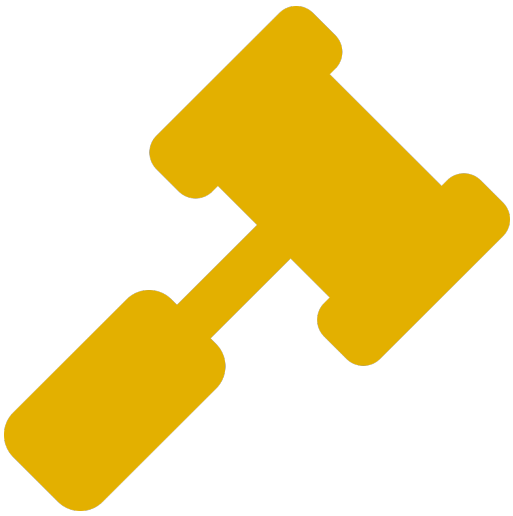

Youth Defense Raising Race Checklist

RACIAL JUSTICE TOOLKIT: CASE ADVOCACY RESOURCE

Youth Defense Raising Race Checklist

NOTE: *Ideas for using social-science research in advocacy are included throughout this checklist. For more information on this research, please read the annotated bibliographies on Implicit Racial Bias (available on the Confronting Bias section of the Toolkit), Policing as Trauma, Racial Trauma, Stereotype Threat, and Latinx Research (all available on the Case Advocacy section of the Toolkit).*

Investigation and Discovery

*What will I need to know to **raise race** in my advocacy?*

□ Data

- Data on race, arrest, and crime in all relevant locations
- Police department charging data, specifically for the relevant type of offense
    - Are youth/adults of color disproportionately charged?
- Data on relevant officers' stops: location, racial breakdown, charges alleged in police report vs charges ultimately filed and outcomes.
    - If officer-specific data isn't available, can you get jurisdiction-wide data?

□ Police Racial Bias and Discrimination

- Has the officer been successfully impeached in court before? Did any of these impeachments involve race (e.g. cross-racial misidentification, misrepresentations in cases of black youth, etc.)?
    - If no one is tracking this, how can you start?
- Officers' social media: are there any posts demonstrating racism or bias?
- Review any video or audio recording in its entirety. What are officers saying to each other/themselves (before, during, and after their interaction with your client)? Do the officers use disrespectful language or racial slurs, or otherwise make racial commentary?
- Ask other defenders if they know anything about these officers. Are there videos of these officers from other cases that demonstrates bias?
- Officers' personnel files and discipline records:
    - Use of force log for officer, looking specifically for use of force against people of color
    - Have the officers had any training on racial bias, adolescence or police trauma?

- In addition to the police department, is there also a community review board or any other entity that receives complaints about police? Are any local groups that organize around race/criminal legal system reform gathering or tracking data on race and policing? Reach out to them to ask for help. You should also ask what they wish they had, but cannot get. They may share an idea for something you can subpoena for your case.

Arraignment and Status Hearings

*Have you considered ways to challenge the **shackling** of your client by raising race?*

□ Presumed Dangerousness

- A decision to shackle a youth may be grounded in the court officer's *implicit bias* that youth of color are inherently dangerous, hostile, and unruly. Defenders may challenge this presumption by drawing attention to that implicit bias, reminding the court that shackling decisions should be individually tailored to each youth, and arguing that shackling is unwarranted when a youth has not demonstrated threatening behaviors during transport to court or while waiting in the holding cell.

*Have you considered ways to challenge **probable cause** by raising race?*

□ Vague Descriptions / Bias

- **Challenging Probable Cause on the Papers:** In any case in which a police report includes a vague description of a suspect, *such as age and race alone*, defenders should argue that there is no probable cause to believe the youth committed the offense.
    - *See*, *e.g.*, *Davis v. Mississippi*, 394 U.S. 721 (1969) (when the only description of an assailant was that he was a Black youth, it was illegal to detain, question, and fingerprint 24 Black youth); *In re T.L.L.*, 729 A.2d 334, 340-41 (D.C. 1999) (finding the description insufficient to justify seizure when lookout for two Black teenagers wearing dark clothing could have fit many, if not most, Black young men in the area at the time).
- **Evidentiary Hearing:** During an evidentiary probable cause hearing, defenders may develop a line of cross examination to highlight a witness' vague suspect description and explore the potential racial bias of any witness, including the witness' presumptions and fears about youth of color.

