces of black men and white men. In the dot-probe task, participants must detect the location of a probe that is initially hidden from view behind one of two stimuli that are simultaneously presented on a computer screen, but subsequently revealed when the two stimuli disappear. A short response latency to detect the probe suggests that participants' attention had been oriented, albeit sometimes unconsciously, to the stimulus that previously obscured it. By contrast, a relatively long response latency suggests that participants' attention had been oriented to the stimulus that had not obscured the probe.

Results

- The results provide preliminary evidence that white perceivers initially attend to black rather than white male targets that are presented without their awareness.
- Participants did reveal a pro-black attentional bias in the first half of the task (32 critical trials), consistent with predictions and with the mountain of evidence that young black men are stereotypically associated with violence and danger.

Relevance

- More empirical evidence that black men garner more attention than white males and are associated with crime on a subconscious level.

STUDY 2

Purpose

- To examine the extent to which researchers could attenuate the attentional bias effect by reducing the threat value of the black male targets.

Methodology

- 24 white college students participated.
- Because direct eye contact may be associated with threat and interacts with race to create a heightened “threat” to observers and therefore creates an exaggerated attentional bias, researchers exposed subjects to images in which the subjects' gaze was averted in a similar dot-probe task as described in Study 1.

Results

- Participants revealed a significant attentional bias for black faces with direct eye-gaze, but not for black faces with averted eye-gaze.

Relevance

- Provides further evidence that black males are implicitly associated with threat.

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Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195 (2009)

Purpose

- To determine if trial judges are affected by implicit bias.

Methodology

- 133 judges from 3 jurisdictions participated in the study, diverse in terms of gender and race.
- Judges were asked to complete a race Implicit Association Test (IAT), two hypothetical vignettes in which the race of the defendant was not explicitly identified but was subliminally primed; and another hypothetical vignette in which the race of the defendant was made explicit.

Results

- The IAT demonstrated a strong white preference in white judges, while the black judges exhibited no preference overall.
- When a judge was primed with words associated with black people, the decision regarding disposition of a respondent correlated with their IAT scores. Judges who exhibited a white preference on the IAT gave harsher sentences to respondents when they had been primed with black-associated words than with neutral words, whereas judges who exhibited a black preference on the IAT gave less harsh sentences when they had been primed with black-associated words than with neutral words.
- When the race of the respondent and the victim were made explicit, IAT scores predicted nothing among the white judges. Among the black judges, however, a black preference on the IAT was associated with a willingness to acquit the black defendant.

Relevance

- Judges, like the rest of us, carry implicit biases concerning race.
- These implicit biases can affect judges' judgment, at least in contexts where judges are unaware of a need to monitor their decisions for racial bias.
- When judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.

Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav. 413 (2011)

Purpose

- To determine whether the disparity between plea recommendations attorneys give to black and white clients will arise from some form of bias on the part of the

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defense attorney, rather than a logical reaction to the recognition that the system is unjust.

Methodology

- Members of the Florida Association of Criminal Defense Lawyers were asked to read a case describing a robbery at a jewelry store. The case was split into three parts: *The Crime*, *Suspect*, and *Evidence*. The section depicting the crime was uniform across all conditions. Race was manipulated in the description of the suspect; strength of evidence was manipulated in the last part of the case summary
- Participants were presented with a list of 12 factors that may be associated with a case, and indicated on a seven-point Likert scale (Completely unimportant to Completely important) how important each was in determining whether or not they would advise their client to consider accepting a plea.
- Attorneys were also asked to indicate how certain they are about the client's actual guilt.

Results

- Consistent with previous research, attorneys rated likelihood of conviction and severity of sentence as the most important factors in their decision to advise a client to consider a plea bargain. The impression that their client may not present well to a jury was a close third.
- Practicing defense attorneys displayed a tendency to recommend plea bargains for African Americans that were longer than those that they would recommend for Caucasian clients. Pleas attorneys felt they could obtain with a minority client contained higher sentences than those they felt they could obtain with a Caucasian client and were significantly more likely to include some jail time.
- Reasons for the disparate recommendations were not due to increased perceptions of guilt with the minority client (i.e., no signs of explicit bias) nor to perceptions that the minority client would fare worse at trial (i.e., not owing to belief that system/jurors will be worse to Black clients).
- Therefore, evidence suggests that the **defense attorneys'** own personal biases are inflating the recommendations given to the African American client.
- Note: Years practicing had the strongest effect showing that for every year the attorney has practiced, the odds of recommending a plea that includes jail time increased.

Relevance

- Even if defense attorneys truly believe that they can zealously represent their clients and put aside all personal biases, unconscious racism or implicit bias may still be a factor.

Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526 (2014)

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STUDY 1

Purpose

- To determine the extent to which we dehumanize black children, testing the following hypotheses:
 - That black boys are seen as less “childlike” than their white peers,
 - That the characteristics associated with childhood will be applied less when thinking specifically about black boys relative to white boys, and;
 - That these trends would be exacerbated in contexts where black males are dehumanized by associating them (implicitly) with apes.

Methodology

- 123 students from a public university participated in the study, 96% of which were female.
- Participants were asked a series of questions about how innocent children were in general without specifying race and how innocent white and black children were.

Results

- For every age group after the age of 9 (i.e., 10–13 through 22–25), black children and adults were rated as significantly less innocent than white children and adults or children and adults generally. The analyses revealed no differences in ratings of innocence between white people and people generally, either within an age group or overall.

Relevance

- Supports the proposition that the general population sees black children as less innocent than white children.

STUDY 2

Purpose

- To examine whether perceptions of innocence differed by target race and the severity of crimes committed.
- To examine whether dehumanization contributes to the perception of black children as less innocent.

Methodology

- 59 students from a large public university participated.
- Participants were shown a series of pictures of white, black or Latino children and were asked to estimate the child’s age, culpability, the attitude of the participant about black people, and asked to take an IAT.

Results

- Participants overestimated the age of black felony suspects to a greater degree than that of black misdemeanor suspects. There was no difference in age errors between white suspects, nor between Latino suspects.
- Participants rated black felony suspects as older than white felony suspects or

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- Latino felony suspects, but revealed no such effects for misdemeanor suspects.
- Black felony suspects were seen as 4.53 years older than they actually were, this would mean that boys would be misperceived as legal adults at roughly the age of 13 and a half.
 - Black people were rated as more culpable than Latinos, and Latinos were rated as more culpable than white people.
 - Black felony suspects were viewed as significantly more culpable than either white felony suspects or Latino felony suspects.
 - A simple correlation found that age errors were moderately related to ratings of culpability such that the older a child was rated, the more culpable the child was seen to be
 - The dehumanization IAT significantly predicted age overestimations of black children. The more readily participants implicitly associated black people with apes, the higher their age overestimation for both black misdemeanor suspects and black felony suspects.
 - The dehumanization IAT significantly predicted perceptions of the culpability of Black children. The more readily participants implicitly associated black people with apes, the higher their culpability ratings for both black misdemeanor suspects.
 - Implicit anti-black dehumanization predicted ratings of white culpability in that the more participants associated apes with black people, the less they found white targets culpable for criminal misdeeds.

Relevance

- Black children are seen as older and more culpable than their counterparts.

STUDY 3a

Purpose

- To establish if implicit dehumanization facilitates racial disparities in real-world policing contexts.

Methodology

- 60 police officers from a large urban police department participated.
- Used the same methodology as Study 2.

Results

- Participants overestimated the age of black felony suspects to a greater degree than that of black misdemeanor suspects, as well as all other suspects.
- White targets were rated as less culpable when associated with felonies, whereas black targets were rated as significantly more culpable when associated with felonies. There was no difference in culpability for Latinos across crime type.
- There was a difference between white targets suspected of felonies and both black targets and Latino targets. No differences emerged between black and Latino felony suspects or between any misdemeanor suspects.
- The older an officer thought a child was, the more culpable that child was rated for their suspected crime.
- The more quickly participants associated black people with apes, the higher was

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- their age overestimation for both black misdemeanor suspects and black felony suspects.
- The dehumanization IAT significantly predicted perceptions of the culpability of black children. The more readily participants implicitly associated black people with apes, the higher were their culpability ratings for both Black misdemeanor suspects and black felony suspects.
 - Implicit dehumanization of black people was a significant predictor of racial disparities in the use of force against child suspects, even controlling for other measures of bias. The more officers implicitly associated black people with apes, the more officers had used force against black children relative to children of other races.

Relevance

- Police officers are also subject to dehumanizing black youth.

STUDY 3b

Purpose

- To replicate the findings of Study 3a with a larger sample size.

Methodology

- 116 police officers from a large police department participated in the study.
- Participants completed the ATB Scale, the personalized IAT, and the dehumanization IAT. Participants then completed a survey regarding children, age, race and culpability.

Results

- Results were the same as found in Study 3a.

Relevance

- See Study 3a.

STUDY 4

Purpose

- To establish if the presence of dehumanizing associations contributes to the racial disparities in the juvenile justice system.

Methodology

- 82 students from a large public university participated.
- Participants were primed with names of apes or of great cats.
- Participants were then asked to complete an “essentialism scale” to determine whether a population views social categories as essentialized. The scale was accompanied by a picture of a black or white child to focus the survey taker on black or white children.

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- Participants were then asked to read crimes scenarios and to conduct an age and culpability assessment.

Results

- White children were seen as a more essentialized group than were black children.
- The ape prime led to lower ratings of black childhood essentialism than did the cat prime, whereas prime had no effect on the essentialism ratings of white children.
- Black targets were perceived as older than were white targets.
- After an ape prime, participants underestimated white suspects' age when they were suspected of a felony relative to a misdemeanor, whereas black suspects had significantly greater age overestimations when suspected of a felony relative to a misdemeanor.
- Black targets were perceived as more culpable than were white targets.
- Targets were seen as more culpable after participants were primed with apes than after they were primed with great cats.
- Similar to the patterns of age overestimation, implicit dehumanization was associated with an increased culpability gap between felony and misdemeanor suspects for black people but was associated with the opposite for white people, leading to the perceptions of reduced culpability for white children.
- The study found a moderately strong relationship between age errors and ratings of culpability such that the older participants rated a target, the more culpable they were rated for their suspected crimes.
- Perceptions of essentialism fully explain the effect of the ape prime on the age overestimations of black felony suspects.

Relevance

- This study offers more proof that black children are not equally “afforded the privilege of innocence—resulting in violent inequalities.”

II. Overcoming Implicit Bias

Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. Personality & Soc. Psychol. 800 (2001)

Purpose

- To establish whether exposure to pictures of admired or disliked members of a group can reduce automatic preference for white over black Americans.

Methodology

- 48 non-black college students participated
- Participants were shown pictures of either admired black and disliked white individuals (pro-black exemplar condition), disliked black and admired white

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individuals (pro-white exemplar condition), or nonracial exemplars (control condition). Participants' task was to correctly identify the person (or object) seen in the pictures. After exemplar exposure, implicit racial attitudes were measured with the IAT and explicit racial attitudes were assessed. 24 hours later, the implicit attitudes were measured again.

Results

- Exposure to positive black examples had a substantial impact on automatic racial associations, and the impact on the implicit bias results lasted for 24 hours.
- Exposure to positive black examples had no impact on explicit biases reported immediately or 24 hours later.

Relevance

- This study offers another model in terms of how to combat implicit racial bias.

Saaid A. Mendoza, Peter M. Gollwitzer & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 Personality & Soc. Psychol. Bull. 512 (2010)

STUDY 1

Purpose

- To establish the extent to which implicit bias is controllable when someone makes a deliberate effort to do so by being told to not focus on the negative stereotype, rather than trying to change the automatic associations made by participants.

Methodology

- 74 non-black native English-speaking undergraduates participated.
- Participants were asked to complete a shoot/don't shoot task, but before they participated in the task were told explicitly to repeat and re-type: "You should be careful not to let other features of the targets affect the way you respond. In order to help you achieve this, research has shown it to be helpful for you to adopt the following strategy: If I see a person, then I will ignore his race!"

Results

- Participants were more likely to shoot unarmed black targets than unarmed white targets, and more likely to not shoot armed white targets than armed black targets.
- The group given special instructions performed with significantly greater accuracy than the group without the instructions.
- Although the instructions helped the accuracy of decision-making in general, it had a greater effect on accuracy of decisions made regarding black targets.

Relevance

- Strategies exist that can help defenders and other system actors to successfully combat their automatic implicit biases.

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STUDY 2

Purpose

- To establish if explicitly focusing on the goal of a particular task can reduce implicit racial bias.

Methodology

- 92 non-black native English-speaking college students participated.
- Participants were asked to perform a shoot-don't shoot task, but before were instructed either to adopt one of the two of the following strategies: "I will always shoot a person I see with a gun!" and "I will never shoot a person I see with an object!" or "If I see a person with a gun, then I will shoot!" and "If I see a person with an object, then I will not shoot!"

Results

- Participants were more likely to shoot unarmed black targets than unarmed white targets, and more likely to not shoot armed white targets than armed black targets.
- The participants who were instructed using the "if-then" structure of instructions performed more accurately on the task than those instructed with no strategy or with the simple goal strategy.

Relevance

- This study gives us guidance on the types of strategies most effective for overcoming implicit bias by intentionally addressing the bias rather than through other methods of altering unconscious associations.

Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. of Experimental Psych. 1267 (2012).

Purpose

- Researchers developed and tested a multi-faceted prejudice habit-breaking intervention to produce long-term reductions in implicit race bias. The intervention is based on the premise that implicit bias is like a habit that can be broken through a combination of awareness of implicit bias, concern about the effects of that bias, and the application of strategies to reduce bias.

Methodology

- The participants were 91 non-Black introductory psychology students (67% female, 85% White), who completed a 12-week longitudinal study for course credit. In the study, people assigned to an intervention group were presented with a bias education and training program, the components of which were intended to increase awareness of bias, increase concern about discrimination, and teach strategies that reduce bias as well as assess strategy use.
- The training component provided participants with a list of five strategies culled from the literature and adapted for the intervention. The training explained the

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- strategies in straightforward language with concrete examples of everyday situations in which they could be used. Participants were then asked to generate situations in which they could use each strategy. The strategies included: **Stereotype replacement** (replacing stereotypical responses for non-stereotypical responses); **Counter-stereotypic imaging** (involving imagining in detail counter-stereotypic others); **Individuation** (preventing stereotypic inferences by obtaining specific information about group members); **Perspective taking** (taking the perspective in the first person of a member of a stereotyped group); and **Increasing opportunities for contact** (seeking opportunities to encounter and engage in positive interactions with out-group members).
- To evaluate the effectiveness of the full intervention, researchers examined its impact on an indicator of implicit bias (using the Black-White Implicit Association Test) and a variety of explicit measures (including racial attitudes, the sources of motivation to respond without prejudice, prejudice-relevant discrepancies, and concern about discrimination in society) longitudinally. Because the intervention included education about the adverse effects of discrimination, researchers also developed a measure assessing concern about discrimination in society.

Results

- In the 12-week study, people who received the intervention showed dramatic reductions in implicit race bias. People who were concerned about discrimination or who reported using the strategies showed the greatest reductions. The intervention also led to increases in concern about discrimination and personal awareness of bias over the duration of the study. People in the control group showed none of the above effects.
- The intervention seems to increase both personal awareness of one's bias and a general concern about discrimination in society. The effect of the intervention on concern grew more pronounced over time, potentially suggesting that the intervention created an increased caring about subtle instances of bias and discrimination. Researchers suspect that the intervention caused people to become more attuned to their own spontaneous biases and everyday instances of discrimination and that these experiences, coupled with increased caring, may have created ever-rising levels of concern.

Relevance

- Our results raise the hope of reducing persistent and unintentional forms of discrimination that arise from implicit bias.

Jennifer T. Kutoba & Tiffany A. Ito, *The Role of Expression and Race in Weapons Identification*, 14 *Emotion* 1115 (2014).

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Purpose

- This study tests whether stereotypes implicitly elicited by a stigmatized racial outgroup member can be moderated by facial expression.

Methodology

- Using the weapons identification task, participants were asked to classify pictures of guns and tools that were primed with pictures of Black and White male faces posing angry, happy, and neutral expressions.

Results

- Researchers found that across three measurements (response latencies, error rates, and automatic processing) facial expression modulated implicit stereotyping.
- “Priming with a stimulus containing cues both to threat (race) and approachability (a smile) decreased previously obtained patterns of implicit stereotyping. Specifically, the tendency for Black faces to facilitate responses to guns, whereas White faces facilitate responses to tools, was ameliorated when the faces displayed happy expressions. By contrast, responses were always faster and more accurate to guns after angry Black than angry White primes, but faster and more accurate to tools after angry White than angry Black primes.”
- In other words, a Black angry prime elicited implicit stereotyping, while a Black happy prime diminished implicit stereotyping. Responding after neutral primes varied as a function of the expression context. When viewed alongside more threatening expressions (Study 1), neutral Black targets no longer elicited implicit stereotyping, but when viewed alongside more threatening expressions (Study 2), neutral Black targets primed crime and danger- relevant stereotypes.

Relevance

- These results demonstrate that an individual can activate different associations based on changes in emotional expression and that a feature present in many everyday encounters (a smile) attenuates implicit racial stereotyping.

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ANNOTATED BIBLIOGRAPHY

RACE AND ADOLESCENT DEVELOPMENT

Adolescent development manifests across all racial and socio-economic groups similarly. A number of studies have controlled for race and socio-economic status, finding no significant differences in key features of adolescence. Not only have studies confirmed that psychological and psychosocial development is similar across racial and socio-economic groups, but self-reported studies on adolescent behavior confirm that adolescent development manifests in similar behavior across racial and socio-economic lines as well.

I. Adolescent Development Studies Controlling for Race and Socio-economic Status

Dustin Albert & Laurence Steinberg, *Age Differences in Strategic Planning as Indexed by the Tower of London*, 82 CHILD DEV. 1501 (2011).

- Researchers studied the strategic planning abilities in participants ages 10-30, controlling for ethnicity and socio-economic status and finding similar levels of maturation across groups.
- Researchers administered the Tower of London task, a tool developed to measure the ability to plan ahead and use complex, integrative decision-making skills.
- Researchers found that although strategic planning improved steadily as youth mature, an *advanced* ability to strategically plan did not develop until ages 22-25.

Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010).

- In this study, researchers found a preference in adolescents for risk taking and for short-term reward over long-term gain, with no significant differences between ethnicities or socio-economic status.
- Researchers also discovered that adolescents are more responsive to positive feedback and less deterred by loss than adults.
- Researchers measured affective decision-making through having 901 participants, ages 10 to 30, participate in a modified version of the Iowa Gambling Task.
- Researchers concluded that decision-making and risk assessment improves throughout adolescence due to affective processing rather than cognitive maturation for all youth.

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Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009).

- In this study, researchers controlled for both ethnicity and socio-economic status and found that youth of similar ages in the study exhibited similar levels of weak future orientation across ethnicity and socio-economic status.
- Researchers measured future orientation and delay discounting through participants' undertaking of a number of computerized tasks to measure these attributes, as well as their completion of self-report measures.
- Youth under the age of 16 of all racial groups had a willingness to accept a smaller reward delivered sooner than a larger one later. They self-reported that they were less concerned about the future and less likely to anticipate the consequences of their decisions than older youth.
- “[Researchers did not] find significant interactions between the repeated time factor and gender, ethnicity, IQ, or SES, suggesting that individuals of different ages, sexes, and ethnic groups, socio-economic back-grounds, and intelligence levels show comparable patterns of discounting over the delay intervals examined here.” *Id.* at 36.

Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008).

- Researchers measured both sensation-seeking and impulsivity amongst a sample of 935 participants, controlling for ethnicity and socio-economic status, and found that youth across all ethnic and socio-economic groups exhibited similar patterns in sensation-seeking and impulsivity.
- Researchers used both self-report questionnaires and behavioral tasks to assess sensation-seeking and impulsivity.
- Researchers found that sensation-seeking behaviors increased between the ages of 12 to 15 (initiating around the beginning of puberty), and then steadily declined.
- Impulsivity was found to steadily decline from age 10 through adolescence and well into early adulthood. Adolescents younger than 16 demonstrated significantly less impulse control than 16- to 17-year-olds, and 16- to 17-year-olds demonstrated significantly less impulse control than 22- to 25-year-olds.
- After age 15, adolescent vulnerability to risky behavior steadily decreases as sensation-seeking decreases, and impulse control continues to increase into early adulthood.
- Evidence from this study is consistent with adolescent brain research that demonstrates that the brain systems (cognitive control system) linked to impulse control and self-regulation do not fully develop until early adulthood. In contrast,

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the brain systems (socio-emotional system) linked with sensation-seeking become more highly aroused in early adolescence.

Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007)

- Researchers measured resistance to peer pressure and controlled for ethnicity and socio-economic status, finding that between 10 and 14, little growth in the ability to resist peer pressure occurs, that between 14 and 18 resistance to peer pressure increases linearly, and that between 18 and 30 little growth occurs, in all groups.
- Researchers conducted a series of interviews and had participants complete computerized tasks in a series of three separate longitudinal studies.
- Researchers found that patterns in resistance to peer influence vary only slightly by ethnicity and socio-economic status, and generally all groups follow the same basic age pattern in developing resistance to peer pressure.

II. Self-Report Studies on Adolescent Behavior Across Race and Socio-economics

LLOYD D. JOHNSON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975-2010. VOLUME I: SECONDARY SCHOOL STUDENTS (2011)

- *Monitoring the Future* is a study based on self-reporting conducted by researchers at the University of Michigan which surveyed 17,000 high school students in 130 high schools nationwide regarding their use of alcohol and different types of drugs. The data is presented as graphs, and tracks the trends from 1974 to 2010. Researchers break the data down and show differences between gender, race (Hispanic, white, and black), education level of parents, population density, region and college plans, and presents the data by grade level. The data suggests that black youth self-report using these various substances less than the other groups.
- By the 12th grade, white youth report using illicit drugs or alcohol more than any other group.

Youth Online: High School YRBS, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf> (last visited June 18, 2014)

- The Youth Risk Behavior Surveillance System (YRBSS) is a self-report survey administered by the Center for Disease Control administered to thousands of youth throughout the country. This survey contains questions on violence as well as drug use. The statistics are as recent as 2013.
- This self-report data indicates that at least according to self-report measures, white youth are engaged in illegal behavior at similar or higher rates compared to

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youth of color.

- Driving Drunk: 10.4% of white youth, 11.6% of Hispanic youth, and 6.2% of black youth.
- Carrying a Weapon: 20.8% of white youth, 15.5% of Hispanic youth, and 12.5% of black youth.
- Carrying a Weapon to school: 5.7% of white youth, 3.9% of black youth
- Carrying a Gun: 10.7% of white male youth, 9.8% of black male youth and 7.5% of Hispanic male youth.
- Current Marijuana Use: 28.9% of black youth, 27.6% of Hispanic youth, 20.4% of white youth.
- Having Been in a Physical Fight on School Property: 12.8% of black youth, 9.4% of Hispanic youth, 6.4% of white youth.

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ANNOTATED BIBLIOGRAPHY

RACE AND THE DEFENDER

RAISING RACE

TANYA E. COKE, *CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* (2013).

- Conference report outlining discussions that took place at a conference attended by criminal justice system stakeholders on overcoming racial disparities in the criminal justice system, including the role of the defender in doing so.

Robin Walker Sterling, *Raising Race*, 04/2011 *The Champion* 24 (2011).

- Outlines the issue of DMC and the ways defense attorneys can challenge DMC at various stages throughout a case including through motions practice, jury instruction, and the use of cultural experts.

Justice for All: Litigating Race Issues to Protect Equal Justice in Kentucky, 30 *THE ADVOCATE* 1 (2008).

- A series of essays on how lawyers can raise the issue of race throughout a case, specifically in the context of Kentucky.
- Although this article frames the issue under Kentucky law, the ideas are applicable to other jurisdictions.

LAW REVIEW ARTICLES ON IMPLICIT RACIAL BIAS

Robin Walker Sterling, *Defense Attorney Resistance*, 99 *Iowa L. Rev.* 2245 (2014).

- Argues that because of their access to defendants and their ethical mandate to represent their clients' expressed interests, defense attorneys are uniquely positioned to be a weapon in the fight against invidious race bias in the criminal justice system.
- Identifies barriers defenders face in challenging racial discrimination in the criminal justice system, including judicial resistance to zealous defense advocacy.
- Suggests strategies defenders can use to raise racial bias in individual criminal cases.

Jonathan Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 *N.Y.U. J. Legis. & Pub. Pol'y* 999 (2013).

- Rapping spends the article talking about IRB, how each actor in the system is affected by IRB (even defenders), and discusses steps that defenders can take to combat IRB, including:

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- Raising IRB in motions practice (using the Fourth Amendment as an example);
- Educating jurors on IRB during voir dire (he goes into a lot of detail about how to do this and how to use the information to pick jurors receptive to addressing their own IRB);
- Educating jurors during trial;
- Educating judges of their own susceptibility through sentencing memoranda on IRB and sentencing data for their particular jurisdiction.
- Encourages defenders to not be discouraged
- Discusses the defender’s role as “cause lawyer”

L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013).

- Points out that PDs are also affected by IRB
- Goes through each part of defender triage to discuss how IRB might affect the defender’s decision at each juncture:
 - Evaluating evidence: may cause defenders to interpret evidence as more probative of guilt and assume guilt when the client’s features align with stereotypes and the charge;
 - Determining the credibility of the client in deciding whether to pursue investigation;
 - Interpreting the client’s behavior and subconsciously influencing the attorney’s behavior when interacting with the client; and
 - Accepting higher sentencing recommendations without advocating or investigating because of the dehumanization of black clients.
- They recommend:
 - Changing office culture by rewarding a commitment to fighting IRB, values-based hiring and hiring a diverse group of defenders;
 - Developing objective triage standards which do *not* emphasize perception of factual innocence and are based on objective measurables (custody status or speedy trial date);
 - Adopting accountability mechanisms (such as checklists) and collecting data on defender decisions;
 - Educating defenders on IRB; and
 - Encouraging defenders to develop “intentional goals” that have been shown to help fight IRB (such as “if when I receive my discovery packet my client is black, I will think of my client as innocent.”)

Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

- A team of legal academics, scientists, researchers, and a sitting federal judge wrote an article about what to do about IRB in the courtroom
- Covers research on implicit bias, and follows the trajectory of a criminal defendant to outline places where IRB might influence decision-making; point out

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- that defense attorneys have similar implicit biases (pointing to the Eisenberg & Johnson article)
- They recommend:
 - Fighting IRB itself by:
 - Putting up positive images in the courthouse;
 - Educating judges about their own susceptibility to IRB, encouraging them to take their time when making decisions and encouraging them to collect data on their own decisions; and
 - Jury selection and education (including encouraging them to actually talk about race instead of pretending to be color blind).

Andrea Lyon, *Racial Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755 (2012).

- This article argues that all people have racial biases, including defense attorneys
- She argues that defense attorneys' biases can impede their ability to communicate with and respect their clients (using pretty blatant examples of lawyers disrespecting their clients) as well as can lead defense lawyers to pick jurors just based on their race

Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 Law & Hum. Behav. 413 (2011).

- Empirical research that measured the plea recommendations defense attorneys encouraged their clients to accept, especially since pleas are how most people end up resolving their cases (race is important at that stage, not just in a courtroom).
- Findings indicated that the pleas attorneys felt they could obtain with a minority client contained higher sentences with a white client and were significantly more likely to include some jail time. Reasons for the disparate recommendations were not due to increased perceptions of guilt with the minority client, nor to perceptions that the minority client would fare worse at trial.
 - Found that Florida attorneys felt that an African American client would fare poorly at trial, which informed their plea decisions.

Lorenzo Bowman et al., *The Exclusion of Race from Mandated Continuing Legal Education Requirements: A Critical Race Theory Analysis*, 8 Seattle J. for Soc. Just. 229 (2009).

- Points out that CLE requirements in most states do not require education on bias and especially racial bias.
- Argues that this is a tacit acceptance of the great racial disparity in our criminal justice system using a Critical Race Theory lens.
- Recommends:
 - Each bar undergo a needs assessment on the nature of the bias in their jurisdiction;
 - CLE requirements should require 3 hours per reporting period on race; and

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- States should establish a task force to track the impact of anti-bias training.

Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539 (2004).

- Had capital defense attorneys take the race IAT, and they displayed similar levels of implicit bias as the rest of the population.

Eva Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 Geo. J. Legal Ethics 1 (1994).

- Unlike the other articles, this article predates most IRB research.
- Points out the moral conflict of utilizing stereotypes and biases to further a client's case (arguing a woman's unreliability in a domestic violence case, playing up a client's race (when white) or background to a prosecutor to elicit a better plea deal) and the harm perpetuating stereotypes causes.
- Also discusses the dilemma in the context of ethics rules, as well as how a clinician should deal with the issue with students.

CRITICAL RACE THEORY AND LAWYERING IDENTITY

Anthony Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 Yale L.J. 1459 (2005).

- Critiques classic liberal lawyering and traditional clinical legal education for ignoring identity politics occurring between the client and lawyer and at the expense of the client.
- “Historical stereotypes of caste and color situate the racial status of the accused and the accuser in law, culture, and society. Defenders cull such stereotypes to mount color-coded defenses in their pretrial tactics (venue transfer) and trial strategies (jury selection). Normative degradation circulates throughout the defender discourses of constitutional, statutory, and common law innocence and excuse. Directly and inferentially, those discourses naturalize color-coded stereotypes of racial inferiority.”
- “Antisubordination principles offer remedial regulation of racialized criminal defense practices. Advancing beyond Ely-derived norms of political access and minority equality, these principles suggest a race-conscious, community-regarding ethic of political empowerment and minority collaboration.”

Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 Tex. L. Rev. 1585 (1999).

- “Alfieri wants to completely transform criminal defense lawyers from defenders of individuals accused of crime, a difficult enough enterprise, to protectors of the

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community.³⁴ He wants to transform the relationship of the defense lawyer to client from one of unmitigated devotion to a sort of tempered fondness, provided this fondness does not get in the way of Alfieri’s formulation of racially sensitive lawyering.”

SPECIFICALLY ON REPRESENTING CHILDREN

Annette Ruth Appell, *Representing Children, Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573 (2008).

- Includes a brief section on “Disparities Between Children’s Attorneys and the Clients they Serve” referring to attorneys in both the welfare and delinquency systems, noting that “an attorney’s lack of familiarity with a child’s culture and social systems may, in turn, lead the attorney to discount the child’s clearly stated preferences. Thus, attorneys may not understand the consequences of the various available outcomes or decisions they may make. For example, the attorney may not be aware that a counseling center to which a child is referred is in rival gang territory. Similarly, children’s attorneys may not see or understand factors contributing to or even causing other legal problems relating to housing, employment, immigration, or other family issues.”
- “Both the juvenile justice system and child welfare system view families of color, particularly African-American families, more negatively than White families, thus further transplanting state norms for family norms. “The system that results stubbornly reflects, and then acts on, race-based conceptions of deviance and gender-based perceptions of appropriate behavior that all too often reinforce racial, economic, and social hierarchies.” Whether children’s attorneys challenge this hegemony depends on the attorney’s self-awareness, knowledge of these forces, and recognition that this punitive, ungenerous system itself is the product of well-intentioned advocates who sincerely seek to help children. If attorneys do not carry this knowledge and are unable to navigate the precarious balance among identifying, over-identifying, and failing to identify with the client, then even well-meaning children’s attorneys are likely to promote state norms over those of their child client and his or her family and community.”

Report of the Working Group on the Role of Race, Ethnicity and Class, 6 Nev. L.J. 634 (2006).

- “This Working Group considered the role of race, ethnicity, and class (hereinafter “REC”) in the attorney-client relationship. Participants recognize that, in American society, children in the child welfare and juvenile justice systems are disproportionately poor and of color while the lawyers for those children and the decision makers are overwhelmingly white and middle class. This racial disparity may affect attorney client communication, perpetuate stereotypes, foster distrust of the legal system and contribute to bad outcomes for the affected children and families. Issues related to REC, which often are ignored both in the attorney client

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- relationship and more generally in the administration of justice, must be identified, confronted, and resolved.”
- Recommends for example:
 - The rules of professional responsibility should be revised to create model rules that (1) attorneys shall consider the REC of the client in the attorney client relationship and representation and (2) to require a finding on the record that the court has considered the child’s REC and environment prior to imposing any conditions on that child.
 - There should be a mandatory CLE requirement for all lawyers involved in children’s advocacy and justice to identify and eliminate REC bias in the legal profession.
 - Children’s advocates should engage in coalition building, utilize research on demographics and discrimination, community organize, and advocate for legislative changes.
 - Children’s attorneys should dedicate time to get to know their client, should visit their clients in their own environments; should interview significant people in their school and community and become familiar with the client’s cultural environment.
 - Further study should be done on “how the lack of basic common cultural and social cornerstones affects the quality of representation for poor youth and youth of color.”

Judith Cox & Derrick Bell, *Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System*, 3 J. of the Cent’r for Fam., Child. & the Courts 31 (2001).

- Suggests the defense bar can affect DMC by:
 - Providing bilingual and bicultural services;
 - Tracking cases by ethnicity, and
 - Ensuring adequate staffing levels of attorneys and investigators to allow for thorough preparation of cases.
 - Defense firms can go beyond legal advocacy by employing “defense advocates” or social workers who work along with attorneys and actively develop pre- and post-adjudication programs and release plans..
 - The defense must understand the risk-based detention scale and actively review the initial scoring of the instrument by probation.
 - Defense advocates ensure that family members are present at hearings and that they understand their role in supervising their children.
 - Defenders should track family contacts, plea agreements, and other service indicators by ethnicity.
 - Defense counsel can actively participate in the establishment of risk-based detention criteria and a continuum of administrative sanctions for probation violations.

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“CULTURALLY COMPETENT” LAWYERING

Carolyn Copps Hartley & Carrie J. Pertrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work & the Law*, 14 Wash. U. J.L. & Pol’y 133 (2004).

- “Therapeutic jurisprudence is an interdisciplinary approach to law that asks how the law itself might serve as a therapeutic agent without displacing due process.”
- This article includes a nice description of Tom Tyler’s work and the relevance of cultural competence on theories of procedural justice.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

	, <i>et al.</i> ,)	Case No.
)	
Petitioner,)	4 th DCA
)	
v.)	Super. Ct. No.
)	
THE SUPERIOR COURT OF)	
THE STATE OF CALIFORNIA,)	
SAN DIEGO COUNTY,)	
)	
Respondent)	
)	
THE PEOPLE OF THE STATE OF)	
CALIFORNIA, by PAUL J. PFINGST,)	
District Attorney of San Diego,)	
)	
Real Party in Interest)	
)	

**BRIEF OF AMICI CURIAE YOUTH LAW CENTER,
JUVENILE LAW CENTER,
CHILDREN'S DEFENSE FUND,
CHILD WELFARE LEAGUE OF AMERICA,
NATIONAL COUNCIL OF LA RAZA,
NATIONAL MENTAL HEALTH ASSOCIATION,
NATIONAL URBAN LEAGUE, AND
THE SENTENCING PROJECT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

et al.,)
)
Petitioner,)
)
v.)
)
THE SUPERIOR COURT OF)
THE STATE OF CALIFORNIA,)
SAN DIEGO COUNTY,)
)
Respondent.)
)
_____)
THE PEOPLE OF THE STATE OF)
CALIFORNIA, by PAUL J. PFINGST,)
District Attorney of San Diego,)
)
Real Party in Interest)
_____)

Case No.
4th DCA
Super. Ct. No.

**BRIEF OF AMICI CURIAE YOUTH LAW CENTER,
JUVENILE LAW CENTER,
CHILDREN'S DEFENSE FUND,
CHILD WELFARE LEAGUE OF AMERICA,
NATIONAL COUNCIL OF LA RAZA,
NATIONAL MENTAL HEALTH ASSOCIATION,
NATIONAL URBAN LEAGUE, AND
THE SENTENCING PROJECT**

INTERESTS OF AMICI CURIAE

Amici curiae are leading organizations in this country that work with and on behalf of children and adolescents at risk, particularly young people in the justice system. Amici come at the issues in this case from a variety of perspectives – child welfare, mental health, civil rights, community empowerment, research and policy development, child advocacy – but are united in their concern that provisions which increase prosecution of youth in adult criminal court, such as

those in Section 26 of Proposition 21, do not increase public safety and are harmful to young people. Amici are especially concerned about racial disparities in the treatment of youth throughout the justice system, and the likelihood that such disparities will be exacerbated by Proposition 21.

Youth Law Center

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system.

The Youth Law Center coordinates the *Building Blocks for Youth* initiative, a nationwide campaign to reduce racial disparities for youth of color in the justice system and to promote rational and effective juvenile justice policies. The *Building Blocks for Youth* initiative is a diverse alliance of researchers, judicial and law enforcement professionals, academics, children's attorneys, and other advocates for youth that supports new research on transfer to adult court and other issues, analyzes front-line decisionmaking by juvenile justice professionals, works with

national, state, and local organizations concerned with the treatment of minority youth in the justice system, and provides public education materials and resources to policymakers, journalists, and the public.

Juvenile Law Center

The Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC believes the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care.

JLC's staff attorneys concentrate their efforts to protect children while reforming the systems meant to serve them, by engaging in the following efforts: litigating key cases in state and federal court, including appellate advocacy; writing amicus briefs in support of important issues affecting children; training lawyers, judges and professionals who work with children; educating the public by distributing a wide range of publications, participating in conferences, and testifying at public forums; advising the executive and legislative branches of state and federal governments on the effects that proposed legislation or regulations will have on children; serving as a resource to the media; and answering telephone inquiries or questions asked to our

web site. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

Children's Defense Fund

The mission of the Children's Defense Fund (CDF) is to Leave No Child Behind® and to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start*, and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective voice for *all* the children of America who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor and minority children and those with disabilities. CDF educates the nation about the needs of children and encourages preventive investment before they get sick, into trouble, drop out of school, or suffer family breakdown. CDF began in 1973 and is a private, nonprofit organization supported by foundations and corporate grants and individual donations. CDF has never taken government funds.

CDF has a long history of advocacy in support of the rehabilitative approach to juvenile justice, including providing treatment and appropriate services for delinquent youth. Believing that children and teens are fundamentally different from adults, CDF also opposes the transfer of minor offenders to the adult criminal justice system. In the early 1970s, CDF staff visited more than 500 adult jails across the country and reported on the widespread practice of jailing children with adults. Staff found that many of these children were suicidal and victims of sexual and physical abuse by adult inmates. In 1974, CDF filed a successful lawsuit to separate children from adult prisoners in South Carolina. Five of the six plaintiffs – two of them truants – had been brutally raped and beaten by adult prisoners. CDF also testified before Congress about the serious harm in detaining youthful offenders with adult inmates and helped to secure passage of

the Juvenile Justice and Delinquency Prevention Act of 1974, which requires that states separate juvenile and adult offenders as a condition of receiving federal funds. In 1976, CDF published *Children in Adult Jails*, documenting the dangerous practice of housing children with adult prisoners. For more than 25 years, CDF has worked to advance public policies that invest in youth before they get into trouble, promote racial fairness in the criminal justice systems, and support the humane treatment of youthful offenders.

Child Welfare League of America

The Child Welfare League of America (CWLA) is the nation's oldest and largest membership-based child welfare organization. CWLA is committed to engaging people everywhere in promoting the well-being of children, youth, and their families, and protecting every child from harm. CWLA envisions a future in which families, neighborhoods, communities, organizations, and governments ensure that all children and youth are provided with the resources they need to grow into healthy, contributing members of society.

CWLA is an association of more than 1,100 public and not-for-profit agencies devoted to improving life for more than 3.5 million at-risk children and youths and their families. Member agencies are involved with prevention and treatment of child abuse and neglect, and they provide various services in addition to child protection -- kinship care, juvenile justice, family foster care, adoption, positive youth development programs, residential group care, child care, family-centered practice, and programs for pregnant and parenting teenagers. Other concerns of member agencies include managed care, mental health, chemical dependency, housing and homelessness, and HIV/AIDS.

The Juvenile Justice Division of CWLA is committed to working with and through its member agencies in activities that work towards reducing the incidence of juvenile delinquency nationwide; reducing reliance on incarceration for accused or adjudicated delinquent youth by developing community-based alternatives that promote positive youth development while ensuring public safety; and by developing and disseminating standards of practice as benchmarks for high-quality services that enhance positive youth development, strengthen families, neighborhoods, and communities and improve integration and coordination of the juvenile justice and child welfare systems.

CWLA supports and advocates for a fair and effective juvenile justice system that treats children as children and focuses on prevention, treatment and rehabilitation. CWLA urges the California Supreme Court to consider the issues raised in this brief, particularly the racial disparities for youth of color prevalent at every point of contact within the juvenile justice system.

National Council of La Raza

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, established in 1968 to reduce poverty and discrimination among, and improve life opportunities for, Hispanic Americans. NCLR serves as an "umbrella organization" for more than 250 local affiliate community-based organizations (CBO's) and 30,000 individual associate members. In addition to providing capacity-building assistance to its affiliates and essential information to individual associates, NCLR serves as a voice for Hispanics on issues of public policy. In recent years NCLR has begun to pay close attention to criminal justice issues, spurred in part by the disproportionate representation of Latinos in the criminal justice system.

NCLR believes Latino youth experience disproportionate rates of incarceration compared to similarly situated white youth. Moreover, NCLR believes that youth incarceration and recidivism levels in the criminal justice system will decrease if youth offenders receive appropriate treatment, education, and rehabilitation in a safe environment free of physical and sexual abuse. Thus, NCLR has a profound interest in and urges this court to consider the issues raised in this brief. In particular, NCLR urges the court to closely examine two issues – one that allows prosecutors to make certain charging and sentencing decisions and the other that increases transfers of youth to adult criminal court. In NCLR’s judgment, neither effectively addresses the causes of crime, and both tend to exacerbate racial and ethnic disparities in the justice system.

National Mental Health Association

The National Mental Health Association (NMHA) is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness. With more than 340 affiliates, NMHA works to improve the mental health of all Americans through advocacy, education, research and service. NMHA launched its Justice for Juveniles Program in 1998 to highlight the critical unmet needs of the hundreds of thousands of young people with mental health and substance abuse problems caught up in America’s juvenile justice system. Most states and communities have failed to adequately invest in services for children and families that can prevent arrest and incarceration. Many also fail to systematically identify and treat the mental health and substance abuse problems of children who enter their juvenile justice systems. NMHA is committed to helping states and communities develop policies and services for vulnerable young people, rather than punishing them.

NMHA believes provisions to increase the transfer of youth to adult criminal court, such as those in California's Proposition 21, do not promote public safety. In fact, several studies demonstrate that such transfers actually increase recidivism. At the same time, youth are exposed to the increased possibility of physical and/or sexual abuse in adult facilities. Studies also show that the suicide rate for juveniles in adult facilities greatly exceeds the rate for the general youth population and is several times higher than the rate for youths in juvenile detention centers. Children with mental health needs are especially at risk in such an environment. In addition, it has been shown that the use of prosecutorial discretion in such transfers serves to exacerbate the problem of disproportionate minority confinement. With these concerns in mind, NMHA urges this court to consider the issues raised in this brief and to hold that Proposition 21 violates the applicable legal principles.

National Urban League

The National Urban League is the nation's oldest and largest community-based movement devoted to empowering African-Americans to enter the economic and social mainstream. Founded in 1910, the heart of the Urban League movement is the professionally staffed Urban League affiliates in more than 100 cities (including Los Angeles, Oakland, Sacramento, and San Diego, CA) in 34 states and the District of Columbia. The Urban League movement carries out its mission at the local, state, and national levels through direct services, advocacy, research, policy analysis, community mobilization, collaboration, and communications.

The National Urban League is calling for a comprehensive national investigation of the blatant patterns of racism at every level of the criminal justice system and to begin to rectify

them by exhortation and/or litigation. The Urban League is a strong advocate for requiring states to address juvenile delinquency prevention and to reducing and eliminating the overrepresentation of minority juveniles at every contact point of the juvenile justice system.

The Sentencing Project

The Sentencing Project is a national non-profit organization which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. Its staff, advisors and consultants have closely observed all aspects of the criminal justice and corrections processes. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. In recent years, as direct, non-judicially-reviewed referral to adult criminal court of juvenile-aged defendants has increased, The Sentencing Project has provided guidance to advocates and information to policymakers intended to limit this practice. The Sentencing Project is particularly concerned that children in criminal court are disadvantaged not only when compared to children in juvenile court, but in comparison to adults charged with the same offense, including by the effective denial of due process rights, their relative inability to present a defense, and the harsh impact of adult sentencing provisions upon them. For these reasons The Sentencing Project urges this court to consider the issues raised in this brief.

I. INTRODUCTION

On March 7, 2000, Proposition 21, the Gang Violence and Prevention Act of 1998, was approved by ballot initiative. Among other things, Proposition 21 provides for increased prosecution of juveniles in adult criminal court, increased incarceration of youth in adult correctional facilities, "direct filing" by prosecutors in adult criminal court for certain specified offenses by juveniles, and determination by prosecutors of both formal charges against juveniles and available sentencing options.

Proponents of Proposition 21 argued that passage would enhance public safety. In point of fact, empirical research demonstrates that prosecution of juveniles in adult criminal court actually *increases* recidivism, thereby reducing public safety. In addition, prosecuting young people in criminal court and incarcerating them in adult facilities places them at significant risk of physical and emotional injury. Moreover, Section 26 of Proposition 21 provides no guidelines for prosecutors in making decisions which youth to transfer to adult court, and thereby allows prosecutors to ignore developmental differences between adolescents and adults, as well as individual differences among adolescents. In this brief, amici present the empirical research on these issues.

Amici are also concerned that prosecution of juveniles in adult criminal court, particularly as authorized by Section 26 of Proposition 21, will exacerbate racial disparities for youth in the justice system. Section 26 allows prosecutors to decide both the formal charges to file against a juvenile and – because prosecutors can charge in juvenile court or "direct file" in adult criminal court" – the sentencing options available to the juvenile. This is important because youth of color are overrepresented throughout the justice system, and empirical research demonstrates that minority youth receive different and more severe treatment than white youth,

even when charged with similar offenses. Moreover, the disparities accumulate, so that racial disparities at the point of arrest are added to the racial disparities at the point of determining whether to detain a youth before adjudication, which in turn are added to the disparities that occur when formal charging decisions are made by prosecutors, which in turn are added to the disparities that occur when prosecutors make decisions whether to waive youth for prosecution in adult criminal court, and which are finally added to the disparities that occur at disposition and in decisions whether to incarcerate. As a result, the most authoritative empirical analysis demonstrates that youth of color are more than three times as likely as white youth to be arrested, processed through the system, and ordered into residential placement.

Empirical research in California indicates that these accumulated racial disparities occur in the justice system in this state. Allowing prosecutors to make the decisions at two critical points in the justice system, to assume both the executive charging function and the judicial sentencing function, is inimical to the administration of justice and is likely to exacerbate racial disparities in the system. One check on racial disparities in the system is the diversity of decisionmakers at key points in the system – police, prosecutors, judges, corrections agencies. Consolidation of multiple functions into a single office, particularly the office most directly responsible in the legal system for obtaining convictions of alleged offenders, is a recipe for potential abuses of discretion.

II. PROVISIONS TO INCREASE TRANSFER OF YOUTH TO ADULT CRIMINAL COURT, SUCH AS SECTION 26 OF PROPOSITION 21, DO NOT IMPROVE PUBLIC SAFETY, BUT INSTEAD REDUCE PUBLIC SAFETY AND SUBJECT CHILDREN TO HARM.

Despite official crime statistics that show youth crimes rates falling significantly,¹ fear of out-of-control juvenile crime has undermined the traditional practice of treating young offenders as different from adult criminals. Proposition 21 makes the California justice system more punitive toward youth by, among other things, increasing prosecution of youth in adult criminal court, housing more youth in adult correctional facilities, narrowing probation eligibility, and making it easier to revoke a minor's probation. Proponents of Proposition 21 claimed harsher penalties are more effective at lowering crime than other strategies.² This is plainly untrue. The

¹ Since 1991, serious youth crime in California has fallen 25 percent (compared to only 11 percent for adults). A recent analysis of official California crime statistics show that today's teenagers are not more criminally prone than past generations. Crime by children today is less frequent than twenty years ago. Of the 68,200 children arrested for an offense in 1978-80, 34.9 % were for felonies. Of the 56,700 children arrested in 1996-98, in a much larger child population, 30.6% were for felonies. Daniel Macallair and Michael Males (2000), Justice Policy Institute, *Dispelling the Myth: An Analysis of Youth and Adult Crime Patterns in California Over the Past 20 Years*.

² Proponents of Proposition 21 consistently argued that harsher measures against today's youth would lower crime. A typical quote came in the aftermath of the passage of Proposition 21 from former California Governor Peter Wilson, who said that voters "acted decisively to retake California's neighborhoods, schools and businesses from vicious street gangs who for too long have hidden behind a lenient and outdated juvenile justice system." *Authorities Fear Fallout, But Weigh Options*, Los Angeles Times, March 14, 2000.

An op-ed in the San Jose Mercury News provides another typical quote: "...youth is no excuse for murder, rape, or any other crime....the current juvenile justice system was originally designed in the 1940s to fight minor offense like truancy and curfew violations. It was not designed to handle gang members, murderers and rapists." *Crack Down on Kids? Vote Yes*, San Jose Mercury News, January 20, 2000.

research shows that increased prosecution of juveniles in criminal court does not increase public safety and instead places troubled youth at great risk of harm.

A. Prosecuting Youth as Adults Undermines Public Safety.

Section 26 of Proposition 21 allows the prosecutor to make two critical decisions affecting youth in the justice system: the decision which formal charges to bring, and the decision which sentencing options are available. Under Section 707(d) of the Welfare and Institutions Code, as amended by Section 26 of Proposition 21, if a youth is 16 years old or older at the time of the offense, and the charge is a specified qualifying offense identified in section 707(d), or if a youth is 14 years or older and the charge is a specified qualifying offense identified in section 707(d), the prosecutor may either (1) file a petition against the youth in juvenile court or (2) prosecute the youth as an adult in criminal court. If the prosecutor chooses to file a petition in juvenile court, the court must, on motion, conduct a fitness hearing to determine whether the juvenile, if adjudicated on the charge, is subject to juvenile sanctions or adult penalties. If the prosecutor instead chooses to "direct file" against the juvenile in adult criminal court, the court does not have the option to impose a juvenile disposition; instead, it must sentence the juvenile as an adult to adult penalties. Pen. Code, Section 1170.17 (a).

Proponents of Proposition 21 claimed that prosecution in criminal court will motivate young offenders to reform: the threat of transfer to adult court is the quintessence of the "scared straight" approach to crime control. Yet there is scant evidence to support the proposition that punitive measures reduce crime. In fact, a panel of leading researchers on juvenile crime established by the National Research Council recently concluded, "Research to date shows that juveniles transferred to adult court may be *more likely to recidivate* than those who remain under juvenile court jurisdiction" (emphasis added). Panel on Juvenile Crime: Prevention, Treatment,

and Control, National Research Council (2001), *Race, Crime, and Juvenile Justice: The Issue of Racial Disparity*, in *Juvenile Crime, Juvenile Justice* 218-226 (Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell, eds.) [hereinafter, National Research Council report].³ Furthermore, detention and incarceration in criminal settings negatively effect the behavior and future development of young people, and make it difficult if not impossible for them to obtain future employment. Thus, exposing youth to processing and punishment in the adult criminal court increases the likelihood of life-long crime.

The implications of this and other research on the impact of transfer provisions such as Proposition 21 on the crime rate are sobering: as the numbers of youth sent to criminal court increase, so will crime. Significantly, Proposition 21 expands transfer criteria to include a broad range of young offenders who are neither particularly serious nor particularly chronic. Proposition 21 targets a broad range of offenses and offenders, sanctioning transfer of sixteen- and seventeen- year-old first-time offenders charged with certain qualifying offenses as well as fourteen- and fifteen-year-old first-time offenders accused of a narrower list of qualifying felonies.

Moreover, because Proposition 21 allows prosecutors (rather than judges) to decide whether youth should be dealt with in the juvenile justice or adult criminal justice system, more

³ The National Research Council was organized in 1916 and is the principal operating agency of the National Academy of Sciences, which was established by an Act of Congress in 1863. The Panel on Juvenile Crime: Prevention, Treatment and Control was established by the National Research Council to analyze data on trends in juvenile justice and juvenile justice system processing; review the research literature on individual, familial, social, and community factors that contribute to juvenile crime, as well as the literature on prevention and treatment programs; and examine information on the effects of the mandates of the federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. Sections 5601 *et seq.* (JJDPA), such as the Disproportionate Minority Confinement (DMC) mandate, discussed *infra*. National Research Council report, *supra*, at *ix*.

youth will be sent to criminal court. When Florida introduced prosecutorial waiver in 1981, the percentage of delinquency cases transferred to criminal court soared from 1.2% to nearly 9% by 1987. A study of two representative Florida counties revealed that only 28% of the youths prosecutors waived to adult court were for violent crimes. More than half of the youths prosecutors transferred to criminal court were charged with property crime offenses that involved no violence. Vincent Schiraldi and Jason Ziedenberg (2000), Justice Policy Institute, *The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles as Adults* 3-4.⁴

1. **The ineffectiveness of “general deterrence”: the threat of criminal punishment does not motivate young offenders to reform.**

Young people are not dissuaded from committing crimes through the threat of severe consequences, including lengthy terms of incarceration in an adult correctional institution. Two studies have evaluated the general deterrent effects of transfer on juvenile crime. Singer and McDowall evaluated the effects of New York’s Juvenile Offender Law, which lowered the age of criminal court jurisdiction to thirteen for murder and four other violent offenses. The researchers examined arrest rates for affected juveniles over a four-year-period prior to enactment of the law and for six years following its implementation. Simon I. Singer and David McDowall. (1988), *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc’y Rev. 521. Singer and McDowall report that the law had little if any measurable deterrent impact, even though the law received substantial advance publicity and was fully

⁴ Further, though Florida leads the nation in using prosecutorial waiver, five of the other fourteen states which allow prosecutors discretion to send youth to criminal court are among the ten states with the *highest* violent crime arrest rate (age 10 -17). *The Florida Experiment, supra.*

implemented. They concluded that the threat of criminal punishment had no general deterrent effect.

Eric Jensen and Linda Metsger reached similar conclusions when they evaluated the general deterrent effect of an Idaho mandatory transfer statute introduced in 1981. Eric Jensen and Linda Metsger (1994), *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96. The law required the transfer of youth as young as fourteen who were charged with murder, attempted murder, robbery, forcible rape, or mayhem. The researchers examined the arrest rates for the five-year period prior to the new law and for five years following its implementation, and found no evidence of general deterrent effects. Instead, arrests for the target offenses *increased* following the introduction of mandatory transfer.

2. **Youth transferred to adult criminal court are more likely to reoffend, and to reoffend more quickly and more often, than those in the juvenile justice system.**

A number of studies have shown that youth transferred to criminal court recidivate at a higher rate than they would if retained in the juvenile justice system. The first study was conducted by Jeffrey Fagan, who in 1991 conducted an experiment to evaluate the effects of juvenile versus criminal justice processing. Jeffrey A. Fagan (1991), *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*. Final Report, Grant 87-IJ CX 4044, to the National Institute of Justice. Fagan identified two counties in New York and New Jersey that were very similar on important socioeconomic, demographic and crime indicators. The two states had very similar robbery statutes. The key difference was that in New York fifteen- and sixteen-year-old youth charged with robbery were automatically prosecuted in the adult criminal courts while in New Jersey they remained in the juvenile courts.

The findings showed significant differences between youth in the two jurisdictions. Those retained in juvenile court in New Jersey were significantly less likely to be rearrested and reincarcerated than those prosecuted in criminal court in New York. And of those who did recidivate, the length of time before rearrest was significantly longer for those who remained in juvenile court. Fagan's study provides strong support for retaining young offenders in the juvenile system.

Subsequent studies reinforce Fagan's findings and conclusions. Bishop and Frazier compared case outcomes in Florida, a state that uses prosecutorial waiver almost exclusively. Donna Bishop *et al.* (1996), *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* 42 *Crime & Delinq.* 171. Their study showed that youth transferred to criminal court in Florida were one-third more likely to re-offend than those kept in juvenile court who were closely matched for current offense, prior offenses, age, race, and gender. The transferred youths re-offended almost twice as fast as those who were sent to juvenile detention. Of those who committed new crimes, the youth who had been prosecuted as adults committed serious crimes at double the rate of those retained in juvenile court.

A follow-up study in 1997 by the same researchers "indicated that transfer led to more recidivism. Moreover, the transferred youths who subsequently reoffended were rearrested more times and more quickly than were the nontransferred youth who reoffended, regardless of the offenses for which they were prosecuted." Donna Bishop *et al.* (1997), *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term.* 43 *Crime & Delinq.* 548, 558.

The Florida studies add substantively to Fagan's research. The studies confirm the findings in a different jurisdiction, time frame and sociolegal context using a different transfer method. They also add new offenses to the research. Taken together, and with the evidence of

no general deterrent effect, these studies make a compelling case – in the interests of public safety – against increased use of transfer to adult criminal court.

3. **Research comparing the experiences of youth in the juvenile justice system and those transferred to the criminal system indicates that the criminal justice system contributes to criminal behavior.**

Comparing the experiences and reactions of adolescents processed in the juvenile system and those transferred to the criminal system reveals that involvement in the criminal justice system contributes to criminal behavior. Bishop and Frazier recently conducted in-depth interviews with ninety-five serious and chronic adolescent male offenders in Florida, of whom forty-nine were transferred to criminal court by Florida prosecutors and either confined in state prisons or placed on probation. The balance had been prosecuted in juvenile court and were incarcerated in maximum-risk juvenile commitment facilities. The researchers inquired into youths' postdisposition experiences in correctional settings, including perceptions of staff, services, and programs. In addition, youth were asked about their experiences in the juvenile and criminal courts, about perceptions of procedural and substantive justice, and about their experiences in and reactions to pre-adjudicatory confinement in detention centers and jails.

Bishop and Frazier found that the youth recognized the rehabilitative strengths of the juvenile justice system in contrast to the criminal system. Sixty percent of those sent to juvenile detention said they expected that they would not reoffend, thirty percent said they were uncertain whether they would reoffend, while three percent said they would likely reoffend. Of those who expected not to reoffend, ninety percent said good juvenile justice programming and services were the reason for their rehabilitation. Most reported at least one favorable contact with a staff person that helped them. The juvenile justice system responses were overwhelmingly positive:

A: "This place is all about rehabilitation and counseling.... This place here, we have people to listen to when you have something on your mind...and need to talk. They understand you and help you."

B: "They helped me know how to act. I never knew any of this stuff. That really helped me, cause I ain't had too good a life."

Donna Bishop *et al.* (1998), *Juvenile Transfers to Criminal Court Study: Phase I Final Report*. [hereinafter, *Phase I Final Report*]. See, also, Donna Bishop and Charles Frazier (2000), *The Consequences of Waiver*, in *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* (Jeffrey Fagan and Franklin Zimring eds.) [hereinafter, *The Consequences of Waiver*].

Bishop and Frazier concluded that the criminal justice system contributes to criminal behavior. Among their interviewees, the researchers found very negative reactions to criminal court processing. The youths prosecuted as adults overwhelmingly responded in despondent and negative ways:

C: "When I was in juvenile programs, they were telling me that I am somebody and that I can change my ways, and get back on the right tracks. In here, they tell me I am nobody and I never will be anybody."

D: "In the juvenile systems, the staff and I were real close. They wanted to help me. They were hopeful for me here. They think I am nothing but a convict now."

Phase I Final Report, supra. Many youth experienced the criminal court process not so much as a condemnation of their behavior as a condemnation of themselves as individuals. Unlike juvenile court, the criminal court failed to communicate that young offenders retain some fundamental worth. Moreover, the offenders interviewed saw the criminal court and its officers more often as duplicitous and manipulative, malevolent in intent, and indifferent to their needs.

It was common for them to experience a sense of injustice, and then to condemn the condemners.

Id.

B. Prosecuting Youth as Adults Places Them at Significant Risk of Physical and Emotional Injury

Young offenders face special problems in adult correctional settings which make them susceptible to victimization and ultimately contribute to an increased recidivism. At the outset, when juveniles are transferred to criminal court and institutionalized with adults, they are exposed to an older, stronger, more seasoned, and violent group of offenders over an extended period of time. Many adult facilities are large and overcrowded. Institutional size and overcrowding have been linked to levels of violence and to other negative behavioral and psychological consequences. Kenneth Adams (1992), *Adjusting to Prison Life*, in *Crime and Justice: A Review of Research* (Michael Tonry ed.).

The vast majority of transferred youth remain in jail for several months. Many transferred youth report feeling overwhelmed, confused and depressed. *The Consequences of Waiver, supra*, at 251-252. Other stressors associated with jail include boredom and anxieties stemming from separation from family and friends, from the unresolved natures of their cases, and from perceived dangers within the jail facilities. Many transferred youths have difficulty adjusting to being jailed together with adult offenders. Several mentioned to Bishop and Frazier that jail officials did not differentiate between them and some of the chronic and violent adult offenders with whom they were housed. Most did not perceive themselves as hardened or dangerous criminals and found it very disquieting when officials viewed them in these terms. In addition the inmate grapevine was riddled with stories of older inmates preying on young boys,

which made them fearful of attack by sexual predators and "crazies." Some responded by isolating themselves as much as they could. *Id.*

The stresses of incarceration in jail are correlated with much higher suicide rates. The suicide rate for youth in jails is almost eight times that of youth in juvenile detention facilities. Michael G. Flaherty (1983), *The National Incidence of Juvenile Suicides in Adult Jails and Juvenile Detention Centers*, 13 *Suicide and Life-Threatening Behavior* 85.

Transferred young offenders serve sentences in adult prisons. Prisons are dangerous places where inmate norms frequently support violent behavior. In a study comparing the experiences of youth in prisons and those in juvenile training schools, sexual assault was five times more likely among youth in prison, beatings by staff nearly twice as likely, and attacks with weapons nearly 50% more common. One-third of the juveniles in prison reported being assaulted with a weapon. Martin Forst *et al.* (1989), *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 39 *Juv. & Fam. Ct J.* 1. Displays of verbal and physical aggression "prove" one's toughness and establish social position in a context in which there are few alternative means of earning status. Such displays are also means by which gangs build cohesion and establish position in the social hierarchy.

Young inmates also feel most vulnerable to physical and sexual predation, which contributes to their exploitation: fear is often interpreted as a sign of weakness. *The Consequences of Waiver, supra*, at 254-260. Because of their vulnerability, adolescent inmates are more likely to be placed in protective or "safekeep" custody than older inmates. While this strategy is intended to protect them from harm, protective custody has serious negative consequences. Inmates in protective custody are generally isolated from others around the clock, do not participate in educational or other programming, and have little recreation.

Fear of victimization has also been linked to poor psychological status, especially among those who are unwilling or unable to retaliate against predators. Fearful inmates are frequently anxious and depressed. Thus, not only are young inmates more likely to be placed in protective custody because of their vulnerability to attack, but they are also more likely to be placed in specialized units for treatment of mental health problems. *Id* at 258.

C. Section 26 of Proposition 21 Provides No Guidelines and Thereby Allows Prosecutors to Ignore Developmental Differences Between Adolescents and Adults, As Well As Individual Differences Among Adolescents.

Section 26 contains no guidelines for prosecutors to use in determining whether to charge youth in juvenile court or adult criminal court. The United States Supreme Court has recognized the importance of considering the individual characteristics of youth in determining whether to transfer them to criminal court. *Kent v. United States* (1966), 383 U.S. 541, 561-563. The Utah Supreme Court struck down a statute similar to Section 26 that failed to provide guidelines for prosecutors. *State v. Mohi* (1995), 901 P.2d 991. The court held, "Legitimacy in the purpose of the statute cannot make up for a deficiency in its design. [The statute] is wholly without standards to guide or instruct prosecutors as to when they should or should not use such influential powers." *Id.* at 999.

Section 26 allows prosecutors to ignore developmental differences between adolescents and adults. As the National Research Council noted, "What is often missing from discussions of juvenile crime today is recognition that children and adolescents are not just little adults, nor is the world in which they live the world of adults." National Research Council report, *supra*, at 15. Adolescence is an inherently transitional time during which there are rapid and dramatic changes in youth's physical, intellectual, emotional and social capabilities. Laurence Steinberg and Robert Schwartz (2000), *Developmental Psychology Goes to Court* 9-31, in *Youth on Trial*

(Thomas Grisso and Robert Schwartz, eds.). Although young people can approach some decisions in a manner similar to adults under some circumstances,

many decisions that children and adolescents make are under precisely the conditions that are hardest for adults – unfamiliar tasks, choices with uncertain outcomes, and ambiguous situations....Further complicating the matter for children and adolescents is that they often face deciding whether or not to engage in a risky behavior, such as taking drugs, shoplifting, or getting into a fight, in situations involving emotions, stress, peer pressure, and little time for reflection.

National Research Council report, *supra*, at 15.

An important difference between young people and adults is that adolescent delinquency generally occurs in a “group context.” Franklin Zimring (2000), *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 271-289 (Thomas Grisso and Robert Schwartz, eds). Young people are particularly susceptible to peer group influences. Most adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive. Fear of being called “chicken” may be the major cause of death and injury from youth violence in the United States – the explicit or implicit “I dare you” leads adolescents to show off, and deters them from publicly backing out of delinquent behavior even if that would be their personal preference. *Id.* at 281.

Recent research indicates that adolescents may be physiologically less capable than adults of reasoning logically in the face of particularly strong emotions. Research using magnetic resonance imaging of the brain reveals cognitive and emotional differences between adolescents and adults. Adolescents process emotionally charged information in the part of the brain responsible for instinct and gut reactions. Adults process such information in the “rational”

frontal section of the brain. A.A. Baird *et al.* (1999), *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. Am. Acad. Child & Adolescent Psychiatry 195.

Section 26 also allows prosecutors to ignore differences *among* adolescents. Most young people develop the ability to resist peer pressure, but individuals develop that ability to different degrees and at different times during adolescence. Adolescents mature physically, cognitively, emotionally, and socially at different rates: one 16-year-old may be much more emotionally mature than his friend of the same age. Even within individual adolescents there is considerable variability: a teenager may be mature physically but immature emotionally, socially precocious but an intellectual late-bloomer.

For all these reasons, the decision whether to transfer youth to the adult criminal court – a “critically important” action determining “vitally important” rights and consequences for a young person, *Kent v. United States, supra*, 383 U.S. at 556 – requires an individualized assessment of their degree of participation, personal responsibility, and culpability in delinquent behavior.

Section 26 allows prosecutors to ignore such considerations.

III. PROVISIONS TO INCREASE TRANSFER OF YOUTH TO ADULT CRIMINAL COURT, LIKE THOSE IN SECTION 26 OF PROPOSITION 21, FOSTER RACIAL DISPARITIES IN THE JUSTICE SYSTEM. BY ALLOWING PROSECUTORS TO MAKE CHARGING AND SENTENCING DECISIONS, SECTION 26 WILL EXACERBATE THIS PROBLEM.

A. Youth of Color Are Overrepresented in the Justice System.

It has long been evident that minority youth are overrepresented in the justice system.

See, e.g., W.E.B. DuBois (1899), *The Negro Criminal*, quoted in Michael Tonry (1995), *Malign Neglect – Race, Crime, and Punishment in America* 53. “Overrepresentation” (or

“disproportionality”) exists when the proportion of minority youth at a particular stage of the justice system exceeds the proportion of those youth in the general population. Thus, although African-American juveniles constitute 15% of the U.S. population ages 10-17, they represent 26% of juvenile arrests, 30% of delinquency cases in juvenile court, 45% of delinquency cases involving detention, 40% of juveniles in residential placement, and 46% of cases judicially waived to adult criminal court. Howard N. Snyder and Melissa Sickmund (1999), *Juvenile Offenders and Victims: 1999 National Report* 192 [hereinafter, *Juvenile Offenders and Victims*].

In 1989, the National Coalition of State Juvenile Justice Advisory Groups, which is charged by federal statute with reporting to the President and Congress on significant juvenile justice matters, 42 U.S.C. Section 5651(f)(2)(B)(C)(D)(E), issued a report that focused on the “differential processing of minorities within the juvenile justice system.” National Coalition of State Juvenile Justice Advisory Groups (1989), *A Report on the Delicate Balance to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention* 1 [hereinafter National Coalition report]. The report noted that issues of racial fairness “tear at the fabric of our society; they are at the heart of problems like poverty, delinquency, substance abuse, child abuse, dependent and neglected children, and violence....” *Id.* The report summarized data on racial disproportionality in the justice system and made detailed recommendations for addressing the problem.

The National Coalition report and other efforts prompted Congress to amend the Juvenile Justice and Delinquency Prevention Act (JJJPA), 42 U.S.C. Sections 5601, 5633. The amendment required states to investigate the problem of disproportionate minority confinement (DMC) in secure facilities and develop action plans to remedy overrepresentation.

In 1990, in a landmark comprehensive analysis, researchers Carl Pope and William Feyerherm reviewed the research conducted between 1970 and 1988 on the relationship between race and juvenile justice processing. Carl Pope and William Feyerherm (1990), *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 1)*, 22 Crim. J. Abstracts 327-335; Carl Pope and William Feyerherm (1990), *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 2)*, 22 Crim. J. Abstracts 527-542. They reported that two-thirds of the studies of state and local juvenile justice systems reported a "race effect" at some stage of the juvenile justice process that negatively affected outcomes for youth of color.

In 1992, Congress strengthened the effort to address racial disproportionality in the juvenile justice system by making efforts to address DMC a core requirement of the Juvenile Justice and Delinquency Prevention Act. 42 U.S.C. Section 5633(a)(23). The DMC mandate requires states to (1) identify the extent to which DMC exists, (2) assess the reasons for its existence, and (3) develop intervention strategies to address the causes for DMC. States were required to demonstrate a good faith effort to address DMC issues or risk losing one-fourth of their federal juvenile justice funding.

In 1997, the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) published a national report analyzing the overrepresentation of youth of color at key points in the justice system: arrest, secure detention, disposition to secure corrections, confinement in adult jails and lockups, transfer to adult court, placement on probation. Donna Hamparian and Michael J. Leiber, Community Research Associates (1997), *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report* [hereinafter, *Disproportionate*

Confinement]. The report reviewed data from the states' 1994-1996 JJDP A Comprehensive State Plans and states' DMC assessment reports.

The report used an index numbering system to determine the level of overrepresentation at each stage of the system for each state. An index of 1.00 meant that youth of color were represented in the justice system in the same proportion as they were represented in the general population. The larger the index number the greater the extent of the overrepresentation.

In California, the index rating for African-American youth at the point of arrest was 2.2, at the point of secure detention it was 3.0, and at the point of confinement in secure facilities it was 3.0. *Id.* at 10. Thus, African-American youth were arrested at more than twice their representation in the youth population in the state, and placed in secure detention pre-adjudication, as well as ordered into secure facilities post-adjudication, at three times their proportion in the general population.

The report found that "race is an explanatory factor in the decision to detain a juvenile prior to disposition even when controls for others factors, such as seriousness of offense, are used." *Id.* at 20. The report also noted that "race, through the detention decision, has an indirect effect on commitment." *Id.* The report revealed that in California differential treatment for African-American youth exists even when statistical controls are applied for offense type and prior record. *Id.*

B. Overrepresentation Results From Differences in Delinquent Behavior By Youth of Color, Enhanced Risk Factors For Minority Youth, Selective Law Enforcement Practices, and Biases Among Decisionmakers in the Justice System.

Minority youth are overrepresented in some types of delinquent behavior. National Research Council report, *supra*, at 237. Some have argued that overrepresentation at arrest,

detention, and other points in the system was simply the result of young people of color committing more crimes than whites. 145 Cong. Rec. S5572 (daily ed. May 19, 1999) (statement of Sen. Hatch).

While there are some racial differences in delinquent behavior for some types of offenses, those differences do not explain the significant overrepresentation of youth of color in the justice system. National Research Council report, *supra*, at 237-238. Closer analysis of the justice system, however, reveals that overrepresentation is a complex social problem caused by a variety of factors that criminologists and other scholars have recognized since the early twentieth century. In 1928, criminologist Thorsten Sellin wrote that social factors such as a "lack of formal education, ...the injustice of our agencies of justice, poverty, and a host of other conditions are brought forth as generators" of overrepresentation of African-Americans in the justice system. Thorsten Sellin (1928), *The Negro Criminal: A Statistical Note*, 140 *Annals Am. Acad. Pol. & Soc. Sci.* 52-64; Gunnar Myrdal (1944), *An American Dilemma - The Negro Problem and Modern Democracy*.

Modern researchers continue to demonstrate that no single factor can explain overrepresentation. Factors such as poverty, joblessness, housing density, and poor health care are more common among people of color and thereby increase the risk for delinquent behavior among minority youth. See Eleanor Miller (1986), *Street Women*; Jeffrey Fagan *et al.* (1986), *Violent Delinquents and Urban Youth*, 24 *Criminology* 439-471; Samuel L. Myers and Margaret C. Simms (1988), *The Economics of Race and Crime*; National Council of Juvenile and Family Court Judges (1990), *Minority Youth in the Juvenile Justice System: A Judicial Response* (Hon. Lindsey G. Arthur, Marie R. Mildon, and Cheri Briggs, eds.); Michael Tonry (1995), *Malign Neglect*.

Overrepresentation also occurs as a result of selective law enforcement practices. Racial profiling by police, leading to the notorious “driving while black” traffic stops, is perhaps the most visible example. Leadership Conference on Civil Rights (2000), *Justice on Trial: Racial Disparities in the American Criminal Justice System* 6 [hereinafter *Justice on Trial*]. Law enforcement officials often target low-income and predominately African-American or Latino urban neighborhoods in their enforcement of drug laws, even though research indicates that white youth aged 12-17 are more than a third more likely to have sold drugs than African-American youth, and white students report cocaine use at 7 times the rate of African-Americans students, crack cocaine use at 8 times the rate of African-Americans students, and heroin use at 7 times the rate of African-Americans students. Office of Applied Studies, Substance Abuse and Mental Health Services Administration (1999), *National Household Survey on Drug Abuse* 71 (Table G); National Institute on Drug Abuse (2000), *Monitoring the Future Report, 1975-1999, Volume I*.

Overrepresentation of minority youth also occurs as a result of biases among other decisionmakers at various points in the justice system. Some decisionmakers are guilty of intentional racial bias. *Justice on Trial, supra*. For others, race-based stereotypes and subjective factors such as perceived attitude and demeanor significantly influence decisions. The National Research Council collected the studies and concluded that disparities exist in arrest (6 of 7 studies), intake (4 of 4 studies), detention (6 of 7), and placement (7 of 7). *Id.* at 247-249.

Few studies directly address the issue of *how* race influences decisionmaking. In an important research effort, Bridges and Steen analyzed probation officers’ written accounts of juvenile offenders and their crimes and court records about the offenders in three Washington counties. George S. Bridges and Sara Steen (1998), *Racial Disparities in Official Assessments of*

Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 *American Sociological Review* 554. They found pronounced differences in officers' attributions about the causes of crime by white versus minority youth. Probation officers consistently portrayed black youth different than white youth in their written court reports, attributing blacks' delinquency to negative *individual* attitudinal and personality traits, while stressing the *social* environment in their depictions of white youth. These attributions about youth shaped the probation officers' assessments of the threat of future crime, and correspondingly their sentence recommendations, since court officials relied more heavily on negative individual attributions than on severity of the current offense or prior delinquency history. Finally, the research found that these attributions are a mechanism by which race influences judgments of dangerousness and sentencing recommendations: officials in part judge black youths to be more dangerous than white youths as a consequence of negative attitudinal and personality traits, and therefore impose longer sentences on them.

Significant overrepresentation occurs in California. The National Council on Crime and Delinquency (NCCD) prepared a report analyzing overrepresentation in California. James Austin, *The Overrepresentation of Minority Youths in the California Juvenile Justice System: Perceptions and Realities* (1995), in *Minorities in Juvenile Justice* (Kimberly Kempf Leonard *et al.* eds.). The report found that African-American youths in California were overrepresented at every stage of the system, even when statistical controls were applied. Thus, nearly 72% of African-American youth referred for felony drug offenses were detained versus 43% of the white youth in the same offense class. The disparities increased deeper into the system. *Id.* at 165, Table 7.6. Although 11% of African-American youth with violent felony offenses were committed to the California Youth Authority (CYA) in 1989, only 3% of white youth with these

offenses were committed to a CYA facility. *Id.* at 164. This disparity at the commitment stage was true for every offense class except misdemeanor drug offenses. The staggering data led the researchers to conclude that their analysis “unveils a picture of persistent differential treatment for some minority groups after having accounted for prereferral factors such as offense and prior record.” *Id.*

In addition, the researchers conducted discussion groups to collect subjective information from representatives of key public agencies involved with the administration of juvenile justice, including district attorneys, public defenders, the court, and the probation department. The discussion groups revealed that many system stakeholders perceived African-American males as “less controllable with limited family support if returned to the community.” *Id.* at 169.

C. Racial Disparities Occur Throughout the Justice System Even for Youth Charged With Similar Offenses.

A comprehensive national report prepared by the National Council on Crime and Delinquency went beyond the issue of overrepresentation and demonstrated that racial disparities for youth occur throughout the justice system for youth charged with the same offenses. Eileen Poe-Yamagata and Michael A. Jones (2000), *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* 1 [hereinafter, *And Justice for Some*]. The authors utilized data from U.S. Department of Justice agencies and publications, including the FBI’s Uniform Crime Report Program; the Office of Juvenile Justice and Delinquency Prevention’s National Juvenile Court Data Archive, Census of Juveniles in Residential Placement, and Juveniles Taken Into Custody Program; and the Bureau of Justice Statistics’ National Corrections Reporting Program, as well as research conducted by NCCD and other research organizations. *Id.* at 5.

The report found that minority youth, especially African-American youth, received different and harsher treatment than white youth at each stage of the justice system, *even when white youth and minority youth were charged with the same type of offense* (person, property, drug, public order). Thus, African-American youth were more likely to be detained prior to adjudication, formally charged in juvenile court, waived to adult criminal court; ordered to out-of-home placement at disposition, and incarcerated in juvenile facilities and adult prisons, than white youth charged with the same offenses. *Id.* at 2-3. The authors concluded that the report documents a juvenile justice system that is “separate but unequal.” *Id.* at 29.

The data raise serious concerns about racial disparities at the two stages of the justice system at issue in the present case: waiver to prosecution in adult criminal court and sentencing to adult prisons.

At the stage of waiver to prosecution in adult criminal court, the data show that minority youth were “much more likely than White youth to be waived to criminal court even when charged with a similar offense.” *Id.* at 13. This was true across all offense categories. Thus, for offenses against persons, white youth constituted 57% of the cases petitioned but only 45% of the cases waived to adult court. African-American youth charged with similar offenses represented 40% of the cases petitioned, but were 50% of the cases waived to adult court. The differences were even more dramatic in drug cases. White youth constituted 59% of cases petitioned but only 35% of cases waived to adult court, while African-American youth charged with similar offenses represented 39% of cases petitioned but were 63% of cases waived to adult court. Consequently, in drug cases, white youth enjoyed a 24% “waiver advantage” and African-American youth carried a 24% “waiver disadvantage.” *Id.*

At the stage of sentencing to adult prisons, the data also raise concerns about racial disparities. In 1997, 75% of youth admitted to state prisons were youth of color. *Id.* at 25. In state-by-state data, overrepresentation of minority youth and underrepresentation of white youth were reported in nearly every state reporting data on admissions to adult prisons in 1996.

D. Racial Disparities Accumulate For Youth in the Justice System.

Not only do racial disparities for youth occur at major points in the justice system, but those disparities accumulate, so that as youth process through the system the disparities at arrest are added to the disparities that occur when decisions are made whether to detain youth before adjudication, which are in turn added to the disparities that occur when formal charging decisions are made by prosecutors, which in turn are added to the disparities that occur when prosecutors make decisions whether to waive youth for prosecution in adult criminal court, and which are finally added to the disparities that occur at disposition and in decisions whether to incarcerate.

