Case Law Incorporating Specific Racial Justice Arguments

RACIAL JUSTICE TOOLKIT: CASE ADVOCACY RESOURCE

*The cases in each section are arranged in reverse chronological order by year.

Case Law Incorporating Specific Racial Justice Arguments

Table of Contents

*The cases in each section are arranged in reverse chronological order by year.

Challenging In/Out-of-Court Identifications

Bernal v. People, 44 P.3d 184 (2002)

- Bernal argued that his due process rights were violated with the Court's admission of testimony concerning an impermissibly suggestive photo array. Of the six men shown, Bernal was the only obviously Hispanic man. The Court held that when few photographs are used by officers in a photo array, the array must be scrutinized for suggestive irregularities, and ***found that the photo array was impermissibly suggestive because Bernal's ethnicity stood out as clearly different from the others pictured***.

United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976)

- Gidley argued that the District Court erred in allowing in-court identifications that were allegedly an impermissibly suggestive photographic display. ***Court held that certain features of the suspects ("long black hair and dark complexions") stood out in the photographs in comparison to other suspects in the photograph***—and under the circumstances were impermissibly suggestive.

*The cases in each section are arranged in reverse chronological order by year.

Descriptions

<u>State v. Scott</u>, 474 NJ Super. 38 (App. Div. 2023)
Note: Scott's appellate brief can be found in the Case Advocacy: Racial Justice Motions and Pleadings section of the Toolkit.

- Scott appealed his conviction based on the trial court's denial of his motion to suppress. Police recovered items on Scott during a stop and frisk, which resulted from a BOLO ("be on look out") wherein dispatch described the suspect as a "Black male wearing a dark raincoat." However, the complainant never made reference to the race of the suspect when reporting the crime. The defense argued that implicit racial Bias led dispatch to assume the suspects race as Black.
- The Court held that a defendant can establish a prima facie case of discrimination in police conduct based on a police dispatcher's impermissible racial targeting and that evidence of implicit bias in a police action can support an inference of discrimination. In its opinion the court noted *that* ***race may not be considered as a basis for making law enforcement decisions other than when determining whether an individual matches the description in a BOLO and that implicit bias is just as real and problematic as intentional bias.*** The State failed to provide a race-neutral explanation for dispatcher's conduct, and thus Scott established racial discrimination in his search and seizure in violation of his equal protection rights. The conviction was reversed and remanded to the trial court.

<u>United States v. Alvarez</u>, 40 F.4th 339 (5th Cir. 2022)

- Alvarez appealed his conviction, arguing that he was subjected to an invalid search and seizure. Alvarez was stopped by officer in the Corpus Christi Gang Unit, who were conducting warrant sweeps of known gang members. One such person was described as a Hispanic man in the area of Leopard and Up River, who may be on a bicycle with large handlebars, and who had previously run from officers. The description did not include the bicycle's color or condition nor did it describe the man other than him being Hispanic. Eventually, officers found a Hispanic man, later identified as Alvarez, riding a bicycle with large handlebars and asked him to stop. Alvarez asked why and kept pedaling. Officers pursued, blocked the sidewalk off, exited their vehicle and grabbed Alvarez. They frisked him and recovered a revolver and placed him in handcuffs. It was then determined that Alvarez was not the man they were looking for, but he did have a warrant and was also a convicted felon in possession of a firearm so he was arrested. Alvarez later moved to suppress the revolver but the district court denied the motion holding that the stop was supported by reasonable articulable suspicion because he was a Hispanic man, rode a bicycle with large handlebars, and was spotted in the area where the subject was known to reside.
- On appeal, the Fifth Circuit reversed, holding that the stop was not supported by reasonable articulable suspicion. Stops based upon outstanding warrants require a higher level of specificity for "reasonable articulable suspicion" than ongoing or recent criminal activity. *"**If a weeks-old description of two black males in a black or blue Chevrolet was insufficient to stop two black males in a black Chevrolet, and a five-week-old description of a man's race, height, weight, hair style, and clothing was insufficient to stop someone matching it, then the***

description of a Hispanic male who had once ridden a bicycle with large handlebars in a general area at some unknown time in the past cannot justify the stop of Alvarez." **The court also found that the description of a Hispanic man in a city that is predominantly Hispanic/Latino is insufficient.**

Commonwealth v. Warren, 475 Mass. 530 (Mass. 2016)

Also included in flight.