*Have you considered ways to challenge **conditions of release** by raising race?*

□ Drug Education / Drug Testing

- Courts will often order drug testing or require a child to attend drug education courses as a standard condition of release, particularly when the youth is a youth of color. Defenders should remind the court that all conditions must be individually tailored to each youth and argue that drug testing is not

necessary when the alleged offense does not involve drugs and the youth has not tested positively for controlled substances.

□ Curfews

- Current research shows that curfews are ineffective at reducing youth crime, yet implicit racial bias may cause a judge or probation officer to assume that a youth of color lacks adult supervision and needs a curfew. Defenders should counter these assumptions by drawing attention to that bias and offering a clear narrative of the child's home life and family support to individualize and differentiate the child from these stereotypes. If the alleged offense did not happen in the evening, or if the youth is involved in afterschool sports and activities that would place them in an adult-supervised environment during the evening, defenders may highlight these protective factors and remind the court that all conditions must be individually tailored to each youth.

□ Presumption of Gang Involvement

- Courts may order conditions based on a biased presumption of gang involvement for Latinx or Black youth. These include prohibiting wearing certain colors, being in certain neighborhoods labeled "gang territory," or socializing with certain people. These conditions are in themselves stigmatizing and may lead to youth feeling as though they are being racially profiled by the judge and the system. This can have a negative mental health impact on youth of color. Defenders should argue against the conditions that flow out of a baseless presumption of gang involvement.

□ GPS Monitoring

- Some courts will order GPS tracking or an ankle tether, based solely on their biased belief that youth of color are dangerous and need to be monitored. Defenders may contest these conditions by drawing attention to these generalized assumptions and reminding the court that the facts of the alleged offense do not suggest that a youth's exact location needs to be known by the court at all times (e.g., GPS is not warranted for a fight that happened at school).

*Have you considered whether race is relevant to your **detention arguments?***

□ Danger to the Community / Flight Risk

- Implicit bias often contributes to a stakeholder's presumption that youth of color will pose a danger to the community or fail to return to court. Defenders may introduce implicit racial bias research and highlight the probation officer's or prosecutor's failure to provide any specific evidence to support a claim of risk-of-flight and dangerousness to the community. Defenders should also remind the court that all conditions must be individually tailored to each youth.

□ Danger to Self

- Racial biases may cause stakeholders to seek pretrial detention as a form of protection from the presumed dangers of the youth's neighborhood or the youth's presumed membership in a gang. Defenders should counter these assumptions by drawing attention to the racialized assumptions

commonly associated with youth of color and reminding the court that many law-abiding youth and families live and thrive in communities experiencing high-levels of crime.

- Even where evidence of dangerous conditions in the community exists, defenders may still challenge detention by highlighting the greater harms that youth experience in detention, including harms from shackling, strip-searching, and isolation experienced by many detained youth, as well as exclusion from their family, school, and positive role models.

Statutory Challenges

*Have you considered whether you can make a racial justice argument to **challenge the statute, either on its face or as applied**?*

□ Legislative History

- Some statutes may have been passed with the legislative intent to address very specific societal problems, but may be enforced arbitrarily against our clients. For example, an anti-hoodie or anti-loitering law may be passed to address specific gang-related concerns in the community but may be enforced arbitrarily against our clients when there is no evidence or reason to suspect gang issues. We should try to educate the court about the legislative history if our client is charged under a law that seems arbitrarily enforced and argue that the law should not be enforced in this particular circumstance—especially in situations in which the law is not enforced against similarly situated people of another racial or socioeconomic group.