This phenomenon has been observed for more than 20 years. In 1979 researchers examining juvenile justice studies that considered the relationship between social class, race, and legal decision making concluded that race differences produced "a cumulative effect that changed a heterogenous prearrest population into a nonwhite, homogeneous institutionalized population." A. E. Liska and M. Tausig (1979), *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decisionmaking for Juveniles*, in 20 Soc. Q. (2) 197. See, also, William Feyerherm (1981), *Juvenile Court Dispositions of Status Offenders: An Analysis of Case Decisions*, in *Race, Crime, and Criminal Justice* (R.L. McNeeley and C.E. Pope, eds.) (finding cumulated racial differences in processing of status offenders). As the researchers at the National Council on Crime and Delinquency recently stated, "Information contained in this report documents the *cumulative disadvantage* of minority youth across the nation." *And Justice for*

Some at 1 (emphasis added). See, also, *Disproportionate Confinement, supra*, at 27 (“The differences between minority and non-minority juveniles representation become amplified at each decision point from early to later stages of the juvenile justice system.”).

The recent review and analysis of research in the field by the National Research Council demonstrates the importance of the accumulation of racial disparities in the justice system.

The National Research Council report noted, in a section entitled “Compound Risk,” that “Compound effects, even of small disparities, can produce large differences.” National Research Council report, *supra*, at 254. Using national arrest, court, and placement data, the report actually calculates the relative risk for black youth and for white youth of (1) being arrested, (2) referred to court for a delinquency case, (3) the case being handled formally, (4) being adjudicated delinquent or found guilty, and (5) being put in residential placement. The report calculates the relative risk at each point in the system, and the *relative compound risk* as a youth progresses through the system. Thus, the relative risk at each particular point in the system is:

<u>Risk of:</u>	<u>Relative black to white risk:</u>
Being arrested	2:00 to 1:00
Referred to court for delinquency case	1.19 to 1:00
Case being handled formally	1.15 to 1:00
Being adjudicated delinquent or found guilty	0.93 to 1.00
Being put in residential placement	1.23 to 1:00

The compound risk, however, is quite different: as black youth go through the system, their accumulated risk grows significantly:

<u>Risk of:</u>	<u>Relative compound black to white risk:</u>
Being arrested	2:00 to 1:00
Referred to court for delinquency case	2.38 to 1:00
Case being handled formally	2.82 to 1:00
Being adjudicated delinquent or found guilty	2.51 to 1:00
Being put in residential placement	3.12 to 1:00

National Research Council report, *supra*, at 256. Thus, cumulatively, black youth are more than three times as likely as white youth to be arrested, processed through the system, and put in residential placement.

E. Youth in California Who Are Transferred to Adult Criminal Court and Sentenced to Imprisonment Are Subjected to Accumulated Racial Disparities.

An analysis of racial and ethnic disparities in California in the transfer of youths to adult court and sentencing to California Youth Authority (CYA) facilities was completed in January, 2000. Mike Males and Dan Macallair (2000), *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California* [hereinafter *The Color of Justice*]. The researchers utilized data collected from the Los Angeles County Probation Department Research Division, Los Angeles County District Attorney's Office, California Youth Authority Research Division, California Department of Justice Criminal Justice Statistics Center, Department of Finance Demographic Research Division and the U.S. Bureau of the Census. Data from Los Angeles County and the entire state for arrests (1996-1998) and sentencings (1997-1999) were for the most recent years for which data were available. The one-year difference takes into account that sentencings occur substantially after arrests. *Id.* at 5.

The report found that both in Los Angeles and statewide, youth of color charged with violent crimes are much more likely than white youth offenders to be sentenced to incarceration in CYA facilities. In Los Angeles, the arrest rate for violent offenses for youth of color was 2.8 times the violent offense arrest rate of white youth. However, the rate of being tried as an adult for youth of color was 6.2 times the rate of white youth, and the rate of imprisonment for minority youth was 7.0 times the rate for white youth. *Id.* at 8. Statewide, the arrest rate for violent offenses for youth of color was 2.7 times the violent arrest rate for white youth. However, after transfer to and prosecution in the adult system, minority youth were 8.3 times as likely as white youth to be sentenced by an adult court to CYA confinement. *Id.* at 9.

Thus, racial disparities accumulate for youth in California who are charged with violent crimes, prosecuted in adult court, and sentenced to CYA imprisonment: the disparate treatment of minority youth arrested for violent crimes “accumulates within the justice system and accelerates measurably if the youth is transferred to adult court.” *Id.* at 10. The racial differentials do not result from more heinous offenses by minority youth: even by the most limited index (homicides), youth of color are significantly more likely to be sentenced to CYA confinement by adult courts than similarly-offending white youth. *Id.* at 11.

F. By Allowing Prosecutors to Make Charging and Sentencing Decisions, Section 26 of Proposition 21 Will Exacerbate Racial Disparities For Youth in the Justice System.

The data demonstrate that racial disparities are pervasive for youth in the justice system, nationally and in California, and that the disparities accumulate for youth of color at various decision points in the system. As a consequence, youth of color are subject to significant racial disparities as they go through the system.

As noted *supra*, Section 26 of Proposition 21 authorizes prosecutors to make two critical decisions affecting youth in the justice system: the decision which formal charges to bring, and the decisions which sentencing options are available.

Allowing prosecutors to make the decisions at two critical points in the justice system, to assume both the executive charging function and the judicial sentencing function, is inimical to the administration of justice and will exacerbate racial disparities in the system. One check on racial disparities in the system is the diversity of decisionmakers at key points in the system – police, prosecutors, judges, corrections agencies. Consolidation of multiple functions into a single office, particularly the office most directly responsible in the legal system for obtaining convictions of alleged offenders, is a recipe for potential abuses of discretion.

A prosecutor's ability to determine which individuals are formally charged, and the offenses with which they are charged, is one of the most powerful functions held by any criminal justice official. Angela J. Davis (1998), *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 20; Bennet L. Gershman (1992), *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 448. Professor Davis, of the Washington College of Law at American University, notes that the discretion of prosecutors raises concerns because it is unregulated. Angela J. Davis (2001), *The American Prosecutor, Independence, Power, and the Threat of Tyranny*, 86 Iowa L. Rev. 393, 435; *see, also*, Tracy L. Meares (1995), *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 862-63.

The U.S. Supreme Court has acknowledged that considerations of race on the part of the prosecutor can infect the justice system. *Swain v. Alabama* (1965), 380 U.S. 202.⁵ More recently, in *Batson v. Kentucky* (1986) 476 U.S. 79, the Court stated:

The reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors.

Id. at 99.

In striking down provisions giving prosecutors "direct file" authority, the Utah Supreme Court spoke in words particularly appropriate to the instant case:

Such unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making. No checks exist in this scheme to prevent such acts as a prosecutor's singling out members of certain unpopular groups for harsher treatment in the adult system while protecting equally culpable juveniles to whom a particular prosecutor may feel some cultural loyalty or for whom there may be broader public sympathy.

State v. Mohi, supra, 901 P.2d at 1002.

The research summarized above may not demonstrate deliberate, invidious discrimination based on race or ethnicity in the prosecution of youth of color. *Cf. Oylar v. Boles* (1962), 368 U.S. 448, 456; *Murgia v. Municipal Court* (1975), 15 Cal.3d 286, 290. Nor does the research

⁵ The Court in *Swain* found:

In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. 380 U.S. at 223-24.

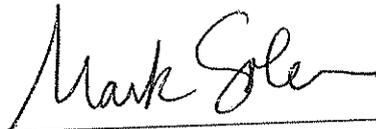
identify any particular individuals who have been selected for prosecution because of their race. *Id.* at 300. Indeed, the research in California and nationwide is limited. The National Research Council report concluded: "Given the importance of the problem of race, crime, and juvenile justice in the United States, the scant research attention that has been paid to understanding the factors contributing to racial disparities in the juvenile justice system is shocking." National Research Council report, *supra*, at 258. Accordingly, the report recommends a comprehensive, systematic, and long-term research agenda. *Id.* at 259.

On the other hand, the evidence of racial disparities affecting youth of color throughout the justice system, nationwide and in California, and the cumulative nature of those disparities from successive decision points in the system, is clear. National Research Council report, *supra*, at 256. The "vast differences" in treatment of white youth and youth of color in the justice system must be "a source of concern" and "disturbing." *People v. Andrews* (1998), 65 Cal.App. 4th 1098, 1102, 1104. Indeed, the research indicates that racial disparities in dispositions to secure confinement are significantly more in adult criminal court (8.3 to 1), *The Color of Justice*, *supra*, at 9, than in juvenile court (3.12 to 1) National Research Council report, *supra*, at 256. Accordingly, this Court should consider the potential impact of Section 26 of Proposition 21

on racial inequities in the justice system, and the likelihood that approval of Section 26 will exacerbate those inequities.

August 31, 2001

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States. I am over the age of eighteen years and not a party to the action. My office address is Youth Law Center, 1010 Vermont Avenue, NW, Suite 310, Washington, DC 20005.

On August 31, 2001, I placed in separate sealed envelopes, postage thereon fully prepaid, and deposited in the United States mail, a true and correct copy of the Brief of Amici Curiae to the following:

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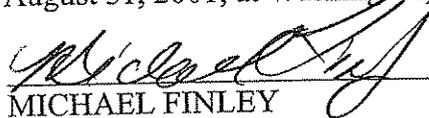
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I HEREBY CERTIFY under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this August 31, 2001, at Washington, DC.


MICHAEL FINLEY

IN THE FAMILY COURT
FOR THE FIFTH DISTRICT OF SOUTH CAROLINA
RICHLAND COUNTY

The State,)	
)	
Plaintiff,)	
)	Docket No. [REDACTED]
v.)	
)	
[REDACTED],)	<u>MEMORANDUM IN SUPPORT OF</u>
)	<u>DEFENDANT</u> [REDACTED]
Defendant.)	<u>MOTION IN LIMINE TO SUPPRESS</u>
_____)	<u>OUT-OF-COURT IDENTIFICATION</u>
)	<u>TESTIMONY</u>

This Memorandum is being submitted by the Defendant in support of the Motion in Limine to Suppress Out-of-Court Identification of the Defendant.

“The influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.” United States v. Wade, 388 U.S. 218, 229 (1967).

Defendant submits this motion to prevent such a miscarriage of justice in the present case.

The out-of-court identification in this case was performed using unreliable methods that erroneously suggested to the witness that the Defendant was engaged in criminal activity. The identification in this case – a single-person station-house procedure – was inherently suggestive and plainly disfavored under the law. The identification was also so unreliable as to be inadmissible – it was made by a witness who (a) had no prior interaction with the suspect, (b) only viewed the suspect for a brief period of time while allegedly in the midst of a struggle with a different suspect, and, (c) perhaps most importantly, gave a description of the suspect which did not match the defendant. The improper suggestion could have easily been prevented by the

State, and the unreliable fruits of the improper identification should be suppressed to prevent prejudicing the case against the Defendant, and to prevent a violation of the Defendant's due process rights.

STATEMENT OF FACTS

The Defendant has been placed on notice that the state intends to try the defendant on the charge of burglary second degree. The Petition alleges that the Defendant was a party to the entry of an apartment and an attempt to remove items from the apartment. The State alleges that another party engaged in a physical struggle with an occupant of the apartment – [REDACTED] – then [REDACTED] allegedly saw Defendant briefly before both he and other party fled. RCSD Incident Rep.; [REDACTED], Stmt., May 2, 2014. The State alleges that [REDACTED] positively identified both the Defendant and another as the two involved in the incident. RCSD Incident Rep.; [REDACTED], Stmt., May 2, 2014.

In support of this motion the Defendant asserts the following:

1. Upon information and belief, that the State intends to offer the out of court identification by [REDACTED] of the Defendant which took place while the Defendant was handcuffed in the containment area of a police cruiser, then while the Defendant was being detained alone in a holding cell. On information and belief, that [REDACTED] identified the Defendant, in those locations, as an intruder in his apartment that he saw briefly during a struggle with another individual.
2. That the Defendant did not struggle in a way that would merit handcuffs prior to identification. Def.'s Aff. at 13.

3. That the police never engaged in proper identification procedures such as lineups or photo arrays in identifying the Defendant. Def.'s Aff. at 23.
4. That [REDACTED] was brought into the Defendant's presence on three separate occasions by the police while the Defendant was restrained and alone. Def.'s Aff. at 12, 18, 19.
5. That the Defendant had neither met nor interacted with [REDACTED] prior to the out of court identification. Def.'s Aff. at 14; [REDACTED] Stmt., May 2, 2014.
6. That [REDACTED] is white, and the Defendant and his brother are African American. Def.'s Aff. at 4, 16; RCSD Incident Rep. (listing Defendant's race as "B" and [REDACTED] as "W").
7. That [REDACTED] called 911 after the alleged burglary and reported that the two suspects were wearing hoodies. RCSD Agency Incident Rep. Comments at 3 ("wearing a gray hoodie////one had on a blue hood.").
8. That the Defendant was not wearing a hoodie, as confirmed by the jail inventory, which lists the Defendant's clothes as including only a t-shirt, sweatpants, shorts, socks, and underwear. Def.'s Aff. at 21; RCSD Inventory.
9. The Richland County Sheriff's Department Incident Report makes no reference to [REDACTED] description of suspects wearing hoodies. RCSD Incident Rep. The Incident Report makes no reference to finding a hoodie matching [REDACTED] [REDACTED] description anywhere in the vicinity of the alleged crime or the arrest. RCSD Incident Rep.
10. The only match between [REDACTED] description of the suspects and the Defendant is the Defendant's age, race, and sex. [REDACTED] described the

suspects as “two b[lack]/males around ■ yoa [years of age].” RCSD Agency Incident Rep. Comments at 3. No other description served to distinguish the suspect from any other adolescent black boy – other than the hoodie, which, as noted, Defendant was not wearing.

11. The Defendant maintains his innocence of the alleged burglary. Def’s Aff. at 24.

ARGUMENT

I. THE SHOW UP IDENTIFICATION MADE BY ■ WAS UNDULY SUGGESTIVE AND INHERENTLY UNRELIABLE

The Defendant seeks to suppress all previous out of court identification procedures that were unduly suggestive and conducive to irreparable mistaken identification as to deny the Defendant due process, as well as any potential in-court identifications. The Defendant cites as grounds for this motion the 5th and 14th Amendments to the Constitution of the United States and Article I, §3 of the Constitution of South Carolina.

An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. State v. Brown, 356 S.C. 496, 502-03, 589 S.E.2d 781, 784 (Ct. App. 2003). The United States Supreme Court set a two-pronged standard for the admissibility of testimony concerning an out-of-court identification of an accused in Neil v. Biggers: Courts must determine if the identification procedures were suggestive and, if so, whether the identification was nonetheless reliable. 409 U.S. 188, 198-99 (1972). “Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Biggers, 409 U.S. at 198.

South Carolina recognizes the two-pronged inquiry of Biggers. State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000).

A. SUGGESTIBILITY

A “witness’s recollection of the stranger can be distorted easily by the circumstances or by later actions of the police.” Manson v. Brathwaite, 432 U.S. 98, 112 (1977). Such a distortion occurred in this case through police procedures which the South Carolina Supreme Court has explicitly held to be disfavored because they are unduly suggestive. Specifically, the Defendant was identified in a single-person show up, and again in another single-person station house identification. During these identifications, the Defendant was restrained with handcuffs in a police vehicle and later in a locked police station holding cell – both suggestions of criminality. Def.’s Aff. at 9-12, 18-19. The police engaged in no non-suggestive identification procedures. There was no line up and the Defendant is aware of no use of a photo array. Def.’s Aff. at 23. The Defendant is not aware of any circumstances which would have prohibited the state from conducting a proper lineup or other, less suggestive, identification procedures on the day of the incident. At a minimum, the police could have removed handcuffs from the Defendant or removed him from places generally reserved for criminals – the back of a police car or a station house holding cell; the Defendant did not struggle so as to require handcuffs and other restraints prior to his identification on the day of the incident. Def.’s Aff. at 13.

Appellate courts have repeatedly found such procedures unduly suggestive. In State v. Moore, the South Carolina Supreme Court overturned convictions for second-degree burglary and grand larceny that were obtained in part by a single-person show-up identification similar to [REDACTED] identification. The witness testified that she saw two men coming out of her

neighbor's house, whom she knew was at work. Approximately 90 minutes later, the witness was taken in a patrol car to a location where two men were detained. The witness proceeded to identify the men based primarily off of their clothing. Moore, 343 S.C. at 285, 540 S.E.2d at 446-47.

The Moore Court noted that “[s]ingle-person show ups are particularly disfavored in the law.” 343 S.C. at 287, 540 S.E.2d at 448 (citing Stovall v. Denno, 388 U.S. 293, 302 (1967) and State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 at 719 (Ct. App. 1993)) (emphasis added). As the U.S. Supreme Court has written, “[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.” United States v. Wade, 388 U.S. 218, 234 (1967). The identification in this case was a single-person show up of a suspect already in police custody, and therefore unduly suggestive, just like the show-up identification in Moore.

Other appellate decisions support this conclusion. For instance, taking a witness to the location where suspects are being detained, and where no other individuals are being detained, is “[c]learly” suggestive. In the Interest of Jamal Rashee A., 308 S.C. 392, 395, 418 S.E.2d 326, 328 (Ct. App. 1992). The only cases where the Court deemed similar single-person identifications to not be unduly suggestive has significantly different facts – such as evidence that the witness had prior knowledge of the defendant. State v. Singleton, 395 S.C. 6, 14, 716 S.E.2d 332, 336 (Ct. App. 2011). Here, ██████████ admitted he had no prior knowledge of the defendant. ██████████ Stmt., May 2, 2014

B. RELIABILITY

As developed in Neil v. Biggers by the United States Supreme Court, the second prong of inquiry in determining the admissibility of an out-of-court identification is reliability. See State v. Moore, 343 S.C. 282, 287 (2000) (citing Neil v. Biggers, 409 U.S. 188 (1972)).

Biggers allowed courts to look at the “totality of the circumstances” to determine if a suggestive identification was nonetheless reliable. The reliability inquiry requires a court to “determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.” Moore, 343 S.C. at 287 (quoting Curtis v. Commonwealth, 11 Va.App. 28, 396 S.E.2d 386, 388 (1990)).

In assessing the reliability of an otherwise unduly suggestive out-of-court identification, a court must weigh the “totality of the circumstances.” Neil v. Biggers, 409 U.S. at 199. That analysis must consider at least five factors: (1) “the opportunity of the witness to view the criminal at the time of the crime;” (2) the witness’s degree of attention;” (3) “the accuracy of the witness’s prior description of the criminal;” (4) “the level of certainty demonstrated by the witness at the confrontation;” and (5) “the length of time between the crime and the confrontation.” Moore, 343 S.C. at 289, 540 S.E.2d at 448-49 (quoting Biggers, 409 U.S. at 199); see also State v. Liverman, 398 S.C. 130, 138 (2012).

The “totality of the circumstances” analysis must include other relevant factors; in this case, one another important reliability factor is the diminished reliability of cross-racial identifications. See John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207, 208 (2001). Cross-racial identifications occur when a witness of one race identifies an individual of another race. Id. at 211. The U.S. Supreme Court has acknowledged the relative unreliability of cross-racial identifications, noting that reliability is

enhanced when the witness and the defendant were the same race. Manson v. Brathwaite, 432 U.S. 98, 115 (1977). The converse – that reliability is undermined when the witness and the defendant are of different races – is also true, and multiple courts have recognized this reality. State v. Cromedy, 727 A.2d 457 (N.J. 1999); State v. Long, 721 P.2d 483, 489 (Utah 1986); People v. McDonald, 690 P.2d 709 (Cal. 1984). This is commonly referred to as the “own-race effect” or “cross-racial impairment.” Rutledge, They All Look Alike, at 211. The exact cause of the cross-racial impairment is unknown, but many ongoing psychological studies exist. A popular theory is simply that many people lack familiarity and substantial exposure to other races, therefore, making it difficult to adequately remember and identify the smaller physical details which distinguish one individual from another. Rutledge, They All Look Alike, at 213. Notably, multiple studies indicate that cross-racial impairment is particularly strong when Caucasian witnesses identify African American suspects. Id. at 211. For instance, studies have reached the conclusion that “a[n] [African American] innocent suspect has a 56% greater chance of being misidentified as the perpetrator by a [Caucasian] eyewitness than a[n] [African American] eyewitness, even without suggestiveness” by police. Radha Natarajan, Note, Racialized Memory And Reliability: Due Process Applied To Cross-Racial Eyewitness Identifications, 78 N.Y.U. L. Rev. 1821 (2003). Moreover, studies also show that “erroneous identifications occur more frequently when the witness is able to view the suspect for only a short period of time,” thus exacerbating the possibility for a fallible identification in a cross-racial witness identification. Id. at 1836.

In Moore, the Supreme Court held the witness identification to be unreliable because it only satisfied one of the five factors mentioned above. Moore, 343 S.C. at 289. In its consideration of the totality of the circumstances, the Court found only the length of time

between the crime and the confrontation to be favorable to the reliability to the out-of-court witness identification. The Court reasoned that the witness “saw the two defendants for only a very brief period of time, at some distance” away. Id. The Court also found the witness’s accuracy of description to be “tenuous at best” since she primarily focused on “the suspects’ clothing and race and that one was taller than the other.” Id.

In the present case, [REDACTED] out-of-court identification of [REDACTED] are unreliable. Similarly to Moore, [REDACTED] identification only sufficiently meets one of the five factors: the length of time between the crime and confrontation. Here, [REDACTED] opportunity to view the suspect was obstructed by his struggle with the other suspect in the room. The whole incident was rather brief – especially [REDACTED] view of the second suspect (alleged to be the defendant), who he says appeared in a doorway and then fled. As in Moore, “[t]his is not a case in which the witness had an opportunity to observe the defendant at close proximity for some considerable period of time.” 343 S.C. at 289, 540 S.E.2d at 449.

Also as in Moore, [REDACTED] physical description provided to the police focused on the suspect’s clothing and race, id., specifically mentioning that the suspect wore a hoodie in 911 call.

In addition, [REDACTED] physical description was inaccurate; [REDACTED] jail inventory confirms that he was not wearing such a hoodie when apprehended, and the police provided no evidence of finding an abandoned hoodie near the crime scene. Accordingly, [REDACTED] identification is even less reliable than the identification ruled unconstitutionally unreliable in Moore. Beyond the inaccurate description regarding the hoodie, [REDACTED] remaining description of the suspects was vague – simply that they were two

teenage black males. RCSD Agency Incident Report at 3. When a witness’s prior description “was vague and . . . somewhat inaccurate,” the Court of Appeals has ruled such identifications inadmissible. In the Interest of Jamal Rashee A., 308 S.C. 392, 396, 418 S.E.2d 326, 328 (Ct. App. 1992).

Moreover, other factors further undermine the reliability of [REDACTED] out-of-court identifications. [REDACTED] needed to see [REDACTED] multiple times in order to be certain of his identification, and each time the police showed [REDACTED] to [REDACTED] for an identification it was in a suggestive manner, thus compounding the suggestiveness of police procedures.

Finally, [REDACTED] vague physical description of the suspect, who is of another race, illustrates that his identification skills are negatively impacted by the psychological termed cross-racial impairment. In his descriptions of the suspects, [REDACTED] failed to provide specific details regarding the individuals, such as height, body weight, an age estimate, etc.

South Carolina courts have only deemed the reliability of a witness identification to outweigh inappropriate, suggestive police procedure in cases with significantly different facts – such as where the witness knew the suspect beforehand or had an ample opportunity to view the suspect’s face. For example, in State v. Liverman, the South Carolina Supreme Court allowed the admission of an identification by the witness because the witness knew the suspect from childhood and identified him with a familiar nickname and detailed physical description. 398 S.C. at 135-36; see also State v. Starks, No. 2013-000869, 2014 WL 5462548 (S.C. Ct. App. Oct. 29, 2014) (holding a suggestive identification to be reliable due to witness’s recognition of the masked suspect by his voice and body build). Here, as noted, [REDACTED] had no prior interaction with the Defendant. In State v. Turner, the South Carolina Supreme Court reasoned

the suggestive identification to nevertheless be reliable due to the witness's "ample opportunity to view her assailant at the time of the crime . . . [she] had a full facial view of him while he asked her questions," and she gave a detailed and accurate description of the defendant to the police before identifying him. 373 S.C. 121, 128, 644 S.E.2d 693, 697 (2007). Here, [REDACTED] had only a brief opportunity to view the suspect, and gave a vague and inaccurate description of the Defendant.

Thus, weighing the totality of the circumstances, [REDACTED] out-of-court identification of [REDACTED] is unreliable and should be suppressed. To do otherwise would violate [REDACTED] constitutionally afforded due process rights.

CONCLUSION

Accordingly, Defendant [REDACTED] respectfully requests that the Court to grant his motion to suppress any testimony regarding [REDACTED] out-of-court identifications of the Defendant, as well as any in-court identification testimony by [REDACTED].

Respectfully submitted,

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F I L E D
STEPHEN THUNBERG
Clerk of the Superior Court

AUG 14 2000

By: D. TIERMAN, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN DIEGO
10

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,)

13 Plaintiff,)

14)
15 Defendant.
16)

CASE NO.:
DA. NO.:

POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER

17
18 STATEMENT OF RELEVANT PROCEDURE

19 On July 19, 2000 and six of his seven co-defendants, appeared in court for
20 arraignment on the complaint. The complaint alleged in count one violated California
21 Penal Code¹ (hereinafter "P.C.") section 245(a)(1) with a special allegation for P.C. section
22 12022.7(a). Count two C. section 368(b)(1). Count three alleges an
23 additional P.C. section 245(a)(1). Count four alleges a violation of P.C. section 211. Count 5
24 alleges another violation of P.C. section 245(a)(1). Count six alleges an additional violation of P.C.
25 section 211. All of the counts contain a special allegation pursuant to P.C. section 422.75(c).
26

27 ¹ All statutory references are to California Codes unless otherwise noted.
28

1 is not charged in counts seven and eight. The complaint also alleges that
2 was fourteen years of age or older when he committed the offenses within the meaning of Welfare
3 and Institutions Code (hereinafter "WIC") section 707(d)(2). All offenses were alleged to have been
4 committed on July 5, 2000.

5 On July 19, 2000, and his co-defendants, demurred to the Complaint and
6 requested a continuance to file this motion. The court granted the motion for a continuance of the
7 arraignment until August 25, 2000.

8
9 **STATEMENT OF THE FACTS**

10 The facts of this specific case are not pertinent to this motion.

11 **INTRODUCTION**

12 On March 7, 2000, California voters approved the "Gang Violence and Juvenile Crime
13 Prevention Act of 1998," more commonly referred to as Proposition 21 (herein after referred to as
14 the "Initiative"). The Initiative included a package of drastic reforms that profoundly changed the
15 state's juvenile justice system, as well as impacting the state's adult criminal justice system. Of
16 consequence here is Section 27 of the Initiative which amends WIC section 707, subd. (d). (herein
17 referred to as "new law").

18 Prior to the passage of the new law, the process governing the transfer of a minor to adult
19 court was pursuant to a "fitness" proceeding to determine the amenability of a minor for juvenile
20 court treatment. The district attorney initiated the process by filing a petition (pursuant to WIC
21 section 602) along with an allegation that the minor was not a fit and proper person for juvenile
22 court proceedings. (WIC section 707). The minor was then entitled to a hearing on the minor's
23 "amenability" for juvenile court jurisdiction. The minor's age and the nature of the charges dictated
24 whether the minor was presumed "fit" or "unfit" for juvenile court treatment. This presumption
25 could be overcome, by either party, by a preponderance of the evidence as to five criteria
26
27
28

1 enumerated in WIC section 707.²

2 The new law reallocates the transfer decision making power from the prosecutors and the
3 court, and gives it to the prosecutor alone. The new law allows a prosecutor to exercise unfettered
4 discretion in filing a case as a delinquency matter or directly in adult court without any further
5 hearing or review. The new law is silent as to any factors to be considered when making this
6 weighty decision. Instead, it allows for discretionary direct filing for minors based on age, nature
7 of the offense and prior record.³

8
9 ² The five criteria were as follows:

- 10 (1) The degree of sophistication exhibited by the minor;
11 (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's
12 jurisdiction;
13 (3) The minor's previous delinquent history;
14 (4) Success of previous attempts by the juvenile court to rehabilitate the minor; and,
15 (5) The circumstances and gravity of the of the offense alleged in the petition to have been
16 committed by the minor.

17
18 ³ Discretionary filing as follows:

- 19 (1) Any minor age 16 or older who are charged with a WIC section 707, subd., (b) offense.
20 (WIC section 707, subd., (d)(1)).
21 (2) Any minor age 14 or older where any one or more of the following occur:
22 (A) The offense, if committed by an adult, would be punishable by death or life
23 imprisonment.
24 (B) The minor personally used a firearm during the commission, or attempted
25 commission of a felony.
26 (C) The minor is alleged to have committed a WIC section 707, subd., (b) offense
27 and one or more of the following apply:
28 (i) Prior true finding for a WIC section 707, subd., (b) offense.
(ii) Offense committed for the benefit of a street gang.
(iii) Offense committed in violation of a person's civil rights.
(iv) Victim was over 65, blind, deaf, quadriplegic, paraplegic,
developmentally disabled, or confined to a wheelchair, and that disability
was known at them time of the commission of the offense. (WIC section
707, subd., (d)(2)).
- (3) Any minor aged 16 or older who is accused of committing one of the following if the
minor sustained a previous felony true finding after the age of 14:
(A) Victim was over 65, blind, deaf, quadriplegic, paraplegic, deve opmentally
disabled, or confined to a wheelchair, and that disability was known at them time
of the commission of the offense.
(B) Offense committed n violation of a person's civil rights.
(C) Offense committed for the benefit of a street gang. (WIC section 707, subd.,

1 It is clear that this reallocation of power, from the court and prosecutor, to the prosecutor
2 alone, is without the benefit of established guidelines which were historically used as an indicator
3 of the possible rehabilitation of the minor. The previous system took into account the seriousness
4 of the offense, the sophistication of the minor and the crime, and the amenability of the minor. All
5 decisions were made in consideration of the impact to, and protection of, our community, which
6 was the public's primary concern in enacting the new law.

7 Now, the entire decision regarding who will be treated as an adult and who as a juvenile is
8 in the hands of the prosecutor. Further, there is no judicial input, or recourse, in this process. The
9 new law gives unfettered discretion to the prosecutor and injects an arbitrariness into the
10 determination which renders the new law unconstitutional.

11 POINTS AND AUTHORITIES

12 Penal Code section 1004 sets forth the grounds on which a defendant may bring a demurrer:

13 The defendant may demur to the accusatory pleading at any time prior to the entry of
14 a plea, when it appears upon the face thereof either:

- 15 1. If an indictment, that the grand jury by which it was found had no legal
16 authority to inquire into the offense charged, or, if an information or
complaint that the court has no jurisdiction of the offense charged
therein
- 17 2. That it does not substantially conform to the provisions of Sections 950
18 and 952, and also Section 951 in case of an indictment or information;
- 19 3. That more than one offense is charged, except as provided in Section
20 954;
- 21 4. That the facts stated do not constitute a public offense;
- 22 5. That it contains matter which, if true, would constitute a legal
justification or excuse of the offense charges, or other legal bar to the
prosecution.

23 A demurrer may be used as a vehicle for constitutional and other attacks on the sufficiency
24 of an accusatory pleading. (*Velasco v Municipal Court* (1983) 147 C.A.3d 340, 195 Cal. Rptr. 108;
25 *People v Jackson* (1985) 171 C.A.3d 609, 217 Cal. Rptr. 540.)

26 _____
27 (d)(4).
28

1 **A. A DEMURRER IS A CHALLENGE TO THE JURISDICTION OF THE COURT**
2 **OVER THE OFFENSE CHARGED; SINCE THE NEW LAW AND INITIATIVE**
3 **ARE UNCONSTITUTIONAL THE REMEDY FOR LACK OF JURISDICTION IN**
4 **THIS CASE IS DISMISSAL**

5 When the Court has no jurisdiction over the offense charged, the Court is to sustain the
6 demurrer since jurisdiction cannot be remedied. (Penal Code section 1007). Defendant was under
7 the age of eighteen when the alleged crime occurred. WIC section 602 mandates that "...any person
8 who is under the age of 18 years when he violates any law of this state...is within the jurisdiction
9 of the juvenile court..." The Initiative added, or amended, many provisions of the Welfare and
10 Institutions Code authorizing direct filing of juvenile cases in a court of criminal jurisdiction. This
11 complaint was filed pursuant to the new law. The new law and the Initiative are unconstitutional.
12 Therefore this court lacks jurisdiction over the defendant.

13 **B. METHODS OF TRANSFER FROM JUVENILE COURT TO ADULT COURT**

14 Every state has its own law that allows for transfer of juveniles to adult court. These statutes
15 are often referred to as "transfer" or "waiver" laws. Prosecution in adult court occurs in one, or a
16 combination of three, ways: judicial waiver, legislative waiver or prosecutorial waiver. The
17 Initiative changed California's traditional judicial waiver system to a legislative and prosecutorial
18 waiver method. Only the new law is challenged by this demurrer.

19 Prosecutorial waiver occurs when a prosecutor exercises an option to file charges in adult
20 court instead of juvenile court. This waiver method is the most controversial since the accused is
21 not afforded a hearing on the suitability of the transfer, and discretion rests entirely with the
22 prosecutor with little statutory guidance. Critics have asserted that prosecutorial waiver is a process
23 that "...invites arbitrary, capricious transfer decision on the part of the prosecutor." (See Charles J.
24 Aaron & Michelle S.C. Hurley, *Juvenile Justice at the Crossroads*, CHAMPION, Jun. 1998, at 63).

25 **C. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE**
26 **UNIFORMITY OF LAWS CLAUSE OF THE CALIFORNIA CONSTITUTIONS**

27 The Utah Supreme Court in *State v. Mohi* (Utah 1995) 901 P.2d 991, examined a
28 discretionary direct-file system virtually identical to the new law. The scheme in Utah, like the new

1 law, specified that juveniles who were alleged to have committed certain offenses were eligible to
2 have their cases filed directly in adult court without judicial input. Instead, the determination was
3 solely in the hands of the prosecutor. The Utah Supreme Court struck down Utah's prosecutorial
4 waiver statute, ruling its provisions violated the uniform operation of laws provision of the Utah
5 State Constitution. (Utah Const. Art. I, 24). California has an identical constitutional provision.
6 (Cal. Const. Art. IV, 16(a) ["All laws of a general nature have uniform operation."]).

7 The Utah Supreme Court focussed on the disparate treatment prosecutorial waiver afforded
8 identically situated minors. The Court reasoned that two classes of minors, charged with the same
9 crime, could be treated differently at the discretion of the prosecutor. The Court found:

10 By the very terms of the statute, they are accused of the same offenses and fall into
11 the same age range. There is absolutely nothing in the statute to identify the juveniles
12 to be tried as adults; it describes no distinctive characteristics to set them apart from
13 juveniles in the other statutory class who remain in juvenile jurisdiction... (T)he
14 statute permits two identically situated juveniles, even co-conspirators or co-
participants in the same crime, to face radically different penalties and consequences
without any statutory guidelines for distinguishing between them. This amounts to
unequal treatment... (*State v. Mohi, supra* 901 P.2d 991, 998 [emphasis added]).

15 The Court found there was no legitimate basis for treating the two classes differently.
16 Specifically, *Mohi* held that the Utah legislature's goal of reducing juvenile crime and the means
17 it chose to achieve this goal were not reasonably related because there was no guarantee that the
18 goal would be achieved by giving the prosecutor unguided discretion. At the heart of the decision
19 was the conclusion that the prosecutor's discretion was arbitrary and standardless since there were
20 no guidelines governing the prosecutor's discretion. The Court emphasized the risks of uneven
21 treatment posed by prosecutorial waiver:

22 The scope for prosecutor stereotypes, prejudices, and biases of all kinds is simply too
23 great. If it is the legislature's determination to have all members of a certain group
24 of violent juveniles... tried as adults, it is free to do so. However, the legislature may
25 not create a scheme which permits the random and unsupervised separation of all such
violent juveniles into a relatively privileged group on the one hand and a relatively
burdened group on the other. (*Id* at 1003 [emphasis added]).

26 Clearly, the Utah Supreme Court feared the prosecutorial waiver provision would lead to
27 inappropriate grouping of identically situated minors into privileged and burdened groups which
28

1 could lead to consequences based on racial or ethnic bias. This fear is grounded in fact as supported
2 by the several studies.

3 An analysis of the Florida prosecutorial waiver law revealed that minors transferred via
4 prosecutorial waiver are seldom the serious and chronic offenders for whom prosecution and
5 punishment in criminal court are arguably justified. (*Bishop and Frazier, Transfer of Juveniles to*
6 *Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, (1991) 5 *Notre Dame Journal*
7 *of Law, Ethics and Public Policy* 2).

8 Further, a study by the Justice Policy Institute confirmed the large discrepancies in
9 confinement of minorities across the nation. A study in California, which utilized data collected
10 from the Los Angeles County Probation Department research Division, Los Angeles County District
11 Attorney's Office, California Youth Authority Research Division, California Department of Justice
12 Criminal Justice Statistics Center, Department of Finance Demographic research Division and the
13 United States Bureau of the Census examined two sets of three year periods on arrests (1996-1998)
14 and sentencing (1997-1999). The study examined juvenile arrests and juveniles transferred to adult
15 court. The purpose of the analysis was to test the hypothesis that minority youth were
16 disproportionately transferred to adult court and sentenced to incarceration compared to white
17 youths in similar circumstances.

18 The study's findings were that in 1996 whites comprised 25%, Latinos 51%, African-
19 Americans 13% and Asians and other races 11% of Los Angeles County's population between the
20 ages of 10 and 17. However, the data revealed that the non-white youths accounted for 95% of the
21 cases where minors were found "unfit" and transferred to adult court. In fact, Latino youths were
22 6 times more likely, African-American youth are 12 times more likely, and Asian/other youth 3
23 times more likely than white youths to be found unfit for juvenile court and transferred to adult
24 court in Los Angeles County. (*Juvenile Justice Policy Institute: "The Color of Justice: An Analysis*
25 *of Juvenile Adult Court Transfers in California"* by Mike Males, Ph.D and Dan Macallair, MPA).
26 Nothing in the prosecutorial waiver provision of the Initiative protects against disparate treatment
27 among similarly situated minors.

1 Both studies clearly confirm the historically disparate handling of non-white youths in the
2 juvenile justice system. Unfettered prosecutorial discretion can only compound this problem. It
3 is reasonable to assume this trend will continue and result in more minority youth being directly
4 filed in adult court.

5 Moreover, there is no truth to the assertion that changing transfer laws will result in longer
6 sentences, deter crime or reduce recidivism rates. According to a May, 1995 report by the federal
7 Office of Juvenile Justice and Delinquency Prevention, the following observation with respect to
8 the efficacy of transferring minors to adult court:

9 Although there have been few reliable studies on the impact of transfer and the studies
10 describe behavior that predates recent large increases in violent juvenile crime, the most
11 common findings of these studies indicate that transferring serious juvenile offenders to the
12 criminal justice system does not appreciably increase the certainty or severity of sanctions.
13 While transfer may increase the length of confinement for a minority of the most serious
14 offenders, the majority of transferred juveniles receive sentences that are comparable to
15 sanctions already available in the juvenile justice system. More importantly, there is no
16 evidence that young offenders handled in criminal court are less likely to recidivate than
17 those remaining in juvenile court.

18 For almost all types of offenses, juveniles committed to the Youth Authority by the juvenile
19 court historically have been incarcerated for longer periods of time than juveniles who receive adult
20 sentences and are sentenced to the Department of Corrections by a criminal court. (Legislative
21 Analyst's Office, Analysis of the 1996-1997 Budget Bill (February, 1996). The Legislative
22 Analyst's Office attribute the lengthier juvenile incarceration periods to the indeterminate
23 sentencing system of the juvenile court. (*Id.*)

24 During hearings in 1995, some experts testified before California Task Force⁴ that there is
25 no evidence that any other waiver system was more effective than the judicial waiver system used
26 in California. Judge Frank Orlando, Director of the Center for the Study of Youth Policy in Florida,
27 stated:

28 What does not work is mass transfers into the adult system using the concept and the
perception that sending juveniles into the adult system is going to have a deterring effect on
youth crime. That has not worked in Florida. In addition, the recent research that was done

⁴ The Task Force, created in 1994 by AB 2428 (Epple).

1 in Minnesota demonstrates that the kids they send to prison have higher rates of re-offending.
2 The (Florida) kids we send to prison have much higher rates of re-offending. (Judge Frank
3 Orlando (Ret.), Director, Center for the Study of Youth Policy, Ft. Lauderdale, Florida, in
4 remarks addressing the Task Force on November 16, 1995).

5 Further, in "The Significance of Place in Bringing Juveniles into Criminal Court," Simon I.
6 Singer raises concerns about the fairness of transfer proceedings based on geography. Through
7 careful analysis of Federal Bureau of Investigations data he shows a phenomenally strong
8 relationship between the size of a place and the percentage of juveniles brought to juvenile court..
9 This finding is supported by similar previous finding in statewide studies. He argues that these laws
10 are likely to exacerbate the differences between treatment of youths in urban and rural areas.

11 **D. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE EQUAL
12 PROTECTION CLAUSE OF THE UNITED STATES AND CALIFORNIA
13 CONSTITUTIONS**

14 The fourteenth amendment of the United States Constitution provides in pertinent part that:
15 "No state shall deny to any person within its jurisdiction the equal protection of the laws." (U.S.
16 Const. amend. XIV, sec. 1). The California Constitution guarantees: "In criminal cases the rights
17 of a defendant to equal protection of the laws..." (Cal. Const. art. 1, sec. 24).

18 Discrimination is not inherently evil or illegal. However, a law is possibly violative of equal
19 protection when it sets apart a group of people, based on race or other immutable conditions, for
20 prosecution, or increased punishment. The equal protection clause of the United States Constitution
21 is an evolving doctrine. Currently, state action challenged on equal protection grounds, is subject
22 to three levels of scrutiny depending upon the nature of the state action. First, under the rational
23 basis test, state action must bear a rational relationship to a legitimate state interest. Second, under
24 the intermediate scrutiny test, state action must bear a substantial relationship to an important state
25 interest. Third, under strict scrutiny, state action must further a compelling state interest that cannot
26 be achieved by less intrusive means. (*San Antonio Indp. Sch. Dist. V. Rodriguez* (1973) 411 U.S.
27 1; *Craig v. Boren* (1976) 429 U.S. 190; *Roe v. Wade* (1973) 410 U.S. 113).

28 Initially, equal protection challenges involved a two-tier scrutiny. The top tier of strict
scrutiny review was reserved for statutes that created a distinction based upon a 'clearly' suspect

1 criteria, or when the law infringed upon personal rights or interests deemed to be fundamental.
2 These laws pass constitutional muster only if they are necessary to protect a compelling
3 governmental interest. (*Dunn v. Blumstein* (1972) 405 U.S. 330, 342, 92 S. Ct. 995 (quoting *Shapiro*
4 *v. Thompson* (1969) 394 U.S. 618, 634, 89 S. Ct. 1322)). Suspect classifications are based on race,
5 (*McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283) national origin, (*Graham v. Richardson*
6 (1971) 403 U.S. 184, 91 S. Ct. 1848) and ancestry (*Oyama v. California* (1948) 332 U.S. 633, 68
7 S. Ct. 269). Fundamental rights or interests are those expressly or implicitly guaranteed by the
8 United States Constitution. (*San Antonio School Dist. V. Rodriguez* (1973) 411 U.S. 1, 93 S. Ct.
9 1278).

10 The second tier was triggered when a law effected neither a suspect class nor a fundamental
11 right. This less demanding scrutiny is referred to as the "rational basis test." Under this test a law
12 is unconstitutional only if the means chosen by the legislative body are "wholly irrelevant to the
13 achievement of the State's objective." (*McGowan v. Maryland* (1961) 366 U.S. 420, 81 S. Ct.
14 1101).

15 Several decades ago the Supreme Court began responding to the limitations of the traditional
16 approach and developed an intermediate test. The Court reasoned that a legislative classification
17 "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and
18 substantial relation to the object of the legislation, so that all persons similarly circumstanced shall
19 be treated alike." (*Reed v. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251). This fair and substantial
20 relation test, or intermediate scrutiny test, appears to trigger a sharper focus of constitutional
21 scrutiny and applies to two general categories. First are laws which impact upon "sensitive,
22 although not necessarily suspect criteria of classification." (L. Tribe, *American Constitutional Law*
23 section 16-3, p. 996 (1978)). The second category, which is pertinent to this motion, relates to laws
24 that affect "important" personal interest or work a "significant interference with liberty or a denial
25 of a benefit vital to the individual." (*Id* at 1090).

26 A law that affects significant personal rights merits scrutiny consistent with the importance
27 of the right involved. A judicial inquiry should pursue the actual purpose of a statute and seriously
28

1 examine the means chosen to effectuate that purpose. A loose fit between the legislative ends and
2 the means chosen to accomplish those goals is intolerable if the means leave a significant measure
3 of similarly situated person unaffected by the enactment, or conversely, which includes individuals
4 within the state's purview who are not afflicted with the problem the statute seeks to fix. (*Maryland*
5 *v. Waldron* (1981) 289 Md. 683, 713, 426 A.2d 929).

6 California equal protection jurisprudence also grew out of a recognition of the inadequacy
7 of the two federal standards. Justice Mosk observed, "[t]he vice of the binary theory...is that it
8 applies either a standard that is virtually always met (the rational relationship test) or one that is
9 almost never satisfied (the strict scrutiny test). Once the test is selected, the result of its application
10 is foreordained..." (*Hays v. Wood* (1979) 25 Cal.3d 772, 796 (conc. Opn. Of Mosk, J.)). California
11 adopted "means scrutiny" as the standard of judicial review applicable under the state equal
12 protection provisions. (*Brown v. Merlo* (1973) 8 Cal.3d 855; *Hays v. Wood, supra*). The Court held
13 that the constitution does "...not tolerate classifications which are so grossly overinclusive as to defy
14 notions of fairness or reasonableness." (*Brown v. Merlo, supra* at p. 877). The Court reached the
15 same conclusion as to underinclusive classification. (*Id.* at p. 877, fn. 17). These holding were
16 based on state Constitution construction and were therefore not constrained by more deferential
17 federal Constitution standards. (*Id.* at 865, fn 7). The holding in *Brown v. Merlo* instructed the
18 courts to scrutinize the means the lawmaker chose to advance its purpose. Therefore, our state
19 Constitution insists on greater precision, and does so by requiring courts to scrutinize the means
20 chosen to advance the purpose of the legislation.

21 The purpose of enacting the new law was to combat and reduce juvenile crime. It clearly
22 allows similarly situated juveniles to be classified (thereby treated) differently. The new law
23 significantly interferes with personal liberty and denial of benefits, namely the statutory right to
24 juvenile treatment. Therefore, the new law is subject to the federal intermediate scrutiny test for
25 constitutionality. The test is then whether there exists a fair and substantial relationship between
26 the purported goal of the new law, and the means set forth to accomplish that goal.

27 The empirical data cited above clearly shows the goal of reducing crime will not be
28

1 accomplished by prosecuting juveniles in adult court. In fact, the statistics show that prosecuting
2 juveniles as adults has the opposite effect in that they reoffend more often, sooner and more
3 violently.

4 Using the same analysis, the new law still fails under the federal rational scrutiny test since
5 there is no reasonable relationship between prosecuting juveniles as adults and reducing juvenile
6 crime. The new law is unconstitutional as it violates the equal protection clause of the United States
7 Constitution.

8 The new law also fails under the state means scrutiny test since this court is required to
9 scrutinize the means chosen to advance the purpose of the legislation. The means chosen do not
10 advance the purpose of the legislation and therefore the new law is unconstitutional under the
11 California Constitution.

12 Moreover, the use of gender, race, religion or other improper characteristics in making
13 jurisdictional decisions clearly will create a significantly greater vulnerability when reviewing a
14 statute's legality. (*Lamb v. Brown* (10th Cir. 1972) 456 F.2d 18).] Again, the data overwhelmingly
15 shows that more minority juveniles are transferred to adult courts in California than white juveniles.
16 This disproportionate treatment, even if unintentional, cannot be ignored. The new law would
17 continue this trend and create an illegal classification of minorities who will be charged as adults.
18 The new law is unconstitutional as it violates the equal protection clause of the United States
19 Constitution by creating a class based on race and treating that class more harsh than other similarly
20 situated people.

21 **E. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE**
22 **PROCESS CAUSE OF THE UNITED STATES AND CALIFORNIA**
23 **CONSTITUTIONS**

24 The due process clauses of the Fifth and Fourteenth Amendments to the United States
25 Constitution require that no person be deprived of life, liberty, or property without due process of
26 law.(U.S. Const. amends. V and XIV, sec. 1). The California Constitution guarantees: "In criminal
27 cases the rights of a defendant... to due process of law..." (Cal. Const. art. 1, sec. 24).

1 The first United States Supreme Court case to address due process, in the context of juvenile
2 court, was *Kent v. United States* (1966) 383 U.S. 541. This decision dramatically changed the
3 nature of the juvenile justice system. In *Kent*, the defendant was sixteen and accused of entering
4 the victim's apartment, taking her wallet and raping her. The defendant filed a motion for a hearing
5 regarding suitability of transfer in anticipation of the judge ordering him to adult court. No hearing
6 was held, the defendant was transferred and convicted in adult court. (*Id.*).

7 On appeal the United States Supreme Court held that due process required a juvenile be
8 afforded both a hearing regarding transfer to adult court and a statement of reasons for the juvenile
9 court judge's decision to transfer. (*Id.* at 557). In addition, the Court set forth factors to be
10 considered by juvenile judges in making transfer decisions.⁵ (*Id.* at 566-567).

11 Since then courts have struggled with the appropriate interpretation of the *Kent* decision. (See
12 e.g., *Woodard v. Wainright* (5th Cir. 1977) 556 F.2d 781, 783-784, cert. Denied). Narrowly
13 construed, the hearing requirement is derived from the Supreme Court's application of District of
14 Columbia statutory law and only articulate the minimal procedures to be followed at such a hearing.

15 However, a more liberal interpretation may be that federal due process requires that whenever a
16 minor is given a statutory right to juvenile status, that right cannot be stripped with out a hearing
17 as to amenability. (*State v. Angel C* (1998) 715 A.2d 652, fn 15). This broader view is further
18 supported by the language in *Kent*. The Court noted that juvenile court's latitude in determining
19 jurisdiction is not complete. There must be "...procedural regularity sufficient in the particular
20 circumstance to satisfy the basic requirements of due process and fairness, *as well as* compliance
21 with the statutory requirement of a 'full investigation'" The Supreme Court established that "basic
22 requirements of due process and fairness" protections are independent of any statutory scheme, and
23 are instead constitutional in nature. (*Kent, supra* at 553 [emphasis added]). Here, the Court clearly
24 states that basic due process requirements are separate and independent from any statutory right.

25
26 ⁵ Many states have incorporated the *Kent* factors into their juvenile codes, often verbatim.
27 (See Eric K. Kleig, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to*
28 *Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371 (1998))

1 The Court then underscores that since the petitioner, by statute, was "...entitled to certain procedures
2 and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile
3 Court. In these circumstances...we conclude that, as a condition to a valid waiver order, petitioner
4 was entitled to a hearing... We believe that this result is required by the statute read in the context
5 of constitutional principles relating to due process and the assistance of counsel" (*Kent, supra* at
6 557). It can be that the statutory right referred to in *Kent* is the right to juvenile jurisdiction, not
7 judicial waiver. Therefore, the new law would violate due process since there is a statutory right
8 to juvenile jurisdiction (WIC section 602) which can't be divested without a hearing as to
9 amenability.

10 Even if this Court embraces the more narrow view, the new law still violates due process.
11 The United States Supreme Court has held that the Fourteenth Amendment's guarantee against the
12 deprivation of liberty without due process of law is applicable in juvenile delinquency proceedings.
13 (*In re Gault* (1967) 387 U.S. 1, 13). The Court forewarned that the "Juvenile Court history has
14 again demonstrated that unbridled discretion, however, benevolently motivated, is frequently a poor
15 substitute for principle and procedures." (*Id.* at 18). Further, the Supreme Court held that the
16 determination to transfer a minor to adult court is a "critically important" action. (*Kent, supra* at
17 560). In explaining, the Court stated the decision was potentially as important to that minor as the
18 difference between five years confinement and a death sentence. (*Id.* at 557).

19 A statute (like the new law) that gives complete discretion to a prosecutor in determining
20 whether to file in juvenile or adult court, without guidelines, is facially invalid. This discretion
21 must be distinguished from traditional prosecutorial charging discretion. The new law provides that
22 prosecutors may file identical charges in either juvenile or adult court. It is not a "charging"
23 decision, but rather a jurisdictional one. This "critically important" determination requires
24 appropriate guidelines to ensure due process. The new law contains no such guidelines. Equally
25 disturbing is the fact that the new law does not require a prosecutor to use any discretion in this
26 critical decision making process. In other words, if a prosecutor filed for adult handling in all cases,
27 or in all cases involving weapons, without a specified statutory instruction to do so, the prosecutor
28

1 is violating due process by failing to exercise any discretion on a case-by-case basis. A judge whose
2 blanket detention decisions, made without exercising discretion, constituted a denial of due process.
3 (*In re William M.* (1970) 89 Cal.Rptr. 33). Therefore, a statute not mandating an exercise of
4 discretion, according to established guidelines, is facially unconstitutional.

5 The instant case illustrates this issue completely. Here, there are eight boys, of varying ages,
6 with vastly different delinquency backgrounds, that have different levels of culpability, who are all
7 being directly filed in adult court. Each minor is constitutionally entitled to separate consideration,
8 based on the statewide established guidelines, when making the critical decision to file in adult
9 court. The new law contains no guidelines and doesn't mandate any consideration. Counsel is not
10 making this argument to show the new law as applied to these minors is unconstitutional. This is
11 offered only to show that the constitutional violations associated with the new law are perfectly
12 depicted by the instant case.

13
14 **F. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE CRUEL
15 AND UNUSUAL PUNISHMENT CLAUSE OF THE UNITED STATES AND
16 CALIFORNIA CONSTITUTIONS**

17 The Eighth Amendment to the United States Constitution mandates no cruel and unusual
18 punishment shall be inflicted (U.S. Const. amend VII). The California Constitution guarantees in
19 criminal cases a defendant shall not suffer the imposition of cruel and unusual punishment.(Cal.
20 Const. art. 1, sec. 24).

21 Whether a particular punishment violates the Eighth Amendment depends on whether it
22 constitutes one of "those modes or acts of punishment...considered cruel and unusual at the time that
23 the Bill of Rights was adopted," (*Frank v. Wainwright*, (1986) 477 U.S. 399, 404) or is contrary to
24 the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*
25 (1958) 356 U.S. 86, 101). In determining whether a punishment violates evolving standards of
26 decency, the Court should look to the conceptions of modern American society as reflected by
27 reliable evidence. (*Coker v. Georgia*) (1977) 433 U.S. 584, 592). In *Coker*, the defendant was
28

1 sentenced to death for committing aggravated rape. On certiorari, the United States Supreme Court
2 reversed the death sentence. Seven members of the Court agreed the sentence should be reversed.
3 Four of the Justices expressed the view that the Eighth Amendment of the United States Constitution
4 barred punishments that were excessive in relation to the crime committed. (*Id.* At 584-585).

5 A variety of conditions within the juvenile justice system have been held to violate the United
6 States Eighth Amendment, including endemic brutality and physical abuse of juveniles committed
7 by an institution's staff, and also by other juveniles with tacit approval by the staff and insufficient
8 staffing in situations that deny juveniles medical and psychiatric needs. (*Morales v. Turman* (E.D.
9 Tex. 1974) 383 F. Supp. 53; rev'd (5th Cir. 1976) 535 F.2d 864; (1977) 430 U.S. 322).

10 Section 34 of the Initiative amends WIC section 1732.6 by adding subd. (b), which mandates
11 that any minor filed directly in adult court under the new law, and convicted by the trier of fact,
12 shall not be committed to the Youth Authority. WIC section 1732.6, subd. (c) provides that no
13 person under the age of sixteen shall be housed in any facility under the jurisdiction of the
14 Department of Corrections. Therefore, the new law requires minors, age sixteen and above, to serve
15 their time in state prison. At this time the Department of Corrections is distributing juveniles (Who
16 were previously sentenced pursuant to WIC section 1732.6, subd. (c)) among the twenty-four prison
17 facilities including such high-security prisons as Pelican Bay and Corcoran.

18 Life in adult prisons is certainly more violent than life in juvenile detention programs.
19 Juveniles in adult prisons are more likely to suffer personal violent victimization by staff and other
20 prisoners. Further, research suggests that juveniles who are placed in adult prisons may become
21 more violent in response to their violent surroundings.⁶

22 It is a violation of the Eighth Amendment prohibition against cruel and unusual punishment
23 to place sixteen year old minors in prison with adult offenders. There is overwhelming evidence
24 to show that they will be routinely targeted for sexual and physical assault. They have neither the
25

26 ⁶ See Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and*
27 *You Are Out!*, 75 OR. L. REV. 1223 (1996) (citing a 1989 study reported that in adult prisons, sexual
28 assault was five times more likely, beating by staff was nearly twice as likely, and attacks with
weapons were approximately fifty-five percent more common than in juvenile centers).

1 physical stature, nor mental maturity, to protect themselves. This type of actual punishment is
2 excessive compared to any crime they might commit. Additionally, it offends the standards of
3 modern decency to sanction this kind of punishment.

4
5 **G. THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE**
6 **SINGLE SUBJECT RULE OF THE CALIFORNIA CONSTITUTION**

7 Article 2, sec. 8(d) of the California Constitution mandates that an initiative measure
8 embracing more than one subject may not be submitted to the electors or have any effect. Courts
9 have determined that this requires that all of an initiative's parts be "reasonably germane" to each
10 other, "and to the general purpose or object of the initiative." (*Senate of the State of California v.*
11 *Jones* (1999) 21 Cal.4th 1142, 1157, quoting *Legislature v. Eu* (1991) 54 Cal.3d 492, 512). The
12 objective for this constitutional limitation on the initiative process is to minimize the risk of
13 confusion and deception of the voters. (*Amador Valley Joint Union High Sch. Dist. V. State Bd. Of*
14 *Equalization* (1978) 22 Cal.3d 208, 231).

15 In *Jones*, the California Supreme Court reviewed pre-ballot Proposition 24, referred to as
16 the "Let the Voters Decide Act of 2000." That initiative proposed to reduce and limit the annual
17 salary of all Members of the Legislature, to limit the travel and living expenses of the same
18 Members, provide for forfeiture of pay, and reimbursement, if the Legislature failed to pass a budget
19 by a certain date and transfer of authority to reapportion voting districts from the legislature to the
20 Supreme Court. (*Id* at 1146-1149). The Court, in deciding this initiative violated the single-subject
21 rule, concluded that the portion of Proposition 24 that purported to transfer the power of
22 reapportionment from the legislative to the judiciary branch was in itself a fundamental and far-
23 reaching change in the law and clearly represents a separate subject within the meaning of the
24 single-subject rule. (*Id* at 1167-1168).

25 Where an initiative violates the single-subject rule of the California Constitution, severance
26 is not an available remedy. (*Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1157,
27 quoting *California Trial Lawyers Association v. Eu* (1988) 200 Cal.App.3d 351, 361-362).

1 The Initiative violates a core provision of the California Constitution designed to ensure the
2 integrity of the electoral process. The Initiative is arguably the largest crime-related initiative in
3 California history. It's provisions address at least three distinct, unrelated subjects: (1) the juvenile
4 justice system, (2) criminal gang activity; and (3) changes to Propositions 8 ("victims' Bill of
5 Rights" initiative) and 184 ("Three Strikes" initiative) that affect sentencing in criminal court for
6 offenses unrelated to juvenile or crime activity. The question is not whether these provisions fit
7 under some broad purpose, but rather whether they relate to a main purpose and are reasonably
8 germane to that purpose and each other.

9 It appears the Initiative has no main purpose. The official title, as prepared by the Attorney
10 General is: "Juvenile Crime. Initiative Statute." However, many of the provision address gang
11 activity, not limited to juvenile gang activity, such as increasing punishment for gang-related crimes,
12 creates a crime of recruiting for gang activities, requires registration for gang activity and authorizes
13 wiretapping for gang activities. None of these provisions' "main purpose" are related solely to
14 juvenile crime. The Initiative also designates additional crimes as violent and serious felonies which
15 relate to adult sentencing, not juvenile court dispositions. Since there is no common object among
16 the various provisions, then they certainly cannot be characterized as so related and interdependent
17 as to constitute a single scheme.

18 Furthermore, the provisions, as they relate to juvenile law, address a dizzying array of
19 subjects including directly filing cases in adult court, reporting criminal history to the Department
20 of Justice, detention of minors arrested for certain offenses, conditions of release pending the filing
21 of a petition, amendments to informal supervision, arrest warrants, expanding accessibility of the
22 public to juvenile court hearings, changing presumptions in a fitness proceeding, changing the nature
23 of juvenile probation violation hearings, precluding sealing of records for life for certain offenses,
24 adding a deferred entry of judgment law, disclosure of a juvenile court true finding, to the public
25 for certain felonies, disclosure of the name of any minor arrested for a serious felony, and
26 disallowing commitments to the Youth Authority for minors directly filed in adult court. None of
27 these provisions are germane to each other. For example, the deferred entry of judgment provision
28

1 (See Initiative, Sec. 29) establishes a new law which allows certain minors to avoid a criminal
2 record by complying with certain conditions of probation. By contrast certain provisions allow law
3 enforcement to release the name of certain minors following their arrest (See Initiative, Sec. 31) and
4 others prohibit the sealing of records for life. (See Initiative, Sec. 28). The Initiative clearly tries
5 to overhaul both the juvenile and criminal justice systems simultaneously.

6 Most apparent is the provision transferring the juvenile court waivers from the court to
7 prosecutors. (See Initiative, Sec. 26). This alone is a fundamental and far-reaching change in the
8 law as to represent a single-subject within the meaning of Article 2, section 8 of the California
9 Constitution. This is exactly the same situation the Supreme Court faced in *Jones, supra*. Namely,
10 a reallocation of power traditionally embodied in one branch of the government to another section.

11 **H. THE INITIATIVE IS ILLEGAL IN THAT IT VIOLATES THE ELECTIONS CODE**

12 The Initiative violates the Elections Code and other laws and regulations governing the
13 electoral process by containing text that is not consistent with text circulated in the petitions to
14 voters for signatures in order to qualify the measure for the ballot in 1998. (Elections Code section
15 900-9015). Further, it inconspicuously amended provisions of prior ballot initiatives without
16 making it clear to voters.

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CONCLUSION

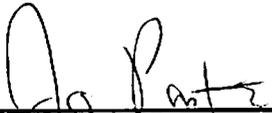
1
2 respectfully requests that the demurrer be sustained and that the complaint be
3 dismissed.

4
5 Dated: 8/14/06

6 Respectfully submitted,

7 STEVEN J. CARROLL
8 Public Defender

9
10 by:

11 
12 JO PASTORE
13 Deputy Public Defender

14 
15 STEWART DADMUN
16 Deputy Public Defender

17 Attorneys for Defendant
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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

CASE NO.:
SECTION:
JUDGE: ORLANDO A. PRESCOTT

IN THE INTEREST OF:

████████████████████
A Child.

_____ /

MOTION TO SUPPRESS PHYSICAL EVIDENCE

THE RESPONDENT, pursuant to Fla.R.Juv.P.8.085(a)(3), moves the Court to suppress all evidence seized as a result of an unlawful search and seizure. The evidence to be suppressed is: Suspect Baggies of Cocaine, Suspect Baggies of Marijuana. The following grounds are asserted in support of this motion:

FACTS

On Tuesday, June 3, 2014, Officer ██████████ observed Mr. G “sitting on the Bus bench just south of NE 135ST on Biscayne Blvd.” Arrest Affidavit at 1. Officer ██████████ approached Mr. G because he supposedly looked like an individual suspected of armed robbery. *See id.* The armed robbery suspect was a 21 year-old Nicaraguan man, who is 5’10” tall with medium length “Afro Natural” hair and a full beard. *See* Mugshot Profile. An internal North Miami Police arrest warrant had been issued for this suspect, and included his picture, name, race, gender, DOB, as well as a prominent note that he has “██████████ tattooed down his forearms.” P.C. To Arrest Poster. Mr. G is a 17 year-old child, who is 5’5” tall with short length, “WAV” style hair, and no tattoos anywhere on his body, including on his forearms. Arrest Affidavit at 1.

Upon passing Mr. G as he sat at a bus stop, Officer ██████████ turned his car around to approach Mr. G. At that point, Mr. G began walking away. Officer ██████████ “caught up with” Mr. G, with his lights activated. *Id.* He then approached Mr. G, and told him that he needed to talk to him. As a result of this stop, Mr. G put his hands in the air, at which point Officer ██████████ allegedly observed the “handle of a knife” in Mr. G’s “left pant pocket,” and “attempted to . . . reach[] the object.” *Id.* Officer ██████████ then conducted a pat down for “officer safety”, in which he recovered alleged marijuana and alleged cocaine from Mr. G. *Id.* at 2. In deposition, Officer ██████████ cites his suspicion that Mr. G was a wanted robbery suspect, and the fact that Mr. G walked down the sidewalk after seeing the officer, as the reasons for seizing Mr. G.

As a result of this stop, Mr. G was charged by Petition for Delinquency with one count of Possession of Cocaine, in violation of Florida Statute 893.13(6)(a), and one count of Possession of Cannabis Under 20 Grams, in violation of Florida Statute 893.13(6)(b).

ARGUMENT

I. OFFICER [REDACTED] ENGAGED IN A FOURTH AMENDMENT SEIZURE REQUIRING REASONABLE SUSPICION OR PROBABLE CAUSE.

Officer [REDACTED] required reasonable, articulable suspicion of criminal activity before stopping Mr. G from continuing to walk down the sidewalk. Pursuant to the Fourth Amendment of the United States Constitution, all warrantless seizures are presumptively unreasonable and invalid. *See, e.g. Katz v. United States*, 389 U.S. 347 (1967); *Hornblower v. State*, 351 So.2d 716 (Fla. 1977). Therefore, when an individual is seized without a warrant, the State has the burden to produce evidence that the detaining officer had, at a bare minimum, a “reasonable and articulable suspicion” to detain the accused. *See Terry v. Ohio*, 392 U.S. 1, 16 (1968); *D’Angostino v. State*, 310 So.2d 12 (Fla. 1975). A person is seized if, under the circumstances, a reasonable person would conclude that she is not free to end the encounter and depart. *See, e.g. Popple v. State*, 626, So. 2d 185, 188 (Fla. 1993). A seizure differs from “a consensual encounter,” which is a situation where “a citizen may either voluntarily comply with a police officer's requests or choose to ignore them.” *Id* at 186 (Fla. 1993). Specifically, a consensual encounter “becomes nonconsensual when the officer prevents the citizen from exercising his right to walk away.” *Nealy v. State*, 652 So. 2d 1175, 1176 (Fla. 2d DCA 1995).

In the instant case, Mr. G’s decision to walk away from the bus stop upon seeing the police officer, Officer [REDACTED] pursuit of Mr. G in his marked police car with his lights engaged, and his subsequent command to Mr. G that he needed to talk with the officer, make clear that the stop and search of Mr. G was not a consensual encounter, but rather an investigatory stop.

II. OFFICER [REDACTED] DID NOT HAVE SUFFICIENT, REASONABLE SUSPICION TO SEIZE MR. G

The reasons articulated by Officer [REDACTED] for stopping Mr. G—that the child walked away from the bus stop, and that Officer [REDACTED] believed the child may have been the subject of a “P.C. to Arrest” poster—do not constitute reasonable, articulable suspicion warranting an investigatory stop of the Respondent.

First, the Officer cannot articulate sufficient similarities between the subject of the P.C. to Arrest poster and Mr. G, for the poster to constitute reasonable suspicion. When probable cause to arrest a specific individual exists, Florida law is clear that “The warrant supplies the officers with probable cause to arrest the person it names and describes, not a license to duck the reasonable suspicion requirement and stop someone they only have a subjective hunch is that person.” *Rios v. State*, 975 So.2d 488, 491 (Fla. 2d DCA 2007) (citing to *United States v. Hudson*, 405 F.3d 425, 439 n. 9 (6th Cir.2005); *Dennis v. State*, 927 So.2d 173, 175 (Fla. 2d DCA 2006)). For this reason, in a case where an officer’s reasonable suspicion is based on a physical resemblance to the subject of the arrest warrant, the officer must present facts “beyond [the arrestee’s] race, gender, hairstyle,” etc. *Dennis*, 927 So. 2d at 175. “[S]imilarities,” such as *some* shared physical characteristics “raise [] a mere ‘hunch’ inadequate to justify an investigatory stop.” *Id* (internal citations omitted). Florida district courts have repeatedly emphasized that a “factual finding” that the arrestee and subject of an arrest warrant “bear a resemblance to each other” is not “sufficient to support an investigatory stop on an arrest warrant.” *Id* (internal quotations omitted) (citing to *Cillo v. State*, 849 So.2d 353 (Fla. 2d DCA 2003)). In deciding whether the arrestee and subject of an arrest warrant share a sufficiently similar physical appearance, district courts look to the “booking photograph and information used by the officers,” as well as if the “similarities that the officers observed in these two men were characteristics that would have been shared by a significant number of men in that neighborhood.” *Id*. Courts have found differences in hair, age, and height to be instructive, especially because with arrest warrants, “these were not patrol officers deciding to stop a man based on a BOLO for a recent crime.” *Id*. at 176. Specifically, in *Dennis*, the District Court found a six inch difference in height to be a crucial fact in deciding officers did not have reasonable suspicion to initiate an investigatory stop of the Defendant based on an arrest warrant. *Id*.

In the instant case, Officer _____ articulation of why he believed Mr. G was the subject of a P.C. to Arrest poster cannot even rise to the level of a hunch. Specifically, Mr. G has physical characteristics that dramatically differ from that of the arrest warrant subject. Mr. G is 5 inches shorter, 4 years younger, and has a different length and style of hair. Most critically, Mr. G was wearing a tank top on the day he was arrested and has no tattoos on his forearms. The differences between Mr. G and the armed robbery suspect rise above and beyond the differences that Florida courts have found to be sufficient to constitute a lack of reasonable suspicion based on an arrest warrant.

Finally, Mr. Gs decision to walk away from the bus stop upon seeing the officer cannot constitute reasonable suspicion to conduct an investigatory stop. Flight alone is insufficient to provide reasonable suspicion. *Parker v. State*, 18 So. 3d 555, 558 (Fla. 1st DCA 2008). While the Court in *Parker* makes clear that flight, in conjunction with other factors, could provide a possible grounds for reasonable suspicion, the only other factor cited by the officer in this case carries no weight. *Id*. Officer _____ once he

caught up with and observed Mr. G on the sidewalk up close, had a full opportunity to view that this child is significantly shorter than the man wanted for robbery, younger, and lacks the dispositive identifying tattoos on his arm. At the point Officer _____ saw Mr. G up close, any possibility of having a suspicion based on a P.C. to Arrest poster completely dissipated. There are therefore no other factors in conjunction with Mr. G's "flight" from the officer to provide the reasonable, articulable suspicion required by law.

CONCLUSION

The evidence in this case was therefore obtained as a result of an unlawful and warrantless search and seizure in violation of the Respondent's rights guaranteed by the Fourth and the Fourteenth Amendments to the United States Constitution, Article I, Section 12, of the Florida Constitution (1968) and an unlawful "stop and frisk" of the Respondent in violation of Section 901.151, Florida Statutes (1995). Any evidence obtained as a result of this unlawful, warrantless "stop and frisk" must be suppressed under the "Fruit of the Poisonous Tree" doctrine, *Wong Sun v. United States*, 371 U.S. 471 (1963).

WHEREFORE, the Respondent requests this Court to enter an order suppressing the aforementioned evidence and any reference thereto during the trial of this cause.

I CERTIFY that a copy of this Motion to Suppress Physical Evidence has been hand-delivered to and/or eServed upon the Office of the State Attorney, 3302 NW 27th Avenue, Miami, Florida 33142 on July 24, 2015.

Respectfully submitted,

Carlos J. Martinez
Public Defender
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305.638.6241
eService email:

/s/ Albert Cornish
Assistant Public Defender
Florida Bar No.: 0101663

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

CASE NO.:
SECTION:
JUDGE: ORLANDO A. PRESCOTT

IN THE INTEREST OF:



A Child.

_____ /

NOTICE OF HEARING

PLEASE TAKE NOTICE that on at , before the Honorable Orlando A. Prescott, in courtroom 2-5, at the Juvenile Detention Center, 3300 NW 27th Avenue, Miami, Florida 33142, the Respondent will call up for hearing **MOTION TO SUPPRESS PHYSICAL EVIDENCE**.

I CERTIFY that a copy of this Notice of Hearing has been hand-delivered to and/or eServed upon the Office of the State Attorney, 3302 NW 27th Avenue, Miami, Florida 33142 on July 24, 2015.

Respectfully submitted,

Carlos J. Martinez
Public Defender
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/s/ Albert Cornish
Assistant Public Defender
Florida Bar No.: 0101663

JTIP Unit XII: Holistic Juvenile Defense Advocacy

LESSON 41, Raising Race

SAMPLE PLEADINGS:

WHAT FOLLOWS IS A SERIES OF EXCERPTS FROM SEVERAL PLEADINGS FILED BY THE ILLINOIS OFFICE OF THE STATE APPELLATE DEFENDER. THESE EXCERPTS INCORPORATE EXPLICIT RACIAL ARGUMENTS IN A VARIETY OF CONTEXTS INCLUDING A CHALLENGE TO JUVENILE TRANSFER TO ADULT COURT, A CHALLENGE TO DNA COLLECTION, A CHALLENGE TO THE USE OF PRIOR ARRESTS AT SENTENCING, AND A REQUEST FOR REVERSAL AND REMAND FOR NEW TRIAL AFTER A JUDGE'S RACIAL REMARKS DURING TRIAL.

EXCLUDED JURISDICTION/AUTOMATIC TRANSFER CHALLENGE

Rather than ensuring fairness, automatic transfer statutes in general have been associated with increasing racial disparities in the criminal justice system, both nationally and in Illinois. Illinois Juvenile Justice Initiative, *Automatic Adult Prosecution of Children in Cook County, Illinois. 2010-2012*, 4, 7-9, 11-13 (April 2014). Indeed, a recent review of excluded jurisdiction prosecutions in Cook County reveals that of the 257 children subject to excluded jurisdiction between 2010 and 2012, 83 percent were African-American and 16 percent were Hispanic. *Automatic Adult Prosecution of Children in Cook County*, at 4, 12-13. One child was white. *Automatic Adult Prosecution of Children in Cook County*, at 4, 12. A transfer system involving an evidentiary hearing and judicial discretion could do nothing but improve these disparities.

DISCRETIONARY TRANSFER TO ADULT COURT

The NAACP opposed the transfer of youth to adult court in light of the highly disproportionate impact of transfer laws on youth of color, and the Council of Juvenile Correctional Administrators “strongly opposes the expansion of eligibility criteria for the waiver and transfer of youth into the adult criminal system [given that] [t]hese policies have resulted in the placement of hundreds of youths into adult penal facilities without adequate treatment services.” See Neelum Arya and Ian Augarten, *Critical Condition: African American Youth In The Justice System*, at 25, 37, citing NAACP Resolution “Opposition to Transfer of Youth to the Adult Criminal System”(available at: <http://www.campaignforyouthjustice.org/documents/AfricanAmericanBrief.pdf>) (last visited January 19, 2011)

* * *

The negative effects of transfer on communities of color is striking, given that African-American youth are far more likely to be transferred to adult criminal court

and receive harsher sentences than other youth. See, e.g., Michele Deitch, et. al., *From Time Out to Hard Time: Young Children in the Adult Criminal System*, Austin, TX: The University of Texas at Austin, LBJ School of Public Affairs, at 32-34 (2009) (available at: <http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.) (last visited Jan. 20, 2011).

CHALLENGE TO DNA COLLECTION

In addition to authorizing the collection of vast amounts of unnecessary information, Section 5-4-3 authorizes far greater uses of the profiles than necessary to serve the governmental purpose of resolving past and future crimes. Specifically, Section 5-4-3 authorizes the use of the data collected to create “a population statistics database,” 730 ILCS 5/5-4-3 (f)(iii). Section 5-4-3 does not define the term “population statistics database,” but a similar Ohio statute defines this type of database as one used “for determining the frequency of occurrence of characteristics in DNA records.” Ohio Rev. Code, Sec. 109.573(A)(3). The term also appears in a 1990 report from Congress’s Office of Technology Assessment which opined that “[a] population statistics database might someday yield information useful for additional investigative purposes” such as “narrow[ing] the field of potential suspects [by race],” but it noted such a use carries with it the risk of racial discrimination against individuals or groups. U. S. Congress, Office of Technology Assessment, *Genetic Witness: Forensic Uses of DNA Tests*, OTA-BA-438 (Washington, D.C.: U. S. Government Printing Office, July 1990), 120-21, http://govinfo.library.unt.edu/ota/Ota_2/DATA/1990/9021.PDF (last visited April 20, 2006).

At least equally as troubling, the creation of such a database raises the spectre of behavioral and phenotypic research on possible genetic links between race, gender, genetic-based behavioral disorders, or physical characteristics and certain types of criminal behavior. See Jonathan

Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. Med. & Ethics 209, 212 (2000); Green & Thomas, *DNA: Five Distinguishing Features for Policy Analysis*, *supra*, at 577, 584-85. “The existence of DNA repositories on convicted felons will eventually prove irresistible to behavioral geneticists who will seek to determine whether certain mutations that are correlated with behavioral problems are more prevalent than expected among such persons.” Michael Avery, *Landry v. Attorney General: DNA Databanks Hold a Mortgage on Privacy Rights*, 44 B.B.J. 18, 34 (2000) (citation and internal quotes omitted) (discussing government efforts aimed at studying biological links to criminal behavior). Furthermore, at least one commentator has noted that collection of any genetic information gives rise to concerns of eugenics, Gostin, *Health Information Privacy*, *supra*, at 491, a far from alarmist concern in light of government efforts to sterilize convicted felons in the not-so-distant past, *see Skinner v. Oklahoma*, 316 U.S. 535, 536-37, 62 S.Ct. 1110, 1111, 86 L.Ed. 1655, 1658 (1942).

Such a population statistics database is wholly unnecessary to serve the government’s primary interest in solving crimes by matching genetic profiles contained in the database to crime scene profiles. In addition, this provision also heightens the individual privacy interests at stake because it lacks an anonymity provision, 730 ILCS 5/5-4-3 (f) (iii), despite a Congressional requirement to that effect for states participating in the FBI’s national database, 42 USCS 14132 (b)(3)(D), (c) (West 2005). This failure to remove personally identifying information appears to be intentional, given that the subsection authorizing the use of the database for quality assurance purposes contains an anonymity requirement. *Compare* 730 ILCS 5/5-4-3(f)(iii) *with* 730 ILCS 5/5-4-3(f)(iv); *but see* 20 Ill. Adm. Code 1285.60 (b) (West 2005) (administrative code currently provides for anonymity when profiles used to create a population statistics database). These concerns regarding the potential for future misuse of such a population statistics database are substantial. “Thomas Jefferson once warned that ‘the time to guard against corruption and tyranny

is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.” *United States v. Kincade*, 379 F.3d 813, 844 (9th Cir. 2004) (Reinhardt, J., dissenting), quoting Thomas Jefferson, *Notes on the State of Virginia* 121 (William Peden ed., 1955).

CONSIDERING EVIDENCE OF PRIOR MERE ARRESTS AT SENTENCING

First, the practice of considering mere arrests or police contacts in delinquency proceedings has conflicted with the express terms of the current Juvenile Court Act since 1999, when the legislature expressly guaranteed minors “all the procedural rights of adults in criminal proceedings, unless specifically precluded by laws that enhance the protection of such minors.” 705 ILCS 405/5-101(3) (West 2008). Furthermore, the use of mere arrest evidence unnecessarily threatens the reliability and fairness of juvenile sentencing proceedings. Simply put, the mere fact of an arrest or a police contact is no more relevant or reliable simply because the person facing imprisonment is a child rather than an adult.