- The Supreme Judicial Court of Massachusetts held that Warren's race alone was insufficient to give officers reasonable articulable suspicion that he was the suspect of an earlier crime when ***the description lacked any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics separate from race.*** The Court also noted that the police had no justifiable cause to arrest Warren for running away; it was within his legal right to run from the police, and the act of doing so did not imply guilt and was not grounds for arrest. Black men in Boston were disproportionately and repeatedly targeted to the extent that flight from police should not necessarily indicate consciousness of guilt. Rather, Black men have "reason for flight totally unrelated to consciousness of guilt," such as the desire to avoid the recurring indignity of being racially profiled.

U.S. v. Williams, 731 F.3d 678 (7th Cir. 2013)

- Williams appealed his conviction on the basis that he was subjected to an invalid *Terry* stop and frisk. Police stopped Williams after responding to an anonymous woman's 911 call alleging that she had observed three or four men with guns out among a group of approximately 25 people. She did not report any specific criminal behavior, only that the group was loud and loitering in the parking lot (in an area known to police as being high crime). Officers responded and encountered a much smaller group who was not being loud, disruptive, or displaying firearms. As officers approached the group, the members dispersed, but no one ran. For unknown reasons, the officers began to pat-down members of the group. One member of the group, Williams, was singled out by Officer Jesberger, even though Williams was not doing anything different than anyone else in the group. Jesberger began to search Williams, who eventually tried to run. He was soon tackled and handcuffed. A firearm was then recovered from the subsequent search. Williams was arrested and charged with being an ex-felon in possession of a firearm. Williams moved to suppress the gun. The district court determined that the gun should not be suppressed and Williams was sentenced to 70 months.
- On appeal, the Seventh Circuit found the initial *Terry* stop to be reasonable but the subsequent frisk to be unreasonable. The recovered firearm was therefore inadmissible. The court noted explicitly that Williams' behavior of avoiding eye contact with the officers, moving away from the area upon arrival of law enforcement, keeping hands in his pockets and/or near his waistband, all while occurring in an alleged high crime area while police were responding to a 911 call for weapons did not individually or cumulatively support reasonable suspicion that Williams was armed and dangerous. ***"Even in high crime areas, where the possibility that any given individual is armed is significant, Terry requires reasonable, individualized suspicion before a frisk for weapons can be conducted. […] The simple fact that one's hands are in***

one's pockets is of a similar nature to one's avoiding eye contact. In other words, it is of little value."

- In his **concurrence in part,** J. Hamilton stated he did not agree with the majority's contention that the officers had a legal justification to conduct a *Terry* stop. He explained that he came to this conclusion based in part on evolving constitutional jurisprudence relating to gun ownership laws. *Terry* stops require reasonable articulable suspicion that an individual has committed or is about to commit a crime, and being armed is not a crime. He recognizes that these changes make policing a more difficult and dangerous undertaking. He also fears that ***"human and institutional responses to those dangers [safety concerns of police officers and citizens] may increase the risk of profiling based on race, ethnicity, dress, class or neighborhood. The new constitutional and statutory rights for individuals to bear arms at home and in public apply to all. The courts have an obligation to protect those rights for people in bad neighborhoods as well as good ones."*** **He cited *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring in the judgement)(explaining historical importance of individual right to bear arms for black citizens in defending themselves from racially-motivated violence by whites)."**

In re T.L.L., 729 A.2d (D.C. 1999)

- T.L.L. was found guilty of armed robbery and on appeal argued that the police lacked reasonable articulable suspicion to detain him for purposes of a show-up identification. ***The description of two black teenagers wearing dark clothing could have fit many, if not most, black young men in the area at the time.*** The D.C. Court of Appeals reversed the conviction and found that reasonable articulable suspicion for the seizure did not exist when T.L.L. was stopped. The Court found that the complainant's **"general description without additional identifying information like height, weight, facial hair, or other distinguishing features" was lacking in the requisite particularity.** The Court further noted that T.L.L.'s detention was not temporally or spatially close to the robbery and that the admission of the show up identification was constitutional error—**in violation of the Fourth Amendment**—that could not be considered harmless beyond a reasonable doubt. The Court determined that the motion to suppress the identification should have been granted.