□ Equal Protection Clause

- When a statute has a classification that is racially neutral on its face but is obviously a proxy for racial categories, the statute still faces strict scrutiny: "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

- But when a statute has a disproportionate *impact* on racial minorities, the standard of review under the equal protection clause is more difficult to overcome. In those circumstances, the claimant must prove that the law had a discriminatory *intent*, and intent is very difficult to prove. *See Washington v. Davis*, 426 U.S. at 229.

□ "Void for Vagueness"

- Some statutes are so vague or commonly violated that the enforcement of the statute against an individual defendant is arbitrary and may be impermissibly based on race. The standard to challenge statutes under the void-for-vagueness doctrine is:

- the statute either does not give adequate **notice** to law abiders of what conduct is impermissible OR
- it "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

- Challenge statutes as unconstitutional by filing a motion to dismiss under the void-for-vagueness doctrine when appropriate.

Diversion and Pleas

*Have you considered whether race is relevant to **diversion and plea offers** your client received?*

□ Diversion and Plea Offers

- Youth of color should have the same opportunity for diversion as white youth. Defenders should urge prosecutors to divert or decline to prosecute youth of color who are arrested for behavior that would not be prosecuted in white communities. Defenders should consider:
  - Highlighting data that shows increases in school-based referrals often impact youth of color at far greater rates than their white counterparts, especially for incidents that involve normal adolescent behavior.
  - Comparing the alleged behaviors of your client to the behaviors of other youth and collecting data regarding the disparate consequences of similar behavior.
  - Tracking plea offers received for all clients and holding prosecutors accountable to offer all youth similar plea offers regardless of race and class.

*Have you considered whether race is relevant to your **plea negotiations** and **client counseling** about whether to **accept or reject** a particular plea offer?*

□ Plea Negotiations and Client Counseling

- Defenders should **remain vigilant** at the plea negotiation stage not to acquiesce to **harsher punishments or worse pleas** for their clients of color because of their own biases. Defenders should consider whether they would be satisfied with the prosecutor's offer if the client were white and charged with the same offense.
  - An empirical study measuring plea recommendations of defense attorneys found that the pleas attorneys felt they could obtain for a client of color contained longer sentences than those involving white clients and were significantly more likely to include jail time. *See*

Vanessa Edkins*, Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?,* 35 LAW & HUM. BEHAV. 413, 419 (2011).

Transfer to Adult Court

*Have you considered whether race is relevant to opposing your clients' **transfer** or **waiver** to adult court?*

□ Identifying Transfer Disparities

- In most jurisdictions, there are significant racial disparities in the transfer of youth to adult court. Defenders should consider using local or national statistics documenting racial disproportionality to enhance arguments against transfer.

□ Challenging Perceived "Maturity"

- Transfer hearings often include a number of factors that may be negatively influenced by implicit racial bias, such as **the age, mental and physical maturity, and sophistication of the child**. Weighing such factors may have a disproportionate racial impact because youth of color are often perceived as more mature. Additionally, children raised in complex environments often develop coping skills and resilience that may be perceived as sophistication. Differences also exist between racial groups in terms of the age of the onset of puberty. Defenders should consider whether such facts would be helpful in challenging transfer.

    - *See, e.g.*, Arnold H. Slyber*, The Pubertal Timing Controversy in the USA, and Possible Causative Factors for the Advance in Timing of Puberty*, 65 CLINICAL ENDOCRINOLOGY 1, 1 (2006); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children,* 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

    - Anita Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE 7(5)(2012) (study participants expressed significantly more support for life without parole sentences for youth in non-homicide cases when they associated that sentence with Black youth than when they associated that sentence with white youth).

□ Arguing Amenability to Rehabilitation

- The United States Supreme Court has recognized that adolescents tend to be more amenable to treatment than adults. Defenders should emphasize this finding for **youth of *all* racial groups** to rebut stakeholders' implicit or explicit biases that youth of color are less likely to be rehabilitated unless punished through the adult system. *See Roper v. Simmons,* 543 U.S. 551, 570-573 (2005); *Graham v. Florida,* 560 U.S. 48, 78 (2010); Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014).