Of particular concern is the effect on poor and minority children, for whom the risk of unfair prejudice is especially acute. As a federal circuit court recently observed,

“officers in affluent neighborhoods may be very reluctant to arrest someone for behavior that would readily cause an officer in the proverbial ‘high crime’ neighborhood to make an arrest. A record of a prior arrest may, therefore, be as suggestive of a defendant’s demographics as his/her potential for recidivism or his/her past criminality.” *United States v. Berry*, 553 F.3d 273, 285 (3rd Cir. 2009).

While “[s]tudies have produced conflicting results as to whether offenders’ race or ethnicity influences decision making in the juvenile justice system, *** [t]he scholarly consensus *** is that there may be small effects of race throughout the process that have a cumulative effect on adjudicatory and dispositional outcomes, with the greatest effects occurring likely at the early stages (arrest, juvenile court intake, detention).” Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?* 10 Va. J. Soc.Pol’y & L. 231, 252 (2002). In Illinois, “African-American youth between the ages of 10 and 16 *** [in 2005] were arrested at a level that was more than 300 percent of their representation in the general youth population” and they were “six times more likely to be arrested than [] Caucasian youth.” Illinois Juvenile Justice Commission, Annual Report to the Governor and General Assembly for Calendar Years 2007 and 2008, p. 4, <http://www.dhs.state.il.us/OneNetLibrary/27897/documents/CHP/Reports/AnnualReports/IJJCAAnnualReport2007-2008.pdf> (last visited July 20, 2010).

The question of whether delinquency courts should be allowed to rely on evidence deemed too unreliable for admission in criminal courts is an issue of broad applicability. While it is impossible to know exactly how many juvenile dispositions are unfairly affected by the introduction of mere arrest evidence, thousands of children are adjudicated delinquent in Illinois every year (Children and Family Justice Center *et al.*, *Illinois: An Assessment of Access to Counsel & Quality of Representation* <http://www.law.northwestern.edu/cfjc/docs/ILAssessmentReport.pdf> (last visited July 30, 2010)), and over 1200 are incarcerated in Department of Juvenile Justice facilities (2 0 0 8 I D O C R e p o r t , p . 2 3 , http://www.idoc.state.il.us/subsections/reports/annual_report/FY08%20DOC%20An

[nual%20Rpt.pdf](#) (last visited July 30, 2010)). Given the current acceptance of mere arrest evidence at sentencing, it is reasonable to assume that a substantial number of these commitments were influenced by such evidence.

JUDICIAL BIAS AND ADOPTION OF REASONABLE PERSON STANDARD

THE TRIAL COURT MADE COMMENTS SUGGESTING BIAS AGAINST THE MINOR BASED ON THE GIRL'S RACE, AND THIS CAUSE SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL BEFORE A DIFFERENT JUDGE.

Immediately after finding the minor guilty of aggravated battery of a teacher following a bench trial, the trial court delivered a long and apparently routine lecture aimed at African American minors which was charged with racial undertones. Among other things, the court admonished the minor that Dr. Martin Luther King, Jr., did not “have his brains blown out” so that African Americans could “commit crimes, get in trouble at school and not . . . contribute.” This colloquy so infected the integrity of the bench trial which immediately preceded it that this Court should reverse and remand for a new trial before a different judge.

Standard of Review

As set forth fully below, this Court should adopt the reasonable person standard used by other jurisdictions to evaluate judicial comments suggesting racial bias. That standard asks whether a reasonable person hearing or reading the comments might question the impartiality of the judge based on racial considerations. *E.g., United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994).

Analysis

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees an individual accused of a crime the right to be tried before an unbiased judge. *People v. Campbell*, 129 Ill.App.3d 819, 820 84 Ill.Dec. 913, 914, 473 N.E.2d 129, 130 (4th Dist. 1984), citing *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955). When bias is based on

race, equal protection guarantees are violated as well. *See Batson v. Kentucky*, 476 U.S. 79, 97-98, 106 S.Ct. 1712, 1723-24, 90 L.Ed.2d 69, 88 (1986). As a general matter, judges have a duty to uphold “the integrity and reputation of the judicial process.” *See People v. Lambert*, 288 Ill.App.3d 450, 463, 224 Ill.Dec. 360, 369, 681 N.E.2d 675, 684 (2d Dist. 1997). That obligation includes “assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice.” *People v. Bradshaw*, 171 Ill.App.3d 971, 975-76, 121 Ill.Dec. 791, 794, 525 N.E.2d 1098, 1101 (1st Dist., 3d Div. 1988).

“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all provisions of this code are precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.”

Ill. Sup. Ct., Preamble, Proc. R.

Although the United States, including its judiciary, has a shameful history on the issue of race in many respects, *see Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), our courts have spent the last several decades condemning the improper treatment of race inside American courtrooms, *see, e.g., Batson*, 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88 (racial discrimination in jury selection violates equal protection). For example, inappropriate racial references by prosecutors now meet with universal condemnation in Illinois courts. In *People v. Turner*, this Court reversed as a matter of plain error where the prosecutor used the phrase “blackey

tromp whitey” and denigrated the intelligence of an African American juror in closing argument. *Turner*, 52 Ill.App.3d 738, 739-40, 10 Ill.Dec. 599, 600-01, 367 N.E.2d 1365, 1366-67 (4th Dist. 1977). Similarly, in *People v. Richardson* the appellate court reversed as a matter of plain error where the prosecutor argued in closing that African Americans did not value the truth and would lie “to protect one of their own.” *Richardson*, 49 Ill.App.3d 170, 172-73, 7 Ill.Dec. 3, 5, 363 N.E.2d 924, 926 (5th Dist. 1977); *see also People v. Johnson*, 114 Ill.2d 170, 199, 102 Ill.Dec. 342, 355, 499 N.E.2d 1355, 1368 (1986) (condemning prosecutorial reference to defendant as “that black man” as “intemperate and improper”); *People v. Bramlett*, 211 Ill.App.3d 172, 180, 182, 155 Ill.Dec. 528, 534, 536, 569 N.E.2d 1139, 1145, 1147 (4th Dist. 1991) (assuming impropriety of prosecutor’s argument that a police officer and defendant shared an identity of interests based on race).

If racial comments by a prosecutor are “intemperate and improper,” similar comments by the trial court are even less acceptable, given the judge’s special role as “a highly visible symbol of government under the rule of law,” Ill. Sup. Ct., Preamble, Proc. R. Canon 3 of the Code of Judicial Conduct specifically addresses the issue of racial bias on the bench:

“A Judge Should Perform the Duties of Judicial Office Impartially
and Diligently.

* * *

A. Adjudicative Responsibilities

* * *

(8) A judge shall perform judicial duties without bias or prejudice.
A judge shall not, in the performance of judicial duties, by words or
conduct manifest bias or prejudice, including but not limited to bias
or prejudice based upon race, . . .”

188 Ill.2d R. 63.

In *People v. Wardell*, 230 Ill.App.3d 1093, 172 Ill.Dec. 478, 595 N.E.2d 1148 (1st Dist., 3d Div. 1992), the Illinois Appellate Court had occasion to address racially improper remarks by a trial

judge. Prior to sentencing two African American defendants for armed robbery and aggravated criminal sexual assault, the trial court stated, “You were going to have some more fun with some white girls.” *Wardell*, 230 Ill.App.3d at 1097, 1103, 172 Ill.Dec. at 481, 485, 595 N.E.2d at 1151, 1155. The appellate court found that the judge’s comment demonstrated that he considered the cross-racial nature of the crime in imposing sentence, and it reversed and remanded for resentencing. *Wardell*, 230 Ill.App.3d at 1101-03, 172 Ill.Dec. at 481, 484-85, 595 N.E.2d at 1151, 1154-55.

While the *Wardell* court concluded that the trial court demonstrated actual bias in its ruling, a showing of actual bias should not be a prerequisite for reversal when the record indicates judicial bias based on race. Comments which might lead a reasonable person to question the impartiality of the judge based on racial considerations should warrant reversal as well. This so-called “reasonable person” standard is employed by a variety of jurisdictions when evaluating racial remarks by a trial court. For example, Maryland’s highest court recently addressed the following racially tainted judicial comments in *Jackson v. State*, 364 Md. 192, 772 A.2d 273 (2001):

“Now, unfortunately, a number of communities in the lovely city of Columbia have attracted a large number of rotten apples. Unfortunately, most of them came from the city. And they live and act like they’re living in a ghetto somewhere. And they weren’t invited out here to behave like animals. Drugs and guns and drugs and guns. Its nonsensical. Other people don’t want that. Other people don’t tolerate that. . . . That’s why people move out here. To get away from people like Mr. Jackson. Not to associate with them and have them follow them out here and act like this was a jungle of some kind. So. It’s not. And our only chance to preserve it is to protect it.”

Jackson, 364 Md. at 197-98, 772 A.2d at 275-76. The court found that the foregoing comments gave the impression that the judge based his sentence, at least in part, on the fact that the defendant came

from an urban area. *Jackson*, 364 Md. at 201, 772 A.2d at 278. The court further noted that the trial court's terminology could lead a reasonable person to conclude that the judge was racially biased. *Jackson*, 364 Md. at 202, 772 A.2d at 278-79.

While the Court of Appeals could not determine the existence of actual racial bias on the part of the trial court, it found that the racial overtones of the judge's comments were no less improper than more blatant comments by prosecutors which had been condemned in earlier cases; "the potential for a racially biased result remains the same." *Jackson*, 364 Md. at 202-03, 772 A.2d at 279. Accordingly, the Court of Appeals reversed and remanded for resentencing based on a "reasonable person" standard, which asks whether a trial court's comments could lead a reasonable person to question the impartiality of the judge. *Jackson*, 364 Md. at 207-08, 772 A.2d at 282.

The Second Circuit similarly has concluded that, even when it is confident that the trial court harbored no actual racial bias, comments which might suggest otherwise warrant reversal based on the appearance of impropriety. *Leung*, 40 F.3d at 586-87. The standard applied was whether "there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that [the accused's] ethnicity . . . played a role" in the outcome. *Leung*, 40 F.3d at 586-87.

The Missouri Supreme Court reached a similar conclusion in *Missouri v. Smulls*, holding that a trial court's reference to "one drop of blood" in determining whether a particular venireperson was black "manifest[ed] a lack of understanding of the import of the issues underlying *Batson* and of what the codewords 'one drop of blood' mean to many participants in the judicial system." *Smulls*, 935 S.W.2d 9, 26-27 (1996).

The reasonable-person standard . . . is not hypersensitive. It merely acknowledges the fact that prejudice is most often subtle, sometimes masquerading in superficially neutral language. No one would dispute that a judge should never use words or terms that suggest racism. Where there is ambiguity, the Court's obligation is to

construe language in favor of assuring the appearance of fairness to the litigants.

Smulls, 935 S.W.2d at 27. Based on the reasoning of these courts, and given the particularly sensitive concerns surrounding racial bias, this Court should adopt the reasonable person standard in evaluating the propriety of race-based judicial comments and hold that judicial comments which would lead a reasonable person to question the impartiality of the judge based on race violate the Fourteenth Amendment to the United States Constitution and warrant reversal. *See Jackson*, 364 Md. at 207, 772 A.2d at 282-83.

Adoption of the reasonable person standard for race-based instances of potential judicial bias has several advantages. First and foremost, the reasonable person standard serves the fundamental aim of preserving the appearance of fairness and the integrity of the court which is indispensable to our system of justice. Second, even well-intentioned statements may lead to the impression that the results of a proceeding are due to racial bias. Under the reasonable person standard, the integrity of the judiciary is preserved without the need to label an insensitive or well-intentioned judge as harboring actual hostile racial sentiments. Third, the reasonable person standard is consistent with subsection (C) of Canon 3 which provides that, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality *might reasonably be questioned*, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party’s lawyer,” 188 Ill.2d R. 63(3)(C)(1)(a) (emphasis added).

The trial court in the instant case engaged in conduct which would lead a reasonable person to conclude that racial considerations affected the court’s decisions, tainted the integrity of the proceedings, and gave rise to an appearance of impropriety. In what apparently is a routine speech necessarily aimed at African American children who appear in delinquency court (Vol. IV, R. 18), the trial court engaged in the following exchange with the minor, a fourteen-year-old black girl:

“THE COURT: . . . when you go to school have you ever studied at all about black history?”

THE RESPONDENT: Yes, ma'am.

THE COURT: Okay. So do you have knowledge about people like Rosa Parks and Martin Luther King?

THE RESPONDENT: Yes, ma'am.

THE COURT: And therefore you would have the knowledge that Martin Luther King had basically his brains blown out because of the efforts that he was making to see that the black people in this country had the same rights as the whites, right[?]

THE RESPONDENT: Yes, ma'am.

THE COURT: Okay. Now do you think that Martin Luther King's brains being blown out all over the street, do you think that you are doing any honor to his efforts --

THE RESPONDENT: No, ma'am.

THE COURT: -- for you and the people? Do you think?

THE RESPONDENT: No.

THE COURT: Okay. Do you think his vision was that you're gonna give all the African Americans the right to vote, right to education, every right they should have but that you're gonna just flip the bird at it, commit crimes, get in trouble at school and not do what you need to do which is to contribute. I mean, is that what you think he was expecting?

THE RESPONDENT: No, ma'am.

THE COURT: But that's what's happening, isn't it?

THE RESPONDENT: Yes.

THE COURT: So between now and the time you come back I want you to think about all this and I want you to be prepared to make a

statement. Because I have told the State's Attorney and I've told the Public Defender that I will not put up with kids hitting teachers at school, and that it's my attitude that kids who do that ought to go to prison. So I want you to come back on sentencing and explain to me why I shouldn't send you to prison, okay.

THE RESPONDENT: Yes, ma'am."

(Vol. IV, R. 18-20)

The trial court went on equated race to mental health and learning disabilities:

"THE COURT: Anything wrong with your IQ, your mental health, anything like that?

THE RESPONDENT: No, ma'am.

THE COURT: Got any learning disabilities?

THE RESPONDENT: No, ma'am.

THE COURT: Then you got no excuse, do you?

THE RESPONDENT: No, ma'am.

THE COURT: And this isn't an excuse either. The color of your skin, is it?

THE RESPONDENT: No, ma'am."

(Vol. IV, R. 21)

Based on the foregoing exchange, a reasonable person could easily infer that the trial judge who had just rendered a guilty verdict was racially biased. That portion of the trial court's comments which implied that blacks are more prone to "commit[ting] crimes, get[ting] in trouble at school, and not . . . contribut[ing]" smacked of the racial stereotypes condemned in *People v. Richardson*, where the prosecutor argued in closing that the black defense witnesses, "don't live in the same social structure that we do. . . . The society they live in [*sic*] do not consider the truth a great virtue. The society they live in, they lie every day. It is nothing to them to protect one of their own kind by

lying. . . . We abide by the law – they do not. That is the difference. . . . They are lying to save a friend, lying to bust society, our society, that is the difference.” *Richardson*, 49 Ill.App.3d at 172-73, 7 Ill.Dec. at 5, 363 N.E.2d at 926. Equally offensive was the court’s equation of race with mental and learning disabilities as “excuses” for criminal behavior. *Cf. Turner*, 52 Ill.App.3d at 739-40, 10 Ill.Dec. at 600-01, 367 N.E.2d at 1366-67 (prosecutor’s denigration of the intelligence of an African American witness in closing warranted reversal).

“[O]ur system of law has always endeavored to prevent even the probability of unfairness Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice.” *In re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625, 99 L. Ed. at 946. It is difficult to imagine how one could satisfactorily explain to a child and her parents that a judge who harbored the sentiments expressed by the trial court in the instant case could have provided a fair trial. As the appellate court observed in evaluating the prejudice from racially insensitive comments by the trial court in *People v. Wardell*, “If it is on [her] tongue, it most assuredly must be on [her] mind.” *Wardell*, 230 Ill.App.3d at 1103, 172 Ill.Dec. at 485, 595 N.E.2d at 1155. The damaging effect of the trial court’s lecture, which was by its very nature limited to African Americans, cannot be underestimated. *See Brown v. Board of Educ.*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873, 880-81 (1952) (noting that racially disparate treatment breeds a sense of inferiority and undermines mental development of black children).

“[T]he offensiveness of [an] act is not transformed by the different skin colors of those persons involved,” *Wardell*, 230 Ill.App.3d at 1103, 172 Ill.Dec. at 485, 595 N.E.2d at 1155, yet this is exactly what the trial court’s comments suggested in the instant case. Even if the judge’s comments did not indicate actual prejudice, they gave rise to an appearance of impropriety which so undermined confidence in both the verdict and sentence that this Court should reverse and remand for a new trial before a different judge.

Although trial counsel did not object to the foregoing comments or move for a new trial, this Court should not consider the foregoing error forfeited on appeal. First, as a general matter, forfeiture is less frequently applied when the error arises from the judge's own conduct. *People v. Nevitt*, 135 Ill.2d 423, 455, 142 Ill.Dec. 854, 867, 553 N.E.2d 368, 381 (1990). The relaxation of forfeiture principles under such circumstances "stems from the fundamental importance of a fair trial and the practical difficulties involved in objecting to the conduct of the trial judge." *People v. Wardell*, 230 Ill.App.3d at 1102, 172 Ill.Dec. at 484, 595 N.E.2d at 1154 (internal quotes and citations omitted).

Second, a suggestion of race-based bias in a judicial proceeding warrants plain error review under Supreme Court Rule 651(a) because of the threat such errors pose to the integrity of the judicial process. The United States Supreme Court has recognized that the damage arising from racial discrimination in the courtroom "extends beyond that inflicted on the defendant . . . to touch the entire community . . . [and] undermine public confidence in the fairness of our system of justice. . . . Discrimination within the judicial system is most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 87-88, 106 S.Ct. at 1718, 90 L.Ed.2d at 81-82 (internal quotations and citations omitted); *see also Richardson*, 49 Ill.App.3d at 173, 7 Ill.Dec. at 6, 363 N.E.2d at 927 (inappropriate racial references "destructive of the proper administration of justice").

In *People v. Turner*, this Court recognized that race-based errors affect the substantial rights of the accused and should be reached as a matter of plain error. *Turner*, 52 Ill.App.3d at 739-40, 10 Ill.Dec. at 600-01, 367 N.E.2d at 1366-67; *see also Richardson*, 49 Ill.App.3d at 174, 7 Ill.Dec. at 7, 363 N.E.2d at 927 (reached racially prejudicial closing argument as plain error). In addition, as set forth *supra* at 15-18, the evidence against the minor was so closely balanced as to give rise to a reasonable doubt of guilt, and plain error review is warranted under the remaining prong of Rule 651(a) as well.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

and [REDACTED]

Plaintiffs,

-against-

**COMPLAINT
DEMAND FOR JURY TRIAL**

THE CITY OF NEW YORK; NEW YORK
CITY POLICE COMMISSIONER
[REDACTED] in his individual and official capacity;
MAYOR [REDACTED] in his
individual and official capacity; NEW YORK
CITY POLICE OFFICER [REDACTED] in his
individual capacity; NEW YORK CITY
POLICE OFFICER [REDACTED] in his
individual capacity; NEW YORK CITY
POLICE OFFICER JANE DOE, in her
individual capacity; and NEW YORK CITY
POLICE OFFICERS, JOHN DOES ##1 and
2, in their individual capacities;

Defendants.

PRELIMINARY STATEMENT

1. This is a civil rights action brought by Plaintiffs [REDACTED] and [REDACTED] to seek relief for Defendants' violation of their rights, privileges, and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Fourth and Fourteenth Amendments to the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), *et seq.* ("Title VI"), and the Constitution and laws of the State of New York.

2. The Defendants in this action, the City of New York ("City"), New York City Police Commissioner [REDACTED] (" [REDACTED] the Mayor of the City of New York, [REDACTED] (" [REDACTED] and New York City Police Officers [REDACTED] Jane Doe and John Does

##1 and 2 have implemented and are continuing to enforce, encourage and sanction a policy, practice and/or custom of unconstitutional stops and frisks of City residents by the New York Police Department (“NYPD”).

3. Without the reasonable articulable suspicion required under the Fourth Amendment, NYPD officers have been, and are engaged in, rampant stops and frisks of individuals, including Plaintiffs. NYPD officers, in violation of the Equal Protection Clause of the Fourteenth Amendment, often have used, and continue to use, race and/or national origin – not reasonable suspicion – as the determinative factors in deciding to stop and frisk individuals. The victims of such racial and/or national origin profiling are principally Black and Latino.

4. The NYPD's widespread constitutional abuses have flourished as a result of, and are directly and proximately caused by, policies, practices and/or customs devised, implemented and enforced by the City, and The City, and have acted with deliberate indifference to the constitutional rights of those who would come into contact with NYPD officers by: (a) failing to properly screen, train, and supervise NYPD officers, (b) inadequately monitoring NYPD officers and their stop and frisk practices, (c) failing to sufficiently discipline NYPD officers who engage in constitutional abuses, and (d) encouraging, sanctioning and failing to rectify the NYPD's unconstitutional practices.

5. As a direct and proximate result of defendants' policies, practices and/or customs, hundreds of thousands of City residents, in particular Black and Latino individuals, have been subjected to unconstitutional stops and frisks by NYPD officers. Indeed, many Black and Latino persons repeatedly have been victims of suspicionless stops and frisks by the NYPD. Moreover, the NYPD's constitutional abuses have been attended by unlawful searches and seizures and, at times,

excessive force, of which the fatal shooting of [REDACTED] by NYPD officers is but one tragic example.

6. Plaintiffs seek injunctive and declaratory relief that the policies, practices and/or customs described herein violate the Fourth and Fourteenth Amendments and an injunction enjoining defendants from continuing such policies, practices and/or customs. In addition, Plaintiffs seek compensatory and punitive damages, an award of attorneys' fees and costs, and such other relief as this Court deems equitable and just.

JURISDICTION

7. Jurisdiction is conferred upon this Court under 28 U.S.C. §§ 1331 and 1343(3) and (4), as this action seeks redress for the violation of Plaintiffs' constitutional and civil rights.

8. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

9. Plaintiffs further invoke this Court's supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a), over any and all state constitutional and state law claims that are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

VENUE

10. Venue is proper in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1391 (b) and (c).

JURY DEMAND

11. Plaintiffs demand trial by jury in this action on each and every one of their claims.

PARTIES

Plaintiffs

12. Plaintiff (" [REDACTED]) is a 28-year-old African-American man who

employees, and agents of the NYPD, a municipal agency of the City. Defendants

Jane Doe and John Does ##1 and 2 are sued in their individual capacities.

17. Defendant _____ is and was, at all times relevant herein, the Mayor of the City of New York and the chief policy making official for the City and its departments, including the NYPD. He is sued in both his individual and official capacities.

18. At all times relevant herein, Defendants _____ Jane Doe, John Does ##1 and 2, and _____ have acted under color of state law in the course and scope of their duties and functions as agents, employees, and officers of the City and/or the NYPD in engaging in the conduct described herein. At all times relevant herein, Defendants have acted for and on behalf of the City and/or the NYPD with the power and authority vested in them as officers, agents and employees of the City and/or the NYPD and incidental to the lawful pursuit of their duties as officers, employees and agents of the City and/or the NYPD.

19. At all times relevant herein, Defendants _____ Jane Doe, John Does ##1 and 2, and _____ have violated clearly established constitutional standards under the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of which a reasonable person would have known.

STATEMENT OF FACTS

20. On April 20, 2007, Plaintiff _____ a freelance film and video editor, was walking in the middle of the day on the sidewalk on Beach Avenue in his Bronx neighborhood, several homes away from where he lives. He witnessed several NYPD officers engaged in a stop of an African-American male on the block where he was walking. _____ crossed the street and was approached by two male NYPD Officers, _____ and _____ and one female officer, Jane

Doe. The officers were riding in a van near Plaintiff as he walked on the sidewalk. These appeared to be the same officers who had just seen stopping the other individual in the same area. Without any basis to formulate a reasonable, articulable suspicion that had engaged in or was about to engage in criminal conduct, the officers told to stop and the officers exited the van. Defendants and surrounded and questioned him about where he was going, what he was doing, asked for identification and whether he had any weapons. responded to these questions and told the officers that he was simply walking home, did not have any weapons and provided the officers with his driver's license. asked the officers why he was being stopped, but they refused to answer or provide any reason for the stop. With no reasonable belief that was armed or dangerous and without probable cause, Defendant proceeded to search under shirt and put his hands into Plaintiff's pants pockets. asked what probable cause the officers had for searching and frisking him, but the officers ignored his question. informed Defendants and that he did not consent to the search. When the officers did not find a gun, drugs or any other illegal item on one of the officers asked why driver's license was from out of state and told him that he could be arrested because it was illegal to not have a New York State identification. informed the officers that he did not drive in New York State. The officers returned identification and got back into their van to leave. asked the officers for their names and badge numbers. Defendant identified himself and jokingly asked the other officers for their names and badge numbers. Defendant Jane Doe stood near the police van during this encounter. The officers left without explaining why they had stopped and searched did not witness any of the officers that stopped and frisked him filling out any paperwork. These officers subjected to

a suspicionless stop, frisk and unlawful search based on his race and/or national origin. In the past year, [redacted] has noticed considerably more NYPD officers in his neighborhood and witnessed an increase in police stop and frisks.

21. On a weekday in January 2006, at approximately 1:00 p.m., [redacted] was on his lunch break from his job as a teaching assistant at Grand Concourse Academy Charter School in the Bronx. He walked to a Subway restaurant on 167th Street and Walton Avenue about two blocks from Grand Concourse Academy. At the time, [redacted] was in his work clothes, a dress shirt, tie and slacks. After buying his lunch at the Subway restaurant, [redacted] walked back up Walton Avenue to 169th Street where he entered a bodega on the corner of 169th and Walton Avenue, directly across the street from the Grand Concourse Academy. Upon entering the bodega, [redacted] noticed Defendant Officers John Doe #1 and John Doe #2, both dressed in plain clothes, standing in the aisles. [redacted] purchased some food items and then exited the bodega. Without any basis to formulate a reasonable, articulable suspicion that [redacted] had engaged in or was about to engage in criminal conduct, Defendant Officers John Doe #1 and John Doe #2 immediately followed [redacted] out of the store and called out to him. [redacted] was walking on the sidewalk in front of the window of the bodega and stopped and turned around to see what they wanted. When [redacted] turned, John Does ##1 and 2 crossed in front of his path and flashed their police badges. The officers, who were both at least half a foot taller than [redacted] positioned themselves less than two feet away from him and stood between [redacted] and the street. The officers' positions placed [redacted] with his back against the bodega window. The officers stated that they wanted to ask [redacted] some questions and, without waiting for [redacted] to consent or object, asked him where he was coming from. [redacted] told Defendants John Doe ##1 and 2 that he was on his lunch break

from his job at Grand Concourse Academy across the street and physically pointed to the school. In response, Defendant Doe #2 told [redacted] that he had allegedly observed him coming from the direction of a building on Walton Avenue which, the officer claimed, was a known center for drug activity. [redacted] then explained that he had bought lunch at the Subway restaurant on 167th Street and Walton Avenue and, thus, had to pass by the building the officer was referring to as he was on his way back to work on 169th Street. Defendant Doe #2 asked [redacted] if he had any contraband on him and whether the officers would find any contraband if they searched him. [redacted] responded that he did not have any contraband and that he did not consent to a search. John Doe #2 asked the same question a second time and [redacted] again, responded that he did not have any contraband and did not consent to a search. At this point, John Doe #2 took several steps toward [redacted] and, raising his voice, asked the same question a third time. [redacted] gave the same answer he previously had. By this time, several people in nearby stores had come out onto the sidewalk to witness the police officers' interrogation and detention of [redacted]. After [redacted] third refusal to consent to a search, the officers left the scene. At no point did [redacted] observe either John Doe #1 or John Doe #2 fill out any paperwork. These officers subjected [redacted] to a suspicionless stop and detention based on his race and/or national origin.

22. Defendants [redacted] Jane Doe and John Does ##1 and 2 have implemented, enforced, encouraged and sanctioned a policy, practice and/or custom of suspicionless stops and frisks in violation of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. This unconstitutional conduct is a direct and proximate result of policies, practices and/or customs of the City, [redacted] and [redacted] and their confederates whose identities are presently unknown to Plaintiffs. Those policies, practices and/or customs include: (a) the failure

to adequately and properly screen, train, supervise, monitor and discipline NYPD officers, and (b) the explicit and tacit encouragement, sanctioning, and ratification of and failure to rectify the NYPD's rampant unconstitutional practices. Defendants each knew, or should have known, that as a direct and proximate result of the policies, practices and/or customs described herein, the constitutional rights of tens of thousands of individuals, particularly Black and Latino individuals, would be violated. Despite this knowledge, and with deliberate indifference to and reckless disregard for the constitutional rights of such individuals, defendants have implemented, enforced, encouraged, sanctioned and failed to rectify such policies, practices and/or customs.

NYPD's History of a Policy, Practice and/or Custom of Suspicionless Stops and Frisks

23. The NYPD has a history of conducting suspicionless stops and frisks which traces back to the formation of the "Street Crime Unit" ("SCU") in the 1970's. The SCU was an elite, commando-like squad of police officers whose self-proclaimed mission was to interdict violent street crime in the City and, in particular, to remove illegal firearms from the streets. The SCU was little noticed until Rudolph Giuliani ("Giuliani") took office as Mayor of the City of New York in 1994. Giuliani had campaigned on a promise of more aggressive law enforcement, and once he assumed office, the SCU became a centerpiece of Giuliani's anti-crime strategy, and its officers primary enforcers of his highly aggressive policies.

24. The SCU, which consisted predominantly of White men, was deployed in so-called "high crime" areas, largely populated by minorities. Race and/or national origin – not the reasonable, articulable suspicion of criminal activity required under the Fourth Amendment – were often the determinative factors in the SCU's decision to stop and frisk. The SCU's policy, practice and/or custom of suspicionless stops and frisks led to a massive deprivation of constitutional rights. In

1997, the SCU reported over 18,000 stops and frisks, but made less than 5,000 arrests. The next year, the SCU reported a 50% increase in stops and frisks, but even fewer arrests than in 1997. The SCU's own figures revealed that over a two-year period more than 35,000 law-abiding people were stopped and frisked. The unconstitutional practices of the SCU led not only to unlawful stops, searches and seizures, but also to violence. One of the most commonly known incidents occurred in February 1999 when the SCU's tactics turned deadly when four SCU officers killed West African immigrant Amadou Diallo in the Bronx in a hail of 41 bullets as he stood in the vestibule of his apartment building.

25. In 1999, the Office of the Attorney General ("OAG") conducted an investigation and released a study of the NYPD's stop and frisk practices for the period of January 1, 1998 through March 31, 1999, which concluded that there was evidence of racial disparities and disparate impact on the basis of race. Analyzing the UF-250 stop and frisk data for the time period from January 1998 through March 1999, the OAG found that although Blacks comprised 25.6% of the City's population and Hispanics 23.7%, these two groups made up 83.6% of all stops by the NYPD. By contrast, Whites were 43.4% of the City's population, but accounted for only 12.9% of all stops. In precincts where Black and Hispanic persons each represented less than 10% of the total population, individuals identified as belonging to these racial group accounted for more than half (53.4%) of the stops in these precincts. The rate at which stops led to arrests also differed by race: only 1 out of 9.5 stops of Blacks, 1 out of 8.8 stops of Hispanics, and 1 out of every 7.9 stops of Whites resulted in an arrest. These stop to arrest rates demonstrated that the stops of Whites were more likely to lead to arrests, whereas those for Blacks were more indiscriminate because fewer of the persons stopped in these broader sweeps were actually arrested. The OAG also found that when examining the crime

rate statistics from the New York Division of Criminal Justice Services (“DCJS”) during this time period, Blacks were stopped 23% more often than Whites; Hispanics were stopped 39% more often than Whites. Controlling for precincts actually increased these discrepancies. The OAG also estimated that SCU officers completed a UF-250 form for only 10%-20% of the stops and frisks they conducted.

26. In 1999, the Center for Constitutional Rights filed a class action lawsuit, *Daniels, et al. v. The City of New York, et al.*, Case No. 99 Civ. 1696, in the Southern District of New York to challenge the NYPD’s unconstitutional policy, practice and/or custom of conducting rampant stops and frisks of individuals without the reasonable articulable suspicion required under the Fourth Amendment and which impermissibly used race and/or national origin -- not reasonable suspicion -- as the determinative factors in deciding to stop and frisk individuals. In 2003, a settlement of the case was reached which resulted in a Stipulation that required, *inter alia*, the NYPD to adopt a written policy prohibiting unlawful racial profiling. The Stipulation also required the NYPD to produce quarterly data concerning the NYPD stop and frisk activity which is contained in its UF-250 forms. During the pendency of the lawsuit, the NYPD claimed it had disbanded the SCU, however, the unlawful practices perfected by the NYPD through the SCU have continued, through other methods, as part of the NYPD’s anti-crime strategy.¹

27. [PARAGRAPH FILED UNDER SEAL]

¹ Pursuant to the directions provided by The Honorable Shira A. Scheindlin at a hearing on December 21, 2007, in *Daniels, et al. v. The City of New York, et al.*, the undersigned Plaintiffs’ counsel was permitted to retain the UF-250 data provided under the Stipulation of Settlement. Counsel was directed to file, under seal, the portions of this Complaint which contain information from the UF-250 database that are subject to the Protective Order issued in *Daniels* until such time as the Court can hear Plaintiffs’ motion that the UF-250 data should be made publicly available. Accordingly, paragraphs 27 through 32 herein are filed herewith under seal.

28. [PARAGRAPH FILED UNDER SEAL]

29. [PARAGRAPH FILED UNDER SEAL]

30. [PARAGRAPH FILED UNDER SEAL]

31. [PARAGRAPH FILED UNDER SEAL]

32. [PARAGRAPH FILED UNDER SEAL]

33. On information and belief, NYPD officers are also under pressure to conduct increased stops and frisks. On information and belief, the stop and frisk reports are tracked and evaluated at the NYPD's weekly CompStat meetings where commanders are questioned about their precinct's crime statistics. CompStat focus gives NYPD officers a strong incentive to generate UF-250s because an officer's UF-250 numbers suggest productivity.

34. Public accounts provide further evidence of unlawful stops and frisks which lack the reasonable suspicion required by the Fourth Amendment and reveal intent to discriminate on the basis of race. For example, on October 10, 2006, the *Daily News* reported that NYPD officers informed the news source that they were given a roll call order by Captain Michael Vanchieri to stop, question and frisk all black males at the Seventh Avenue Park Slope subway station in Brooklyn after he described a series of robberies on the F subway line in Brooklyn that were concentrated near that station. This directive prompted calls by One Hundred Blacks in Law Enforcement and the National Latino Officers Association for an investigation of police commands that were indicative of racial profiling.

35. A report by the New York City Civilian Complaint Review Board ("CCRB") also shows that the incidents of unlawful stops and frisks has risen dramatically since 1999. The CCRB reported that in 1999, 1,240 individuals made complaints of being subjected to stops and frisks

which were an abuse of police authority. In 2006, the complaints for improper stops and frisks totaled 5,089; the overall total for complaints made for that year was 7,669. According to the CCRB, the substantiation rate for allegations of unlawful stops and frisks was at least more than twice the rate for any other allegation made from 2002 through 2006.

36. The Fourth Amendment prohibits police officers from conducting stops and frisks without a reasonable, articulable suspicion of criminal conduct; frisking persons without a reasonable belief that they are armed or presently dangerous; searching and seizing persons without probable cause; or using excessive force in the course of policing activities. Additionally, the Equal Protection Clause of the Fourteenth Amendment bars police officers from targeting individuals for stops and frisks on the basis of race or national origin.

37. Defendants have applied a facially neutral policy, the anti-racial profiling policy, to Plaintiff, and similarly situated individuals, in an intentionally racially discriminatory manner.

NYPD's Suspicionless Stop and Frisk Practice is A Direct and Proximate Result of Defendants' Policies, Practices and/or Customs

38. The pervasive unconstitutional practices of the NYPD are a direct and proximate result of policies, practices and/or customs devised, implemented, enforced and sanctioned by the City, and and their confederates whose identities are presently unknown, with the knowledge that such policies, practices and/or customs would lead to violations of the Fourth and Fourteenth Amendments. Those policies, practices and/or customs include: (a) failing to properly screen, train and supervise NYPD officers, (b) failing to adequately monitor and discipline NYPD officers, and (c) encouraging, sanctioning and failing to rectify the NYPD's custom and practice of suspicionless stops and frisks.

Failure to Properly Screen, Train and Supervise NYPD Officers

39. Although fully aware that the work of the NYPD demands extensive training, superior judgment and close supervision, the City, and failed to properly screen, train and supervise NYPD officers, knowing that such failures would result in Fourth and Fourteenth Amendment violations.

40. The inadequate screening, training and supervision of the NYPD is a direct and proximate cause of the NYPD's rampant unconstitutional stops and frisks. As a direct and proximate result of the defendants' failure to screen, train and supervise NYPD officers, tens of thousands of people have been subjected to unlawful stops and frisks, many times simply because of their race and/or national origin. By failing to properly screen, train and supervise NYPD officers, the City, and have acted recklessly and with deliberate indifference to the constitutional rights of those who would come into contact with the NYPD.

Failure to Monitor and Discipline NYPD Officers

41. The NYPD's widespread abuses are also a direct and proximate result of the failure of the City, and to properly and adequately monitor, discipline and take necessary corrective action against NYPD officers who engage in, encourage or conceal unconstitutional practices. Among other things, these Defendants knowingly, deliberately and recklessly have failed:

- (a) to take appropriate disciplinary action and corrective measures against NYPD officers who have engaged in suspicionless stops and frisks;
- (b) to adequately monitor NYPD officers who have incurred a substantial number of civilian complaints, even in instances where the number of complaints should have triggered monitoring under established departmental guidelines;
- (c) to devise and implement appropriate oversight, disciplinary and remedial

measures in the face of extensive evidence that no charges are brought against the overwhelming majority of persons stopped and frisked by NYPD officers;

- (d) to conduct adequate auditing to determine if the stop and frisks conducted by NYPD officers comply with the NYPD's written policy prohibiting stop and frisks that are not based upon reasonable suspicion and use race and/or national origin as the determinative factor in initiating police action;
- (e) to take sufficient, if any, steps to curb NYPD officers' non-compliance with departmental directives requiring that UF-250's be completed for each stop and frisk;
- (f) to take sufficient corrective and remedial action against NYPD officers who provide fabricated, false, or impermissible justifications for stops and frisks; and
- (g) to take sufficient corrective, disciplinary and remedial action to combat the so-called "blue wall of silence," wherein NYPD officers regularly conceal or fail to report police misconduct, *inter alia*, in sworn testimony, official reports, statements to the Civilian Complaint Review Board (CCRB) and the Internal Affairs Bureau, and in public statements.

42. The City, and failed to properly and adequately monitor, discipline and take necessary corrective action against NYPD officers, knowing that such omissions would lead to Fourth and Fourteenth Amendment violations. By such acts and omissions, the City, and have acted recklessly and with deliberate indifference to the constitutional rights of those who would come into contact with the NYPD.

Encouraging, Sanctioning and Failing to Rectify the NYPD's Suspicionless Stops and Frisks

43. With the knowledge that such acts and omissions would create a likelihood of Fourth and Fourteenth Amendment violations, the City, and also have encouraged, sanctioned and failed to rectify the NYPD's abusive and unconstitutional practices.

44. For example, Defendants, on information and belief, have enacted and enforced

unwritten "productivity standards" or de facto quotas of a certain number of stops and frisks and specific types of arrests per month for each NYPD officer. On information and belief, NYPD officers who fail to meet the productivity standards face adverse employment consequences. In their efforts to satisfy the productivity standards, NYPD officers have engaged in widespread suspicionless stops and frisks of individuals.

45. As a direct and proximate result of the above policies, practices and/or customs, tens of thousands of people have been, and will continue to be, subjected to unconstitutional stops, frisks, searches and seizures by NYPD officers, sometimes in violent encounters, simply because such individuals happen to be the wrong color, in the wrong place, at the wrong time. Through such acts and omissions, the City, and have acted recklessly and with deliberate indifference to the constitutional rights of individuals who would come into contact with the NYPD.

**Recent Measures Are Inadequate and Insufficient to Eradicate, Curb or Deter the
Suspicionless Stop and Frisk Policy**

46. Pursuant to the Stipulation in *Daniels, et al. v. The City of New York*, Defendant City and the NYPD were required to implement a written policy which prohibits racial or ethnic/national origin profiling which violates the United States and New York State Constitutions. As explained herein, Defendants have violated that written policy. Defendant City and the NYPD were also required, *inter alia*, to supervise, monitor and train officers and supervisors regarding the policy prohibiting unlawful racial profiling; to conduct supervision and monitoring of the policy through audits by the NYPD Quality Assurance Division that determine whether, and to what extent, the audited stop, question and frisk activity is based upon reasonable suspicion; to require that NYPD officers and supervisors document stop, question and frisk activity in UF-250 forms, memo books,

logs and monthly activity reports; to compile a database of all UF-250 reports; to conduct public information and outreach through community forums, high school workshops and distribution of materials informing the public about their rights concerning stop, question and frisk encounters and making complaints about concerns arising from a stop, question and/or frisk encounter with the police.

47. None of these measures, however, sufficiently or adequately have addressed, much less irrevocably eradicated, curbed or deterred the NYPD's pervasive policy, practice and/or custom of unconstitutional stops and frisks. Thus, despite these initiatives, Plaintiff, and hundreds of thousands of other individuals, continue to face the imminent likelihood of becoming victims of the NYPD's constitutional abuses in violation of the Fourth and Fourteenth Amendments to the U.S. and New York State Constitutions.

FIRST CLAIM
**(Claim Pursuant to 42 U.S.C. § 1983 Against All Defendants
for Violations of the Fourth Amendment)**

48. Plaintiffs repeat and re-allege paragraphs 1 through 47 above as if fully set forth herein.

49. Defendants City, Jane Doe and John Does
##1 and 2 and have implemented, enforced, encouraged and sanctioned a policy, practice and/or custom of stopping and frisking individuals without the reasonable articulable suspicion of criminality required by the Fourth Amendment. These constitutional abuses often are coupled with unconstitutional searches and seizures and, at times, excessive force.

50. The NYPD's constitutional abuses and violations were and are directly and proximately caused by policies, practices and/or customs devised, implemented, enforced,

encouraged and sanctioned by the City, and including: (1) the failure to adequately and properly screen, train, and supervise NYPD officers; (2) the failure to properly and adequately monitor and discipline NYPD officers; and (3) the overt and tacit encouragement and sanctioning of, and the failure to rectify, the NYPD's suspicionless stop and frisk practices.

51. Each of the Defendants has acted with deliberate indifference to the Fourth Amendment rights of Plaintiffs and other similarly situated individuals. As a direct and proximate result of the acts and omissions of each of the Defendants, Plaintiffs' Fourth Amendment rights have been violated. By acting under color of state law to deprive Plaintiffs of their rights under the Fourth Amendment, the Defendants are in violation of 42 U.S.C. § 1983, which prohibits the deprivation under color of state law of rights secured under the United States Constitution.

52. The NYPD targets Black and Latino individuals for illegal stops and frisks in areas where Plaintiffs reside and/or visit. Thus, a real and immediate threat exists that Plaintiffs' Fourth Amendment rights, and the rights of other similarly situated persons, will be violated by NYPD officers in the future. Moreover, because Defendants' policies, practices and/or customs subject Plaintiffs, and other similarly situated persons, to stops and frisks without any reasonable, articulable suspicion of criminality, and often on the basis of race and/or national origin, Plaintiffs, and other similarly situated individuals, cannot alter their behavior to avoid future violations of their constitutional and civil rights at the hands of the NYPD.

53. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from continuing the NYPD's policy, practice and/or custom of unconstitutional stops and frisks, and the policies, practices and/or customs that have directly and proximately caused such constitutional abuses.

SECOND CLAIM
**(Claim Pursuant to 42 U.S.C. § 1983 Against All Defendants for
Violation of Equal Protection Clause)**

54. Plaintiffs repeat and re-allege paragraphs 1 through 53 as if fully set forth herein.

55. The City, Jane Doe and John Does ##1 and 2 have implemented and enforced a policy, practice and/or custom of stopping and frisking individuals, including Plaintiff, based solely on race and/or national origin. These suspicionless stops and frisks have and are being conducted predominantly on Black and Latino individuals, on the basis of racial and/or national origin profiling. As a result, the NYPD's policy, practice and/or custom of suspicionless stops and frisks violate the Equal Protection Clause of the Fourteenth Amendment. The NYPD's constitutional abuses were and are directly and proximately caused by policies, practices and/or customs devised, implemented, enforced, encouraged, and sanctioned by the City, and including: (1) the failure to adequately and properly screen, train, and supervise NYPD officers; (2) the failure to adequately and properly monitor and discipline the NYPD and its officers; and (3) the encouragement and sanctioning of and failure to rectify the NYPD's use of racial and/or national origin profiling in making stops and frisks.

56. Each of the Defendants has acted with deliberate indifference to Plaintiffs' Fourteenth Amendment rights. As a direct and proximate result of the aforesaid acts and omissions of the Defendants and each of them, Plaintiffs' Fourteenth Amendment rights have been violated. By their acts and omissions, Defendants have acted under color of state law to deprive Plaintiffs of their Fourteenth Amendment rights in violation of 42 U.S.C. § 1983.

57. Due to the NYPD targeting Black and Latino persons in areas where Plaintiffs and similarly situated individuals reside and/or visit, a real and immediate threat exists that Plaintiffs'

Fourteenth Amendment rights will be violated by NYPD officers in the future. Moreover, because Defendants' policies, practices and/or customs subject Plaintiffs and other similarly situated individuals to repeated stops and frisks without any reasonable, articulable suspicion of criminality, and often on the basis of race and/or national origin, Plaintiffs cannot alter their behavior to avoid future violations of their constitutional and civil rights at the hands of the NYPD.

58. Plaintiff has no adequate remedy at law and will suffer serious and irreparable harm to his constitutional rights unless Defendants are enjoined from continuing the NYPD's policy, practice and/or custom of unconstitutional race and/or national origin-based stops and frisks, and the policies, practices and/or customs that have directly and proximately caused such constitutional abuses.

THIRD CLAIM

**(Claims Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), *et seq.*
Against the City)**

59. Plaintiffs repeat and re-allege paragraphs 1 through 58 as if fully set forth herein.

60. The law enforcement activities described in this complaint have been funded, in part, with federal funds.

61. Discrimination based on race in the law enforcement activities and conduct described in this complaint are prohibited under 42 U.S.C. § 2000(d), *et seq.* The acts and conduct complained of herein by the Defendants were motivated by racial animus, and were intended to discriminate on the basis of race and/or had a disparate impact on minorities, particularly Blacks and Latinos.

62. As a direct and proximate result of the above mentioned acts, Plaintiffs have suffered injuries and damages and have been deprived of their rights under the civil rights laws. Without appropriate injunctive relief, these violations will continue to occur.

70. As a direct and proximate result of such acts, Defendants John Does ##1 and 2 deprived Plaintiff of his Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983.

71. As a direct and proximate result of those constitutional abuses, Plaintiff has suffered and will continue to suffer physical, mental and emotional pain and suffering, mental anguish, embarrassment and humiliation.

72. The acts of Defendants John Does ##1 and 2 were intentional, wanton, malicious, reckless and oppressive, thus entitling Plaintiff to an award of punitive damages.

SIXTH CLAIM
(Claims Against the City, and

73. Plaintiffs repeat and re-allege paragraphs 1 through 72 as if fully set forth herein.

74. With deliberate indifference to Plaintiffs' constitutional rights, Defendants City, and have directly and proximately caused the NYPD's policy, practice and/or custom of suspicionless stops and frisks in violation of the Fourth and Fourteenth Amendments by devising, implementing, enforcing, adopting, sanctioning and ratifying a policy, practice and/or custom of (a) failing to properly screen, train, and supervise NYPD officers; (b) failing to adequately monitor and discipline the NYPD and its officers; and (c) encouraging, sanctioning and failing to rectify the NYPD's constitutional abuses.

75. As a direct and proximate result of the aforesaid acts and omissions, Defendants City, and have each deprived Plaintiffs of their Fourth and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983.

76. The acts and omissions of Defendants and explained herein were

intentional, wanton, malicious, reckless and oppressive, thus, entitling Plaintiffs to an award of punitive damages. In engaging in such conduct, and acted beyond the scope of their jurisdiction, without authority under law, and in abuse of their powers.

SEVENTH CLAIM
(Violation of Plaintiffs' Rights Under New York Law)

77. Plaintiffs repeat and re-allege paragraphs 1 through 76 as if fully set forth herein.

78. By the actions described above, each and every Defendant, jointly and severally, has committed the following wrongful acts against Plaintiffs, which are tortious under the Constitution and laws of the State of New York:

- a) assault and battery;
- b) trespass;
- c) violation of the right to privacy;
- d) negligence; and
- e) violation of rights otherwise guaranteed under the Constitution and the laws of the State of New York.

79. In addition, Defendants City, and were negligent in their hiring, screening, training, supervision and retention of Defendants Jane Doe and John Does ##1 and 2.

80. The foregoing acts and conduct of Defendants were a direct and proximate cause of injury and damage to Plaintiffs and violated the statutory and common law rights as guaranteed to them by the Constitution and laws of the State of New York.

EIGHTH CLAIM
(Respondeat Superior Claim Against the City Under New York Common Law)

81. Plaintiffs repeat and re-allege paragraphs 1 through 80 as if fully set forth herein.

82. The conduct of Defendants Officers Jane Doe and John Does ##1 and 2 occurred while they were on duty, in and during the course and scope of their duties and functions as New York City police officers, and while they were acting as agents and employees of defendant City. As a result, Defendant City is liable to Plaintiffs under the doctrine of respondeat superior.

83. WHEREFORE, Plaintiffs pray that the Court will:

- a) Issue a judgment declaring that the NYPD's policy, practice and/or custom of suspicionless stops and frisks challenged herein is unconstitutional in that it violates the Fourth and Fourteenth Amendments to the United States Constitution, Title VI, and the Constitution and laws of the State of New York, and that its implementation, enforcement and sanctioning by NYPD officers is a direct and proximate result of the following policies, practices and/or customs of the City, and
 - i) failing to adequately screen, train and supervise officers;
 - ii) failing to adequately monitor the NYPD and its officers and discipline those NYPD officers who violate the constitutional rights of residents of the communities they patrol; and
 - iii) encouraging, sanctioning, and failing to rectify the NYPD's unconstitutional stops and frisks.
- b) Issue an order for the following injunctive relief:
 - i) enjoining the NYPD from continuing its policy, practice and/or custom of suspicionless stops and frisks;
 - ii) enjoining the NYPD from continuing its policy, practice and/or custom of conducting stops and frisks based on racial and/or national origin profiling;
 - iii) enjoining the use of formal or informal productivity standards or other de facto quotas for arrests and/or stops and frisks by NYPD officers;

- iv) requiring the City, and to institute and implement improved policies and programs with respect to training, discipline, and promotion designed to eliminate the NYPD's policy, practice and/or custom of suspicionless stops and frisks;
 - v) requiring the City, and to deploy NYPD officers with appropriate and adequate supervision;
 - vi) requiring the City, and to institute and implement appropriate measures to ensure compliance with departmental directives that NYPD officers complete UF-250's on each and every stop and frisk they conduct;
 - vii) requiring the City, and to institute and implement appropriate measures to mandate that UF-250's or other documentation be prepared and maintained in an up to date computerized database for each stop conducted by an officer, regardless of whether the stop is followed by the use of force, a frisk, a search, or an arrest; and
 - viii) requiring the City, and to monitor stop and frisk practices of the NYPD, including periodically and regularly reviewing form UF-250's to determine whether reported stops and frisks have comported with constitutional requirements.
- c) Award Plaintiffs compensatory damages in amounts that are fair, just and reasonable, to be determined at trial;
 - d) Award Plaintiffs damages against Defendants and the individual Officer Defendants, to the extent that their liability is based upon reprehensible actions and/or inaction undertaken in their individual capacities, in an amount which is fair, just and reasonably designed to punish and deter said reprehensible conduct, to be determined at trial;
 - e) Award Plaintiffs reasonable attorneys' fees pursuant to 42 U.S.C. § 1988;
 - f) Award Plaintiffs costs of suit pursuant to 42 U.S.C. §§ 1920 and 1988; and
 - g) Award such other and further relief as this Court may deem appropriate and equitable, including injunctive and declaratory relief as may be required in the interests of justice.

DATED: January 31, 2008

By: Andrea Costello
Andrea Costello (AC-6197)

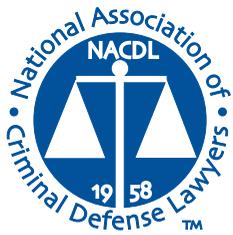
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Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System



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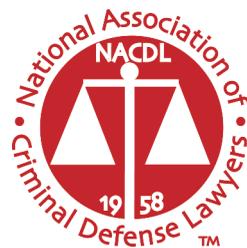
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Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities In the Criminal Justice System

CONFERENCE REPORT BY
Tanya E. Coke

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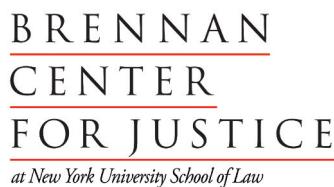
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ABOUT THE CONTRIBUTING ORGANIZATIONS



The **Association of Prosecuting Attorneys (APA)** was founded as a national “think tank” to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive innovative prosecutorial practices that prevent crime, ensure equal justice and make communities safer. APA is the only national organization to represent and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, tribal prosecutors, district attorneys, state’s attorneys, attorneys general or U.S. attorneys. The association’s activities include acting as a global forum for the exchange of ideas, allowing prosecutors to collaborate with all criminal justice partners, conducting timely and effective technical assistance and providing access to technology for the enhancement of the prosecutorial function.



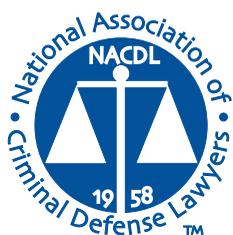
The **Brennan Center for Justice** at the New York University School of Law is a nonpartisan law and policy institute that seeks to improve systems of democracy and justice. The Center works to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all, exemplified by a campaign to reduce mass incarceration. The Center’s work ranges from voting rights to campaign finance reform, from racial justice in criminal law to constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group, part communications hub — the Brennan Center seeks meaningful, measurable change in the systems by which the nation is governed.



The **Center for NuLeadership on Urban Solutions** is a twelve-year-old independent, activist, public policy think tank and advocacy training center, formerly at Medgar Evers College in the City University of New York. Its staff is comprised of academic professionals who have had experiences within the criminal punishment system. It is the first and only center of its kind in the country. It was created to reduce reliance on prisons and mass incarceration as solutions to the problems of economic inequality and poverty in under-served urban communities. The Center is dedicated to creating new and innovative paradigms for solving community-development and related public-safety challenges that move from criminal justice to human justice. It serves as a platform to advocate for and give voice to the huge emerging constituency of citizens recently released from correctional supervision and returning to local jurisdictions after paying their debts to society. It seeks to achieve systemic change through increased transparency and accountability; community empowerment through targeted advocacy, network development and civic engagement; and individual transformation through motivated education and activist training.



The **Foundation for Criminal Justice (FCJ)** preserves and promotes the core values of the National Association of Criminal Defense Lawyers and the American criminal justice system. Ongoing and recent projects supported by the FCJ include an unprecedented study of obstacles to the restoration of rights and status after conviction; a conference to identify concrete and easily achieved solutions to racial disparities in the criminal justice system; an ongoing series of events to celebrate the 50th anniversary of the Supreme Court’s landmark *Gideon v. Wainwright* decision; free trainings for lawyers on a variety of topics including representing juveniles accused of wrongdoing and individuals facing immigration-related collateral consequences of conviction; and efforts to improve indigent defense in federal and state courts.



The **National Association of Criminal Defense Lawyers (NACDL)** is the pre-eminent organization in the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL’s approximately 10,000 direct members in 28 countries — and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America’s criminal justice system.



The **New York County Lawyers' Association (NYCLA)**, founded in 1908, was the first major bar association open to all lawyers admitted to the bar regardless of race, gender, religion or ethnicity. Throughout its history, NYCLA has promoted the public interest by advocating for access to justice and reforms in the law, providing pro bono services for those in need, and encouraging diversity in the bench and bar. With 9,000 members today, NYCLA continues to be in the forefront of most legal debates, ranging from criminal justice to consumer rights.

Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities In the Criminal Justice System

Introductory Statement

One only has to step into a typical courtroom in the United States to see that profound racial and ethnic disparities persist in the American criminal justice system. On October 17-19, 2012, the National Association of Criminal Defense Lawyers (NACDL), the Foundation for Criminal Justice (FCJ), the New York County Lawyers' Association (NYCLA), the Brennan Center for Justice at New York University School of Law, the Association of Prosecuting Attorneys (APA), and the Center for NuLeadership on Urban Solutions together co-sponsored a conference designed to bring to light concrete ideas for remedying racial disparities. The conference was convened in lower Manhattan in the shadow of the World Trade Center site at the New York County Lawyers' Association's historic Home of Law. This report summarizes the candid, sometimes painful panel discussions, and identifies a panoply of remedies that may advance the goal of purging disparate impact from America's criminal justice system.

I. Conference Mission and Overview

The conference assembled a distinguished group of criminal justice experts — prosecutors, defense attorneys, judges, scholars, community leaders, and formerly incarcerated advocates — to identify critical points of intervention and concrete, practical reforms to redress racial disproportionality at every stage of criminal proceedings. Rather than belabor what has gone wrong or has not worked, participants shared innovative disparity-reduction practices from around the country, as well as new ideas for reforming policies that produce mass incarceration.

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The conference focused on the criminal justice system in New York City, but the recommendations put forward by participants have broad implications for reform nationally. A number of academic articles on race and the criminal justice system prepared for the conference will be published in a supplement to the *New York University Journal of Legislation and Public Policy*.

The conference included a town hall panel that presented the major issues, as well as roundtables that explored in greater depth what system actors could do to reduce bias and disparities at charging, in pretrial detention and motions practice, at jury selection, and in sentencing. The discussion also explored emerging models of community justice in New York City.

Rather than belabor what has gone wrong or has not worked, participants shared innovative disparity-reduction practices from around the country, as well as new ideas for reforming policies that produce mass incarceration.

II. What Is the Scope of Racial Disparities?

The conference sponsors opened the proceedings by emphasizing the unparalleled size, cost and scope of the U.S. criminal justice system: 2.2 million people incarcerated as of 2012,¹ many for non-violent offenses, at a cost of 70 billion dollars. Millions more are under some form of restraint or supervision, either while the case is pending or as component of the final sentence. A staggering 65 million adults in the United States — approximately one in four — now have a criminal record, and live with the increasing public exposure, civil disabilities and other consequences that flow from a criminal record.²

The Hon. Marcy Friedman, a judge on the New York State Supreme Court, New York County, and former NYCLA Justice Center board member, noted that according to one study as of 2007, some 69 percent of arrests in New York City's criminal justice system are for misdemeanor offenses or lesser violations.

“Never before have so many been arrested for so little.”

“Never before have so many been arrested for so little,” she remarked, citing a scholarly article.³ Despite the minor nature of most offenses processed through the system, a large number of defendants will be too poor to post bail, will plead guilty to time served to get out of jail, and then will suffer one or more of the collateral consequences of criminal conviction: deportation from the United States, the inability to get or keep a job, the loss of housing, student loan disqualification, and/or the denial of the right to vote.

Norman Reimer, executive director of NACDL, remarked that the “criminal justice system is a window into a society’s soul.” If this is true, what are we to make of harsher outcomes for people of color at every stage of the criminal justice system: from arrest to decisions about bail and pretrial detention and from adjudication to sentencing? What is the role of prosecutors, defenders, judges, and police in propagating racial disparities in the system, even if unintentionally? More important, what can system actors do to reduce or eliminate disparities?

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III. Town Hall Meeting

Panelists: Theodore Shaw (moderator), Columbia University School of Law; Eddie Ellis, Center for NuLeadership on Urban Solutions; Hon. George Bundy Smith, former associate judge on the New York Court of Appeals, NYCLA Justice Center; Zachary Carter, former U.S. Attorney and partner, Dorsey & Whitney; Lisa Wayne, past president, NACDL; Vanita Gupta, American Civil Liberties Union; Glenn Martin, Fortune Society; Rick Jones, Neighborhood Defender Service of Harlem; Leroy Frazer, Manhattan District Attorney’s Office.

The Brennan Center’s Nicole Austin-Hillery kicked off the Town Hall Meeting, describing the vast racial disparities in the criminal justice system and their impact on the fundamental values underlying that system.

A. Differing Perspectives

Disparity vs. Mass Incarceration. Conference panelists expressed differing views as to whether the problem we seek to address is one of disparate treatment between minority and white defendants, or the larger phenomenon of mass incarceration that has consigned 1.3 million African American and Hispanics to prison. According to the latest available figures, these two groups comprise 58 percent of all inmates, even though they make up only one quarter of the U.S. population.⁴

Responsibility. At several points throughout the three-day conference, some prosecutors, defense attorneys and judges insisted that their practice is blind to race. Prosecutors said that they often do not know the race of the defendant until arraignment or the grand jury. Some judges equated the discussion of disproportionality in the criminal system with an accusation of personal racism.

Societal Factors. Others endorsed the argument of Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010), that the criminal justice system operates like a modern-day system of social control, and ought to be addressed as the urgent civil and human rights issue of the century.

Role of Bias. Most panelists and attendees agreed that both systemic and individual bias — often unconscious and unintentional — are at work, and combine to produce jails and prisons that are largely filled with black and brown men and women. Whether that bias originates from “animus or an absence of empathy or indifference doesn’t really matter,” said Zachary Carter, a partner at Dorsey and Whitney and former U.S. Attorney for the Eastern District of New York. “From the point of view of those stopped, the insult to personal dignity is the same, regardless of the motive of the officer who makes the stop.”

Raising the Issue in the Courtroom. Change, concluded most conference participants, will require prosecutors, defense attorneys and judges to recognize the influence of race in the criminal justice system, and for defense attorneys in particular

to call it out in court. “If the defense lawyer isn’t comfortable talking about race, no one else in the courtroom will understand or confront it,” said Lisa Wayne, a criminal defense attorney and past president of NACDL. Ensuring that there are leaders of color in bar associations, public defender and district attorneys offices who are willing to raise the issue of racial bias is important, she said.

Economic Status. While race is an important determinant of outcomes, money also matters. Wayne and other defense attorneys who had transitioned from government offices to private practice observed that black and Latino defendants with the means to hire their own attorney command greater attention and leniency from prosecutors and judges. Poor defendants, by contrast, are at a disadvantage both at disposition and on probation, where they risk being violated and returned to prison if they lack the means to pay for monthly GPS-monitoring, drug-testing and other probation fees and requirements that have proliferated in recent years.

Individual Services vs. Systemic Reform. The conference also addressed the unresolved tension between solutions that focus on individuals versus those that focus on structural reforms. Barry Campbell, a special assistant at the Fortune Society, an organization that serves and advocates on behalf of former prisoners, emphasized the importance of mentors who can reform the ways of young people involved in crime. “When I was younger, what I needed most of all was someone who looked like me, talked like me, knew me, who could help me get on a better direction . . . someone who lived in my neighborhood and who did something positive.”

Others challenged the predisposition to fix people rather than institutions. “We need to distinguish between those who have chosen a life of crime, and those innocent people who the system has chosen to criminalize,” said Deborah Small of Break the Chains, a drug policy reform organization, referring to the thousands of young men of color arrested each year for putting their feet on a bus or subway seat, or carrying an open container of alcohol — behaviors that are routinely ignored in white communities. “I understand that institutional change is harder, slower, more difficult to quantify, and not nearly as personally fulfilling. Nonetheless, you cannot fix structural or institutional racism by fixing people; you can only do it by fixing the institutions and structures that continue to generate racially disparate results.”

Policing. Although conference organizers intentionally left the topic of policing off the agenda — a subject they said could consume an entire three-day conference of its own — panelists largely agreed that the best way to reduce racial disparities in the criminal justice system was to focus on the point of entry, i.e., racially disparate arrest practices by police. Participants called for political organizing and litigation to

challenge policing practices that disproportionately target people of color in poor neighborhoods, as well as policies that use the criminal justice system to deal with a host of social ills, such as deficient public education, and a lack of employment opportunities and mental health services. Defenders and several prosecutors agreed that more must be done to challenge the escalation of “broken windows” policing that has flooded the justice system with misdemeanor arrests for criminal trespass, marijuana possession and disorderly conduct in New York and other cities. “Prosecutors should be reviewing these kind of arrests for credibility and dismiss the charges in cases where they can’t be proven,” said Irwin Shaw of the Legal Aid Society, “and defenders should examine them very carefully before pleading them.”

B. What Would Systemic Reform Require?

Panelists debated whether the goal ought to be to eradicate racial disparities or, perhaps more realistically, to simply reduce them. Most current reform efforts to address racial bias and disparity have been “piecemeal efforts, tinkering around the edges, and never addressing the roots of racism,” observed Eddie Ellis, founder and president of the Center for NuLeadership on Urban Solutions. Ellis invoked the late Professor Derrick Bell’s Critical Race Theory, which states that racism is a permanent fixture in the justice system, and an inevitable reflection of racism in the larger society. “But there is nevertheless a moral imperative for us to challenge and change it,” said Ellis.

Nonetheless you cannot fix structural or institutional racism by fixing people; you can only do it by fixing the institutions and structures that continue to generate racially disparate results.

Participants across the spectrum considered, and generally sympathized, with the view that systemic change would require bold reforms and identified several key policies that fuel racial disproportionality:

- **Stop-and-frisk policing**, particularly in New York City, where the police department has sharply escalated the use of this tactic in poor neighborhoods.
- **Coercive use of cash bail.** The presumptive imposition of cash bail, particularly in misdemeanor cases, which un-

necessarily incarcerates minority defendants and is used implicitly to coerce guilty pleas.

- **Mass incarceration for non-violent offenses.** Rather than using incarceration as a response to failures of the education, mental health, immigration, and child welfare systems, prison should be used as a last resort reserved for truly dangerous offenders.
- **Marijuana arrests.** Many conference participants — including judges and prosecutors — voiced their personal (if not institutional) view that possession of small amounts of marijuana fuels unnecessary arrests and ought to be decriminalized.

C. Litigation

Panelists also concurred that criminal and civil litigation is a necessary, but insufficient, tool to combat racial disparities. “The law can be an instrument of social change, but is not inherently so,” said Ted Shaw, a professor of law at Columbia University and former director of the NAACP Legal Defense and Educational Fund. “Progressive lawyers and activists have bent the law against its natural inherent conservatism and its inclination to maintain the *status quo*.”

Rick Jones of the Neighborhood Defender Service of Harlem closed the opening town hall with a provocative statement: that the surest path to reform would be to arrest more white people.

D. Legislation

Some of the best reform opportunities now lie in the legislatures, said some, where fiscal conservatives are coming to the realization that states can no longer afford to incarcerate so many people. Advocates must unapologetically embrace economic arguments that speak to policymakers, even if these do not always acknowledge the inherent injustices of the current system, argued Vanita Gupta, director of the ACLU’s Center for Justice. Similarly, advocates must be clear-eyed about the fact that the prison and justice systems have become powerful, self-perpetuating industries. Glenn

E. Martin, Vice President of Development and Public Affairs of the Fortune Society, argued that the *status quo* benefits not only private prison corporations, but also a host of criminal justice actors whose employment depends upon a steady stream of arrestees: police, prosecutors, corrections officers, defense attorneys, social service counselors, companies that contract with corrections departments, and communities that benefit from free prison labor.

E. The Role of Interest Convergence

Rick Jones of the Neighborhood Defender Service of Harlem closed the opening town hall with a provocative statement: the surest path to reform would be to arrest more white people. Jones reasoned that, if white people were arrested in numbers anywhere near their percentages in the overall population, the system would, overnight, become less punitive and tendencies towards overcriminalization and mass incarceration would be relaxed. Lisa Wayne and others agreed with the truth, if not the practicality, of this position, noting that it took the controversy surrounding the conviction of Alaska Senator Ted Stevens to motivate a serious discussion of reforming the federal rules of discovery. Nkechi Taifa, a criminal justice policy analyst for the Open Society Foundations in Washington,

observed that the most effective criminal justice reformers in recent years have been conservative white elites, such as Pat Nolan and Chuck Colson, who went to prison and emerged as reformers. But is arresting more white people a practical solution? Deborah Small of Break the Chains, a drug policy reform organization, suggested that this might not make much difference, as those whites most likely to be incarcerated would be poor, undereducated and unemployed, and not the middle-class people whose criminalization would spark controversy or debate.

IV. Charging, Plea Bargains And Diversion

Panelists: Thomas Giovanni (moderator), Brennan Center for Justice; Lance Ogiste, Office of the Brooklyn District Attorney; Irwin Shaw, Legal Aid Society, Manhattan; Wayne McKenzie, New York City Department of Probation.

Conference participants examined the role of prosecutors and defense attorneys in charging, plea bargains and alternatives to incarceration, with an emphasis on the role that implicit biases play in their activities.

A. The Role of Implicit Bias in Prosecution

Current or former district attorneys on the panel emphasized that the business of prosecution in large, urban offices, where upwards of 300 cases a day are processed, is largely a “paper practice.” In a fast-paced system, line prosecutors focus on the police complaint and the reliability of victims’ statements, they said, and often do not even know the race of the defendant or victim until the case is presented to the grand jury. Similarly, Irwin Shaw, Attorney-in-Charge of the Legal Aid Society, New York County, stated that most defenders do not consciously or unconsciously “bring their A game to white clients, and B game to clients of color.”

Wayne McKenzie, General Counsel for the New York City Department of Probation and former director of the Vera Institute’s Project on Race and Prosecution, characterized this as a common refrain. “We are processing cases so fast and don’t even know the race of defendants; how could we be biased?” But this stance fails to acknowledge the all-important role of implicit bias, said McKenzie. “If you accept that there are disparities, you must accept reality that we all have prejudices learned from birth. We should also accept that not every disparity is the result of bias.”

Advances in neuroscience have shown that people can consciously believe in equality while simultaneously acting on subconscious prejudices of which they may not be aware. Unconscious bias results from subconscious mental shortcuts our brains make to process information and make decisions quickly.⁵ “Implicit bias” is thus a universal response in all people of all races, although we are more susceptible to it when considering people different from ourselves. Because of racial images that saturate the media and social sphere, explained McKenzie, prosecutors who are processing cases may readily assume the 18-year-old defendant from Brooklyn with the truancy charge is a black male, and the embezzlement charge against a middle-aged man from Long Island involves a white person. These often unconscious assumptions ultimately influence our actions and reactions to others.

The good news, said McKenzie, is that the research shows that unconscious biases can be effectively reduced when people are made aware of them and commit to changing practice.

Recommendations for Reducing Prosecutorial Bias

The good news, said McKenzie, is that the research shows that unconscious biases can be effectively reduced when people are made aware of them and commit to changing practice.⁶ In one district attorney’s office with which the Vera Institute worked, the data showed that African American women arrested for drug offenses were prosecuted more frequently, and stayed in the system longer, than white women with the same charges. While some staff proffered justifications for the higher rate (for example, the theory that some of these women were also prostitutes), six months after raising the disparity and asking employees to scrutinize their charging practices, the disparity had disappeared.

All system actors will need guidance to help them analyze disparities and confront racial bias in their practice. Essential components of an effective intervention to reduce implicit bias are:

- **Data collection.** Accurate information to help prosecutors track decisions in their offices is critical. The data must then be used to ground a discussion of strategies to address disparities. “You can’t manage what you can’t measure,” warned McKenzie. “Overall rates of prosecution may look similar, but it is necessary to dig deeper to see which offenses generate disparity.” For example, in Milwaukee, Wisconsin, the Vera Institute found that while the *overall* likelihood of prosecution was virtually the same for black and white defendants, two subcategories — drug crimes and public order offenses — were generating large racial disparities.
- **Fresh eyes.** An outside consultant or other expert can help to analyze patterns of decision-making and facilitate a conversation with staff about issues presenting in the data.
- **Courageous leadership.** Chief district attorneys and chief defenders must be willing to raise the issue of race and create a safe space to collaborate with their staff and outside agencies. Panelists described an example of a prosecutor in Philadelphia who, alarmed at the disparate rate of arrests of minorities for marijuana offenses, worked with judges and defense attorneys to divert many of the city’s 7,000 prosecutions annually to a weekend program.
- **Focus on inexperienced prosecutors.** McKenzie recalled working with one office in which the largest racial disparities appeared in the charging of first-time possession of marijuana and cocaine. Among white defendants, there was a 67 percent chance of dismissal. Among black defendants, however, only 27 percent of the cases were rejected. Further discussion with staff revealed that young prosecutors viewed the presence of drug paraphernalia such as crack pipes as more serious in urban neighborhoods than needles and bongs in suburban ones.

Accurate information to help prosecutors track decisions in their offices is critical. The data must then be used to ground a discussion of strategies to address disparities.

Panelists also called for structural reforms that would constrain the prosecution of very low-level misdemeanors where racial disproportionality is most prevalent. Specific suggestions were to:

- **Change prosecutorial performance incentives.** “Generally, the lower a DA’s dismissal rate, the higher your office is regarded,” said McKenzie. However, this may not be appropriate when police are making disproportionate arrests. Others suggested that, instead of evaluating prosecutors by conviction rate, they should be assessed based on “appropriate charging” — i.e., the alignment between the original charge and the final charge of conviction. This would discourage the practice of overcharging. McKenzie and other current and former prosecutors warned, however, that such a change requires including legislators and community members in the conversation. “When a DA’s dismissal rate goes up, he or she will be attacked and need political cover,” said McKenzie.
- **Raise the standard for charging.** Others suggested that DA offices shift the standard for charging from “probable cause” to “likelihood of conviction,” or alternatively, make an office-wide decision not to prosecute certain low-level offenses. The Milwaukee district attorney’s office, for example, made non-prosecution of first-time arrests for drug paraphernalia the default position, and made a decision to divert second offenses to an alternative-to-incarceration program. Any decision to override office policy requires approval from the chief.

B. The Role of Defenders in Combating Racial Disparities

Jonathan Rapping, founder and director of the Southern Public Defender Training Center (now Gideon’s Promise), described the journey from arrest to incarceration as a pipeline, with the role of the defender “to provide friction.” In truth, said Rapping, “there are two pipelines: one for white folks, and a second for black and brown people, with more points of entry and more WD 40 lubrication, that generally fails to provide the same level of defense attorney friction.”

Rapping suggested that implicit bias affects defenders as well as prosecutors and other actors in the system: “All of us harbor implicit racial bias, and as a result of our socialization tend to equate aggressiveness and other negative qualities [to black people]. As defenders, many of our clients are black and brown and wear an orange jumpsuit. I am just as guilty of saying, ‘What’s going on here?’ when I see the rare white defendant in a court-issued jumpsuit.”

Recommendations for Reducing Defender Bias

Rapping and other conference participants described several steps to more effective, less racially disparate outcomes:

- **Self-awareness.** Educate defenders about implicit bias so they can be more conscious and effective in combating it.
- **Patience.** Realize that we are not going to fix the problem overnight, but that it is important to fight nonetheless. “Rather than focus on all the clients who may be falling through the cracks, focus on those you can save through zealous representation,” said Rapping.
- **Prevent pretrial detention, and fight zealously against cash bail and detention in misdemeanor cases.** At bail hearings, defenders must zealously advocate for release pending trial, given the clear evidence that pretrial detention increases the likelihood of conviction and longer sentences.⁷ Defenders must inject into the discussion the damning statistics showing disparity in the release of similarly situated whites.
- **Education.** Educate other actors about their implicit biases at different stages of proceedings.
- **Voir dire.** At trial, defenders should make motions and present experts to educate courts about implicit bias. The question “Can you be fair and impartial?” is not sufficient, said Rapping. “All jurors harbor racial biases and we need to get at these in *voir dire* to understand their experiences, not simply their aspirations.”
- **Trial.** Call experts to testify at trial or sentencing on the social science of implicit bias, which shows that jurors are more likely to associate a black or dark-skinned defendant with guilt. “Even if you aren’t granted the request, the judge will have read the papers and have been educated about the role of unconscious bias,” said Rapping.
- **Out of court judicial interactions.** Engage with judges both in and out of court, to raise issues of racial disparities in situations where the clients will not bear the brunt of any animosity generated by the confrontation.
- **Familiarize judges and district attorneys with alternative-to-incarceration programs.** First-year DAs should visit jails and community diversion/release programs, suggested Barry Campbell of the Fortune Society. Seeing defendants of color in alternate settings run by well-regarded providers makes prosecutors more amenable to diversion programs. Campbell noted that the Fortune Society also encourages newly appointed parole commissioners to visit

“Most clients would rather plead and go home than stay in jail while discovery proceeds.”

halfway houses and release programs. This has helped to persuade commissioners to release more prisoners with histories of violence.

- **Minimize economic burdens to clients sentenced to incarceration.** Defenders should argue for suspension of child support payments for prisoners when they have no resources to pay during their term of incarceration, said Divine Pryor of the Center for NuLeadership on Urban Solutions.

Conference participants debated, without agreeing, whether defenders should take more cases to trial rather than engage in routine plea bargaining. Some formerly incarcerated panelists said defense attorneys pressure clients to accept a plea deal. Irwin Shaw of the Legal Aid Society explained that, to the great frustration of many defense lawyers, the imposition of excessive monetary bail and the lack of discovery put many clients in the quandary of passing up freedom in order to go to trial. “Most clients would rather plead and go home than stay in jail while discovery proceeds.” This also frustrates lawyers’ ability to bring systemic litigation challenging disparities because clients are eager to take a deal that will enable them to go home. However, Shaw and others pointed to a number of things defenders can do to root out bias and affirm the humanity of their clients:

- **Include clients as presenters in legal training programs** to talk about the indifferent treatment they have received at the hands of defense attorneys and other criminal justice system personnel.
- **Oppose the criminalization of clients who themselves are victims**, such as female defendants in prostitution and human trafficking cases.
- **Employ social workers to assist clients who have mental health or other needs**, and work to get these defendants out of the criminal justice system.

C. The Role of the Judge and Racial Bias

Some conferees agreed that white defendants were easier to humanize in court, and judges more likely to view them as victims, or simply worthy of a break.

Research shows that one of the greatest determinants of outcomes in misdemeanor and felony cases is whether the defendant was detained pretrial. Those who are detained pretrial serve on average two weeks in jail, and often plead quickly out of desire to go home.

Thomas Giovanni, director of the Community-Oriented Defender Network at the Brennan Center for Justice at New York University School of Law, related his experiences that white clients charged with prostitution were much easier to characterize as victims of sex trafficking than black females. As a result, prosecutors and judges were more likely to dismiss these cases. “The same case and facts with a black female defendant means ‘more work to do,’” said Giovanni.

Wayne McKenzie, a former prosecutor, related an illustrative story about disparate treatment of white and black defendants

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charged with Christmas tree theft in a large midwestern city. Each Christmas, white fraternities at the local university competed to see who could steal the most trees from outdoor lots. Black defendants were generally young men reselling the trees for Christmas spending money.

When arrested, white college students would appear at arraignment with private counsel — often in tears, as they imagined their career prospects spiraling down the drain. They would often appear before a judge who graduated from the same local university and who was inclined to view the incident as a youthful indiscretion. Invariably, the case would be dismissed. Young black males, by contrast, would appear at arraignment represented by a public defender. They would stand stoically before the bench with a blank look (“because I can’t cry and look like a punk.”) These cases would end with a misdemeanor conviction. “Both sets of young men were scared out of their mind,” said McKenzie, but would evoke different reactions, and ultimately results, from judges.

Strategies for Reducing Judicial Bias

Conferees offered a number of suggestions as to how judges could reduce racially disparate outcomes in the criminal justice system:

- **Refuse to set monetary bail in misdemeanor cases.** System officials agreed that the criminal justice system discourages litigation by offering to send pretrial detainees home in exchange for a guilty plea. Clients face a loss of employment, childcare and housing if they don’t plead quickly. If defendants are truly presumed innocent, there ought to be a presumption against requiring monetary bail in misdemeanor cases, argued several defense attorneys.
- **Pre-conviction diversion for misdemeanors.** The current model emphasizes alternative-to-incarceration programs following conviction. But several conferees said that more could be done to suspend prosecution and divert cases prior to conviction (in New York, this is called an adjournment in contemplation of dismissal, or ACD). Cases are typically adjourned for six months; if the defendant does not get into further trouble during this time, the court dismisses the case.

