



Advancing Racial Justice on Appeal



If this case is new to you, review the record to determine if there are racial undertones (or overtones) in the record, including things like stereotype threat;¹ a cultural element related to music, lyrics, or other art;² or whether racism was the impetus for the filing of the delinquency petition.³ Incorporate these into your storytelling themes just as you would with the legal issues in your case.

Remember, though, that raising race on appeal is a long-haul battle. With cases like *Whren v. U.S.*,⁴ essentially authorizing discriminatory police investigations, and most race-based arguments relegated to equal protection claims and harmless error review,⁵ defenders need to be creative and precise to advance these issues on appeal.

☐ Find a Friend—Use Amicus

- When you are first considering an appeal, reach out to potential partners.
 - Be specific with your content request and what exactly they can bring to the table.
 - Clearly communicate deadlines to the potential writers.
 - Inform your potential team about local rule/admission requirements in your jurisdiction.
- Benefits of amici on appeal in lower courts:
 - Amici claims can go further than counsel of record when needed in terms of

the relief sought (e.g., amici can argue for abolishment of a punishment even though counsel of record argued only for a portion of the punishment to be found unconstitutional below).

- Amici can bring in research and studies that are not a part of your record.
- Amici can pull in a national perspective that might otherwise have been missing from the facts of your case.

☐ Ensure the record on appeal is complete and that the racial justice issue was not omitted (by error, accident, or on purpose).

- This is especially true when more than one court or more than one lawyer may have handled proceedings in your case (e.g., a transfer proceeding).
- If anything is missing, move to correct the record to include it.

☐ Consider how your jurisdiction assigns error to claims involving race.

- Plain error: To establish plain error, the appellant must demonstrate that 1) there was an error, 2) it was clear or obvious, and 3) it materially prejudiced a substantial right of your client's.
 - If a court is going to recognize your claim as plain, it is more likely to be on the legal issue alone.

1 See Cynthia J. Najdowski et al., *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 LAW & HUM. BEHAV. 463 (2015).

2 See Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007); see also ERIK NELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE LYRICS, AND GUILT IN AMERICA* (2019).

3 Jason Okonofua & Jennifer Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617 (2015); see also Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526 (2014).

4 *Whren v. U.S.*, 517 U.S. 806 (1996).

5 Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 42 GONZAGA L. REV. 341, 342-44, 354-355 (2012).

- Harmless error: Even if the appellant can demonstrate an error occurred, a harmless error is when the court reasons that the error would not have changed the outcome of the proceedings or determination of guilt.

- Where many errors go to die! This is difficult, but not impossible. Most of the claims we can raise related to racial injustice or discrimination will fall here.

- Non-constitutional: We must demonstrate prejudice.
- Constitutional: The state must prove the error was harmless.

- Structural error: More than simply an error in trial proceedings, a structural error is a defect affecting the framework of the proceedings such that it renders the trial fundamentally unfair or unreliable.

- Structural errors evade traditional prejudice analysis because they affect the very framework with which the trial proceeds, rather than the process itself.⁶ A *Batson* violation (racially discriminatory juror selection) is structural, meaning harmless error does not apply.⁷

- Caution: In 2022, the U.S. Supreme Court declined to hear the appeal of a Black man who was convicted in a capital case after a white juror in his case affirmed that the juror believed non-whites are more dangerous than whites.⁸

- In light of the current Supreme Court climate, consider analyzing your state constitution to determine whether it has stronger due process protections than the federal constitution. If your state constitution has better grounds for relief, it may help insulate your case from federal review.

- ☐ Centralize the racial justice issue identified at trial (see Part 2).

- Include the issue in your assigned error or proposition of law.

- Example: A.R.'s right to due process was violated when the state indicted him on offenses that were not charged in the juvenile court. This unconstitutional practice of the state disproportionately impacts youth of color and contributes to the mass incarceration of Black youth in Ohio.

- Example: The defense team failed to generate evidence to objectively demonstrate the racial bias embedded in the photo array used in John's identification procedure.

- Re-cite the data and/or studies utilized in your legal question.

- This will (hopefully) require the court to answer the question in its opinion or a dissent.

- Even if you did not introduce the study at trial, cite it in your brief.

- Find a case that cited it first, and link to the case, then string cite to the study you want.

- Utilize amicus to cite to the research to support your claim.

- ☐ Couple your equal protection claim with another amendment.

- Arguing that a protected class has been discriminated against—either intentionally or via disparate impact—is not an easily fought battle. Such claims require the court to engage in a strict-scrutiny analysis (the state satisfies the test by demonstrating the statute or act in question was narrowly tailored to meet a compelling governmental interest), which does not often result in a victory for the claimant.

- The limits on error standards may be overcome with a due process claim that gets you to the same place.

