# The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 30, Issue No. 3 May 2008

## JUSTICE FOR ALL

## LITIGATING RACE ISSUES TO PROTECT EQUAL JUSTICE IN KENTUCKY

# TABLE OF CONTENTS



**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*.

*Continued on page 6*

*Continued from page 5*

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 "wiggle 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 unpublished[1] 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 plain-clothes 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.

*Continued on page 10*

*Continued from page 9*

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 431.005[33] – 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 there 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]

*Continued on page 14*

*Continued from page 13*

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 152Ky.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

*Continued on page 16*

*Continued from page 15*

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

*Continued on page 18*

*Continued from page 17*

> 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 PopulationSource:**
**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**

| | KSP | EKCC | GRCC | KCIW | KCPC | KSR | LLCC | NTC | RCC | WKCC | BCFC | BCC | FCDC | LAC | MAC | A&C | CD | CSC | CC | CI |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 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 Luckett 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?

*Continued on page 20*

*Continued from page 19*

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) then 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 & Anjuli 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.)
5. Lawson, Robert, DIFFICULT TIMES IN KENTUCKY CORRECTIONS—AFTERSHOCKS OF A "TOUGH ON CRIME" 93 Ky. L.J. 305, 308 -309 (2004-2005).
6. *Id.*
7. *Moore v. Commonwealth, Ky., 983 S.W.2d 479, 487 (1998)* (prosecutor has broad discretion as to what crime to charge and what penalty to seek)
8. 57 Vand. L. Rev. 885, 898 (2004) 57 VNLR 885 Vanderbilt Law Review FELONY JURY SENTENCING IN PRACTICE: A THREE-STATE STUDY April, 2004
9. *Id.*
10. *Id.* 57 Vand. L. Rev. 885, 901 (2004)
11. See ABA Standards Relating to the Administration of Criminal Justice-The Prosecution Function
12. KRS 533.010
13. *Id.*
14. *Aviles v. Commonwealth,* 17 S.W.3d 534, 536-37 (Ky.App.2000).
15. *Cavanah v. Commonwealth,* 2007 WL 4355454, 3 (Ky.App.,2007)
16. *Brewer v. Commonwealth,* 550 S.W.2d 474, 477 (Ky.1977)
17. Commentary to KRS 533.010
18. *E.g., Webb v. Com.* 2008 WL 898931, 2 (Ky.App.2008)(Not to be Published)
19. *Tiryung v. Commonwealth,* 717 S.W.2d 503, 504 (Ky.App.1986).
20. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky.1999).
21. *Baker v. Com.*, 2007 WL 2343795, 2 -3 (Ky.App.2007) (Not to be Published)
22. *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky.1976).
23. KRS 533.060
24. Editorial, *A Just Balance, Larson's View of Justice Is Too Simplistic*, Lexington Herald Leader, (2/05/08).
25. Ellis, Ronnie, "Social Workers Keeping Some Out of Jail", at www.glasgowdailytimes.com/statenews/cnhinsall_story_043144126.html - (2/12/08)
26. *The Cumulative Effects Of Racial Disparities In Criminal Processing, Journal of the Institute of Justice and International Studies*, 261 (2007)
27. *Id.*
28. *Reducing Racial Disparity in the Criminal Justice System, A Manual for Practitioners and Policymakers*, The Sentencing Project, p. 16 (2000).
29. *Id.*
30. Robert M.A. Johnson (county attorney, Anoka County, Minnesota), ABA Criminal Justice Magazine, p.32, Winter (2007).
31. American Bar Association Commission On Effective Criminal Sanctions Criminal Justice Section National District Attorneys Association National Legal Aid And Defender Association Report To The House Of Delegates [On Training In The Exercise Of Discretion] Recommendation
32. Eleanor Holmes Norton, "A sour note, Constitution came up short on matter of equality,**"** *Lexington Herald-Leader*, (October 1, 1987). ■

# The Cumulative Effects of Racial Disparities in Criminal Processing

By Traci Schlesinger,[1] DePaul University

**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; Steffesmeier, 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.