V. Pretrial Incarceration

Panelists: Thomas Giovanni (moderator), Brennan Center for Justice; Marika Meis, Bronx Defenders; Hon. Melissa Jackson, Criminal Court, New York County; Tim Koller, Staten Island District Attorney’s Office; Barry Campbell, the Fortune Society.

Research shows that one of the greatest determinants of outcomes in misdemeanor and felony cases is whether the defendant was detained pretrial. Those who are detained pretrial serve on average two weeks in jail, and often plead quickly out of desire to go home. Some conferees suggested that in high-volume criminal justice systems that depend on plea bargains to process cases, bail is used — whether consciously or unconsciously — as a bargaining chip to coerce pleas, especially in low-level offenses that likely carry little, if any, jail time.

Marika Meis of the Bronx Defenders reminded participants that the New York State bail statute, which was enacted as part of the 1970 criminal procedure law, was actually intended to *reduce* rates of pretrial detention. The statute strongly favors pretrial release, with the setting of monetary bail as the exception and only when required to ensure an accused returns to court. Yet the reality of courtroom practice is far different: In New York City, nearly one-third of the over 370,000 defendants arraigned annually are detained pretrial, even though 80 percent of their cases involve low-level misdemeanors or violations like turnstile jumping, marijuana possession, or fighting in public.⁸ One result is that nearly half of New York City's jail beds are occupied by those charged with low-level offenses who, despite the presumption of innocence, are incarcerated for days or weeks because they cannot make cash bail.⁹

The racial impact of setting bail in so many cases is stark, with blacks and Latinos comprising 90 percent of those detained in the city's central jail on Riker's Island.¹⁰ Meis questioned why so many defendants are held pretrial, when nearly a quarter of arrestees who have bail set in their cases are charged with misdemeanors and do not pose a threat to public safety.¹¹ Moreover, research conducted by the Bronx Defenders and the Criminal Justice Agency¹² indicates that most defendants would return to court even without posting bail:

- More than 80 percent of those accused of crimes who are released without bail return for their court appearances. In 2009, the failure to appear rate in NYC was only 16 percent for those released on their own recognizance.¹³ More appear voluntarily within 30 days of their second court date, dropping the warrant rate further to 6 percent.¹⁴
- The difference between the return rate of those released on their own recognizance (RORs) and those with cash bail was only 3 percent.¹⁵
- The difference in return rates between cases involving bail set at \$500 and bail set at up to \$7,500 is slight — no more than 2 percent.¹⁶ Yet in cases where bail is set at \$1,000 or less, 48 percent of defendants remain incarcerated for an average of 15.7 days until their case is resolved.
- Judges are setting bail at levels that impoverished defendants cannot meet, resulting in unjust, unnecessary and costly

Meis questioned why so many defendants are held pretrial, when nearly a quarter of arrestees who have bail set in their cases are charged with misdemeanors and do not pose a threat to public safety.

incarcerations. When bail is set at \$500 or less, only 13 percent of those charged with misdemeanors are able to post bail at arraignment. By the time of disposition, 44 percent are still detained,¹⁷ even though most will receive dismissals, no jail time, or a jail sentence less than time served in pretrial detention.¹⁸

A. Recommendations

What can system actors do to reduce pretrial detention for poor defendants of color? Panelists offered several ideas for judges, defenders and legislators.

Judges. The Hon. Melissa Jackson, Supervising Judge in the New York County Criminal Court, and Tim Koller, an assistant district attorney from Staten Island, argued that disparities in bail outcomes are driven by economics more than race: poor people simply do not have the money to make bail. There is little that judges or prosecutors can do, they suggested, given that New York's bail statute requires the imposition of monetary bail.

The Hon. Melissa Jackson, Supervising Judge in the New York County Criminal Court, and Tim Koller, an assistant district attorney from Staten Island, argued that disparities in bail outcomes are driven by economics more than race: poor people simply do not have the money to make bail.

Marika Meis and others disputed the requirement of monetary bail as a misreading of the statute,¹⁹ and pointed to several things that judges can do to reduce the disproportionate impact of pretrial detention on defendants of color:

- **Use the alternatives to cash bail** set forth in the statute. The New York bail statute includes nine forms of bail, including unsecured bond, which is a personal appearance bond that does not require any money to be posted, and a partially secured bond, which requires a posting of up to 10 percent of the full amount. A 1986 amendment also allows for bail to be secured with a credit card, but has never been fully implemented.²⁰
- **Lower the bail to a token amount that actually takes into account the finances of the accused.** For unemployed or working poor people scrambling to make ends meet on a minimum wage salary of \$1,000 per month, a \$500 bail “might as well be a million dollar ransom,” said Meis. Yet only 6 percent of defendants in New York City courts had bail set under \$500.²¹ Seventy percent of non-felony cases had bail set between \$500 and \$1,000, and a staggering 9 out of 10 of those who had bail set below \$1,000 were unable to post it at arraignment.²² “Whether the barrier is race or poverty,” said Tracy Velazquez of the Justice Policy Institute, “setting bail at a level that the poor cannot pay is a violation of civil rights.” Why not set it at \$1 or even a penny to satisfy the statute? This would “send a message to legislators,” said Lisa Wayne, past president of NACDL.
- **Calibrate the consequences for failure to appear.** Judges, defenders and prosecutors use risk assessments prepared by the Criminal Justice Agency at every arraignment. These assessments provide the same negative evaluation of a person for a failure to appear, regardless of whether a defendant voluntarily appears in court one day late, or is brought in on a new arrest after five years on the run. Some conference participants argued for greater calibration in the penalties for failing to appear.

Participants agreed that there were too many misdemeanants held pretrial for low-level offenses, and a statutory waiver of bail in these cases would be appropriate.

Defenders. Defense attorneys agreed that they could do more to:

- **Make zealous bail applications,** and cite the above research showing the high rate of return of those released on their own recognizance.
- **Ask for alternative forms of bail.** Panelists urged defenders and judges to closely read the New York State bail statute, and to consider and request creative alternatives to cash bail.
- **Sensitize system actors to the jail experience,** through jail tours for district attorneys, judges and defense attorneys. Seeing and talking with prisoners who are clearly mentally ill can be a transformative experience, said one conference participant.

Legislators. Judges, prosecutors and defenders largely agreed that what was most needed was legislative reform of the New York State bail statute. Specifically, participants recommended that legislators:

- **Change the statute to abolish cash bail.** If 80 percent come back on RORs, why set bail on misdemeanors? Several panelists observed that the statute already creates a presumption of release, with bail the exception.
- **Abolish bail in misdemeanor cases.** Participants agreed that there were too many misdemeanants held pretrial for low-level offenses, and a statutory waiver of bail in these cases would be appropriate. One audience member worried whether abolishing bail would lead legislators to felonize more misdemeanors, or prosecutors to charge cases more harshly. Prosecutors said that a move to upgrade charges was unlikely in low-level cases, such as subway fare evasion, but might well happen in misdemeanor domestic violence and other assault cases, where danger to the community is at issue.
- **Create a pretrial services office** that would provide background assessments and supervision in misdemeanor as well as felony cases. Supervision and services would help assure courts that defendants will appear, said several judges and prosecutors. However, some defenders questioned whether pretrial supervision was necessary in misdemeanor cases, especially when the statistics indicate that most people will return of their own accord.

VI. Jury Selection

Panelists: Darryl Stallworth, defense attorney and former prosecutor (moderator); Justice Ruth Pickholz, New York State Supreme Court, New York County; Abbe Smith, Professor, Georgetown University Law Center; Deanna Rodriguez, Kings County (Brooklyn) District Attorney’s Office Gang Bureau; Cathleen Price, the Equal Justice Initiative (EJI).

The Constitution does not require a racially representative jury, only an impartial “jury of one’s peers.” Panelists grappled with whether, in the 21st century, race should be considered a proxy for partiality. Deanna Rodriguez, an assistant district attorney from Brooklyn, observed: “People are people, and one shouldn’t assume alignment between ethnicity and views on criminal justice. I have encountered some Latinos who are ‘Hang ’em high,’ while others are very suspicious of the criminal justice system.” Others agreed that a juror’s life experiences are probably the most important factor in selection. Abbe Smith, a professor at Georgetown University Law Center, argued that race continues to be a relevant factor in at least two respects:

- **Research shows some continuing evidence of same-race favoritism.** When jurors sit in judgment of an accused they can relate to, they more easily extend the presumption of innocence.

- **Attitudes about police diverge sharply between African Americans and whites.** Whites tend to regard police officers as “friendly helpers,” whereas African Americans approach police with greater skepticism. According to a 2007 survey by the Pew Research Center, 58 percent of whites but only 23 percent of blacks believe that police enforce the law without excessive force and while treating all races equally.²³

Racially representative juries may not be difficult to seat in a culturally diverse location like New York, but diverse pools remain elusive in the South and other regions of the country, said Cathleen Price, a capital defense lawyer with the Equal Justice Initiative in Montgomery, Alabama. Traditional jury composition mechanisms, such as voter rolls and driver license lists, tend to underrepresent racial minorities. Racially motivated challenges for cause or peremptory strikes may further reduce the diversity of juries. In a recent report, EJI found that over 80 percent of African Americans qualified for jury service in Houston County, Alabama, were struck in death penalty cases. In Jefferson Parish, Louisiana, there has been little or no representation of racial minorities in 80 percent of criminal trial juries.²⁴

Rodriguez argued that “judicially controlled time limits on *voir dire* are ridiculous when you’re talking about somebody’s freedom and a victim who has suffered a loss. You simply can’t pick fair jurors in 10 minutes.”

A. Uncovering Bias and Preserving a Diverse Panel in Jury Selection

Voir Dire. Panelists vigorously debated who should control juror questioning during jury selection. The Honorable Ruth Pickholz, a justice on the New York State Supreme Court for New York County, argued that judge-conducted *voir dire* is better, faster and more honest than when questioning is conducted by defense counsel or the prosecutor. DAs and defense attorneys countered that judges are less likely to elicit honest admissions of bias, and that they may be overly inclined to rehabilitate questionable jurors. Professor Abbe Smith cited jury research suggesting that: “People act differently with authority figures. Judges too often say, ‘I know you were a victim of crime and have some feelings about the charge here, but you’re a fair-minded person, aren’t you? If I instruct you that the government bears the burden of proof, you can follow that instruction, can’t you ma’am?’ It is a rare juror who will say no.”

Defense attorneys and prosecutors also objected to the strict time limits that judges often impose on *voir dire*. ADA Rodriguez argued that “judicially controlled time limits on *voir dire* are ridiculous when you’re talking about somebody’s freedom and a victim who has suffered a loss. You simply can’t pick fair jurors in 10 minutes.”

Racially Based Peremptory Challenges. Over 25 years ago, the Supreme Court declared race-based peremptory challenges by prosecutors illegal in *Batson v. Kentucky*, 476 U.S. 79 (1986). Several years later, the Court extended the *Batson* rule to

defense counsel in *Georgia v. McCollum*, 505 U.S. 42 (1992). Panelists agreed that *Batson* and *McCollum* had largely failed to constrain racially motivated strikes, for several reasons. First, defense attorneys are often less than vigilant about tracking racial patterns of peremptory challenges and often hesitant to accuse prosecutors of acting with racial motives. Second, it is all too easy for prosecutors to offer pretextual reasons for strikes.

Panelists debated, but did not reach agreement, on whether peremptory challenges should be outlawed altogether. “I’ll give up my peremptories when you give up your unanimous juries,” said ADA Rodriguez to defense attorneys on the panel, to laughter in the hall.

Justice Pickholz conceded that *Batson* was an imperfect remedy: “But once the challenge is made, it tends to chill the party, and they do not exercise many peremptory challenges against jurors of color after that.”

Jury pools composed only of registered voters exclude many people of color who may not vote in numbers representative of their population, or who have felony convictions that in some states disqualify them from voting.

B. Recommendations

Panelists offered several suggestions for what judges and trial counsel can do to maximize the participation of jurors of color:

- **Offer hardship accommodations for jury service.** Jurors of color are more likely to experience financial or logistical hardship from jury service, and may be more likely to request recusals. Courts should routinely offer childcare at the courthouse and public transportation passes or mileage reimbursement, said panelists. For courts that do not routinely offer these accommodations, defense attorneys and prosecutors should move the court for funds for jurors who state they lack the financial resources to serve. Panelists debated whether courts should excuse people who do not want to serve, with some favoring dismissal, and others, like ADA Rodriguez, emphasizing the civic duty to serve. “Even initially resistant jurors sometimes change their minds and make them open

to serving, if the importance of their service is explained,” observed Rodriguez.

- **Challenge the pro forma exclusion of jurors with personal or family exposure to the criminal justice system.** Professor Abbe Smith counseled defense attorneys to challenge the routine use of the question: “Has anyone in your family been caught up in the criminal justice system?” Similarly, counsel should object to strikes based on the ground that the juror lives in a “high-crime community.” The unprecedented scale of mass incarceration in America today — with one out of every three black men expected to serve time in prison during his lifetime — means that a question about criminal justice contact can no longer be treated as a race-neutral question or strike for cause.²⁵ ADA Rodriguez agreed with this assessment: “The mere fact that a family member has contact is irrelevant. What’s relevant is their *view* on that experience. Many people of color with family members who have been arrested or sent to jail will tell you, ‘He deserved it.’ My interest as a prosecutor is knowing whether there is anything about that experience that made you feel that your loved one did not get a fair trial.”

- **Restore party-controlled *voir dire*.** Thorough questioning by the parties allows counsel to obtain sufficient information about jurors’ life experiences so that they do not have to resort to race and gender as proxies. Both counsel must have adequate time, although all of the experts on the panel emphasized that good *voir dire* is about *effective* questions more than the number of questions. (Here, prosecutors and defense attorneys observed that, as more judges take control of questioning jurors, younger lawyers are not learning how to conduct skillful *voir dire*s.) Panelists recommended the following time-saving compromise: Counsel should be allowed at least 30-40 minutes to question the first *venire* of jurors. Less time could be allowed in subsequent rounds, as newly seated jurors will have heard the previous questions and parties can move through interviews more quickly.

- **Advocate for alternatives to voter-based jury rolls.** Jury pools composed only of registered voters exclude many people of color who may not vote in numbers representative of their population, or who have felony convictions that in some states disqualify them from voting. Even those disenfranchised through a felony conviction still have a right to serve on juries, said Cathleen Price of the Equal Justice Initiative. Price urged trial counsel to consider litigation challenging the exclusion of felons on

the basis that former prisoners qualify as a cognizable group under “fair cross-section” jurisprudence. While this argument has not been firmly established in the case law, bringing these kinds of challenges forces courts to articulate why ex-offenders should be disqualified from jury service.²⁶ Price also urged defense counsel and prosecutors to work with court clerks to expand their jury pool sources. Utility bill rosters are broader, more representative sources than either drivers’ licenses or voter rolls, said Price.

VII. Search, Seizure And Identification Issues

Panelists: Lexer Quamie, Leadership Conference on Civil and Human Rights (moderator); Hon. Mark Dwyer, New York State Supreme Court, Kings County; Rodney Mitchell, REEntry Legal Services; Donna Lieberman, New York Civil Liberties Union (NYCLU); William Gibney, Director of Special Litigation Unit, Legal Aid Society; Delores Jones-Brown, Center on Race, Crime and Justice, John Jay College of Criminal Justice; David LaBahn, Association of Prosecuting Attorneys.

“Any program that targets 90 percent innocent people cannot be an effective crime fighting tool.”

— Professor Delores Jones-Brown

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A. Stop-and-Frisk Policing in New York City

Delores Jones-Brown, a professor at the John Jay College of Criminal Justice, painted a disturbing picture of search and seizure practices in New York City. Over the past 10 years, under the leadership of Mayor Michael Bloomberg and Police Commissioner Raymond Kelly, the New York Police Department has aggressively escalated its use of stop-and-frisk policing, a move it credits with maintaining a historic drop in violent crime. In 2011, New York City police officers made 684,330 stops across the five boroughs — a 14 percent increase over the previous year and more than double the number of stops under the administration of Mayor Rudolph Giuliani, a pioneer of the “broken windows” theory of policing.

But stop and frisks are a very localized experience, largely confined to the 10 precincts in the city that are predominantly populated by blacks and Hispanics. Of the 684,330 stops by police in 2011, 87 percent were of blacks or Hispanics; only 9 percent were of whites. Blacks comprised 62 percent of stops and 52 percent of arrests, although only 25.5 percent of the city’s population is black.²⁷

Most arrests following a stop and frisk are for misdemeanors. Misdemeanor arrests for marijuana possession in New York City have skyrocketed — with about 350,000 arrests over the past 10 years, a nearly twelve-fold increase over the 30,000 total arrests in the preceding decade.²⁸ Of particular concern, said some conference panelists, was the common practice of ordering suspects to empty their pockets in a stop and frisk, and then making an arrest for marijuana under a city ordinance prohibiting the possession of marijuana “in public view.” (The possession of small amounts of marijuana in pockets or outside of public view was essentially downgraded to a violation in the 1970s.) The commissioner of police ordered officers to cease arrests for “manufactured” plain view arrests in 2011, but after dropping for a short time, such arrests have risen to previous levels.

Of particular concern, said some conference panelists, was the common practice of ordering suspects to empty their pockets in a stop-and-frisk, and then making an arrest for marijuana under a city ordinance prohibiting the possession of marijuana “in public view.”

This targeting of minority communities for drug enforcement is the principal driver of racial disparities in the city’s criminal justice system, said many conference participants: blacks and Hispanics comprise 50 percent of NYC’s population, but 88 percent of all arrests.

Perhaps most disturbing, in the view of some panelists, is that the NYPD’s aggressive use of stop-and-frisk policing produces little evidence of crime. Guns are uncovered in roughly .11 percent of stops; contraband in only 2 percent of stops;

and summonses and arrests or summons are issued in less than 12 percent of all cases.²⁹ This means that nearly 90 percent of all stop and frisks are conducted against innocent persons, said Jones-Brown.

Reasons proffered by police for stops are highly subjective, leaving room for racial bias. The leading reason for stops cited in police reports is “furtive movement” — a justification that appears more than three times as often as identity-based stops, such as “suspect fits the description of a perpetrator.” Professor Jones-Brown concluded that young men of color in New York City are subjected to police contact based largely on their attire (e.g., saggy pants, hoodies or suspected gang colors), and cited evidence suggesting that lesbian, gay, bisexual and transgender youth and adults of color are also frequent targets of police harassment.

The Honorable Mark Dwyer, an acting justice on the Kings County (Brooklyn) Supreme Court — but speaking purely in an individual capacity — agreed that the practice of making stops and frisks without the articulable reasonable suspicion required in *Terry v. Ohio*, 392 U.S. 1 (1968) must end. Those practices not only conflict with relevant case law, but also alienate members of minority communities and make it harder for police to elicit their cooperation to prevent and solve crime. But he questioned whether it was possible to address crime and public disorder in New York City without alternatives to overly robust use of stop-and-frisk that rely upon additional assistance from residents of crime-prone neighborhoods. Neighborhoods with higher crime need different, more aggressive policing strategies, said Dwyer. And community assistance to the police is central to potentially successful strategies. If residents of high crime neighborhoods want change, they must be part of what changes, he said.

Professor Jones-Brown disagreed with the proposition that policing strategies must differ between neighborhoods, citing research showing that a small number of repeat offenders are responsible for the majority of criminal offenses. “Crime is down across the city, including in ‘high crime’ neighborhoods where aggressive stop-and-frisk policing

has escalated. It is a violation of civil liberties to subject a majority of law-abiding residents to oppressive policing in order to capture or deter a few,” said Jones-Brown.

Panelists discussed a range of interventions needed to address the abuse of stop-and-frisk policing in New York City and elsewhere.

B. The Role of Civil Litigation

Some conferees agreed that post-arrest litigation in individual cases is inadequate to address the problem of racially disparate policing practices because district attorneys, defense counsel and judges see only the small percentage of cases in which contraband was found — not the majority of cases where innocents were unnecessarily and unjustly stopped.

For this reason, several defender and public interest legal organizations have brought civil lawsuits to challenge these practices. The Center for Constitutional Rights is litigating a class action case, *Floyd v. City of New York*, challenging the racial profiling and unconstitutional stop and frisks by the NYPD. The Legal Aid Society of New York, the NAACP Legal Defense and Educational Fund and a private law firm (Paul, Weiss, Rifkin, Wharton, & Garrison LLP) have filed a pattern-and-practice case, *Davis v. City of New York*, challenging abusive arrests for criminal trespass in New York City Public Housing Authority (NYCHA) buildings. The suit alleges that police officers routinely arrest residents and their guests who are legitimately on the property.

Separate litigation filed by the NYCLU, the Bronx Defenders and Latino Justice/PRLDEF challenges a sister program called Operation Clean Halls, in which police conduct “vertical patrols” in private buildings. Advocates have challenged the validity of the program based upon the large number of trespassing arrests subsequently thrown out in court. “Untold numbers of people have been wrongly arrested for trespassing because they had the audacity to leave

their apartments without IDs or visit friends and family who live in Clean Halls buildings,” said Donna Lieberman, director of the NYCLU. Recently, the federal judge presiding over the three cases described above issued a preliminary ruling calling trespass policing “a longstanding unconstitutional practice.”

These lawsuits are supported by a growing coalition represented by Communities United for Police Reform (CPR), which works to end discriminatory policing practices and build a movement to promote public safety approaches based on cooperation and respect. Among the remedies being sought by coalition members are:

“Untold numbers of people have been wrongly arrested for trespassing because they had the audacity to leave their apartments without IDs or visit friends and family who live in Clean Halls buildings.”

- **Better police management** (specifically, reform of performance measures for police officers). Although the NYPD denies enforcing arrest quotas, police department performance evaluations still refer to the numbers of arrests in assessing officers' effectiveness, said reform advocates.
- **Education and training for officers on implicit bias.**
- **Orientation toward problem solving and community building.**

“ . . . Training police on the proper legal standard for stop-and-frisk will do little unless we change the performance criteria upon which they're judged. Stop-and-frisk quotas are fundamentally inconsistent with the legal standard predicated on individualized suspicion [*Terry v. Ohio*].”

C. Education vs. Structural Approaches to Reform

Conferees engaged in a vigorous debate as to whether training and education to increase the cultural competence of police are effective in reducing racial disparities, or whether structural changes that focus on oversight and reform of police accountability measures provide the greater impact.

Professor Jones-Brown described a course she teaches at John Jay called “Perspectives on Race and Crime in America.” The students include “a lot of well-intentioned officers who are learning about their own implicit biases. They see non-white, poor people, dressed in ways they think are inappropriate, and decide this non-criminal behavior signals someone who should be stopped.”

Others emphasized the importance of cultural competence for new officers, who may view people hanging out on stoops and street corners in poor neighborhoods as troublemakers, when in fact this may be the norm in communities where residents live in crowded apartments and may lack the resources to frequent restaurants or other indoor social spaces. Rodney Mitchell, founder of REEntry Legal Services in Washington, D.C., concurred. A beat officer's relationship with the community will determine his effectiveness in resolving crime, said Mitchell. Accordingly, Mitchell's program focuses on building relationships among police, clergy and young people in the neighborhood, and familiarizing police with social networks and clubs in their service area.

A defense attorney in the audience insisted that the larger problems are structural ones — in particular, arrest quotas that encourage officers to make excessive numbers of arrests. “If you want to make detective, you have to make the collars,” he said. He and others emphasized the need for performance reforms that would reward officers based on the quality rather than quantity of arrests.

Donna Lieberman, director of the NYCLU, weighed in on the question of differential policing strategies and the role of police training versus performance measures: “The Compstat data are helpful, and police should be responding to crime hotspots. But the NYPD has abused the data to impose quotas on line officers. Training police on the proper legal standard for stop-and-frisk will do little unless we change the performance criteria upon which they're judged. Stop-and-frisk quotas are fundamentally inconsistent with the legal standard predicated on individualized suspicion [*Terry v. Ohio*].”

D. Legislative Reforms

Advocates are working with several members of the New York City Council on a package of four bills that they believe would curtail abusive stop-and-search practices.³⁰ The legislation includes:

- **A bill that would outlaw racial profiling and strengthen its definition**, as well as provide a private right of action for innocent victims of profiling.
- **A bill creating an Office of the Inspector General**, an independent office that would review the civil rights and liberties impact of police policies and practices and make recommendations for reform. (The NYPD has its own Office of Internal Affairs, but proponents of the measure say that an independent agency would provide greater oversight and accountability.)
- **A bill requiring that police give the equivalent of *Miranda* warnings before a “consensual” search.** This measure is considered important to counter an atmosphere in which police leadership have counseled young people to consent to search — whether or not probable cause exists — if they want to avoid arrest.
- **A bill requiring that police state their name and badge number** when conducting a stop and frisk.

**“We have a good system —
but it’s the one that white kids get”**

E. Criminal Litigation Challenging Stop- and-Frisk Arrests

Despite the fact that post-arrest suppression motions in criminal court will never address the majority of cases in which police may have overreached, some conferees agreed that there were several things that prosecutors and defense attorneys can do once a defendant is arrested for trespass or contraband arising from a questionable stop and frisk:

- **Bring greater prosecutorial scrutiny of “plain view” cases.** DAs should refuse to prosecute marijuana possession cases (particularly for marijuana in “plain view” following an order to empty pockets). The Association of Prosecuting Attorneys now advises district attorneys to rethink the prosecution of marijuana possession cases, said David LaBahn of the APA, because it limits, due to volume, their ability to focus on more serious, violent crimes.
- **Demand routine interviews with police officers.** DAs should require interviews with arresting officers in cases involving questionable stops and searches. So many trespass arrests in Bronx public housing complexes were thrown out in recent years that in September 2012, Bronx District Attorney Robert Johnson announced that his office would no longer prosecute such cases based on a paper complaint alone. Going forward, DAs will be required to conduct face-to-face interviews with arresting officers.³¹ This move is widely expected to reduce the number of arrests.
- **Bring motions to suppress.** Defense attorneys should move to suppress the fruits of illegal stops and searches. Motions give defense counsel an opportunity to challenge what is going on behind the scenes, said panelists.

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VIII. Sentencing And Community Corrections — A Tale Of Two Systems

Panelists: Nkechi Taifa, Open Society Foundations (moderator); Dr. Divine Pryor, Center for NuLeadership on Urban Solutions; Clinton Lacey, New York City Department of Probation; Jonathan Rapping, the Southern Public Defender Training Center; Mike Randle, Cuyahoga County, Ohio Community-Based Correctional Facility.

In New York City, one-third of all probationers are 16-24 years old. The vast majority are young men of color. These levels of disparity are even starker in the juvenile justice system. Vincent Schiraldi, Commissioner of Probation in New York City, observed that there was little discussion of racial disparities, or the need to address them, within corrections bureaucracies. Why? “The opposite of love is often apathy,” he said. “We’ve become inured to amazing levels of disparity in our systems.”

“We have a good system — but it’s the one that white kids get, which diverts kids out of the system and retains the few who really need to be in prison,” said Schiraldi to a hushed room.

Dr. Divine Pryor, Executive Director of the NuLeadership Center for Urban Solutions, concurred: “There is an unwritten understanding among police that you don’t arrest white kids and put them in the system, because you don’t want them to get a record. Young people of color in poor neighborhoods have an entirely different experience of the criminal justice system,” said Pryor. “Communities are being traumatized by these [policing] practices when 700,000 are stopped and searched per year. . . . High schoolers assume the position, and drop their backpacks when they see police roll up. Whole generations have already accepted prison as the norm. This is the destructive effect of mass incarceration on community consciousness and personal aspirations.”

A. The Role of Probation in Reducing Racial Disparities

Clinton Lacey, Deputy Commissioner for Adult Services in the New York City Department of Probation, described three core approaches that his agency is using to minimize the impact of the criminal justice system on poor communities of color:

- **Reduced reliance on incarceration.** Under Schiraldi's leadership, the NYC Probation Department is using several means to minimize defendants' exposure to prison. First, the Department is using risk and needs assessments to develop sentencing recommendations to judges. These are designed to distinguish between defendants who are high risk and defendants who are merely high need. On the back end, the Department has cut the rate of violations by 40-50 percent in recent years by being more thoughtful, creative and patient. "Our approach is to exhaust other options before violating a probationer and sending him to prison," said Lacey. Finally, the Department has significantly increased its requests to court for early discharge from probation for many people in its caseload. "The literature is clear that after 18 months, probation supervision brings diminishing returns, despite the fact that misdemeanor charges carry a three-year term of probation, and felony charges five years. Courts often agree with us."
- **More services.** The Department has shifted its focus during the probationary period from supervision and monitoring to providing services and lifting barriers to employment and housing.
- **Do it in the community.** Probationers now report to neighborhood-based centers, part of the Department's Neighborhood Opportunity Network, rather than to department headquarters. This encourages greater knowledge of community context, risks and services among probation officers, and "gives them a different view of the community where the client lives," said Lacey. "Communities of color are not just venues of pathology, but places with assets where solutions will be made." Some probation officers are even embedded in community-based organizations that provide resources and services. A community-based setting also brings advantages to probationers and parolees, who no longer have to miss work or other obligations to travel to faraway offices to report.

B. The Role of Corrections in Reducing Disparities

Mike Randle, a long-time corrections executive from Ohio, observed that many people are surprised to learn that over half of state prisoners serve only 12 months or less. "Prison should be reserved for serious, violent predatory offenders, yet our prisons are clogged with people serving short terms for less serious offenses."

Now more than ever, said Randle, there is a new interest among policymakers in reducing incarceration rates in order to reduce pressure on state budgets. Although "no politician ever won election arguing for rehabilitation rather than prison," in the words of one conference participant, there is a willingness to talk about alternatives to incarceration that reduce reoffending.

"The literature is clear that after 18 months, probation supervision brings diminishing returns, despite the fact that misdemeanor charges carry a three-year term of probation"

After more than 23 years working in state prison facilities, Randle now runs a new initiative that provides front-end diversion from prison. The Community-Based Correctional Facility (CBCF) is a secure institution in the heart of Cleveland, the largest "sending" community to state penitentiaries in Ohio. The program targets offenders with low-level felonies who are at high risk to reoffend without intervention. Placement in CBCF is based upon risk level, with residents otherwise falling somewhere between electronic monitoring and prison.

The goals, according to Randle, are to give judges another option short of prison and to help offenders become productive members of the community. Offenders serve up to 6 months with substance abuse counseling, cognitive behavioral treatment, anger management, and employment or other activities that maintain their ties to the local community. Residents earn the opportunity to leave the facility after some period of time. Staff interaction with residents is rooted in evidence-based cognitive practices — as well as the expectation that they will succeed. "We help offenders recognize risky behavior, engage in more effective de-

cision-making, and reward positive behavior IMMEDIATELY,” said Randle.

C. Sentencing Reform

Some conferees suggested that tight budgets across the country and within the federal government have created a policy window for sentencing reforms that promote crime prevention, shorter prison terms, and services or other programming to reduce reoffending. Nkechi Taifa, a policy analyst with the Open Society Foundations in Washington, D.C., noted that two major pieces of federal legislation have passed Congress in recent years. Both have improved outcomes for people of color in the criminal justice system:

- **Second Chance Act** — Signed into law on April 9, 2008, the Second Chance Act (P.L. 110-199) was designed to improve outcomes for people returning to communities from prisons and jails. The legislation authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support and other services that can help reduce recidivism. In 2012, 58 million dollars was appropriated toward re-entry services.
- **Fair Sentencing Act** — Signed into law in 2010 by President Obama, the Fair Sentencing Act (P.L. 111-220) reduced the 100:1 sentencing disparity between crack and powder cocaine to 18:1. The legislation also eliminated

tirely by the taxpayer, and private operators have no incentive to save bed space, noted several panelists. While some states have barred private prison contractors after poor experiences with them, other states are actively considering privatizing state facilities.

Conference participants called for additional sentencing reform efforts on the state and local level that would:

- **Reduce certain misdemeanors to infractions**, such as walking between subway cars, fare beating and disorderly conduct. David LaBahn of the APA described a recent effort in California to downgrade certain misdemeanors to a \$250 fine. Sponsors ultimately could not get it through the legislature, but district attorneys in some jurisdictions subsequently worked with judges and the defense bar to create a diversion process that took those cases out of the system. In 2010, the California legislature approved the downgrade of simple marijuana possession to a fine of \$100.
- **Reinvest justice savings in community programs that prevent crime and recidivism**. Justice Reinvestment is a reform initiative that seeks to reinvest savings from prison commitments into non-incarceration alternatives and community resources in high-crime neighborhoods.
- **Restrict the use of conspiracy laws**. Karen Garrison, a criminal justice reform activist from Washington, D.C., whose twin sons were wrongfully convicted of drug conspiracy, lamented the long reach of conspiracy laws. Conspiracy charges — which under federal law carry significant sentencing consequences — are too often brought against peripheral actors in order to compel them to inform on others.

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David LaBahn of the APA described a recent effort in California to downgrade certain misdemeanors to a \$250 fine.

the five-year mandatory minimum sentence for simple possession of crack cocaine.

Notably, each of these pieces of legislation passed with strong bipartisan support. Advocates of reform included state prosecutors and former U.S. Attorneys, who testified before the U.S. Sentencing Commission.

At the same time, sentencing reform continues to face stiff opposition from the private prison industry, which makes its profit on a per prisoner basis and therefore depends on continued high prison commitments. Private prisons have won contracts largely on the argument that their operational costs are lower; however, contracts are financed en-

Some conferees agreed that more should be done to ensure the sharing of best practices that reduce racial disparities. Among other resources, conferees mentioned the following professional networks that help systems reduce the use of incarceration, detention and disproportionate minority confinement:

- **The Juvenile Detention Alternatives Initiative (JDAI)** of the Annie E. Casey Foundation. JDAI networks juvenile justice system stakeholders around the country and focuses on reducing disproportionate minority confinement, as well as overall detention rates of young people. See www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx for more information and resources.

D. Networks for Sharing Best Practices

- **The Haywood Burns Institute** focuses on strategies to reduce racial disparities in the juvenile justice system. See www.burnsinstitute.org for more information and resources.

IX. Community Justice

Panelists: Brett Taylor, Center for Court Innovation (moderator); Anne Swern, Brooklyn District Attorney’s Office; Dennis Lawrence, AmeriCorps; Robin Steinberg, Bronx Defenders; James Brodick, Brownsville Community Justice Center and NYC Community Cleanup.

For more than 15 years, New York City has been the locus of several pioneering community justice initiatives developed by innovative defender, prosecution and court offices. This panel explored the role and potential of community justice models in addressing racial disparities.

Panelists agreed that the core features of a “community justice” approach are: 1) consultation with local residents — including youth, local businesses, offenders and crime victims — about community needs and priorities; and 2) services or advocacy to address the underlying causes of crime or criminal justice involvement.

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A. Defender-led Community Justice: The Bronx Defenders

Robin Steinberg is the executive director of the Bronx Defenders, a 15-year-old public defender agency located in the poorest congressional district in the nation. Steinberg described her office’s model of “holistic defense” as one that seeks solutions to the underlying issues driving clients into the criminal justice system. The Bronx Defenders also seeks to mitigate the collateral consequences flowing from involvement in the criminal justice system. This process is “informed by, and responsive to community voices,” said Steinberg. “Public defense is not the solution,” she cautioned, “but how we practice defense can have an impact on racial disparity.” Steinberg outlined several community-oriented practices that the Bronx Defenders developed to do so:

“Public defense is not the solution,” she cautioned, “but how we practice defense can have impact on racial disparity.”

- **Create structures and mechanisms to capture community voices regarding advocacy needs.** The Bronx Defenders has a client advisory board, convenes regular town hall meetings and conducts open, walk-in intake. It also conducts collaborative information sessions and Know-Your-Rights workshops with other community-based organizations and city agencies. These efforts “help us develop responses to larger issues that are surfacing,” said Steinberg.

In response to client input, staff at the Bronx Defenders developed several initiatives:

- **A voter registration project** at the city’s largest jail to counteract the “urban myth” (one often propagated by misinformed corrections and probation officers) that people with arrest or conviction records cannot vote in New York State.
- **Civil litigation challenging stop-and-frisk policies** in New York City public housing developments, as well as a class action lawsuit, successfully settled with the NYPD, challenging illegal arrests for loitering.

- **A data collection and public education project on marijuana arrests.** Bronx Defenders staff heard repeatedly from community members that police were routinely throwing young men of color against the nearest wall, going into their socks and pockets, pulling out (non-criminal amounts of) marijuana, and then charging the youth for marijuana possession “in plain view.” This policing practice is illegal, but had remained little more than anecdotal. The Bronx Defenders began to collect and publish data that educated the public about racial disparities in marijuana arrests. The initiative has helped spur a statewide debate and a legislative proposal from Governor Andrew Cuomo to decriminalize public possession of small amounts of marijuana, lowering the penalty from a misdemeanor to a non-criminal violation.
- **A bail initiative** that educates defense attorneys and judges about alternatives to cash bail authorized by the New York State bail statute. “We do not need pretrial supervision to throw a wider net of supervision over clients,” argued Steinberg. “What we need are alternatives to cash that will assure their appearance in court.” The Bronx Defenders also created its own revolving bail fund that helps clients meet bails of \$1,000 or less.
- **Alternatives to jail and prison** that would keep those charged with less serious crimes close to their homes and families, while also ensuring accountability and public safety. The Brooklyn DA’s office became the first prosecutor’s office in the nation to develop a drug treatment alternative program (called DTAP in New York City, for Drug Treatment Alternatives to Prison) for putative felons who normally would have served at least 2-4 years in prison. “We took seriously the notion that this is a medical problem,” said Swern.
- **The need for support for re-entering prisoners.** The Brooklyn DA’s office created a re-entry partnership called ComALERT (Community and Law Enforcement Resources Together). With on-site drug treatment, job development, public health testing, and GED instruction, ComALERT connects re-entering residents with community services all in one venue. The DA’s office used its own resources to fund the program, which was later evaluated by a researcher at Harvard University.
- **Education for over-age students.** The Brooklyn DA’s office collaborated with the city’s Department of Education to launch a program in Brownsville called “Restart” for 13-14 year olds who have been held back a grade or more, but who are too mature physically or emotionally to join a classroom of 6th graders. The project, located in a neighborhood with a high drop-out rate, has had a 100 percent graduation rate in its first year of operation. Swern described the collaboration as an example of how prosecutors can leverage their credibility as crime fighters to “connect the dots between public safety and community initiatives.”

B. Community Prosecution in Brooklyn

Anne Swern, First Assistant District Attorney in the Kings County (Brooklyn) District Attorney’s Office, described community prosecution simply as “community justice delivered by the prosecutor’s office.” “My boss is an elected

The Bronx Defenders began to collect and publish data that educated the public about racial disparities in marijuana arrests.

official, so the community must have a role in all I do,” emphasized Swern. For prosecutors, building relationships with the community is critical to generating confidence in the criminal justice system. Without that confidence, witnesses will not come forward and people will be afraid to report crime. For all of these reasons, explained Swern, the Brooklyn DA’s office “is known as the office of ‘yes.’ We initiate projects based on what the community tells us is important.” Swern described some of the needs they heard over the years and the community justice programs that emerged in response:

The Brooklyn DA’s office was also instrumental in bringing a community court to Red Hook, an impoverished neighborhood in Brooklyn reeling from the shooting of a popular school principal. Swern recounted, “We wanted a community court that would be transparent, accessible and accountable to the community. We didn’t want to limit the kinds of cases it could hear but wanted to think expansively.” Hence the Red Hook Community Justice Center was born to address the needs of the community, not just the litigants in court.

Community Courts: The Red Hook and Brownsville Examples

James Brodick, a project director with the Center for Court Innovation, described the skepticism that greeted the initial proposal to build a community court in Red Hook, a geographically isolated neighborhood that lies along the Gowanus Canal in northern Brooklyn. “No one is standing up and clapping at the prospect of a court coming to the neighborhood. When people go to court, it’s never for a

good reason,” said Brodick. Bringing “early deliverables” to the neighborhood is a key to getting buy-in for a community court. Recognizing that most crime results from a lack of opportunity, the first priority was a community-wide survey, conducted door to door, to understand what people saw as the biggest issues in the neighborhood. “Job developers, educators and social workers are all part of the equation, not just lawyers and judges,” said Brodick. Several initiatives — as well as unintended benefits — flowed from the survey process:

- **The launch of an AmeriCorps program and teen court.** Instead of the usual model, in which privileged people come from afar to help a blighted neighborhood, the court launched an AmeriCorps program with young people from the Red Hook and Brownsville neighborhoods who serve their own community. The program has trained young people as organizers and community leaders. Among the initiatives is a teen court, in which youth trained as mediators help to resolve cases involving other young people. “This is an empowering experience that gives them a different lens on the criminal justice system,” said Brodick. “It teaches accountability, fairness and getting people on the right track.” Dennis Lawrence, a life-long Brownsville resident and AmeriCorps volunteer, praised the program’s interventions as literally life saving. “Brownsville is in a state of genocide — we have young people who are killing each other. We help to mediate between their current situation and future incarceration.”
- **Pretrial supervision.** The community court model houses a pretrial services office on site. The pretrial investigation and monitoring services have given judges greater confidence that defendants will appear in court. As a result, community courts are 14 times less likely to require bail than traditional courts, said Brodick. “It will mean more conditions, but no cash.”
- **One-stop services.** The community court offers drug treatment, a job center and other services, all at the courthouse site. Job training programs include driving instruction, culinary arts classes and GED training.

Brodick said that the community court model had helped to reduce crime recidivism by 10 percent among adults and by 20 percent among young people. Red Hook is now one of safest places in Brooklyn, he said, and has attracted new stores/employers like Ikea and Fairway to the neighborhood.

Another positive, although unintended, consequence of the community court model was greater system accountability, said Brodick. “The culture changes when cases go in front

Brodick said that the community court model had helped to reduce crime recidivism by 10 percent among adults and by 20 percent among young people.

of the same judge, prosecutor and Legal Aid attorney every week” in a small court, he said, because officials more readily see patterns of injustice and act on them. Brodick gave as an example a judge who heard repeatedly from young defendants coming before him that a certain police officer was harassing them. That judge called on Brodick, as the court administrator, to contact the precinct chief and investigate. “Downtown, when you’re working cases in front of different judges, you’re less likely to worry about what’s best for this person or the community, and more concerned about moving the docket,” said Brodick. Anne Swern agreed. She noted that the Brooklyn DA’s office had also adopted a catchment zone model that divided staff among 23 police precincts of heterogeneous crime rates that better allows prosecutors to identify troublesome patterns and hotspots and develop local relationships. “It’s not as comprehensive as a community court with everything and everyone under one roof, but it requires far fewer resources, and thus can address the remaining 20 police precincts that do not have community justice centers with a similar philosophical approach,” said Swern.

The Center for Court Innovation is now taking its community court model to Brownsville, a two-square-mile Brooklyn neighborhood of 115,000 people, 40 percent of whom live in public housing. Brownsville has a serious drug and crime problem. As part of its start-up effort, the court has launched a joint program with the Department of Probation, which targets 16-to-24-year-olds for job training. Enrollees participate in classes for six months and even receive a stipend.

The court is also trying to ease the tension between young people and police in the neighborhood. Brodick described a typical dynamic in which young rookies — wary of Brownsville’s reputation as a tough neighborhood — were getting into ego-fueled altercations with young neighborhood men that frequently spiraled out of control. The rookies would “go in with their guard up, not willing to nod and smile at residents, or look people in the eye. Given how young people in those neighborhoods already view cops, you can guess how those interactions end up,” said Brodick. As court officials, “We walk the line of keeping good relations with the police and community, which is not always easy. We say to the local captain — whether this is an impact zone, or whether you do stop-and-frisk policing is not

Ann Swern of the Brooklyn DA's office added mental illness and insufficient mental health services to the list of problems that are deposited on the doorstep of a criminal justice system neither designed nor equipped to handle them.

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our call. But we can help introduce your officers to the neighborhood.” The community court began to arrange community tours with teams of young people from the neighborhood. The community walks have helped to “get both parties to see eye to eye. The truth is that both the rookie cops and young people in Brownsville are scared.”

Brodick summed up by saying, “Engaging communities in the planning process, and using the right professionals to come up with good outcomes to cases, helps to hold systems accountable.”

C. Do Community Justice Models Really Impact Racial Disparities?

Robin Steinberg challenged the element of complacency underlying the presentations. Community justice programs in courts, prosecution and defender offices, “while interesting, innovative and an improvement over traditional models,” are essentially “palliative care” that fails to address the larger issues of racism, poverty and lack of opportunity that went “unaddressed long before anyone hits the courthouse steps.” Steinberg also said:

We have decided that rather than solve those problems of racism and poverty, we will cede them to the criminal justice system. It shouldn't be the case that the biggest building and most resourced entity in a poor neighborhood is the courthouse — not the schools, hospitals or conflict resolution organizations, but the courthouse. . . . Criminal justice agencies aren't really addressing the larger issues of racialized policing and how we respond to poor versus wealthy communities. . . . [O]ur agencies need to be pushing and asking the larger questions. It's not good enough to say to police, “How you do your stop and frisk — that's your call.” It's NOT their call, it's OUR call [as officers of the court]. We should be calling that out as a problem.

Steinberg also questioned the value of offering services after arrest, because “people needed those services long before they got arrested into the criminal justice system.” She also refuted the assumption of therapeutic justice models that every defendant needs to get “back on track”:

In New York City a majority of people being hauled into the criminal justice system — almost all of them poor people of color — are coming in on low-level misdemeanors. These are not [offenses] that actually require ‘getting back on track.’ We have to question why we are using the long arm of the criminal justice system to arrest young people who write on their desk, or black and Latino men who write their name on a wall, or why we arrest kids for pot in a pocket when we don't arrest other kids for pot. This has less to do with lives off track, and more to do with how we define crime, whom we target, and how we police certain communities.

Like earlier panelists, Steinberg argued that “we’d resolve most race disparity if you either policed evenly, or made the decision that we shouldn’t be criminalizing non-violent, non-victim crimes. The impact of this policing model is to further victimize and disenfranchise people who, together with their families, suffer horrible consequences that flow from even a marijuana arrest.” Community justice models and criminal justice agencies, she concluded, are “too late in the game” to eliminate racial disparity in the criminal justice system.

Ann Swern of the Brooklyn DA’s office added mental illness and insufficient mental health services to the list of problems that are deposited on the doorstep of a criminal justice system neither designed nor equipped to handle them. But Swern argued that the system must still hold people accountable for less serious offenses in order to create a livable society. “Don’t talk to me about decriminalization unless you have a plan and some details about how you’re going to do it and provide resources to hold people accountable. I don’t need a bicyclist riding on the sidewalk in the criminal justice system, but I don’t want him mowing down an old woman either.”

In these less serious cases, Swern suggested that agencies do have a duty to reduce the harm of criminal arrests. “I can separate out those cases that are serious and victimizing the community. As for the other, far larger group of cases — I have to ask myself whether there is anything I can do to make the trip to the courthouse less than a complete harm or waste of time.”

Swern explained that the Brooklyn DA focuses on jail and prison diversion, particularly for drug crimes, as a strategy for minimizing racial disparity, because “we understand that incarceration undermines family and economic support relationships.” Her office was one of the first in the country to create a drug treatment alternative for both felony and misdemeanor drug offenders. In the face of criticism from defense attorneys, who argued that the year-long program widened the net of surveillance for clients who would otherwise face a limited or suspended jail sentence, the parties compromised upon a policy that requires drug treatment, but only after the 12th misdemeanor drug arrest.

Even though these approaches cannot completely address the full range of problems steering cases to the courthouse, “we can remediate what we see,” concluded Swern.

James Brodick argued that strategies undertaken by community courts, like community-police walks, build relationships that can in fact reduce racial bias. “Officers should know who the young people are in the communities they police. It’s problematic that young people run when they see cops,” he argued. “If we can identify a police captain and young people who are willing to put themselves out there [to build relationships], that’s good,” he said. AmeriCorps volunteer Dennis Lawrence agreed. “Ego can get in the way of patience and courtesy. It’s important [for police officers] to show some respect, and know your name.”

Brodick also argued that by reducing crime, community justice initiatives lay the groundwork for economic development in poor neighborhoods. Pointing to the transformation of Red Hook as an example, Brodick noted, “Fairway and Ikea aren’t willing to put businesses into neighborhoods they do not view as safe. Economic development and jobs depend on public safety.” He also suggested that hope and motivation were essential ingredients in a community-transformation strategy. AmeriCorps and other youth development programs show young people that they are “worth more than jail, and that with patience and concern, I can become somebody.”

“Officers should know who the young people are in the communities they police. It’s problematic that young people run when they see cops.”

X. Recommendations For Moving Forward

The conference ended with a call for advocacy on two fronts to reduce the race-related harms of the criminal justice system:

1. **Structural reform at points of entry and sentencing**, by ensuring fair and equal law enforcement across socioeconomic and geographic groups and/or repealing policies and practices that drive racial disparities (e.g., racially disproportionate policing and excessive drug and other sentences); and

2. **Fair administration of justice reforms to minimize the impact of existing racial and economic disparities**, through periodic monitoring, assessment and review of racial outcomes in bail decisions; prosecutorial charging and diversion; post-arrest service programs; and post-release programs that help ex-offenders lead productive lives.

The conference focused mainly on the second set of strategies — assessment, diversion and provision of services — that reduce the worst impacts of the criminal justice system on racial minorities. The discussions spotlighted a host of innovative strategies being developed by forward-thinking prosecutors, defenders and judges to reduce the disparate impact of the criminal justice system on people of color. While more can and should be done to replicate these best practices, most participants urged greater efforts to address the structural factors that funnel so many blacks and Latinos into the criminal justice system in the first place. Some conferees especially called for changes in policing practices that disproportionately target poor people of color and other policies that use law enforcement to address social and economic problems. Without greater efforts to address harsh policing and sentencing policies, initiatives aimed at the fair administration of justice in courts will be insufficient to eliminate the racial disproportionality that currently defines the U.S. criminal justice system.

A recurring theme in the conference was a call for greater public debate and conversation about what are — and what should be — our priorities for the criminal justice system. *Do our laws, policies and practices reflect public consensus on these priorities? If not, what needs to change? How do we move the system away from a paradigm focused on arrest, punishment and social control of communities of color to one that focuses on healing and restoration? How do we avoid using courts as the dumping ground for difficult or seemingly intractable social problems?*

Conference participants underscored the need to bring police, mayors and elected officials — as well as members of the public to whom they respond — into the conversation about the need for deeper structural reform. Specifically, some conferees called for more vocal advocacy to reform the wide-ranging policies and practices that drive racial disparities. These include:

- outlawing racial profiling practices by police;
- strengthening civilian review and control of local police departments;
- reforming bail policies to make release for non-violent offenders the default, and reducing or eliminating the requirement of cash bail;
- bringing transparency and accountability to prosecutorial decisions — especially charging and plea bargains;
- decriminalizing more non-violent drug offenses;
- ending the practice of adjudicating juveniles in adult courts;
- repealing mandatory minimum sentencing schemes;
- repealing zero-tolerance school discipline policies that funnel youth into the criminal justice system;
- reforming “truth-in-sentencing” laws that prevent or delay the consideration of parole;

- repealing post-conviction consequences that impede the successful re-entry of those with criminal histories; and
- assessing the impact of political fund-raising and corporate contributions on sentencing.

This is, no doubt, an ambitious agenda. Deborah Small, a conference advisor and leader in the drug policy reform movement, encouraged bold goals and bold thinking:

“Our vision and goals should be ones that future generations will believe were sufficient to the problem. We would not remember the Montgomery Bus Boycott if its demand was limited to two or three extra rows to sit on in a segregated bus. It is because they demanded and fought for dismantling legal segregation that they sparked a national movement and achieved historical significance. Given the magnitude of mass criminalization in the United States and its continuing devastating impact on African American and Latino families and communities, our goals should be equally ambitious and our methods equally committed.”

“Our vision and goals should be ones that future generations will believe were sufficient to the problem . . . ”

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2. NATIONAL EMPLOYMENT LAW CENTER, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS (2011).
3. Steven Zeidman, *Time to End Violation Pleas*, N.Y.L.J., April 1, 2008.
4. NAACP Criminal Justice Fact Sheet, at <http://www.naacp.org/pages/criminal-justice-fact-sheet>.
5. JERRY KANG, NATIONAL CAMPAIGN TO ENSURE THE RACIAL AND ETHNIC FAIRNESS OF AMERICA'S STATE COURTS, IMPLICIT BIAS — A PRIMER FOR COURTS (Aug. 2009).
6. The American Bar Association offers a toolbox of research and resources on implicit bias, and strategies for “debiasing,” available at <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html>.
7. MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY (2012).
8. MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, 2008 ANNUAL REPORT at 16 (reflecting a total of 369,440 arraignments of which bail was set in 32 percent of the continued cases); HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM at 35 and Figure 5 (Dec. 2010).
9. See HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM at 21 (Dec. 2010) (reporting that in 2009 there were 98,980 total admissions to New York City's jails, 51,047 of which were pretrial detainees incarcerated solely because they had not posted bail).
10. *Id.* Blacks and Hispanics account for 89 percent of all pretrial detainees held on bail of \$1,000 or less.
11. *Id.* Of the city's 98,980 jail admissions in 2009, 23 percent (22,846) were being held for misdemeanor cases.
12. The New York City Criminal Justice Agency (CJA) is a private, non-profit corporation providing pretrial release services in New York City's Criminal Courts. CJA's Research Department conducts studies on a variety of criminal justice policy issues.
13. MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, RESEARCH BRIEF NO. 27, HOW RELEASE TYPE AFFECTS FAILURE TO APPEAR at 3 (Sept. 2011) (demonstrating that the failure to appear (FTA) rate for all cases with a defendant who was released pretrial for the combined boroughs was 16 percent).
14. *Id.*
15. MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, 2008 ANNUAL REPORT at 27, 40 (Dec. 2009).
16. MARY T. PHILLIPS, RESEARCH BRIEF NO. 27 at 5, 7 (asserting that “bail at the lower end of this range is just as effective as higher amounts in assuring return to court”); NEW YORK CITY CRIMINAL JUSTICE AGENCY, INC. EFFECTS OF RELEASE TYPE ON FAILURE TO APPEAR (October 2011) at 55 (“the FTA rate was 17 percent for ROR compared to 14 percent for bail”; “Very low bail had nearly the same probability of FTA as higher bail: 12 percent among cases with bail amounts from \$50 to \$500, dropping below 10 percent only when bail rose to amounts over \$7,500.”).
17. HUMAN RIGHTS WATCH at 13 (In 48 percent of the cases in which a person arrested in 2008 had bail set at \$1000 or less, the person charged was never able to post bail); NEW YORK CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES FINAL REPORT (November 2007) at 22. These numbers remain consistent with bail amounts from \$500 to over \$4,000. *Id.* (reflecting a total percentage of people who made bail at arraignment when bail was set as ranging from 6 percent to 14 percent and a percentage of those held to disposition when bail is set ranging from a low of 42 percent (where bail was set between \$500 and \$749) to a high of 58 percent (where bail was set between \$2,000 and \$3,999)).
18. HUMAN RIGHTS WATCH at 30 (In 2009, the average length of pretrial incarceration for people charged with misdemeanors was 15 days; yet in 48 percent of such cases resulting in a conviction and jail sentence, the sentence was less than 15 days).
19. Criminal Procedure Law § 510.30(2)(a) requires a judge to consider various factors, including the accused's “employment and financial resources” as set forth in subdivision (ii). The preface to this provision states that “the court must consider the kind and degree of control or restriction that is necessary to secure [an accused's] court attendance when required.” *Id.* According to Meis of the Bronx Defenders, “a fair reading of the statute requires a judge to consider an accused's finances but only insofar as a financial restriction would be necessary to ensure return to court. Where an accused has limited finances, no, or a very low financial restriction would adequately ensure return to court.”
20. Beginning on January 28, 2013, this provision became effective in all five boroughs in New York City for amounts up to \$2,500.
21. HUMAN RIGHTS WATCH at 13 (Where bail is set, judges set bail below \$500 in only 6 percent of cases, at \$500 to \$749 in 6.1 percent of cases and at \$750 to \$999 in 2.7 percent of cases).
22. Jamie Fellner, *Bail Shouldn't Mean Jail for Poor Nonfelony Defendants*, NEW YORK LAW JOURNAL, Feb. 9, 2011.
23. Pew Research Center, “Optimism about Black Progress Declines” at 9 (Nov. 13, 2007).
24. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (Aug. 2010).
25. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 at 8 (2003).
26. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, AMERICAN UNIVERSITY LAW REVIEW 53:1 (Oct. 2003).
27. U.S. CENSUS BUREAU, STATE AND COUNTY QUICK FACTS, at <http://quickfacts.census.gov/qfd/states/36/3651000.html>.
28. Alice Speri, *2010 Marijuana Arrests Top 1978-96 Total*, NEW YORK TIMES, Feb. 11, 2011.
29. *NYPD Finds Most Guns Outside of Stop-and-Frisk Hotspots*, WNYC, July 16, 2012 (Out of more than 685,000 stops in 2011, about 770 guns were recovered, with most of these in areas outside those most heavily policed by stop-and-frisk hot spots).
30. Known together as “The Community Safety Act,” the first two bills passed the New York City Council with veto-proof majorities on June 27, 2013, and remained unsigned by Mayor Bloomberg as of this report's publication date.
31. Graham Rayman, *Robert Johnson, Bronx DA, to NYPD: No More Frivolous Stop and Frisk Trespassing Arrests*, VILLAGE VOICE BLOGS, Sept. 26, 2012.

APPENDIX A: BIOGRAPHIES

STEWART D. AARON is a partner and head of the New York Office of Arnold & Porter LLP. Mr. Aaron practices commercial litigation with an emphasis on securities law matters. His practice involves the representation of clients in litigated matters in state and federal courts, and before regulatory bodies and self-regulatory organizations. He is also a past president of the New York County Lawyers' Association.

NICOLE AUSTIN-HILLERY is the first director and counsel of the Washington, D.C. office of the Brennan Center for Justice at New York University School of Law, which she opened in March 2008. In her role, Ms. Austin-Hillery serves as the chief advocate for the Brennan Center on a host of justice and democracy issues in D.C. Before beginning her career at the Brennan Center, Ms. Austin-Hillery practiced with the law firm of Mehri & Skalet, PLLC where she focused primarily on the firm's civil rights employment class action litigation practice.

STEVEN D. BENJAMIN is an attorney in private practice with the firm of Benjamin & DesPortes, based in Richmond, Virginia. In addition, he serves as special counsel to the Virginia Senate Courts of Justice Committee. Mr. Benjamin is also the 54th president of the National Association of Criminal Defense Lawyers (NACDL).

BARRY CAMPBELL came to the Fortune Society in 1992 after his release from incarceration. While an intern at the Fortune Society, he impressed everyone with his ability to relate to various people from very diverse walks of life. He was hired as staff in 1993. He left briefly but returned in January 2004 to work as the special assistant to the President & CEO Joanne Page ever since.

ZACHARY CARTER is a partner and co-chair of Dorsey & Whitney LLP's White Collar Crime and Civil Fraud practice. Mr. Carter served as U.S. Attorney for the Eastern District of New York from 1993 to 1999. Mr. Carter practices in the areas of white collar criminal defense and securities and other complex civil litigation, representing government contractors and companies in government regulated industries.

INIMAI M. CHETTIAR is the director of the Brennan Center's Justice Program, which focuses on reducing mass incarceration. Prior to her work at the Brennan Center, Ms. Chettiar helped start up the American Civil Liberties Union's Initiative to End Overincarceration. Her reform efforts and publications have been featured in *The New York Times*, *The Wall Street Journal*, *The Hill*, *Politico*, NBC.com, NPR, *The Huffington Post* and many others.

TANYA COKE is a program development consultant for major foundations and social justice nonprofits. From 1998 to 2002, she was a director of the Criminal Justice Initiative and later Counsel to the Open Society Institute's (OSI) U.S. Programs, where she designed the foundation's signature initiative to reduce incarceration in the United States. She began her career as an anti-death penalty advocate with the NAACP Legal Defense Fund, and later served as Acting Director of the Poverty and Race Research Action Council (PRRAC). After law school, she clerked for the Honorable Pierre N. Laval on the Second Circuit Court of Appeals and practiced as a trial attorney in the Federal Defender Division of the Legal Aid Society in Manhattan.

HON. MARK DWYER is a judge in the New York State Court of Claims and an acting justice of the New York State Supreme Court. He is also the chair of the ABA Criminal Justice Standards Committee and the Chair of the New York State Bar Association's Criminal Justice Section. He is one of the five authors of *West's New York Pretrial Criminal Procedure* and is the treasurer of the Eastern District Civil Litigation Fund, a non-profit group that arranges for pro bono representation of indigent persons in federal civil litigation.

EDWIN (EDDIE) ELLIS is the founder and president of the Center for NuLeadership on Urban Solutions. Under his leadership, the Center developed several innovative projects, including: Institute for Juvenile Justice Reform and Alternatives (IJJRA), the Full Employment Opportunities Campaign, NuLeadership Training Institute, NuUrban Marshall Plan, Criminal Justice Practitioner Training Program, and Project ReNu. He is also the host and executive producer of “On the Count: The Prison and Criminal Justice Report,” a weekly public affairs program broadcast over Radio Station WBAI (99.5 FM) in New York City.

HON. FERN FISHER serves as Deputy Chief Administrative Judge for New York City Courts and is also charged with statewide responsibility for access to justice issues. As part of her responsibilities, Justice Fisher also handles the city-wide administration of the Civil Court. Justice Fisher contributes the views from the bench in *Residential Landlord-Tenant Law in New York*, a practice guide by Lawyers Cooperative Publishing.

LEROY FRAZER, JR., serves as Executive Assistant District Attorney for External Affairs at the New York County District Attorney’s Office. In May 2009, Mr. Frazer was appointed to the position of First Assistant District Attorney, which he held until he assumed his current post on January 1, 2010. In his current position, Mr. Frazer also serves as coordinator of the New York State Law Enforcement Council and Attorney-in-Charge of the District Attorney’s Northern Manhattan Office.

HON. MARCY FRIEDMAN is a justice of the Supreme Court, New York County, Civil Term, and was recently named to the Commercial Division of that court where she presides largely over complex commercial cases. She continues to hear arraignments four times a year in Criminal Court, New York County.

WILLIAM GIBNEY has been with the Legal Aid Society Criminal Practice Special Litigation Unit since 1999 and has been the director of the unit since 2007. He has conducted class action litigation against the New York City and New York State regarding (i) conditions in the pre-arraignment holding pens, (ii) jail time credit for mentally ill prisoners, and (iii) improper arrests resulting from police sweeps in public housing.

THOMAS GIOVANNI is counsel to the Justice Program at the Brennan Center, and director of the Community-Oriented Defender Network, a national network of defender offices housed in the Brennan Center’s Justice Program. Before coming to the Brennan Center, Mr. Giovanni was a public defender for a decade at the Neighborhood Defender Service of Harlem. And he has collaborated extensively with clinical law programs at Cardozo and Fordham.

VANITA GUPTA is the deputy legal director of the American Civil Liberties Union and director of the ACLU’s Center for Justice, which houses the organization’s criminal justice reform, prisoners’ rights, and capital punishment work. She directs the ACLU’s National Campaign to End Overincarceration. In addition, Ms. Gupta is an adjunct clinical professor at NYU School of Law, where she teaches and oversees a racial justice litigation clinic.

HON. MELISSA C. JACKSON is a judge for the New York City Criminal Court of New York County, New York. Her current term expires in 2017. Judge Jackson formerly served with the Kings County District Attorney’s Office for nearly 22 years where she rose to become Deputy District Attorney of the Major Frauds/Rackets Bureau.

RICK JONES is the executive director and a founding member of the Neighborhood Defender Service of Harlem (NDS). He is a distinguished trial lawyer with more than 20 years of experience in complex multi-forum litigation. Rick is a lecturer in law at Columbia Law School, where he teaches a criminal defense externship and a trial practice course. He is also on the faculty of the National Criminal Defense College (NCDC) in Macon, Georgia, and is frequently invited to lecture on criminal justice issues throughout the country.

DR. DELORES JONES-BROWN, PH.D. is a former assistant prosecutor in Monmouth County, New Jersey and is currently a professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. She is the founding director of the John Jay College Center on Race, Crime and Justice and its current faculty research fellow.

HON. BARRY KAMINS is Administrative Judge of the Criminal Court of the City of New York and Administrative Judge for Criminal Matters, Second Judicial District. Judge Kamins is the former President of the Association of the Bar of the City of New York. He is the author of *New York Search and Seizure*, a leading treatise on the Fourth Amendment.

TIMOTHY KOLLER Appointed as Assistant District Attorney in Richmond County in 1980, Koller has served there for 32 years as a misdemeanor prosecutor, Chief of the Career Criminal Unit, Chief of the Investigations Bureau, Chief of the Supreme Court, and Executive Assistant District Attorney, a position that he currently holds where he oversees the day-to-day operations of that office. Koller has lectured at the NYPD Police Academy, the New York State Division of Criminal Justice Services Basic Prosecutors' Course, as well as numerous continuing legal education presentations.

CLINTON LACEY recently joined the New York City Department of Probation as the Deputy Commissioner for adult operations. In this capacity he is responsible for oversight of a division that supervises some 27,000 clients on probation and is leading a series of innovative initiatives to designed to reform the Probation Department's key policies and practices. Previously, Clinton served as the director of the Youth Justice Program at Vera Institute of Justice, where he oversaw a technical assistance project focused on the reform of New York State's juvenile justice policies.

DENNIS LAWRENCE is currently serving as an AmeriCorps volunteer with the Brownsville Community Justice Center, a demonstration project of the Center for Court Innovation. He is working in conjunction with the Department of Probation on a project called Justice Community that focuses on adult male probationers ages 16-24.

DONNA LIEBERMAN has been executive director of the New York Civil Liberties Union since December 2001. Under Lieberman's leadership, the NYCLU has expanded the scope and depth of its work, supplementing the pursuit of litigation with an aggressive legislative advocacy and a field organizing program. As a result, the organization is widely recognized as the state's leading voice for freedom, justice and equality, advocating for those whose rights and liberties have been denied, especially for those most marginalized by society.

GLENN MARTIN is the vice president of development and public affairs and director of the David Rothenberg Center for Public Policy at the Fortune Society, Inc., a social service and advocacy organization devoted to the successful re-entry and reintegration of individuals with criminal histories. Mr. Martin is responsible for developing and advancing Fortune's criminal justice policy advocacy agenda and providing leadership over the agency's Development and Communication Units.

WAYNE S. MCKENZIE is general counsel for the NYC Department of Probation (DOP). He is the primary advisor to the commissioner on all legal matters; ensures that the DOP is operating within the law at all times; provides direction and administrative review to all agency attorneys; and as a cabinet member participates in the formulation and administration of city policies, programs and legislative promulgation/review relating to adult and juvenile crime. Prior to joining DOP, Wayne was the founding director of the Prosecution & Racial Justice Program at the Vera Institute of Justice.

MARIKA MEIS has been a public defender for over 10 years. She joined the Bronx Defenders in 2004 and has served as legal director since 2008. As legal director, Ms. Meis supervises de novo bail applications and bail writs for the Bronx Defenders and trains lawyers on alternative forms of bail and bail advocacy.

RODNEY MITCHELL, a native Washingtonian and formerly incarcerated citizen, is currently a practicing attorney and an advocate for the formerly incarcerated in the D.C. metro area. Recently, he was appointed by D.C. Congresswoman Eleanor Holmes Norton to serve as a commissioner on the D.C. Commission on Black Men and Boys. Mr. Mitchell currently serves as the Re-entry Coordinator for the D.C. Department of Corrections.

LANCE PATRICK OGISTE is the counsel to the Kings County District Attorney Charles J. Hynes. Presently, among his many duties, Mr. Ogiste oversees the Appeals Bureau, the Major Narcotics Investigations Bureau, the Gangs Bureau and the ComALERT Program, which is a program to aid ex-offenders by helping them avoid returning to a life of crime by referring them to services offering job assistance, education, health/mental health treatment and housing assistance.

HON. RUTH PICKHOLZ presides in Criminal Term of New York Supreme Court, New York County. Previously, she held various posts in the New York City Mayor's Office, including Arson Strike Force Coordinator, Counsel to the Criminal Justice Coordinator, and Acting Criminal Justice Coordinator. She became a judge in 1990, when Mayor David Dinkins appointed her to the Criminal Court of the City of New York. Judge Pickholz currently presides over criminal trials and hearings in Manhattan.

CATHLEEN PRICE is a senior attorney with the Equal Justice Initiative, a non-profit law office that addresses problems in the criminal justice system. Since 1997, she has worked on behalf of death-sentenced prisoners, other offenders subject to excessively harsh punishments, and communities marginalized by poverty and chronic discrimination. She litigates on behalf of individuals, advocates before legislators and other policymakers, and serves as faculty at training seminars on the death penalty and related topics.

DIVINE PRYOR, PH.D. is a social scientist who has extensive knowledge and experience in the health and social service fields, having spent over half his career administrating youth development, domestic violence, prison re-entry, substance abuse, and other social service non-profit organizations. He is currently the executive director of the Center for NuLeadership on Urban Solutions, the world's first and only public policy, research, advocacy, and training center created and administered by formerly incarcerated professionals.

LEXER QUAMIE is a policy counsel with the Leadership Conference on Civil and Human Rights and the Leadership Conference Education Fund. There, she helps facilitate the development of a federal policy agenda for a broad coalition of civil and human rights groups and analyzes federal current civil rights issues and legislation in the areas of racial profiling and criminal justice, transportation equity, workers' rights, and equal opportunity. Prior to joining the Leadership Conference, Ms. Quamie was a policy analyst with the Center for Law and Social Policy, where she provided policy guidance on job quality and work life issues.

MICHAEL P. RANDLE began his career with the Ohio Department of Rehabilitation and Correction (ODCR) in 1990 as case manager and later was promoted to unit manager at the Ohio Reformatory for Women. Since then, he served in a number of positions including, mental health administrator for three female institutions of ODRC; deputy warden at Ross Correctional Institution; warden at Chillicothe Correctional Institution; and others. He is currently the program director of the Judge Nancy R. McDonnell Community Based Correctional Facility.

JONATHAN RAPPING teaches criminal law and criminal procedure at Atlanta's John Marshall Law School and is the executive director of the Southern Public Defender Training Center (now Gideon's Promise). Prior to joining the JMLS faculty, Professor Rapping was the chief of training for the Orleans Public Defenders and has been instrumental in the rebuilding of that office in the wake of Hurricane Katrina.

NORMAN L. REIMER is the executive director of the National Association of Criminal Defense Lawyers (NACDL), the nation's preeminent criminal defense bar association. Since joining NACDL, Mr. Reimer has overseen a significant expansion of the Association's educational programming and policy initiatives, cultivated external support and launched a major capital campaign. Mr. Reimer also serves as publisher of NACDL's acclaimed magazine, *The Champion*. Prior to assuming this position he practiced law as a criminal defense lawyer based in New York City for 28 years.

DEANNA RODRIGUEZ is the chief of the Gang Bureau in the King's County DA's Office, which she created in 1994 and which is the only specialized bureau of its kind in New York State. Ms. Rodriguez is considered an expert in her field. She speaks at conferences across the nation, including the National District Attorney's Association, and has testified before the New York State Legislature and the New York City Council regarding legislation and policy issues.

IRWIN SHAW, attorney-in-charge, Criminal Defense Practice of the New York County Office of the Legal Aid Society, has spent his entire 42-year legal career as an attorney with The Legal Aid Society's Criminal Defense Practice. As a staff attorney he represented thousands of indigent people accused of crimes in the New York State Supreme Court and New York City Criminal Court. In 2005 he was a recipient of NYCLA's award for outstanding public service.

THEODORE M. SHAW is professor of Professional Practice at Columbia University School of Law. He is also Of Counsel to Fulbright & Jaworski LLP. Mr. Shaw was an attorney with the NAACP Legal Defense and Educational Fund for 23 years, where he also served as director-counsel and president.

ABBE SMITH is the director of the Criminal Defense and Prisoner Advocacy Clinic, co-director of the E. Barrett Prettyman Fellowship Program, and professor of law at Georgetown University. Prior to coming to Georgetown, Professor Smith was deputy director of the Criminal Justice Institute, clinical instructor, and Lecturer at Law at Harvard Law School. Professor Smith teaches and writes on criminal defense, juvenile justice, legal ethics, and clinical legal education.

HON. GEORGE BUNDY SMITH served for 31 years as a judge in the courts of New York State, the last 14 on the New York State Court of Appeals, New York's highest state court. Following his retirement in 2006, he became a partner in the national and international law firm of Chadbourne & Parke, LLP. He now has his own firm, George Bundy Smith, Senior and Associates, LLP.

DARRYL STALLWORTH is an attorney specializing in the area of criminal defense. Prior to becoming a defense attorney and opening his own practice, Mr. Stallworth served for 15 years in the Alameda County District Attorney's Office, where he tried over 50 cases and resolved over 10,000 cases during his tenure. Mr. Stallworth has also lectured internationally on effective forms of case resolution.

ROBIN STEINBERG is a leader and a pioneer in the field of indigent defense. Starting as a criminal trial lawyer with the Legal Aid Society, continuing her career as a founding member and deputy director of the Neighborhood Defender Service of Harlem, and ultimately creating the Bronx Defenders in 1997, Robin has extensive experience in every aspect of public defense — from representing individual clients to creating a non-profit organization. Today, Robin advocates nationally and internationally for holistic representation, delivering papers, conducting trainings, providing technical assistance to defender offices moving towards holistic defense, and hosting visitors from around the world.

ANNE J. SWERN, the First Assistant District Attorney to Charles J. Hynes, District Attorney of Kings County (Brooklyn), has served as a prosecutor for 32 years. She supervises more than 1,000 attorneys and support staff members in their prosecutorial and administrative functions. She is the District Attorney's Office's senior executive for alternative sentencing policy and programming and is the executive in charge of the nationally acclaimed Drug Treatment Alternative-to-Prison (DTAP) Program, dedicated to diverting prison-bound non-violent predicate felons into residential substance abuse treatment. She supervises Brooklyn's three substance abuse treatment courts, the Red Hook Community Justice Center, the Mental Health Court and the Treatment Alternatives for the Dually Diagnosed (TADD) Program, which divert mentally ill defendants into treatment.

NKECHI TAIFA is a senior policy analyst at the Open Society Foundations and Open Society Policy Center, working to influence federal public policy in support of comprehensive justice reform. Ms. Taifa focuses on issues involving sentencing reform, law enforcement accountability, re-entry of previously incarcerated persons, prison reform, and racial justice. She has played a major role in raising the visibility of issues involving unequal justice. Ms. Taifa also convenes the Justice Roundtable, a Washington-based advocacy network advancing federal criminal justice policy reforms.

BRETT TAYLOR is deputy director of national technical assistance at the Center for Court Innovation. He has also been deputy director of the Center's Tribal Justice Exchange program since its inception in 2008. Before joining the Center in 2007, Mr. Taylor served as the senior defense attorney for six years at the Red Hook Community Justice Center in Brooklyn, New York. Mr. Taylor has presented at numerous national conferences on community courts, tribal courts, community prosecution, and other community justice topics.

WHITNEY TYMAS is the director of the Prosecution and Racial Justice Program at the Vera Institute of Justice. This is a groundbreaking initiative that is piloting internal assessment and management procedures to help chief prosecutors identify evidence of racial or ethnic bias in prosecutorial decision making and respond appropriately when it is found. Ms. Tymas came to Vera from the National District Attorneys Association, where she ran that organization's Gun and Gang Violence Program and its Southwest Border Crime Program — both of which delivered training, support, and technical assistance to prosecutors and allied members of law enforcement nationwide.

MICHAEL WALDMAN is president of the Brennan Center for Justice at NYU School of Law, a non-partisan law and policy institute that focuses on fundamental issues of democracy and justice. Previously, Mr. Waldman was director of speechwriting for President Bill Clinton from 1995-99, serving as assistant to the president. As the top White House policy aide on campaign finance reform, he drafted the Clinton administration's public financing proposal.

LISA MONET WAYNE is the immediate past president of the National Association of Criminal Defense Lawyers (NACDL). She represents individuals and corporations accused of crime at all stages in both federal and state courts around the country. She is a frequent national lecturer, a lecturer in law at the University of Colorado law school in Boulder, a television commentator for national media outlets, and was a Colorado State Public Defender for 13 years.

APPENDIX B: AGENDA

The goal of the conference is to assemble a distinguished group of participants in the criminal justice system — judges, prosecutors, defense attorneys, scholars, community leaders, law enforcement officials, and formerly incarcerated advocates — who will collaborate to develop a menu of practical reforms to reduce race and ethnicity as a negative factor in the criminal justice system.

