Effective Use of Data and Experts to Litigate Race

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I. Introduction

Racial bias permeates the justice system, affecting decision-making at every level of the system from who is stopped by police, to charging decisions, plea bargaining, and sentencing. Everyone knows this. Everyone, that is, except perhaps the judge hearing your case. For example, at a recent Senate Judiciary Committee hearing, Seventh Circuit nominee Michael Brennan declined to agree with Senator Booker's assertions that racial bias exists in the criminal justice system, saying he would need to look at the data before giving an opinion. As defense lawyers, one of our jobs is to get the judges to "look at the data," and think about broader issues relating to race. Often times investigators, mitigation specialists, and other experts are essential for communicating our clients' stories and getting the judge to understand how issues relating to race are relevant in a particular case.

This session focuses on the use of experts when litigating issues of race in the federal courts. We explore the utility of experts to discuss race, the types of expert to contemplate, and where to find experts. There will be a further discussion on how to get funding for these experts. The goal here is simple –we want people to think creatively about the different ways experts can be used to explore issues of race in criminal cases.

We also want to persuade you, as a general matter, to use experts more frequently. Experts can make a good defense great. Defense counsel can argue to the court or a jury that the lack of gun powder residue on the defendant's hands means he didn't handle a firearm, but how much stronger is that claim if there is expert testimony to back it? Likewise, an attorney can try to articulate the coercion a client felt that compelled them to speak to law enforcement officers, or following the example of the Brendan Dassey attorneys,[1] who used experts to provide data and research to convince the court. When exploring issues of race in the court, experts are useful and can help explain nuanced issues counsel presents to the court.

[1] Juvenile Brendan Dassey was charged as an adult with murder, along with his uncle Steven Avery. The details of their case were explored in the Netflix documentary "Making a Murderer."

II. Brainstorm how information about issues of race might inform decision making by the judge or jury at every stage of the proceedings

A. Bail Issues

1. Mitigation specialist/social worker to create release plan for clients lacking family support and financial resources

2. Racial disparities in defendants released on bail

3. Racial bias in risk assessment algorithms

4. Undiagnosed and/or untreated mental health[2]

5. Employment disparity[3]

6. Misdemeanors/ordinance violations as forms of social control and their impact on bail[4]

B. Suppression Motions

1. Whether fleeing provides reasonable suspicion of criminal activity

   a. May consider whether defendant was member of racially targeted group with reason to flee from police, *see Commonwealth of Massachusetts vs. Jimmy Warren*[5]: "Such an individual, when approached by police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's

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[2] African American Mental Health, National Alliance of Mental Illness; Mental Health and African Americans, U.S. Department of Health and Human Services Office of Minority Health

[3] "Unemployment of black and Hispanic workers remains high relative to white workers", Janelle Jones, Economic Policy Institute, January 3, 2018

[4] i.e. Ferguson Report (March 4, 2015)

[5] 58 N.E. 3d 333 (Mass. 2016); court held that investigatory stop was not justified by reasonable suspicion that defendant committed breaking and entering, specifically noting that where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston.

findings in weighing flight as a factor in the reasonable suspicion calculus."

2. Whether a person's race is relevant in determining whether they would have considered themselves free to leave for purposes of evaluating whether there is a "seizure" or "custody."

   a. *See United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (in determining whether defendant was seized when she was asked to accompany DEA agents to their airport office, it was "not irrelevant" that as a black female the defendant may have felt unusually threatened by white male officers.

   b. *United States v. Smith*, 794 F.3d 681, 687-88 (7th Cir. 2015) – Court found that defendant had been seized based on other factors, and declining to address Smith's argument that "no reasonable person in [defendant's] 'position'—as a young black male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained-would have felt free to walk away" from the officers. Court states: "We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system," while ultimately following *Mendenhall*.

   c. *United States v. Randy Johnson*, 874 F.3d 571 (7th Cir.): Court found that there was no Fourth Amendment violation, as the car was parked illegally. Following his scathing dissent in the initial appellate decision, Judge Hamilton dissented again when the case was presented en banc.

      He notes the difference between the low-income, minority dominated neighborhood Johnson was arrested in and the affluent, primarily white east side. He writes, "[t]he majority's treatment of the loading-and-unloading proviso bears no practical relationship to reality or to what happened here on the streets of Milwaukee. Imagine that the police tried these tactics in Milwaukee's affluent east side. Citizens would be up in arms, and rightly so. No police officer could expect to keep his job if he treated a car standing in front of a store as worthy of such an intrusive *Terry* stop. The government's theory—that the seizure of a stopped car by the police would be

justified because the occupants could always explain in court that they had merely stopped the car to make a purchase—invites intolerable intrusions on people just going about their business."

