

CLE SEMINAR

Implicit and Actual Bias in Sentencing

Hosted at:
Federal Public Defender's Office

Speaker:
Attorney Jonathan Solovy

Portland, Oregon

Live on June 21, 2017

12:00pm to 1:00pm

Medford, Oregon

Via video conference on June 21, 2017

12:00pm to 1:00pm

Eugene, Oregon

Via video conference on June 21, 2017

12:00pm to 1:00pm

IMPLICIT AND ACTUAL BIAS IN SENTENCING

Jonathan Solovy
Law Office of Jonathan S. Solovy
(206) 388-1090
solvovlaw@earthlink.net

In the thousands of sentencing hearings that occur in this country every week, bias based on race, ethnicity, nationality and alienage, rarely appears on the surface. Nevertheless, as established by the disproportionate mass incarceration of people of color, racial and ethnic bias in sentencing is undeniable.

STUDIES CONCERNING BIAS IN SENTENCING

Studies Establishing That Courts Impose Harsher Sentences On Persons Of Color:

Christina Dyou, Ryan Kling, Jeremy Luallen & William Rhodes, *Federal Sentencing Disparity: 2005-2012*, Bureau of Justice Statistics, 66-68 (2015).

Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, Vol. 44, No. 1, *The Journal of Legal Studies* 75-111 (2015).

Jeffrey S. Nowacki, *Race, Ethnicity, and Judicial Discretion: The Influence of the United States v. Booker Decision*, Vol. 61, No. 10 *Crime and Delinquency* 1360 (2013).

U.S. Sentencing Comm'n, *Report On The Continuing Impact Of United States v. Booker On Federal Sentencing, Part A* 3, 8, 9, 108-10 (2012).

Jill K. Doerner & Stephen Demuth, *The Independent and Joint Effects of Race/Ethnicity, Gender, and Age on Sentencing Outcomes in U.S. Federal Courts*, Vol. 27, No.1 *Justice Quarterly* 1 (2010).

David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 *J. L. & Econ.* 285, 308-12 (2001).

Studies Establishing That Hispanic Persons Have Not Been Spared From Racial And Ethnic Disparity In Sentencing, Especially If They Are Non-Citizens:

Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities across U.S. District Courts, 1992-2009*, Vol. 48, No. 2 *Law & Society Review* 447, 448, 450, 465-66 (2014).

Byungbae Kim, Cassia Spohn & E. C. Hedberg, *Federal Sentencing As A Complex Collaborative Process: Judges, Prosecutors, Judge-Prosecutor Dyads, And Disparity In Sentencing*, Vol. 53, No. 4 *Criminology* 597, 611 (2015).

Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, Vol. 52, No. 3 *Criminology* 514 (2014).

Michael T. Light, Michael Massoglia & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79(5) *American Sociological Review* 825 (2014).

Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, Vol. 39, No. 1 *Criminology* 145 (2001).

Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who Is Punished More Harshly?*, Vol. 65, No. 5 *American Sociological Review* 705, 724-27 (2000).

United States v. Bannister, 786 F. Supp. 2d 617, 652 (E.D.N.Y. 2011) (in 2011, the rate of incarceration of incarceration of Latino persons was 2.5 times higher than the rate for Caucasians).

Seminal Study Establishing Implicit Bias:

Mahzarin Banaji & Anthony Greenwald, *Blind Spot: Hidden Biases of Good People* (Delacorte Press 2013). In their book, Banaji and Greenwald explore the startling results of the Implicit Association Test taken by thousands of individuals. The results show that well-intentioned individuals, despite their best efforts, harbor racial prejudices and biases.

Sources:

In researching the issue of racial or ethnic bias in sentencing, defense counsel may contact the Bureau of Justice Statistics (BJS), an agency within the U.S. Department of Justice. An excellent source at the Bureau of Justice Statistics is Mark Motivans, BJS Statistician: (202) 514-4272 (Mark.Motivans@usdoj.gov). Mr. Motivans is very knowledgeable about academic research and studies conducted by the Department of Justice concerning sentencing bias based on race, ethnicity, nationality and alienage.

The Administrative Office of the U.S. Courts maintains a website that may be useful. See <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-facts-and-figures>)

Another source is the National Criminal Justice Reference Service (NCJRS), at 800-851-3420; or visit their web site at <http://www.ncjrs.gov>. The NCJRS website has a searchable abstract database and virtual library at <http://www.ncjrs.gov/search.html>. Questions can be

submitted online at <http://www.ncjrs.gov/App/QA/SubmitQuestion.aspx>. Publications can be ordered online at <http://www.ncjrs.gov/App/Publications/AlphaList.aspx>.