*Continued on page 24*

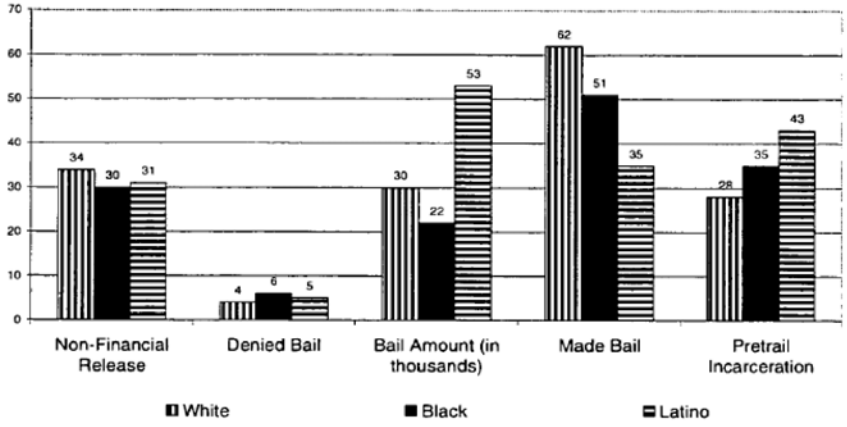
*Continued from page 23*

**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

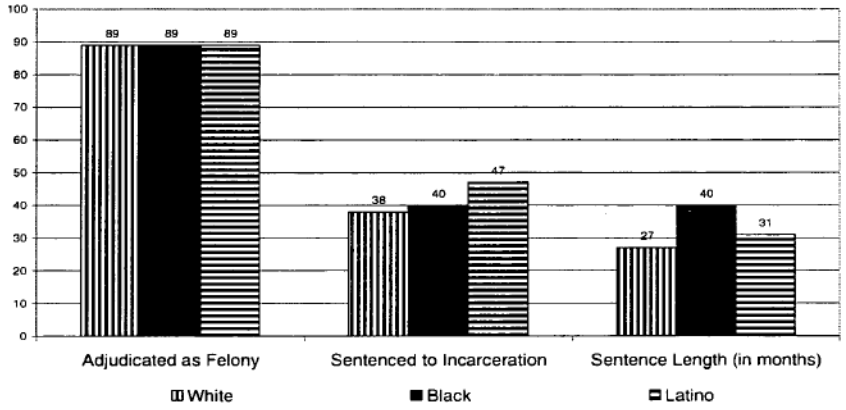



Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

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 defendants[8] (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



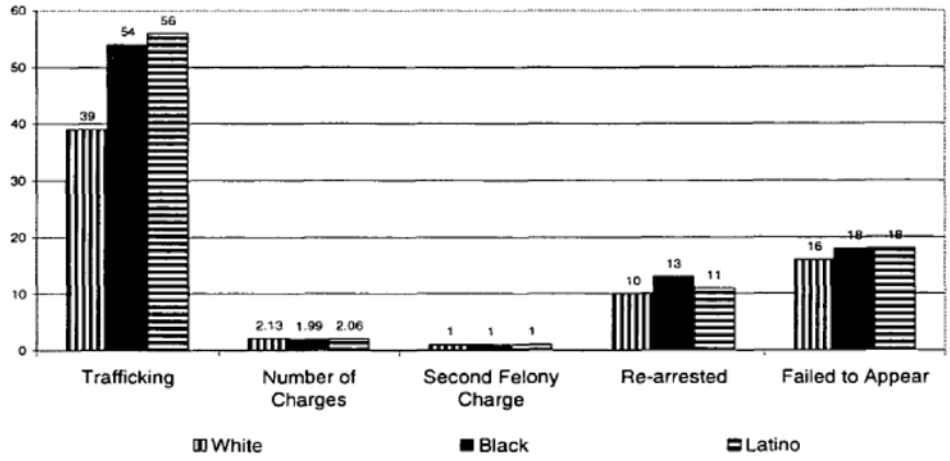

Note: Data for this figure are from the State Court Processing Survey, 1990 – 2002.