He ends his emphatic dissent with the following: "What made the officers decide so fast to swoop in to seize this car? On this record, the only explanation is the neighborhood, and the correlation with race is obvious. It is true that Johnson has not made an issue of race, but we should not close our eyes to the fact that this seizure and these tactics would never be tolerated in other communities and neighborhoods. If we tolerate these heavy-handed tactics here, we enable tactics that breed anger and resentment, and perhaps worse, toward the police.

Defendant Johnson is not a sympathetic champion of the Fourth Amendment, of course. That is not unusual in Fourth Amendment litigation. But the practical dangers of the majority's extension of *Terry* and *Whren* to suspected parking violations will sweep broadly. Who among us can say we have never overstayed a parking meter or parked a little too close to a crosswalk? We enforce the Fourth Amendment not for the sake of criminals but for the sake of everyone else who might be swept up by such intrusive and unjustified police tactics. I respectfully dissent."

d. *United States v. Easley*, 2018 WL 354673 (January 10, 2018): The Court must faithfully apply the Fourth Amendment in order to ensure equal protection for all. Ignoring the fear-infused racial dynamics in a police encounter weakens if not eviscerates Fourth Amendment protections for people of color. Because the Tenth Circuit instructs courts to consider the totality of the circumstances, so long as it does not rely on the subjective perspective of the defendant, the Court must consider race as one of numerous contextual factors in the same way that the Supreme Court has considered age.

3. Understanding slang/hip hop

a. *See State v. Demesme*, 228 So.3d 1206 (La. 2017) (Crichton, J., concurring in denial of writ of certiorari) – During in custody interrogation, defendant stated "I know that I didn't do it so

why don't you just give me a lawyer dog cause this is not what's up." Concurring judge emphasizes that in his view the reference to a "lawyer dog" is not an invocation of counsel. An expert might explain how a request for a "lawyer, dawg" doesn't mean the client wanted a dog with a law degree, but rather was invoking his right to counsel.

b. Experts who can explain that "violent" hip-hop lyrics can't be taken at face value and are not true threats or cause for concern. *See, e.g.,* amicus brief in support of cert petition in *Bell v. Itawamba County School Board,* filed on behalf of Killer Mike and other hip-hop artists, also discussed in The New Yorker article "Killer Mike's Supreme Court Brief". The amicus brief cites a study where people are asked to assess the offensiveness and dangerousness of a 1960 folk song about killing a sheriff—the results depend on whether the subjects were told the song was rap, country, or folk.

c. *See United States v. Alvarez-Nunez*, 828 F.3d 52 (1st Cir. 2016)—The court addressed the issue of whether a defendant's music could be a relevant factor at sentencing. Here they held that a defendant's music should not be any more relevant to a sentencing decision than an actor's portrayal of a sadistic character. Particularly relevant when the government attempts to introduce such things as rap lyrics to prove a defendant's predisposition, etc.

d. Use of props in videos, photos, and social media.

4. Investigating officer's actions in other cases to determine if relying on same alleged justifications for a stop in many cases

i. Community relationships and perceptions about law enforcement

ii. Police practices in minority neighborhoods[6]

iii. Traffic data

iv. Race as proxy for gang affiliation

[6] Broken windows policing, predictive policing, etc.

C. Other Pretrial Motions

1. Selective Prosecution[7]
2. Equal Protection Claims
3. Challenges to Composition of Venire[8]

D. Trial

1. Jury Selection/Questionnaire

   a. Jury consultant
   b Investigator to investigate jurors for bias
   c Avoid *Pena-Rodriguez* issues[9]

2. False confessions[10]

4. Cross-racial identification[11]

5. Rebutting racial stereotypes and improper expert opinion

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[7] See *United States v. Armstrong*, 517 U.S. 456 (1996); See Chicago stash house litigation cases discussed here and here. Judge Castillo's order here.