THE SENTENCING GUIDELINES

The Text of Guideline 5H1.10:

Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status **(Policy Statement)**

These factors are not relevant in the determination of a sentence.

U.S.S.G. § 5H1.10

In enacting 28 U.S.C. § 994(d), Congress directed the Sentencing Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.” This Congressional directive generated Guideline 5H1.10, which specifies that these factors are not relevant in determining a sentence.

Query:

Are federal courts post-*Booker* free to disregard the policy statement of Guideline 5H1.10? See *Spears v. United States*, 555 U.S. 261, 265-66 (2009) (district courts may vary categorically from the Guidelines based on a policy disagreement with the Guidelines).

Where there is no appeal waiver, appellate counsel may rely on Guideline 5H1.10 in cases into which the district court injected considerations of race or ethnicity into the sentencing proceedings.

CASE LAW

Despite the magnitude of the problem of mass incarceration of persons of color, there is a dearth of case law addressing sentencing bias based on race, ethnicity, nationality, and alienage.

United States Supreme Court Case Law:

The Supreme Court recognized that the Constitution prohibits sentencing courts from considering race or nationality. While noting that sentencing courts may conduct a broad and largely unlimited inquiry as to the kind of information they may consider, the Supreme Court in *Pepper v. United States*, 562 U.S. 476, 489 n. 8 (2011), stated that sentencing courts’ discretion is subject to constitutional constraints. *Id.* In doing so, the Supreme Court parenthetically quoted *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994), specifying that a “defendant’s race or nationality may play no adverse role in the administration of justice, including at sentencing.” *Pepper*, 562 U.S. at 489 n. 8. In *Graham v. Collins*, 506 U.S. 461, 484 (1993)

(Thomas, J., concurring), Justice Thomas stated that racial prejudice is “the paradigmatic capricious and irrational sentencing factor.”

Recently, the Supreme Court addressed the issue of race and justice. In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017), in which a juror made a clear statement reflecting that he relied on racial stereotypes or animus to convict the defendant, the Supreme Court held that the no impeachment rule must give way. The Court stated that “discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’ *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L.Ed.2d 739, . . .” *Pena-Rodriguez*, 137 S. Ct. at 859.

In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Supreme Court held that defense counsel’s performance during the trial’s death penalty phase fell outside the bounds of competent representation where counsel presented expert testimony that the prisoner was statistically more likely to act violently in the future because he is black. The Court stated:

It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race. *See Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (identifying race among factors that are “constitutionally impermissible or totally irrelevant to the sentencing process”). No competent defense attorney would introduce such evidence about his own client.

Id. at 775. *See also In re Murchison*, 349 U.S. 133, 136 (1955) (“Fairness of course requires an absence of actual bias in the trial of cases.”). *See also Rippo v. Baker*, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017) (Due Process Clause may sometimes demand recusal even when a judge has no actual bias).

Circuit Court Case Law – The Appearance of Justice Standard vs. The Actual Bias Test:

There is a split in the circuits in addressing claims alleging that the court injected into the sentencing proceedings matters of race, ethnicity, nationality or alienage. The Ninth Circuit and the Eleventh Circuit appear to be on the wrong side of justice by requiring proof of actual bias. The Second, Fourth, Seventh and Eighth Circuits apply the appearance of justice/reasonable observer test.

The Actual Bias Test (the Ninth Circuit and the Eleventh Circuit):

In cases where the sentencing court injects matters of race, ethnicity, nationality or alienage, the actual bias test requires proof that the district court imposed a harsher sentence due to considerations of race, ethnicity, nationality or alienage.

In *United States v. Borrero-Isaza*, 887 F.2d 1349, 1353 (9th Cir. 1989) (per curiam), the sentencing court stated that Columbian drug traffickers are “the total scourge of this country,”

and that he wanted “the message to go to Colombia that we are not going to accept this kind of thing.” The defendant claimed that the district court violated due process by imposing a sentence five years longer than the co-defendant’s sentence based on his national origin. *Id.* at 1351-52. Concluding that the district court penalized the defendant because of his national origin, and not because he trafficked in drugs emanating from a source country, the Ninth Circuit vacated the sentence. *Id.* at 1355, 1357. The Ninth Circuit applied the actual bias test by instructing that whether the defendant’s “right to due process was violated hinges upon the district court’s *actual basis* for imposing a stricter sentence.” *Id.* at 1352 (emphasis added).