**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.

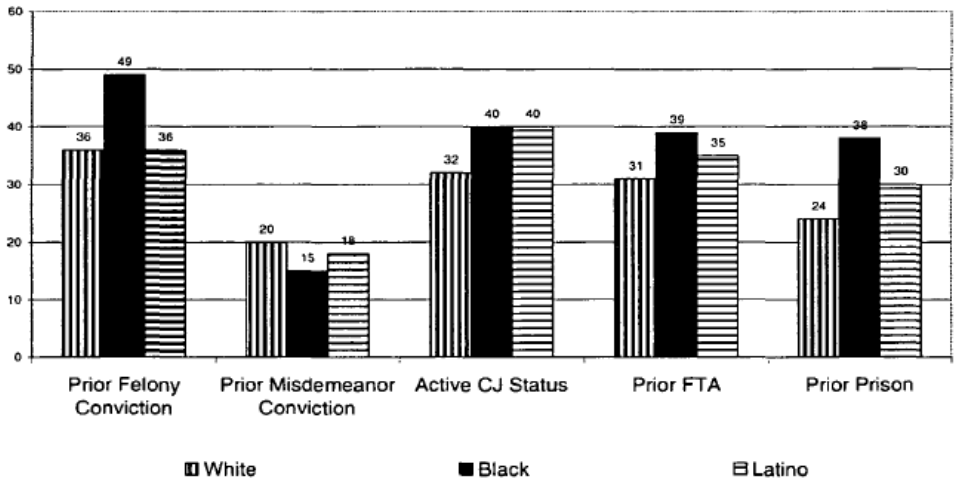
*Continued on page 26*

*Continued from page 25*

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:

$$\text{logit}(p_{ij}) = x'ij\langle\langle\text{beta}\rangle\rangle + {}_{ij}$$

while the effects of race on bail amount and sentence length can be estimated as:

$$\log(Y_{ij}) = x'ij\langle\langle\text{beta}\rangle\rangle + {}_{ij}$$

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-square = 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*

*Continued from page 27*

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*** | 1.17** | 1.20*** | 1.17*** | 1.11* | 1.07 |
| | (6.08) | (3.17) | (3.41) | (.05) | (.05) | |
| Latino | 1.45*** | 1.22*** | 1.29*** | 1.35*** | 1.22*** | 1.20*** |
| | (7.45) | (3.84) | (4.45) | (.05) | (.05) | (.05) |
| Pretrial | | 4.00*** | 3.64*** | | 1.86*** | 1.80*** |
| Incarceration | | (32.84) | (29.16) | | (.04) | (.04) |
| Adjudication | | | .78*** | | | 5.47*** |
| Level | | | (3.74) | | | (.06) |
| Trafficking | 1.97*** | 1.81*** | 1.95*** | 2.08*** | 1.92*** | 1.77*** |
| | (18.00) | (14.85) | (15.67) | (.04) | (.04) | (.03) |
| Number of | 1.11*** | 1.09*** | 1.11*** | 1.09*** | 1.09*** | 1.08*** |
| Charges | (7.29) | (5.91) | (6.73) | (.01) | (.01) | (.01) |
| Second Felony | 1.47 | 1.16 | 1.20 | .91*** | .81 | .82 |
| Charge? | (1.07) | (.40) | (.47) | (.32) | (.31) | (.29) |
| Re-Arrested | 1.06 | 1.63*** | 1.68*** | 1.15** | 1.62*** | 1.51*** |
| Pretrial? | (1.12) | (8.78) | (8.36) | (.05) | (.06) | (.05) |
| Failure to | .54*** | 0.88** | 1.50*** | 1.04 | 1.03 | 1.04 |
| Appear | (12.43) | (2.57) | (6.91) | (.04) | (.04) | (.04) |
| Prior Felony | 1.98*** | 1.73*** | 1.70*** | 1.63*** | 1.51*** | 1.51*** |
| Conviction | (13.76) | (10.49) | (9.56) | (.05) | (.05) | (.05) |
| Prior Misd. | 1.15** | 1.18** | 1.16** | .83*** | .84 | .85*** |
| Conviction | (2.66) | (2.49) | (2.59) | (.05) | (.05) | (.05) |
| Active Criminal | 1.36*** | 1.11** | 1.08 | 1.30*** | 1.20*** | 1.20*** |
| Justice Status | (7.61) | (2.49) | (1.78) | (.04) | (.04) | (.04) |
| Prior Failure | 1.22*** | 1.13** | 1.50*** | 1.04 | 1.03 | 1.04 |
| to Appear | (4.70) | (2.75) | (9.56) | (.04) | (.04) | (.04) |
| Prior Prison | 1.22*** | 1.13** | 1.15* | 1.55*** | 1.51*** | 1.51*** |
| | (4.46) | (2.58) | (2.21) | (.04) | (.04) | (.04) |
| 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."