In re A.S., 614 A.2d 534 (D.C. 1992)

- The D.C. Court of Appeals reversed the trial Court's finding that A.S. was delinquent because the search and seizure of A.S. violated the **Fourth Amendment.** ***Because the only description given to the police was "a black male, with blue jacket, gray sweatshirt, dark jeans with a black skull cap," the Court granted A.S.'s motion to suppress on the grounds that the police lacked particularized articulable suspicion when they stopped him.*** On appeal the Court held that: "(1) the police lacked reasonable suspicion to stop the minor; (2) there were at least five individuals in the area that fit the broadcast description, and the police knew that the minors in the area wore similar clothing; (3) there was no evidence of flight; and (4) the police lacked particularized articulable suspicion when they arrested the minor and seized the $20 bill."

United States v. Hawthorne, 982 F.2d 1186 (8th Cir. 1992)

*The cases in each section are arranged in reverse chronological order by year.

- The Court held that reasonable articulable suspicion ***will not be met if the officer's suspicion is based solely on racial incongruity—when a person is seen in a particular geographic area that is predominantly populated with people of a different race***.

Davis v. Mississippi, 394 U.S. 721 (1969)

- When the only description of an assailant was that he was a Black youth, the Supreme Court held that it was illegal to detain, question, and fingerprint 24 Black youth. Davis' seizure was unreasonable because it was not supported by probable cause and ***the probable cause for arrest and search was based on a vague description resting on age and race alone.*** The Supreme Court held that since Davis' detention by the police was unlawful, his fingerprints were obtained in violation of the **Fourth and Fourteenth Amendments**, and inadmissible at his trial.

*The cases in each section are arranged in reverse chronological order by year.

Flight

<u>Commonwealth vs. Tykorie Evelyn</u>, 485 Mass. 691 152 N.E.3d 108 (2020)
Note: Tykorie Evelyn's appellate brief can be found in the Case Advocacy: Racial Justice Motions and Pleadings section of the Toolkit.

- The Massachusetts Supreme Judicial Court upheld the denial of Tykorie Evelyn's motion to suppress. Thirteen minutes after a shooting, and one half-mile away, two police officers encountered Mr. Evelyn walking on the sidewalk and drove slowly beside him for approximately one hundred yards, while he repeatedly rebuffed their attempts to speak with him. When one of the officers started to get out of the cruiser, Mr. Evelyn ran away. The officers found a firearm on the ground along the route on which he had run. Mr. Evelyn was indicted on charges including murder in the first degree. In a motion to suppress, Mr. Evelyn argued that the officers stopped him without reasonable suspicion at the moment that one of the officers opened the door of the cruiser. Mr. Evelyn also argued that his race and age should form part of the totality of the circumstances in the determination of whether he was seized. The Court concluded that Mr. Evelyn was indeed seized when the officer in the front passenger's seat opened the cruiser door after having trailed Mr. Evelyn and repeatedly tried to talk with him. ***The court acknowledged the troubled history of policing in African American communities, but declined to decide here whether the race of a defendant properly informs the seizure inquiry and feared that a bright line rule that race is always relevant to the seizure analysis might "do more harm than good."*** The Court held that the Court should consider age in the totality of the circumstances as part of the seizure analysis going forward, if the suspect's age is known to the officer or objectively apparent to the officer. In the present case, the Court found that Mr. Evelyn's age would not have been apparent to the officer based on the facts of the case.
- The Court also concluded that the officers had reasonable articulable suspicion to stop Mr. Evelyn due largely to the proximity of gunshots to Mr. Evelyn and Mr. Evelyn's body language and positioning that suggested he was carrying a weapon. Although it agreed that the police had reasonable articulable suspicion, the court reiterated its previous holding in ***Commonwealth v. Warren*** **that flight of an African-American man from police "is not necessarily probative of . . . consciousness of guilt" based on the history and present reality of policing African Americans. In Mr. Evelyn's case, the Court extended that reasoning to other types of nervous or evasive behavior in addition to flight to conclude that the weight of the defendant's nervous and evasive behavior should be significantly discounted in the reasonable suspicion analysis.**