The Ninth Circuit sows confusion. Despite applying the actual bias standard in *Borrero-Isaza*, the Ninth Circuit in the same decision indicated that it considered the appearance of fairness standard. In analyzing the district court’s statements regarding defense counsel’s claim that the court impermissibly imposed a harsher sentence because the defendant was Colombian, the Ninth Circuit stated that “the court’s response to this suggestion only adds to the *appearance* of impropriety.” *Id.* at 1355 (emphasis added). Also, the Ninth Circuit considered the “appearance of fairness” in determining whether to remand the case to a different judge. *Id.* at 1357. The Ninth Circuit in *Borrero-Isaza* further provided:

After a careful review of the record, we are left with the overriding *impression* that the district court partially based the sentence on Borrero’s national origin. *Apparently*, the district court believed that the best way to “send a message” to source countries was to penalize people with national ties to those countries.

Id. at 1355 (emphasis added).

In a later unpublished opinion, the Ninth Circuit appeared to recognize the appearance of justice standard. While citing *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352-53 (9th Cir. 1989) (per curiam), the Ninth Circuit in *United States v. Bulltail*, No. 13-30367, 594 F. App’x 346, 347 (9th Cir. Dec. 9, 2014) (unpublished), stated that “[e]ven the *appearance of impropriety* requires a remand for resentencing.” Emphasis added.

In a recent unpublished memorandum decision, the Ninth Circuit in *United States v. Hernandez Sandoval*, 659 F. App’x 433 (9th Cir. 2016), appeared to affirm its reliance on the actual bias standard. The panel stated:

Whether [the defendant’s] right to due process was violated hinges upon the district court’s *actual basis* for imposing a stricter sentence.” *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989). The district court made passing reference to “strong family ties” in “Spanish culture” and referred to “Hispanic families.” These statements were not the basis for enhancing Hernandez Sandoval’s sentence,

Id. at 434 (emphasis added).

In *United States v. Rodriguez*, 627 F.3d 1372, 1380-81 (11th Cir. 2010), the Eleventh Circuit strongly signaled that it parts company with the Second Circuit’s adoption of the

appearance of justice/reasonable observer test. Because the Eleventh Circuit in *Rodriguez* resolved the case on plain error grounds, it did not need to hold that proof of actual bias is required.

The Appearance of Justice / Reasonable Observer Standard:

In cases where the court injects into the sentencing hearing matters of race, ethnicity, nationality or alienage, the appearance of justice standard requires courts to consider whether there is a sufficient risk that a reasonable observer, hearing or reading the sentencing court's remarks, might infer that the defendant's race, ethnicity, nationality or alienage played a role in determining the sentence.

The Second Circuit. The appearance of justice standard was originally established by the Second Circuit in *United States v. Leung*, 40 F.3d 577, 586-87 (2d Cir. 1994). In *Leung*, the Second Circuit expressed confidence that the district court harbored no bias against the defendant because of her ethnic origin or alien status. *Id.* Nevertheless, in remanding the case to a different judge, the Second Circuit provided that "even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing." *Id.* at 586-87. The Second Circuit established the appearance of justice/reasonable person standard by specifying that "there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that Leung's ethnicity and alien status played a role in determining her sentence." *Id.* at 586-87. Similarly, the Second Circuit in *United States v. Kaba*, 480 F.3d 152, 156-59 (2d Cir. 2007), applied the appearance of justice/reasonable person test in vacating the sentence despite concluding that the district court harbored no bias.

The Fourth Circuit. The Fourth Circuit in *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991), addressed a case in which the sentencing court stated that the defendant had "no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests." *Id.* at 740. Although *Bakker* does not address racial or ethnic bias, the decision establishes that the Fourth Circuit adopted the appearance of bias standard. The Fourth Circuit remanded for resentencing because it was "left with the apprehension" that the lengthy sentence derived from the district court's own sense of religious propriety. *Id.* at 740-41. The Fourth Circuit also noted that courts "cannot sanction sentencing procedures that *create the perception* of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." *Id.* at 740 (emphasis added).