[8] See *United States v. Raskiewicz*, 169 F.3d 559 (7th Cir. 1999)(rejecting fair cross section and equal protection challenge to exclusion of "reservation Indians" from Eastern District of Wisconsin jury process.); *United States v. Barry*, 71 F.3d 1269 (7th Cir. 1995)(rejecting challenge to exclusion of felons from jury selection)

[9] *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) (During jury deliberations a juror expressed anti-Hispanic sentiments that were reported to the lower court. The lower court declined to grant a new trial. The Supreme Court held that where a juror makes clear they relied on racial stereotypes or animus to convict a person, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee)

[10] *See United States v. Odeh*, 815 F.3d 968 (6th Cir. 2016) (court erred by excluding testimony of expert who would have testified that defendant's torture in Israeli prison and PTSD could have affected her ability to know what was false where defendant charged with lying about prior criminal arrests and convictions).

[11] See "Cross-Racial Identifications: Solutions to the "They All Look Alike Effect"", Laura Connelly, 21 Mich. J. Race & L. 125 (2015); *United States v. Bartlett*, 567 F.3d 901 (7th Cir. 2009)(This case provides succinct justification regarding relevance (per Federal Rule of Evidence 403) of eyewitness identification at trial. "It will not do to reply that jurors know from their daily lives that memory is fallible. The question that social science can address is how fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct. Many people believe that identifications expressed with certainty are more likely to be correct; evidence that there is no relation between certitude and accuracy may have a powerful effect."); "Cross-racial identifications are much less likely to be accurate than same race identifications." Rahaim & Brodsky, Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy, 7 Law and Psych. Rev. 1, 2 (1982). *Arizona v. Youngblood*, 488 U.S. 51, 72 (1988)

a. *Buck v. Davis*, 137 S. Ct. 759 (2017)--Supreme Court vacates death sentence where *defense lawyer* presented expert who testified that defendant was statistically more likely to be dangerous because he was black, emphasizing such testimony "appealed to a powerful racial stereotype—that of black men as 'violence prone.'"

b. *United States v. Doe*, 903 F.2d 16 (D.C. Cir. 1990): Introduction of role of Jamaicans in local market for illegal drugs was reversible error.

E. Sentencing

1. Racial bias in risk assessment algorithms[12]

2. Continuing crack cocaine-powder cocaine disparity[13]

3. Demographic comparison of punishments, both juvenile and adult[14]

4. Disproportionate discipline at school[15]

5. Arrest/prosecution/plea bargaining/sentencing disparities that result in harsher sentences for current offense because of criminal history and incremental sentencing[16]

6. Undiagnosed and/or untreated mental health[17]
   a. Trauma
   b. PTSD[18]

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[12] See "Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing", D. Kehl, P. Guo, S. Kessler (July 2017)

[13] See "Crack vs. Powder: Why Cocaine Arrests Aren't the Same", Christopher James-NYU, February 23, 2015

[14] i.e. "Black Disparities in Youth Incarceration", The Sentencing Project, September 12, 2017; "Native Disparities in Youth Incarceration", The Sentencing Project, October 12, 2017; "Latino Disparities in Youth Incarceration", The Sentencing Project, October 12, 2017

[15] See K-12 Education Discipline Disparities for Black Students, Boys, and Students with Disabilities, United States Government Accountability Office Report to Congressional Requesters (March 2018)

[16] Highlight the history of racist practices from other states if there's out-of-jurisdiction criminal history.

[17] See "Trauma Exposure, Posttraumatic Stress Disorder and Depression in an African-American Primary Care Population", Tanya Alim, et. al., 98 JAMA 10 (October 2006); Culture and Mental Health Disparities Lab

[18] "Assessment of Posttraumatic Stress Disorder in African Americans", E. Malcoun, M.T. Williams, & L.V. Bahojb-Nouri, Guide to Psychological Assessment with African Americans (2015)