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WEDNESDAY, OCTOBER 17, 2012

- 2:00 p.m. — 2:45 p.m.** *Registration*
- 2:45 p.m. — 3:00 p.m.** *Welcome*
Steve Benjamin, President, National Association of Criminal Defense Lawyers
Michael Waldman, President, Brennan Center
- 3:00 p.m. — 3:30 p.m.** *Opening Remarks*
Norman L. Reimer, Executive Director, NACDL
Hon. Marcy Friedman, Justice, Supreme Court, New York County, Civil Term.
- 3:30 p.m. — 5:00 p.m.** **Introduction of “Town Hall Panel” Nicole Austin-Hillery**, Director and Counsel, Brennan Center Washington Office
Roundtable 1 — Stakeholders
Moderator: **Ted Shaw**, Professor of Professional Practice in Law, Columbia Law School
Panelists: **Eddie Ellis**, President, Center for NuLeadership on Urban Solutions
Hon. George Bundy Smith, Chair, NYCLA Justice Center, Former Associate Judge New York State Court of Appeals
Zachary Carter, Partner, Dorsey & Whitney LLP; Board Member, Brennan Center
Lisa Wayne, Immediate Past President, NACDL
Vanita Gupta, Deputy Legal Director, ACLU
Glenn Martin, Vice President of Development & Public Affairs, The Fortune Society
Rick Jones, Executive Director, Neighborhood Defender Service
Leroy Frazer, Jr., Executive Assistant District Attorney for External Affairs, Office of the Manhattan District Attorney
- 5:00 p.m.** *Closing Remarks*
Nicole Austin-Hillery, Director and Counsel, Brennan Center Washington Office
Reception to Follow

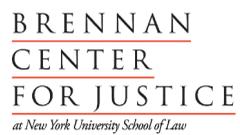
THURSDAY, OCTOBER 18, 2012

- 8:00 a.m. — 8:45 a.m.** *Registration/Breakfast*
- 8:30 a.m. — 9:00 a.m.** *Welcome*
Stewart D. Aaron, President, NYCLA
Opening Remarks
Hon. Fern Fisher, Deputy Chief Administrative Judge, New York City Courts
Inimai Chettiar, Director, Justice Program at Brennan Center for Justice
- 9:00 a.m. — 10:15 a.m.** **Roundtable 2 — Charging, Plea Bargains, Diversion**
Moderator: **Thomas Giovanni**, Community-Oriented Defender Network
Director (CODN), Brennan Center
Panelists: **Lance Ogiste**, Counsel, Office of the Brooklyn District Attorney
Irwin Shaw, Attorney-in-Charge, Legal Aid Society Manhattan
Office of the Criminal Practice
Wayne S. McKenzie, General Counsel, New York City Department
of Probation
- 10:15 a.m. — 10:30 a.m.** *Break*
- 10:30 a.m. — 11:45 a.m.** **Roundtable 3 — Pretrial Incarceration**
Moderator: **Thomas Giovanni**, CODN Director, Brennan Center
Panelists: **Marika Meis**, Legal Director, The Bronx Defenders
Tim Koller, Executive Assistant DA, Staten Island
Hon. Melissa Jackson, Supervising Judge, Criminal Court New
York County
Barry Campbell, Special Assistant to the President & CEO, The
Fortune Society
- 11:45 a.m. — 12:00 p.m.** *Break*
- 12:00 p.m. — 1:15 p.m.** **Working Group for Roundtables 2 and 3**
- 1:15 p.m. — 2:00 p.m.** *Lunch*
- 2:00 p.m. — 3:15 p.m.** **Roundtable 4 — Jury Selection**
Moderator: **Darryl Stallworth**, Defense Attorney, Oakland, California
Panelists: **Cathleen Price**, Cooperating Senior Attorney, Equal Justice
Initiative, Seminar Lecturer, Columbia University
Hon. Ruth Pickholz, Acting Justice, New York County Supreme
Court, Criminal Term
Abbe Smith, Director, Criminal Defense & Prisoner Advocacy
Clinic and Professor of Law at Georgetown Law
Deanna Rodriguez, Chief, Brooklyn District Attorney's Gang
Bureau
- 3:15 p.m. — 3:30 p.m.** *Break*
- 3:30 p.m. — 4:15 p.m.** **Working Group for Roundtable 4**
- 4:15 p.m. — 4:30 p.m.** *Closing Remarks*

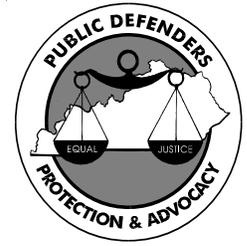
FRIDAY, OCTOBER 19, 2012

- 8:15 a.m. — 8:45 a.m.** *Breakfast*
- 8:45 a.m. — 9:00 a.m.** *Opening Remarks*
- 9:00 a.m. — 10:15 a.m.** **Roundtable 5 — Pretrial Litigation on Search and Seizure and Identification Issues**
Moderator: **Lexer Quamie**, Counsel, The Leadership Conference on Civil and Human Rights
Panelists: **Hon. Mark Dwyer**, Acting Justice, Supreme Court, Kings County, Criminal Term
Donna Lieberman, Executive Director, New York Civil Liberties Union
William Gibney, Director, Criminal Practice Special Litigation Unit, The Legal Aid Society
Delores Jones-Brown, Faculty Research Fellow, Center on Race, Crime and Justice at John Jay College of the City University of New York
Rodney Mitchell, Founder, REEntry Legal Services
- 10:15 a.m. — 10:30 a.m.** *Break*
- 10:30 a.m. — 11:45 a.m.** **Roundtable 6 — Sentencing and Community Corrections**
Moderator: **Nkechi Taifa**, Senior Policy Analyst, Open Society Foundations
Panelists: **Dr. Divine Pryor**, Executive Director, Center for NuLeadership on Urban Solutions
Clinton Lacey, Deputy Commissioner for Adult Services, New York Department of Probation
Jonathan Rapping, Founder and CEO, Southern Public Defender Training Center
Mike Randle, Program Director, Cuyahoga County Ohio Community Based Correctional Facility
- 11:45 a.m. — 12:00 p.m.** *Break*
- 12:00 p.m. — 1:00 p.m.** **Working Groups for Roundtables 5 and 6**
- 1:00 p.m. — 1:45 p.m.** *Lunch*
- 1:45 p.m. — 3:00 p.m.** **Roundtable 7& Discussion — Community Justice**
Moderator: **Brett Taylor**, Deputy Director, Center for Court Innovation
Panelists: **Anne Swern**, First Assistant District Attorney, Office of the Brooklyn DA
Robin Steinberg, Executive Director, The Bronx Defenders
Dennis Lawrence, AmeriCorps Member
- 3:00 p.m. — 3:15** *Closing Remarks*

This publication is available online at: www.nacdl.org/reports/eliminatedisparity



The Advocate



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JUSTICE FOR ALL



LITIGATING RACE ISSUES TO PROTECT EQUAL JUSTICE IN KENTUCKY

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Disproportionate minority confinement and minority overrepresentation in the criminal justice system is a well-documented problem in Kentucky, the state that brought us *Batson*. Chief Justice Lambert has urged members of the bar to eradicate any vestiges of racial discrimination in the courts. With support from the Kentucky Bar Foundation, the Department of Public Advocacy (DPA) in Kentucky has initiated a “Litigating Race Education Project” to inform members of the legal profession about disproportionate minority confinement and how to litigate issues of racial disparity in individual cases. This special edition of *The Advocate* is funded in part through a grant from the Kentucky Bar Foundation.

WHY LITIGATE RACE?

By Rebecca Ballard DiLoreto

It is time to address “the complexities of race in this country that we’ve never really worked through — a part of our union that we have yet to perfect.” It is time to realize that “the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination — and current incidents of discrimination, while less overt than in the past — are real and must be addressed. Not just with words, but with deeds — ...by enforcing our civil rights laws and ensuring fairness in our criminal justice system....”¹

Race can affect all aspects of a client’s case, from first encounters with law enforcement and witnesses, through the investigation, the charges filed, whether diversion or mediation are considered, presentation to the grand jury, trial preparation, pre-trial practice, jury selection, the trial itself, the attitude of the judges, prosecutors, jurors and witnesses. Even we, as defense counsel, should watch the assumptions we make. We all wear cultural blinders. And our own blinders may be the most dangerous, because our own blinders may cause us to overlook critical aspects of our client’s case.

“People react to their own culture in the same way they react to their own drinking water. While they think their own has no flavor, they readily discern a peculiar taste in water from other regions.”²

We must throw off the filters that blind us to the world, because those filters limit and impair our advocacy.

We must overcome our natural aversion to “raising the race card.” As defense attorneys, we reasonably fear that raising racial issues can impact trial strategy in unpredictable ways. Heading into trial, our instinct is to control as many variables as possible, because we know there will be variables we absolutely cannot control. But whether we admit it or not, the Pandora’s Box of *bias based on race* often impedes justice. If we fail to ferret out and explore racial issues, we permit ourselves to wear blinders. If we never explore the race issues, never investigate, or research to find law to benefit a client who is being railroaded, in part, because of race, then our failure is not a reasonable strategic decision. If we fail to preserve race issues for appellate review because we never even saw the issues, we certainly cannot swear that ours was a reasonable trial strategy.

This manual presents new strategies to fight the prejudicial impact of race, and new ideas for litigating race issues. But it does not present any easy answers or fixes. Defending people — young people in family and juvenile court, people claimed to be mentally ill in involuntary commitment hearings, and people accused of criminal offenses— is not an exact science. Instead, we are marshalling all the resources we can muster, and advocating for those who —but for us— would have no one representing them. Before we even start to work, we must take off our blinders. Only then will we be able to identify critical racial issues, marshal the law, and access all possible resources.

The fixes will not be easy, partly because issues related to racial bias are often multi-faceted. For instance, in challenging the jury pool, we may need to combine evidence of under-representation with the manner of granting excusals from service, and the prosecutor’s historic use of peremptory strikes to forge a stronger, winning argument. Likewise, bringing to bear historic unfair practices in our county can bolster our right to make certain inquiries in *voir dire*. Racism often goes hand-in-hand with other constitutional violations. A prosecutor who makes racist references in closing argument also often violates the Golden Rule or disparages defense counsel. A *Brady*³ claim will have more bite if we also show that the prosecution team, and police, evinced racial or cultural bias towards our client or other key witnesses.

To succeed in litigating about race and investigating the potential negative impact of racial bias, we must expand our defense teams to include racial and cultural diversity. Whether formally appointed, or brought on for a particular case, the role of these special team members must be clear to all on the team, and a record made in our files of the nature of their role, the kinds of information that we will share with them and that which cannot be shared due to concerns over confidentiality. The more formal the arrangement, the better protected our client. If our clients or potential witnesses are non-English-speaking, the defense team must have someone who speaks the language and understands the cultural customs we may

Continued on page 4

Continued from page 3

miss and that may be crucial to a defense.⁴ With no window to the cultural, ethnic or racial world of our clients, we can fail to consider what might be the heart of the case.

At a recent family function in a small town in northern Michigan, someone shared a racist comment made by a friend and noted that the person who made the comment hailed from Atlanta. My relative assumed that a white Southerner was more likely to be racist. But we must not assume that if no African Americans live in a community, white people from that community are likely racist. Likewise we must not assume that people who live in multi-cultural cities are *less* racist. The opposite may actually be closer to the truth.

“...perhaps, ... living in close proximity to other races – sharing industries and schools and sports arenas – actually makes Americans less sanguine about racial harmony rather than more so.. The growing counties ...social friction and economic competition, especially in an age of declining opportunity, are as much a part of daily life as traffic and mortgage payments. ...sociologists have, in fact, found that people living in more diverse areas evince less trust for others – no matter what their race...those living in the shadow of postindustrial atrophy seem to have a harder time detaching from enduring stereotypes...”⁵

Expect to make mistakes. I have never met a lawyer new to criminal or juvenile defense who did not make mistakes that might have been avoided by a more seasoned practitioner. We must move forward bravely, recognize the limitations of our skills and knowledge, and seek advice. We must understand that as limited as we are, we can stand with those accused, those who have no one else to stand for them. Our clients will teach us as much as our years of experience or our attendance at CLE conferences. We must be open to learning, and unafraid of taking a risk.

“... it is where we start. It is where our union grows stronger. And as so many generations have come to realize over the course of the two-hundred and twenty one years since a band of patriots signed that document in Philadelphia, that is where the perfection begins.”⁶

Endnotes:

1. Barack Obama, from the “More Perfect Union” speech, March 18, 2008, Philadelphia
2. Konopka, G. *Social Group Work: A helping process*. Englewood Cliffs, NJ: Prentice Hall (1983).
3. *Brady v. Maryland*, 373 U.S. 83 (1963)
4. *See e.g. Siripongs. v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994).
5. What’s the Real Racial Divide, The meaning of Clinton’s big-state victories by Matt Bai. Pp.15-16, The New York Times Magazine
6. Barack Obama, from the “More Perfect Union” speech, March 18, 2008, Philadelphia. ■

SELECTIVE PROSECUTION

By Gail Robinson, Juvenile Post Disposition Branch

A dozen years ago my law partner and husband, Kevin McNally, represented Gary Benton, an African American charged with carjacking resulting in death contrary to 18 U.S.C. § 2119 in the United States District Court in Frankfort, Kentucky. The victim was an elderly white man. Benton was acquitted and then re-arrested before he could leave the federal courtroom, this time on state court charges in Franklin County, including murder, kidnapping and first degree robbery, based on the same events which gave rise to the federal charge. See *Benton v. Crittenden*, 14 S.W.3d 1 (Ky. 1999). Representing Benton in state court, Kevin and I moved to dismiss the state court charges, urging that they were barred by double jeopardy and the doctrine of collateral estoppel embodied in KRS 505.050(2). But we also made a motion for a hearing on selective prosecution since our investigation had revealed no other Franklin County cases where state court charges were filed subsequent to an acquittal in federal court based on the same events. We suspected that Benton might have been singled out for prosecution because he was African American and the victim was white. However, we were unable to convince the trial judge to grant us a hearing because we could not produce the evidence required by *United States v. Armstrong*, 517 U.S. 456 (1996).

Unquestionably, proving a selective prosecution claim is a challenge. In fact, obtaining relevant discovery is difficult. But the task is not impossible, and this article will outline the current state of the law on this topic. In *United States v. Armstrong*, 517 U.S. at 458 the Supreme Court addressed what showing must be made for a defendant to be entitled to discovery on a claim that the prosecutor singled him out for prosecution because of his race. The defendants in that case were black and charged with conspiring to possess and distribute crack cocaine as well as federal firearms offenses. *Id.* They moved to dismiss the indictment or for discovery, alleging they were selected for prosecution because of their race. 417 U.S. at 459. In support of the motion they filed an affidavit outlining that the defendant in each of the twenty-four (24) comparable cases closed by the federal defender's office in 1991 was black. *Id.* The district court granted discovery and then dismissed the indictment when the government refused to comply with the discovery order. 417 U.S. at 459-461. After the federal appeals court affirmed, the Supreme Court granted certiorari and reversed.

The Supreme Court recognized that a prosecutor's discretion is subject to constitutional constraints including the equal protection clause. Quoting *Oyler v. Boles*, 368 U.S. 448 (1962), the Court held that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" However, the Court adopted a very deferential approach to prosecutorial discretion. "To establish discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." 517 U.S. at 465. Citing *Ah Sin v. Wittman*, 198 U.S. 500 (1905), a case involving a law prohibiting operation of laundries in wooden buildings, the Supreme Court stated that the "similarly situated" requirement is not impossible to prove. The Supreme Court invalidated that law in *Ah Sin* because authorities denied two hundred (200) Chinese applicants permits to operate in wooden buildings while granting eighty (80) non-Chinese applicants permits under similar conditions. 517 U.S. at 466. Reviewing the affidavit presented by the defendants in *Armstrong*, the Supreme Court found it did not constitute "some evidence" tending to demonstrate a selective prosecution claim and thus the defendants were not entitled to discovery. 517 U.S. at 470. The flaw in the affidavit was its failure to identify individuals who were not black, could have been prosecuted for the offenses with which the defendants were charge but were not prosecuted. *Id.*

United States v. Holloway, 29 F.Supp.2d 435 (M.D. Tenn. 1998) is instructive with respect to proving the "similarly situated" requirement. Holloway, who is white, filed a motion to dismiss the indictment against him for killing a witness and for discovery, alleging that the government was seeking the death penalty because of his race in order to "balance the books" in response to criticism that it was disproportionately seeking death against minorities. *Id.* at 436. Holloway filed an affidavit claiming there were two black defendants charged with committing crimes substantially identical to his but not chosen to face the death penalty. *Id.* at 437. He also submitted an affidavit concerning all one hundred and thirty three (133) cases in which the death penalty was sought by the Department of Justice since 1988. *Id.* at 438. And the government submitted various statistical data. *Id.*

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The federal court nonetheless rejected his claim after scrutinizing the cases of the two black defendants not facing possible death sentences and finding them factually distinguishable. *Id.* at 439-440. And the court rejected the witness killing murder case statistics which the court acknowledged appeared “very alarming,” finding, among other things, that the sample was too small to be meaningful. *Id.* at 440-441. Finally, the court noted that statistical evidence could not establish the necessary proof of discriminatory intent, and the defendant had nothing else. *Id.* at 441-442. The motion to dismiss and for discovery was denied. See also *United States v. Bass*, 536 U.S. 862 (2002) where the Supreme Court summarily reversed the United States Court of Appeals for the Sixth Circuit which had granted discovery concerning Bass’s claim of racial bias in the decision – making process about whether to seek the federal death penalty. *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001).

There are no published Kentucky cases addressing selective prosecution based on race. The only published selective prosecution case from the modern era is *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993). Johnson claimed he was improperly targeted for prosecution as an adult while other co-participants were proceeded against in juvenile court or not at all. *Id.* at 274. The Supreme Court referred to *City of Ashland v. Heck’s Inc.*, 407 S.W.2d 421 (Ky. 1966) which upheld an injunction barring the city from enforcing the Sunday closing law against the department store Heck’s while not prosecuting any other violators, quoting with approval that case’s holding that “it is only the obvious and flagrant case that warrants relief.” 864 S.W.2d at 274. The Court found that the other co-participants’ cases were not identical to Johnson’s and that, even if they were identical, his situation was not comparable to what Heck’s had experienced since he was not the only juvenile to be prosecuted as an adult for serious crimes. *Id.* at 274-275. The Court concluded Johnson had not demonstrated “an obvious and flagrant case of selective enforcement.” *Id.* at 275.

City of Ashland v. Heck’s Inc., *supra* may be helpful. The Supreme Court of Kentucky observed that the Sunday closing law had been found to be constitutional as was the law in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). 407 S.W.2d at 423. It affirmed the lower court’s reliance on *Yick Wo* in finding enforcement of the Sunday closing law only against Heck’s to be unlawfully discriminatory under the equal protection clause of the 14th Amendment. *Id.* at 422. The Court upheld the grant of relief even though other businesses were cited for violations since the other cases were dismissed or continued indefinitely. *Id.* Stating that no law has been or will be enforced “uniformly and without exception,” the Court found the case before it to be “the obvious and flagrant case that warrants relief...” *Id.* at 424. Thus, there may be some “wobble room” in Kentucky with respect to the requirement of proof that “similarly situated” individuals were not prosecuted.

Holsey v. Commonwealth, 2004 WL 2914750 (Ky. App. 2004) is unpublished¹ but informative. *Holsey* claimed that his attorney was ineffective for failing to seek a timely evidentiary hearing on the issue of selective prosecution. *Id.* at 6-7. The Court of Appeals cited *Armstrong* and noted that “a person claiming selective prosecution must show that the prosecutorial decision had both a discriminatory effect and was motivated by a discriminatory purpose.” *Id.* The Court also stated that “both elements must be proven by clear and convincing evidence.” *Id.* Addressing the discriminatory effect prong which requires a showing that similarly situated individuals of a different category were not prosecuted, the Court quoted from *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000):

One who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government’s enforcement priorities and enforcement plan and against whom the evidence was as strong or stronger than that against the defendant.

With respect to the discriminatory intent prong the Court observed that the defendant must show the prosecutor “selected or reaffirmed a particular course of action at least in part ‘because of’, not merely ‘in spite of’ its adverse effects upon an identifiable group.” *Id.* at 7, quoting *Wayte v. United States*, 470 U.S. 598, 610 (1985). The Court described what proof of discriminatory intent might be acceptable in the absence of direct evidence:

Where direct evidence of discriminatory purpose is unavailable, a court may review other factors such as **disparate** impact, historical background, and specific events leading up to the challenged decision; emphasis in original.

Unfortunately, the Court ultimately found that Holsey had not established a legitimate claim of selective prosecution and thus had not proved ineffective assistance of counsel for failing to pursue the claim. *Id.* at 8. However, the Court does offer substantial guidance to attorneys who are contemplating raising selective prosecution claims.

Wolf, M., "Proving Race Discrimination in Criminal Cases Using Statistical Evidence," *Hastings Race and Poverty Law Journal* 395, 415-422 (Spring 2007) is a good resource. The author suggests ways to meet the *Armstrong* standard and overcome the aversion of the courts to statistical evidence, including statistically sound methodology, narrow focus on particular players in the criminal justice system such as the local prosecutor and emphasizing evidence of striking disparities which are immediately obvious. *Id.* at 421-422.

How can a criminal defense lawyer pursue issues of selective enforcement? If a lawyer observes that black defendants are being treated differently than whites who are "similarly situated" then information concerning those cases should be collected systematically. For example, if white defendants who are charged with felony drug offenses are allowed to plead to amended charges in district court while black defendants with the same type of charges are not offered such pleas there may be a selective enforcement issue. A lawyer must also be alert to any reports that the prosecutor has made racially insensitive remarks, particularly if he was talking about defendants he was prosecuting. Remember that there are two elements of proof: 1.) that others similarly situated have not been prosecuted; and 2.) that the prosecutor's decision to prosecute your client was based on race, an impermissible factor under the constitution. If you can present "some evidence" concerning each of those factors you should be able to get discovery and a hearing.

Endnotes:

1. CR 76.28(4)(c) provides that "unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." A copy of the decision must be tendered to the court and all parties. ■

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

JERRY BERNARD WINSTEAD

DEFENDANT

DEFENDANT'S MOTION TO BAR THE COMMONWEALTH

FROM SUBJECTING HIM TO A SENTENCE OF DEATH

IN LIGHT OF KENTUCKY'S HISTORY OF RACISM

FACTS

Throughout the history of the Commonwealth, until very recent times, it has been the legal policy of the Commonwealth to deprive African-Americans of their rights. In slavery times, from the foundation of the Commonwealth until after the Civil War, African Americans had the legal status of chattel, unless freed by their owners. After abolition, the Commonwealth's policy was in every way to degrade and to abase African American citizens and to deprive them of equality formally guaranteed by the Fourteenth Amendment. Since the Civil Rights Movement of the 1960's, the legal status of black citizens has improved, but racism remains a constant presence in Kentucky life....

For the rest of this motion by Rob Sexton and Shelia Kyle-Reno go to:

<http://dpa.ky.gov/Education/WinsteadBarDeath.doc>

USING KENTUCKY LAW AND THE KENTUCKY CONSTITUTION TO CHALLENGE RACIALLY BIASED SEARCHES AND SEIZURES

By Tim Arnold, Post Trial Division Director

The Fourth Amendment gets a lot of bad press these days. While much of that press may be deserved, the fact remains that it continues to provide significant protections against police misconduct. For example, in 2006, Kentucky's appellate courts issued almost twice as many published decisions reversing convictions based on Fourth Amendment violations than for violations of the Fifth and Sixth Amendments combined.¹ Despite the bad press, a defense attorney who ignores a possible suppression claim does so at the client's peril.

Where the Fourth Amendment falls flat is in restricting racially biased or discriminatory search and seizure practices. The Supreme Court has exhibited an almost defiant unwillingness to recognize the disparate impact that police policies can have on certain racial and ethnic groups. In *Illinois v. Wardlow*, for example, the Supreme Court found that living in a high crime area and fleeing from the police is sufficient "reasonable suspicion" to justify a *Terry* stop.² As Justice Stephens pointed out in his dissenting opinion:

Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal."³

In explaining this conclusion, Justice Stephens pointed to state courts that had concluded that their police departments had engaged in discriminatory and even abusive practices against minorities.⁴ Ironically, many of these practices have been authorized by the Supreme Court's decisions concerning arrest practices.⁵ The Supreme Court's recent decision to exempt warrant execution practices – specifically the "knock and announce" rule – from the exclusionary rule will do nothing to alleviate the problems.⁶

The Supreme Court's blindness to the disparate impact of certain police practices is most evident in its refusal to consider the subjective intentions of the police in evaluating a Fourth Amendment claim. In *Whren v. United States*, two plainclothes vice-squad officers pulled over a vehicle, ostensibly because it was speeding.⁷ Though Justice Scalia was willing to assume that the District of Columbia vice squad was desperately concerned about enforcing the speed limit, to most observers the officers' "speeding" rationale was merely a pretext for their real intentions, *i.e.*, investigating possible drug offenses. The Supreme Court found that whether the stop was pretextual or not, it was valid so long as it was supported by probable cause to believe that the defendants were guilty of *any* offense.⁸ The Supreme Court reasoned that any improper motives on behalf of the police could be dealt with through the Fourteenth Amendment, rather than the Fourth.⁹ In effect, the *Whren* decision amounted to a finding that a violation of even the most technical, picayune traffic ordinance acts as a waiver of most of our rights against unreasonable government intrusion.

In *Atwater v. Lago Vista*, the Supreme Court made sure we all understood that they weren't kidding when they held that probable cause to believe the defendant has committed *any* offense is sufficient to justify an arrest.¹⁰ In *Atwater*, a woman filed an action under 42 U.S.C. § 1983 after she was arrested, booked and taken to jail for a seat belt violation – a "crime" which carried only monetary consequences under Texas law. The Supreme Court found that there was no Fourth Amendment violation, concluding that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."¹¹

Most recently, in *Virginia v. Moore*, the Supreme Court took it over the top by finding that the Fourth Amendment was not implicated when a police officer made an arrest in violation of state law.¹² Moore was pulled over for driving on a suspended license.¹³ Under Virginia law, police are not permitted to arrest a person for driving on a suspended license except under certain narrowly defined circumstances, none of which applied.¹⁴ Nevertheless, the police arrested Moore in violation of

the statute, and found cocaine during the search incident to that arrest.¹⁵ Moore sought to suppress the drugs as the fruit of an illegal seizure, but a unanimous Supreme Court disagreed.¹⁶ Describing Moore's position as "novel," the Supreme Court found that "it is not the province of the Fourth Amendment to enforce state law."¹⁷

We have long been aware of a number of practices which seem to disproportionately burden our minority clients – racial profiling, *Terry* stops, and the like. The *Atwater* and *Moore* decisions create another category – the illegal arrest on a minor offense, followed by a search for evidence of a greater offense – which will potentially burden members of some racial and ethnic groups more than others. We also know that the Fourth Amendment – for all its value in cases where there is no probable cause (or in the case of a *Terry* stop, no reasonable suspicion) – offers no protection in this area. How can we protect our clients from these practices?

In those cases where the Fourth Amendment is not going to help our clients, we need to turn our focus towards state law as a means of attacking racial profiling and similar practices. At present, twenty-eight states interpret their constitutional privacy provisions to sweep more broadly than the Fourth Amendment.¹⁸ Several other jurisdictions interpret their constitutions to be co-extensive with the Fourth Amendment, but nevertheless have departed from the Fourth Amendment on other state law grounds.¹⁹

Certainly, Kentucky has had no problem finding that the Kentucky Constitution is broader in some areas than the comparable provisions of the United States Constitution.²⁰ Nevertheless, recently Kentucky courts have concluded that "[S]ection 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment."²¹ That was not always the case. Nearly 30 years ago, we could have said that Section 10 was one of the provisions that was broader than the United States Constitution. For example, in 1979 the Kentucky Supreme Court interpreted Section 10 to sweep more broadly than the Fourth Amendment with respect to automobile inventory searches.²² Four years later, a different Kentucky Supreme Court reversed that decision, and concluded that the Fourth Amendment cases were sufficient to meet the requirements of Section 10.²³ But since 1983, Kentucky courts have not deviated from the United States Supreme Court's Fourth Amendment jurisprudence, though the Kentucky Supreme Court has considered doing so at least as recently as *Crayton v. Commonwealth* in 1992.²⁴

Looking at how Kentucky courts originally construed Section 10 (and its predecessors in the first three Kentucky Constitutions), it is clear that the framers of Kentucky's current constitution intended to provide more protections to its citizens than what the Fourth Amendment now provides.

- In 1829, our High Court concluded that a peace officer acting on an invalid warrant could not defend against a trespass action merely because he believed in good faith that the warrant was valid.²⁵
- By 1891, the Court had construed the language of what is now Section 10, in conjunction with Kentucky statutes, to generally prohibit warrantless arrests, except upon probable cause to believe a felony had been committed, or for a misdemeanor committed in the presence of the officer.²⁶ In reaching that conclusion, the Court lamented the "wrongs, injuries, and oppressions which might and, as we think, would often result from investing a mere peace-officer with unlimited authority to arrest any person, and place him in custody upon the unsworn complaint of another or on the faith of some rumor to which the officer might give credence"²⁷
- In 1920, our High Court rejected the argument that a warrantless search must merely be "reasonable" (which is to say, supported by probable cause) to be valid.²⁸ Rather, the Court concluded that Section 10's reference to "unreasonable search and seizure" was intended to operate as a limitation on the situation where a warrant should be issued. According to the Court, searches without a warrant were completely prohibited, except to the extent that they were incident to a lawful arrest. Basing its conclusion largely on the historical discussion of the origins of the Fourth Amendment found in an 1886 United States Supreme Court decision,²⁹ the Court concluded that Section 10 required that evidence obtained illegally must be suppressed, finding that it could not authorize the admission of illegally obtained evidence without causing "infinitely more harm than good in the administration of justice"³⁰

Sadly, many of Kentucky's early decisions interpreting Section 10 as providing broad protection have been undone by more recent decisions. For example, in *Crayton*, the Kentucky Supreme Court accepted the "good faith exception" which it seemed to have rejected more than 150 years earlier.³¹ There can be little doubt that a warrant is no longer a prerequisite for a valid search in Kentucky.

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However, the Kentucky Supreme Court is almost entirely new, and most of the current justices have never authored an opinion comparing Section 10 to the Fourth Amendment. The new justices have attained their positions on the Court at a time when people of all political stripes are expressing concern that the Fourth Amendment has been construed too narrowly to protect individual privacy. Moreover, there are emerging issues that will prompt the justices to reconsider their view of Section 10. For example, Kentucky courts have thus far merely skirted the question whether a search incident to an invalid arrest may still be legal, *i.e.*, the issue presented in *Virginia v. Moore*.³² Perhaps that issue – given the long history of Kentucky cases finding a constitutional dimension to the rule now embodied in KRS 431.005³³ – will prompt the Kentucky Supreme Court to reconsider its view of Section 10.

And Section 10 is not the only arrow in our quiver. Section 2, coupled with KRS 15A.195 (the “Racial Profiling Act”) provides a litigant with a much more robust right to litigate racially discriminatory conduct than does the federal constitution. Generally, a claim that the police violated the Equal Protection Clause in their enforcement practices can only go forward if the defendant can make a showing that the police have engaged in enforcement actions against members of the defendant’s racial group, and *not* engaged in those same actions against members of other racial groups.³⁴ This showing has to be made *before* discovery into police practices will be authorized – an extremely high bar.³⁵

In Kentucky, the bar is much lower. Section 2 is violated whenever any administrative agency (which would include police agencies) acts “arbitrarily.”³⁶ Arbitrary action includes acts which are contrary to law or properly adopted regulation or policy.³⁷

KRS 15A.195 not only forbids state police officers “stop[ping], detain[ing] or search[ing] any person when such action is solely motivated by consideration of race, color or ethnicity,” it also requires both state and many local law enforcement agencies to adopt policies prohibiting racial profiling – policies that can be broader than what the statute requires. The Justice Cabinet has adopted a Model Policy that is slightly broader than the statute, in that it defines “racial profiling” to include “. . . discretionary decisions during the execution of law enforcement duties based on [consideration of an individual’s actual or perceived race, color or ethnicity]. . . .”³⁸ Under the *Cornell* definition of arbitrary action,³⁹ a violation of this provision could be regarded as a violation of Section 2.

Moreover, as a result of the Racial Profiling Act, many police departments have begun to keep statistics on traffic stops by race, in order to evaluate their success in eliminating racial profiling. Those statistics are open records, which can be provided under the Open Records Act, or through discovery.⁴⁰

Obviously, Kentucky still has much to do before it can say that it has eliminated police practices which disproportionately burden certain racial or ethnic groups. However, we are dealing with a brand new Kentucky Supreme Court, and a new day of racial healing is dawning in our country. Given Kentucky’s long history of protecting privacy, and the clear social policy of our Racial Justice Act, there is reason to hope that we may see a departure from the United States Supreme Court’s Fourth Amendment jurisprudence, towards a model which more effectively protects the privacy rights of Kentucky citizens.

Endnotes:

1. **Fourth Amendment:** *Commonwealth v. Hatcher*, 199 S.W.3d 124 (Ky. 2006)(warrantless search not justified by exigent circumstances); *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006)(warrantless search not justified as an administrative search); *Southers v. Commonwealth*, 210 S.W.3d 173 (Ky. App. 2006)(warrantless search not supported by probable cause); *Krause v. Commonwealth*, 206 S.W.3d 922 (Ky. 2006)(warrantless search not justified by consent, where consent was obtained through police deception); *Monon v. Commonwealth*, 209 S.W.3d 471 (Ky. App. 2006). **Fifth Amendment:** *Radford v. Lovelace*, 212 S.W.3d 72 (Ky. 2006)(violation of double jeopardy). **Sixth Amendment:** *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006)(confrontation clause violation); *Tinsley v. Commonwealth*, 185 S.W.3d 668 (Ky. App. 2006)(right to counsel). There have been several other cases where the court found a Sixth Amendment violation and reversed the lower court’s decision, but which did not result in a reversal of the defendant’s conviction. See *Moore v. Commonwealth*, 199 S.W.3d 132 (Ky. 2006)(denial of effective assistance of counsel in appealing from post conviction action warrants reinstatement of the appeal; conviction not reversed); *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006)(finding that an ineffective assistance of counsel claim could be sustained where an error is deemed not to be palpable error on appeal, and remanding for further proceedings; conviction not reversed).

2. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

3. *Id.*, at 132-133.

4. *Id.*, at 133, n. 10 (noting reports from New Jersey and Boston).

5. See, e.g., *Pennsylvania v. Mims*, 434 U.S. 106 (1977)(police may force driver from car during traffic stop);

- Maryland v. Wilson*, 519 U.S. 408 (1997)(police may force passenger from car during traffic stop); *Ohio v. Robinette*, 519 U.S. 33 (1996)(officer does not have to inform driver that they are free to go before seeking consent).
6. See *Hudson v. Michigan*, 547 U.S. 586 (2006)
 7. *Whren v. United States*, 517 U.S. 806 (1996)
 8. *Id.*, at 813.
 9. *Id.*
 10. *Atwater v. Lago Vista*, 532 U.S. 318 (2001).
 11. *Id.*, at 354.
 12. *Virginia v. Moore*, ___ U.S. ___, 2008 WL 1805745 (2008).
 13. *Id.*, pg. 2.
 14. *Id.*
 15. *Id.*
 16. *Id.*, pg. 9
 17. *Id.*
 18. *Reeves v. State*, 706 P.2d 727, 734 (Alaska 1979); *State v. Sullivan*, 74 S.W.3d 215, 218 (Ark. 2002); *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983); *State v. Mikolinski*, 775 A.2d 274, 278 (Conn. 2001); *Jones v. State*, 745 A.2d 856, 863 (Del. 1999); *State v. Tau 'a*, 49 P.3d 1227, 1239 (Haw. 2002); *State v. Fees*, 90 P.3d 306, 313 (Idaho 2004); *State v. Jackson*, 764 So.2d 64, 71, n. 10 (La. 2000); *Jenkins v. Chief Justice of the Dist. Ct. Dep't*, 619 N.E.2d 324, 330 & n. 16 (Mass. 1993); *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004); *Graves v. State*, 708 So.2d 858, 861 (Miss. 1997); *State v. Hardaway*, 36 P.3d 900, 909 (Mont. 2001); *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003); *State v. Ball*, 471 A.2d 347, 350-53 (N.H. 1983); *State v. McAllister*, 875 A.2d 866, 873 (N.J. 2005); *State v. Gutierrez*, 863 P.2d 1052, 1056 (N.M. 1993); *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001); *State v. Campbell*, 759 P.2d 1040, 1044, n. 7 (Or. 1988); *Jones v. City of Philadelphia*, 890 A.2d 1188, 1193 (Pa.Comm.Ct. 2006); *State v. Werner*, 615 A.2d 1010, 1012 (R.I. 1992); *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001); *State v. Schwartz*, 689 N.W.2d 430, 435 (S.D. 2004); *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997); *Heitman v. State*, 9815 S.W.2d 681, 690 (Tex.Crim.App. 1991); *State v. Debooy*, 966 P.2d 546, 549 (Utah 2000); *State v. Kirchoff*, 587 A.2d 988, 991-92 (Vt. 1991); *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002); *Smith v. State*, 557 P.2d 130, 132 (Wyo. 1976).
 19. *State v. Ault*, 724 P.2d 545, 549 (Ariz. 1986)(prohibiting warrantless entry into home, absent exigent circumstances, “as a matter of Arizona law”); *Gary v. State*, 422 S.E.2d 66, 69 (Ga. 1992)(state statute precludes recognition of the “good faith” exception); *People v. Delaire*, 610 N.E.2d 1277, 1282 (Ill.Ct.App. 1993)(prohibiting disclosure of telephone records); *State v. Carter*, 370 S.E.2d 553, 559 (N.C. 1988)(rejecting “good faith” exception on state law grounds);
 20. *Baucom v. Commonwealth*, 134 S.W.3d 591 (Ky. 2004)(Kentucky constitution recognizes a right to hybrid representation); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky.1989) *overruled on other grounds*, *Caudill v. Commonwealth*, 120 S.W.2d 635 (Ky. 2003)(right to personal confrontation can only be waived by the defendant personally, not by counsel).
 21. *LaFollette v. Commonwealth*, 915 S.W.2d 747, 748 (Ky. 1996)
 22. *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979); *overruled by Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983).
 23. *Estep*, *supra* note 22
 24. *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992)
 25. *Reed v. Rice*, 25 Ky. 44, 1829 WL 1312 (1829)
 26. *Jamison v. Gaernett*, 73 Ky. 221, 1874 WL 7215 (1874), *see also Madden v. Meehan*, 151 Ky. 220, 151 S.W. 681 (1912)(same holding).
 27. *Jamison*, 1874 WL 7215, at pg. 2.
 28. *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W.860 (1920).
 29. *Id.*, at 863, citing *Boyd v. United States* 115 U.S. 616 (1886).
 30. *Id.* at 866.
 31. *Crayton*, *supra* note 24
 32. *Birch v. Commonwealth*, 203 S.W.3d 156 (Ky.App. 2006)(finding that the taint of the defendant’s illegal arrest was removed by the existence of a valid search warrant).
 33. KRS 431.005 (1)(c) provides that a peace officer may make an arrest without a warrant when there is probable cause to believe that the person being arrested has committed a felony.
 34. *United States v. Armstrong*, 517 U.S. 456 (1996).
 35. *Id.*. For an excellent discussion of why so called “selective enforcement” claims should nevertheless be pursued, *see* Gail Robinson, *Selective Prosecution*, elsewhere in this Manual.
 36. *Commonwealth, Transportation Cabinet, Dept. of Vehicle Regulation v. Cornell*, 796 S.W.2d 591 (Ky.App. 1990)
 37. *Flying J Travel Plaza v. Commonwealth, Transp. Cabinet, Dept. of Highways*, 928 S.W.2d 344 (Ky. 1996)
 38. Model Policy Prohibiting Racial Profiling, Rev. 6/28/01.
 39. *Cornell*, 796 S.W.2d 591.
 40. KRS 61.870-61.884. ■

BIAS AFFECTING PRE-TRIAL RELEASE

By Rebecca Ballard DiLoreto

Legal scholars pondering reports that 1 of every 100 U.S. adults is in jail or prison need look no further than *Roger Clemens* to see why it is blacks who mainly choke the jails. Men such as Clemens - unlike their counterparts such as, say, *Barry Bonds* - enjoy a white privilege conveying a sense of immunity from prosecution, or even suspicion.¹

Race as a data source is often something difficult to determine statistically because we fail to notate it in so many instances. For example, most jury questionnaires or forms do not require the potential juror to state their race. Interestingly, right on the front of Kentucky's standardized pretrial release form there is a blank for RACE. It comes right after SEX and before MARITAL STATUS. Pretrial release officers are trained to complete the form and when they contact the judge on duty regarding bond, they routinely read off the first section of the form and the risk assessment for the individual. Thus, they routinely state the race of the accused, incarcerated person. Former Kentucky pretrial officer and supervisor, Tracy Hughes notes "I have never been comfortable with recording a defendant's race on the pretrial interviews. It really serves no purpose except to promote stereotypes or discrimination. Recording a defendant's race does not aid in identifying the defendant, because our nation is so diverse that many people have a very diverse ethnic heritage." Officers are not trained in *how to determine* an individual's race. In the census, race is self-reported. Pre-trial officers seldom *ask* the individual what their race is, but rather make a visual determination.

Some judges in the state direct their officers not to identify the persons by race, name or sex because the judges want to make a decision based on risk factors alone and not be prejudiced by making what may well be irrelevant or erroneous associations and assumptions.²

Bond serves two explicit purposes. It is designed to protect the public and to ensure that the defendant returns for appropriate processing of her case in court.³ Criminal Rules 4.00 to 4.58 guide a trial court in making a bond determination. RCr 4.12 provides that : If a defendant's promise to appear or his execution of an unsecured bail bond alone is not deemed sufficient to insure his appearance when required, the court shall impose the least onerous conditions reasonably likely to insure his appearance as required.⁴

Bond is to be reviewed on appeal with the abuse of discretion standard. However, trial courts are required to give due consideration to all of the factors set forth in the rules and to impose the **least onerous** conditions reasonably necessary to secure our client's appearance in court.

Pre-trial release serves both the client with whom we are concerned as defense counsel and the community. Reasonable terms of release permit an accused to act responsibly and meet her obligations by maintaining employment and complying with any other terms of release. Specific terms allow pretrial supervisors a means of enforcing conditions of release in an orderly process that appropriately limits demands upon the court, prosecution, defense counsel or law enforcement. If conditions are set, the individual is released and the case is docketed for an appearance, no one's time is wasted needlessly litigating the release of every person accused or initially arrested. Pretrial release provides a means of monitoring activity following a charged offense with the design to reduce the risk of future crimes. It allows individuals to live with their families, participate in community life and work with trial counsel to prepare a defense to the charges or to work towards making any amends.

"Studies that analyze the effects of pretrial incarceration on sentencing decisions find that this detention affects both the decision to incarcerate and sentence length (Albonetti, 1989; Clark & Henry, 1997; Nobling et al., 1998; Spohn & Cederblom, 1991; Unnever, 1980). In addition, studies that examine racial disparities in pretrial processing find that Black and Latino defendants are given less favorable pretrial decisions than are White defendants (Demuth, 2003; Schlesinger, 2005). When looked at together, these two sets of findings suggest that racial disparities in the pretrial stage may be responsible—either wholly or in part—for the racial disparities found in sentencing. In fact, ... defendants who are incarcerated pretrial are four times as likely to be sentenced to incarceration and, when sentenced to incarceration, receive sentences that are 86% longer than defendants who were released."⁵

As advocates we must seek first to persuade our judges and pretrial officers to look clearly at our clients' situations, present them with reasonable alternatives for pre-trial placement and reasonable terms of bond that our clients can meet. It may be that we can partner with local concerned citizens and perhaps local sociologists and gather data to establish if clients defined as African American or Hispanic are denied release on recognizance or supervised release; subjected to bail amounts which they cannot post; denied admission to diversion; detained because of their inability to post bail. See *Reducing Racial Disparity in the Criminal Justice System, A Manual for Practitioners and Policymakers*, The Sentencing Project, Washington, D.C. (2000). Realistically, such data gathering is too much work for over-burdened public defenders, but sometimes we can find allies in academia or with our local Human Rights Commission who may assist us in such efforts.

Experience and statistics inform us that there are far-reaching implications for our clients who are detained pre-trial. They are more likely to plead guilty, more likely to be found guilty and receive a prison term rather than probation, and finally, less able to assist counsel in pre-trial planning.

With youth in juvenile court, analyses of sentencing decisions indicate that pretrial detention is typically the second most important determinate of home removal and secure confinement. Moreover, the analyses suggest some gender and racial bias in the administration of detention.⁶

In advocating for pretrial release, we should be certain to remind the court that the law strongly favors such release whenever possible. The U.S. Supreme Court has noted that "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."⁷ Where bond is set in a manner calculated to ensure that the defendant cannot meet the conditions of release, that bond is unconstitutionally excessive.⁸

In order to ensure that defendants are not detained pretrial except when absolutely necessary, RCr 4.02 states that any person charged with an offense where death is not a possible punishment *shall* be considered for pretrial release. Even persons charged with death eligible offenses must be given reasonable bond unless the Commonwealth can establish that the proof is evident and the presumption is great that the defendant is guilty.⁹

Persons who are eligible for pretrial release (which is to say, almost all defendants) ". . . shall be released upon personal recognizance or upon unsecured bail bond unless the court determines, in the exercise of its discretion, that such release will not reasonably assure the appearance of the defendant as required."¹⁰ Where personal recognizance or an unsecured bond is insufficient, the court shall impose the "least onerous conditions reasonably likely to insure the defendant's appearance as required."¹¹ In determining the conditions needed to assure the defendants appearance as required, the court may not rely solely on the nature of the offense, but must also inquire into the defendant's prior record, the defendant's reasonably anticipated conduct if released, and the defendant's financial ability to give bail.¹²

When advocating for pretrial release, follow the general dictates of an Alternative Sentencing Plan. That means counsel should:

- Account for where defendant will be living and have witnesses available.
- Take family history to show defendant's ties to the community. Preferably, involve a social worker or mitigation specialist to assist in this.
- Rely on defendant's past appearances for court.
- Account for where defendant will be working or attending school. Include hours of work or school. Have witnesses available from work or school. If unavailable, get affidavits.
- Account for transportation.
- Build in compliance with a reporting requirement every week, every other week, every month . . . whatever the court will allow.
- Include conditions regarding drinking, drug use, contact with felons, children, etc. depending on the situation.

Finally, where the court sets an unreasonable bond, or no bond at all, counsel should litigate the issue aggressively. First, whenever a client is in custody when by law they should be released, counsel should press for a speedy trial. On this issue, Kentucky courts disagree with the federal courts on what is necessary to invoke the right. Kentucky's Supreme Court has held that a motion to dismiss for failure to provide a speedy trial is not sufficient to invoke the defendant's right to speedy trial.¹³ However, the Sixth Circuit Court of Appeals held in evaluating a speedy trial challenge from a Kentucky state court on habeas corpus review, "that a demand for reasonable bail is the functional equivalent of a demand for speedy trial."¹⁴

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In *Barker v. Wingo*, the Supreme Court found that among the considerations in determining whether a defendant has not been afforded his constitutional right to a speedy trial is whether he was incarcerated prior to trial.¹⁵ As the Supreme Court explained:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.¹⁶

A violation of the right to a speedy trial will result in dismissal of the charges against the defendant. Consequently, it is in the interest of everybody that clients in custody have their cases tried promptly. Likewise, it is also in everybody's interest that those who cannot be tried promptly be released from custody.

Second, one should appeal pretrial release decisions whenever the court has set bond at an unreasonably high level. The procedure for appealing cases is as follows:

- If in circuit court, file a notice of appeal within 30 days of the date of the denial of bond, of denial of the bond reduction motion. Within 30 days of the notice of appeal, the clerk of the circuit court must file the relevant record with the Court of Appeals.¹⁷ At that point, counsel has 15 days to file an abbreviated (5 pages or less) brief with the Court of Appeals.¹⁸ The decision on the appeal is to be made "as soon as practicable."¹⁹ Neither the filing of a notice of appeal nor pendency of the appeal will stay further proceedings in the prosecution.²⁰ Although it is the responsibility of the trial office to file appeals from Circuit Court, the DPA Appeals Branch will assist you if you ask.
- If you are in district court, file a writ of habeas corpus in the county where your client is incarcerated.²¹ If you lose, that decision can be appealed to the Court of Appeals by filing a notice of appeal within 30 days.²²

Endnotes:

1. Les Payne, *America's Way of Justice Favors Whites Over Blacks*, Newsday.com, March 2, 2008.
2. Interview with Tracy Hughes, March 21, 2008
3. 78 A.L.R.3d 780 (originally published 1977)
4. *Abraham v. Commonwealth*, 565 S.W.2d 152 Ky.App. (1977).
5. 2007 JIJINTST 261 Journal of the Institute of Justice and International Studies *The Cumulative Effects Of Racial Disparities In Criminal Processing 2007* (Approx. 20 pages)
6. Feld, Barry C. *The Right To Counsel In Juvenile Court: An Empirical Study Of When Lawyers Appear And The Difference They Make*, At 1338 79 JCRLC 1185 Northwestern University School of Law, Winter, 1989 (Approx. 227 pages),
7. *Stack v. Boyle*, 342 U.S. 1, 3, 72 S.Ct. 1, 2 (1951).
8. *Id.*, *Abraham v. Commonwealth*, 565 S.W.2d 152 (Ky.App., 1977).
9. *Commonwealth v. Stahl*, 237 Ky. 388, 35 S.W.2d 564 (1931); Ky.Const. § 16, RCr. 4.02
10. RCr 4.10.
11. RCr 4.12.
12. RCr 4.16(1); KRS 431.525(1); *Abraham v. Commonwealth*, *supra*, note 8
13. *MacDonald v. Commonwealth*, 569 S.W. 2d (Ky. 1978)
14. *Cain v. Smith*, 686 F 2d 374 (6th Cir. 1982)
15. 407 U.S. 514, 92 S.Ct. 2182
16. *Id.*, 407 US at 532-33
17. RCr 4.43(1)(b).
18. RCr 4.43(1)(c).
19. RCr 4.43(1)(d).
20. RCr 4.43(1)(e).
21. RCr 4.43(2); KRS 419.020.
22. KRS 419.130. ■

DISPARATE IMPACT: RACIAL BIAS IN THE SENTENCING AND PLEA BARGAINING PROCESS

By Rebecca Ballard DiLoreto

I. Impact of Racial Disparity on Sentencing is Devastating on Intergenerational Level

A. With Children

The effects of disproportionate incarceration are devastating on African-American and Hispanic family structures. An African-American child is nine times more likely to have a parent incarcerated than is a white child. A Hispanic child is three times more likely than a white child to have a parent imprisoned.¹

B. With Women and Families

Over-incarceration of men impacts women who are trying to raise families alone. The increased incarceration of women obviously prevents them from raising their sons and daughters. Ann Jacobs, Director of the Women's Prison Association, comments in her introduction to a new study of women in prison that "The cycling of women through the criminal justice system has a destabilizing effect not only on the women's immediate families, but on the social networks of their communities. They are, more often than not, primary caretakers of young children and other family members."² *The Punitiveness Report - Hard Hit: The Growth in Imprisonment of Women, 1977-2004* tracks changes in the incarceration rate of women between 1977 and 2004, a period in which the number of women serving sentences of more than a year grew by 757 percent—nearly twice the 388 percent increase in the male prison population.³ Most of the increase can be accounted for by the drug war: the percentage of women serving time for drug offenses grew from 11% in 1979 to 32% in 2004. In most cases, women arrested for involvement in the drug trade tend to play peripheral or minimal roles, selling small amounts to support a habit, or simply living with intimates who engage in drug sales.⁴

II. Our Nation has Embraced Long Sentences of Incarceration as the End All and Be All Solution

Politicians have been catering to the fears of law abiding citizens and competing to prove who would make our communities the safest. In the context of quick, symbolic sound-bites, promising to lock up the bad guy and legislating ever more punitive criminal sanctions paved the easy path to popularity. As noted by renowned expert on criminal law and procedure, Professor Robert Lawson, "[t]he huge appetite for incarceration of citizens reflected in these numbers is a relatively new development for America, shown by the fact that just thirty years ago the country's inmate population stood at less than 330,000."⁵ The thought that the country holds more than two million citizens in custody is disquieting on its own, but even worse when overlaid with the understanding that racial disparity has increased, not decreased.⁶

III. Our Criminal Justice System Gives Prosecutors Enormous Often Unbridled Discretion

Conversation among criminal defense attorneys reflects significant disparity in the exercise of prosecutorial discretion from one judicial district to the next. We know that our clients are better or worse off depending upon where the alleged criminal activity occurred. The case law is clear that judges cannot force a prosecutor to offer a reasonable plea.⁷ To compound matters, in many jurisdictions, jurors, fearful of anyone charged with an offense and with little belief in the importance of constitutional rights, impose severe sanctions. In a study published by Vanderbilt Law School, Kentucky lawyers and judges consistently describe jury sentences as severe. Summed up one defender: "Prosecutors like jury sentencing better, juries [are] more inclined to give higher sentences."⁸ The study reported that prosecutors, defense counsel, and judges have anecdotally found that juries are particularly punitive in a varied array of cases, theft, sex abuse, and drug cases.⁹

Even where a judge might correct sentencing disparity within the range of allowable punishment, studies find that they rarely do so. "If jury sentences are so high, what keeps a defendant from undercutting the prosecutor's leverage by seeking a sentence from the judge that is lower than the sentence a jury would give? Here unfolds one of the most interesting

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aspects of criminal procedure in Kentucky. Jury sentencing may serve as such a powerful incentive to plead guilty because trial judges have given the prosecutor nearly complete control over the sentencing differential between plea and jury trial. Defendants in Kentucky have virtually no access to independent judicial assessments of sentence severity. Their choice is stark: risk the jury's sentence or take the prosecutor's offer."¹⁰

The prosecutor's duty to do justice is often ignored.¹¹

IV. Our Sentencing Scheme and the Criminal Justice Process Gives Judges Enormous, Often Unbridled Discretion

A. The statutes emphasize importance of probation

If one simply read the statutes governing sentencing, a practitioner might believe that Kentucky law has a preference for probation.

KRS 533.010 provides:

Before imposition of a sentence of imprisonment, the court **shall consider probation, probation with an alternative sentencing plan, or conditional discharge**. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, after due consideration of the nature and circumstances of the crime and the history, character, and condition of the defendant, probation or conditional discharge **shall be granted**, unless the court is of the opinion that imprisonment is necessary for protection of the public because: [emphasis added]

(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime;

(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.¹²

Barring certain circumstances, a sentencing court must consider and grant probation or conditional discharge "unless the court is of the opinion that imprisonment is necessary for protection of the public" for one of the three enumerated reasons.¹³

B. However, the Caselaw puts no teeth in the statute because overturning a sentence based on abuse of discretion is nearly impossible.

The trial court retains considerable discretion in determining, based on its opinion, whether any of the three enumerated KRS 533.010(2) factors exist and, for the protection of the public, necessitate imprisonment in lieu of an alternative disposition.¹⁴ Generally, all a judge needs to do to protect the record is to address all three factors set out in KRS 533.010(2) before denying probation.¹⁵

In *Brewer v. Commonwealth*, the Kentucky Supreme Court held that KRS 533.010 guidelines were discretionary rather than mandatory but that "the record of the proceedings leading up to the entry of the judgment should clearly reflect the fact that the consideration required by KRS 533.010 had been afforded the convicted person before judgment was finally entered."¹⁶

The commentary to KRS 533.010, states:

[i]t is to be acknowledged that the trial court must be granted substantial discretion in deciding upon the disposition of convicted offenders. This section provides criteria to guide the court in the exercise of that discretion by listing the legitimate reasons for imposing a sentence of imprisonment.¹⁷

Kentucky courts continue to affirm that the factors are a guide, and it simply must be clear that the court considered them in its rulings.¹⁸

When an individual is probated, the decision as to whether probation should be revoked when the conditions of probation are violated rests firmly within the discretion of the trial court and may be overturned only when the court abuses that discretion.¹⁹ “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”²⁰

The Kentucky Court of Appeals has additionally held that a trial court is not obligated to consider only partial revocation when a probationer violates the terms of her probation.²¹ However, the case in which this issue was decided did **not** have a preserved record at the trial level, thus **persuasive, fact based argument** was not presented to support the legal claim on appeal. Appellants are not permitted to make one argument to a trial judge and a different one to the appellate court.²²

The alternative sentencing provisions can be found in KRS 533.010(6):

[u]pon initial sentencing of a defendant or upon modification or revocation of probation, when the court deems it in the best interest of the public and the defendant, the court may order probation with the defendant to serve one (1) of the following alternative sentences: [emphasis added]

- (a) To a halfway house for no more than twelve (12) months;
- (b) To home incarceration with or without work release for no more than twelve (12) months;
- (c) To jail for a period not to exceed twelve (12) months with or without work release, community service and other programs as required by the court;
- (d) To a residential treatment program for the abuse of alcohol or controlled substances; or
- (e) To any other specified counseling program, rehabilitation or treatment program, or facility.²³

KRS 533.020(1) sets forth, in part, that a court:

may modify or enlarge the conditions [of probation] or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

KRS 533.060(6) sets forth, in part, that:

[w]hen imposing a sentence of probation or conditional discharge, the court, in addition to conditions imposed under this section, **may** require as a condition of the sentence that the defendant submit to a period of imprisonment in the county jail or to a period of home incarceration at whatever time or intervals, consecutive or nonconsecutive, the court shall determine.

With these statutes available, it becomes our job as *advocates* for our clients to present **reasonable alternative sentencing plans**. It may seem ironic that given the great discretion resting with the judiciary and what the law allows, critics have scorned the value of social workers assisting defense counsel in investigating and preparing reasonable sentencing plans.²⁴

The Circuit Judge for the 21st Judicial Circuit, William B. Mains, has identified that nearly 75% of his caseload involves drug offenses or substance abuse. His daily experiences as a judge have led Judge Mains to be certain that treatment, not incarceration is the long-term solution. A recent news article reflected his perspective:

“If you end up in the county jail – which is where most D felons (non-violent offenders) go – you’re not going to get any treatment,” Mains said. Kentucky this year will spend about \$417 million imprisoning inmates and county jails – many of which house Class D state felons – are breaking county budgets. Since 1970, the state’s felon population has skyrocketed from about 2,800 to nearly 23,000 although the crime rate has increased by only

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3%. Most of the increase is tied to drug abuse and drug crimes. County jails house about 8,000 of the felony inmates but they're crammed as well with county prisoners. "We can't incarcerate our way out of the problem," Mains said. "We can't just scare these kids into straightening out their lives. It's not going to stop until we give them the tools to change their lifestyles."²⁵

This reality is true regardless of how one would define the cultural, ethnic or racial background of our public defender clients.

V. We Have an Ethical Obligation To Investigate and Then Persuasively Present the Facts for the Sentencing Court and Our Prosecutors to Consider.

We are called to reframe the way decision-makers in the court system see our clients. This effort is most critical when we represent people of color who have suffered historical prejudice because of an identified racial classification.

Racial disparity in punishment has a long history in the United States; Blacks have been disproportionately incarcerated since shortly after the Civil War (Curtin, 2000) and racial disparities increased again during the last quarter of the 20th century (Beckett, 1999). Currently, Blacks are 600% and Latino/as are 50% more likely than Whites to have ever been imprisoned—and disparity is not limited to prisons. Blacks are almost three times more likely than Latinos and five times more likely than Whites to be in jail (Bureau of Justice Statistics (BJS), 2006). In 1997, 1 out of every 11 Blacks living in the U.S. was under some form of correctional supervision, compared to 1 out of 50 Whites (BJS, 1998). When this disparity is combined with current "prison boom" levels of criminal justice intervention, the results are disastrous; by 2001, almost 17% of Black men had been imprisoned at some time in their life. Looking toward the future, the Bureau of Justice Statistics (2003) predicts that if imprisonment rates remain unchanged, one in three Black men born in 2001 will go to prison at some point during his life.²⁶

Startlingly, over a quarter of the individuals incarcerated in the U.S. are being held in local jails, and over half of these individuals are being held pending trial (BJS, 2001b). Even if they are later found not guilty, or given a non-custodial sentence, [internal citation omitted] these individuals experience terms of incarceration that may lead to many of the deleterious effects associated with post-trial incarceration: a decreased likelihood of employment, depressed wages, a decreased likelihood of marriage, and an increased likelihood of recidivism (Pager, 2003; Western & McLanahan, 2000; Western & Pettit, 2000). Focusing on sentencing decisions may obscure this important moment of disparate punishment.²⁷

Racial Profile of Kentucky's Inmate Population
Source:
Kentucky Department of Corrections;
 Profile of Inmate Population;
 January 13, 2005

Race	Number	Percent
White	12,237	68
Black	5,477	31
Native American	7	0
Asian	15	—
Hispanic	198	1
Other	43	—
Total	17,977	100

Comparison of Profiles Percentage of Institutional Populations																				
	K S P	E K C C	G R C C	K C I W	K C P C	K S R	L L C C	N T C	R C C	W K C C	B C F C	B C C	F C D C	L A C	M A C	A & C	C D	C S C	C C	C I
White	67	64	70	76	86	72	68	57	63	67	66	67	46	58	59	62	77	62	68	72
Black	32	34	29	24	6	25	32	40	37	32	34	33	54	39	41	37	22	37	32	26
Violent	65	55	54	40	16	47	42	53	41	35	41	37	38	44	34	28	14	14	13	13
Sex	13	15	14	5	0	32	34	10	3	24	0	0	0	17	0	8	—	0	0	4
Property	12	14	13	22	28	10	10	16	22	16	22	23	22	19	21	22	41	20	23	22
Weapon	1	1	1	1	0	1	1	1	4	1	3	3	—	1	2	2	2	2	2	1
Drug	7	12	17	30	49	9	12	17	30	23	33	35	38	16	42	31	33	41	59	31
Other	—	2	2	2	2	2	1	2	0	1	1	2	1	3	2	5	10	2	2	4
Median Sentence in years	17	12	13	9	7	14	10	11	10	11	10	10	11	11	10	7	3	10	7	5
Median Age	34	32	34	35	32	41	35	31	33	33	34	38	38	33	32	32	32	35	30	31

Legend:

Maximum Security
KSP: Kentucky State Penitentiary

Private Prisons
LAC: Medium Security: Lee Adjustment Center
MAC: Minimum Security: Marion Adjustment Center

Medium Security
EKCC: Eastern KY. Correctional Complex
GRCC: Green River Correctional Complex
KCIW: KY. Correctional Institute for Women
KCPC: KY. Correctional Psychiatric Center
LLCC: Luther Lockett Correctional Complex
NTC: Northpoint Training Center
RCC: Roederer Correctional Complex
WKCC: Western KY. Correctional Complex

Other
A&C: Assessment and Classification Center
CD: Class D Felon
CSC: Community Services Centers
CC: Community Custody
CI: Controlled Intake

VI. We can Emphasize and Point to Good Policy Like that Offered by the Sentencing Project

“Since the vast majority of criminal cases are disposed by plea, assuring that minorities are not disadvantaged in the process is critical. Misdemeanor level crimes, which typically account for a majority of criminal cases, are brought to disposition and sentence in the lower courts. Although, the sentences imposed in these courts are generally less severe than those imposed in the higher courts, a conviction becomes part of the defendant’s criminal history and can lead to more severe treatment in subsequent cases.”²⁸

Consistent with NLADA standards and a fully funded indigent defense bar, the Sentencing Project asks some fundamental questions:

- Are organizations serving minority communities given sufficient access to the Courts and to the public funds that support alternative sanction programs ?
- Have the courts, prosecution, defense, and probation service reviewed the factors that influence bail decisions and plea and sentence negotiations, including sentencing guidelines where they exist, so as to satisfy themselves that these processes are not inadvertently biased against members of racial minorities.?
- Are there special purpose courts operating in the jurisdiction? Do minority defendants have effective access to them?

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Have the process and factors used to determine eligibility for transfer to these courts been reviewed to eliminate inadvertent racial bias?

- Does the probation service have an adequate understanding of, and access to, the defendant's community so as to involve community resources in the sentencing plan?²⁹

Prosecutors urge their colleagues to consider that [p]lea bargaining practices could be modified to eliminate discriminatory impacts.... Sentencing provisions could be reexamined."³⁰

VII We can encourage the KBA and the local bar to follow ABA recommendations and train our judges and prosecutors in the exercise of their discretion.

The American Bar Association recommends that judges and prosecutors be trained on how to exercise their discretion. The resolution the ABA passed reads:

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments, and licensing authorities to fund professional associations and organizations to develop programs to train all criminal justice professionals – including judges, prosecutors, defense counsel, probation and parole officers, and correctional officials — in understanding, adopting and utilizing factors that promote the sound exercise of their discretion.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments and licensing authorities to recognize that such training should be credited towards continuing education program requirements.³¹

It is through our exercise of discretion that we leave our imprint on society as lawyers and as members of the human race. As advocates we are called by the needs of our clients to elevate the human race past the idiocies born of prejudice and selfish desire. It is as much our duty in our individual cases on behalf of our individual clients to eradicate racism, just as it is the calling of the Human Rights Commission or the Kentucky Civil Liberties Union to do so for society at large.

Kentuckian and political leader, Eleanor Norton Holmes spoke eloquently to this calling some years ago:

The law was base when it rationalized slavery. In its statutes and decisions, the law built an evil tower of jurisprudence to justify and cement slave statutes. And when war overturned the slave system, our law invented Jim Crow and separate but equal, an intricate embroidery of inequality whose effects we are still trying to root out.

The law was noble when it applied its own self-corrective and overturned doctrinal segregation. Lawyers and judges applied the same Constitution to lead our country to an entirely different notion of equality not embraced by the majority of Americans.

That the same Constitution could yield results as antithetical as segregation and integration should be a warning of the need for permanent self-criticism and continuing readjustment to the needs of society. It is a system always in search of values. It is we who bear responsibility for the quality of justice, not our founding document.³²

VIII. We can continue to reframe the image that the court system has of our clients.

In many respects, sentencing advocacy starts when your client is charged, and does not end until the case is concluded. In the early stages of the case, advocating for release on bail is critical. Clients who are released on bail are much better positioned to get probation (or get acquitted) than those who are locked up before trial.

While the case is ongoing, try to help your client present herself well to the court and prosecutor. Your client may not understand the values of the players in the courthouse — you play a critical role in helping your client navigate from one world to the other. On the flip side, you also play a critical role in encouraging the prosecutor and judge to consider the values of your client's world. In explaining that world to them, you can inspire the prosecutor and judge to be agents of change and to see helping your client as a part of a larger systemic effort to do justice.

Finally, at the close of the case, prepare an alternative sentencing plan which emphasizes your client's strengths and assets in the community, and which gives the judge and prosecutor a workable alternative to prison. If you have access to a social worker or social work intern, use them to help identify your clients needs, and find resources in the community to meet those needs. The best sentencing advocates never leave the judge without a workable alternative. Simply asking for probation on the day of sentencing isn't enough.

Endnotes:

1. See United States Conference of Catholic Bishops, *Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice* (2002) available at <http://www.usccb.org/sdwp/criminal.htm>
2. Introduction to Natasha Frost, Judith Greene and Kevin Pranis, *The Punitiveness Report - Hard Hit: The Growth in Imprisonment of Women, 1977-2004* (2006), available at <http://www.wpaonline.org/institute/hardhit/foreword.htm>.
3. *Id.*
4. Lenora Lapidus, Namita Luthra & Anjali Verma; Deborah Small; Patricia Allard & Kirsten Levingston. "Caught in the Net: the Impact of Drug Policies on Women and Families." Available at <http://www.fairlaws4families.org/> (A second volume of the study will look more deeply at factors that increased the risk of imprisonment for women arrested for felony offenses and increased the amount of time spent behind bars.)
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THE CUMULATIVE EFFECTS OF RACIAL DISPARITIES IN CRIMINAL PROCESSING

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Abstract

Data from the *State Court Processing Statistics Series* was used to analyze the cumulative effects of racial and ethnic disparities in criminal processing of men who are charged with felony drug offenses in large urban counties from 1990 to 2002. Estimating a series of models, I find not only that Black and Latino men receive less beneficial sentencing decisions than White men with similar legal characteristics, but also that these disparities are produced through a combination of direct and indirect effects. More particularly, I find that Black and Latino men are less likely to be granted non-financial release, more likely to be denied bail, and are given higher bails than White men with similar legal characteristics; that Black and Latino men are more likely to be adjudicated as felons than White men with similar legal characteristics; and that sentencing outcomes are determined by a combination of current case characteristics, prior record, economic resources and networks, and racially disparate processing—both indirectly through pretrial incarceration and level of adjudication, and directly during sentencing decisions.

The Cumulative Effects of Racial Disparities in Criminal Processing

Racial disparity in punishment has a long history in the United States; Blacks have been disproportionately incarcerated since shortly after the Civil War (Curtin, 2000) and racial disparities increased again during the last quarter of the 20th century (Beckett, 1999). Currently, Blacks are 600% and Latino/as are 50% more likely than Whites to have ever been imprisoned—and disparity is not limited to prisons. Blacks are almost three times more likely than Latinos and five times more likely than Whites to be in jail (Bureau of Justice Statistics (BJS), 2006). In 1997, 1 out of every 11 Blacks living in the U.S. was under some form of correctional supervision, compared to 1 out of 50 Whites (BJS, 1998). When this disparity is combined with current “prison boom” levels of criminal justice intervention, the results are disastrous; by 2001, almost 17% of Black men had been imprisoned at some time in their life. Looking toward the future, the Bureau of Justice Statistics (2003) predicts that if imprisonment rates remain unchanged, one in three Black men born in 2001 will go to prison at some point during his life.

While racial disparity in punishment is acknowledged, scholars disagree about its sources. Almost undoubtedly, disparity is the result of the interactions between race-salient criminal laws,² differential offending,³ differential policing,⁴ and differential criminal processing.⁵ The questions remain, however, as to how much each of these pieces contributes to total disparity and how disparity generated at one criminal processing stage affects the production of disparity at later stages.

Racial Disparities in Punishment Outcomes

Early studies, from the 1920s to the 1970s, generally examined the effects of race on punishment outcomes and found that Black men received more punitive criminal justice outcomes than White men. However, when later studies—conducted in the 1970s and 1980s—added variables for prior record and offense seriousness, the effects of race and class often disappeared or decreased. As a result, many scholars wrote that the “discrimination thesis” had been disproved and that what appeared to be effects of racial discrimination were actually the effects of legally relevant variables that are correlated with race, such as prior record (Blumstein, 1982; Chiricos & Waldo, 1975; Hagan, 1974; Kleck, 1985; Langan, 1985).

Since this time, several new developments have occurred that help to show where discrimination exists and why it was invisible in these earlier studies. Four of these developments are examining non-sentencing processing decisions, separating processing decisions into their composite parts, dividing analyses by offense types, and controlling for county level demographics.

While there are still few studies that examine pretrial processing decisions, studies that have examined this stage of criminal processing find consistent and substantial evidence that Black and Latino defendants receive less beneficial pretrial decisions than do White defendants with similar legal characteristics, regardless of the primary charge crime type (Demuth, 2003; Schlesinger, 2005). The available evidence suggests that disparities at this stage of criminal processing may be larger and more consistent than disparities in sentencing.

Startlingly, over a quarter of the individuals incarcerated in the U.S. are being held in local jails, and over half of these individuals are being held pending trial (BJS, 2001b). Even if they are later found not guilty, or given a non-custodial sentence,⁶ these individuals experience terms of incarceration that may lead to many of the deleterious effects associated with post-trial incarceration: a decreased likelihood of employment, depressed wages, a decreased likelihood of marriage, and an increased likelihood of recidivism (Pager, 2003; Western & McLanahan, 2000; Western & Pettit, 2000). Focusing on sentencing decisions may obscure this important moment of disparate punishment.

When scholars separate the sentencing decision into two parts, the decision to incarcerate and sentence length, such studies find that while there are rarely racial differences in sentence length once legal variables are controlled for, Blacks are more likely to be sentenced to incarceration than Whites with similar legal characteristics (Chiricos & Bales, 1991; Nobling, Spohn, & Delone, 1998; Petersilia, 1985; Spohn & Cederblom, 1991; Spohn, Gruhl, & Welch, 1981; Spohn & Holleran, 2000; Steffensmeier, Ulmer & Kramer, 1998). One possible explanation for this finding rests on the distribution of discretion. While judges have wide discretion when deciding whether or not to incarcerate an individual convicted of a crime, sentencing ranges are often “recommended” if not mandated, leaving judges little room to adjust sentences for a given offense.

Studies that look at the effects of race on sentencing by offense category have found that being Black or Latino is more harmful for offenders charged with certain offenses than with others. For example, the most consistent and substantial evidence of disparate processing is among defendants charged with drug offenses (Blumstein, 1982; Spohn & Cederblom, 1991; Steffensmeier & Demuth, 2000).

Studies that examine the effects of county level demographics, such as economic inequality between Black and White populations, find that sentencing disparities are more substantial and consistent in some counties than others and that this is linked to the demographics of those counties. For instance, Blacks face the most discrimination in sentencing decisions in counties where the percent Black and economic inequality are both low (Bridges & Crutchfield, 1988; Crawford, 2000; Crawford, Chiricos, & Kleck, 1998).

Finally, studies have begun to examine the treatment of Latino/as. Studies that have included Latinos frequently find that their ethnicity affects criminal processing (Hebert, 1997; Holmes & Daudistal, 1984; LaFree, 1985; Spohn & Holleran, 2000; for negative finding see Spohn et al., 1981). In fact, some theorists claim that, at least during some processing stages, Latino/as receive less beneficial criminal processing decisions than Blacks (Demuth, 2003; Schlesinger, 2005; Steffensmeier & Demuth, 2000, 2001). Additionally, when ethnicity is not considered, this not only obscures ethnic disparities in criminal processing, it also acts to obscure racial disparities since Whites and Latino/as are often included in the same category. Specifically, if both Latino/a and Black defendants receive criminal justice decisions that are less beneficial than those that white defendants receive, including Latino/as in the “White” category will make the White-Black gap in criminal processing appear smaller than it actually is. As such, it is imperative that scholars begin to include Latino/a defendants and analyze the effect of their ethnicity when examining disparities in criminal processing.

While all of these advances help students of punishment and racism to understand when disparities in criminal processing happen and what external conditions affect the likelihood of disparate processing, no known study has combined these insights to examine how disparities in punishment outcomes are produced through disparities that accumulate throughout successive stages of criminal processing. In order to uncover the cumulative effects of disparate processing, this study draws on several methodological advances of earlier studies: it examines several stages of criminal processing—pretrial decisions and outcomes, adjudication decisions, and sentencing decisions; disaggregates each of these decisions into their composite parts; focuses on individuals charged with felony drug offenses; uses fixed effects models to control for county level demographics; and includes White, Black, and Latino defendants.

Data

The data used for this analysis is the *State Court Processing Statistics, 1990 - 2002: Felony Defendants in Large Urban Counties (SCPS)*. The SCPS tracks a sample of felony cases filed in 65 of the nation’s 75 most populous counties until their final disposition or until 1 year has elapsed from the date of filing. This dataset—which contains a representative sample of state felony cases in large metropolitan counties in the years 1990, 1992, 1994, 1996, 1998, 2000, and 2002—provides detailed information on prior record and offense severity; a comprehensive list of common offenses, several measures of demographic characteristics, and a nationally representative sample of adequate size. This study is limited to an analysis of Black, White, and Latino men who are charged with felony drug offenses.⁷ After dropping observations for all female defendants, “other race” male defendants, defendants for whom information on legal variables was missing, and defendants not charged with drug offenses, the sample includes 36,709 defendants.

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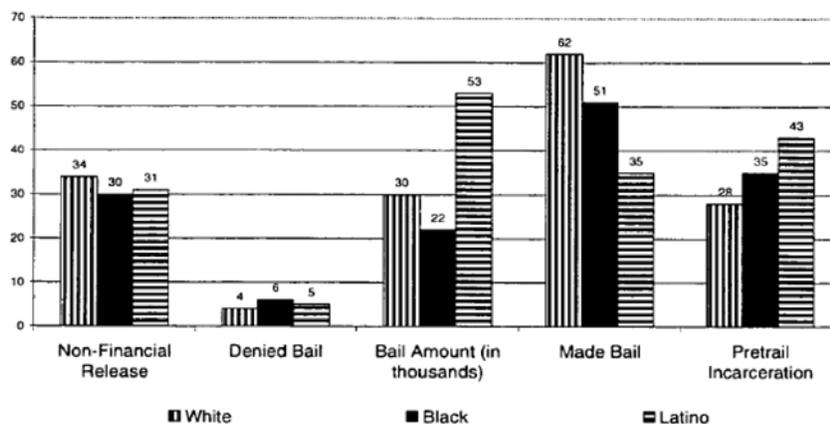
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Dependent Variables

There are eight dependent variables for this study. The first three are legal decisions that affect pretrial incarceration: the decision to deny bail, the decision to grant a non-financial release, and bail amount. The next two are pretrial processing outcomes: whether defendants given bail are able to post bail and pretrial incarceration. The sixth is the level of adjudication and asks whether the offender was adjudicated at a felony level. The final two are sentencing decisions: sentenced to incarceration and sentence length.

Studies that examine whether an offender was released or detained pretrial rather than the legal decisions that affect pretrial incarceration (Chiricos & Bales, 1991; Spohn et al., 1981) do not disaggregate the effects of discrimination from the effects of socio-economic status. While the pretrial incarceration results for defendants who are either given non-financial release or denied bail are completely determined by these legal decisions, most defendants are given financial requirements for release. Some of these defendants are able to post bail while others are not. Thus, in addition to the three legal decisions that influence pretrial incarceration, the economic resources and networks of defendants also influence release. The effects of these resources and networks can be seen when examining whether defendants given financial requirements for release are able to meet those requirements and, more broadly, whether defendants are released or detained pretrial. Both of these outcomes result from the interaction of legal decisions—the denial of bail, the granting of non-financial release, and the setting of bail amount—and the economic networks and resources of the defendants.

Figure 1.
Pretrial decisions of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race

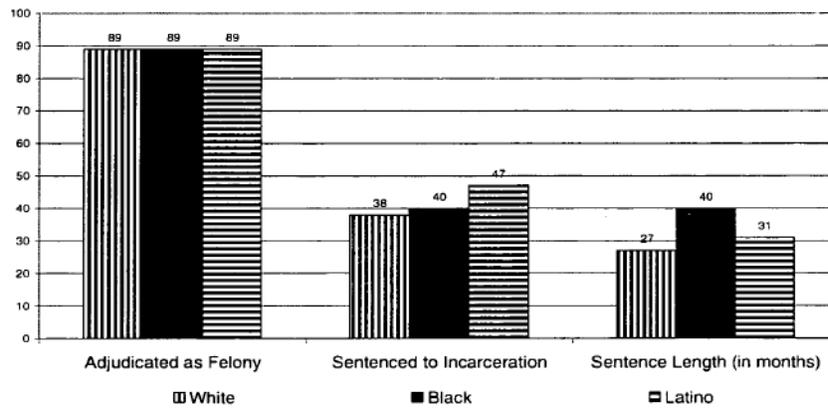


Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

White drug defendants are the most likely to be granted a non-financial release, the least likely to be denied bail, and receive bail amounts between those of Black and Latino drug defendants⁸ (see Figure 1). More specifically, while 34% of White defendants charged with felony drug offenses receive non-financial releases, only 30% of Black drug defendants and 31% of Latino defendants receive these releases. Similarly, while 4% of White drug defendants are denied bail, 6% of Black drug defendants and 5% of Latino drug defendants are denied bail. Finally, while White drug defendants receive average bails of \$30,000, Black drug defendants receive bails that average \$22,000, and Latino drug defendants receive bails that average \$53,000. In addition, White drug defendants are the most likely to be able to post when given a bail: 62% of Whites granted bail post, compared to 51% of Blacks and 35% of Latinos. As a combined result of receiving the most beneficial pretrial decisions and also having the most extensive economic resources and networks—as reflected in the ability to post bail—White drug defendants are substantially less likely than Black or Latino drug defendants to be jailed pretrial. Twenty eight percent of White drug defendants are incarcerated pretrial, compared to 35% of Black drug defendants and 43% of Latino drug defendants.

While all of the individuals in the SCPS data were charged with felonies when they were arrested, 11% of men originally charged with felony drug offenses were adjudicated as misdemeanants—this percent is constant across racial groups (see Figure 2). In contrast, White offenders are the least likely to be sentenced to incarceration and, when sentenced to incarceration, receive the shortest sentences.⁹ In particular, 38% of White drug offenders compared to 40% of Black drug offenders and 47% of Latino drug offenders are sentenced to incarceration. When sentenced to incarceration, White drug offenders receive sentences that average 27 months, while Black drug offenders receive sentences that average 40 months, and Latino drug offenders receive sentences that average 31 months.

Figure 2. Sentencing decisions of offenders convicted of drug offenses in large, urban counties from 1990 to 2002, by race



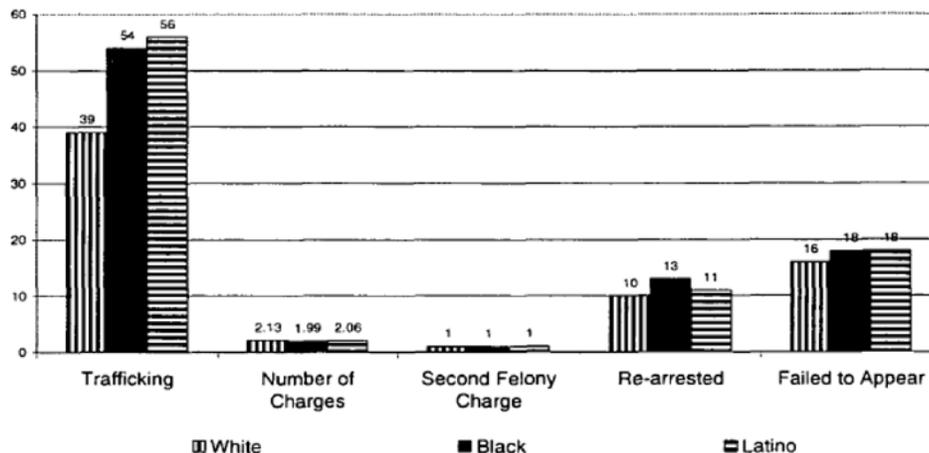
Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

Independent Variables

Explanatory variables include both extra-legal and legal variables. The data set contains over a dozen measures of offense seriousness and prior record. The variables included in the models are the ones that best predict each of the dependant variables. The models all include dummies for the race of the defendant, whether the charge was for trafficking or possession, whether the defendant had an active criminal justice status when arrested, whether they were charged with a second felony, the total number of charges, age and age squared (to account for the curvilinear effect of age), whether the defendant had a prior felony conviction, a prior misdemeanor conviction, or no prior convictions, whether the defendant had ever been imprisoned before, and both county level and year fixed effects. The pretrial models also control for whether the defendant had previously failed to appear for a court appearance, while the sentencing models also control for whether the defendant was rearrested while awaiting sentencing.

The extra-legal variables are race, ethnicity, and age. Of defendants in the sample, only 22% are White, 48% are Black, and 30% are Latino. Defendants in all three racial and ethnic groups average approximately 30 years old: White defendants have a mean age of 31, Blacks of 29, and Latinos of 28.