<u>United States v. Brown</u>, 925 F.3d 1150 (9th Cir. 2019)

- After receiving an anonymous tip regarding a Black man carrying a gun—which is not a criminal offense in the state of Washington—police spotted Brown (who was on foot), activated their lights and pursued him by car. Before flashing their lights, the police did not order or signal Brown to stop. Brown ran for about a block before the officers stopped him at gunpoint. Upon review, the Court found that "[w]ith no reliable tip, no reported criminal activity, no threat of harm, no suggestion that the area was known for high crime or narcotics, no command to stop, and no requirement to even speak with the police," Brown's flight from the officers was not enough to find reasonable suspicion that criminal activity was afoot.

- The Court additionally found that, the metro officers took an anonymous tip that a young, Black man had a gun and "jumped to an unreasonable conclusion" that Brown's later flight indicated criminal activity." ***Noting that flight can be evaluated for reasonable suspicion, the Court states that we cannot totally discount the issue of race, and that there is little doubt that uneven policing practices affect the reaction of certain individuals—including those who are innocent—to flee law enforcement.***
- Judge McKeown in her opinion highlights the significance of Wardlow, a case decided almost 20 years ago. She shares that since Wardlow, news coverage of racial disparities in policing has increased, which has justifiably amplified concerns for people of color. ***"Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an 'innocent' explanation of flight…we are particularly hesitant to allow flight to carry the day in authorizing a stop."***

People v. Horton, 142 N.E.3d 854 (Ill. App. Ct. 2019)

- Police officers observed three men standing in front of a home; one of the men, Horton, was observed to be carrying something metallic protruding from his waistband. When the officers got out of their vehicle to investigate, Horton bolted inside and ran upstairs. Officers pursued and eventually found Horton crouched behind a bed. They subsequently recovered a firearm from underneath the mattress. Horton's motion to suppress the firearm was denied by the trial court. The appellate court reversed.
- The appellate court decided that the officers did not have probable cause to arrest Horton, finding that the record did not show that officers even believed Horton possessed a gun at all, and that even if he did possess a gun, possession was not a crime in itself that would establish probable cause.
- Lastly, the appellate court rejected the state's argument that "headlong flight" after a suspect sees the police is a relevant factor in assessing probable cause. The court went as far to point out that in Illinois, "running from the police is not even sufficient to establish reasonable suspicion unless other circumstances indicate suspicious or illegal behavior." Furthermore, there are **"*eminently reasonable and noncriminal reason[s] [that] explain Horton's actions after seeing the police...some negative interactions between the police and members of some communities have led to a measurable amount of fear and distrust of police. And thus, one can readily understand why a young [B]lack man having a conversation with friends in a front yard would quickly move inside when seeing a police car back up*."**

Everett Miles v. United States, 181 A.3d 633 (2018)

- The D.C. Court of Appeals held that an anonymous tip describing a man "shooting a gun in the air," together with the defendant's flight from the police, did not establish reasonable suspicion to justify detention. In March 2013 officers stopped Everett Miles, a Black man, acting on a tip from a "concerned citizen" who reported "a Black male with a blue army jacket shooting a gun in the air and location." Officers stopped Mr. Miles a few blocks away from the reported location. Mr. Miles fled on foot, officers eventually detained him, and retrieved a gun. Mr. Miles was found guilty of unlawful possession of a firearm by a convicted felon, possession of an unregistered firearm, unlawful possession of ammunition, and carrying a firearm outside a home or place of business. ***Relying heavily on race-based empirical research and data, the***

Court held Mr. Miles did not exaggerate his fear of police brutality based on "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests." Mr. Miles' flight was provoked and not probative of guilt. The officers' actions towards Mr. Miles during the stop were startling and possibly frightening to many reasonable people, providing a reason other than consciousness of guilt for Mr. Miles to have fled. There was also no sufficient evidence to conclude the tip was a "reliable assertion of illegality." The tip in this case did not indicate that the caller observed a crime. Therefore, Mr. Miles' flight was too equivocal to reasonably corroborate the anonymous tip that the man had a gun. The police did not have enough evidence to justify a Terry stop. Mr. Miles' convictions were reversed and the case remanded.

