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# *Tools for Developing a Record on Race*

## The Defender Initiative – Gideon at 60

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Melissa Lee, [leeme@seattleu.edu](mailto:leeme@seattleu.edu)

Jessica Levin, [levinje@seattleu.edu](mailto:levinje@seattleu.edu)

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# Overview

## Our Starting Point:

- question *how* race is playing a role, not *if*

## Methods:

- Apply a legal standard that accounts for the operation of systemic racism and unconscious bias
- Leverage social science to explain how race may improperly influence outcomes
- Incorporate race disproportionality data



# *Standards That Account for Systemic Racism & Unconscious Bias*

- Replacement of intent-based tests with standards that account for systemic racism and more subtle, or implicit, forms of racism
- Tailoring “objective” tests to specifically consider race
- Evolution of the objective observer standard from GR 37



# *Standards That Account for Systemic Racism & Unconscious Bias*

- WA Supreme Court's Open Letter to Legal Community, June 4, 2020
  - The devaluation and degradation of black lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding....Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed.
  - The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will. The injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all



# *Standards That Account for Systemic Racism & Unconscious Bias*

## GR 37 / Peremptory Challenges

- If objective observer COULD view race or ethnicity as a factor, challenge shall be denied.
- Objective observer is someone who “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”

## Race-based Juror Misconduct

- *State v. Berhe*, 193 Wn.2d 647 (2019)
  - objective observer standard applies to assessing whether a prima facie showing of implicit racial bias exists when juror misconduct is asserted

# *Standards That Account for Systemic Racism & Unconscious Bias*

## Race-based Prosecutorial Misconduct

- *State v. Zamora*, 199 Wn.2d 698 (2022)
  - objective observer standard applies to assess whether there was a flagrant or apparently intentional appeal to racial bias
- *State v. Bagby*, 199 Wn.2d 698 (2022)

## Seizure

- *State v. Sum*, 199 Wn.2d 627 (2022)
  - A person's race or ethnicity must be considered in determining whether the person was seized by law enforcement under article I, section 7, if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave

# *Leveraging Social Science*

- Social science can help persuade judge(s) that racial bias is likely operating in a specific case/context
- Social science helps explain the observed disproportionate/unfair outcome in the system
- Including social science in your briefing educates the bench (and ourselves!)



# *Leveraging Social Science*

## Jury Diversity

- Longer deliberation; motivates white jurors to avoid prejudice; better information exchange

## Coded Language/Priming

- subtle language that is racially neutral can activate stereotypes or animate racial prejudice



# Leveraging Racial Disparity Data

- Using statistics on racial disproportionality to raise claims challenging application/administration of a criminal statute/sentencing scheme.
- What are the opportunities/challenges in a post-*Gregory* landscape?
  - What types of statutes can be challenged systemically?
  - What is a constitutionally cognizable measure of statistically significant racial disparity?
  - Use of descriptive statistics v. multivariate regression analysis?
- *State v. Brown* – Appellant’s Brief



# *Raising Race – A Hypothetical Case*

Client: 16 year old Latinx kid charged with Murder 2 in King County

- Race at Decline
- Race at Jury Selection & Trial
- Race at Sentencing



# Race & Decline

- If your client is a young person of color who is at risk of decline or subject to auto-decline, you should challenge that and present the court with race disproportionality data
- Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State, 2009-2019* (2021)
- *State v. Quijas*, 12 Wn. App. 2d 363 (2020)
  - When racial bias is alleged (at any phase of the proceeding), and supported by some evidence, the trial court must rule on it
- Raise a state equal protection challenge based on disparate impact



# *Race & Decline*

- Adultification bias – needs to be considered at decline as well as sentencing
- Retain a trauma-centered forensic psychologist who can explicitly address the impacts of living in systems of oppression and connecting that to how trauma impacts brain development



# Race at Trial

## Art I, Sec 21/22 Fair Cross Section Challenges to the Venire

- Possible new rule in *State v. Rivers* (decision pending – Washington Supreme Court)?
  - Advocating for a more protective rule under article I, section 21 & 22 than fair cross section claims under the Sixth Amendment
  - Underrepresentation of a distinctive group that is not fair and reasonable in relation to their numbers in the community (20% comparative disparity)
  - Dr. Peter A Collins & Dr. Brooke Gialopsos at Seattle U, *Statewide Juror Summons Demographic Survey Project, An Analysis of Selected County Data, 2022 Interim Report*

## During Trial

- Leverage GR 37, pay attention to coded language and/or priming during trial, and object to any perceived race-base prosecutorial conduct

# Race & Sentencing

- What data is available on the AEJG Data Dashboard and elsewhere to contextualize the sentencing decision?
- Address adultification bias
  - “Adultification is real and can lead to harsher sentences for children of color if care is not taken to consciously avoid biased outcomes.” *PRP of Miller*, 21 Wn. App. 257, 367 (2022)
- Retain a mitigation specialist who can discuss how experiencing racism relates to the *Miller/Houston-Sconiers* sentencing analysis that recognizes link between trauma and reduced culpability
- When representing a young person of color at a *Miller/Houston-Sconiers* hearing, include briefing on the impact of racism as trauma
- Expressions of remorse as mediated by culture/ethnicity



Questions?



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