* $p = < .01$; ** $p = < .005$; *** $p = < .001$

*Continued on page 30*

*Continued from page 29*

**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

*Continued on page 32*

*Continued from page 31*

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.

**References**


- Beckett, K. (1999). *Making crime pay: Law and order in contemporary American politics*. New York: Oxford University Press.
- Beckett, K., Nyrop K., & Pfingst L. (2006). Race, drugs, and policing: Understanding disparities in drug delivery arrests. *Criminology, 44,* 105-137.
- Blumstein, A. (1982). On the racial disproportionality of United States' prison populations. *The Journal of Criminal Law and Criminology, 73*, 1259-1282.
- Bridges, G. & Crutchfield, R. (1988). Law, social standing, and racial disparities in imprisonment. *Social Forces, 66*, 699-724.
- Bureau of Justice Statistics. (1998). *Correctional populations in the United States, 1997*. Washington, DC: U.S. Government Printing Office.
- Bureau of Justice Statistics. (2003). *Prevalence of imprisonment in U.S. population, 1974 - 2001*. Washington, DC: U.S. Government Printing Office.
- Bureau of Justice Statistics. (2006). *Prison and jail inmates at midyear, 2005*. Washington, DC: U.S. Government Printing Office.
- Chiricos, T. & Gordon, W. (1975). Socioeconomic status and criminal sentencing: An empirical assessment of a conflict proposition. *American Sociological Review, 40*, 753-772.
- Chiricos, T. & Bales, W. (1991). Unemployment and punishment: An empirical assessment. *Criminology, 29*, 701-24.
- Crawford, C. (2000). Gender, race, and habitual offender sentencing in Florida. *Criminology, 38*, 263-80.
- Crawford, C., Chiricos, T., & Kleck, G. (1998). Race, racial threat, and sentencing of habitual offenders. *Criminology, 36*, 481-511.
- Curran, D. A. (1983). Judicial discretion and defendant's sex. *Criminology, 21*, 41-58.
- Curtin, M. E. (2000). *Black prisoners and their world, Alabama 1865 - 1900*. Virginia: University Press of Virginia.
- Daly, K. (1989). Rethinking judicial paternalism: Gender, work-family relations, and sentencing. *Gender and Society, 3*, 9-36.
- Delgado, R. (1994). Rodrigo's eighth chronicle: Black crime, white fears—on the social construction of threat. *Virginia Law Review, 80*, 503-48.
- Demuth, S. (2003). Racial and ethnic differences in pretrial release decisions and outcomes: A comparison of Hispanic, Black, and White felony arrestees. *Criminology, 41*, 873-907.
- Hagan, J. (1974). Extra-legal attributes and criminal sentencing: An assessment of a sociological viewpoint *Law & Society Review, 8*, 357-384.
- Gruhl, J., Welch, S., & Spohn, C. (1984). Dismissal, conviction and incarceration of Hispanic defendants: A comparison with Anglos and Blacks. *Social Science Quarterly, 65*, 257-264.
- Kautt, P. & Spohn, C. (2002). Crack-ing down on black drug offenders? Testing for interactions among offenders' race, drug type, and sentencing strategy in federal drug sentences. *Justice Quarterly, 19*, 1-35.
- Kleck, G. (1985). Life support for ailing hypotheses: Modes of summarizing the evidence for racial discrimination in sentencing. *Law and Human Behavior, 9*, 271-285.
- Kruttschnitt, C. & McCarthy, D. (1985). Familial social control and pretrial sanctions: Does sex really matter? *Journal of Criminal Law and Criminology, 76*, 151-75.
- Langan, P. (1985). Racism on trial: New evidence to explain the racial composition of prisons in the United States. *The Journal of Criminal Law and Criminology, 76*, 666-683.
- Nobling, T., Spohn, C., & Delone, M. (1998). A tale of two counties: Unemployment and sentencing severity. *Justice Quarterly, 15*, 459-85.
- Pager, D. (2003). The mark of a criminal record. *American Journal of Sociology, 108*, 937-975.
- Petersilia, J. (1985). Racial disparities in the criminal justice system. *Crime & Delinquency, 31*, 15-34.
- Peterson, R. & Hagan, J. (1984). Changing conceptions of race: Towards an account of anomalous findings of sentencing research. *American Sociological Review, 49*, 56-70.
- Reiman, J. (2004). *Rich get richer and the poor get prison: Ideology, class, and criminal justice*. USA: Allyn & Bacon, Inc.
- Schafer, J., Carter, D., Katz-Bannister, A., & Wells, W. (2006). Decision making in traffic stop encounters: A multivariate analysis of police behavior. *Police Quarterly, 9*, 184-209.
- Schlesinger, T. (2005). Racial and ethnic disparities in pretrial criminal processing. *Justice Quarterly, 22*, 170-192.
- Spohn, C., Gruhl, J., & Welch, S. (1981). The effect of race on sentencing: A re-examination of an unsettled question. *Law & Society Review, 16*, 71-88.
- Spohn, C. & Cederblom, J. (1991). Race and disparities in sentencing: a test of the liberation hypothesis. *Justice Quarterly, 8*, 305-27.
- Spohn, C. & Spears, J. W. (1997). Gender and case processing decisions: A comparison of case outcomes for male and female defendants charged with violent felonies. *Women and Criminal Justice, 8*, 29-59.
- Spohn, C. & Holleran, D. (2000). The imprisonment penalty paid by young, unemployed Black and Hispanic male offenders. *Criminology, 38*, 281-306.