Figure 3. Current offense and case characteristics of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

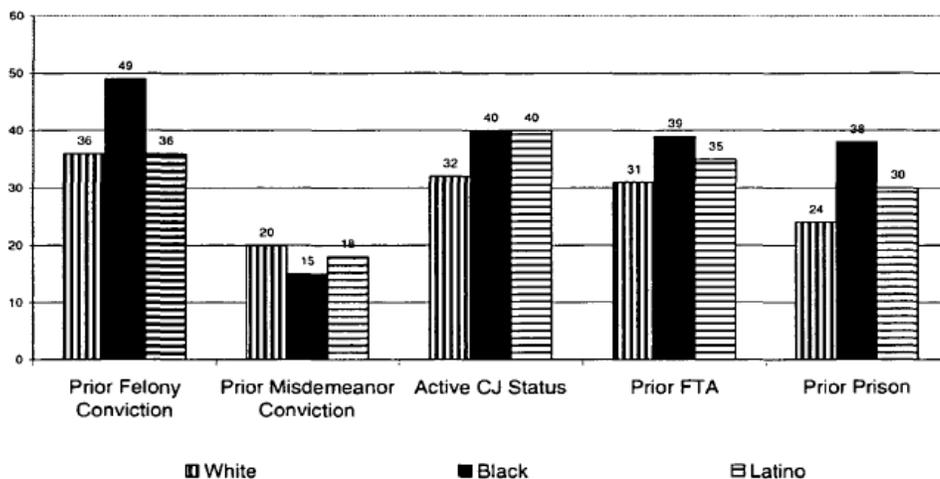
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Legal variables include those that describe the current offense and case characteristics and those that describe the defendant’s prior record (see Figure 3). Looking at current characteristics first, White defendants are least likely to be charged with a trafficking arrest, to be rearrested while awaiting trial, or to fail to appear for a court appearance than either Black or Latino defendants. The only current case characteristic for which White defendants score highest is the number of charges: Whites are charged with an average of 2.13 offenses, Blacks with an average of 1.99, and Latinos with an average of 2.06. There are no racial differences in the percent of defendants charged with a second felony; in fact, only 1% of White, Black, or Latino drug defendants have a second felony charge.¹⁰

Turning our attention to defendants’ prior records, Blacks are the most likely to have a prior conviction and their prior convictions are the most likely to be felony convictions (see Figure 4). More particularly, 56% of Whites, 64% of Blacks, and 54% of Latinos have prior convictions. Moreover, Whites are the least likely to have an active criminal justice status (to be on probation or parole or to be awaiting adjudication on another charge), the least likely to have failed to appear for a court case for a previous charge, and the least likely to have spent time in prison.¹¹ Overall, Blacks are arrested for more serious crimes and have more considerable prior records; as such, racial disparity in criminal processing will seem greater without these controls.

Figure 4.
Prior record of defendants charged with felony drug offenses in large, urban counties from 1990 to 2002, by race



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

Models

To understand how racial disparities in punishment outcomes are produced, it is necessary to examine both direct and indirect effects of racially disparate processing. To do this, the study estimates a series of models. The first set of models employed estimates of the association between being Black or Latino and the likelihood of being sentenced to incarceration and sentence length, while controlling for current case characteristics and prior record. Next, these models are re-estimated, first with a control for whether the offender was released or detained pretrial, then with an additional control for whether the offender was adjudicated as a felon. These six models examine whether the racial disparities found at the sentencing stage are generated, in whole or in part, by disparities in earlier processing decisions.

If sentencing disparities are generated by disparities in pretrial incarceration or adjudication level, the next question that arises is whether these earlier disparities are themselves the result of disparate criminal processing. In order to answer this question, one set of models that examines racial disparities in level of adjudication and another set of models that examines racial disparities in pretrial processing are estimated. These models estimate the association between being Black or Latino and being adjudicated as a felon with and without controlling for pretrial incarceration. This will help to answer, first, if racial disparities in level of adjudication among defendants with similar legal characteristics exist, and second, if and to what extent these disparities are generated through disparities in pretrial incarceration.

The final set of models examines the association between being Black and Latino and pretrial decisions and outcomes.¹² Knowing that racial differences in the likelihood of being detained pretrial help produce racial disparities in sentencing outcomes is not enough. In order to understand the cumulative effects of racially disparate processing, it is necessary to know whether racial differences in pretrial incarceration are themselves produced in part by disparate processing—as opposed to by either legally relevant characteristics of the defendants or by differences in the ability to post bail. In year i and county j , the effects of race on non-financial release, denied bail, made bail, pre-conviction incarceration, and sentenced to incarceration can be estimated as:

$$\text{logit}(p_{ij}) = x'_{ij}\beta_{ij} + \epsilon_{ij}$$

while the effects of race on bail amount and sentence length can be estimated as:

$$\log(Y_{ij}) = x'_{ij}\beta_{ij} + \epsilon_{ij}$$

Following each model, a post-regression Wald Test was estimated in order to establish whether the difference in the coefficients for 'Black' and 'Latino' is significant. While the regressions estimate whether Blacks or Latinos are treated differently from Whites, the Wald Tests estimate whether Blacks and Latinos are treated differently from each other.

Taken together, the results from these three sets of models answer the following questions: Are Black and Latino men who are charged with felony drug offenses more likely to be sentenced to incarceration than White men with similar legal characteristics? Among defendants sentenced to incarceration for drug offenses, do Black and Latino men receive longer sentences than White men? If disparities exist in the likelihood of being sentenced to incarceration or in sentence length, to what extent are these disparities the result of racial differences in the likelihood of being detained pretrial or adjudicated as a felon? To what extent are disparities in pretrial incarceration the result of disparate processing decisions? To what extent are disparities in level of adjudication the result of disparate processing decisions?

Findings

Employing models that control for offense seriousness, current case characteristics, and prior record, this study finds that Black and Latino offenders are more likely to be sentenced to incarceration and are given longer sentences than White offenders with similar legal characteristics. As Models 1 and 4 in Table 1 show, Black offenders have odds of being sentenced to incarceration that are 34% higher and, when sentenced to incarceration, receive sentences that are 17% longer than White offenders with similar legal characteristics. Latino offenders have odds of being sentenced to incarceration that are 45% higher and, when sentenced to incarceration, receive sentences that are 35% longer than White offenders with similar legal characteristics. A post-regression Wald Test reveals no significant difference between Black and Latino's likelihood of being sentenced to incarceration, but reveals that the difference between Black and Latino's sentence lengths is, in fact, statistically significant ($\chi^2 = 10.42; p < .002$).

However, while these models control for offense seriousness and prior record they do not control for prior processing outcomes. Studies that analyze the effects of pretrial incarceration on sentencing decisions find that this detention affects both the decision to incarcerate and sentence length (Albonetti, 1989; Clark & Henry, 1997; Nobling et al., 1998; Spohn & *Continued on page 28*

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Cederblom, 1991; Unnever, 1980). In addition, studies that examine racial disparities in pretrial processing find that Black and Latino defendants are given less favorable pretrial decisions than are White defendants (Demuth, 2003; Schlesinger, 2005). When looked at together, these two sets of findings suggest that racial disparities in the pretrial stage may be responsible—either wholly or in part—for the racial disparities found in sentencing. In fact, as Models 2 and 5 in Table 1 show, defendants who are incarcerated pretrial are four times as likely to be sentenced to incarceration and, when sentenced to incarceration, receive sentences that are 86% longer than defendants who were released. However, the direct association between being Black or Latino and sentencing outcomes remains. Controlling for pretrial incarceration, Black offenders have odds of being sentenced to incarceration that are 17% higher and receive sentences that are 11% longer than White offenders with similar legal characteristics and Latino offenders have odds of being sentenced to incarceration that are 22% higher and receive sentences that are 22% longer than White offenders with similar legal characteristics. Similar to the post-regression results for Models 1 and 4, post-regression Wald Tests reveal no significant difference between Black and Latino's likelihood of being sentenced to incarceration. However, they do reveal that the difference between Black and Latino's sentence lengths—controlling for pretrial incarceration this time—is still statistically significant (chi-square = 4.97; $p < .026$).

Finally, studies that examine whether race is associated with prosecutorial assistance find that White offenders are most likely and Latinos are least likely to receive prosecutorial assistance (Steffensmeier & Demuth, 2000). This suggests that White offenders might be more likely than Black or Latino offenders to have their charges dropped from felony to misdemeanor level. If this is true, the level of adjudication may be responsible for all or part of the racial disparities in sentencing outcomes. As Models 3 and 6 in Table 1 show, offenders who are adjudicated as felons have odds of being incarcerated that are three and a half times higher and, when sentenced to incarceration, receive sentences that are 80% longer than offenders who are adjudicated as misdemeanants. Strikingly, controlling for the level of adjudication actually increases the association between race and being sentenced to incarceration and mitigates the association between race and sentence length only modestly.

When controlling for offense seriousness, prior record, pretrial incarceration, and level of adjudication, the analysis finds that Black offenders have odds of being sentenced to incarceration that are 20% higher and receive sentences that are 7% longer than White offenders with similar legal characteristics. Similarly, the analysis finds that Latino offenders have odds of being sentenced to incarceration that are 29% higher and receive sentences that are 20% longer than White offenders with similar legal characteristics. Once again, post-regression Wald Tests reveal no significant difference between Black and Latino's likelihood of being sentenced to incarceration, but reveal that the difference between Black and Latino's sentence lengths—even when controlling for pretrial incarceration and level of adjudication this time—is statistically significant (chi-square = 7.02; $p < .008$). These findings suggest a direct effect of disparate processing on sentencing outcomes that systematically disadvantages Black and Latino offenders.

In addition, these findings may suggest indirect effects of disparate processing on sentencing outcomes—through pretrial incarceration and/or level of adjudication. In order to test for the presence of these indirect effects, models that examine the association between being Black or Latino and being adjudicated as a felon are estimated next. As Table 2 shows, Blacks and Latinos are more likely to be adjudicated as felons than are Whites; moreover, while being incarcerated pretrial is also associated with being adjudicated at a felony level, racial differences remain after controlling for this prior case outcome. As Model 1 in Table 2 shows, Black offenders have odds of being adjudicated at a felony level that are 50% higher and Latino offenders have odds of being adjudicated at a felony level that are 40% higher than White offenders with similar legal characteristics. Additionally, as Model 2 in Table 1 shows, individuals who are incarcerated pretrial have odds of being adjudicated as felons that are 23% higher than those who are released. Once this prior case outcome is controlled for, Black offenders have odds of being adjudicated as felons that are 45% higher than Whites, and Latino offenders have odds of being adjudicated as felons that are 34% higher than Whites. Legal variables are particularly poor at explaining this case outcome. Post-regression Wald Tests reveal no significant differences in the level of adjudication between Black and Latino offenders.

Finally, the analysis turns to pretrial decisions and outcomes. As Table 3 shows, Black defendants have odds of being granted a financial release that are 9% lower and odds of being denied bail that are 44% higher than White defendants with similar legal characteristics; there is no evidence of a difference between Black and White offenders' bail amounts. Latino defendants have odds of being granted a financial release that are 25% lower, odds of being denied bail that are 64% higher, and receive bail amounts that are 26% higher than White defendants with similar legal characteristics. Post-regression Wald Tests reveal significant differences between Black and Latino defendants during non-financial release (chi-square = 15.24; $p < .000$), and bail amount (chi-square = 27.74; $p < .000$), but not during the decision to deny bail.

Table 1.

The cumulative effects of racially disparate processing on sentencing outcomes in large, urban counties from 1990 - 2002

	Decision to incarcerate			Sentence length (in months)		
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Black	1.34*** (6.08)	1.17** (3.17)	1.20*** (3.41)	1.17*** (.05)	1.11* (.05)	1.07
Latino	1.45*** (7.45)	1.22*** (3.84)	1.29*** (4.45)	1.35*** (.05)	1.22*** (.05)	1.20*** (.05)
Pretrial		4.00*** (32.84)	3.64*** (29.16)		1.86*** (.04)	1.80*** (.04)
Incarceration			.78***			5.47***
Level			(3.74)			(.06)
Trafficking	1.97*** (18.00)	1.81*** (14.85)	1.95*** (15.67)	2.08*** (.04)	1.92*** (.04)	1.77*** (.03)
Number of	1.11*** (7.29)	1.09*** (5.91)	1.11*** (6.73)	1.09*** (.01)	1.09*** (.01)	1.08*** (.01)
Charges	1.47 (1.07)	1.16 (.40)	1.20 (.47)	.91*** (.32)	.81 (.31)	.82 (.29)
Second Felony	1.06 (1.12)	1.63*** (8.78)	1.68*** (8.36)	1.15** (.05)	1.62*** (.06)	1.51*** (.05)
Pretrial?	.54*** (12.43)	0.88** (2.57)	1.50*** (6.91)	1.04 (.04)	1.03 (.04)	1.04 (.04)
Appear	1.98*** (13.76)	1.73*** (10.49)	1.70*** (9.56)	1.63*** (.05)	1.51*** (.05)	1.51*** (.05)
Prior Felony	1.15** (2.66)	1.18** (2.49)	1.16** (2.59)	.83*** (.05)	.84 (.05)	.85*** (.05)
Prior Misd.	1.36*** (7.61)	1.11** (2.49)	1.08 (1.78)	1.30*** (.04)	1.20*** (.04)	1.20*** (.04)
Active Criminal	1.22*** (4.70)	1.13** (2.75)	1.50*** (9.56)	1.04 (.04)	1.03 (.04)	1.04 (.04)
Justice Status	1.22*** (4.46)	1.13** (2.58)	1.15* (2.21)	1.55*** (.04)	1.51*** (.04)	1.51*** (.04)
Prior Failure						
to Appear						
Prior Prison						
N	15,721	15,721	15,721	7,777	7,777	7,777

Note: Data for this table are from the *State Court Processing Survey, 1990 - 2002*. Odds ratios with Z-scores (absolutes) in parentheses are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Sentence length is logged and exponentiated (e^x-1) results are reported; these exponentiated coefficients can be interpreted as “percents.”

* $p < .01$; ** $p < .005$; *** $p < .001$

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Table 2.
Racial disparities in level of adjudication in large, urban counties from 1990 - 2002

	Model 1	Model 2
Black	1.50***	1.45***
	(4.85)	(4.27)
Latino	1.40***	1.34**
	(3.68)	(3.07)
Pretrial Incarceration		1.23**
		(2.71)
Trafficking	2.64***	2.49***
	(13.41)	(12.00)
Number of	1.08***	1.07**
Charges	(3.28)	(2.61)
Second Felony	2.20	1.89
Charge?	(.99)	(.80)
Re-Arrested	1.15	1.15
Pretrial?	(1.45)	(1.44)
Failure to	1.18	1.17
Appear	(1.75)	(1.62)
Prior Felony	1.24*	1.14
Conviction	(2.34)	(1.42)
Prior Misdemeanor	.98	.94
Conviction	(.22)	(.69)
Active Criminal Justice	1.07	1.06
Status	(.91)	(.74)
Prior Failure	.93	.93
to Appear	(.96)	(.92)
Prior Prison	.89	.90
	(.07)	(1.24)
N	15,590	15,590

Note: Data for this table are from the *State Court Processing Survey, 1990 - 2002*. Odds ratios with Z-scores (absolutes) in parentheses are reported for the logistic regressions.

* $p < .01$; ** $p < .005$; *** $p < .001$

Examining pretrial incarceration outcomes, the analysis finds Blacks and Latinos have odds of making bail that are less than half those of Whites with the same bail amounts and legal characteristics. Further, Blacks have odds that are 72% higher than Whites, while Latinos have odds of pretrial incarceration that are almost double those of Whites. This suggests—not surprisingly—that Blacks and Latinos have fewer economic resources and networks than Whites with similar legal characteristics. Wald Tests reveal that Latinos are even less likely to be released pretrial than Blacks (chi-square = 15.24; $p < .000$). This is ostensibly due not only to their relative disadvantage during the decision to grant non-financial releases, but in the setting of bail amount and their relative lack of economic resources and networks (compared to Black defendants).

Table 3.
Racial disparities in pretrial decisions and outcomes in large, urban counties from 1990 - 2002

	Non-Financial Release	Denied Bail	Bail Amount (logged)	Made Bail	Pretrial Incarc.
Black	.91*	1.44***	1.06	.44***	1.72***
	(1.92)	(3.52)	(.03)	(11.44)	(10.42)
Latino	.75***	1.64***	1.26***	.46***	1.99***
	(5.47)	(4.46)	(.04)	(10.71)	(13.18)
Bail Amt.				.54***	
(logged)				(26.95)	
Trafficking	.43***	1.27**	2.04***	1.15**	1.97***
	(20.92)	(3.12)	(.03)	(2.57)	(17.60)
Number of	.89***	1.06*	1.15***	1.06**	1.06***
Charges	(7.47)	(2.11)	(.01)	(2.93)	(4.17)
Second Felony	.19**	3.37*	1.77**	1.08	2.75**
Charge?	(3.00)	(2.17)	(.22)	(.16)	(2.83)
Prior Felony	.53***	1.25*	1.05	.62***	1.94***
	(12.11)	(2.13)	(.03)	(6.73)	(13.15)
Prior Misd.	1.14**	.54***	.85***	.84*	.92
Conviction	(2.47)	(4.62)	(.04)	(2.27)	(1.55)
Active Criminal	.55***	6.10***	1.10***	.61***	2.23***
Justice Status	(13.43)	(20.25)	(.03)	(8.54)	(19.37)
Prior Failure	.88**	1.16	1.04	.84**	1.18***
to Appear	(2.79)	(1.70)	(.03)	(3.02)	(3.85)
Prior Prison	.73***	1.05	1.23***	.85***	1.39***
	(6.26)	(.60)	(.03)	(2.53)	(7.30)
N	18,625	18,625	10,487	10,487	18,625

Note: Data for this table are from the *State Court Processing Survey, 1990 - 2002*. Odds ratios with Z-scores (absolutes) are reported for the logistic regressions and coefficients with standard errors in parentheses are reported for the linear regressions. Bail Amount is logged and exponentiated (e^x-1) results are reported; these exponentiated coefficients can be interpreted as “percents.”

* $p < .05$; ** $p < .01$; *** $p < .001$

When considered together, the findings presented in Tables 1, 2, and 3 suggest that Black and Latino defendants face disparate processing at several processing points, and that racial disparities in early processing decisions increase racial disparities in sentencing outcomes. Put differently, it seems that racially disparate processing affects sentencing decisions both directly and indirectly—through pretrial processing decisions and level of adjudication. Tendencies to focus on single processing stages obscure these indirect effects.

Discussion and Conclusion

Research on racial disparities in criminal processing has focused on sentencing decisions. The few studies that examine racial differences in pretrial processing consistently find that Blacks and Latinos receive less beneficial decisions than Whites. However, studies have yet to comprehensively examine how these disparities generated during early stages of

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criminal processing affect later stages of criminal processing. This study addresses this gap in the literature by estimating a series of models that examine the cumulative effects of racially disparate processing on punishment outcomes of White, Black, and Latino men who are charged with felony drug offenses.

Estimating a series of models, this study finds not only that Black and Latino men receive less beneficial sentencing decisions than White men with similar legal characteristics, but also that these disparities are produced through a combination of direct and indirect effects. More particularly, the findings suggest that Black and Latino men are less likely to be granted non-financial releases and more likely to be denied bail than White men with similar legal characteristics; that Latino men are given higher bails than White men with similar legal characteristics; that Black and Latino men are more likely to be adjudicated as felons than White men with similar legal characteristics; and that sentencing outcomes are determined by a combination of current case characteristics, prior record, economic resources and networks, and racially disparate processing—both indirectly through pretrial incarceration and level of adjudication, and directly during sentencing decisions. Finally, whenever there is a disparity in the treatment of Black and Latino defendants with similar legal characteristics, Latinos always receive the less beneficial decisions.

Several theorists of punishment argue that racial disparities in punishment outcomes are created predominantly or exclusively through differential involvement in crime (Blumstein, 1982; Chiricos & Waldo, 1975; Hagan, 1974; Kleck, 1985; Langan, 1985). However, the findings of this study—and of many other methodologically rigorous studies conducted during the last 20 years (e.g. Bridges & Crutchfield, 1988; Crawford, Chiricos, & Kleck, 1998; Demuth, 2003; Nobling et al., 1998; Petersilia, 1985; Schlesinger, 2005; Spohn & Cederblom, 1991; Steffesmeier et al., 1998)—challenge that perspective. In fact, the study's findings suggest that racially disparate decision making at several stages of criminal processing contribute substantially to racial disparities in punishment outcomes—in pretrial incarceration, level of adjudication (and thus prior record), and post-sentencing incarceration (and therefore in post-release supervision, such as parole). It is time that researchers of race and punishment realize that, while findings on racial bias influences in criminal processing are mixed, the findings on whether racial bias is present in criminal processing are consistent: during some criminal processing stages, among some groups of offenders, Black and Latino offenders are disadvantaged compared to White offenders with similar legal characteristics.

Criminal justice systems operate most smoothly and efficiently when the citizens have faith in their legitimacy. However, this legitimacy is threatened when offenders are processed and released in ways that disproportionately impact members of marginalized communities. As such, it is imperative that our criminal justice system not only assures that offenders with similar legal characteristics receive comparable punishment outcomes, but also that these outcomes are the least punitive ones necessary for obtaining the system's goals. Criminal processing policies, and especially pretrial processing policies, need to be rethought. For example, since residential stability and employment correlate with race and ethnicity, procedures for pretrial release decisions that stress these variables may contribute to racial disparities in pretrial decision making. As such, pretrial decisions based, even in part, on these variables may be doing more damage than good.

Finally, this study suggests many roads for future research. First, this study's finding of particularly harsh treatment of Latino defendants is not the first. Although this finding should be interpreted cautiously—Blacks still face the most disparity, and this disparity may be generated by criminal justice practices such as policing that lay outside the scope of this study—there is a consensus emerging from studies conducted since the most recent large-scale immigration of Latinos into the U.S. that disparity in the criminal processing of Latino defendants is both real and pervasive. This finding calls for more research that breaks down the Black/White binary paradigm of race and begins to explore disparity based on myriad and complex racial categorizations. Second, research in other fields finds that Latinos from different national origins face extremely different experiences once in the U.S. (Johnson, 1998; Portes, 1996). Thus, it is imperative that data be collected that will allow criminologists to analyze Latinos from different national origins separately. Finally, current methodologies mask the ubiquity of racially disparate criminal processing. Researchers need to use methodologies that are more adept at detecting both direct and indirect effects of racially disparate processing and to include more stages of processing within our analyses. The findings of this study suggest that the field would benefit from future research employing alternative methodologies, such as multi-stage and structural equation modeling. These methodologies could help the U.S. criminal justice system understand not just when differential processing happens, but also how it is produced.

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Endnotes:

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2. For example, federal sentencing guidelines penalties for crack are dramatically more punitive than are those for powder cocaine. Also, many state codes include sentencing enhancements for crimes committed in public housing (Schlesinger, 2006).
3. Whites are disproportionately arrested for tax fraud, embezzlement, and insider trading (and many other types of white-collar crime). Further, although these crimes cost more money per capita than all street crime combined (Delgado, 1984; Reiman, 2004), sentences for these crimes are, on average, shorter than sentences for even nonviolent street crime. Blacks are disproportionately arrested for street crime—violent and nonviolent.
4. Studies find that police target Black communities, crimes more likely to be committed by Blacks, and Blacks themselves (Beckett, Nyrop, & Pfingst, 2006; Schafer et al., 2006).
5. Research shows that Blacks and Latinos receive less favorable criminal processing decisions than Whites with similar legal characteristics (Crawford, 2000; Kautt & Spohn, 2002; Schlesinger, 2005).
6. Non-custodial sentences are those that do not require incarceration; they include probation, fines, and suspended sentences.
7. The effect of the defendant's race on criminal processing varies by sex (Curran, 1983; Daly, 1989; Spohn & Holleran, 2000; Steffensmeier & Demuth, 2000); further, previous research finds that women are treated more leniently than men by the criminal justice system (Gruhl, Welch, & Spohn, 1984; Kruttschnitt & McCarthy, 1985; Spohn & Spears, 1997; Steffensmeier, Kramer, & Streifel, 1993; Steury & Frank, 1990). For these reasons, it would be imprudent to combine both groups in the same sample; an analysis that includes both men and women would need to explain the differences found between the two groups, as well as explore the interactions between race and gender. This is beyond the scope of the current paper.
8. t-tests reveal all of these differences to be statistically significant.
9. t-tests reveal no significant differences in the mean values for "adjudicated as felony" across racial groups. However, both Blacks and Latinos are significantly more likely to be sentenced to incarceration than Whites. Finally, t-tests show that the differences in sentence lengths between Blacks and Whites, but not between Latinos and Whites, is significant.
10. t-tests show that both Black and Latino felony drug offenders are significantly more likely to be charged with trafficking than are White felony drug offenders. In addition, Black offenders are significantly more likely than White or Latino offenders to be rearrested while awaiting trial. Although the difference between the numbers of charges White, Black, and Latino drug offenders have is small, t-tests show this difference to be significant. There are no other significant differences for case characteristics.
11. t-tests show that Blacks are significantly more likely to have prior felony convictions than Latinos or Whites; that Blacks and Latinos are significantly more likely than Whites to have had active criminal justice status when they were arrested, and to have failed to appear for a previous court date. Finally, Blacks are significantly more likely than Whites or Latinos to have been imprisoned prior to the current arrest.
12. Studies that examine whether an offender was released or detained pretrial rather than the legal decisions that affect pretrial incarceration (Chiricos & Bales, 1991; Spohn et al., 1981) do not disaggregate the effects of discrimination from the effects of socio-economic status. While the justice system may obligate defendants to meet comparable financial requirements in order to be granted release, the economic resources and networks of the alleged offenders will determine if they are able to meet those requirements. Thus, identical treatment by the justice system does not guarantee identical pretrial incarceration outcomes.

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CHALLENGING THE VENIRE

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Any experienced defense attorney knows that a fair trial is impossible without a fair jury panel. To many of our clients, a fair jury panel is one which reflects the diversity of the community. In particular, the absence of African Americans on our jury pools creates an impression of injustice which infects the entire justice system.

Since the 1880's, the Supreme Court has recognized that excluding persons from jury service based solely on their membership in an identifiable group, such as race or gender, violates the Equal Protection Clause.¹ More recently, the Supreme Court has concluded that the protection of the right to trial by jury required that the jury be selected from a venire composed of a "fair cross section" of the community.² In spite of these pronouncements, throughout most of our history racial minorities and women have been functionally excluded from jury service. For many years jurors in Kentucky were selected solely from voter registration lists by jury commissioners chosen by circuit judges.³ In 1977, the Supreme Court reviewed a system similar to Kentucky's and found it to be unconstitutionally discriminatory.⁴

Nevertheless, the jury commissioner system persisted in Kentucky. Particularly in capital cases, defense counsel routinely investigated the composition of jury panels and often found that women, blacks and young adults (ages 18-29) were substantially under-represented. Many motions were filed across the Commonwealth, and eventually the Supreme Court abolished the jury commissioner system and in 1991 implemented a new automated random selection system with broader source lists including both the voters list and the drivers license list.⁵ The statute relating to jury commissioners was not formally repealed until 2002.⁶

The new, automated system eliminated much of the potential for deliberate discrimination, and was a significant improvement over the jury commissioner system. Nevertheless, to many observers the improvements have not resulted in a system where the proportion of minorities and women on the venire mirrors their proportion in the community. Even though the modernized system has still not achieved the goal of ensuring that the jury pool looks like the community at large, challenges are infrequent, owing principally to the secretive and apparently automated nature of the process.

Part I of this article will address the federal constitutional requirements for selecting a jury venire. Part II will look at the specific Kentucky procedures, with an eye towards identifying those areas which may result in the under-representation of minorities and women. Part III will describe the steps that individual counsel can take to litigate these issues successfully.

I. Federal Requirements For Jury Panels

The Federal Constitution protects the right to a fairly selected jury venire in two distinct ways. First, the Equal Protection Clause of the Fourteenth Amendment prohibits deliberate discrimination when selecting members of the venire. Second, the Sixth Amendment right to a jury trial encompasses the right to have the jury selected from a venire consisting of a "fair cross section" of the community. These requirements appear almost interchangeable at first glance. Both apply only to members of a "distinctive group," a term which has never been precisely defined, but which includes race, ethnicity, gender, and economic status, but not social attitudes such as a belief in the death penalty.⁷ In the modern era, both rely almost exclusively on the assertion that this distinctive group is under-represented to a statistically significant degree in the venire or grand jury.⁸ Both employ a burden shifting analysis, where upon the making of a *prima facie* case, the burden shifts to the state to justify the actions taken.⁹ Nevertheless, each is a distinct doctrine, with distinct requirements. Mistaken reliance on the wrong one may result in forfeiture of an otherwise valid claim for relief.¹⁰

A. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits purposeful discrimination against a member of a cognizable group, solely because of the individual's membership in that group. Originally such discrimination was frequently overt and therefore easy to prove – for example, through a state statute expressly forbidding blacks from serving on a jury. However, in the modern era discrimination is generally proved statistically. The Supreme Court laid out the process in *Castaneda v. Partida*:

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The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time. This method of proof, sometimes called the “rule of exclusion,” has been held to be available as a method of proving discrimination in jury selection. Finally, as noted above, a selection procedure that is susceptible to abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the state to rebut that case.¹¹

In short, the defendant must show that, due to the decisions of an individual, or the application of a specific policy, or both, a distinctive group is underrepresented to a statistically significant degree on the jury. This requires more than merely showing that the group has a lower percentage of members of the venire than it does in the population at large. As the title “rule of exclusion” implies, the evidence must be sufficient to exclude the possibility that the reduction in the number of group members in the venire would have occurred by chance. Moreover, the reduction has to be attributable to some decision – either as to policy (*e.g.* which source lists the pool is drawn from¹²), application of the policy (*e.g.*, whether the person responsible for creating the master list corrects a computer error which eliminates the residents of a town¹³), or a person who makes case by case decisions (*e.g.*, a judge granting excuses from service¹⁴). This is not something which can generally be accomplished without expert assistance.

Once a prima facie case is made, the burden shifts to the state to justify the discriminatory action.¹⁵ Generally, it is not sufficient for the state merely to assert that the decision-makers were also in the same cognizable group which was underrepresented, and therefore discrimination was unlikely.¹⁶ Instead, the state must offer evidence describing the actual process which was used.¹⁷ If that evidence shows that the decision-making process was not purposefully discriminatory, then the practice is valid.¹⁸ However, if the state cannot make that showing, then the Equal Protection Clause rights of the jurors have been violated, and reversal of the conviction is required.¹⁹

B. Fair Cross Section

In *Duren*, the Court, invalidating a voluntary exemption for women, set out the elements of a fair cross-section violation:

In order to establish a *prima facie* violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.²⁰

These elements are essentially the same as the elements of an Equal Protection challenge. The requirement of a “systematic exclusion” does indeed mean what it suggests, *i.e.* that there is a flaw in the process which is resulting in an underrepresentation of a “distinctive” group.²¹ Although this requirement is clearly different than the equal protection requirement that an individual or group of individuals have “purposefully discriminated” against a specific group, the two are hard to distinguish in practice. Both ultimately require proof that a rule or decision-making process have resulted in a pattern of exclusion which has continued over time.

Rather, the two principal differences between an Equal Protection Clause challenge and a Sixth Amendment “fair cross section” challenge are these: (a) the Equal Protection Clause applies to both the venire and the petit jury, whereas the fair cross section requirement applies only to the venire and (b) (as discussed below) the burden on the state is much harder to meet in a fair cross section case than in an equal protection case.

Applicability: It is now well established that there is no such thing as a right to a jury composed of a “fair cross section” of the community.²² Rather, the only obligation is to ensure that the pool from which that jury is selected meets “fair cross section” requirements.²³ On the other hand, the Equal Protection Clause clearly does apply to prohibit a party from purposefully discriminating against a “distinctive group,” and indeed is litigated regularly in courtrooms around the nation.²⁴

The State’s Burden: As noted above, once a prima facie case of discrimination has been made in a case brought under the Equal Protection Clause, the state has only to prove, by direct evidence, that the actors involved were not purposefully

discriminating against the affected group. In the context of jury selection, this burden will typically be met by showing that the individuals were simply attempting to enforce facially neutral court procedures.

In a fair cross section case, on the other hand, the subjective intentions of the state actors is completely irrelevant. Rather, the state must show that “the attainment of a fair cross section [is] incompatible with a significant state interest.”²⁵ The justification must be more than that needed to satisfy a “rational basis review.” As the *Duren* court explained:

The right to a proper jury cannot be overcome on merely rational grounds. Rather, it requires that a significant state interest be manifestly and primarily advanced by those aspects of the jury selection process, such as exemption criteria, that result in a disproportionate exclusion of a distinctive group.²⁶

This is a very high bar. The state cannot meet its burden unless it can identify a “significant interest” which can only be achieved by implementing the policy or practice at issue. As a practical matter, this means that where a court is failing to fully comply with established jury selection procedures, and thereby systematically excluding a particular group, a “fair cross section” challenge will always be available.²⁷

II. Kentucky Law

1. Source lists and random selection process

The first critical step is to read carefully KRS Chapter 29A and Part II, Jury Selection and Management of the Administrative Procedures of the Court of Justice (“ACPJ”) as well as RCr 9.30 - 9.40. KRS 29A.040, which was revised in 2002 to add those filing tax returns, describes the master list of prospective jurors which includes voters, licensed drivers and those who have filed Kentucky income tax returns. AOC is to obtain the relevant lists from state agencies and then merge them.²⁸ Section 3 of the APCJ, Part II provides that AOC shall select jurors from the master list by computer at random. The chief circuit judge or his designee advises AOC at least once a year of the number of jurors that will be needed.²⁹ Moreover, each district and circuit judge must notify the chief circuit judge of his need for jurors during the next jury term and shall advise if a larger panel than usual is needed because of a case with particular notoriety.³⁰

Once AOC provides a randomized list of jurors the chief circuit judge is responsible for deciding how many jurors should be chosen from the list in sequential order for a particular term of court and for causing those jurors to be summonsed for service at least 30 days before they are required to attend.³¹ Those names are to be made available to the public.³² Service of the summons is to be made by first class mail or, if that method fails, personally by the sheriff.³³ The juror qualification form shall be enclosed with the summons, and jurors shall be advised to complete it and return it within 10 days.³⁴

2. Disqualification of jurors

KRS 29A.080(2) and APCJ, Part II, § 8 address “disqualifications” for jury service. This is to be distinguished from “excuses.” Disqualifications are limited to the following:

A prospective juror is disqualified to serve on a jury if the juror:

- (a) Is under eighteen (18) years of age;
- (b) Is not a citizen of the United States;
- (c) Is not a resident of the county;
- (d) Has insufficient knowledge of the English language;
- (e) Has been previously convicted of a felony and has not been pardoned or received a restoration of civil rights by the Governor or other authorized person of the jurisdiction in which the person was convicted;
- (f) Is presently under indictment; or
- (g) Has served on a jury within the time limitations set out under KRS 29A.130.³⁵

The juror qualification form includes questions about each of those grounds. Until July 15, 2002, only the chief circuit judge or another judge he designated could decide if a juror was disqualified from service. Now the chief circuit judge or the other designated individuals, including a court administrator or deputy clerk, can decide based on review of the qualification form whether a juror is disqualified.³⁶ If the juror is determined to be disqualified, that shall be entered on the form and the juror shall be notified.³⁷ Moreover, the chief circuit judge may grant a permanent exemption if an individual requests and the judge finds “a permanent medical condition rendering the individual incapable of serving.”³⁸ The judge is to notify the person exempted and AOC. Note that § 8 of APCJ, Part II has not been revised to include these revisions to KRS 29A.080(1) and (3).

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3. Excusing jurors from service

If a juror is not statutorily disqualified or permanently exempted from jury service he or she can still ask to be excused “upon a showing of undue hardship, extreme inconvenience, or public necessity.”³⁹ A juror who wishes to be “excused” must ask to be heard on the day jurors are summonsed to appear if he has not done so previously.⁴⁰ KRS 29A.090 prohibits automatic exemptions (excuses) from jury service. Postponing or reducing a juror’s service rather than excusing the juror altogether is favored.⁴¹ Breastfeeding mothers are to have their service postponed until such time as they are no longer breastfeeding.⁴²

KRS 29A.100(2) allows the chief judge to designate another judge, court administrator or clerk **to excuse jurors from service for not more than 10 days or postpone service for no more than twelve months.**⁴³ The reason(s) must be entered on the qualification form. **Only the judge may excuse a juror from service altogether, reduce the number of days of service or postpone service up to 24 months.**⁴⁴ He must record the reason for granting any excuse on the qualification form.⁴⁵ Like KRS 29A.080, KRS 29A.100 was revised effective July 15, 2002 to permit the chief judge to delegate some duties in this area to others. § 9 of the APCJ, Part II has not been revised to include the changes to KRS 29A.100.

4. “No Show” Jurors

KRS 29A.150(1) states that “A person summonsed for jury service who fails to appear as directed *shall* be ordered by the court to appear forthwith and show cause for his failure to comply with the summons.” While it is a matter of discretion whether the juror is ultimately held in contempt, the statute clearly requires the court to enter an order to show cause for any person who fails to respond to a jury summons.

5. Insufficient jurors for trial

KRS 29A.060 provides that, if there is an “unanticipated shortage of available jurors” from the randomized list, the chief circuit judge “may cause to be summonsed a sufficient number of jurors selected sequentially from the randomized jury list beginning with the first name following the last name previously selected.”⁴⁶ Jurors so summonsed need not be given the 30-day notice usually required. KRS 29A.060(7) describes how a judge can obtain jurors from an adjoining county if satisfied “after making a fair effort in good faith” that finding a jury in the county free of bias will be “impracticable.”

6. Grand jurors

Grand jurors are summonsed in the same manner as all other jurors.⁴⁷ The chief circuit judge decides when a grand jury shall convene, and that shall occur at least once every four months.⁴⁸ That judge may also convene special grand juries.⁴⁹ And a juror deemed incapable of serving as a grand juror but capable of serving as a petit juror may be released from the grand jury and retained for the petit jury.⁵⁰

7. How to investigate

KRS 29A.110 provides that records and papers used by AOC and the clerk in connection with the jury selection process and not required to be disclosed shall not be disclosed “except in connection with the preparation or presentation of a motion under the Rules of Civil Procedure or the Rules of Criminal Procedure or upon order of the Chief Justice.” APCJ, Part II, § 13 contains the same provision. Defense counsel may want to send a letter to the clerk and chief circuit judge citing this authority and requesting relevant records.

8. Legal Challenges in Kentucky

The Kentucky Supreme Court has held that preserved error regarding substantial deviation from the statutes regarding selection of jurors will result in reversal of a conviction. In *Commonwealth v. Nelson*, the defendant objected to his indictment, urging that the grand jurors had been selected contrary to KRS Chapter 29A.080, 29A.100 and II APCJ Secs. 8 and 12 because the chief circuit judge delegated to court administrators the power to decide whether jurors should be disqualified, excused or postponed from service.⁵¹ The Supreme Court observed that such delegation was not permitted by law.⁵² Relying on *Colvin v. Commonwealth*, the Court observed that the court personnel excused, disqualified or postponed service of 73.5% of the prospective grand jurors.⁵³ “This discretionary reduction in the pool of prospective jurors affects the accused’s right to a random selection from a fair cross section of the community.”⁵⁴ The court found the delegation of authority to be a substantial deviation from the statute and affirmed the decision of the circuit court dismissing the indictment.⁵⁵

KRS 29A.080(1) and 29A.100(2), as amended in 2002, permit the chief judge to delegate decisions concerning disqualification, excuse from service for 10 days or less, and postponement of service for less than a year to another judge, court administrator, or clerk. However, decisions regarding excuses for “undue hardship, extreme inconvenience or public necessity” for more than 10 days must still be made by the judge.⁵⁶ If the local authorities are not following the law concerning jury selection a motion to quash the indictment and/or a motion to dismiss the petit jury panel can be made. Such a motion must be made prior to examination of the jurors.⁵⁷

It is important to realize that merely making an oral objection prior to voir dire is not sufficient to preserve the error. In *Grundy v. Commonwealth*, the court considered a situation where a surprisingly low number of jurors appeared for trial.⁵⁸ Trial counsel asked to postpone the proceedings until the no-show jurors appeared, and the court denied the motion.⁵⁹ On appeal, Grundy alleged that the court violated *Nelson* by improperly excusing an excessive number of jurors.⁶⁰ The Supreme Court held that the claim was unpreserved, because trial counsel had not made a sufficient record to permit the appellate court to rule on whether the excuses were or were not proper.⁶¹

The accused has a right to make a record sufficient to permit appellate review of alleged errors.⁶² Consequently, in a situation like *Grundy*, counsel should object to any juror being absent who was not excused pursuant to the procedures set forth in KRS Chapter 29A and APCJ Part II. Counsel should then ask the court to allow him or her to review the excuses for any “no show” jurors. If the court permits that, counsel should put those excuses in the record for appellate review. If, on the other hand, the judge wishes to proceed to trial without allowing counsel to review the excuses, counsel should make an oral motion on the record asking the court to put the excuses in the record as an avowal.

III. Preparing Your Challenge To The Jury Pool

Generally, cases regarding both fair cross section and Equal Protection Clause challenges to jury pools have required those challenges to be based on a pattern of discriminatory activity, rather than merely a single unrepresentative panel.⁶³ However, investigating a single panel can give rise to challenges related to the failure to comply with the jury procedures in KRS Chapter 29A and the APCJ, Part II. As noted above, even where there is no clear indication that the violations have resulted in the under-representation of a cognizable group, the mere violation of the procedures is a basis for reversing a conviction under state law, where the issue has been properly raised and preserved for review.⁶⁴

Even if such challenges do not present themselves, counsel should try to answer the following questions about the jury selection process in their courthouse:

- When did the chief circuit judge ask AOC to select jurors for current term?
- Did the judge ask for a sufficient number of names from AOC?
- Is the list being used to summons jurors for this term fresh or stale?
- Is the chief judge asking the clerk to summons a sufficient number of jurors?
- If the letters including jury summons and qualification forms don't reach the jurors, is the chief circuit judge having the sheriff attempt personal service?
- Is the chief judge or someone he's properly designated reviewing forms and deciding if jurors are disqualified?
- Is the reason for disqualification being entered on the form?
- Is the judge following the correct standard on permanent medical exemptions?
- As far as excuses, is the chief circuit judge acting or designating someone listed in the statute to act **only** as permitted (excused up to 10 days, postponement up to 12 months)?
- Is the judge following the strict standard for excuses (hardship, extreme inconvenience, public necessity)?
- When does judge grant excuses and does counsel have any input?
- If jurors have appeared for orientation but don't appear for trial, does judge require them to explain themselves?

Where it appears that the court is not following the proper procedures, counsel should be sure to get all appropriate documentation, and should be prepared to put that documentation in the record. Just as importantly, counsel should have their investigator present for every jury empanelling. The investigator should take clear notes concerning the numbers of jurors who report, their ethnic, racial and gender breakdown (to the extent it can be perceived through observation) and the breakdown of who the judge permits to be excused from service.

Once it appears that a fair cross section or equal protection claim can be sustained, counsel will need an expert in statistics. Generally speaking, a university professor of statistics, or a person with at least a Master's level knowledge of statistics, is sufficiently qualified to perform the required analysis. As a practical matter, the necessity of proving that the under-representation at issue is not the result of random chance means that failure to seek an expert is usually fatal to a fair cross section or equal protection claim.⁶⁵ Counsel should not attempt a “do it yourself” solution except as a last resort. *Continued on page 40*

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Indigent defendants are entitled to funds to secure expert assistance where they can make a threshold showing of “reasonable necessity.”⁶⁶ KRS 31.185 authorizes the court to hear such a motion “ex parte and on the record,” and to order those expenses to be paid from a special fund set up for the purpose of paying the costs of indigent defense.⁶⁷ In the case of a constitutional challenge to jury selection procedures, counsel can make that showing by comparing the rate at which the “distinctive group” appears in the community to the rate at which they appear in the venire. As noted above, counsel should be gathering information, both from jury qualification forms, as well as from observation, to document the rate at which the “distinctive group” appears in the venire. Counsel can get information on the rate at which the group appears in the community from the US Census.⁶⁸ After that, it is a matter of simply comparing the two. As the Georgia Supreme Court observed:

Generally speaking...an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5% and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional.⁶⁹

Counsel can use this authority to show that the observed disparity at issue is large enough to raise a constitutional concern. That constitutional concern, coupled with the clear requirement that the challenge be based on a statistically significant pattern of under-representation, suffice to meet the “reasonable necessity” requirement.

Once the expert is obtained, counsel and the expert should make a list of the information needed for the expert to render a comprehensive opinion on the likelihood that the under-representation at issue would have occurred by chance. Counsel should be prepared to follow up with a discovery motion compelling the court clerk to provide the information needed to make that challenge. Once the information is gathered, counsel should make sure that not only is the expert attempting to resolve the issue of whether there is a statistically significant under-representation in the jury pool, but also attempting to determine what elements of the jury selection process are resulting in the exclusion.

Ultimately, at the hearing the burden will be on the defendant to show that the under-representation is statistically significant, and not likely to have occurred by chance alone. If such a showing is made, then the state will be responsible for showing that the elements are not discriminatory (in the case of an equal protection challenge) or that they serve a legitimate state interest (in the case of a fair cross section challenge). As noted above, this showing must be made through testimony, which should be subject to cross examination.

Conclusion

There are many good reasons to insist on a jury selection process which produces jury pools which are sufficiently large to permit meaningful voir dire, and which are representative of a fair cross section of the community. Our clients deserve and are legally entitled to such a process. The citizens of the community deserve to participate in the jury system, and they will have more confidence in that system if juries fairly reflect the composition of the community.

Endnotes:

1. *Strauder v. West Virginia*, 100 U.S. 303 (1880).
2. *Taylor v. Louisiana*, 419 U.S. 522 (1975).
3. KRS 29A.030, repealed by 2002 Ky.Acts. ch. 252 § 12 (Banks/Baldwin, 2002).
4. *Castaneda v. Partida*, 430 U.S. 482 (1977).
5. See Administrative Procedures of the Court of Justice (hereinafter “APCJ”) Part II (amended October 1, 1991).
6. *Supra*, note 3
7. See *Castaneda v. Partida*, *supra* note 4 (under-representation of Mexican-Americans in the grand jury is prima facie evidence of discriminatory intent for Equal Protection purposes); *Alexander v. Louisiana*, 405 U.S. 625 (1972)(under-representation of African-Americans is prima facie evidence of discriminatory intent); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946)(exclusion of wage earners violated equal protection); *Duren v. Missouri*, 439 US 357 (1979)(under-representation of women is prima facie evidence

of systematic exclusion under the Sixth Amendment’s fair cross section requirement); see also *Lockhart v. McCree*, 476 U.S. 162 (1986)(death qualification of jurors does not affect a “cognizable group” for equal protection or fair cross section purposes).

8. *Id.*

9. *Id.*

10. See *Holland v. Illinois*, 493 U.S. 474, 488 (1995)(concurring opinion by Justice Kennedy, noting that he agreed that the defendant was not entitled to relief under the Sixth Amendment, but almost certainly would be under the Equal Protection Clause).

11. *Castaneda v. Partida*, 430 U.S. at 494 (internal citations omitted).

12. *Love v. McGee*, 287 F.Supp. 1314 (D.C.Miss. 1968)(Use of voter registry as exclusive list of jurors was discriminatory,

where black voters were still discouraged from registering and therefore were disproportionately unregistered).

13. *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002)(Deciding, as a matter of state law, that the failure to correct a computer error which resulted in a town's exclusion from jury selection – materially affecting the racial component of the venire – warranted reversal).

14. See *Castaneda*, *supra* note 4.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Duren*, 439 U.S. at 364.

21. See, e.g. *State v. Johnson*, 723 N.E.2d 1054 (Ohio 2000)(mere assertion of under-representation in one jury venire is inadequate to make out a fair cross section claim); *Ford v. Seabold* 841 F.2d 677 (6th Cir. 1988)(apparent underrepresentation of women on two jury panels is not sufficient to show a “systematic” exclusion of women).

22. See *Holland v. Illinois*, *supra* note 10.

23. *Id.*

24. See *Batson v. Kentucky*, 476 U.S. 70 (1986).

25. *Duren*, *supra* 439 US at 368.

26. *Id.*, at 367 (internal citations omitted).

27. See *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992), discussed *infra*.

28. See also § 2 of the APCJ, Part II.

29. *Id.*

30. *Id.* at § 4; KRS 29A.060(1).

31. KRS 29.060(3); APCJ, Part II, § 5 and 6.

32. APCJ, Part II, § 5.

33. KRS 29A.060; APCJ, Part II, § 6.

34. KRS 29A.060(4); KRS 29A.070; APCJ, Part II, § 7.

35. KRS 29A.080(2).

36. KRS 29A.080(1).

37. *Id.*

38. KRS 29A.080(3).

39. KRS 29A.100(1).

40. KRS 29A.100(1); APCJ, Part II, § 9.

41. KRS 29A.100(3).

42. KRS 29A.100(4).

43. KRS 29A.100(2).

44. KRS 29A.100(3).

45. KRS 29A.100(2)

46. KRS 29A.060(5). See APCJ, Part II, § 10(7).

47. KRS 29A.060(3).

48. KRS 29A.210; APCJ, Part II, § 21.

49. KRS 29A.220; APCJ, Part II, § 22.

50. KRS 29A.230; APCJ, Part II § 23.

51. 841 S.W.2d 628, 629-630 (Ky. 1992).

52. *Id.*

53. *Colvin*, 570 S.W.2d 281 (Ky. 1978) (holding that a defendant has a right to grand and petit juries selected at random from a fair cross section of the community); *Id.* at 631.

54. *Id.*

55. *Id.*

56. KRS 29A.100(3).

57. See RCr 9.34.

58. 25 S.W.3d 76 (Ky. 2000)

59. *Id.*

60. *Id.*

61. *Id.*

62. See *Powell v. Commonwealth*, 554 S.W.2d 386, 390 (Ky. 1977).

63. See, e.g., *Ford v. Seabold* 841 F.2d 677 (6th Cir. 1988)(apparent underrepresentation of women on two jury panels is not sufficient to show a “systematic” exclusion of women).

64. See *Nelson*, *supra* note 51.

65. See, e.g., *State v. McNeill*, 700 N.E.2d 596 (Ohio 1998)(defendant's observation that blacks were under-represented in his venire, without a statistical showing that the under-representation was not a matter of chance, does not suffice to make a claim on either equal protection or fair cross section grounds).

66. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985); *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992).

67. KRS 31.185(2).

68. <http://www.census.gov> contains a county by county population breakdown, which is updated between the “official” census using statistical sampling. Certified copies of that data can be obtained from the U.S. Census Bureau.

69. *Smith v. State*, 571 S.E.2d 740, 745 (Ga. 2002). ■

LITIGATING RACE IN VOIR DIRE

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Introduction

Litigating race (group discrimination) in voir dire is largely governed by three Supreme Court cases, *Batson v. Kentucky*,¹ *Miller-El v. Dretke*,² and *Snyder v. Louisiana*.³ Part I of this manual discusses these three cases. Part II lists protected groups under *Batson*. Part III covers pre-trial preparation. Part IV details how to proceed during the three-step *Batson* process. Part V discusses the *Batson* hearing. Part VI covers remedies at trial, on appeal and in post conviction. Part VII discusses what to do if your peremptory strike is challenged.⁴

I. Three Supreme Court cases

1. *Batson v. Kentucky*: —a lighter burden of proof.

Some twenty-two years ago in Louisville, Kentucky, black defendant James Batson objected that the prosecutor's use of peremptory strikes against all four black jurors from his venire violated Equal Protection. Without granting a hearing, the judge denied relief, saying both sides were entitled to "strike anybody they want to." Indeed, the Kentucky Supreme Court affirmed Batson's conviction based on *Swain v. Alabama*,⁵ which required proof of systemic exclusion of black jurors beyond the individual case. Batson had pointed out that his prosecutor was purposely following a manual prescribing peremptory removal of all black jurors. But in 1986 under *Swain*, without proof of discrimination in other cases besides his own, Batson didn't have enough proof of intentional discrimination.

Batson overruled *Swain*, and held that no pattern of discrimination needed to be shown because "even a single invidiously discriminatory governmental act" violates the Equal Protection Clause and requires a new trial.⁶ *Batson* abolished the "crippling burden" of proving systemic discrimination.⁷ *Batson* lightened the burden of proof to make it easier for defendants to prove discrimination based solely on the evidence within the four corners of the case, and prescribed a three-step process⁸:

Step 1. Challenger produces prima facie showing of purposeful discrimination.

Step 2. Opponent demonstrates neutral reason for the strike.

Step 3. Challenger meets burden of proving purposeful discrimination

2. *Miller-El v. Dretke*: — increased scrutiny.

In 2005, almost twenty years after *Batson*, the United States Supreme Court in *Miller-El* expressed its frustration that *Batson* had not cured the problem of discriminatory peremptory jury strikes:

"The rub has been the practical difficulty of ferreting out discrimination"⁹

When the *Miller-El* prosecution removed 10 out of 11 black jurors with peremptory strikes, the state court found no discrimination. But *Miller-El* boldly overturned the state court fact-findings for lack of clear and convincing support in the record, and rejected the state's explanations for excusing them.

"If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much...."¹⁰

Miller-El employed a significantly elevated level of scrutiny of peremptory strikes of black jurors. It also increased the focus on the individual case by noting the importance of **side-by-side comparisons of juror responses** during *voir dire*:

More powerful than ... bare statistics... are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve.¹¹

But *Miller-El* offered no new definitions, rules, or guidelines. Instead, *Miller-El* diluted its stricter scrutiny and emphasis on comparing juror responses, by listing a number of additional factors in support of its finding of discrimination. These factors—unfortunately—provided grounds for distinguishing future cases from *Miller-El*. An example is *Taylor v. O'Neil*, a wrongful death action involving the 2002 Louisville police shooting of a black man in handcuffs.¹²

Taylor v. O'Neil illustrates the weakness of *Miller-El*. Taylor's estate sued Louisville and the detective who shot Taylor. On a jury questionnaire, a number of white panelists (who were not struck) responded similarly to black panelists (who were struck). The Kentucky Court of Appeals upheld denial of relief, because none of the prospective white jurors had the exact same *combination* of objectionable answers as the struck black jurors. More to the point, Taylor had pointed to no "**other circumstances**" that would compel a finding of discrimination. The Court of Appeals latched onto the "other circumstances" in *Miller-El* to distinguish *Taylor*, and to support its decision that *Batson* had not been violated.¹³

3. *Snyder v. Louisiana*: — the bare minimum.

In 2008, *Snyder v. Louisiana*¹⁴ compared the *voir dire* treatment of a **single black juror** with that of two white jurors, and—finding no good reason for disparate treatment—held that peremptorily striking the black juror violated *Batson*. *Snyder* has eliminated the necessity of historical, statistical, "other circumstance" evidence of discrimination from *voir dire* race litigation. After *Snyder*, "other circumstance" evidence is still admissible, and may—even standing alone—still prove discrimination. But "other evidence" proof of discrimination can no longer be deemed essential. *Snyder* reduces the proof needed to win a *Batson* claim to a bare minimum.

***Snyder*: —one black juror compared with two white jurors.**

Snyder clarifies that all it takes for a *Batson* violation is one discriminatory strike. *Batson* involved the wrongful striking of all four black jurors in the venire. In *Miller-El* the prosecutor struck 10 out of 11 black panelists, or 91%. By contrast, the *Snyder* opinion is based on a strike against **one prospective juror**. That juror, Brooks, —after learning he could make up any missed student-teaching time—expressed no further concern about serving on the jury. As anticipated, the trial continued only two days after Brooks was struck.

Two white jurors in *Snyder* who were *not* struck had disclosed conflicting obligations at least as serious as Brooks' student teaching. Based on this comparison alone, the United States Supreme Court in *Snyder* reversed and remanded for a new trial. No "other circumstances" are mentioned. *Snyder* is undiluted by reliance on other, supporting factors. By focusing on the wrongful striking of a single black juror, based **solely** on a comparison with the *voir dire* testimony of two white jurors, *Snyder* strips the burden of proving a *Batson* violation to a bare minimum.

Snyder's dicta on demeanor

A cautionary note: In addition to concern over the black juror's potential lost student-teaching time, the prosecutor in *Snyder* also offered the "race-neutral" reason that Brooks "looked very nervous to me throughout the questioning."¹⁵ *Snyder* did not reach the question of demeanor because the trial court ignored it and made no finding. But in dicta, the Court underscored that great deference is due to trial court rulings on demeanor:

"[N]ervousness cannot be shown from a cold transcript, which is why ... the [trial] judge's evaluation must be given much deference." As noted above, deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor.¹⁶

The demeanor dicta suggest *Snyder* might have gone the other way if the trial court had **found** that the juror looked nervous. *Snyder*, unfortunately, has left juror demeanor as a potential excuse for striking minority jurors:

... the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," and we have stated that "in the absence of exceptional circumstances, we would defer...."¹⁷

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After *Snyder*, defenders may have to grapple more than ever with demeanor, and other intangible excuses. Even before *Snyder*, the Kentucky Supreme Court agreed that a black juror's **lack of demeanor**, *i.e.*, his failure to respond to a question was a race-neutral reason to strike him. In the same case, the prosecutor offered an **unsupported, inconclusive, extra-record allegation** that a police witness had arrested someone in the 1970s with the same surname and address as one of the struck jurors.¹⁸

II. Who is protected?

1. Race

The striking of a single black juror for a racial reason violates the Equal Protection Clause.¹⁹

Under *Batson*, a defendant who is a member of an identifiable racial group may challenge exclusion of members of that group from the jury. Under *Powers v. Ohio*, a white defendant may challenge the striking of black jurors.²⁰

2. Gender

A litigant may challenge use of peremptories to strike jurors on the basis of gender.²¹

3. Religion

Numerous courts have held that jurors may not be struck on the basis of religion.²²

But many courts have gone the other way. In 1995, when a Texas prosecutor used peremptory challenges to remove two Pentecostal jurors on the basis that members of that faith have trouble assessing punishment, the Texas Court of Criminal Appeals found no *Batson* violation.²³ In 2002, the Alabama Court of Criminal Appeals reversed an earlier opinion and held that religious-based strikes of venire members are facially race neutral.²⁴ And in 2007, a New York appellate court held that the prosecutor did not violate *Batson* by using a peremptory strike to challenge a prospective juror whose name sounded possibly Middle Eastern or South Asian, despite defendant's claim of religious discrimination.²⁵

Davis v. Minnesota

The United States Supreme Court refused in 1996 to grant certiorari to correct a peremptory strike against a Jehovah's Witness on the ground that Jehovah's Witnesses are reluctant to exercise authority over other human beings.²⁶ Concurring in denial of certiorari in *Davis*, Justice Ginsburg noted two observations by the lower court: 1) that religious affiliation (or lack thereof) is not as self-evident as race or gender, and 2) ordinarily, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper.²⁷

But Justice Thomas dissented, arguing that under *J.E.B.*, "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."²⁸

4. Disability

Federal law recognizes that discrimination on the basis of mental or physical disability is unlawful.²⁹ As discussed above, *J.E.B.* can be argued to extend to cover discrimination on the basis of disability. State constitutional law may also provide protection.³⁰

5. National Origin, Language

Italian-Americans have been recognized as members of a racial group for *Batson* purposes,³¹ as have Irish-Americans.³² In *Hernandez v. New York*, apparently the U. S. Supreme Court would have found a *Batson* error if strikes had been based purely on Hispanic ethnicity. But the prosecutor's "race-neutral explanation" that he doubted Spanish-speaking jurors' ability to defer to official Spanish translation was held "race-neutral."³³

6. Age, sexual orientation, socio-economic status....

The Kentucky Supreme Court has said that "[c]ertainly age was not a sufficient reason to strike a 43-year-old man."³⁴ But beware, the 6th Circuit has found that (youthful) age is not an improper reason to strike a juror.³⁵

According to SCR 4.300, Kentucky Code of Judicial Conduct, Canon 3, Section B(6):

A judge shall require lawyers in proceedings before the judge to refrain from manifesting by words or conduct bias or prejudice based upon **race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status**, against parties, witnesses, counsel, or others.... (emphasis added)

Canon 3, above, supplies grounds for *Batson* challenges on the basis of age, and other grounds. If you have made a *Batson* challenge on the basis of race, and the prosecutor insists the reason for the challenge was (for instance) age, not race, Canon 3 supports an argument that age is not a legitimate reason for the use of a peremptory strike.

7. All litigants

Batson protects every litigant, civil as well as criminal.³⁶ *Batson* applies to both prosecutors and defendants.³⁷ A litigant may object to race-based exclusions of jurors regardless of whether the litigant and the excluded juror share the same race.³⁸

8. All jurors

Batson protects every juror. Peremptorily striking a juror based on race or other group membership discriminates **against the juror**.³⁹ When you make a *Batson* challenge, you are not just asserting your client's right. You are also asserting the equal protection rights of the excluded jurors.

The exclusion of even a single juror on the basis of race violates the Equal Protection Clause

The striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.⁴⁰

III. Pretrial Preparation

1. Find out how jurors are summoned. Is the proper procedure for summoning prospective jurors being followed?⁴¹ Many steps in the jury selection procedure involve personal attendance or approval by the chief circuit judge. Make sure that shortcuts have not been implemented to get around or lessen the chief circuit judge's role and responsibility.⁴² And don't overlook the possibility of illegal discrimination in selecting the **grand jury**.⁴³

2. Know your jurisdiction. Does the local system, by which prospective jurors are notified of service, excused from service, or granted a delay of service, ultimately result in the elimination of a disparate number of an identifiable group? What percentage of the county population is represented by the various identifiable groups? What percentage of the venire? A comparison of these figures could be important in a *Batson* challenge.

Census data can be extremely helpful. If 19 percent of your county is black, and only 3 percent of the venire is black, and 0 percent of your client's jury is black, you can point out that "happenstance"⁴⁴ is unlikely to have produced such a disparity.

Government web sites are good sources.

—Google "census," or "Kentucky census."

Ask around, see if there has been litigation in your jurisdiction over jury practices. See if remedial actions have been ordered for your jurisdiction. If so, they should be scrutinized. For instance, when a federal district court in Michigan determined that African Americans were under-represented for jury service, the court enacted rules that removed from the jury panel every fifth juror categorized as "white" or "other." As a result, African American participation in jury service increased. But the rules also dramatically reduced jury participation by Hispanics (who fell in the "other" category). Criminal defendants successfully challenged the discriminatory effect of the rules and were granted new trials.⁴⁵

Once you have educated yourself regarding jury practices in your county, the evidence you gather regarding historical, pattern, or practice evidence should prove useful in more than one case.

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3. Know the prosecutor. Gather all the information you can about how individual prosecutors conduct voir dire and exercise strikes. If possible, find out what kind of “neutral” explanations the prosecutor has given in past cases. Does the prosecutor routinely state that the juror “had a scowl” or was “not paying attention”? A prosecutor who repeats the same race-neutral reasons at every trial loses credibility, but only when you point it out, and back it up. After *Snyder*, perhaps more than ever, trial judges will be focusing on the demeanor and credibility of the prosecutor, as well as the jurors.⁴⁶

4. Formulate good questions. Formulate voir dire questions to bring out feelings on race and gender. It is generally within the trial court’s discretion whether to permit group or individual voir dire on the subject of race.⁴⁷ But questioning prospective jurors about possible racial bias or prejudice—at least in some cases—is constitutionally required.⁴⁸ In *Turner*, a capital conviction was reversed because the trial court failed to allow counsel to voir dire potential jurors on the issue of racial bias.⁴⁹

A sample list of voir dire questions is included in Chapter 8.

5. Prepare in advance to take good notes. Create an efficient system for recording the race, gender, physical appearance, and other important characteristics of each and every juror AND for noting each time that a juror says something, no matter what is said. The best way to keep track is with the assistance of another attorney or a paralegal, administrative assistant, secretary, law clerk, or investigator. **Good notes will be crucial for arguing comparisons between struck and unstruck jurors.**

6. Prepare to ensure a proper record. Before trial, check out the court’s video system, including the placement of cameras, and find out what each camera picks up. Will every member of the venire be identifiable by race or other group characteristics in the appellate record during group voir dire? Make sure that each time a venire panelist speaks, the panelist’s identity and group membership are **somehow** identified for the record. If it will not appear on the video record, you must note it for the record verbally. Will there be jury questionnaires? Will these identify jurors by race or other group membership? If so, you will want to **make sure they are filed in the record** for appellate purposes. The same applies to jury lists and strike sheets.

IV. The Three-Step Process

Step One: The Prima Facie Case

- **Timeliness**

1. Challenging the makeup of the venire. A challenge to the entire venire panel must be made before the prospective jurors are questioned. RCr 9.34 provides:

A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.

This is the time to point out to the court that the panel is all white, or that only two of the 40 panel members are women, indicating that something is wrong with the venire selection process.

2. Challenging the prosecutor’s strikes. A *Batson* challenge to the prosecutor’s strikes must be made before the petit jury is sworn and the other panel members are excused. Specifically:

“If there is a challenge to be made to the exercise of peremptories in this state, it should be made when the lists of strikes have been returned to the judge and before the jury has been accepted by the parties and sworn to try the case and before the remainder of the jurors have been discharged from service.”⁵⁰

It is never too late to bring a *Batson* challenge. If defense counsel did not have a chance to make a *Batson* challenge before the panel members were excused and the jury was sworn, the challenge is still timely if it is made “as soon as...practically possible.”⁵¹

- **Mind that record!**

If your client, or a juror, is a member of a protected group, be sure to point it out on the record. For appellate purposes, don’t be reluctant to state the obvious. You and the judge and the prosecutor know that Juror No. 122 is an elderly black woman. But neither a trial transcript nor a videotape record will necessarily show these important details to an appellate court.

Make sure each juror is identified for the record, not only in individual voir dire, but also when the juror speaks in group voir dire. Not only by name, but by group identity.

Be sure the juror strike sheets are made part of the record on appeal.⁵²

- **Do you feel lucky?** Sometimes, at Step One all that defense counsel need do is point out that a protected juror has been struck, and ask for a race-neutral reason. If the Commonwealth asks for a *prima facie* showing of discrimination, you must provide one.

If the Commonwealth forgets to ask, no *prima facie* showing is necessary.

- **A minimal *prima facie* showing of a *Batson* violation has not been defined.** Our highest court has not defined a minimal *prima facie* showing, except to say that the trial judge should consider all the “relevant circumstances.”⁵³ Safe to say, it takes more than a statement of suspicion. Counsel may be well advised to present as much evidence at Step One as possible. Step Three –proving discrimination— can then be used for rebutting the state’s race-neutral reasons, and supplementing the *prima facie* showing, if necessary.
- ***Batson* requires more than a numerical calculation.** Numbers alone cannot form the basis for a *prima facie* showing.⁵⁴ You must be prepared to say more than, “The prosecutor struck 4 of 5 African-Americans.” But if that is all you have, don’t hesitate to raise the issue. Remember *Snyder* found a *Batson* violation based on a wrongful challenge to a single juror.
- **Present side-by-side comparisons of minority and non-minority jurors.** Even “more powerful” than the numbers, said *Miller-El*, were side-by-side comparisons of black venire panelists who were struck and white panelists who were allowed to serve. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”⁵⁵ Under *Snyder* the side-by-side comparison of voir dire treatment of minority versus non-minority venire panelists was **key**.

More powerful than numbers = side-by-side comparisons of jurors.

—Miller-El, Snyder

- **Has the prosecutor asked disparate questions?** Keep track of the prosecutor’s questions to each potential juror. Disparate questioning based on race was another indicator of discrimination in *Miller-El*, as graphic descriptions of the death penalty were given more frequently to potential black jurors than to whites. Also, potential black jurors, more frequently than white jurors, were asked how low a sentence they would be willing to impose.
- **Has the state mischaracterized jurors’ responses?** *Miller-El* pointed to mischaracterization of a venire person’s testimony as evidence of discrimination.⁵⁶
- **Non-group member jurors’ responses need not be identical.** The *Miller-El* Court was impressed with white jurors’ testimony that was merely “comparable,” rather than “identical” to voir dire testimony of struck black jurors.⁵⁷
- **Present the juror’s voir dire as a whole.** *Miller-El* did not confine itself to judging selected words spoken by the juror, but viewed the struck juror’s voir dire testimony as a whole.⁵⁸
- **Look at the prosecutor’s practices in the immediate case.** In *Miller-El*, the Court looked at the fact that the prosecutor reshuffled the venire whenever too many potential black jurors appeared near the front of the line for questioning, and that the prosecutor noted down the race of each panel member, following a manual that included racial stereotypes.⁵⁹

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- **Keep a tally of the number of individual questions** the prosecutor asks each member of the venire. Is the prosecutor spending extensive time engaging minority persons in conversation with the result that eventually the person says something the prosecutor can hang onto for a peremptory strike? If considerably more questions are asked of minority persons compared to non-minority venire persons, this is indicative of bias.
- **Does the prosecutor address minority persons by first names** but non-minorities more formally?
- **Present the basic math.** Present the basic venire numbers in your case, *e.g.*, how many whites versus blacks were called, how many of each group were removed prior to voir dire, how many of each group were challenged for cause, how many removed through peremptories, and what were the final percentages? The basic numbers in *Miller-El* were fairly typical, yet the Supreme Court found them “remarkable.”⁶⁰ *Snyder* also looked at the venire numbers.⁶¹
- **If necessary, look outside the record.** Sometimes false reasons may be shown up within the four corners of the case. Other times a court may not be sure unless it looks beyond the case at hand. Under *Batson* a defendant may rely on “all relevant circumstances” to raise an inference of purposeful discrimination, including relevant circumstances outside the immediate record.⁶²
- **Present other circumstances, historical evidence, patterns, practices, census data.** If you have historical, or other extra-record proof of discrimination, you should present it. This could include census data, court records, or witness testimony.

Miller-El looked to the fact that the Dallas County District Attorney’s Office had, for decades, followed a specific policy of systematically excluding blacks from juries, *Batson* said that a defendant could establish a *prima facie* case with proof that members of the defendant’s race were substantially underrepresented on the venire from which his jury was drawn, or that the venire was selected under a practice providing “the opportunity for discrimination.”⁶³

Remember, under *Snyder*, as discussed above, this evidence is less critical, if a side-by-side comparison of jurors supports a finding of discrimination.

Is there no better explanation, other than race? The *Miller-El* Court found purposeful racial discrimination because, “The facts correlate to nothing as well as to race.”⁶⁴

Step Two: The Neutral Proffer

Once the challenger meets the burden of showing a *prima facie* case of discrimination, the burden shifts to the opponent to come forward with neutral explanations for its peremptory challenges. The prosecution must present justification that does not violate equal protection.⁶⁵

The state’s “racially neutral” reasons need only be neutral on their face.

The state’s “racially neutral” reasons need not “rise to the level justifying exercise of a challenge for cause,”⁶⁶ and need only be neutral on their face.⁶⁷ And you might be surprised what a court will consider a “race-neutral” reason. For example, the Kentucky Supreme Court found in 2007 that striking a black juror because she lived in a high-crime area and that her participation in murder trial would put her in a “tight spot” was race-neutral, and survived a *Batson* challenge.⁶⁸

The state’s reasons must be “clear and reasonably specific.”

Quoting *Batson*, the 6th Circuit has said that the prosecutor’s reason must be “clear and reasonably specific.”⁶⁹ Self-serving explanations based on claims of intuition or mere disclaimers of any discriminatory motive are not sufficient.⁷⁰ The state cannot meet its burden “on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the state must demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.”⁷¹

Step Three: Proving Discrimination

In Step Three, the burden shifts back to the defendant, and the trial court determines if the evidence of discrimination is sufficient to rebut the prosecutor's "race-neutral" reasons. The court must decide **two things**: **1)** whether the proffered reasons are neutral and reasonable, and **2)** whether the reasons are a **pretext** for purposeful discrimination. Peremptory strikes against protected jurors **must meet both requirements**.⁷²

If the defendant has presented all available evidence at Step One (with or without a hearing) no further evidence need be presented at Step Three. If the state has presented evidence or made claims as part of its race-neutral reasons, however, more evidence may be necessary. The defendant also should be allowed to present rebuttal.⁷³

If a hearing has not already been conducted, this is a good time to ask for a *Batson* hearing. In addition, consider asking for additional individual voir dire to challenge vague excuses such as "he wasn't paying attention," "she was yawning," "he fell asleep in a trial I had last week."

At Step Three, **you must say something** to renew your objection.

Caution: Even if you have no more proof to present, at Step Three you must renew your objection to the wrongful strikes, *i.e.*, say **something** after the state proffers its race-neutral reasons. Defendant's silence after the Commonwealth articulated its facially race-neutral reasons for exercising a peremptory challenge has been held **fatal** to a *Batson* claim.⁷⁴

What if race is only a factor?

If it appears at Step Three that race, or other group discrimination, may not have been the **whole** reason for a strike, but you have at least demonstrated that it is a **factor**, you should still argue that a violation has occurred. "We hold that equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror."⁷⁵

V. The *Batson* Hearing

The challenger has a right to a hearing. And it is not the *prima facie* case that triggers the right to a hearing. Once a *Batson* challenge is made, a hearing is **mandatory**.⁷⁶ *Batson* requires that "upon *timely* objection to peremptory challenges for alleged discrimination, the court shall hold a hearing to determine if a *prima facie* case of discrimination can be made."⁷⁷ Have a copy of the *Simmons* case ready for the trial judge's review.

- 1. Witnesses, documents, and/or judicial notice.** A *Batson* hearing is an opportunity to put on evidence from within the case itself, and, if necessary, extra-record evidence, including census data, historical data, pattern and practice evidence.
- 2. Put the prosecutor on the stand.**⁷⁸ Make the prosecutor back up claims of extra-record information. The *Miller-El* Court discounted the prosecution's reason that the juror's family member had prior convictions saying it was "not creditable" in light of prosecutorial "failure to enquire about the matter." Ask for certified prior convictions, and proof of family relationships.

Be aware: The Kentucky Supreme Court—in *Snodgrass*—said the information the prosecutor points to does not have to be proven true, and can be based on personal knowledge, or sources outside the record.⁷⁹

- 3. Opinion, reputation, or other impeaching evidence**⁸⁰ should also be allowed, since both the United States and Kentucky Supreme Courts agree that the prosecutor's demeanor and credibility will be key. Trial judges must not accept explanations at face value.⁸¹ It should be proper to attack the prosecutor's credibility.
- 4. If nonverbal conduct is at issue**, ask the prosecutor to describe the nonverbal conduct with particularity.⁸² If the juror appears on the trial video, replay it. Ask the prosecutor to point out the offending body language. Be prepared to play back video of other nonstruck jurors showing similar or identical body language. Is there any difference between the struck juror's body language and the non-struck juror's? If the prosecutor cannot point out the body language, or claims it is not visible in the video, argue the prosecutor is arguably relying on "intuition." This is not a "clear and reasonably specific" reason for a strike.⁸³

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In *Washington*, the court found the prosecutor's claim that the juror was "inattentive" and "bored" was troubling where the prosecutor had failed to ask the juror any questions.⁸⁴ Check to see if there were other jurors the prosecutor failed to question. Were they also bored?

With *Snyder* placing more importance on demeanor, now more than ever, "explanations which focus upon a venire person's body language or demeanor **must be closely scrutinized because they are subjective and can be easily used. . . as a pretext for excluding persons on the basis of race.**"⁸⁵

5. Recall jurors for questioning (at your own risk).

Be prepared to deal with the *Snodgrass*⁸⁶ pronouncement that neither the state nor federal constitution require further questioning **of a juror** to clear up the prosecutor's suspicions articulated in the "race neutral" explanation. Argue that *Gamble* is more recent, and it contradicts, and effectively overrules *Snodgrass* on this point by stating that the court should not accept explanations at face value. In any event, *Snodgrass* does not forbid recalling a juror. Argue that since the burden is on you, due process requires that you be given an opportunity to present any relevant evidence.⁸⁷ But be careful what you wish for. Are you certain the juror's further testimony will support you?

VI. Remedies

A. At the trial level

Be creative: Once the trial judge rules that the prosecutor has not sufficiently articulated "neutral" reasons for a peremptory challenge, what relief are you entitled to? You can be as creative as you want.

Neither the Kentucky Supreme Court nor the United States Supreme Court has set out the proper remedy for a *Batson* violation at the trial level. *Batson*, however, suggests that discharge of the entire panel or placing the improperly discharged jurors back on the panel may be in order.⁸⁸ The Kentucky Supreme Court has also suggested possible relief in *Simmons*.⁸⁹ Although the *Batson* challenge was not timely in *Simmons*, the Court noted that the relief requested was a mistrial, and not a demand that the "alleged discriminatory challenges be disallowed." Discussing timeliness, the Court said, "If it were determined that the challenge of any juror was the result of discrimination, that challenge could have been disallowed and that juror would have remained on the panel."⁹⁰ But *Simmons* should not be considered a limitation on potential forms of relief.

Any of the following could be appropriate:

- a. Mistrial.
- b. The entire venire is resealed⁹¹
- c. The jury panel is discharged and a new panel is assembled.⁹²
- d. The prosecutor loses all peremptory challenges, all persons struck by the prosecutor are placed back on the panel, and the defense is given additional challenges equal to the number of challenges lost by the prosecutor.
- e. The improperly eliminated jurors are placed, not just back on the panel, but on the jury.⁹³
- f. All prosecution strikes are returned to the panel, and the defense is given an opportunity to redo its strikes.
- g. Any other relief you can think of.

Many jurisdictions have decided that a proper *Batson* remedy is that the trial court should disallow the peremptory challenge and seat the challenged juror.⁹⁴ But the *Ezell* court adopted the "flexible" approach used in Texas and Massachusetts, which permits the trial court to choose to reinstate the challenged juror or to seat an entirely new panel. Another court determined that the proper remedy for a *Batson* violation was to strike the entire venire.⁹⁵

Note well: If you are entitled to relief, it means the prosecutor is guilty of illegal discrimination and should be punished. But if the punishment is not strong enough, it will have no deterrent effect.

If the only relief granted is loss of a peremptory, illegal discrimination may be well worth the risk .

If the only relief granted is loss of a peremptory, illegal discrimination may be well worth the risk. The punishment should fit the crime.

B. On appeal

Kentucky appellate courts have been generally hostile to *Batson* claims, finding them untimely, unpreserved, unsupported, procedurally defaulted, or containing sufficient race-neutral reasons.⁹⁶ As a result, in the last ten years, only three Kentucky decisions have sustained *Batson* claims. The most significant of these remains *Washington v. Commonwealth*, in which the Commonwealth first claimed not to recall striking the juror, and then made up a pretext, claiming the juror was struck due to his “youthful age” of 43.⁹⁷ Another case is unreported, and contains no description of the reasons that were found to be pretextual.⁹⁸ The third upheld the Commonwealth’s challenge to a defendant’s use of peremptory strikes against women.⁹⁹

A trial court’s denial of a *Batson* challenge will not be reversed on appeal unless it is clearly erroneous.¹⁰⁰ As noted in *Hernandez*, the decisive question is whether the prosecutor’s race-neutral explanation is believable.¹⁰¹ If a *Batson* error is unpreserved, it must meet the “plain error” standard on direct appeal.¹⁰²

Batson error constitutes “**structural error**,” which is not subject to harmless error analysis and requires automatic reversal.¹⁰³

Reversal and remand for a new trial has been ordered based on *Batson* violations.¹⁰⁴ Even where the trial court has failed to make findings on the sufficiency of the prosecutor’s explanations and failed to conduct an inquiry into the basis of each peremptory challenge, the remedy has still been held to be reversal of the conviction for a retrial, not remand for a *Batson* hearing.¹⁰⁵

The 6th Circuit has made clear, however, that a remand for further *Batson* proceedings may be an appropriate appellate remedy when the trial record lacks important details, including:

... the order of strikes, who exercised them, or the racial composition of the district in which this case was tried. The record also denies us the district court’s thoughts as to how these factors, and any others ... weighed on the district court’s conclusion in the third step of the *Batson* analysis.¹⁰⁶

C. In post conviction

Remember that *Miller-El* was a federal habeas case that won at the Supreme Court level **twice** – which is amazing when one considers the strictures of the AEDPA.¹⁰⁷ This means you should pursue and **can win** a *Batson* claim in post conviction, at least if you persevere into federal habeas.