⁶ See, e.g., *United States v. Curbelo*, 343 F.3d 273, 281 (4th Cir. 2003) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) and *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

⁷ Cal Barnett-Mayotte, Comment, *Beyond Strickland Prejudice: Weaver, Batson, and Procedural Default*, 170 U. PA. L. REV. 1050 (2022).

⁸ *Love v. Texas*, 142 S.Ct. 1406 (2022).

- Example: A prosecutorial practice of overcharging Black and Latino/a youth with transferrable offenses may fall squarely within an equal protection claim (i.e., the transfer statute has a disparate impact on Black and Latino/a youth); but, the state may counter this claim by demonstrating that transferring youth who are of a certain age and commit an offense with a firearm is a compelling governmental interest that is narrowly tailored to meet those ends—therefore, it is immaterial that Black and Latino/a youth are more frequently included in this group. And this tactic may work if the total number of youth who are transferred annually is less than one percent of the number of youth who are charged with felonies in that same period.

- If you do manage to win an equal protection claim like this, the remedy will be for the case to go back to juvenile court and your client would be prosecuted in juvenile court only!

- Couching the same issue in terms of a due process violation may lead to further relief (e.g., a new probable cause hearing) and get you outside of a strict-scrutiny review.

- Example: In addition to also disproportionately transferring Black and Latino/a youth for prosecution as adults, the prosecutor also frequently stacks additional charges on those cases, once the case arrives in adult criminal court. In addition to your equal protection claim, raise a separate but contemporaneous due process claim that attacks the procedural irregularity of not filing all charges in juvenile court first, while also highlighting that this practice disproportionately impacts Black and Latino/a youth.

- A due process win on this claim could either: a) remand your client's case back to the start of the common pleas proceedings and/or b) prohibit the state's practice when transferring youth in future cases.

☐ Briefing

- In your recitation of the facts, incorporate the facts necessary to fully demonstrate the racial justice issues in your case.

Example from a brief where the racial makeup of a neighborhood and cultural norms were central to a claim:

The West End is nestled between developed and revitalized Over-the-Rhine and Queensgate. The West End has long been the hub for Black families in Cincinnati. City of Cincinnati, West End Statistical Neighborhood Approximation (2010), available at <http://tinyurl.com/y39ajzn7>, 2 (accessed June 24, 2019); Eric R. Jackson, Why So Many African Americans have Roots in the West End of Cincinnati, The Voice of Black Cincinnati (Apr. 9, 2019), <http://tinyurl.com/y3ry6qo2>, 2-3, 5 (accessed June 24, 2019). (Exhibit A, Affidavit of Alexis Kidd, p.2). "Before a highway cut through the neighborhood in the 1970s, it was thriving." (Exhibit A, p.2). After the highway was built, houses were torn down and 60,000 residents were displaced. (Exhibit A, p.2). At one time, 80% of the folks in the West End "were homeowners and 20% were renters." (Exhibit A, p.2). Now, the West End is comprised of mostly renter-occupied units. West End Statistical Neighborhood Approximation at 8-9. The West End was hit hard and continues to suffer: the median household income is less than \$15,000, housing is scooped up for investment, repairs to current homes are slow to come, and there is little opportunity for employment for its young people. West End Statistical Neighborhood Approximation at 5. (Exhibit A, p.2; Exhibit B, p.1).

- If permitted, attach the data and research cited in the trial/juvenile court as an exhibit or supplement to your brief.
- Include hyperlinks to online materials if permitted by your local rules.
- Rely on amicus to include support for your racial justice claim.

- Use federal cases to bolster your argument, even if the case was not initially favorable to our general clientele and causes.
 - Example: Second Amendment cases can be used for our benefit on gun charges that exist outside of another felony.⁹
 - Example: We can use *Dobbs v. Jackson Women's Health Organization*¹⁰ to argue a new type of judicial federalism.

☐ Oral argument

- Incorporate the racial justice story in your narrative.
 - Do not assume that briefing it means the court will ask about it.
 - If you do not plan to raise it, it will not be part of the discussion.
- Moot your case prior to argument.
 - Ask colleagues to ask you questions related to the racial justice claim so that you are used to answering those questions under pressure.

⁹ Damon Root, *The New York Times is Surprised to Find Public Defenders Championing the Second Amendment*, w (Aug. 1, 2022), reason.com/2022/08/01/the-new-york-times-is-surprised-to-find-public-defenders-championing-the-second-amendment/.

¹⁰ *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).

Acknowledgement

This guide was created with the generous assistance of:
 Brooke Burns, Managing Counsel, Youth Defense Department,
 Office of the Ohio Public Defender

© The Gault Center July 2023

The Gault Center | @gaultcenter | DefendYouthRights.org