*Continued on page 34*

*Continued from page 33*


- Steffensmeier, D., Ulmer, J., & Kramer, J. (1998). The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, Black, and male. *Criminology, 36,* 763-797.
- Steffensmeier, D., Kramer, J., & Streifel, C. (1993). Gender and imprisonment decisions. *Criminology, 31,* 411-46.
- Steffensmeier, D. & Demuth, S. (2000). Ethnicity and sentencing outcome in U.S. federal courts: Who is punished more harshly? *American Sociological Review, 65,* 705-29.
- Steury, E. H. & Frank, N. (1990). Gender bias and pretrial release: More pieces of the puzzle. *Journal of Criminal Justice, 18,* 417-432.
- Western, B. & McLanahan, S. (2000). Fathers in fragile families: The impact of incarceration on family formation. In G. L. Fox (Ed.) *Families, crime, and criminal justice,* (pp. 307-22). London: Oxford University Press.
- Western, B. & Pettit, B. (2000). Incarceration and racial inequality in men's employment. *Industrial and Labor Relations Review, 54,* 3-16.


**Endnotes:**

1. *Direct correspondence to tschlesi@depaul.edu*
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.

***Reprinted with author's permission.***

# CHALLENGING THE VENIRE

**By Tim Arnold, Post Trial Division Director**
**Gail Robinson, Juvenile Post Disposition Branch**
**Lisa Clare, Appeals Branch**

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*:

*Continued on page 36*

*Continued from page 35*

> 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 from[12]), 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 town[13]), or a person who makes case by case decisions (*e.g*., a judge granting excuses from service[14]). 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).

*Continued on page 38*

*Continued from page 37*

### 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 summoned 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*

*Continued from page 39*

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

**by Susan Jackson Balliet, Frankfort Appeals, and**

**Bruce P. Hackett, Louisville Metro Public Defender**

**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 process[8]:

**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]

*Continued on page 44*

*Continued from page 43*

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.

*Continued on page 46*

*Continued from page 45*

**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]

*Continued on page 48*

*Continued from page 47*

- **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 the 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]

*Continued on page 50*

*Continued from page 49*

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 reseated[91]

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.

*Continued on page 52*

*Continued from page 51*

**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 Flags**[118]

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 Ceglio, 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).

*Continued on page 54*

*Continued from page 53*

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, 400-40 2 (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 McAnulty, 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. Rodriquez*, 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).