The Seventh Circuit. In *United States v. Trujillo-Castillon*, 692 F.3d 575, 579 (7th Cir. 2012), the Seventh Circuit, while noting that the district court did not expressly adopt the government's position regarding the defendant's Cuban heritage, stated that the sentencing court "did nothing to reasonably assure the defendant that his Cuban heritage would not factor into its calculus." *Id.* The Seventh Circuit held that the district court "arguably" made the defendant's national origin a sentencing factor, and that a "reasonable observer hearing or reading the remarks might certainly think so." *Id.*

The Eighth Circuit. In *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991), the district court noted that the Nigerian defendant was not a United States citizen and repaid the

privilege of being in the United States by committing a crime. In pronouncing sentence, the district court articulated three reasons, including the defendant's alienage, for imposing a sentence at the top of the range. *Id.* at 651-52. The Eighth Circuit remanded the case without concluding that the district court imposed a harsher sentence because of alienage or nationality. The Eighth Circuit concluded that "[b]ecause we cannot say that the district court would have imposed the same sentence absent this impermissible consideration, we must vacate Onwuemene's sentence and remand for resentencing." *Id.* at 652.

Recently, in *United States v. Kouangvan*, 844 F.3d 996, 998 (8th Cir. 2017), the appellant unsuccessfully argued that the length of her prison sentence was influenced by race or national origin (both hers and the victims), the fact she immigrated to the United States, and her anticipated inability to afford to pay restitution. Arguing for probation, Kouangvan emphasized her difficult childhood, including the nearly two years her family spent as refugees in Thailand after fleeing the communist regime in Laos. *Id.* at 998. The government responded:

What happened here is not cultural, it's criminal, and she should be punished as such. She victimized her fellow Laotians. I think most notable here, considering she's discussing so much about her culture, she victimized fellow Laotians." *Id.* at 998-99.

The district court commented:

I looked at the pictures from the refugee camp and I felt badly, and then I thought, what a way to pay back the United States of America for giving you a far, far, far better life than you could have dreamed of there, to come here and dupe your fellow Laotians. . . .

Id. at 999.

Citing *United States v. Pena*, 339 F.3d 715, 718 (8th Cir. 2003), the Eighth Circuit provided that "[a]lthough nationality and such characteristics must not play any role in shaping a defendant's sentence, the district court is not forbidden from ever acknowledging or mentioning them." *Kouangvan*, 844 F.3d 996 at 1000. The Eighth Circuit was not swayed by the argument that even if there is doubt that the district court was actually biased, resentencing is necessary as long as a reasonable observer, hearing or reading the court's remarks, would perceive reliance on an improper factor. However, the Eighth Circuit did not reject the appearance of bias / reasonable person standard. The Eighth Circuit provided that although "[p]erhaps the district court and the prosecutor should have been clearer in their statements to reduce the risk of appearing to be influenced improperly, . . . we believe a hypothetical reasonable observer would take what was said in context, just as we do." *Id.* at 1002.

The Tenth Circuit. The Tenth Circuit in *United States v. Franco-Guillen*, 196 F. App'x 716, 718-19 (10th Cir. 2006) (unpublished) applied the appearance of bias test. The Tenth Circuit remanded the case to a new judge where the district court at sentencing abruptly set aside the plea when the defendant voiced dissatisfaction with the presentence report. The district court

stated, “I will not put up with this from these Hispanics or anybody else.” The court, further declared, “I’ve got another case involving a Hispanic defendant . . . and he’s lying . . .” The government conceded error.

See also United States v. Sayad, 589 F.3d 1110, 1118 n. 3 (10th Cir. 2009) (considering what a “reasonable observer” would believe, but holding the sentencing court’s reference to defendant’s Iranian-Christian ethnicity to be “patently incidental”).

TO OBJECT OR NOT TO OBJECT – THAT IS THE QUESTION

The Second Circuit’s Forgiveness Plan.

In *United States v. Leung*, 40 F.3d 577, 586 (2d Cir.1994), the government argued that because Leung had not objected to the judge’s remarks indicating bias, she had forfeited her right to challenge them on appeal. The Second Circuit disagreed, explaining that “[t]he first remark was somewhat ambiguous, and a defendant is understandably reluctant to suggest to a judge that an ambiguous remark reveals bias just as the judge is about to select a sentence.” *Id.* at 586. Noting that remanding the case for resentencing would not strain judicial resources, the Second Circuit observed that “[u]nlike trial errors, whose correction requires a new trial that a timely objection might have obviated, correcting sentencing errors usually demands only a brief resentencing procedure.” *Id.* at 586 n. 2.