Pre-trial Motions

*Have you considered whether race is relevant to your **Fourth Amendment** analysis?*

□ Seizure and Consent to Search

- Youth of all races often defer to adults and may not understand that they can decline an officer's request to talk with them or search them. When the child is a youth of color, this dynamic can be exacerbated. For example, a Black child might not feel **free to leave** during a police interaction and may **"consent"** to a search because **they are afraid** of being harmed by the police. Particularly in the wake of publicized police shootings, defenders should consider whether a client's fear of the officers affected whether they felt free to leave or the voluntariness of their "consent" to a search.

    - *See, e.g.*, *JDB v. North Carolina,* 564 U.S. 261, 264 (2011) (noting that, for the purposes of the *Miranda* custody analysis, "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."); *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015) (citing police misconduct studies and strained police relations to hold that Mr. Smith, a Black male in an urban area, was seized and not free to leave).

    - Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment,* 67 AM. U. L. REV. 1513 (2018).

□ Flight

- Youth of color may run from police because they are afraid, not because they are guilty of a crime. Youth of any race may run because they are more likely than adults to be impulsive, to be influenced by peers, and to fail to think ahead to the long-term consequences of their behavior. Defenders may use case law and research supporting these arguments to challenge the inference of guilt that is commonly associated with flight.

    - *See Commonwealth v. Warren*, 475 Mass. 530 (Mass. 2016) (acknowledging the county's racial profiling data when determining that Warren's flight could easily be indicative of fear of the police, rather than consciousness of guilt). *See also* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment,* 67 AM. U. L. REV. 1513 (2018).

□ Nervousness /Furtive Gestures

- Similarly, youth of color may exhibit nervousness or make furtive gestures because of their fear of police, rather than their consciousness of guilt. Youth of any race may be nervous and fidgety because they tend to have less knowledge of their legal rights than adults, they easily recognize the power imbalance between youth and adults, and they are more likely than adults to fail to think ahead to the long-term consequences of their behavior. Defenders may use case law and research supporting these arguments to challenge the inference of guilt that is commonly associated with nervousness/furtive gestures.

- *See, e.g., Commonwealth v. Warren*, 475 Mass. 530 (Mass. 2016); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment,* 67 AM. U. L. REV. 1513 (2018).

□ Proximity to Crime Scene/ Presence in High Crime Area

- Police officers frequently claim that a seizure occurred in a "high crime area" to support reasonable articulable suspicion or probable cause. Defenders may argue that the talismanic litany of "high crime area" is often a proxy for race and may challenge the classification of a neighborhood as a high crime, especially when police and prosecutors have failed to establish what specifically makes the area "high crime."

    - *See United States v. Montero-Camargo,* 208 F.3d 1122, 1138 (9th Cir. 2000) (noting that "the citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity").

- Additionally, youth of color may simply live in an area experiencing high levels of crime or near a particular crime scene by virtue of their socio-economic level.

    - *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (noting that presence in a high crime neighborhood alone is a fact too generic and susceptible to innocent explanation to satisfy the reasonable suspicion inquiry).

□ Association with Known Criminals

- Because of the over-criminalization and over-policing of communities of color, residents in these communities are substantially more likely to have been arrested, incarcerated, and to have a criminal record. Thus, when police claim that a youth was associating with a known offender, defenders should remind the court that youth of color frequently and innocently engage with friends and family members who have been arrested.

    - **Mere association** with a known criminal cannot on its own be a basis for "reasonable suspicion." *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979). *See also Sibron v. New York,* 392 U.S. 40 (1968) (noting that reasonable suspicion required more than mere association with known criminals or addicts).

□ Descriptions

- Race becomes irrelevant when it describes the majority of a population in the area, and a seizure will be unconstitutional when it is based on a description that is too broad and would apply to a large number of youth at a given time. Defenders may consider whether a description given by an officer or a purported witness would apply to many children of color in the area and challenge it for **vagueness.**

    - *See In re T.L.L.,* 729 A.2d 334, 340-41 (D.C. 1999) (finding description insufficient to justify seizure when lookout of two Black teenagers wearing dark clothing could have fit many, if not most, Black young men in the area at the time).