*Continued on page 56*

*Continued from page 55*

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 English[1]

## 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-Americans[3] 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

*Continued on page 58*

*Continued from page 57*
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 nota 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]

*Continued on page 60*

*Continued from page 59*

**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 left 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

*Continued on page 62*

*Continued from page 61*

**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

**Jeffery P. Robinson**
***Schroeter Goldmark & Bender***
**500 Central Building**
**810 3rd Ave, Ste 500**
**Seattle, WA 98104**

**Jodie English**
**Indiana Public Defender Council**
**309 West Washington Street, Suite 401**
**Indianapolis IN 46204**
**E-mail: englishlaw@earthlink.net**

**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 indentify non-whites than is a white person who has little contact with non-whites.
5. See Russell, Katheryn 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*."
7. Robert B. Hirschhorn, 217 South Stemmons Freeway, Suite 203, Lewisville, TX 75067; (972) 434-5879; Fax (972) 434-0176; cebjury@gte.net ■

# 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

*Continued on page 64*

*Continued from page 63*

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.

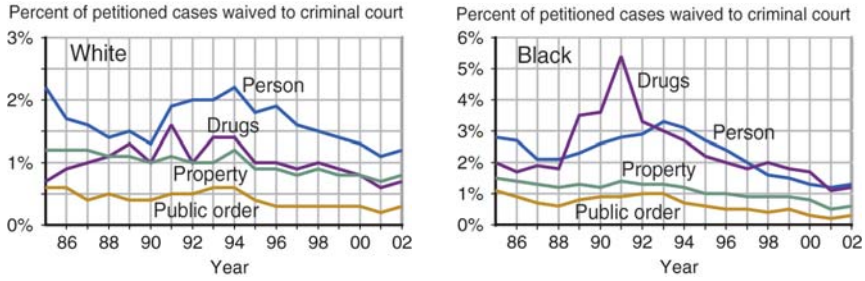
IV. Develop a reasonable, sellable alternative plan to transfer that will meet both the judge and the prosecutor's concerns and that the client will find understandable and acceptable.

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.

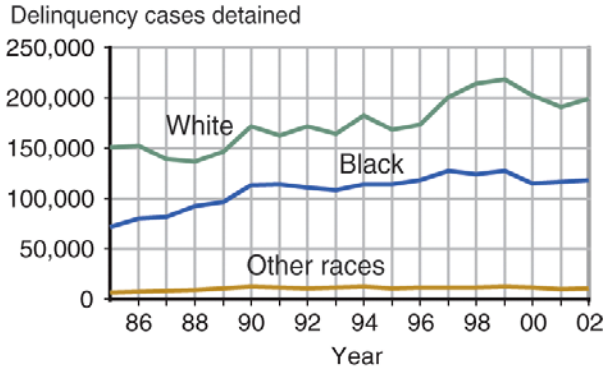
VI. Use criminal justice data in preliminary motions to set the stage for the presence of disparity in broad criminal justice decision-making. (OJJDP, DJJ Biennium Reports, NJDC, ABA, the Sentencing Project) The following examples of statistics and graphs from the OJDP illustrate just some of the persuasive 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*

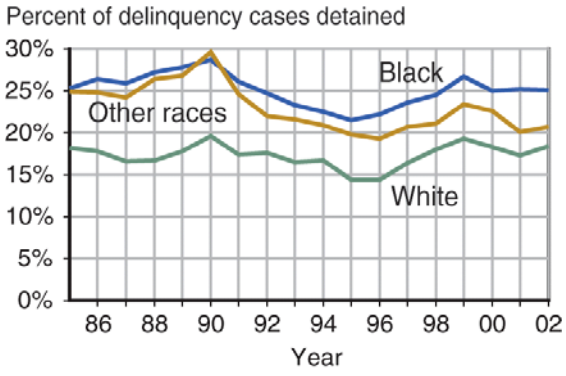
## For most of the period from 1985 to 2002, the likelihood of waiver was greater for black youth than for white youth regardless of offense category