c. Bipolar Disorder and/or Schizophrenia

7. Employment disparity/Poverty

8. Affluenza v. thug

9. Misdemeanors as a means of social control

10. BOP ability to treat medical issues that disproportionately impact the population[19]

F. Supervised Release

1. Racial bias in risk assessment algorithms

2. Undiagnosed and/or untreated mental health

3. Employment disparity/Poverty

III. Vehicles for getting the information to the decision maker.

1. Rule 17 subpoenas

2. Citations to research in moving papers

3. Sentencing memos

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[19] See *United States v. Rothbard*, 851 F.3d 699 (7th Cir. 2017)(Posner dissent noting that the BOP was not equipped to continue medical treatment for client's leukemia and were likely unable to manage his bipolar disorder with manic episodes. Also cites compelling statistics regarding the galling lack of medical treatment for persons incarcerated in the BOP, and especially at the private prisons used by the agency.); "Sickle Cell Patients Endure Discrimination, Poor Care And Shortened Lives", Jenny Gold, www.npr.og, November 4, 2017; "Sickle Cell Anaemia and Deaths in Custody in the UK and the USA", Simon Dyson and Gwyneth Boswell, The Howard Journal, Vol 45 No. 1, February 2006; Also, an individual can't sue BOP under a Bivens action (the implied 1983 type remedy against the feds). The law is clear that Bivens does not provide a remedy for alleged constitutional deprivation directly against a federal agency. *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994), *cited in Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1283 (11th Cir. 2012); The Eighth Amendment prohibits prison officials from acting with deliberate indifference to a prisoner's objectively serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). To establish an Eighth Amendment violation, the prisoner must show that the prison official was subjectively aware of his serious medical need, and was then deliberately indifferent to it, such as by "intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Id*. at 104; Enduring Stigma: The Long-Term Effects of Incarceration on Health, Jason Schnittker and Andrea John, Journal of Health and Social Behavior, Vol. 48, No. 2, pp. 115-130, June 2007)(Spending time in prison is its own independent factor contributing to poor health, concluded a longitudinal study in the general prison population on incarceration and health care.)

4. Live testimony

5. Local and regional statistical information

6. Ex Parte Application for Experts

7. Sentencing videos

IV. Consider whether an expert will assist in persuading the decision maker about the salience of race under the circumstance of the case?

1. Potential experts

2. Investigators

3. Mitigation Experts
   a. Social history
   b. Development of alternatives to incarceration

4. Psychologists

5. Psychiatrists

6. Epidemiologists

7. Social Workers

8. Professors

9. Statisticians

10. Cultural Experts
    a. Naming conventions[20]
    b. Interpreters[21]

11. Immigration Experts[22]

12. Community Organizations

[20] See Naming Conventions of Spanish-Speaking Cultures, www.tarver-geneology.net
[21] See "Access To Justice for People Who Do Not Speak English", Chief Justice Randall Shepard, 40 Ind. L. Rev. 643 (2007)
[22] National Immigrant Justice Center

V. Getting funding for these experts?[23]

A. Authority for Obtaining Investigative, Expert, and Other Services

1. 18 U.S.C. s. 3006A(e)

a. Counsel for defendant who can't afford service may request them in ex parte application (even if retained).

b. Can obtain services without prior authorization necessary for adequate representation in amount totaling up to $800 without prior authorization but subject to subsequent review..

c. Compensation for services provided by person or organization in excess of $2400 must be approved by Circuit.

2. See Guide to Judiciary Policy, Vol. 7, Pt. A., Ch. 3 (detailing procedures)

B. Constitutional

"Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), an indigent defendant who "demonstrates to the trial judge that his [or her] sanity at the time of the offense is to be a significant factor at trial .. . must [be given free] . . . access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" Although Ake itself dealt only with psychiatric experts, the Court's reasoning applies to other kinds of expert assistance as well. The Ake decision is grounded upon the State's obligation to afford an indigent defendant "access to the raw material integral to the building of an effective defense," 470 U.S. at 77. The same obligation exists whether the necessary "raw material" is a psychiatrist or some other type of expert. "'Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'" *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam). In these cases, the government must furnish the necessary funds."[24]

In *Ayestas v. Davis*, 584 U.S. ___ (2018), the court examined whether the defendant's request for expert funds was properly denied. In the Court's opinion, the standard was clarified. "Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the

[23] The CJA 25 provides instructions for getting authorization to hire experts.
[24] Anthony Amsterdam and Randy Hertz, Trial Manual 6 for the Defense of Criminal Cases, Section 5.2, "ALI", 6th. Ed. (2016)

claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.

To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. But the "reasonably necessary" test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone."

Justice's Sotomayor's concurrence further clarified, stating that the "exercise of that discretion may be appropriate if there is a showing of gamesmanship or where the State has provided funding for the same investigation services, as Ayestas conceded at argument. Nonetheless, the troubling failures of counsel at both the trial and state postconviction stages of Ayestas' case are exactly the types of facts that should prompt courts to afford investigatory services to ensure that trial errors that go to a "bedrock principle in our justice system" do not go unaddressed."

In short, the highest court in the land sees the value in using experts when they are relevant to the defense. It is the responsibility of attorneys to determine when experts should be used for a myriad of issues, and race is one issue that should always be contemplated when one represents a client of color.