Similarly, the Second Circuit in *United States v. Kaba*, 480 F.3d 152, 158 (2d Cir. 2007), reviewed the bias claim despite the lack of an objection. The Second Circuit in *Kaba* adopted the reasoning in *Leung* providing that a defendant is understandably reluctant to suggest to a judge that an ambiguous remark reveals bias just as the judge is about to select a sentence. *Id.*

The Eleventh Circuit’s Approach – No Mercy For Cowardly Lions.

In *United States v. Rodriguez*, 627 F.3d 1372, 1374 (11th Cir. 2010), the Eleventh Circuit stated that the case “poses the question of whether there is a vindictive judge or cowardly counsel exception to the contemporaneous objection rule.” Showing no mercy for cowardly lions, the Eleventh Circuit held that unless defense counsel makes a contemporaneous objection, claims of bias will be waived. The Eleventh Circuit expressly rejected the Second Circuit’s approach to forgive the failure to object regarding bias claims based on race, ethnicity or nationality. *Id.* at 1380-81.

APPEAL WAIVER – EXCEPTION

Defense counsel may argue that the appeal waiver is unenforceable as to claims alleging ethnic or racial bias in sentencing because (1) such claims are constitutional in nature, (2) on contract principle grounds, in entering into the plea agreement the parties could not have reasonably assumed that the defendant’s race, ethnicity, nationality or alienage would play a role

in sentencing, and (3) the reviewing court should exercise its supervisory powers to avoid a manifest injustice.

Constitutional Grounds. In *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir.), *cert. denied*, 552 U.S. 1052 (2007), the Ninth Circuit provided that a sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution. The waiver of the right to appeal is subject to exceptions, including claims alleging that the sentence was imposed in violation of the plea agreement or for racially discriminatory reasons, or where the sentence was illegal. *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996). Further, a “miscarriage of justice” may justify appellate review despite a knowing and voluntary waiver. See *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011).

The Ninth Circuit in *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), provided that appeal waivers may be subject to certain exceptions, including claims alleging racial disparity in sentencing among co-defendants. Similarly, in *United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc), the Ninth Circuit quoted with approval the Third Circuit’s decision in *United States v. Gwinnett*, 483 F.3d 200, 201 (3d Cir. 2007), providing that despite a blanket appeal waiver, jurisdiction may be exercised if the sentence is “based on constitutionally impermissible criteria, such as race. . . .”

The Sixth Circuit stated that the “circuits have been similarly uniform in accepting the principle that defendants who have otherwise waived their appellate rights may yet attack sentences based on constitutionally impermissible criteria like race.” *United States v. Caruthers*, 458 F.3d 459, 471 n.5 (6th Cir. 2006). See also *United States v. Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005); *United States v. Johnson*, 347 F.3d 412, 414-15 (2d Cir. 2003); *United States v. Andis*, 333 F.3d 886, 894 (8th Cir. 2003) (en banc); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

Contract Principles. An express waiver of the right to appeal is valid only if knowingly and voluntarily made. *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996). Reflecting that the Ninth Circuit also relies on contract principles to apply an exception to an appeal waiver is its statement in *Baramdyka* that the defendant “implicitly preserved his right to appeal on grounds that the sentence was illegal, imposed in violation of the plea agreement or for racially discriminatory reasons.” *Id.*

The Second Circuit provided that “a sentence tainted by racial bias could not be supported on contract principles, since neither party can be deemed to have accepted such a risk or be entitled to such a result as a benefit of the bargain.” *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). See also *United States v. Hahn*, 359 F.3d 1315, 1344 (10th Cir. 2004) (no defendant entering into a broadly worded waiver “could be said to reasonably understand that he is giving the district court license to utilize an impermissible criterion at sentencing, such as race, religion, or sex”).

Supervisory Powers. Defense counsel may also urge courts to apply their inherent supervisory powers to review claims alleging that the sentencing was tainted by considerations of race, ethnicity or nationality. See *Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981)

(supervisory power to determine whether to allow voir dire inquiry as to racial or ethnic prejudice).