## 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

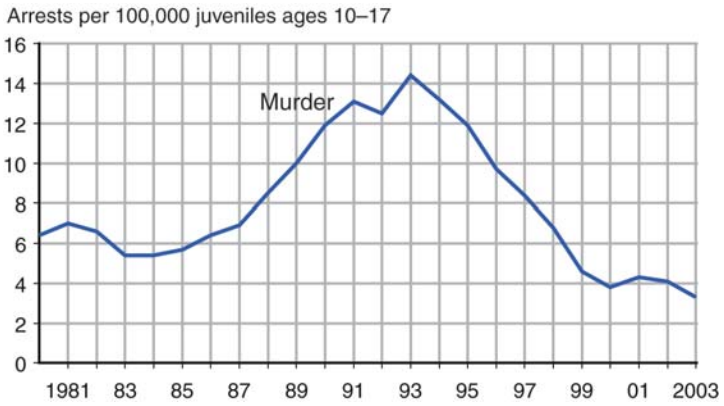




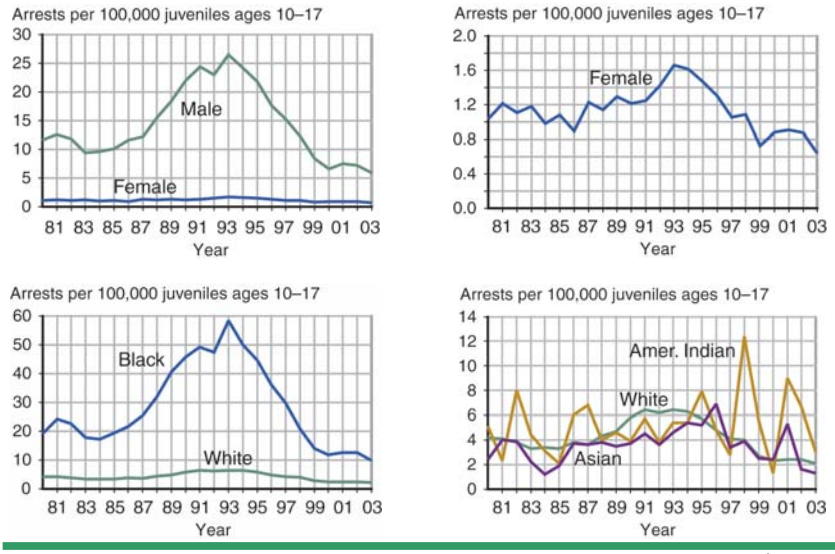

*Continued on page 66*

*Continued from page 65*

## The arrest rate for murder in 2003 was the lowest since at least 1980 for white, black, male, and female juveniles

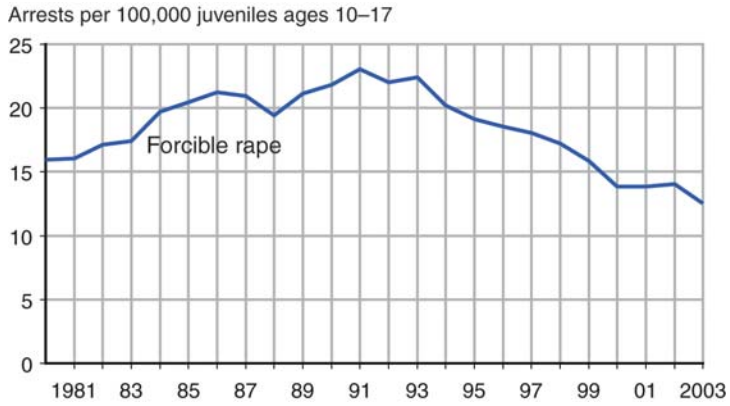



## Murder arrest rate trends by gender and race

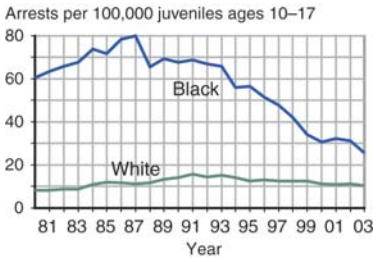


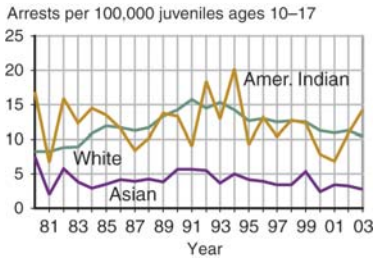

***Juvenile Offenders and Victims: 2006 National Report*** NCJJ / OJJDP

## 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

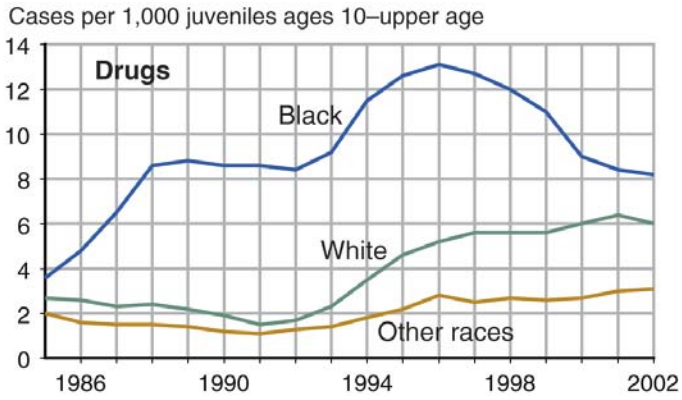



## Forcible rape arrest trends by race




## Case rates for drug offenses more than doubled from 1985 to 2002 for both white (118%) and black (128%) youth

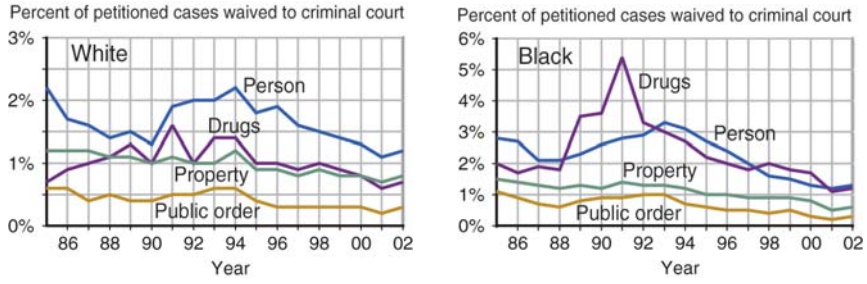





*Continued on page 68*

*Continued from page 67*

**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**




***Juvenile Offenders and Victims: 2006 National Report*** NCJJ / OJJDP

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]

*Continued on page 70*

*Continued from page 69*

State courts have no authority to enforce federal immigration laws, and therefore cannot hold defendants who are otherwise eligible for release without bail pending Immigrations 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 the 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 offers 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 offers 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 role, 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 misadvise 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 misadvise 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

*Continued on page 72*

*Continued from page 71*

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 Seminar[23] 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.

*Continued on page 74*

*Continued from page 73*

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. S*ee 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 veniresmen 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. Palaciaos-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

**Acknowledgments**

Dan Kesselbrenner and Sandy Lin are the principal authors of the chart. We would like to thank Ann Benson, Kathy Brady, Ira Kurzban, Lisa Palumbo, Lory Rosenberg, Norton Tooby, Manuel Vargas, and Marianne Yang for their many significant contributions to this research and the staff at the National Immigration Project of the National Lawyers Guild for its support.

We are grateful to the Gideon Project of the Open Society Institute, the Ford Foundation and the Jeht Foundation for funding the Defending Immigrants Partnership.