□ Racial Incongruity

- Descriptions that result from a youth of color's mere presence in a particularly affluent or racially homogeneous area should also be challenged.

    - *See United States v. Hawthorne*, 982 F.2d 1186, 1190 (8th Cir. 1992) (noting that reasonable articulable suspicion will not be met if the officer's suspicion is based solely on ***racial incongruity***—when a person is seen in a particular geographic area that is predominantly populated with people of a different race).

□ Identification

- When the parties are of different races, defenders may introduce research (through motions and expert testimony) on cross-racial identifications. Research shows that people are less able to recognize faces of a different race than their own due to a phenomenon known as "own-race bias."

    - *See, e.g.*, *Commonwealth v. Zimmerman*, 441 Mass. 146, 154, 155 (Mass. 2004) (Cordy, J., concurring) (noting the unreliability of cross-racial identification is a subject "beyond the ordinary experience and knowledge of the average juror"); Harvey Gee, *Cross-Racial Eyewitness Identification, Jury Instructions, and Justice*, 11 RUTGERS RACE & L. REV. 70 (2009); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

*Have you considered whether race is relevant to your **Fifth and Fourteenth Amendment** analysis?*

□ *Miranda* Custody Analysis

- The United States Supreme Court has held that age is relevant to the *Miranda* custody analysis. The Court stressed that children are particularly vulnerable to questioning by authority figures. Defenders should remind the court that race can exacerbate this dynamic when there is tension between communities of color and law enforcement.

    - The Supreme Court recognized in *JDB v. North Carolina*, 564 U.S. 261, 264 (2011), that, for the purposes of the *Miranda* custody analysis, "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."

□ *Miranda* Waiver Analysis (Knowing, Intelligent, Voluntary)

- Defenders should also be creative in thinking about ways in which race may affect a child's knowing, voluntary, and intelligent waiver of *Miranda* rights. Specifically, a youth of color may feel more intimidated in the presence of one or more officers and acquiesce to the officers' interrogation despite initial reservations.

- Black or Latinx children may fear they are being judged or treated negatively due to their race, which may cause anxiety and psychological stress. This is called "stereotype threat" and is known to effect Black and Latinx people during police encounters like interrogations. This stress can lead to "cognitive overload" and feelings of helplessness, adding an additional barrier to truly understanding and asserting their rights. *See* Cynthia Najdowski, Bette Bottoms and Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters,* 39:5 J. Law & Hum. Beha. 463-477 (2015); Deborah Davis and Richard Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 J. Psycho., Pub. Policy, and Law, 673–704 (2012). Please read the Stereotype Threat Annotated Bibliography (available on the Case Advocacy section of the Toolkit*)* for research to support this argument.

- Judges may assume that a Black or Latinx child's *Miranda* waiver is knowing, intelligent, and voluntary because they perceive them to be more adult-like and thus more capable of overcoming the inherently coercive interrogation environment. When judges subconsciously perceive youth of color as adults, they may believe youth of color have adult-like abilities to exert their own free will and make an uncomplicated *Miranda* waiver, when in reality youth of color experience the same developmental challenges to understanding and asserting their rights as white youth. *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014) (finding that Black children are perceived as older and more culpable than same aged white youth). Please read the Implicit Racial Bias Annotated Bibliography (available on the Confronting Bias section of the Toolkit) for additional research to support this argument.

□ Fourteenth Amendment (Involuntariness, Due Process)

- Defenders should advocate that courts should look at every factor in the totality of the circumstances through the lens of race. What is intimidating and coercive to a youth of color may not be to a white youth or adult. Youth of color who have grown up with a fear of police are often paralyzed by the presence of multiple uniformed and armed officers. Please read the Policing as Trauma Annotated Bibliography (available on the Case Advocacy section of the Toolkit*)* for research to support this argument.

- Some youth will have been traumatized on the street by the officer's aggressive tone or intrusive touch during a "stop and frisk." These arguments will be similar to those regarding voluntariness in the *Miranda* context, as described above. Please read the Policing as Trauma Annotated Bibliography (available on the Case Advocacy section of the Toolkit*)* for research to support this argument.