Recently, in the unpublished memorandum decision in *United States v. Hernandez Sandoval*, 659 F. App'x 433, 434 (9th Cir. 2016), the Ninth Circuit rejected the argument that the sentencing court impermissibly referenced race, ethnicity, or national origin during the sentencing hearing, thereby rendering the sentence unconstitutional and the appeal waiver unenforceable. The panel in *Sandoval* stated:

Because Hernandez Sandoval's waiver is valid and enforceable, we dismiss the appeal. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (“Absent some miscarriage of justice ... we will not exercise [appellate] jurisdiction to review the merits of [an] appeal if we conclude that [the defendant] knowingly and voluntarily waived the right to bring the appeal.” (internal alterations and quotation marks omitted)).

Id. at 435.

HELPFUL COMMENTS BY THE GOVERNMENT

In opposing a petition for writ of certiorari concerning the Ninth Circuit's unpublished decision in *United States v. Hernandez Sandoval*, 659 F. App'x 433 (9th Cir. 2016), the government made the following comments which defense counsel may seek to use in other cases:

The government recognizes that any reference to race, ethnicity, or national origin in sentencing is inappropriate, and racial, ethnic, or national-origin bias that affects or creates the appearance of affecting a sentence has no place in the administration of the criminal justice system.

Luis Hernandez Sandoval v. United States, Supreme Court No. 16-7237, Solicitor General's Brief in Opposition, p.10.

Referring to the case law applying the appearance of justice standard, the government stated:

All of those cases support the general proposition that it is unconstitutional to base a sentence on invidious factors such as race or ethnicity, but that a court's passing reference to such factors will not automatically require reversal.

Luis Hernandez Sandoval v. United States, Supreme Court No. 16-7237, Solicitor General's Brief in Opposition, pp.16-17.

DISCUSSION ISSUE

Is it better for defense counsel to argue that (1) race, ethnicity, nationality and alienage have no place in the courtroom, or (2) race, ethnicity, nationality and alienage do, and should matter, because they play a sociological roll which should serve as a mitigating factor in sentencing? The fact of implicit and actual bias provides good reason for defense counsel to be vigilant and argue that considerations of race, ethnicity, nationality and alienage should have no place in sentencing proceedings. On the other hand, avoiding considerations of race, ethnicity, nationality and alienage may result in defense counsel overlooking mitigating factors in sentencing.

Mitigating factors based on race are detailed brilliantly by Judge Jack Weinstein of the Eastern District of New York, in *United States v. Bannister*, 786 F. Supp. 2d 617 (E.D.N.Y. 2011). Judge Weinstein presented the sociological reasons for varying from the Guidelines and the mandatory minimum sentences imposed on ten African Americans and one Hispanic person convicted of conspiracy to sell crack cocaine and heroin in the hallways and streets of a Brooklyn public housing project. In attempting to explain how the defendants, nearly all African Americans, ended up at the sentencing, Judge Weinstein tracked the historical roots of African American segregation and poverty, unemployment, poor health care, sub-standard education, and high crime. *Id.* at 623-45. The district court then detailed the history of the enactment of tough drug sentencing laws, their racially disparate impact, and the resulting mass incarceration of persons of color. *Id.* at 645-54. Judge Weinstein outlined the reasons to turn to alternatives to the tough sentencing regime. *Id.* at 655-62. Recognizing that under the current law his hands were tied, Judge Weinstein ordered that every reasonable effort be made to provide counseling, drug and alcohol treatment, gambling rehabilitation, anger management therapy, education, and job training. *Id.* at 689. However, Judge Weinstein voiced his doubts as “it is by no means clear that these aids will be effectively provided.” *Id.*

Defense counsel may seek to object to consideration of arrests as a basis to impose a harsher sentence. In *United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2017), the Third Circuit held that calculating a person’s sentence based on crimes for which he or she was not convicted constituted plain error which undermines the fairness, integrity, and public reputation of judicial proceedings. The Third Circuit cited scholarship and studies reflecting that persons of color are more likely to be arrested despite similar rates for criminality for Caucasians. *Id.* at 551-54 & nn.30-36 (3d Cir. 2017). The scholarship the Third Circuit cited in *Mateo-Medina* includes:

- The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System* (August 2013), available at <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (hereinafter Sentencing Project Report).
- Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743 (2002).

- Jane W. Gibson–Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3-SPG KAN. J.L. & PUB. POL'Y 99, 101 (1994).
- Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, Justice Quarterly (Jan. 2013), available at <http://dx.doi.org/10.1080/07418825.2012.761721>.