The United States Supreme Court reversed and remanded *Miller-El* the first time, finding that the 5th Circuit should have granted Miller-El a certificate of appealability to consider his habeas claim because reasonable jurists could have debated whether the prosecution’s use of peremptory strikes was the result of purposeful discrimination.¹⁰⁸ When the 5th Circuit affirmed his conviction again after remand, certiorari was granted a second time. It was in the second *Miller-El* decision that the United States Supreme Court found that the prosecutor’s use of strikes was purposeful, and *Batson* had been violated.¹⁰⁹

Batson claims are federal constitutional claims grounded in 14th Amendment Equal Protection, which must be raised in state post conviction, and “exhausted” in state court, in order to be pursued in federal habeas proceedings.¹¹⁰

If a *Batson* violation appears to have occurred, but was not raised or preserved at trial, or was raised at trial but not pursued on appeal, it should be raised and pursued in post conviction under RCr 11.42 as ineffective assistance of counsel. If a *Batson* violation occurred, but was not apparent at the time of trial, and comes to light only after trial, post conviction relief may be pursued under CR 60.02

Ineffective assistance of trial counsel

In framing an RCr 11.42 or CR 60.02 claim, the improperly struck jurors will need to be identified by name, number, and group characteristic, such as race. Post conviction counsel will need to make the same side-by-side comparison of voir dire treatment of jurors that trial counsel should have made, to demonstrate trial counsel’s ineffectiveness. At a hearing, trial counsel can be questioned to determine why no *Batson* challenge was made, *i.e.*, to dispel any presumption that allowing the prosecution to strike minority jurors was defense trial strategy.

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Ineffective assistance of appellate counsel

In *Davis*, trial counsel had preserved *Batson* error, but appellate counsel failed to appeal the trial court's denial of a mistrial. *Davis* threw out the ineffective assistance of appellate counsel claim, because Kentucky does not allow RCr 11.42 to be "used as a vehicle for relief from ineffective assistance of appellate counsel."¹¹¹ Moreover, "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction."¹¹² However, post conviction counsel should not be deterred by *Davis*, because federal courts, including the 6th Circuit, **do recognize** ineffective assistance of appellate counsel claims.¹¹³ In order to preserve an appellate ineffectiveness claim for federal habeas, Kentucky defenders need to raise ineffective assistance of appellate counsel in the client's RCR 11.42 proceeding. Then if (when) it is denied on appeal, it will be exhausted for federal court purposes.

Note: Appellate counsel has been held **not ineffective** in failing to raise a *Batson* issue where no objection to specific strikes on that basis had been raised in trial court.¹¹⁴

When YOU are challenged

Batson applies to *all* litigants, civil and criminal. This means that defenders are also "prohibited purposeful discrimination on the ground of race in the exercise of peremptory challenges."¹¹⁵

Don't make a strike you can't defend.

Don't make a strike you can't defend. Be prepared to defend each and every one of your own peremptory strikes.

According to *McCollum*, the same Three Step procedure applies to challenges of your strikes, that is, the prosecutor must demonstrate a *prima facie* case of discrimination.¹¹⁶ Then you must articulate a neutral explanation for the peremptory challenges. Finally, the court must decide whether your proffered reasons are neutral and reasonable, and whether your reasons are a **pretext** for purposeful discrimination.¹¹⁷

Eight Red Flags¹¹⁸

1. Disparate treatment, *i.e.*, persons with the same or similar characteristics as the challenged juror were not struck.
2. The reason given for the peremptory challenge is not related to the facts of the case.
3. There was a lack of questioning to the challenged juror or a lack of meaningful questions.
4. Disparate examination of members of the venire, *i.e.*, questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members.
5. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.
6. The prosecutor's statements or demeanor during voir dire.
7. The demeanor of the excluded venire persons.
8. The trial court's past experiences with the prosecutor.

Endnotes:

1. *Batson v. Kentucky*, 476 U.S. 79 (1986).
2. *Miller El v. Dretke*, 545 U.S. 231 (2005).
3. *Snyder v. Louisiana*, 128 S.Ct.1203 (2008).
4. Thanks to Kentucky Department of Public Advocacy attorneys Lisa Clare, Glenn McClister, and Donald Morehead, and to former Louisville Metro defender and current federal defender Frank Heft, for contributions to this chapter.
5. *Swain v. Alabama*, 380 U.S. 202 (1965) (requiring proof of a “pattern” of discriminatory challenges).
6. *Batson*, 476 U.S. at 95. See also *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (non-*Batson* case discussing the fact that Kentucky’s Constitution provides greater protection than the 14th Amendment).
7. *Batson*, 476 U.S. at 92-93.
8. *Batson*, 476 U.S. at 93-94.
9. *Miller-El*, 545 U.S. at 238.
10. *Miller-El*, 545 U.S. at 240.
11. *Miller-El*, 545 U.S. at 241.
12. *Taylor v. O’Neil*, ___ S.W.3d ___, 2007 WL 2069590 (Ky.App. 2007) (NOT FINAL, currently pending in the Kentucky Supreme Court on discretionary review). The Court of Appeals opinion summarizes distinguishing factors in *Miller-El*, including the prosecution’s use of a “jury shuffle,” marking the race of the jurors on the jury forms, using disparate tactics in voir-diring black vs. white jurors, mischaracterizing responses of black jurors, using peremptory challenges to strike a higher percentage of blacks, and adopting a formal policy to exclude minorities from jury service.
13. See also, *McPherson v. Commonwealth*, 171 S.W.3d 1 (Ky. 2005) (also latching onto facts in *Miller-El* to distinguish itself); *Taylor v. O’Neil* was still pending at the time of this manual in 2008.
14. *Snyder v. Louisiana*, 128 S.Ct.1203 (2008).
15. *Snyder*, 128 S.Ct. at 1208.
16. *Snyder*, 128 S.Ct. at 1209. (internal citations omitted)
17. *Snyder*, 128 S.Ct. at 1208. (internal citations omitted)
18. *Chatman v. Commonwealth*, 241 S.W.3d 799 (Ky. 2007).
19. *Snyder*, *supra* (finding clear error in striking one struck black juror, and remanding for further consistent proceedings); see also, *Batson*, 476 U.S. at 95 (a single invidiously discriminatory governmental act is not immunized). *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); See also *Harrison v. Ryan*, 909 F.2d 84, 88 (3rd Cir. 1990).
20. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).
21. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (putative father’s successful challenge to state’s exclusion of men from jury); *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App.1998) (defendant could not use his peremptory challenges to strike women from the jury solely on the basis of their gender). [Note that *Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky.App.1989), which says that *Batson* does not apply to gender discrimination in the use of jury strikes, was decided before *J.E.B.*]
22. *State v. Purcell*, 18 P.3d 113 (Ariz.App. 2001) (extending *Batson* to strikes based on religious affiliation); *Joseph v. State*, 636 So.2d 777, 780 (Fla. 3d. D.C.A. 1994) (Jewish jurors protected under *state* constitution); *Highler v. State*, 854 N.E.2d 823 (Ind. 2006) (religion in general, dicta); *Commonwealth v. Carleton*, 641 N.E.2d 1057 (Mass. 1994) (reversing due to prosecutor’s challenges of jurors Ceglie, Cantwell, McConaghy, Kellegher and Ferolito, because they were based solely on assumption these jurors were Irish or Italian Roman Catholics, but expressly **not reaching** the claim of religion-based discrimination); *People v. Kagan*, 101 Misc.2d 274, 420 N.Y.S.2d 987 (1979) (court could not conclude on basis of four peremptory challenges of persons who it was subsequently ascertained were Jewish that the prosecutor was systematically excluding persons of Jewish faith).
23. *Casarez v. State*, 913 S.W.2d 468 (Texas Ct.Crim.App. 1995) (relying on *J.E.B. v. Alabama ex rel. T.B.* in finding that exercise of peremptory challenges on the basis of religion was not improper).
24. *Smith v. State*, 838 So.2d 413, 436 (Ala.Crim.App.2002).
25. *People v. Mohammed*, 45 A.D.3d 251 (N.Y.A.D. 2007).
26. *Davis v. Minnesota*, 511 U.S. 1115 (1994) (J. Thomas, dissenting from the denial of certiorari).
27. *Id.*
28. *Davis*, 511 U.S. at 1115.
29. The Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101 et seq.
30. See *New York v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d. 130 (N.Y.Co.Ct. 1990) (Deafness not a proper reason to strike a juror, under the N.Y. state constitution).
31. *United States v. Biaggi*, 853 F.2d 89, 96 (2nd Cir. 1988) (Italian-Americans)(Italian-Americans are protected, but prosecutor presented sufficient neutral reasons for strikes).

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32. *Commonwealth v. Carleton*, 641 N.E.2d 1057 (Mass. 1994) (reversing due to prosecutor's challenges of jurors Ceglio, Cantwell, McConaghy, Kellegher and Ferolito).
33. *Cf., People v. Mohammed*, 45 A.D.3d 251 (N.Y.A.D. 2007) (court refused to find *Batson* error for striking jurors whose names sounded Middle-Eastern, or South Asian).
34. *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000)
35. See *United States v. Maxwell*, 160 F.3d 1071 (6th Cir. 1998) (upholding strikes against two jurors, aged 18 and 21); *see also, Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988) (neither young adults nor college students are a "distinctive group" as required to establish prima facie violation of Sixth Amendment fair cross section requirement).
36. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 618-619 (1991) (race-based exclusion violates equal protection rights of the challenged jurors); *See also Washington v. Goodman*, 830 S.W.2d 398, 400-402 (Ky. App 1992).
37. *Georgia v. McCollum*, 505 U.S. 42 (1992), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App.1998).
38. *Powers v. Ohio*, 499 U.S. 400, 401 (1991).
39. *Powers v. Ohio; Edmonson v. Leesville Concrete Co.; Georgia v. McCollum*.
40. *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); *see also Snyder, supra* (finding clear error in striking one black juror); *Batson*, 476 U.S. at 95 (a single invidiously discriminatory governmental act is not immunized); *and, Harrison v. Ryan*, 909 F.2d 84, 88 (3rd Cir. 1990).
41. See KRS Chapter 29A and Administrative Procedures of the Court of Justice, Part II, Jury Selection and Management (II Ad. Pro. Sections 1-33).
42. *See Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992).
43. *See Campbell v. Louisiana*, 523 U.S. 397 (1998).
44. *Miller El*, 545 U.S. at 232.
45. *United States v. Ovalle*, 136 F.3d 1092 (6th Cir 1998) (Jury selection plan which provided for random removal of one in five non-African-Americans violated Jury Selection and Service Act (JSSA) warranting reversal).
46. *See also, Commonwealth v. Snodgrass*, 831 S.W.2d 176 (Ky. 1992) (okay to strike black juror on the basis of information prosecutor received from source other than voir dire indicating that the juror lived in same neighborhood as defendant).
47. RCr 9.38; *cf., Irvin v. Dowd*, 366 U.S. 717, 723-724 (1961).
48. *Turner v. Murray*, 476 U.S. 28 (1986); *but cf., Ristaino v. Ross*, 424 U.S. 589 (1976) (fact that defendants were black and victim white did not elevate right to question veniremen specifically about racial prejudice to constitutional dimension); *and Ham v. South Carolina*, 409 U.S. 524 (1973) (where defense was "framing" due to civil rights activities and racial issues were inextricably bound up with the trial, right to voir dire on race was constitutionally protected).
49. *Turner*, 476 U.S. 28 (1986); *see also Bob Jones University v. United States*, 461 U. S. 574 (1983) (people who hold beliefs against interracial marriages are not impartial and do have a racial animus).
50. *Simmons v. Commonwealth*, 746 S.W.2d 393, 398 (Ky. 1988); *see also, Dillard v. Commonwealth*, 995 S.W.2d 366, 370 (Ky. 1999).
51. *Gamble v. Commonwealth*, 68 S.W.3d 367 (Ky. 2002) (*Batson* objection sustained on appeal though not raised until after prospective jurors who had been stricken were discharged and had left courtroom); *Washington v. Commonwealth*, 34 S.W.3d 376, 378 (Ky. 2000) (defense objected after panel sworn —prosecutor had erred in failing to identify struck juror).
52. RCr 9.36(4) (If trial counsel so moves, the written record on appeal shall include the juror strike sheets); CR 75.07(4) (record on appeal shall include the juror strike sheets pursuant to RCr 9.36).
53. *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989). *See also Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky. 1995) (requiring that the "facts and circumstances of the selection" raise an inference of discrimination).
54. *Hardy*, 775 S.W.2d at 920. (emphasis added)
55. *Miller-El*, 545 U.S. at 241.
56. *Miller-El*, 545 U.S. at 244.
57. *Miller-El*, 545 U.S. at 250.
58. *Miller-El*, 545 U.S. at 273 (Breyer concurrence).
59. *Miller-El*, 545 U.S. at 233.
60. *Miller-El*, 545 U.S. at 232: "The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members Happenstance is unlikely to produce this disparity."
61. *Snyder*, 128 S.Ct. at 1207: "Eighty-five prospective jurors were questioned as members of a panel. Thirty-six of these survived challenges for cause; 5 of the 36 were black; and all 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes."
62. *Batson*, 476 U.S. at 96-97.

63. *Batson*, 476 U.S. at 95.
64. *Miller-El*, 545 U.S. at 266.
65. See *United States v. Maxwell*, 160 F.3d 1071, 1074 (6th Cir. 1998), citing *J.E.B. v. Alabama*.
66. *Batson*, 476 U.S. at 97.
67. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) (“At this step of the inquiry, the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”); accord, *Chatman*, 241 S.W.3d 799.
68. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2007) (Justice McNulty, with Chief Justice Lambert, dissenting on this issue)
69. *United States v. Gibbs*, 182 F.3d 408, 438-39 (6th Cir. 1999); accord *Washington v. Commonwealth*, 34 S.W.3d at 379; see also *Gamble*, 68 S.W.3d at 371.
70. *Washington v. Commonwealth*, *supra*.
71. *Batson*, 476 U.S. at 94.
72. *Gamble*, 68 S.W.3d at 371.
73. For instance, evidence of African-American housing patterns could be introduced to disprove the race-neutrality of living in a high crime area as a reason for striking a black juror.
74. *Chatman*, 241 S.W.3d 799.
75. *Benavides v. American Chrome & Chemicals*, 893 S.W.2d 624, 627 (Tex. App. – Corpus Christi 1994).
76. *Batson*, 476 U.S. 79 (1986); *McKinnon v. State*, 547 So.2d 1254 (Fla. App. 4 Dist. 1989) (challenger is entitled to a “full hearing.”)
77. *Simmons v. Commonwealth*, 746 S.W.2d 393, 397 (Ky. 1988).
78. See *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988); *Smith v. State*, 814 S.W.2d 858 (Tex. App. – Amarillo 1991); *Ex Parte Lynne*, 543 So.2d 709, 712 (Ala. 1988) (counsel permitted to cross-examine opposing counsel).
79. *Snodgrass*; but cf., *Gamble*, contradicting *Snodgrass*, stating explanations must not be accepted at face value.
80. KRE 607, 608.
81. *Gamble*, 68 S.W.3d at 371.
82. See *Price v. Short*, 931 S.W.2d 677, 681-682 (Tex. App.-Dallas 1996).
83. *United States v. Gibbs*, 182 F.3d 408, 438-39 (6th Cir. 1999); accord *Washington v. Commonwealth*, *supra*, 34 S.W.3d at 379; see also *Gamble*, 68 S.W.3d at 371.
84. *Washington*, 34 S.W.3d at 379.
85. *Epps v. United States*, 683 A.2d 749, 753 (D.C.App. 1996), quoting *People v. Harris*, 544 N.E.2d 357, 380 (Ill. 1989) (emphasis added).
86. *Snodgrass*.
87. See *Green v. State*, 891 S.W. 2d 340, 342 (Tex. App. - Beaumont 1995) (because burden on appellant, appellant “had the opportunity to call venireperson Brown to the stand and question him); see also, *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) (court pointed out that after prosecutor states neutral explanation, defense has opportunity to present evidence to rebut the explanation); *Mackintrush v. State*, 978 SW.2d 293 (Ark. 1998) (emphasizing importance of presenting additional evidence or argument after hearing the other party’s “racially neutral” explanation).
88. *Batson*, 476 U.S. at 99, fn. 24.
89. *Simmons*, 746 S.W.2d at 397.
90. *Simmons*, 746 S.W.2d at 398.
91. See *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995), and *United States v. Bentley-Smith*, 2 F.3d 1368 (5th Cir. 1993).
92. *Brogden v. State*, 649 A.2d 1196 (Md.App. 1994); *Gilchrist v. State*, 627 A.2d 44 (Md.App. 1993).
93. *State v. Bennett*, 907 S.W.2d 374 (Mo.App. E.D. 1995).
94. *Ezell v. State*, 909 P.2d 68, 72 (Okl. Cr. 1995)
95. *People v. Rodriguez*, 58 Cal. Rptr. 2d 108, 115 (Cal. App. 5 Dist. 1996).
96. Based on review of westlaw search for all Kentucky cases containing the word “Batson.”
97. *Washington v. Commonwealth*, 34 S.W.3d 376 (Ky. 2000).
98. *Pryor v. Commonwealth*, 2003 WL 21241881 (Ky.App. 2003) (reversing due to trial court acceptance of “pretextual” reasons) (NOT REPORTED).
99. *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App. 1998).
100. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) see also *Wells v. Commonwealth*, 892 S.W.2d 299 (Ky. 1995).
101. *Hernandez*, 500 U.S. at 365.
102. *Chatman v. Commonwealth*, 241 S.W.3d 799 (Ky. 2007), citing, *United States v. Jackson*, 347 F.3d 598 (6th Cir. 2003).

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103. *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (racial discrimination in the selection of grand jurors is structural error that requires automatic reversal); *Avery v. Georgia*, 345 U.S. 559, 561 (1953) (jury selection based on race warrants reversal of a conviction regardless of the strength of the evidence presented); *United States v. Angel*, 355 F.3d 462, (6th Cir. 2004).
104. *Washington*, 34 S.W.3d 376; *But see, United States v. Hill*, 146 F.3d 337 (6th Cir. 1998) (remand for further proceedings and specific findings by the trial court on a *Batson* issue).
105. *Cleveland v. State*, 888 S.W.2d 629, 632 (Ark. 1994).
106. *United States v. Hill*, 146 F.3d 347 (6th Cir. 1998); see also *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1520 (6th Cir. 1988) (indicating the need for a “full record for intelligent appellate review” including 1) the racial composition of the initial group seated and the final jury panel sworn; 2) the number of peremptory strikes allowed each side; and 3) the race of those who were struck or excused from the jury panel throughout voir dire (whether for cause or by a peremptory challenge), the order of strikes, and by whom they were exercised, and—in the right case—the percentage of the “cognizable racial group” in the jury pool, or the racial composition of the district wherein the jury pool is selected).
107. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, § 104(d), 110 State 1214, 1219.
108. *Miller-El v. Cockrell*, 537 U.S. 322 (2003)
109. *Miller-El v. Dretke*, 545 U.S. 231 (2005)
110. *White v. Mitchell*, 413 F.3d 517 (6th Cir. 2005) (Failure to present a *Batson* ineffectiveness claim in state court precluded federal habeas relief).
111. *Commonwealth v. Davis*, 14 S.W.3d 9 (Ky. 1999), quoting *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1986).
112. *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001).
113. *Valentine v. United States*, 488 F.3d 325 (6th Cir. 2007) (failure to raise a *Batson* claim on appeal); *McFarland v. Yukins*, 365 F.3d 688, 699 (6th Cir. 2004) (must meet two-prong *Strickland* test to establish ineffective assistance of appellate counsel).
114. *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2001).
115. *Georgia v. McCollum*, 505 U.S. 42 (1992).
116. *Collum*, 505 U.S. 42 (1992).
117. *Gamble*, 68 S.W.3d at 371.
118. Compiled in *Smith v. State*, 814 S.W.2d 858, 860-61 (Tex. App. – Amarillo 1991) and *State v. Martin*, 892 S.W.2d 348, 353 (Mo. App. W.D. 1995); see also *State v. Davis*, 894 S.W.2d 703 (Mo. App. W.D. 1995). ■

CONFRONTING THE RACE ISSUE IN JURY SELECTION

by Jeff Robinson and Jodie English¹

Introduction

First, no one likes to talk about race, especially in public. Second, the criminal justice system is perhaps the most volatile forum for a discussion of race. Mix the two together, and get voir dire on the issue of race in an open, public courtroom in a criminal case. Actual opinions held by jurors, whether expressed or not, will probably cover a broad range. Some people think racism died a long time ago, and they are tired of discussing it. Some feel that if the criminal defense lawyer raises the issue, she is playing the “race card.” Some feel that minorities are simply more likely to be criminals and we should simply acknowledge that fact.

At the beginning, it is important not that we do not fool ourselves. Who can honestly believe that opinions on issues as sensitive as race, opinions which have been formed over a person’s lifetime, can be significantly changed in the time allowed for jury selection in a criminal case? The jury selection process may not be the best tool to change people’s viewpoints about race,² but our primary goal in jury selection cannot and should not be to change the opinions of jurors. Our primary goal should be to discover what those viewpoints are, and how strongly they are held and how they may impact a verdict in our case. The challenge in jury selection is to get people to talk as forthrightly as possible about race so we can maximize our ability to intelligently exercise preemptory challenges and challenges for cause. If we succeed in getting people to talk about race, we may not change race relations in the world, but we may change the verdict in our case.

The Race Card

There is now a term to describe the behavior of those us who dare raise the issue of race in a criminal trial – a lawyer plays the so called “race card” by interjecting the issue of race into the analysis of a factual situation where race is, according to some undefined group of people, irrelevant. According to the “race card” theory, the issue of race is raised in order to influence members of a certain race on the jury. Many believed this is exactly what happened in the presentation of the O. J. Simpson defense. This viewpoint reveals how deeply issues of race divide the people that live in this country.

Soon after the Simpson verdict, an African-American comedian in New York performed in front of a mostly black audience. He discussed his amusement at the anger exhibited by many white Americans as a result of the Simpson defense team suggesting that Detective Mark Furman’s racial views were somehow relevant to the issue of his credibility as a police investigator, and therefore Mr. Simpson’s guilt or innocence. The comedian posed a rhetorical question - if Jerry Seinfeld was accused of murder, and Louis Farrakhan was the only police officer who claimed to have found a bloody glove, would people think it inappropriate for Mr. Seinfeld’s defense lawyers to discuss Mr. Farrakhan’s views about Jewish people? The comedian’s comment was met with a large amount of laughter and applause. It is inconceivable to most African-Americans³ that there could even be a debate on the appropriateness of exploring the racial bias of a police officer in a homicide prosecution where an African-American man is charged with killing two white people. And yet, for some white Americans, it is inconceivable that race has any relevance whatsoever in a jury’s decision in such a case. Given this, we had better find out how our potential jurors define the “race card,” and how that definition may reflect their broader viewpoint on issues of race.

Stereotypes Can Lead To Conviction

It is a mistake to assume that, all other things being equal, an African-American or other non-white juror is a better defense juror in a criminal case than a white juror. On the one hand, the experience of living as a non-white person in America will undoubtedly have an effect on a person’s world view and life experience. Many African-Americans were both born and raised in the Deep South or have family members who were. The first-hand experiences of people born in the pre-World War II years and those who grew up in the 50s and 60s are now the subject of documentary films on the horrors of racism. Their life experience tell them that it is completely possible for a white police officer to be biased and prejudiced against an African-American defendant. As opposed to many white Americans, they would have no reason to believe that it would be very unlikely or rare for a white police officer to lie on the witness stand in a criminal case involving an African-American defendant.

These same are often deeply religious, hard working people. They believe in law and order. They can be politically conservative in many areas, with a notable exception being their views of civil rights for non-whites. In the garden-variety criminal case, some jurors

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of color would not be ideal jurors whether the defendant was non-white or not. It is necessary to go beyond the surface level of analysis to thinking about what it means to grow up non-white in America, and how the view of the world that a non-white person may have connects with the actual issues in dispute in a particular criminal case.

How Do You Get People To Start Talking?

No one likes to talk about race - especially not in public. What follows are a series of questions (thanks to Larry Pzner and Roger Dodd) that may be helpful in getting prospective jurors to talk about race. These questions have been developed for use with the "struck method" or "Donahue" style of jury selection - that is, a method of jury selection where the lawyer first addresses questions to the entire panel as opposed to questioning individual jurors one at a time. Follow up with individual jurors is critical.

What If No One Looked Like You?

These questions are designed to get jurors to think about how a minority defendant might feel in the courtroom surrounded by people of a different race.

- I. Assume that you are on trial - the alleged victim was African-American - the judge and the lawyers were African-American - the police officers were all African-American - all the jurors were African-American - you are the lone white person in the courtroom:

What are you feeling?

Right now, as I describe this all black courtroom in which you are the only white face, what is going through your mind? Tell me about it.

Why would you feel that way?

- II. Mr./Ms. _____ may be tried by an all white jury (this question takes on additional power if the prosecutor decides to strike a juror of color.)

How do you think/feel that an all white jury may affect the verdict?

Why? (ask several people) - If the lawyer finds that this question is not generating responses from the jury:

- A. Try the Pozner/Dodd technique of reversal and ask the following: "How many people think that the fact that Mr./Ms. _____ may be tried by an all white jury will have no impact on the verdict?"
- B. Why do you think this? Tell me more. Who feels otherwise?
- C. Or, style the question so the prospective jurors have to choose: *e.g.*, "Some people think an all white jury will have no impact, while others feel it will make it more difficult for my African-American client to get a fair trial. What do you think? Why? If the jury does end up being all white, how will you make sure the case is decided only on the evidence?"

How Often do you Spend Time with Minorities in Your Everyday Life?⁴

Questions for whites:

- I. **Neighborhood:** Do you live in a racially integrated area? Why or why not?

Why do you think your neighborhood is (or is not) integrated?

What do you think/hear about racial tensions in your town? How do those tensions affect your neighborhood?

- II. **Work:** Tell me whether you have contact with African-Americans at work. How often? Describe those contacts? Have you ever been supervised by or had a boss who was an African-American? How was that experience?

Have you held jobs in the past where you had frequent contact with African-Americans? Tell me about that.

- III. **Socializing:** Do you belong to any social club, political organization, or religious groups which have no African-American members?

Why do you think no African-Americans are members of this club?

How often do you spend your leisure time with African-Americans? Do you have any friends who are African-American? If yes, please tell us about them - have you ever invited them to your home? Have they ever invited you to their home?

How would you feel if a family member wanted to marry someone who was African-American?

Tell me about a memorable experience you have had with an African-American – (Note that the question could call for either a positive or negative experience).

Are African-Americans Viewed as More Likely to Commit Crimes?

- I. Racial Hoaxing:**⁵ How many people have heard of the Susan Smith case in South Carolina where Ms. Smith drowned her two children and then claimed that an African-American male had kidnapped them?

How many people have heard of the case in Boston where a man killed his wife then claimed that an African-American had attacked them in a car?" (Ask it this way to see if someone comes up with the name Charles Stuart).

Why do you think these people choose to tell the police that an African-American male had attacked them?

Why do you believe Susan Smith's story for nine days even though there wasn't a shred of evidence to support it?

If a female decided to falsely accuse a man of rape, for whatever reason, would it be easier to accuse an African-American or a Caucasian? Why?

When you walked into the courtroom did anyone think Mr. Black Defendant was the lawyer and the white male defendant was the client? For those that do not raise their hand, why not?

- II. Racial Slurs:** What kind of derogatory stereotypes and words have you heard about African-Americans? (Perhaps make a list of them on the board.)

Do you think African-Americans are more prone toward violence or other kinds of crimes than whites?

Why or why not?

Do you think those opinions are widely held?

What do you think those opinions are based on?

How do you think those opinions will affect _____'s ability to get a fair trial? (If you have made a list of different stereotypes, you can refer to it when asking this question.)

Everybody Is Prejudiced, How About You?

- I. Self Disclosing helps others be truthful:** A very close friend, a white person, a person who is not a bigot or racist, told me that she was at a stoplight the other day when a young black male pulled up in a brand-new BMW. She said her first thought was "drug dealer." Not son of a doctor, son of a lawyer, but drug dealer. Has anyone else ever had a similar experience? (You may be able to substitute yourself as the person making the assumption – if you can admit to such thoughts, the jurors may as well.)

Imagine you are sitting in your car at a stoplight, and 2 young black men approach the crosswalk. Do you check to see if your doors are locked? Why check? Would you do the same thing if 2 young white men approached the crosswalk? Why or why not?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

How many people walked into the courtroom, saw Mr. _____, and thought "well, they have charged another innocent man?" Why or why not?

- II. If African-Americans can admit to prejudice, whites can too:** Jesse Jackson tells the story about one night when he was walking down the streets of a large city and got nervous when he heard footsteps approaching from behind, and was then relieved when he saw that it was three young white males instead of three young black males – why do you think he was embarrassed about his thoughts?⁶

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III. Making the target bigger: If whites are encouraged to discuss their own experiences with being victims of discrimination, they may have an increased ability to understand the danger of prejudiced thinking in the courtroom.

Have you heard the saying that you should not judge a book by its cover? What does that mean?
Have you been judged by a cover – either because you are old, young, fat, bald, bleached blonde, have facial hair, or drive a motorcycle, etc.?

How did that make you feel?

What was unfair about how you were treated?

What is the risk to an innocent man if jurors rely on judging based on a surface characteristic like skin color rather than look to the evidence?

Let's Talk About "Playing the Race Card"

What you heard about "playing the race card?" Tell me more. Do you believe that African-Americans "play the race card?" Why do you believe that? How does it help African-Americans to "play the race card?" How does it hurt African-Americans to do so?

When is it necessary to look at the role race played in a criminal case? Under what circumstances? When might it make it harder to find the truth if race is ignored?

What is the risk to an innocent African-American defendant if his lawyers never mention race with the jury?

Can racists become police officers? What do you think of that? What have you heard? Can racists sit on a juries?

How can a racist end up being a juror when an African-American defendant is on trial?

What Will You Do You If Something Bad Starts To Happen In The Jury Room?

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions.

How do you feel when someone uses a racial slur or tells a racial joke?

What, if anything, do you do in response to hearing such language?

If your child used a racial slur, what would you tell your child?

What, if anything, do you think teachers should do to a white high school student who calls an African-American high school student by a racial slur?

If you hear a juror making an argument based on race prejudice or stereotypes, what would you do about it? (You are really hoping here for someone to say that they will tell the judge — if that suggestion does not come up, "would you consider telling the judge?")

May I See A Show Of Hands...

Robert Hirschhorn⁷ is a member of NACDL and an expert on jury selection techniques. He suggests asking a series of questions that can simply be answered by a show of hands – for example, making a statement and asking who agrees and who disagrees. This format can encourage more of the prospective jurors to express themselves, thereby expanding the pool of persons who can be asked follow-up questions on an individual basis. Some questions that may work with this technique:

Yes or No Questions: How many say "yes?" — if so, please raise your hand. Now, how many say "no?" Again, please raise your hand.

Is racism by whites against African-Americans a thing of the past?

Do you believe there is more, less or the same amount of racial prejudice today as 30 years ago?
African-Americans commit more violent crimes per capita than whites.

Whites who encourage their children not to marry African-Americans are making a wise choice.

Whites are being discriminated against due to affirmative action programs.

Blacks use more illegal drugs than whites.

Have any of you ever seen an example of racism? (The lawyer can ask people who raise their hands to describe the incident and their feelings about it, and then ask other jurors about their reaction to the incident described.)

Ideas For Questionnaires

Robert Hirschhorn also encourages petitioning the court for use of a questionnaire in cases where race is an issue. Prospective jurors may be more likely to reflect honestly and independently when answers are given in writing and individually as versus in the public and intimidating environs of a criminal court. Some sample questions follow. Be sure to leave several lines after each question so as to encourage fuller response.

Racial Prejudice: Personal Experience

A. Free response questions.

Racial prejudice can take many forms. Tells us about your experiences with racial prejudice or where you have felt labeled.

Have you ever felt like you were the target of racial prejudice? Tell us about that situation or experience?

Have you ever had racially prejudiced thoughts about another person, even if those thoughts made you feel uncomfortable or uneasy?

Please tell us about experiences you have had where other people expressed racially prejudiced beliefs or opinions?

How do you feel when someone uses a racial slur or tells a racial joke?

Who has been your memorable experience with someone who is African-American?

When you are sitting at a stoplight and two young black men approach the sidewalk, do you check to see if your doors are locked? Why do you check?

Would you do the same thing if two young white men approached the cross walk?

Do you have any friends who are African-American? If yes, please tell us about them.

How would you feel if a member of your family wanted to marry someone who was African-American?

Have you ever invited someone who is African-American to your home?

If your child used a racial slur, what would you tell your child?

Would you be more inclined to believe that a black police officer would be more likely to commit a crime than a white police officer? Why?

B. Multiple choice questions: Circle the answer that you feel is most true:

I would not want my child to marry an African-American.

Strongly Agree Agree Disagree Strongly Disagree

I get angry when I hear negative remarks about African-Americans.

Strongly Agree Agree Disagree Strongly Disagree

Blacks are less disciplined than whites.

Strongly Agree Agree Disagree Strongly Disagree

No respectable white woman would ever have consensual sex with a black man.

Strongly Agree Agree Disagree Strongly Disagree

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Racial Prejudice: Beliefs about societal prejudice: Circle the answer that you feel is most true:

Racial prejudice still exists.

Strongly Agree Agree Disagree Strongly Disagree

There is more racial prejudice today than there was 30 years ago.

Strongly Agree Agree Disagree Strongly Disagree

African-Americans commit more violent crimes per capita than whites.

Strongly Agree Agree Disagree Strongly Disagree

Whites who encourage their children not to marry African-Americans are making a wise choice.

Strongly Agree Agree Disagree Strongly Disagree

Whites are being discriminated against due to affirmative action programs.

Strongly Agree Agree Disagree Strongly Disagree

Blacks use more illegal drugs than whites.

Strongly Agree Agree Disagree Strongly Disagree

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Endnotes:

1. We wish to express thanks to the lawyers who shared their ideas for this paper. In addition to those named in the paper, our thanks go to Theresa Olson of The Defender Association in Seattle, Washington.
2. See, Dasgupta, Greenwald, "On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals." In this study, which can be found at www.newschool.edu/gf/psy/faculty/dasgupta participants reminded of pro-black exemplars exhibited less automatic preference for whites over African-Americans than participants who were reminded of pro-white or non racial exemplars. The authors' research suggests that there may be some benefit to encouraging prospective jurors to look at positive African-American role models as part of the selection or questionnaire process.
3. The authors recognize that issues of race involve non-white defendants who are not African-American. In this paper, we hope to present issues and the methods of dealing with them that can apply to cases involving non-white defendants other than African-Americans.
4. Expert psychology testimony regarding the difficulty of cross-racial identification is premised on research involving persons who had infrequent contact with members of the opposite race. Thus, for example, a white person who works with, lives in a neighborhood with, spends time socializing with or is in a relationship with a non-white is generally better able to accurately identify non-whites than is a white person who has little contact with non-whites.
5. See Russell, Kathryn K., *The Color of Crime, Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and other Macroaggressions*, New York University Press, (1998): in addition to the Susan Smith and Charles Stuart cases, the author cites over sixty additional case of racial hoaxing where blacks are blamed for white criminality.
6. December 17, 1993, *Wall Street Journal*; the full quote from Jesse Jackson reads: "There is nothing more painful for me at this stage of my life, than to walk down the street and hear footsteps and start to think about robbery, and then to look around *and see it's somebody white and feel relieved.*"
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PREVENTING SYSTEMIC DISCRIMINATION AND ADDRESSING BIAS AGAINST CHILD/ADOLESCENT CLIENTS IN THE JUVENILE AND ADULT JUSTICE SYSTEMS

By Rebecca Ballard DiLoreto

The first thing to remember in representing a youthful member of a minority group who may be facing transfer from the juvenile justice system to adult court, is to apply the same good sense and skills as you would to all of your other juvenile or family court cases. Be familiar with the code, the case law, and the practices and attitudes of your judge, prosecutor, Department of Juvenile Justice worker and others who will influence the outcome.

Second, apply the same principles you would to an adult client you are representing whose cultural background is other than white middle class. Jacque Joiner, Social Worker for the Kenton County Public Defender Office has underscored the importance of appreciating cultural diversity and possessing cultural competence in the representation of youth. As she notes, it is vital to understand your client's cultural background:

“Professionals must incorporate knowledge of cultural norms and cultural variability with practices that respect and account for individual difference.

Skills for Culturally Competent Practices

- Ability to be self aware – to tune into one's stereotypical thinking.
- Ability to identify difference as an issue – to raise subject matter and openly discuss taboo topics such as racial identity.
- Ability to individualize and generalize – to enter another person's cultural frame of reference, to understand, cognitively and affectively, the experience of oppression, discrimination, and its impact on people.
- Ability to advocate – to argue for culturally appropriate services from other systems.”

As attorneys we can educate ourselves, but we also need to recognize our need for experts. Experts can help us identify culturally appropriate services. They can teach us to identify and explain taboo topics, and the impact of oppression and discrimination on our client. Experts can make clear for the court what that group discrimination has to do with the charges our client faces.

The first critical step toward avoiding transfer is to seek the release of our client at the detention hearing stage. Those clients who are detained pretrial are more likely to be determined guilty whether in juvenile or adult court—and more likely to receive a more punitive sentence. Unfortunately, there is research supporting harsh treatment of minority juveniles. But there is also research demonstrating that race has a significant impact on the decision to detain and the decision to punish.

Researchers have reached divergent conclusions about the impact of race on juvenile detention decisions. Some suggest that so many Black children are confined to detention facilities not because of their race but because of the seriousness of their crimes, because of their poverty, or because of their uncooperative behavior. On the other hand, numerous studies demonstrate that, even after taking severity of present offense and prior record into account, juvenile court judges hand down more severe sanctions on Black juveniles in delinquency dispositions. A recent, well-designed study, for example, found that race had an independent and significant influence on detention. Using data on felony offenses in five counties of one state, the researchers controlled for factors other than race, such as the crime location, socioeconomic status, and offense characteristics that might explain juvenile confinement. Race was directly responsible for higher rates of detention at three stages in the juvenile justice process: police contact, juvenile court intake, and the preliminary hearing.

After reviewing research on racial bias, University of Missouri criminologist Kimberly L. Kempf similarly concluded that race predicts the fate of children in the juvenile justice system, even when researchers controlled for factors such as prior record and severity of offense. Kempf highlights the need for a process-oriented approach that examines the interdependence of decisions at multiple stages of juvenile justice. She recognizes that decisions

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made early in the process—for example, by police officers and prosecutors—affect how judges ultimately dispose of cases. In her own study of juvenile justice cases in Pennsylvania, Kempf found that racial disparities in the early stages built on each other to produce worse outcomes for Black children.¹

You have been appointed to represent a client in a transfer case where the client is identified as a member of a minority group. What tools and strategies are available to you to competently defend your client? As a first step, consider the value of the juvenile code itself. What does the juvenile code contemplate that you know and in what areas are you expected to be prepared to provide a defense?

- I. Seek a consulting and/or testifying expert to assist you in proving to the court that unique consideration must be given your client and the court must appropriately weigh the following factors in 640.010 (2) (b)
 1. 640.010(2)(b)(3) The maturity of the child as determined by his environment
 2. 640.010(2)(b)(5) The best interest of the child and community
 3. 640.010(2)(b)(6) The prospects of adequate protection of the public
 4. 640.010(2)(b)(7) The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system;
 5. 640.010(2)(b)(8) Evidence of a child’s participation in a gang

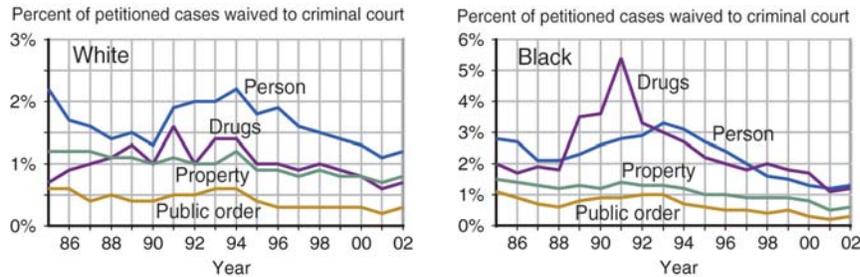
An adversarial hearing where you are assisted by experts who have investigated the case and are prepared to present the evidence in support of your arguments against transfer is essential. The rule of law in Kentucky is: “A waiver order is doubtless a matter of critical importance affecting the right of a minor accused of a crime to be treated as a child rather than as an adult.” *C.E.H. v. Commonwealth*, 619 S.W.2d 725, 726 (Ky. App., 1981).

“The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a ‘critically important’ decision is tantamount to denial of counsel. There is no justification for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner’s counsel, and it was error to fail to grant a hearing.” *Kent v. U.S.*, 383 U.S. 541, 86 S.Ct. 1045 (1966)

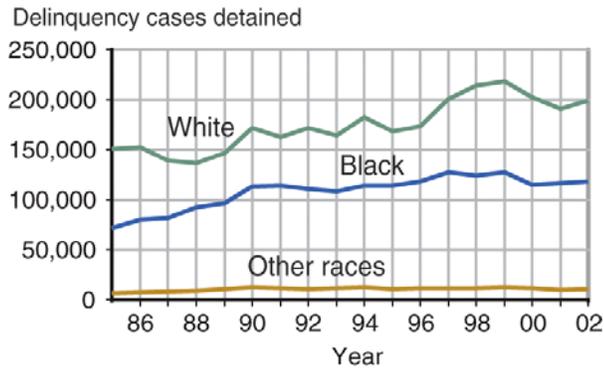
- II. Utilize social work staff to develop a complete social history. Keep in mind the need for diversity among the staff assisting you in this effort and the need for additional preparation to secure a complete and accurate picture of your client.. Include visit to the client’s home and community to ensure you are gaining a complete and accurate picture. Consider use of video, or photography to capture an accurate description of the community
- III. Seek sufficient time from the juvenile court to prepare for the transfer hearing, recognizing that if you and your client have significant cultural differences, it will take time for you to gain a complete and accurate understanding of the client’s world, and to determine how to translate that world in a manner that will successfully avoid transfer.
- IV. Develop a reasonable, sellable alternative plan to transfer that will meet both the judge and the prosecutor’s concerns and that the client will find understandable and acceptable.
- V. Work to sell other stakeholders on the image of the client and her/his world that will help your case BEFORE the hearing. Recognize that all of these players are likely lobbying the judge and the prosecutor well before the hearing date. If you cannot persuade a critical stakeholder to support your advocacy (DJJ juvenile justice specialist, local school personnel, victims), be prepared to meet that individual’s arguments in court or to neutralize them ahead of time.
- VI. Use criminal justice data in preliminary motions to set the stage for the presence of disparity in broad criminal justice decision-making. (OJJDP, DJJ Biennium Reports, NJDC, ABA, the Sentencing Project) The following examples of statistics and graphs from the OJDP illustrate just some of the persuasive material that is available:

Research shows that poverty exerts influence on family disruption which in turn influences juvenile violent crime rate. In 2002 Black and Hispanic juveniles were more than 3 times as likely to live in poverty as non-Hispanic white youth. See Juvenile Offenders and Victims: 2006 National Report by OJJDP pages 7-9. www.ojp.usdoj.gov/ojjdp

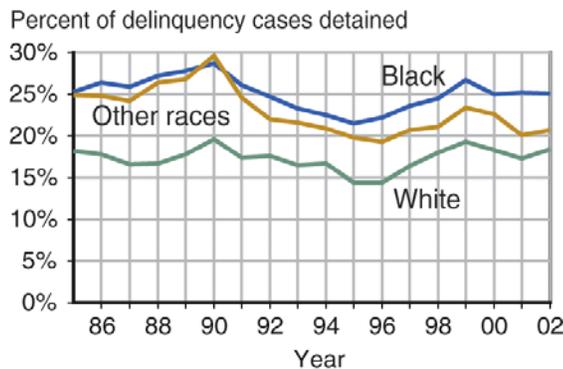
For most of the period from 1985 to 2002, the likelihood of waiver was greater for black youth than for white youth regardless of offense category



White youth accounted for the largest number of delinquency cases involving detention



Although they accounted for the largest number, white youth were the least likely to be detained

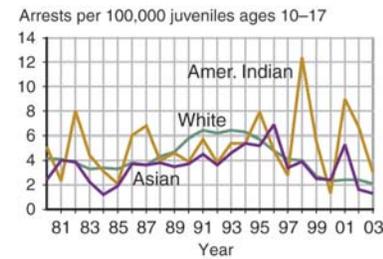
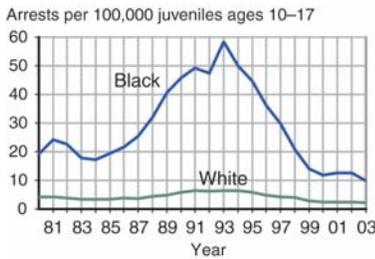
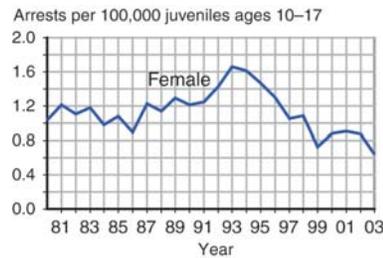
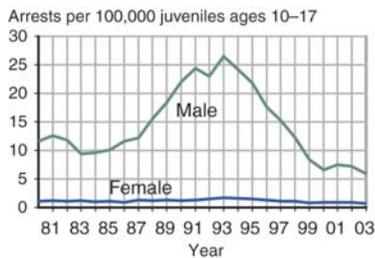


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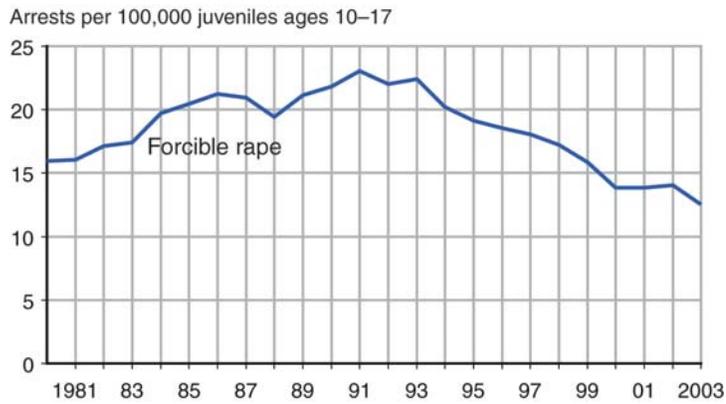
The arrest rate for murder in 2003 was the lowest since at least 1980 for white, black, male, and female juveniles



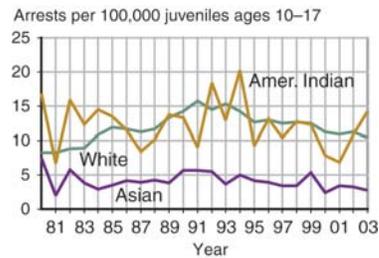
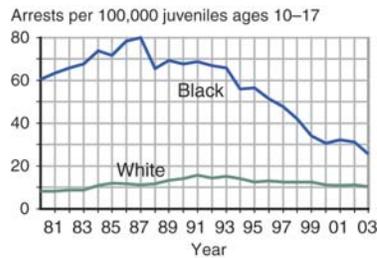
Murder arrest rate trends by gender and race



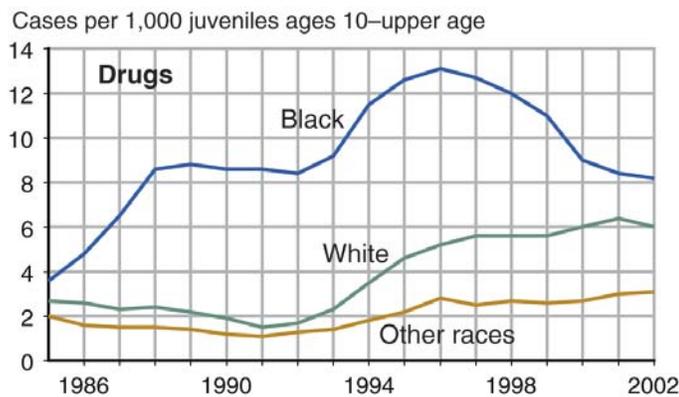
Between 1991 and 2003, the juvenile arrest rate for forcible rape fell 46%, with a larger decline in the black rate than the white rate



Forcible rape arrest trends by race

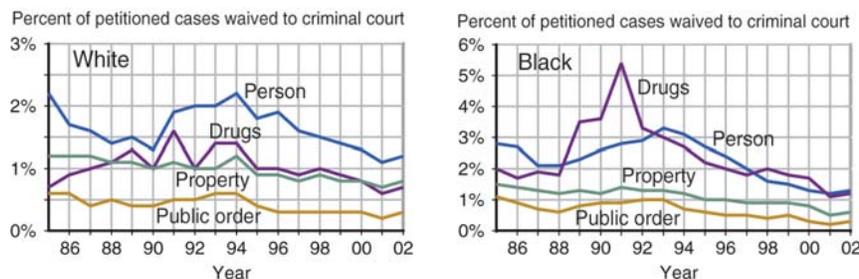


Case rates for drug offenses more than doubled from 1985 to 2002 for both white (118%) and black (128%) youth



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For most of the period from 1985 to 2002, the likelihood of waiver was greater for black youth than for white youth regardless of offense category



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- VII. Consider seeking expert funds for an expert to testify on disparate treatment in the criminal justice system. Consider the impact of such an expert on your local decision-maker. Balance the ability to persuade a trial judge against the need to build a record for appellate purposes. Consider the value of using such data in dialogue with the court and prosecutor, by motion, or by expert testimony from a competent social scientist. You won't have to look far. Experts here in Kentucky, from the University of Louisville, are knowledgeable, and have been closely involved in studies on disparate treatment locally:

“Contrary to the literature on MOR and DMC, the studies in other states, and the two studies conducted in the Commonwealth of Kentucky, the majority of respondents in this survey did not believe that race, ethnicity, and gender were issues impacting selection bias within the juvenile justice system. Overwhelmingly, selection bias was not seen as something that happened in the respondents’ particular jurisdiction. However, to the extent that respondents were inclined to believe that selection bias may exist, it was seen to be much more associated with measures of social class such as family income and type of neighborhood. . . . It was significant that public defenders, law enforcement officers, and school resource officers, all reported that the impact of race and gender was more likely to be a factor in selection bias compared to county attorneys, district court judges, court designated workers, and department of juvenile justice service workers.” *Minority Overrepresentation and Disproportionate Minority Confinement in Kentucky Technical Report July 2004, An Analysis of the Perceptions of Bias of Juvenile Justice Officials Employed with Various Agencies*, Authored by Clarence Talley Ph.D U of L, Theresa Rajack-Talley Ph.D U of L, Mark Austin, PhD U of L

- VIII. Work to ensure critical lay witnesses are present at the hearing to present a favorable image of your client and a realistic picture of what will happen to your client if the case is kept in juvenile court.
- IX. Look to the client’s community to find those who are willing to step up and provide the client with accountability and support in any plan to retain the case in juvenile court.
- X. Determine if cross-cultural aspects of the case impact the question of probable cause proof on the level of the offense, or whether the offense occurred. If so, determine if there is a need for expert funding, or lay witnesses to challenge the probable cause findings or to challenge the seriousness of the offense.

Endnotes:

1. Dorothy E. Roberts, “Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement,” 34 U.C. Davis L. Rev. 1005, 1021-1022 (Summer 2001) (internal citations omitted) ■

RACE AND IMMIGRATION ISSUES

By Jay Barrett, Paintsville Trial Office

“At any rate we think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours; he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, *deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples.*”¹

These words penned by Judge Learned Hand reflect the aversion Americans felt towards deportation, even as a consequence of serious crimes, well into the twentieth century. It has been argued that race began to play a significant role in American immigration policy well before then, when Congress passed the Chinese Exclusion Act of 1882 which barred further Chinese immigration, prohibited naturalization of those already in the U.S. and established deportation procedures for Chinese railroad workers who overstayed their initial contracts.²

Times have changed. Two laws adopted by Congress in 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, broadened the range of criminal convictions which may result in deportation of non-citizens. Efforts to enforce these laws were increased after the events of September 11, 2001, and may be expected to grow as a result of public and political sentiment over the “immigration crisis.”

As immigrant populations continue their growth, criminal practitioners across the Commonwealth advise clients from Central America, West Africa, Eastern Europe and elsewhere about plea agreements which may affect the client’s immigration status. The purpose of this chapter is not to debate immigration policy or its racial impact, but to assist criminal defense attorneys in representing these clients and minimizing the chance that the disposition of criminal charges will subject our clients to adverse immigration consequences.

Undocumented Status Should Not Affect Criminal Proceedings

From the earliest stage of representation, pretrial release, it is critical to understand that the presence of a person in the United States with undocumented status is not a crime. Competent counsel should not allow a client’s undocumented status to prejudice him or her at any stage of a criminal proceeding. It is only a crime to be in the U.S. without proper immigration documents if the client has been previously deported.³ Undocumented status alone does not make the defendant a criminal.

Kentucky’s Administrative Office of the Courts trains its pretrial release officers that undocumented status is immaterial to the determination of bail, as national studies show no correlation between immigration status and failure to appear. Arrestees are not asked their immigration status in pretrial service officer’s interviews. Immigration status is not a factor in the AOC’s pretrial release eligibility calculations, which assess the risk level of each arrestee, both as to whether they are likely to appear in court and whether they pose a risk of offending while on pretrial release.

The NEO8 assessment and pretrial services officer’s testimony can be used to persuade the judge to release the defendant on the same terms that a citizen would be released on for a given charge. Counsel should be prepared to use these to meet any argument prosecutors may make concerning undocumented status. Kentucky’s former Attorney General, Greg Stumbo, trained prosecutors to argue that such status is relevant to bail decisions. But prosecutors are not likely to be ready to present any empirical data to support their assertion.

Nor should undocumented status subject a defendant to a harsher sentence than a citizen would receive for the same conduct. Undocumented status is not a proper grounds for denial of probation to an otherwise eligible defendant.⁴ Some district judges have made a practice of sentencing undocumented immigrant defendants to twice the fine or days of confinement for routine offenses that other defendants are sentenced to. Counsel should challenge that practice, starting with a tactful off-the-record conversation, but by litigation if necessary, with reference to the defendant’s race and the Fourteenth Amendment.⁵

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State courts have no authority to enforce federal immigration laws, and therefore cannot hold defendants who are otherwise eligible for release without bail pending Immigration and Customs Enforcement action. In a ruling captioned *Ramos v. Jenkins*,⁶ Circuit Judge Tyler Gill granted habeas corpus relief to 17 undocumented aliens who were held without bond in Logan and Todd counties by order of the district court pending investigation of their status by Immigration officials. There was no indication that Immigration and Customs Enforcement had pending cases on any of the defendants, though the district judge had attempted to contact them to initiate the investigations.

Judge Gill found the defendants' custody unlawful on several grounds, including the denial of counsel, the denial of bail, and the arbitrary imposition of indefinite detention in violation of Section 2 of the Kentucky Constitution. By taking this action on its own initiative, the court had violated the separation of powers between the executive and judicial branch. Judge Gill scolded the court, stating that "the rule of law has now inexplicably been ignored or abandoned by the very institution entrusted to uphold it." Kentucky's Judicial and Retirement and Removal Commission agreed, and suspended the district judge without pay for her conduct, which brought disrepute to the bench. Whether the defendant is being held without bail pretrial or after completion of a lawful sentence, counsel should challenge any detention for immigration purposes by a state court on these grounds, as well as federal preemption of immigration action by state courts, discussed below.

Local Enforcement of Immigration Law and Racial Profiling

While the separation of executive and judicial powers regarding immigration issues is clear, the role of state, county, and city police in enforcing federal immigration law is a matter of heated ongoing debate. In the week of April 21, 2008, the governor of Georgia signed a law purporting to authorize state and local police to detain arrestees for federal immigration law violations, and the governor of Arizona vetoed a bill to allow local law enforcement to arrest undocumented immigrants for trespassing. In the waning days of the 2008 Kentucky legislature, immigration enforcement bills that would have authorized or even required the Department of Corrections and local detention centers to determine an inmate's citizenship status prior to release failed to make it out of the House Judiciary Committee. Should such a bill pass, counsel should challenge any hold beyond the inmate's specified release date as unlawful in the absence of an ICE detainer (see above).

The present state of the law has been summarized by one commentator:

From the state's point of view, the federal government's exclusive power over immigration does not preempt every state activity affecting aliens. And it generally has been assumed that state and local officers may enforce the *criminal* provisions of the INA if state law permits them to do so but are precluded from directly enforcing the INA's *civil* provisions. This view may be changing, however.⁷

The distinction between civil and criminal enforcement remains critical: deportation proceedings involve civil enforcement, and undocumented status is not a crime (for those not previously legally deported). Therefore undocumented aliens are not subject to criminal arrest. It is pushing the envelope to argue that illegal entry into the U.S. is a crime, thus making someone present without proper documentation subject to arrest. This argument cannot succeed in Kentucky, because unlawful entry into the U.S. is only a misdemeanor.⁸ Peace officers may arrest without a warrant for a misdemeanor offense only when it is committed in their presence.⁹ The act of unlawful entry is completed at the border and is not a continuing offense.¹⁰ For such a misdemeanor offense not committed in the officer's presence, a warrant is required before an arrest can be made.

State and local law enforcement officers are authorized to arrest aliens who are both illegally present in the U.S. and have been convicted of a felony and either deported or left the country subsequent to the felony conviction.¹¹ This authority arises only *after* the officers have confirmed the alien's status with ICE, and lasts only long enough for ICE to take the person into federal custody.

Congress has also authorized the Secretary of Homeland Security to enter into written agreements with states and municipalities to assist in enforcing immigration law.¹² The agreements must provide for specific training of the individual officers to be involved in immigration enforcement, and specify the duties they are permitted to perform and the federal officer who will supervise them in those duties. The training must include civil rights and potential liability of the officers. Florida and Alabama have entered into memoranda of understanding that allow selected state police officers to assist in immigration enforcement, as has the city of Nashville. In Kentucky, the city of Shepherdsville recently expressed its intent to apply for this authorization.

As more Kentucky municipalities seek authorization to assist in enforcement of federal immigration law, we are bound to see increased instances of racial and ethnic profiling in contact between officers and individuals seeking to determine immigration status. Such stops of persons or vehicles violate Kentucky statutory and both state and federal constitutional protections. KRS 15A.195 prohibits stops “solely motivated by consideration of race, color, or ethnicity” and requires Kentucky Law Enforcement Foundation funded agencies, and encourages all other law enforcement agencies, to have Racial Profiling Policies.

One Kentucky court has ruled that a violation of a law enforcement agency’s racial profiling policy is not grounds for suppression of evidence (due to self-contained remedy of administrative discipline).¹³ The *Hardy* court misperceived the issue, which is not a violation of the policy, but a violation of statute. Therefore *Hardy* is questionable as precedent on the issue of a statutory violation. The court did expressly state that only constitutional violations invoke the remedy of the exclusionary rule, so effective counsel must plead a constitutional as well as the statutory violation.

The U.S. Supreme Court has held that the Fourth Amendment does not provide a basis for challenging racially motivated stops.¹⁴ Counsel should not, therefore, plead only 4th Amendment grounds in seeking suppression, but should include its state counterpart, Section 10 of the Kentucky Constitution.

State and federal courts have recognized that the Fourteenth Amendment Equal Protection clause and related Kentucky Constitutional provisions (Sections 1, 2, 3, and 26) are implicated by the practice of racial profiling. The standard of proof is analogous to that used in proving selective enforcement of prosecutions.¹⁵ The *Hardy* opinion noted that the arrestee had not offered any proof of racial intent. The methods of proving intent and effect include statistics (which can prove discriminatory effect, or difference between treatment of races, and can support an inference of discriminatory purpose) or direct proof of different treatment of individuals of different races.¹⁶

Recent immigration enforcement efforts in Kentucky have focused on Hispanic immigrants. But the same protection against racially based arrests would apply to Haitians, Africans, and many other immigrant communities. The state prohibition against race, color or ethnicity-based stops, searches or detentions would seem a severe impediment to street level immigration enforcement by state and local officers. Counsel should litigate these issues in criminal defense, but practices are not likely to change until civil rights actions result in the liability of officers and their departments for violation of the statute and the Constitution.

Immigration Consequences of Conviction

Perhaps the most immediate and most difficult challenge facing counsel defending a non-citizen arises in advising the client of potential immigration consequences of a conviction, whether by trial or plea negotiations. The Kentucky Supreme Court has ruled, contrary to some other states’ decisions, that the failure to advise a client of immigration consequences of a particular conviction is not ineffective assistance of counsel in Kentucky.¹⁷ Even misadvice about such consequences has been held not to warrant post conviction relief, though two dissenters would distinguish bad advice from no advice.¹⁸

Federal courts are under no obligation to advise defendants of deportation consequences.¹⁹ But counsel’s misadvice has been held to be ineffective assistance:

“We agree that where, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel’s performance is objectively unreasonable under contemporary standards for attorney competence. Here, Kwan asked counsel whether pleading guilty would cause him to be deportable, and counsel chose to advise him. Moreover, counsel represented himself as having expertise on the immigration consequences of criminal convictions. Subsequently, counsel either failed to keep abreast of relevant and significant changes in the law or failed to inform Kwan of those changes’ effect on the deportation consequences of Kwan’s conviction. In either case, counsel never advised Kwan of the options that remained open to him prior to sentencing, and counsel never informed the sentencing judge that a sentence only two days shorter than the sentence ultimately imposed would enable Kwan to avoid deportation and remain united with his family. That counsel may have misled Kwan out of ignorance is no excuse ...”²⁰

Counsel must become aware of the immigration consequences of the plea before it is entered, as there are two hurdles that virtually exclude effective post conviction relief. First, Kentucky courts have held that consequences learned after the plea do not constitute “exceptional circumstances” to grant relief under CR 60.02(f) that is unavailable under RCr 11.42.21

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Second, even if you could get the trial court to vacate the conviction, the vacation of a conviction may not hold up in federal court, and may be found ineffective for immigration purposes if it was done solely to avoid immigration hardship.²²

Since we aspire to be more than just “not ineffective,” let’s learn the basics of immigration consequences. Available online are a PowerPoint presentation prepared by Cori Hash of the Maxwell Street Legal Clinic for the 2007 Department of Public Advocacy Annual Seminar²³ and the National Lawyers Guild manual on Immigration Consequences of Criminal Convictions.²⁴ Review of these materials will familiarize counsel with the issues involved in these cases. What follows here is a simplification of those materials, followed by specific Kentucky practice tips that may assist you in avoiding or minimizing these consequences for your clients.

First, counsel must determine whether a client is or is not an American citizen. This process starts with asking each client simply, “Are you an American citizen?” If so, none of these concerns apply. But we should not assume any client to be a citizen. Many people in the U.S. are legal permanent residents, undocumented, refugees, or those seeking asylum. Others may hold one of many forms of visas, including student, work, religious, or domestic violence victim visas. Forty percent of all illegal immigrants in the U.S. entered lawfully but overstayed these visas.²⁵ If your client is not a citizen, ask whether they are in the process of applying for citizenship or lawful permanent resident status. And don’t forget to ask whether someone is assisting them with immigration—they may have an immigration lawyer who can help inform you while taking the responsibility of advising the client about the consequences of possible dispositions of the criminal charge.

Second, find out which concern is of greater importance to the client, deportation or the sentence that may be imposed. In a serious felony, the client may be more concerned about the sentence to be served than deportation. Counsel can then try to negotiate a shorter actual sentence to save the Commonwealth the expense of incarcerating someone who won’t be in the community upon completion of the sentence anyway due to deportation. Conversely, a client more concerned with avoiding deportation may be willing to serve more time in jail to avoid a longer suspended sentence or conviction of a specific offense that would make deportation likely. Be sure you and the client have the same goals with respect to the outcome of the criminal case.

Third, counsel must be aware of the federal definition of a “conviction.” 8 U.S.C. § 1101(a)(48)(A) provides that “The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

Because of this definition, a pretrial diversion of a felony in Kentucky pursuant to KRS 533.250 *et seq.* is a conviction for immigration purposes. A guilty plea is required, KRS 533.250(f), even though formal adjudication of guilt may be withheld. In addition, the court typically orders probation pursuant to KRS 533.254, or at least some specific conditions which may be considered restraints on liberty. The AOC form requires the parties to note in the record what sentence **will be** imposed should there be a revocation of diversion, and an immigration court may construe these as “some form of punishment” or penalty. Because an *Alford* plea is considered a form of guilty plea (and labeled as such on AOC form 491.2), it is likely to be treated as a guilty or *nolo contendere* plea: *i.e.*, the same as a conviction.

By contrast, a pretrial diversion in a misdemeanor case, which does not involve a guilty plea, should not be construed as a conviction. But counsel should make sure there is no reference to a conditionally discharged sentence in a misdemeanor diversion. As Ms. Hash’s presentation notes, the immigration court is not limited to a docket entry, but will look at all the contents of the file (including the file jacket in district court). So be sure on entry into a misdemeanor diversion that there is nothing contradicting that disposition on the file jacket or elsewhere in the file. If the disposition is not made in court and recorded, make sure any “Waiver of Recording” or other document reflecting the agreed disposition contains no reference to a guilty plea or sentence.

Fourth, counsel must determine whether the offense of conviction, or offered plea, is classified as an Aggravated Felony or a Crime of Moral Turpitude. Generally, any noncitizen is subject to deportation upon conviction of an aggravated felony. Two or more convictions of crimes of moral turpitude not arising from the same scheme will also subject a noncitizen to deportation, unless the offense occurs within 5 years of admission to the United States (in which case one conviction is sufficient). Some jurisdictions have compiled charts identifying which statutory offenses are aggravated felonies and which may be considered crimes of moral turpitude. We don’t yet have such a chart in Kentucky. The chart for federal

offenses prepared by the National Immigration Project is attached (attachment D) by their permission for reference and analogy to Kentucky offenses. Charts for other states may be found online.

These classifications are terms of art. There is no specific, categorical definition of “crime of moral turpitude.” These are generally offenses that are morally reprehensible or intrinsically wrong (*malum in se*) and courts look to common law in determining which are crimes of moral turpitude. “Aggravated felony,” on the other hand, has an extensive statutory definition, which includes offenses you may not consider aggravated and some that are not felonies under state law.²⁶ Conversely, some state felonies are not federal felonies and are therefore not includable as aggravated felonies.

In *Lopez v. Gonzales*,²⁷ the U.S. Supreme Court held that although South Dakota treated an alien’s conviction for aiding and abetting another person’s possession of cocaine as equivalent to possessing the drug, and thus a felony under that state’s law, the offense was a misdemeanor under the Controlled Substances Act, and thus **not** an “aggravated felony” under the Immigration and Nationality Act. The issue was not aiding and abetting, but the fact that possession of a controlled substance is not a felony under federal law, but a misdemeanor.²⁸ Hence possession of a controlled substance is not an “aggravated felony” for immigration purposes. The Sixth Circuit Court of Appeals had already reached this conclusion prior to *Lopez*, ruling that the defendant’s two prior state felony convictions for possession of cocaine, in violation of Ohio and Kentucky law, did not constitute “aggravated felonies”, since these offenses did not involve trafficking, and were not punishable as a felonies under federal law.²⁹

There are several gray areas in Kentucky offenses involving marijuana. Trafficking in less than 8 ounces of marijuana is a misdemeanor on first offense,³⁰ and trafficking over 8 ounces but less than five pounds is a Class D felony. However, the federal penalties for trafficking in marijuana include up to five years imprisonment for any quantity less than 50 kilograms.³¹ **So the state misdemeanor may be held to be an “aggravated felony” under the trafficking in controlled substance provision of 8 U.S.C. Sec. 1101(a)(43). An exception may be argued for distributing a small amount of marijuana for no remuneration, which is treated as a misdemeanor under 21 U.S.C. Sec. 841(a)(1)(D)(4).** Similarly, Kentucky law distinguishes between cultivation of 5 or more plants, a felony and fewer than 5 plants, a misdemeanor. KRS 218A.1423. It is not clear (until we have a federal decision) whether all such cultivation would be considered manufacturing or trafficking a controlled substance, an aggravated felony; as possession of marijuana, a misdemeanor; or whether immigration courts would treat fewer than 5 plants as possession and greater than 5 as trafficking. If a plea to (or jury instruction on) possession of marijuana can be entered as a lesser included offense in any of these circumstances, even with more time to actually serve than these charges might result in, that would be preferable for immigration purposes.

The Supreme Court has recognized a distinction not immediately apparent in the statutory definition of violent crime. In *Leocal v. Ashcroft*,³² the Supreme Court found that the offenses without a mental state, or where the mental state is mere negligence, are not aggravated felonies under the INA. Using the reasoning employed by the Supreme Court, wanton endangerment, though a felony, might therefore not be considered an “aggravated felony.” If counsel cannot avoid an assault conviction, it would be advisable to seek a bill of particulars or stipulation of record that a defendant pleading to a felony assault was acting wantonly, rather than intentionally. This should be apparent in vehicular assault cases, but it is essential to get the mental state in the record at or before the entry of the plea. At trial, seek separate instructions on wanton and intentional conduct to assure both a unanimous verdict and a clear record of the conduct of which the defendant was convicted.

Beware of state misdemeanors that constitute aggravated felonies. In *U.S. v. Gonzales-Vela*,³³ the court held that the Kentucky misdemeanor of sexual abuse second degree is an aggravated felony because it is included (“sexual abuse of a minor,”³⁴ in federal statutory definition of “aggravated felony.”

In attempting to avoid a felony conviction, counsel routinely seek to have a charge amended to Attempt, K.R.S. 506.010, or Conspiracy, 506.040, since violation of these provisions when the crime involved is either a Class C or Class D felony is only a misdemeanor. This will not work for immigration purposes due to the catch-all subsection (U) of the statutory definition of aggravated felony, “an attempt or conspiracy to commit an offense described in this paragraph.” A better argument might be made for the offense of criminal facilitation in violation of KRS 506.080. However, counsel should review the Supreme Court’s ruling that aiding and abetting a theft is included in the theft definition of “aggravated felony,” *Gonzales v. Duenas-Alvarez*.³⁵ The Supreme Court declined in *Lopez, supra*. to reach the question of whether California’s unauthorized use of a motor vehicle offense (Kentucky’s K.R.S. 514.100 misdemeanor) constituted an “aggravated felony,” as the issue was not preserved for review.

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The fifth determination counsel must make is whether the sentence involved has immigration consequences. For crime of moral turpitude purposes, only the possible (not *actual*) sentence is required: one year or more. For aggravated felonies, only those involving theft, receiving stolen property, burglary and “crimes of violence” convictions where the defendant receives a sentence of one year incarceration or more qualify. It is crucial to note that suspended time counts toward the one year, and that twelve months is a year.³⁶ Thus, a twelve month suspended sentence for misdemeanor theft or receiving results in an “aggravated felony.” A 364-day sentence does not. Counsel and client must be willing to trade a larger fine or more time to actually serve in such misdemeanors to obtain a suspended sentence less than the maximum twelve months.

One strategy to avoid a single twelve-month sentence in a case warranting a sentence in that range is to spread the sentence out among several counts. In lieu of a single or concurrent sentence (suspended or otherwise) of twelve months for separate thefts or assaults, seek separate consecutive sentences of less than 12 months. Some immigration authorities suggest that where the prosecution insists on service of a one year sentence, counsel and defendant waive presentence credit and accept a prospective sentence of less than one year.

Where the offense is a single crime of moral turpitude with a maximum of twelve months, seek to obtain a sentence of less than six months (including suspended time). There is an exception to the denial of admissibility of an alien for one “petty offense,” defined by an actual sentence of six months or less.³⁷ This becomes important when your client attempts to re-enter the country.

Finally, counsel should be aware that a non-citizen convicted of any two offenses (regardless of whether they were crimes of moral turpitude, aggravated felonies, or neither) who is sentenced to an aggregate of five years or more in prison is inadmissible.³⁸ This means that if the client were not deported, but left the U.S., they would face great difficulty in returning. So bargain that Class C felony down to a D and take a (preferably probated) sentence of less than five years if all other tactics fail.

Again, this chapter is not intended to be a comprehensive coverage of a subject that warrants, and has produced, entire books. Knowing some of the immigration consequences of convictions makes us keenly aware that **there is no substitute for consulting an immigration attorney when these questions arise**. Counsel may have an ethical obligation to refer the client to more qualified counsel in this area for more complex questions. In Kentucky we are blessed to have two organizations that assist indigent clients in immigration matters. Their resources are limited, but they may be able to answer a well framed question from counsel, or advise the client directly. They are:

Maxwell Street Legal Clinic

315 Lexington Avenue
Lexington, KY
(859) 233-3840
<http://maxlegalaid.kyequaljustice.org/>

Catholic Charities of Louisville, Inc.

2911 South Fourth Street
Louisville, KY 40208
(502) 637-9786
www.catholiccharitieslouisville.org
(Immigration Legal Services)

Resources

Immigration Law and Crimes available in the DPA library and at:

http://west.thomson.com/store/product.asp?product_id=13514773

Norton Tooby, *Criminal Defense of Immigrants* Ch. 1 available online at:\

http://criminalandimmigrationlaw.com/~crimwcom/Free_verified.php

Endnotes:

1. *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630 (2d Cir. 1926)
2. See Ogletree, *America's Schizophrenic Immigration Policy: Race, Class and Reason*, 41 B.C. Law Rev. 771 (July 2000).
3. 8 U.S.C. Sec. 1326
4. See *State v. Martinez*, (Kansas App. 2007),
5. See *Race and Sentencing Chapter*
6. Available online at <http://dpa.ky.gov/Education/Immigration%20Habeas.pdf>; and at <http://dpa.ky.gov/Education/RamosvJenkinsPetitionforWritofHabeasCorpus.pdf>.
7. Enforcing Immigration Law: The Role of State and Local Law Enforcement <http://www.ilw.com/immigdaily/news/2005,1026-crs.pdf> (footnotes omitted)
8. INA Sec. 275
9. KRS 431.005(1)(d).
10. *Enforcing Immigration Law* at fn.21
11. 8 U.S.C. Sec 1252c
12. 8 U.S.C. Sec. 1357(g)
13. *Hardy v. Com*, 149 SW3d 433 (Ky. App. 2004)
14. *Whren v. U.S.*, 517 U.S. 806 (1996) (racial motivation doesn't render stop "unreasonable" in Fourth Amendment analysis).
15. See *U.S. v. Armstrong*, 517 U.S. 456 (1996): discriminatory effect and purpose.
16. See *Dees v. Commonwealth*, Unpublished 2004 WL 2567152 (Ky. App.2004). Cf. *Snyder v. Louisiana*, __ U.S. __, 128 S.Ct.1203 (2008) (finding intentional discrimination based entirely on a comparison of questions and answers of black veniremen versus non-black)
17. *Commonwealth v. Fuartado*, 170 SW3d 384 (Ky.2005)
18. *Commonwealth v. Padilla*, __ SW3d __, 2008 WL 199818 (Ky. 1/24/08)(not final).
19. 3 C.J.S. Aliens, Sec 122,
20. See *United States v. Kwok Chee Kwan*, 407 F.3d 1005, 1015-16 (9th Cir. 2005):
21. *Commonwealth v. Bustamonte*, 140 SW3d 581 (Ky. App. 2004) (reversing Fayette court order vacating 12 month sentence for misdemeanor theft).
22. *Sanusi v. Gonzales*, 474 F3d 341 (6 Cir. 2007)
23. <http://dpa.ky.gov/Education/Immigration%20PowerPoint.ppt>
24. <http://defendingimmigrants.org>
25. Ogletree, *supra*. At fn. 72 citing U.S. Dept. of Justice, INS, *Illegal Alien Resident Population (1999)*
26. 8 U.S.C. Sec. 1101(a)43(a)
27. 549 U.S. 47, 127 S.Ct. 625, 166 L.Ed.2d 462, (2006)
28. 21 U.S.C. Sec. 844.
29. *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)
30. KRS 218A.1421(2)
31. 21 U.S.C. Sec 841(a)(1)(D)
32. 543 U.S. 1, 125 S.Ct. 377 (2004)
33. 276 F.3d 763 (6 Cir. 2001)
34. 8 U.S.C. Sec 1101(43)(1))
35. 127 S.Ct. 815, 166 L.Ed.2d 683, (2007)
36. *U.S. v. Ramirez-Cayetamo*, 57 Fed.Appx. 635 2003 WL 192115 (C.A.6 (Ky.)) (unpublished).
37. 8 U.S.C. § 1182(a)(2)(A)(i)
38. 8 U.S.C. Sec 1182(a)(2)(B). ■

SELECTED IMMIGRATION CONSEQUENCES OF CERTAIN FEDERAL OFFENSES

by Dan Kesselbrenner and Sandy Lin
National Immigration Project of the National Lawyers Guild
On behalf of the Defending Immigrants Partnership

Introduction

- 1. Using the Chart.** The chart analyzes adverse immigration consequences that flow from conviction of selected federal offenses and suggests how to avoid the consequences. The chart is organized numerically by code section.
- 2. Sending comments about the Chart.** This is the updated edition of the chart, which we first published in 2003. Please contact us if you disagree with an analysis, see a relevant new case, want to suggest other offenses for us to discuss, or want to propose other alternate “safer” pleas, want to suggest improvements, or have general comments. Please send your comments to dan@nationalimmigrationproject.org.
- 3. Disclaimer and Note to Users.** Immigration consequences of crimes are a complex, unpredictable, and constantly changing area of law where there are few guarantees. Practitioners should use this chart as a starting point rather than as a substitute for legal research. For a more detailed analysis of offenses and arguments, see *Immigration Law and Crimes* available at: http://west.thomson.com/store/product.asp?product_id=13514773

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Selected Immigration Consequences of Certain Federal Offenses

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
8 U.S.C. § 1324(a)(1)(A)	Harboring, smuggling, and transporting	Yes, under 8 U.S.C. § 1101(a)(43)(N). Statutory exception for first offense for assisting, abetting, or aiding one's spouse, child, or parent. ¹	Unlikely. ²	Yes, under smuggling ground for bringing in offense.	
8 U.S.C. § 1325 (a)	Illegal entry	Yes, under 8 U.S.C. § 1101(a)(43)(O) when person convicted was previously deported for an aggravated felony conviction other than illegal entry or reentry. ³	No.	n/a	
8 U.S.C. § 1326	Illegal reentry	Yes, under 8 U.S.C. § 1101(a)(43)(O) when person convicted was previously deported for an aggravated felony conviction other than illegal entry or reentry.	No. ⁴	n/a	
18 U.S.C. § 3	Accessory after the fact	Yes, under 8 U.S.C. § 1101(a)(43)(S) as an obstruction of justice offense. ⁵	Possibly, if the underlying offense involves moral turpitude. ⁶	Not a controlled substance offense. ⁷	Consider a plea to misprision of felony, if possible.
18 U.S.C. § 4	Misprision of felony	No. ⁸	Possibly. ⁹	Not a conviction under controlled substance ground even where felony concealed involves drug distribution. ¹⁰	
18 U.S.C. § 111	Assaulting, resisting, or impeding certain officers or employees	Possibly if defendant receives a sentence of a year or more. ¹¹	Very likely. ¹²	n/a	
18 U.S.C. § 201(b)	Bribery of public officials and witnesses	Possibly an aggravated felony under 8 U.S.C. § 1101(a)(43)(S) for commercial bribery where the defendant receives a sentence of a year or more. It is not clear that bribing a public official necessarily includes a commercial element.	Yes. ¹³	n/a	Try to ensure that the record of conviction does not include any evidence that the bribery was commercial in nature.
18 U.S.C. § 287	False, fictitious or fraudulent claims	Offense is divisible. If record of conviction indicates that offense	Possibly. ¹⁵	n/a	

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		involved fraud or deceit and loss to the victim exceeded \$10,000, then it would be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). ¹⁴			
18 U.S.C. § 371	Conspiracy to commit offense or to defraud United States	Divisible offense. If substantive offense is an aggravated felony then a conviction for conspiracy to commit the offense will be an aggravated felony under 8 U.S.C. § 1101(a)(43)(U). ¹⁶ If offense is for defrauding United States, then a conviction will be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) where loss to the victim exceeds \$10,000. ¹⁷	Yes, where underlying offense involves moral turpitude or where offense involves fraud. ¹⁸	Firearm, controlled substance, or other criminal ground where underlying offense would make a noncitizen deportable. ¹⁹	If possible, plead to conspiracy to commit an offense that does not involve fraud or trigger other immigration consequences.
18 U.S.C. § 373	Solicitation to commit crime of violence offense	Probably crime of violence aggravated felony where defendant receives a sentence of a year or more. ²⁰	Probably.	n/a	
18 U.S.C. § 401(3)	Criminal contempt	Possibly. ²¹	Unlikely.	n/a	
18 U.S.C. § 472	Uttering counterfeit obligations or authorities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more. ²²	Yes. ²³	n/a	
18 U.S.C. § 473	Dealing in counterfeit obligations or securities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Yes. ²⁴	n/a	
18 U.S.C. § 474	Possessing counterfeit securities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Not necessarily. ²⁵	n/a	
18 U.S.C. § 485	Possessing counterfeit coins	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a	Not necessarily. ²⁶	n/a	Divisible statute.