**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 | |

*Continued on page 78*

*Continued from page 77*

| 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 | *See Valansi v. Ashcroft*, 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). | |

*Continued on page 80*

*Continued from page 79*

| 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 | |

*Continued on page 82*

*Continued from page 81*

| 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 *Chang v. INS,* 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 |

*Continued on page 84*

*Continued from page 83*

| 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 underling 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 | |

*Continued on page 86*

*Continued from page 85*

| 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 |

*Continued on page 88*

*Continued from page 87*

| 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 | |
| 21U.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. | |

*Continued on page 90*

*Continued from page 89*

| 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).

*Continued on page 92*

*Continued from page 91*

27. *Matter of K*, 7 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*, 9 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); *Izedonmwen 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 it if 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). ■

PRESORTED STANDARD
U.S. POSTAGE PAID
LEXINGTON, KY
PERMIT # 1

# THE ADVOCATE

**Department of Public Advocacy**
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601

***The Advocate:***
**Ky DPA's Journal of Criminal Justice Education and Research**

*The Advocate* provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

*The Advocate* is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

*The Advocate* strives to present current and accurate information. However, no representation or warranty is made concerning the application of the legal or other principles communicated here to any particular fact situation. The proper interpretation or application of information offered in *The Advocate* is within the sound discretion and the considered, individual judgment of each reader, who has a duty to research original and current authorities when dealing with a specific legal matter. *The Advocate*'s editors and authors specifically disclaim liability for the use to which others put the information and principles offered through this publication.





**Department of Public Advocacy**
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 236
Fax: (502) 564-7890
E-mail: Lisa.Blevins@ky.gov

Paid for by State Funds. KRS 57.375