- Additionally, implicit racial bias and stereotype threat, described above, may render police more likely to misclassify Black people as guilty and use coercive questioning tactics that can lead to false confessions.

*Have you considered how you can raise race in your motions to exclude evidence based on the **rules of evidence**?*

□ Lack of Relevance

- Defenders should move to exclude evidence that is only relevant when viewed through a white lens (i.e. evidence that relies on assumptions based on the white experience to prove relevance), for example:

    - **Motion to Exclude Rap Lyrics**: Rap is an artform, utilizing a variety of rhetorical devices, and not a literal recitation of facts or a statement of true intentions.

    - **Motion to Exclude Evidence of Flight**: Prosecutors rely on the underlying assumption that flight is abnormal and indicative of guilt to prove its relevance. While this may be a reasonable conclusion when considering a white adult, there are many valid reasons (including fear of harm) an innocent Black, Latinx, or indigenous young person would run when they see police. Evidence of flight should be excluded as irrelevant because it is not indicative of guilt.

□ Risk of Unfair Prejudice (i.e. more prejudicial than probative)

- Defenders should move to exclude evidence that enflames racial bias, for example:

    - **Motion to Exclude Rap Lyrics**: Any potential probative value of rap lyrics as evidence is outweighed by the danger that they will incite unfair racial prejudice. The high risk of unfair prejudice derives from the strong cultural stereotypes associating rap with Blackness and criminality. Like the argument against relevance, you may argue that the probative value of rap lyrics in your case is minimal because rap is an artform and not a literal recitation of facts or a statement of true intentions.

    - **Motion to Exclude Evidence of Flight**: The risk of unfair prejudice from admitting evidence of flight is high. Implicit racial bias may lead the factfinder to assume that the young person ran because they had a guilty conscience. If this evidence is admitted it could lead the factfinder to make other baseless assumptions about the young person's attitude towards law and law enforcement, unfairly prejudicing the factfinder against the young person. As stated above in the argument against relevance, there are many valid reasons an innocent Black, Latinx, or indigenous young person would run when they see police (including fear of harm), negating any potential probative value.

□ Improper Character Evidence

- **Gang affiliation:** Defenders should move to exclude evidence related to gang affiliation as inadmissible character evidence.

- **Implicit character evidence:** Defenders should look for any implicit character evidence that may trigger implicit biases connecting Blackness to criminality. This could include witness testimony on the client's clothing, speech, or gait. For example, there is a stereotype connecting sagging pants and criminality. Testimony that a Black teenage boy wore sagging pants should be excluded as improper character evidence (or as more prejudicial than probative).

- **Prior convictions**: Even if evidence of prior convictions or arrests are admissible under a separate rule, factfinders are still likely to improperly judge the person's character. Black people are at greater

risk of this judgement because they are more likely to have prior convictions due to systemic racism. Additionally, evidence of prior convictions can strengthen the implicit associations between Blackness and criminality and lead factfinders to be influenced by implicit racial bias in their decision-making.

For more information on the impact of race on the rules of evidence, read Report to the Rules Review Subcommittee of the Maryland Judiciary's Committee on Equal Justice (Maryland)

Jury Selection

*If you live in a state where young people have the right to a jury in delinquency court, have you considered whether race is relevant to the **jury selection** process?*

□ Voir Dire

- Voir dire can be used as an opportunity to both educate potential jurors about the effects of implicit racial bias, and to identify jurors who will be more or less attuned to how implicit bias may influence their own decisions and interpretations during trial.
    - Defenders may ask the judge to **appoint an expert** to explain implicit racial bias to the jury and educate them on how bias might lead to discriminatory decisions and explain how self-motivation may be used to overcome implicit racial bias.
    - To further educate the panel, defenders **may request that the panel take the Implicit Association Test** as an educational tool. Even if the request is denied, the motion will introduce the judge to the implicit bias research.
    - In jurisdictions with **attorney-conducted voir dire**, defenders should consider asking jurors about their **most impactful past experiences** with **members of another race**. Asking about such experiences may expose implicit beliefs about members of another race that are not easily obtained when asking about racial biases directly.
    - Defenders should also attempt to identify jurors **with explicit racial biases** and strike them from the jury.
        - *See* Jonathan Rapping*, Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions,* 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1020-21 (2013); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012).