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		sentence of a year or more.			
18 U.S.C. § 487	Possessing U.S. coin molds with intent to defraud	Yes, under fraud ground if loss to victim exceeds \$10,000 or probably under counterfeiting ground if the defendant receives a sentence of a year or more.	Yes. ²⁷	n/a	Try to plead to 18 U.S.C. § 485 to avoid crime of moral turpitude.
18 U.S.C. § 494	Counterfeiting and forgery	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 513(a)	Securities of the States and private entities	Yes, under 8 U.S.C. § 1101(a)(43)(R) where defendant receives a sentence of a year or more. ²⁸	Possibly.	n/a	
18 U.S.C. § 545	Smuggling goods into the U.S.	Probably under fraud ground if loss to the victim exceeds \$10,000. The offense is possibly an aggravated felony under the theft ground if the defendant receives a sentence of a year or more.	Possibly. ²⁹	Not necessarily controlled substance ground where record of conviction does not indicate type of merchandise. ³⁰	The statute includes knowingly bringing into the United States any merchandise contrary to law, which appears to be the least likely offense under 18 U.S.C. § 545 to trigger immigration consequences.
18 U.S.C. § 656	Theft, embezzlement, or misapplication by bank officer or employee	Possibly a fraud offense under 8 U.S.C. § 1101(a)(43)(M)(i) if loss to victim exceeded \$10,000 or a theft offense if the defendant receives a sentence of a year or more. ³¹	Yes. ³²	n/a	<i>See Valansi v. Ashcroft</i> , 278 F.3d 203 (3d Cir. 2002) for possible strategy to avoid treatment as an aggravated felony.
18 U.S.C. § 758	High speed flight from immigration checkpoint	Unlikely.	Unlikely.	Yes, separate ground of deportability under 8 U.S.C. § 1227(a)(2)(A)(iv).	

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
18 U.S.C. § 793	Gathering, transmitting or losing defense information	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Possibly.	Possibly, under national security ground.	
18 U.S.C. § 798	Disclosing classified information	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Probably.	Possibly, under national security ground.	
18 U.S.C. § 842(h)	Offenses related to explosive materials	Yes, under 8 U.S.C. § 1101(a)(43)(E)(i).	Possibly.	Yes, under firearm ground.	
18 U.S.C. §§ 844(d)-(i)	Explosives	Yes, under 8 U.S.C. § 1101(a)(43)(E)(i).	Probably. ³³	n/a	
18 U.S.C. § 875	Interstate communications	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	
18 U.S.C. § 876	Mailing threatening communications	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	
18 U.S.C. § 877	Mailing threatening communications from foreign country	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably. ³⁴	Possibly under international child abduction ground.	
18 U.S.C. § 911	False claim to U.S. citizenship	Unlikely to be an aggravated felony.	Probably. ³⁵	Yes, under false claim to citizenship ground.	
18 U.S.C. § 912	Impersonation	Yes, under theft ground if defendant receives a sentence of a year or more or under fraud ground if loss to the victim exceeds \$10,000.	Yes. ³⁶	n/a	
18 U.S.C. §§ 922(g)(1), (2), (3), (4), or (5)(j), (n), (o), (p), (r)	Firearms offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E)(ii).	Depends on section.	Yes, under firearm ground.	
18 U.S.C. § 922(g)(5)	Unlawful possession or transportation of a firearm by certain noncitizens	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Unlikely.	Yes, under firearm ground.	
18 U.S.C. §§ 922(j), (n), (o), (p), (r)	Firearms offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Depends on section.	Yes, under firearm ground.	
18 U.S.C. § 924(h)	Transfer of a firearm for certain unlawful purposes	Yes, under 8 U.S.C. § 1101(a)(43)(E).	Possibly if record specifies unlawful purpose and unlawful purpose involves moral	Yes, under firearm ground and possibly also under controlled substance ground.	

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
			turpitude.		
18 U.S.C. § 871	Threats against the President	Likely to be a crime of violence if defendant receives a sentence of a year or more.	Likely.	Yes, under miscellaneous crimes ground.	
18 U.S.C. § 960	Expedition against friendly nation	Possibly.	Not necessarily.	Yes, under miscellaneous crimes ground.	
18 U.S.C. § 1001	False statements	Offense is divisible. If record of conviction indicates that offense involved fraud or deceit and loss to the victim exceeded \$10,000, then it would be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i). ³⁷	Probably. ³⁸	n/a	Pleading to a simple false. But not fraudulent statement is the least likely to trigger adverse immigration consequences.
18 U.S.C. § 1014	False statement on loan application	Yes, under theft offense ground if defendant receives a sentence of a year or more. ³⁹	Possibly. ⁴⁰	n/a	Pleading to a false non-material statement is the least likely to be a crime involving moral turpitude.
18 U.S.C. § 1028(a)	Fraud and related activity in connection with identification documents and information	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds \$10,000.	Yes, for those offenses for which fraud is an essential element.	n/a	Divisible statute.
18 U.S.C. § 1029(a)	Fraud and related activity in connection with access devices	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds \$10,000. Depending on the subsection, an offense may constitute an aggravated felony theft offense if defendant receives a sentence of a year or more.	Yes, all subsections involve "intent to defraud."	n/a	
18 U.S.C. § 1036	Entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds \$10,000.	Yes, if defendant admits to using a fraudulent pretense.	n/a	

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	airport				
18 U.S.C. § 1071	Concealing person from arrest	Unlikely.	Yes. ⁴¹	n/a	A plea to misprision of felony might be less likely to involve moral turpitude. ⁴²
18 U.S.C. § 1111	Murder	Yes, under murder aggravated felony ground.	Yes.	n/a	
18 U.S.C. § 1112	Manslaughter	Possibly a crime of violence if a defendant receives a sentence of a year or more. ⁴³	Yes. ⁴⁴	n/a	If defendant pleads to an offense that involves negligently taking life of another, it would not be a crime of violence. ⁴⁵
18 U.S.C. § 1113	Attempt to commit murder	Yes, under 8 U.S.C. § 1101(a)(43)(U) if defendant convicted of attempted murder.	Yes.	n/a	
18 U.S.C. § 1201	Kidnapping	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Yes.	n/a	
18 U.S.C. § 1202	Ransom proceeds	Yes, under 8 U.S.C. § 1101(a)(43)(H).	Probably.	n/a	
18 U.S.C. § 1341	Mail fraud	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds \$10,000.	Yes.	n/a	Investigate pleading to an offense under 18 U.S.C. § 1342 that involves use of mail for unlawful purpose other than fraud or deceit.
18 U.S.C. § 1342	Fictitious name or address	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i), where loss exceeds \$10,000 and where underlying offense involves fraud or deceit.	Yes, if defendant pleads to section that requires a fraudulent intent. It is possible to commit offense by using mail for an unlawful purpose other	n/a	Plead to use of mail for unlawful purpose other than fraud or deceit.

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
			than fraud.		
18 U.S.C. § 1343	Fraud by wire, radio, or television	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i) where loss exceeds \$10,000.	Yes.	n/a	
18 U.S.C. § 1344	Bank fraud	Yes, under 8 U.S.C. § 1101(a)(43)(M)(i) where loss exceeds \$10,000.	Yes.	n/a	See <i>Chang v. INS</i> , 307 F.3d 1185 (9th Cir. 2002) for discussion on calculating “loss to victim.”
18 U.S.C. § 1426(b)	Reproduction of naturalization or citizenship papers	Unlikely.	Yes. ⁴⁶	Possibly, under false claim to citizenship ground.	
18 U.S.C. § 1503	Influencing or injuring officer or juror generally	Yes, under 8 U.S.C. § 1101(a)(43)(S) if defendant receives a sentence of a year or more. ⁴⁷	Yes. ⁴⁸	n/a	
18 U.S.C. § 1510	Obstruction of justice	Yes, under obstruction of justice ground if defendant receives a sentence of a year or more. ⁴⁹	Probably.	n/a	Consider plea to misprision of felony.
18 U.S.C. § 1542	False statement in application and use of passport	Possibly, under 8 U.S.C. § 1101(a)(43)(P) where defendant receives a sentence of a year or more.	Yes. ⁵⁰	Possibly, if it is under false claim to citizenship ground.	
18 U.S.C. § 1543	Forgery or false use of passport	Aggravated felony under 8 U.S.C. § 1101(a)(43)(P) where defendant receives a sentence of a year or more.	Probably.	Possibly, under false claim to citizenship ground.	The statute creates an exception for a first offense in which a noncitizen aided only his or her spouse, child, or parent. If applicable, ensure that the record of conviction reflects that crime relates to family member

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
					covered by exception. Consider a possible plea under 18 U.S.C. § 1542, which is not enumerated as an aggravated felony offense under 8 U.S.C. § 1101(a)(43)(P).
18 U.S.C. § 1546(a)	Fraud and misuse of visas, permits, and other documents	Yes, under § 1101(a)(43)(P) where sentence imposed is at least one year.	Yes. ⁵¹	A conviction for violating 18 U.S.C. § 1546(a) is a separate ground of deportability under 8 U.S.C. § 1227(a)(3)(B)(iii).	The aggravated felony definition creates an exception for a first offense in which a noncitizen aided only his or her spouse, child, or parent. If applicable, ensure that the record of conviction reflects that crime relates to family member covered by exception.
18 U.S.C. § 1581	Peonage	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1582	Vessels for slave trade	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1583	Enticement into slavery	Yes, under ground "relating to peonage, slavery, and involuntary servitude."	Yes.	n/a	
18 U.S.C. § 1584	Sale into involuntary servitude	Yes, under ground "relating to peonage, slavery, and involuntary	Yes.	n/a	

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		servitude.”			
18 U.S.C. § 1585	Seizure, detention, transportation or sale of slaves	Yes, under ground “relating to peonage, slavery, and involuntary servitude.”	Yes.	n/a	
18 U.S.C. § 1588	Transportation of slaves from United States	Yes, under ground “relating to peonage, slavery, and involuntary servitude.”	Yes.	n/a	
18 U.S.C. § 1621	Perjury generally	Yes, under 8 U.S.C. § 1101(a)(43)(S) if defendant receives a sentence of a year or more.	Yes.	n/a	Consider plea to 18 U.S.C. § 1001 if possible.
18 U.S.C. § 1622	Subornation of perjury	Yes, under 8 U.S.C. § 1101(a)(43)(S) if defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 1708	Theft or receipt of stolen mail matter generally	Yes, under 8 U.S.C. § 1101(a)(43)(G) where defendant receives a sentence of a year or more. ⁵²	Yes. ⁵³	n/a	Consider a plea to delay of mail under 18 U.S.C. § 1703.
18 U.S.C. § 1952	Interstate and foreign travel or transportation in aid of racketeering enterprises	Yes, under drug trafficking ground where record of conviction established that underlying offense involved distribution of a controlled substance. ⁵⁴	Probably.	Possibly, under controlled substance ground where record of conviction establishes that underlying conduct involved a controlled substance. ⁵⁵	If possible, have record of conviction reflect that underlying offense did not involve distribution of a controlled substance.
18 U.S.C. § 1955	Prohibition of illegal gambling businesses	Yes, under 8 U.S.C. § 1101(a)(43)(J) where potential sentence of one year exists.	Probably.	n/a	
18 U.S.C. § 1956(a)(1)(A)	Laundering of money instruments	Yes, under money laundering grounds if amount of funds exceeds \$10,000. ⁵⁶	Probably.	n/a	Investigate whether there is a factual basis to plead to structuring transactions to avoid a reporting requirement in violation of 31 U.S.C. § 5322(b).
18 U.S.C. §	Engaging in	Yes, under 8 U.S.C. §	Probably.	Possibly depending on	

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
1957	monetary transactions in property derived from specified unlawful activity	1101(a)(43)(D) when amount of funds exceeds \$10,000.		underlying activity.	
18 U.S.C. § 1962	Racketeer influenced corrupt organizations (RICO) offenses	Yes, under 8 U.S.C. § 1101(a)(43)(J) where potential sentence of one year exists.	Probably.	Possibly, depending on underlying offense.	
18 U.S.C. § 2113(b)	Bank robbery and incidental crimes	Yes, under theft ⁵⁷ or crime of violence ⁵⁸ ground if defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 2114	Mail theft	Yes, under theft ground if defendant receives a sentence of a year or more. ⁵⁹	Yes.	n/a	
18 U.S.C. § 2241	Aggravated sexual abuse	Yes, under rape ground. ⁶⁰ Also a crime of violence if the defendant receives a sentence of a year or more. ⁶¹	Yes.	n/a	
18 U.S.C. § 2242	Sexual abuse	Yes, under rape ground. ⁶² Also a crime of violence ⁶³ if the defendant receives a sentence of a year or more.	Yes.	n/a	
18 U.S.C. § 2251	Sexual exploitation of children	Yes under sexual abuse of minor ground regardless of sentence imposed, and under trafficking ground. 8 U.S.C. § 1101(a)(43)(I).	Yes.	Yes, under domestic violence ground.	
18 U.S.C. § 2251A	Selling or buying of children	Yes, under sexual abuse of minor ground aggravated felony, regardless of sentence imposed, and under trafficking ground. 8 U.S.C. § 1101(a)(43)(I).	Yes.	Yes, under domestic violence ground.	
18 U.S.C. § 2252	Certain activities relating to material involving the	Yes, under sexual abuse of minor ground aggravated felony, regardless of sentence	Yes.	Yes, under domestic violence ground.	

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	sexual exploitation of minors	imposed, under 8 U.S.C. § 1101(a)(43)(I).			
18 U.S.C. §§ 2261	Interstate domestic violence	Possibly crime of domestic violence if defendant receives a sentence of a year or more.	Probably. ⁶⁴	Yes, under domestic violence ground.	
18 U.S.C. §§ 2262	Interstate violation of protection order	Possibly crime of domestic violence if defendant receives a sentence of a year or more.	Probably.	Yes, under domestic violence ground.	
18 U.S.C. § 2312	Transportation of stolen vehicles	Yes, under receipt of stolen property ground.	Yes.	n/a	
18 U.S.C. § 2313	Sale or receipt of stolen vehicles	Probably an aggravated felony under the theft ground if the defendant receives a sentence of a year or more or under the fraud or deceit ground if the loss to the victim exceeds \$10,000	Likely, depending on the crime committed.	n/a	
18 U.S.C. § 2314	Transportation of stolen goods	Yes, if loss to victim exceeds \$10,000, and under theft ground if defendant receives a sentence of a year or more.	Yes, where fraud is element of the offense. ⁶⁵	n/a	The offense that is least likely to trigger immigration consequences under 18 U.S.C. § 2313 would be transporting a falsely made security knowing the same to be a false security that is made with an unlawful intent.
18 U.S.C. § 2381	Treason	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Yes.	Yes, under national security grounds.	
18 U.S.C. § 2382	Misprision of treason	Yes, under 8 U.S.C. § 1101(a)(43)(L)(i).	Very likely.	Yes, under national security grounds.	
18 U.S.C. § 2421	Transportation of minors, generally	Yes, under ground relating to transportation for the purpose of prostitution if committed for	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense involved

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
		commercial advantage. ⁶⁶			commercial advantage.
18 U.S.C. § 2422	Coercion and enticement of minors	Yes, under ground relating to transportation for the purpose of prostitution if committed for commercial advantage.	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense involved commercial advantage.
18 U.S.C. § 2423	Transportation of minors	Yes, under ground relating to transportation for the purpose of prostitution if committed for commercial advantage.	Yes.	Yes, under domestic violence ground.	Try to avoid finding in record that offense involved commercial advantage.
18 U.S.C. § 2701(a)(1)	Unlawful access to stored communication	Possibly a theft offense if defendant receives a sentence of a year or more.	Probably not.	n/a	
18 U.S.C. § 3146	Penalty for failure to appear	Yes, under 8 U.S.C. § 1101(a)(43)(T) if the crime for which the defendant did not appear is a felony punishable by two years or more.	Probably not.	n/a	
18 U.S.C. § 3607	First Offender Act.	No.	No.	No.	
18 U.S.C. § 5031-5042	Juvenile Delinquency	No.	No.	No.	
19 U.S.C. § 1593	Smuggling merchandise	Probably not.	Yes. ⁶⁷	n/a	
20 U.S.C. § 1097(a)	Student loan fraud	Yes, fraud offense if loss to the victim exceeds \$10,000 or under theft ground where sentence is a year or more.	Yes, where fraud is element of offense. ⁶⁸	n/a	
21 U.S.C. § 333(b)	Prescription drug marketing violations	Yes, under drug trafficking ground.	Yes. ⁶⁹	Yes, under controlled substance ground.	
21 U.S.C. § 841(a)	Manufacture, distribution, or possession with intent to distribute	Yes, under drug trafficking ground.	Yes. ⁷⁰	Yes, under controlled substance ground.	
21 U.S.C. § 841(c)	Offenses involving listed chemicals	Yes, under drug trafficking ground.	Possibly. ⁷¹	Yes, under controlled substance ground.	
21 U.S.C. §§	Wrongful	Yes, under drug	Possibly.	Yes, under controlled	

STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
841(f)(1), (2)	distribution or possession of listed chemicals	trafficking ground.		substance ground.	
21 U.S.C. § 842(b)	Manufacture of a controlled substance	Yes, under drug trafficking ground.	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 843(b)	Communication facility	Yes, under drug trafficking ground. ⁷²	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 846	Attempt and conspiracy to violate controlled substance laws.	Depends on the law of the circuit. ⁷³	Possibly, depending on the subsection that the defendant violated.	Yes, under controlled substance ground.	
21 U.S.C. § 849(b)	Distribution or possession for sale within 1,000 feet of a truck stop or rest area	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 854(a)	Investment of illicit drug profits	Yes, under drug trafficking ground.	Possibly.	Yes, under controlled substance ground.	
21 U.S.C. § 856	Establishment of manufacturing operations	Yes, under drug trafficking ground.	Possibly. ⁷⁴	Yes, under controlled substance ground.	
21 U.S.C. § 859	Distribution to persons under age twenty-one	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 860	Distribution or manufacturing in or near schools and colleges	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 860(c)	Employing children to distribute drugs near schools or playgrounds	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 861	Employment or use of persons under 18 years of age in drug operations	Yes, under drug trafficking ground.	Possibly. ⁷⁵	Yes, under controlled substance ground.	
21 U.S.C. § 861(a)(3)	Receipt of a controlled substance from a person under 18 years of age.	Yes, under drug trafficking ground.	Possibly. ⁷⁶	Yes, under controlled substance ground.	
21 U.S.C. § 861(f)	Distribution of controlled substance to pregnant	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	

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STATUTE	OFFENSE	AGGRAVATED FELONY?	CRIME INVOLVING MORAL TURPITUDE?	OTHER GROUNDS OF DEPORTABILITY?	SUGGESTIONS
	individual				
21 U.S.C. § 863(a)	Trafficking in drug paraphernalia	Yes, under drug trafficking ground.	Possibly. ⁷⁷	Yes, under controlled substance ground.	
21 U.S.C. § 952(a)	Importation of controlled substances	Yes, under drug trafficking ground.	Probably.	Yes, under controlled substance ground.	
21 U.S.C. § 953(a)	Exportation of controlled substances	Yes, under drug trafficking ground.	Yes.	Yes, under controlled substance ground.	
21 U.S.C. § 959(a)	Possession, manufacture, or distribution of controlled substance	Yes, under drug trafficking ground.	Yes, if offense involves distribution. ⁷⁸	Yes, under controlled substance ground.	
26 U.S.C. § 2803(a)	Conspiracy to transport spirits without tax stamps	No.	No. ⁷⁹	No.	
26 U.S.C. § 5861	Firearm offenses	Yes, under 8 U.S.C. § 1101(a)(43)(E)(iii).	Probably not.	Yes, under firearm ground.	
31 U.S.C. § 5322	Criminal violation of banking regulations	No.	No. ⁸⁰	n/a	
31 U.S.C. § 5324	Structuring financial transactions to evade reporting requirement and related offenses	Unlikely.	No. ⁸¹	n/a	
42 U.S.C. § 408	Reporting false Social Security number	Yes, under fraud or deceit ground when loss to the victim exceeds \$10,000. ⁸²	Possibly. ⁸³	n/a	
50 U.S.C. § 421	Revealing identity of certain United States undercover intelligence officers, agents, informants, and sources	Yes, under 8 U.S.C. §§ 1101(a)(43)(L)(ii), (iii).	Probably.	n/a	
50 U.S.C. App. § 462	Evading draft	No.	Not a crime involving moral turpitude. ⁸⁴	n/a	

Endnotes:

1. *Matter of Ruiz-Romero*, 22 I & N Dec. 486 (BIA 1999) (holding that parenthetical reference limiting aggravated felony to only smuggling is “merely descriptive” rather than limiting); *United States v. Galindo-Gallegos*, 244 F.3d 1154 (9th Cir. 2001); *Gavilan-Cuate v. Yetter*, 276 F.3d 418 (8th Cir. 2002); *Patel v. Ashcroft*, 294 F.3d 465 (3d Cir. 2002) (ignoring parenthetical and treating harboring conviction as an aggravated felony); *Castro-Espinoza v. Ashcroft*, 257 F.3d 1130 (9th Cir. 2001) (same).
2. *Matter of Tiwari*, 19 I & N Dec. 875 (BIA 1989).
3. *Matter of Alvarado-Alvino*, 22 I & N Dec. 718 (BIA 1998) (holding not an aggravated felony conviction where defendant had no prior conviction); *Rivera-Sanchez v. Reno*, 198 F.3d 545 (5th Cir. 1999) (same).
4. *Rodriguez v. Campbell*, 8 F.2d 983 (5th Cir. 1925).
5. *Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) (holding that noncitizen convicted of accessory to drug crime is deportable under obstruction of justice aggravated felony ground). *But see Matter of Espinoza-Gonzalez*, 22 I & N Dec. 889 (BIA 1999) distinguishing, but not overruling *Batista* while holding that misprision conviction does not constitute obstruction of justice aggravated felony).
6. *Cabral v. INS*, 15 F.3d 193 (1st Cir. 1994) (holding that accessory to murder is a crime involving moral turpitude); *Matter of Sanchez-Marin*, 11 I & N Dec. 264 (BIA 1965) (holding that a conviction for accessory to manslaughter is a crime involving moral turpitude).
7. *Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) (holding that accessory to drug trafficking offense is not a controlled substance offense).
8. *Matter of Espinoza-Gonzalez*, 21 I & N Dec. 291 (BIA 1999).
9. *Compare Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (holding conviction under 18 U.S.C. § 4 is a crime involving moral turpitude); *Matter of Giraldo-Valencia*, A26 520 954 (BIA Index Dec. Oct 22, 1992) (distinguishing between common law and statutory misprision offenses in holding that federal misprision under 18 U.S.C. § 4 is a crime involving moral turpitude) *with Matter of S-C-*, 3 I & N Dec. 350 (BIA 1949) (holding that common law crime of misprision of felony is not a crime involving moral turpitude).
10. *Matter of Velasco*, 16 I & N Dec. 281 (BIA 1977); *Castaneda De Esper v. INS*, 557 F.2d 79 (6th Cir. 1977) (holding that conviction for 18 U.S.C. § 4 of conspiracy to possess heroin is not conviction relating to possession or traffic in narcotic drugs under former 8 U.S.C. § 1251(a)(11)).
11. In light of the Supreme Court’s decision in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004), there is an argument that this offense lacks sufficient intentionality to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).
12. *Matter of Danesh*, 19 I & N Dec. 669 (BIA 1988).
13. *See, e.g., Okabe v. INS*, 671 F.2d 863 (5th Cir. 1982); *Matter of H*, 6 I & N Dec. 358 (BIA 1954).
14. *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004).
15. There is an argument that a conviction for a simple false statement under 18 U.S.C. § 1001(a)(2) is not necessarily a conviction for a crime involving moral turpitude. *See Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962) (holding that a conviction under predecessor statute 18 U.S.C. § 80 did not necessarily involve moral turpitude because a simple false statement does not necessarily involve fraud); *Matter of Marchena*, 12 I & N Dec. 355 (BIA 1967).
16. *Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004)
17. *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (regarding conviction for conspiracy to export firearms without a license).
18. *Jordan v. De George*, 341 U.S. 223 (1951) (treating as a crime involving moral turpitude any conviction for an offense that has fraud as an essential element).
19. *See, e.g., Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (holding that conviction for conspiracy to export firearms is a firearm offense because it involves a conspiracy to commit a firearm offense).
20. Although solicitation to commit a controlled substance offense is not a drug trafficking aggravated felony in the Ninth Circuit, it is not clear that reasoning would apply to the crime of violence ground. *See United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).
21. *Compare United States v. Galin*, 217 F.3d 847 (9th Cir. 2000) (holding that charge under 18 U.S.C. § 401(3) does not require finding of obstruction of justice) *with Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004) (following BIA analysis in *Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) to hold that a conviction under 18 U.S.C. § 401(3) was an aggravated felony under the obstruction of justice ground).
22. *See Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000).
23. *Lozano-Giron v. INS*, 506 F.2d 1073 (7th Cir. 1974); *Matter of Lethbridge*, 11 I & N Dec. 444 (BIA 1965).
24. *Matter of Martinez*, 16 I & N Dec. 336 (BIA 1977).
25. *Matter of Lethbridge*, 11 I & N Dec. 444 (BIA 1973).
26. *Matter of K*, 7 I & N Dec. 178 (BIA 1956).

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27. *Matter of K*, 71 I & N Dec. 178 (BIA 1956).
28. *Kamagate v. Ashcroft*, 385 F.3d 144 (2d Cir. 2004) (holding that violation of 18 U.S.C. §513(a) is an aggravated felony under the counterfeiting ground).
29. *Compare Eyoum v. INS*, 125 F.3d 889 (5th Cir. 1997) (holding that conviction for importation of pancake turtles is not a crime involving moral turpitude) with *Matter of D*, 91 I & N Dec. 602 (BIA 1962) (holding that smuggling liquor with intent to defraud U.S. is a crime involving moral turpitude).
30. *See U.S. v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002) (holding it is not a requirement that defendant know the type of merchandise defendant is importing).
31. *Compare Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001) (holding that conviction of misapplication of bank funds constituted an aggravated felony because crime necessarily involved fraud or deceit) with *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) (holding that conviction for embezzling in excess of \$400,000 in cash and checks from bank employer was not an aggravated felony where record was inconclusive regarding intent). *See Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2003) (imposing distinct requirements when offense involves both fraud and theft aggravated felony grounds).
32. *Matter of Batten*, 11 I & N Dec. 271 (BIA 1965).
33. There is a small possibility that 18 U.S.C. §§ 844(g) and (h) would not involve moral turpitude. For a person charged with using or carrying an explosive in the commission of a federal felony pursuant to 18 U.S.C. § 844(h), the defendant should plead to committing a felony that does not involve moral turpitude, if possible.
34. *Matter of P*, 5 I & N Dec. 444 (BIA 1953) (interpreting conviction under the predecessor statute as a crime involving moral turpitude).
35. *Compare White v. INS*, 6 F.3d 1312 (8th Cir. 1993) (treating conviction as a crime involving moral turpitude) with *Matter of I*, 4 I & N Dec. 159 (BIA 1950) (holding that conviction under former 8 U.S.C. § 746(18) does not involve moral turpitude).
36. *Matter of B*, 6 I & N Dec. 702 (BIA 1955); *Matter of Gonzalez*, 16 I & N Dec. 134 (BIA 1977).
37. *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. 2004).
38. There is an argument that a conviction for a simple false statement under 18 U.S.C. §1001(a)(2) is not necessarily a conviction for a crime involving moral turpitude. *See Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962) (holding that a conviction under predecessor statute 18 U.S.C. § 80 did not necessarily involve moral turpitude because a simple false statement does not necessarily involve fraud); *Matter of Marchena*, 12 I & N Dec. 355 (BIA 1967).
39. *See United States v. Dabeit*, 231 F.3d 979 (5th Cir. 2000) (involving conviction under 18 U.S.C. §§ 1014 and 2113(b) for check kiting conspiracy). Section 1014 of 18 U.S.C. may be an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i) also.
40. Since materiality is not an element of the offense, a false statement that is not material would not be a conviction for a crime involving moral turpitude. *See Matter of Marchena*, 12 I & N 355 (BIA 1967) (determining that false statement under 18 U.S.C. § 1001, before it had a materiality element, did not necessarily involve moral turpitude).
41. *Matter of Sloan*, 12 I & N Dec. 840 (BIA 1966, AG 1968).
42. *See Matter of S-C-*, 3 I & N Dec. 350 (BIA 1949) (holding that common law crime of misprision of felony is not a crime involving moral turpitude) *Compare Itani v. Ashcroft*, 298 F.3d 1213 (11th Cir. 2002) (holding conviction under 18 U.S.C. § 4 is a crime involving moral turpitude) with *Matter of Giraldo-Valencia*, A26 520 954 (BIA Index Dec. Oct 22, 1992) (distinguishing between common law and statutory misprision offenses in holding federal misprision under 18 U.S.C. § 4 is a crime involving moral turpitude).
43. *See Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004) (requiring at least a mental state of recklessness for an offense to be a crime of violence under 18 U.S.C. §16). *See also Lara-Cazares v. Gonzales*, 408 F.3d 1217, 2005 U.S. App. LEXIS 9349 (9th Cir. May 23, 2005) (holding that California vehicular manslaughter was not a crime of violence because mental state of gross negligence did not satisfy *Leocal* test).
44. *Matter of Franklin*, 20 I&N 867 (BIA 1994).
45. *See Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004) (requiring at least a mental state of recklessness for an offense to be a crime of violence under 18 U.S.C. §16). *See also Lara-Cazares v. Gonzales*, 408 F.3d 1217, 2005 U.S. App. LEXIS 9349 (9th Cir. May 23, 2005) (holding that California vehicular manslaughter was not a crime of violence because mental state of gross negligence did not satisfy *Leocal* test).
46. *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).
47. *See Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) (treating offenses like those labeled obstruction of justice under 8 U.S.C. §§ 1501-1518 as aggravated felonies); *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004) (same).
48. *Knoetze v. U.S. Dept. of State*, 634 F.2d 207 (5th Cir. 1981).
49. *See Matter of Batista-Hernandez*, 21 I & N Dec. 955 (BIA 1997) (treating offenses comparable to 18 U.S.C. §§ 1501-1518 as obstruction of justice offenses); *Alwan v. Ashcroft*, 388 F.3d 507 (5th Cir. 2004) (same).
50. *Bisaillon v. Hogan*, 257 F.2d 435 (9th Cir. 1958); *Matter of B*, 7 I & N Dec. 342 (BIA 1956).
51. *See Matter of Serna*, 20 I & N Dec. 579 (1992) (holding that offense involves moral turpitude only if record of conviction reflects that defendant intended to use the document).

52. *Randhawa v. Ashcroft*, 298 F.3d 1148 (9th Cir. 2002).
53. *Okoroha v. INS*, 715 F.2d 380 (8th Cir. 1983); *Matter of F*, 7 I & N Dec. 386 (BIA 1957) (holding that comparable state statute involved moral turpitude).
54. *Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003); *United States v. Rodriguez-Duberney*, 326 F.3d 613 (5th Cir. 2003).
55. *Urena-Ramirez v. Ashcroft*, 341 F.3d 51 (1st Cir. 2003); *Johnson v. INS*, 971 F.2d 340 (9th Cir. 1992) (holding that conviction under 18 U.S.C. § 1952 was a controlled substance offense).
56. *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (rejecting government attempt to include restitution amount as measure of funds laundered).
57. 8 U.S.C. § 1101(a)(43)(G).
58. 8 U.S.C. § 1101(a)(43)(F).
59. 8 U.S.C. § 1101(a)(43)(G).
60. 8 U.S.C. § 1101(a)(43)(A).
61. 8 U.S.C. § 1101(a)(43)(F).
62. 8 U.S.C. § 1101(a)(43)(A).
63. 8 U.S.C. § 1101(a)(43)(F).
64. *See Matter of Tran*, 21 I. & N. Dec. 291 (BIA 1996).
65. *See United States v. Castro*, 26 F.3d 557 (5th Cir. 1994).
66. *See* 8 U.S.C. § 1101(a)(43)(K)(ii).
67. *Matter of De S*, 1 I & N Dec. 553 (BIA 1943).
68. *Kabongo v. INS*, 837 F.2d 753 (6th Cir. 1988) (holding conviction for offense is a crime involving moral turpitude); *Izedonmwun v. INS*, 37 F.3d 416 (8th Cir. 1994) (same).
69. *Matter of P*, 6 I & N Dec. 795 (BIA 1955).
70. *See, e.g., Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
71. *See Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
72. *United States v. Orihuela*, 320 F.3d 1302 (11th Cir. 2003).
73. *Compare Matter of Yanez*, 23 I & N Dec. 390 (BIA 2002) *with Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002).
74. *See Matter of Khourn*, 21 I & N Dec. 293 (BIA 1992).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Matter of G*, 7 I & N Dec. 114 (BIA 1956).
80. *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (conviction under 31 U.S.C. §§ 5322(b), 5324(a)(3) not a crime involving moral turpitude.); *Matter of L-V-C-*, 22 I & N Dec. 594 (BIA 1999) (same).
81. *Matter of L-V-C*, 22 I & N Dec. 594 (BIA 1999).
82. *St. John v. Ashcroft*, 43 Fed. Appx. 281 (10th Cir. 2002) (rejecting argument that restitution amount was not equivalent to loss to victim).
83. *Compare Matter of Adetiba*, 20 I & N Dec. 506 (BIA 1992) (finding that conviction involves moral turpitude) *with Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (relying on limited statutory amnesty for people who present false social security cards to conclude that the offense is not a conviction for a crime involving moral turpitude).
84. *Matter of S*, 5 I & N Dec. 425 (BIA 1953). ■

USING OUR STATE CONSTITUTION

By Rebecca Ballard DiLoreto

The Fourteenth Amendment, in particular, can be a powerful tool for litigating issues of racial fairness. However, we should not forget about our state laws, which sometimes can go farther than the Federal Constitution in demanding racial fairness. A number of state courts have developed their own standards on independent state grounds for the claims covered in this manual. For example, under the Colorado Constitution, “defense counsel [has] a right and an obligation to inquire into the racial views of the venire members in the interest of obtaining a fair and impartial jury.”¹ Connecticut has also permitted extensive questioning about the impact of race as a matter of state constitutional law. This has extended well beyond cases involving interracial, violent crime.² Indeed, Connecticut’s courts have said, “Our state, by constitutional provision, allows the questioning of each prospective juror individually by counsel, and, within that framework, counsel is entitled to interrogate on the subject of race prejudice.”³ Other states have developed their rules as a matter of statutory interpretation. For example, Georgia reached the same result as the Supreme Court on the need for voir dire on racial issues, on the basis of its own statutory requirements.⁴

Other state appellate courts have exercised their “supervisory authority” to create such rules. For example, Maryland expressly adopted a rule broader than *Ristaino v. Ross*,⁵ as a matter of state non-constitutional criminal law. Exercising its supervisory authority over state courts, the Maryland high court held that questioning as to racial prejudice was required in a prosecution of an African-American for possession of cocaine.⁶ It is not necessary that there be an interracial, violent crime; voir dire should be permitted at the request of the defendant, to discover if any potential juror harbors a disqualifying bias.⁷ New Jersey law is similar. “Even in cases with no interracial crime or obvious racial overtones, this Court has stated that it prefers a searching inquiry into racial bias, if so requested by the defendant.”⁸ Seemingly exercising its supervisory powers over lower courts, the Arkansas Court of Appeals has required questioning about racial bias in a case in which an African American was charged with delivery of a controlled substance.⁹

There is precedent in Kentucky for courts using the state constitution to reach areas not reached by federal law.¹⁰ Perhaps the most pertinent example of the Kentucky law going where federal law would not was the case of *Commonwealth v. Wasson*.¹¹ In *Wasson*, the Supreme Court considered a challenge to Kentucky’s sodomy law. A similar law in Georgia had been upheld by the United States Supreme Court six years earlier.¹² In addressing the statute, the Kentucky Supreme Court concluded that Kentucky’s Constitution offers even more protection and is more extensive than the federal Equal Protection Clause. In *Wasson* our Supreme Court recognized the breadth of Kentucky Constitution Sections 2 and 3, which read:

Section 2. Absolute and arbitrary power over the lives
liberty and property of freemen exists nowhere
in a republic, not even in the largest majority.

Section 3 All men, when they form a social compact are equal.

As the Kentucky Supreme Court observed, “[c]ontrary to popular belief, the Bill of Rights in the United States Constitution represents neither the primary source nor the maximum guarantee of state constitutional liberty. Our own constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution.”¹³ The Supreme Court found that the “right to privacy” in Kentucky was broader than the federal equivalent, and prohibited the state from regulating consensual sexual contact. In explaining its decision, the Court said:

To be treated equally by the law is a broader constitutional value than due process of law... We recognize it as such under the Kentucky Constitution, without regard to whether the United States Supreme Court continues to do so in federal constitutional jurisprudence. “Equal Justice Under Law inscribed above the entrance to the United States Supreme Court, expresses the unique goal to which all humanity aspires. In Kentucky it is more than a mere aspiration. It is part of the “inherent and inalienable” rights protected by our Kentucky Constitution...”¹⁴

With the example of *Wasson* in mind, perhaps the time has come to reemphasize the breadth of our state constitution in litigating the issues discussed in this manual. However, the Kentucky Constitution is not the only area of the law which demands fairness from the Court of Justice. State statutes can also be used to attack racial bias. Perhaps the most well known statute on the issue is the Racial Justice Act.¹⁵ Not only does that Act prohibit prosecutors from seeking the death penalty because of race, but it sets forth a procedure which authorizes the use of statistical evidence to show that race was a “significant factor” in the decision to seek death.¹⁶ These protections are much more robust than what the Fourteenth Amendment requires.¹⁷

While we should endeavor to use state law whenever possible, we should nevertheless proceed with caution, without waiving any federal claims our clients might have. While there are many who are critical of how the Anti-Terrorism and Effective Death Penalty Act has cut back on a habeas petitioner’s right to seek protection from the Fourteenth Amendment in federal court, the fact is that those restrictions have placed a larger ethical responsibility on the state court practitioner to properly preserve challenges to racial discrimination on state and federal grounds.¹⁸

Endnotes:

1. *People v. Baker*, 924 P.2d 1186, 1191 (Colo. Ct. App. 1996).
2. *State v. Tucker*, 629 A.2d 1067, 1078 (Conn. 1993)
3. *State v. Marsh*, 362 A.2d 523, 525 (Conn. 1975) (sale of narcotics); see also *State v. Smith*, 608 A.2d 63, 66-67 (Conn. 1992) (collecting cases).
4. Compare *Turner v. Murray* 476 U.S. 28 (1986) with *Legare v. State*, 348 S.E.2d 881, 881-82 (Ga. 1986) (citing Ga. Code Ann. § 15-12-133 (1986));
5. 96 S.Ct. 1017 (1976),
6. *Hill v. State*, 661 A.2d 1164, 1169 (Md. 1995); see also *Bowie v. State*, 595 A.2d 448, 453 (Md. 1991) (holding that questioning as to racial prejudice is required in a trial of an African-American charged with murder) and cases cited therein
7. *Hill*, 661 A.2d at 1168-69.
8. *State v. McDougald*, 577 A.2d 419, 434 (N.J. 1990) (involving a murder case in which the defendant and victims are of same race) (citing *State v. Ramseur*, 524 A.2d 188, 250 (N.J. 1988)); accord *State v. Loftin*, 680 A.2d 677, 736-39 (N.J. 1996) (O’Hern, J., dissenting) (collecting capital cases); *State v. Horcey*, 629 A.2d 1367, 1370-71 (N.J. Super. App. Div. 1993) (collecting cases).
9. See *Smith v. State*, 800 S.W.2d 440, 441 (Ark. Ct. App. 1990); see also *Cochran v. State*, 505 S.W.2d. 520, 521 (Ark. 1974) (holding that voir dire questioning on racial prejudice is required when an African-American defendant is charged with assaulting a Caucasian police officer).
10. See, e.g., *Baucom v. Commonwealth*, 134 S.W.3d 591 (Ky. 2004)(Kentucky constitution recognizes a right to hybrid representation); *Dean v. Commonwealth*, Ky., 777 S.W.2d 900 (1989) (overruled on other grounds, *Caudill v. Commonwealth*, Ky., 120 S.W.2d 635 (2003))(right to personal confrontation can only be waived by the defendant personally, not by counsel); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (1989) (Kentucky’s constitution affords greater coverage for children in matters of public education than in the federal Equal Protection Clause of the Fourteenth Amendment)
11. 842 S.W.2d 487, 497 (Ky. 1992)
12. *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), overruled in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)
13. *Wasson* at 492.
14. *Wasson* at 501.
15. KRS 532.300-532.309
16. KRS 532.300(2) and (3)
17. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996)(permitting litigation into selective enforcement only if it could be shown that the crime was enforced against one group, and not against another).
18. See O’Connor, Michael P., *Time out of Mind: Our Collective Amnesia About the History of the Privileges and Immunities Clause*, 93 Ky. L.J. 659 (2004-2005). ■



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and federal prisons and jails nationwide in 1972,² to more than 2.3 million people as of June 30, 2009.³ This number translates to 748 inmates per 100,000 U.S. residents.⁴ More than one in every 100 adult U.S. residents lives behind bars.⁵

The racial dimension behind these numbers is well-known to criminal defense attorneys. In 2009, Blacks comprised less than 13 percent of the U.S. population, but accounted for almost 40 percent of the jail and prison population.⁶ In that same year, Latinos also comprised less than 15 percent of the U.S. population, but accounted for 20 percent of the jail and prison population.⁷ In 2009, African American men, with an incarceration rate of 4,749 inmates per 100,000 U.S. residents, were incarcerated at a rate more than six times higher than that of white men (708 inmates per 100,000 U.S. residents), and Latino men (1,822 inmates per 100,000 U.S. residents) were incarcerated at a rate more than 2.5 times higher than white men.⁸ Also in 2009, African American women, with an incarceration rate of 333 per 100,000, were 3.6 times more likely than white women (91 per 100,000) to be in prison or jail, and the incarceration rate for Latino women, at 142 per 100,000, was one and a half times the incarceration rate for white women (91 per 100,000).⁹

Raising Race

“It is not permissible that the authors of devastation should be innocent. It is the innocence which constitutes the crime.”

James Baldwin

MY DUNGEON SHOOK: LETTER TO MY NEPHEW ON THE ONE HUNDRETH ANNIVERSARY OF EMANCIPATION

I. Introduction

A. Disproportionate Minority Contact: The Problem

The statistics are familiar and jarring. Beating out even China, the United States has the highest incarceration rate in the world.¹ The U.S. incarceration rate has increased roughly six-fold, from fewer than 350,000 people in state

U.S. taxpayers spend upwards of \$35 billion each year to build and maintain prisons.¹⁰ Switching from the view at 30,000 feet to the view on the ground, these numbers mean that one in nine black men between the ages of 20 and 34 is behind bars, and one in one hundred black women in their mid- to late-30s is incarcerated.¹¹

This trend extends to juvenile delinquency courts. For example, in 2007 juvenile arrest statistics showed that while African American youth accounted for only 17 percent of the general population, they comprised 51 percent of arrests for juvenile violent arrests and 32 percent of arrests for juvenile property arrests. It is well-documented that “youth of color enter and stay in the system with much greater frequency than White youth” in nearly all juvenile justice systems.¹²

The criminal justice system has exploded outside of the prison walls, as well. As of 2009, the number of people under criminal justice supervision — including those who are in jail, in prison, on probation, and on parole — totaled 7.2 million people.¹³ In a dismaying parallel to incarceration rates, people of color are also overrepresented among arrestees, probationers, and parolees.¹⁴ There are more

BY ROBIN WALKER STERLING

African Americans under correctional control today than were enslaved in 1850.¹⁵ And as of 2004, there are more African American men who are denied the right to vote due to felon disenfranchisement laws than were denied the right to vote in 1870, the year the Fifteenth Amendment outlawed measures that explicitly denied the right to vote on the basis of race.¹⁶

Perhaps surprisingly, the rising incarceration rate does not track crime rates. Sociologists have long noted that punishment has more to do with social control than with crime rates, and the United States exemplifies this reality.¹⁷ The U.S. prison population has grown almost every year since 1970.¹⁸ And that growth has been constant — increasing “in years of rising crime and falling crime, in good economic times and bad, during wartime and while we were at peace.”¹⁹ In stark contrast, the current crime rate hovers around 1970s levels, when just under 200,000 people were incarcerated, and when the incarceration explosion started. Nor can the prison boom be credited with the subsequent decline in crime rates to historic lows.²⁰ A close look at the data reveals that the prison population continued to grow independent of crime rates, which, after the mid-1990s, began to decline and remained relatively low.²¹

With numbers like these, it is clear that this overrepresentation of minorities in the criminal justice system, or disproportionate minority contact (DMC), is one of the major human rights violations of our time.

B. Disproportionate Minority Contact: The Causes

Although DMC has been extensively documented in jurisdictions across the country and is widely decried, the numbers consistently climb. The possible social causes behind this disparate treatment are complex and varied and include conscious or unconscious racial bias by various criminal justice system actors in arrest decisions,²² charging decisions, bail determinations, sentencing,²³ and parole and probation practices;²⁴ the disparate impact of the war on drugs;²⁵ and the consistent and widespread underfunding of public defender services.²⁶

The possible legal causes of DMC are just as vexing. The legal standard for proving impermissible invidious racial discrimination is hopelessly tied to overt intent in a time when the social opprobrium attached to overt expressions of racial bias is significant. The U.S. Supreme Court has played a key role in creating

this dilemma. Perhaps the most famous (and disappointing) example of the Supreme Court’s failure to address race bias in the criminal justice system is its decision in *McCleskey v. Kemp*.²⁷ *McCleskey* considered racial disparities in the administration of the death penalty through presentation of the findings of an intensive and meticulous study of 2,000 capital cases in Georgia. The Court held that racial bias in sentencing could not be challenged on Fourteenth Amendment equal protection grounds without evidence of clear, discriminatory intent. More than insulating criminal sentencing against challenges based on race bias, this decision established that a certain amount of racial bias in administration of the death penalty was constitutionally acceptable.²⁸ Stating that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,”²⁹ the Court expressed concern that “[i]f we accepted *McCleskey*’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”³⁰ In his dissent, Justice Brennan summed up the majority’s rationalization with five words: “fear of too much justice.”³¹

Two other cases provide examples of the Court’s treatment of race bias in the criminal justice system. The first is well-known to any criminal defense attorney who has filed a suppression motion for a traffic stop in a “high drug area.”³² In *Whren v. United States*,³³ the Court held that police officers may use minor traffic violations as a pretext to stop drivers for suspected drug involvement. The *Whren* facts are particularly striking because the *Whren* police officers had no evidence to suspect the defendant and his passenger, both Black,³⁴ of involvement in a drug crime besides the Washington, D.C., neighborhood in which they were stopped. According to the Court, a police officer’s possible racial bias in making traffic stops is inconsequential to the determination of whether the officer’s behavior was “reasonable” under the Fourth Amendment so long as the officer can point to an actual traffic violation.³⁵ The second is *United States v. Armstrong*,³⁶ in which the Court ruled that, in order to win discovery on a selective prosecution claim, the defendant must first present evidence that similarly situated white defendants have been treated differently. The Court literally required the defendant to produce in advance the exact evidence the defendant was asking to be allowed to obtain as part of discovery. With cases like these, it seems almost

impossible to vindicate constitutional claims based on race discrimination.

Juxtaposing the cold record of these cases and the cold reality of the country’s record of disproportionate minority contact brings the paradox into stark relief: the practice of race discrimination has evolved, but the law against race discrimination has not. While the shadow cast by the criminal justice system has grown darker and larger, the cultural understanding of what constitutes racism has narrowed.³⁷ We subscribe to the “perpetrator model of racism,” which “defines racism narrowly and sees discrimination from the perspective of the perpetrator.”³⁸ But the reality of contemporary racism is that it is difficult, if not impossible, to ascribe its effects to the discrete, intentional action of a single person. As it operates now, the criminal justice system ensnares unprecedented numbers of people of color “with penal policies broadening in ways that render the identification of racial intent and causation especially difficult.”³⁹ Although we do have political leaders engaging the issue of race using coded language, we do not often see people shouting anything as overt as “Segregation now, segregation tomorrow, segregation forever!” Instead, it feels as though the criminal justice system has taken on a life of its own, becoming more than the sum of the millions of individuals who make up its parts, to simply charge ahead and accomplish with almost unassailable efficiency the discrimination that George Wallace advocated.

Many of those millions of individuals are police officers, prosecutors, and judges, and how the discretion they command contributes to the problem has been well-documented.⁴⁰ Simply put, the realities of day-to-day practice allow DMC to flourish. The problem starts with discretion at arrest and is compounded at every stage. In the initial on-the-street encounter, police officers enjoy virtually untrammelled discretion regarding where to police and whom to stop, search, arrest, and charge. Prosecutors have even more discretion, including whether to charge at all, what to charge (or overcharge) and, as a corollary, what possible penalties the defendant will face, whether to offer a reasonable plea agreement, the time limit to put on the plea agreement, and whether to condition the plea offer on what motions defense counsel might file. For their part, once the case is in court, judges grant extraordinary deference to both the officer’s on-the-street judgment call, considering the “totality of the circumstances” as the officer relays them, and to the prosecutor’s charging decision. And of course,

judges have enormous discretion in conducting the trial as well as at sentencing if the defendant is convicted.

C. Disproportionate Minority Contact: Role of the Defense Attorney

But what is the role of the defense attorney? Are they the check on the system? Are they inadvertently complicit, exacerbating the problem instead of alleviating it? Are other system actors correct when they complain that defense attorneys are simply unreasonable obstructionists, elevating rights instead of doing right? If defense attorneys can make sure that police officers abide by the Fourth and Fifth Amendments, that prosecutors observe due process, and that judges do not abuse their discretion, shouldn't they be able to confront this problem, too?

Make no mistake: tackling DMC from the defense side is an uphill battle. There are enormous systemic, financial, and other pressures that make it extremely difficult for criminal defense attorneys to raise and vindicate claims based on racial bias. The problems are widespread and well-documented. States almost uniformly underfund their criminal defense delivery systems. Across the country, public defenders, contract counsel, and appointed counsel have caseloads so staggering as to compromise representation in ways too numerous to list; cases must be triaged instead of tried. Particularly in small jurisdictions where defense counsel's contract or appointment must be approved by a judge or prosecutors, raising a powder keg of an issue like race discrimination might be the difference between having a job and losing a job. As described above, creative legal advocacy in this area too often leads to precedents that make raising race issues more difficult for subsequent defendants. And, there can be tension between the tactics a defender would employ on behalf of an individual client and tactics that would support systemic change. This tension can especially characterize DMC strategies, for example, where an individual case might not have overtly racial issues, but where the client fits into a population of defendants that is disproportionately arrested, overcharged, or incarcerated or detained.

But defense attorneys are the ones positioned to take this on, if not by virtue of power and discretion, then by virtue of the urgency of firsthand experience. Studies show that defense attorneys are more concerned than other system actors about DMC. According to a recent study,

“[b]y a very wide margin, defense attorneys are most inclined to strongly agree or agree that minority overrepresentation is a problem, followed by probation officers and judges. Few prosecutors express any agreement with this statement.”⁴¹ Criminal defense attorneys are more likely to agree that DMC is a problem because their clients feel its impact in courts across the country every day.

The goal of this short article is to suggest concrete tactics and strategies that criminal defense attorneys might use⁴² in individual cases to get race discrimination and bias issues before the court and on the record. These tactics will not necessarily win the substantive argument. Here, winning means creating a courtroom situation in which race discrimination and bias issues are openly joined on the record instead of relegated to the background. This is a sensitive and frustrating topic because, while most defense attorneys agree there is a serious problem with disproportionate minority contact that affects the day-to-day practice in criminal cases, there is little agreement on effective ways that defense attorneys can attack the problem in the cases of their individual clients. Perhaps individual defense attorneys around the country have tried many of these ideas. This list is not exhaustive. Certainly, there are many other ideas that could be added to the list. The hope is that the beginning of a collection of ideas, here, will inspire an intentional and concerted effort — in specific courthouses, in specific counties, or even in courtrooms across the country. The article will proceed in two parts. Part II will suggest steps that public defender offices, as well as appointed and contract defense attorneys, can take to address the problem systemically. Part III will propose motions and arguments that defense attorneys can make at various stages of litigation to bring DMC to the court's attention.

II. Systemic Changes

As of 2004, only 19 states have a government-funded, statewide public defender system providing trial and appellate level representation statewide in felonies, misdemeanors, and juvenile delinquency cases.⁴³ Other states have hybrid systems, providing public defense services through a combination of contract and appointed counsel. The following suggestions are meant to be adopted by public defender offices, but can also be adopted in counties like Clark County in Washington, where contract counsel are organized and work together to advocate for issues on their own behalf and on behalf of their clients.

A. DMC Practice Group

Public defense offices that want to make combating DMC a priority will dedicate resources to litigating it. These resources can include the time, talent, and effort of a small number of staff attorneys allowed to develop expertise in this area of criminal and juvenile practice; office file space for a DMC bank of cases, case law, pleadings, and other materials; and trainings by these attorneys.

This type of practice group is familiar to public defender offices around the country, but the practice groups usually center on creating a core group of attorneys specializing in a particular kind of case, such as sex offenses or homicides, or around a legal issue such as forensic evidence or sex offender registration. Offices can import this same model to designate a core group of attorneys who will specialize in raising and litigating issues of race in criminal and juvenile cases. This practice group should plan to attack the issue from at least three different dimensions: (1) collecting data; (2) drafting motions and developing arguments; and (3) working with community groups, participating in state DMC coalitions, and engaging in legislative advocacy.

1. Data Collection: Keep Your Own Statistics

Local data is critical to mounting a successful effort at reducing DMC. Sadly, the status of record keeping for DMC statistics varies widely from jurisdiction to jurisdiction. It is fair to say that baseball statistics are kept more meticulously and uniformly than DMC statistics.⁴⁴ Most states have some kind of DMC Task Force that focuses on data collection. There are many sources and kinds of data that can contribute to analysis of the depth of the problem and targeted solutions, including:

- ❖ *From the police department* — the number of arrests in a given time period, disaggregated by race, gender, age, zip code, officer, and time of day;
- ❖ *From schools* — the number of arrests at schools with school security officers compared to the number of arrests at schools without; the number of arrests at schools with zero tolerance policies compared to the number of arrests at schools without; the demographics of schools with school security officers compared to the demographics of schools without; a breakdown of the types of cases that schools refer to police officers and their most common dispositions, disaggregated by race, gender, age, zip code, and time of day;

- ❖ *From prosecutors* — the number of cases that are diverted pre-arrest, post-arrest but before arraignment, and at arraignment, disaggregated by race, gender, age, zip code, and prosecutor; plea agreements offered, disaggregated by race, gender, age, zip code, criminal history, charges, and judge the prosecutor is assigned to, and prosecutor;
- ❖ *From probation officers* — the number of recommendations of revocation, disaggregated by race, gender, age, zip code, criminal history, and charge; and
- ❖ *From judges* — bail determinations made, release conditions set, sentences handed down, and sentences of probation revoked, all disaggregated by race, gender, age, zip code, and criminal history.

Reliance on data has several advantages. First, despite the stunning consistency of the DMC data in jurisdiction after jurisdiction across the country, people still are reluctant to believe that their jurisdiction has a problem with DMC.⁴⁵ No one wants to be called racist. George Wallace was racist. Bull Connor was racist. No judge thinks she or he is racist. Neither does any prosecutor, police officer, or defense attorney, for that matter. Not even when the DMC numbers coming out of their jurisdictions show that something must be going horribly wrong.

Data and hard numbers make the hard discussions that must accompany racial progress easier. If a comparison reveals that a particular judge is locking up more people of color than other similarly situated judges, or is locking up more people of color than other similarly situated white defendants, it is easier to confront that judge with data than with what might otherwise feel to the judge like an accusation. As a corollary, it is easier to craft a tailored response with data that helps to pinpoint a source of the problem. If the numbers show that a large percentage of juvenile cases are coming from referrals from a handful of schools, then a meeting with those school principals with a spreadsheet full of data might be in order.

The problem with data is that a full statistical picture requires cooperation from several different governmental agencies that may, for various reasons, be uncommitted to combating DMC. Even assuming that individual agencies like the police department, prosecutors' offices, or the administration of the courts keep the kind of data that DMC tracking might require — which is a big assumption — it is often difficult to get information from

these agencies. Add to that the fact that these governmental agencies most likely use different computer software, with different categories (for example, in disaggregating race, schools might use 7 different racial categories, while the police department might use 5), and with different information retrieval mechanisms (again using the example of race, at schools, children might be categorized by their mother's race, while the police department might categorize arrestees by their self-report on what their race is). Also consider that these government agencies might have strained relationships because of the nature of the adversarial process (e.g., the police and defense attorneys, the prosecutor and defense attorneys, the judges and defense attorneys), and the data knot gets harder and harder to unsnarl. Imagine the bureaucracy involved in renewing a driver's license at the DMV, and multiply it times one hundred.

For all these reasons, public defender offices, and even individual contract and appointed counsel, should start to keep their own statistics, for their own information. Most contract attorneys and public defender offices, who are often in the position of having to advocate with state legislatures about their budgets, have some kind of client-tracking system; this might be a good place to start. A member of the DMC Practice Group would need access to this information and the ability to manipulate it to yield information that might be useful for tracking DMC issues.

There are at least three big advantages to defense attorneys tracking their own data. Most importantly, it is critical for defense agencies to examine their own role in creating DMC, and data is an excellent way to ascertain the contours of that role. Defense attorneys can track:

- ❖ The number of pleas each year, disaggregated by race, gender, age, zip code, offenses charged and offenses admitted, and time of day;
- ❖ The number of cases taken each year, disaggregated by race, gender, age, zip code, and offense;
- ❖ The number of motions filed overall, and the number of particular kinds of motions filed in specific zip codes (e.g., if there are one or two zip codes where the majority of the Fourth Amendment suppression motions are filed, is this evidence that these areas are over-policed?);
- ❖ Sentences imposed, disaggregated by offense, race, criminal history, whether

the case was disposed of by plea or by trial, and judge; and

- ❖ The origins of cases (e.g., is there a particular department store that is sending the bulk of the shoplifting cases? Is there a particular school that is sending the bulk of the juvenile cases?).

Second, data can be a cudgel. In the event that there is a state DMC effort involving other government agencies that is stalled because of other agencies' reluctance to turn over data, information from the defense side of the equation showing that there is a DMC problem might be enough to spur the other agencies to apply themselves to the task more diligently. Third, as Part III will detail, these data can be mined for motions, pleadings, and arguments.

2. Participation in Local and National DMC Coalitions

Most states have some kind of inter-agency governmental DMC task force or coalition. It is critically important for the criminal defense perspective to be included in these efforts. Criminal defense attorneys can serve the same function on these kinds of task forces as they serve in court: injecting the voice and stated interests of the client into the debate. Members of the DMC Practice Group can also actively contribute to litigation and legislative campaigns that might affect DMC. They can do this in several ways. Members can partner with national advocacy groups that specialize in civil rights litigation, like the national and local offices of the ACLU, NAACP LDEF, MALDEF, and others, by providing information about potential plaintiffs (with the clients' permission, of course). For example, the ACLU has made mass incarceration one of its major priorities, and is actively seeking client stories from criminal defense attorneys. Criminal defense attorneys can also work with local legislators to provide testimony and education on pending bills that intersect with DMC.

B. Community Outreach

Successful DMC efforts often enjoy community support. The example of the efforts of the San Francisco Public Defender's Office (SFPD) to dispel some of the stereotypes surrounding Asian children and families is instructive. In close collaboration with community leaders, the Juvenile Division of the SFPD developed a fact sheet of recommendations titled, "Ten Tips for Working with Asian Youth and Families." These tips, which were discussed

at a training session, include everything from explanations for why parents might be overly forthcoming with probation officers or seem particularly harsh with their children, to tips about why defense attorneys should not ask close family members to interpret conversations. The goal of this fact sheet is to arm defense attorneys with the knowledge necessary to combat unfair assumptions about Asian youth and families (for example, interpreting a child's stoniness in public as a lack of remorse, when it is much more likely that the child is acting out of a heightened sense of privacy) and inappropriate responses to this population.⁴⁶ In another example, the W. Haywood Burns Institute's work with criminal justice stakeholders in Baltimore, Md., led to the development and implementation of low-cost policies that

that serves "the interests of justice" is properly included in it, this might be an excellent vehicle to use to get race-related issues before the court that would not otherwise be admissible. Opportunities for this type of advocacy are clear in cases with overt racial overtones, such as a case in which a client of color is charged with assault on a white police officer (or a police officer who is alleged to have used racial slurs), and the client's defense is self-defense. But there are other opportunities to file this kind of motion as well, such as in cases that would lead to greatly disproportionate sentences. Just as the government frequently relies on the persuasive merit of "public safety," the defense attorney's counter could be, for example, discussion of "public justice,"⁴⁸ or the public's interest in a non-discriminatory criminal justice system.

than an individual defense attorney will be to blame for race-based litigation.

No doubt it would be much easier to raise and discuss these kinds of DMC-targeted statistics at bail, disposition or sentencing, when the evidentiary standard is much more flexible, and when judges are more apt to be willing to consider information outside the four corners of the charging document. However, as these kinds of stock motions can affect the judge's decision-making *ex ante* by priming the judge to consider the proceedings through a certain lens or urging the judge to question a practice the judge has often adhered to in the past (e.g., a stock motion about disparate arrests for drug crimes might make a judge who has a policy of holding defendants arrested for distribution think twice), it is worth strategizing ways to get the information in pretrial.

In the same way that the relaxed evidentiary standards at bail and at sentencing might allow room for consideration of DMC data, specialty courts, like drug courts and mental health courts, might also be excellent venues to file these types of motions.

These tactics will not necessarily win the substantive argument. Here, winning means creating a courtroom situation in which race discrimination and bias issues are openly joined on the record instead of relegated to the background.

reduced the number of youth securely detained because of a missed court date. The Burns Institute worked with stakeholders to institute a system simply to remind youth of their upcoming court date. As a result, the secure detention of African American youth dropped by almost 50 percent.⁴⁷ Given the time and permission to do it, the DMC Practice Group can start the long-term task of forging alliances with community leaders that can bear fruit.

III. Motions and Arguments

A. Pretrial Motions

1. Motion to Dismiss in the Interests of Justice

Many jurisdictions allow the filing of a motion to dismiss in a case in which the equities, for one reason or another, augur in favor of sparing the defendant the risks of going forward with the case. This filing can be styled a motion to dismiss in the interests of justice or, in some juvenile delinquency courts, a motion to dismiss for social reasons. Because the motion is styled with a title so broad that any reason

2. Motions Concerning Disparate Arrest Rates, Disparate Incarceration and Detention Rates, etc.

Every criminal defense attorney should have a set of motions educating the court about DMC in his or her arsenal. Just as many defense attorneys file suppression motions or discovery motions in most cases, motions featuring data about and the impact of DMC in their local jurisdictions should be added to motions checklists. Sources for crime statistics in individual jurisdictions abound. For defense attorneys just beginning their search, good places to start include the websites of the Sentencing Project; the Bureau of Justice Statistics; the FBI; and, for juveniles, the Office of Juvenile Justice and Delinquency Prevention. In addition to educating the court, motions of this type at least introduce race into the discussion, and put the judge and prosecutor on notice that the defense attorney is alert to and not afraid to raise issues of race bias in the case. Of course, the presence of a DMC Practice Group might help the line criminal defense attorneys on this point, since the "office" rather

3. The Unreliability of Eyewitness Identifications

Motions challenging the reliability of eyewitness identifications are an excellent vehicle for educating the court about DMC-related issues in cases where there are cross-racial identifications. Besides the scientific studies about cross-racial eyewitness identifications, these motions might also contain a discussion regarding the fact that certain neighborhoods are over-policed, oppressive police practices that reoccur in specific neighborhoods, such as jump outs and warrant sweeps, and other issues.

B. Trial: Jury Instruction

Jury instructions offer many opportunities to inject race into the discussion at criminal trials. For example, the fact that African Americans are disproportionately arrested, charged, and convicted of crimes means that a disproportionate number of African Americans are unreliable witnesses because they can be impeached with prior convictions. The numbers are particularly inflated in drug arrests, where nationally, African Americans comprise 38 percent of arrests despite being only 12.2 percent of the population and 13 percent of drug users.⁴⁹ Accordingly, criminal defense attorneys might craft a jury instruction that includes some local statistics about dis-

proportionate drug convictions, and adds language that jurors should take these statistics into account as they consider how much a prior drug conviction bears on a witness's credibility.

C. Cultural Experts

In the same way that police departments use longtime police officers to testify as narcotics experts, criminal defense attorneys can offer community leaders as cultural experts when appropriate. Cultural experts have broad applicability, at pretrial, trial, sentencing, and probation violation hearings. Some defense offices are already doing this. As part of its work to educate the juvenile court bench about Asian youth and families, the San Francisco Public Defender's Office has worked with cultural experts who aim to illuminate cultural mores and beliefs for the court as context or background in individual cases.⁵⁰ Of course, these experts have the benefit of essentially providing cultural competency training for and educating juvenile court judges. They also are able to offer creative disposition options that, coming from them, have more credibility than the same plan would have coming from a defense attorney.

There are some drawbacks to cultural experts. For example, some judges have reacted to these cultural experts poorly because the judges do not believe that Asian American culture is beyond the ken of the court's understanding, or because the judges are not willing to admit that they are not familiar with the cultural differences that the cultural experts are explaining. In addition, the questions of what qualifies a person as a cultural expert, whether cultural experts would work for a demographic that would be perhaps more difficult for a judge to consider to be beyond the ken of the court (like African American or Latino culture), and finally, how a defender might supply a nexus between expert testimony and the individual client, are all untested.

With respect to 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. This way, the testimony is admitted and on the record, even if the fact finder does not credit it in the court's ruling concerning guilt or innocence. The judge has still heard the testimony, has perhaps been educated about cultural differences of that individual client, may rely on it in the sentencing disposition, and may apply this knowledge to other cases.

IV. Conclusion

As discussed earlier, the systemic disincentives to take up race issues are too numerous to count — not the least of which is the fact that the law functions to insulate the criminal justice system from race-based challenges. *McCleskey* even explicitly acknowledges that American society must tolerate a certain amount of racial bias. But it is important to remember that the United States Supreme Court defended “separate but equal” before *Brown v. Board of Education*⁵¹ topped Jim Crow. Perhaps the United States is in the early stages of this next movement. *McCleskey* is our *Plessy v. Ferguson*.⁵² *Whren* is our *Dred Scott v. Sandford*.⁵³ *Armstrong* is our *Korematsu v. United States*.⁵⁴ *Plessy* was the law of the land for decades before it was overturned. But it was overturned. Our *Brown v. Board of Education* is ahead of us. Criminal defense attorneys, literally the clients' voices in court, are at the forefront of this next movement. This is a fight worth folding into the defense mission. This is how change comes. This is how justice lives.

The author facilitated sessions dedicated to discussion of what defense attorneys can do to combat DMC at the Annual Juvenile Defender Leadership Summits in 2007 and 2008, and is indebted to participants in those sessions for their frank discussion of their struggles with this topic. In particular, the author wishes to thank Patti Lee, Managing Attorney in the San Francisco Public Defender's Office and Co-Director of the Pacific Juvenile Defender Center, for her leadership on this issue; Professor Michelle Alexander, for her meticulous research and inspiring courage in taking this issue on in her book The New Jim Crow: Mass Incarceration in the Age of Colorblindness; Professor Christopher Lasch, Professor Lindsey Webb, Eric Klein, Esq., and Ann Roan, Esq., for their trenchant comments and suggestions; and Aaron Thompson for his invaluable research assistance.

Notes

1. Pierre Thomas & Jason Ryan, *U.S. Incarceration Rate Hits All-Time High: 2.3 Million Incarcerated*, ABC NEWS, June 6, 2008, <http://freedom-school.com/reading-room/prison-population-hits-all-time-high.pdf>. As of 2007, China, with its much larger population, had the second largest incarcerated population, with 1.5 million imprisoned. Russia has the second highest incarceration rate, at 581 per 100,000. James Austin et al., *Unlocking America: Why and How to Reduce America's Prison Population* 3 (Nov. 2007)

available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2010).

3. Heather C. West, U.S. Department of Justice Bureau of Justice Statistics, *Prison Inmates at Midyear 2009 — Statistical Tables, 2*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf> (June 2010).

4. *Id.*

5. Pew Center on the States, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, 5, <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> (2008).

6. Heather C. West & William J. Sobol, U.S. Department of Justice Bureau of Justice Statistics, *Prisoners in 2009*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf> (December 2010).

7. *Id.*

8. Heather C. West, U.S. Department of Justice Bureau of Justice Statistics, *Prison Inmates at Midyear 2009 — Statistical Tables, 22*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf> (June 2010).

9. *Id.*

10. See Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC ONLINE, <http://www.theatlantic.com/past/issues/98dec/prisons.htm> (Dec. 1998).

11. Pew Center on the States, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, 3, <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> (2008).

12. Ashley Nellis & Brad Richardson, *Getting Beyond Failure: Promising Approaches for Reducing DMC*, http://www.uiowa.edu/~nrcfcp/dmrc/documents/NellisRichardson2010_000.pdf. For the past 20 years, the federal Juvenile Justice Delinquency and Prevention Act has required federally funded state juvenile justice systems to adopt the Act's core principles concerning treatment of youth in the juvenile justice system. Tracking and addressing disproportionate minority confinement (DMC) in the juvenile justice system was added to these core principles in 1992. “DMC” came to stand for disproportionate minority contact in 2002, when this core requirement was broadened to encompass racial and ethnic disparity at all points of contact.

13. Bureau of Justice Statistics, *Key Facts at a Glance*, <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm>.

14. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 700 (2010).

15. Michelle Alexander, *The New Jim Crow*, The Huffington Post, February 8, 2010, <http://www.huffingtonpost.com/>

michelle-alexander/the-new-jim-crow_b_454469.html.

16. *Id.*

17. See, e.g., MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 14 (2004) (observing that “[g]overnments decide how much punishment they want, and these decisions are in no simple way related to crime rates.”).

18. James Austin et al., *Unlocking America: Why and How to Reduce America's Prison Population*, 3 (Nov. 2007) available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>.

19. *Id.* at 1.

20. *Id.* at 3.

21. *Id.* at 5.

22. Al Baker, *New York Minorities More Likely to be Frisked*, N.Y. TIMES, May 12, 2010, available at http://www.nytimes.com/2010/05/13/nyregion/13frisk.html?_r=1&scp=1&sq=racial%20profiling%20ny%20police%20probable%20cause&st=cse (discussing a study that revealed that blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009, but, once stopped, were no more likely to be arrested).

23. MICHAEL TONRY, JUDICIAL COUNCIL OF CALIFORNIA, EXECUTIVE SUMMARY OF THE FINAL REPORT OF THE JUDICIAL COUNCIL ADVISORY COMM. ON RACIAL AND ETHNIC BIAS IN THE COURTS, <http://www.courtinfo.ca.gov/reference/execrace.htm>.

24. George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIOLOGICAL REV. 554 (1998).

25. See Michael Tonry, *supra* note 17. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

26. See Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L. Q. 219, 238-39 (1994).

27. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

28. *Id.* at 309.

29. *Id.* at 312.

30. *Id.* at 315.

31. *Id.* at 339.

32. *Whren v. United States*, 517 U.S. 806, 808 (1996).

33. 517 U.S. 806 (1996).

34. *Id.* at 810.

35. *Id.* at 813 (stating that “[w]e think that these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual police officers involved.”).

36. *United States v. Armstrong*, 517

U.S. 456 (1996).

37. Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC'Y REV. 695, 700-01 (2010).

38. *Id.*

39. See generally *id.*

40. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010). See also Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

41. Geoff Ward, Aaron Kupchik, Laurin Parker & Brian Chad Starks, *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, RACE AND JUSTICE 27 (forthcoming April 2011).

42. Of course, criminal defense attorneys have an ethical obligation to serve the expressed interests of their clients, and should make decisions about this kind of advocacy in close cooperation with their clients. Needless to say, this article assumes pressing forward with DMC advocacy when doing so is aligned with the client's interests, and the attorney does so with the client's full knowledge.

43. THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS: 2005, <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/statewideindddefsyste.ms2005.authcheckdam.pdf> (2005).

44. Interview with Patrick Vance, juvenile defense attorney and member of the board of the Colorado Juvenile Defender Coalition, in Denver, Colorado, (March 21, 2011).

45. The numbers are also uniform across jurisdictions. According to The Sentencing Project's July 2007 report *Uneven Justice, State Rates of Incarceration by Race and Ethnicity*, 2000 census data showed that African Americans are disproportionately incarcerated in every state. See generally, Marc Mauer and Ryan King, UNEVEN JUSTICE, STATE RATES OF INCARCERATION BY RACE AND ETHNICITY, http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf.

46. Interview with Patti Lee, Managing Attorney, San Francisco Public Defender's Office & Co-Director of the Pacific Juvenile Defender Center, in Washington, D.C. (Oct. 20, 2007), as part of the DMC Workgroup at the Juvenile Defender Leadership Summit.

47. THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT, http://www.sentencingproject.org/doc/publications/publications/jj_DMCfactsheet.pdf.

48. As Professor Erin Murphy asked in

her article, *When Fear Threatens Freedom*: “[W]hy should the prosecution lay sole claim to [representing the interests of] ‘the People’? Have we not learned that only tyranny results when the government alone decides what constitutes ‘law and order’? . . . Why then should the state earn the monopoly on the commendable values? I am, after all, a public defender. My job is to represent, one case at a time, the interests of the people.” ERIN MURPHY, WHEN FEAR THREATENS FREEDOM, THE CHAMPION, <http://www.nacdl.org/publicnsf/ChampionArticles/A0201p33?OpenDocument> (January/February 2002).

49. DRUG POLICY ALLIANCE, RACE AND THE DRUG WAR, <http://www.drugpolicy.org/communities/race/>.

50. Interview with Patti Lee, Managing Attorney, San Francisco Public Defender's Office & Co-Director of the Pacific Juvenile Defender Center, in Washington, D.C. (Oct. 20, 2007), as part of the DMC Workgroup at the Juvenile Defender Leadership Summit.

51. *Brown v. Board of Education*, 347 U.S. 483 (1954).

52. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

53. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

54. *Korematsu v. United States*, 323 U.S. 214 (1944). ■

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RAISING RACE

Kristin Henning
Professor of Law, Director, Juvenile-Justice Clinic, Georgetown Law
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The Classic Joy Ride



The Classic Joy Ride



ROADMAP FOR TRAINING

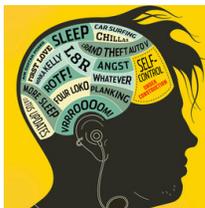
- Research on race and adolescent development
- Research on implicit racial bias and its impact on crim/juv justice system & defenders
- Raising racial justice arguments in every stage of delinquency cases & its challenges
- The role of defenders in systemic reform

KEY CONCEPTS

- ❖ **Disparity** = different groups having different probabilities for a particular outcome due to group status. Doesn't necessarily mean discrimination exists
- ❖ **Overrepresentation** = larger number of people of particular racial or ethnic group represented in the CJS than would be expected based on their proportion in the general population
- ❖ **Discrimination (or disparate treatment)** = different treatment based on a group status, such as race or ethnicity, rather than on one's behavior or qualifications.

Race and Adolescent Development

ADOLESCENT BRAINS DEVELOP THE SAME WAY ACROSS RACE AND SOCIOECONOMIC LINES



BUT THE CONSEQUENCES FOR NORMAL TEEN BEHAVIOR DIFFER



SELF-REPORT DATA



CDC
CENTERS FOR DISEASE CONTROL AND PREVENTION

Monitoring the future
a continuing study of American youth

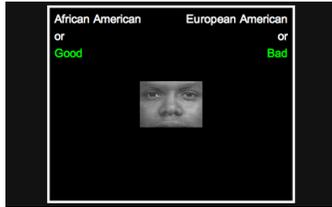
SILENT BEATS

Implicit Bias

Implicit bias involves "attitudes or stereotypes that affect our understanding, decision-making, and behavior without our even realizing it."

Implicit bias *functions automatically*, including in ways that the person *would not endorse* if he or she had conscious awareness.

Race Implicit-Association Test



Juvenile Justice Stakeholders and Implicit Bias

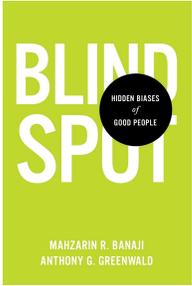


Perceived Innocence/Culpability of Black Youth

Subjects perceived:

- Youth ages 0–9 as equally innocent regardless of race
- Black children as significantly less innocent than other children at every age group, beginning at the age of 10
- Innocence of Black children age 10–13 equivalent to that of other children age 14–17
- Innocence of Black children age 14–17 equivalent to that of non-Black adults age 18–21.

Implicit Bias and Defenders



- Defenders face a greater risk that we have a "bias blindspot," which is the belief that others are biased but we are not. Thinking this way, ironically, leaves us more susceptible to biases

Implicit Bias and Defenders

Implicit racial bias thrives

- In "cognitively taxing environments"
- With "complex decisions under time pressure"
- With imperfect information
- When decision-makers are cognitively depleted, anxious, or distracted
- When the task is complex or a decision difficult



Impact of Implicit Bias on Defenders



- Prioritizing Cases
- Opinions Regarding Home Environment
- Client Counseling
- Evaluation of Evidence
- Paternalism
- Attorney-Child Communication

Correcting Implicit Racial Bias



- Stereotype replacement
- Counter-stereotypic imaging
- Individuation
- Perspective taking
- Increasing opportunities for contact

Raising Race in a Delinquency Case



- Referrals
- Charging phase
- Pretrial detention
- Challenging transfer
- Statutory Challenges
- Fourth Amendment
- Fifth Amendment
- Out-of-Court Identifications
- In-Court Identifications
- Plea Negotiations
- Voir Dire

Jury Education, Judge Mark W. Bennett

"Do not decide this 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 every important decision in this case, I strongly encourage you to evaluate the evidence carefully and 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 the 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."

Attorney-Conducted Voir Dire

"You have just learned about the concept of IRB. Not everyone agrees on the power of its influence or that they are personally susceptible to it. I'd like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making. Let me start by asking for your reaction to learning about the idea of implicit, or subconscious, racial bias."

Raising Race in a Delinquency Case



- Referrals
- Charging phase
- Pretrial detention
- Challenging transfer
- Statutory Challenges
- Fourth Amendment
- Fifth Amendment
- Out-of-Court Identifications
- In-Court Identifications
- Plea Negotiations
- Voir Dire
- Trial
- Disposition
- Post-Disposition

Defense Theories at Trial



- Racial Bias to Falsely Accuse
- Cross Racial Identification
- Reasonable Interpretation of Threats

Raising Race in a Delinquency Case



- Referrals
- Charging phase
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Challenges & Fears



Systemic Reform