Adjudication/Trial

*Have you considered ways that race might be relevant to your **defense theory**?*

□ Fabrication/Intentional False Accusation

- If a complainant or other witness has shown any explicit racial bias in this case or in the past (e.g., remarks made on body-worn camera, social media, etc.), defenders may consider raising this bias as the witness' motivation for falsely accusing a youth or otherwise giving false testimony.

□ Cross-Racial Misidentification

- Even if the court has not suppressed an out-of-court identification as suggestive and unreliable, defenders may still present evidence to the trial court on the unreliability of cross-racial identification for the purposes of negating the weight of the evidence presented**.**

- A motion to appoint an expert witness provides defense counsel with an opportunity to present the judge with information about implicit racial bias and the fallibility of eyewitness identifications, especially cross-racial identifications.

□ Self-Defense / Duress

- Defenders should consider whether certain racial or cultural dynamics would be helpful to demonstrate that a youth acted in self-defense or out of duress.

□ Racially Biased Interpretations of Innocuous Behavior

- Implicit racial bias may lead witnesses to interpret a youth of color's **innocuous or ambiguous behavior as threatening or criminal.** In many jurisdictions, certain offenses such as felony threats and resisting arrest require the court to examine subjective experiences to evaluate whether it was reasonable for the complainant or police to interpret the conduct as threatening, resistant, or otherwise unlawful. For example, several studies have demonstrated that racial bias causes people to interpret the behavior of young Black men as more aggressive and threatening than other people. This research may enhance the youth's defense theory.

    - *See, e.g.*, Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008) (summarizing two studies in which subjects behaved in ways indicating they found Black male faces to be more threatening than other faces); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

*Have you considered raising race in your **opening statement and closing argument**?*

□ Alternative Client Narratives

- To fight against implicit racial bias, defenders should consider whether the opening statement and closing arguments provide an opportunity to counter racial stereotypes and assumptions. Defenders may offer alternative narratives that portray the youth as a "loving son" or "hard working student."

□ Fairness and Equality Themes

- Depending on the facts and circumstances of the case and the makeup of the local jurisdiction, defenders should consider whether the opening statement or closing arguments provide an opportunity to emphasize themes related to racial fairness and equity.

*Have you considered using **experts** to advance your racial justice arguments?*

□ Cross-racial identification

- Defenders should consider using expert testimony to explain to the judge or jury that cross-racial identifications are inherently less reliable than identifications made when both parties are of the same race.

□ Implicit Racial Bias

- Defenders may consider using an expert to educate the factfinder on the impact of implicit racial bias at any stage of a delinquency case. This research may enhance defense arguments that stakeholders (police, witness, probation officers, etc.) often perceive Black youth to be older and less innocent than other youth, and that police officers are more likely to perceive ambiguous or innocuous facial expressions as hostile and threatening when on a Black face than on a white face.

□ Adultification

- Similarly, expert testimony may help factfinders understand and resist the adultification of youth of color at sentencing or in transfer or waiver proceedings. Experts may help the court understand that youth of color are often seen as older, more culpable, and more dangerous than their white counterparts, even when engaged in the same behaviors.

□ Trauma

- Expert testimony can be used to educate factfinders on the traumatic impact of routine policing and other types of racial discrimination experienced by Black, Latinx, and indigenous youth. Particularly when so many youth of color experience trauma and have a heightened number of Adverse Childhood Experiences ("ACEs"), an expert may help explain the ways that trauma causes or affects a child's reasoning, ability to resist peer influences, impulse control, and/or risk perception. Additionally,

Disposition/Sentencing

*Have you considered raising race during **disposition/sentencing**?*

□ Challenging Perceptions of "Maturity"

- Defenders should help stakeholders understand that because of trauma and coping strategies, some youth of color **may appear more developmentally mature** than they actually are (e.g., life experiences have led to forced self-reliance and adult work and responsibilities). In addition, defenders should highlight implicit racial bias research showing that individuals often perceive Black youth to be older and less innocent than white youth.

    - Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children,* 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

□ Challenging Risk Assessment Scores

- Defenders should become familiar with any Risk Assessment Instrument (RAI) used in the local jurisdiction and be aware that RAIs may use **racially-coded factors** such as the past incarceration of family members or the parents' ability to miss work for disposition programming. Defenders may identify and challenge RAI factors that contribute to racially disparate and unfair outcomes.

□ Challenging Racially Disparate Sentencing

- Defenders may use **disposition letters and arguments** to highlight the statistics on racial disparities in sentencing or disposition in the local jurisdiction. These arguments may appeal to the judge's egalitarian values, commitment to fairness, and desire to reduce disproportionate confinement of youth of color by using less restrictive, but equally safe and effective alternatives.

□ Advocating for Culturally Appropriate Services and Placements

- **Services:** Defenders should work with their clients to identify and recommend programs that are appropriate for or attentive to the **youth's cultural needs**, especially when such programs are required to report a youth's compliance directly to their probation officer. Additionally, defenders should **resist the over-servicing of youth** in the juvenile legal system.

    - For example, when the judge requires mentoring, tutoring, or employment as a condition of probation for a Black client, defenders may consider whether students at a local Historically Black College or University or members of a predominantly Black sorority or fraternity in the area might be able to assist the youth, rather than subjecting them to a court-run program. Defenders should also consider whether a youth could attend a substance-abuse prevention or drug education program run by a church or recreation center, rather than one run by the courts. Defenders in many jurisdictions have been successful when using these types of creative approaches.

- **Placements:** Defenders may advocate against the placement of **non-English speaking youth and youth of color** in residential facilities or other placements with no staff who speak the youth's language and/or with no other youth of the same race or ethnicity.

Post-Disposition Advocacy

*Have you considered raising race during your **post-disposition advocacy**?*

□ Violations of Probation

- Defenders should consider whether a youth of color is being brought to court for alleged minor **"technical violations"** that would not be so harshly reprimanded if the youth were white.

- Defenders should consider whether a youth's **inability or refusal to comply** with certain services stem from **cultural barriers** or the care providers' **cultural incompetence**.

    - For example, a youth may refuse to comply with therapy because of mental health stigmas in the Black and Latino communities or care providers who are not culturally astute in working with youth of color.

- Defenders should consider whether a youth is non-compliant because they are **being over-serviced as the result of the judges' implicit biases**, and challenge the appropriateness of the services for the youth's specific rehabilitative needs.

    - For example, a youth may refuse to comply with a judge's order to attend drug education courses when they were never tested positive for drug use in the first place. A youth may be afraid or refuse to attend gang intervention and anger management programming when they have never been affiliated with a gang.

□ Placement During Commitment

- Defenders may file a motion to modify a youth's placement or to release a youth from care when it appears the youth's continued placement outside of their home is based on the stakeholders' racial or class biases about a youth's home life or the "dangers" of the youth's neighborhood. Defenders may rebut these stereotypes by offering a clear narrative of the child's home life and parental support in ways that individualize them. Defenders should also remind stakeholders that youth are more likely to be rehabilitated when they develop effective coping skills and learn to manage their triggers and resist negative peer influences in their own communities.

    - *See* Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453 (2010).

□ Conditions of Confinement

- Defenders should be attentive to how **a youth's race, ethnicity, or religion** may impact their experiences while incarcerated. Defenders should:

    - monitor the youth's opportunity to **practice their religion**;

- ensure that every detained client is placed in a facility with staff who are able to **communicate with them in their first language**;

- be alert to housing classifications in detention facilities **that presume that youth of a certain race are gang involved;**

- be alert for alleged **disciplinary violations** that seem to be affected by race; and

- look for trends in the detention facility's housing classification and solitary confinement policies and practices that tend to **"classify" youth** into various categories or threat levels according to **racialized assumptions.**