Commonwealth v. Warren, 475 Mass. 530 (Mass. 2016)

Also included in descriptions.

- The Supreme Judicial Court of Massachusetts held that Warren's race alone was insufficient to give officers reasonable articulable suspicion that he was the suspect of an earlier crime when the description lacked any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics separate from race. The Court also noted that the police had no justifiable cause to arrest Warren for running away from them; it was within his legal right to run from the police, and the act of doing so did not imply guilt and was not grounds for arrest. Black men in Boston were disproportionately and repeatedly targeted to the extent that flight from police should not necessarily indicate consciousness of guilt. Rather, ***Black men have "reasons for flight totally unrelated to consciousness of guilt," such as the desire to avoid the recurring indignity of being racially profiled.***

Illinois v. Wardlow, 528 U.S. 119 (2000)

Editorial Note: ***This case has been included for its concurrence in which Justice Stevens breaks down possible reasons that people, particularly people of color, might run when encountering police officers.***

- In Justice Stevens **concurrence** he argues that ***"flight" can be attributed to other considerations. For some, particularly "minorities" and those "residing in high crime areas," there is the possibility that the fleeing person is entirely innocent, but with or without justification believes that contact with the police itself can be dangerous. For such a person, unprovoked flight is neither aberrant nor abnormal.***
- Majority opinion: The Supreme Court found that nervous, evasive behavior was a pertinent factor in determining reasonable suspicion for a Terry stop, and that headlong flight was the consummate act of evasion. The Court found that the determination of reasonable suspicion had to be based on common sense judgments and inferences about human behavior, and that officers were justified in suspecting that Wardlow was involved in criminal activity based on his presence in an area of heavy narcotics trafficking and his unprovoked flight upon noticing the police. The Court concluded that Wardlow's presence in an area of heavy narcotics trafficking and his unprovoked flight upon noticing police created a reasonable suspicion justifying a Terry stop.

*The cases in each section are arranged in reverse chronological order by year.

Interrogation

<u>Bond v. State</u>, 9 N.E.3d 134 (Ind. 2014)

- While interrogating Bond concerning a cold-case murder, a detective suggested that he would not receive a fair trial because the jury will not have any African-American representation nor anyone from his neighborhood (or general area). Upon hearing this, Bond confessed and was charged with murder. Before trial Bond filed a motion to suppress his confession but the trial court denied his motion and he was subsequently convicted. The Court of Appeals affirmed the trial court's ruling and on further appeal the Indiana Supreme Court reversed.
- This opinion begins with a call back to the words of Martin Luther King Jr. in his famous *Letter From A Birmingham Jail*, and the spirit of the struggle for Black rights is echoed throughout.
- Considering that the interrogating detective informed Bond that he would not receive a fair trial on account of his race, the Indiana Supreme Court ultimately reversed the lower courts and held Bond's confession to be involuntarily given. The court writes **"*Bond was intentionally deceived as to the fairness of the criminal justice system itself because of the color of his skin. Regardless of the evidence held against him or the circumstances of the alleged crime, he was left with the unequivocal impression that because he was African American he would spend the rest of his life in jail. [sic] Unless he confessed. And in unfortunate days gone by, this might have been the case. But no one wants to go back to such a time or place in the courtroom, and so we will not allow even the perception of such inequality to enter the interrogation room" Id* at 140.**

*The cases in each section are arranged in reverse chronological order by year.

Jury Selection (Improper Race-Based Exclusion of Prospective Juror for Cause)

State v. Edwin Andujar, 462 N.J. Super. 537 (App. Div. 2020)

- The NJ Superior Court of Appeals held that a prosecutor inappropriately conducted a criminal history check on a prospective Black male juror and the juror was improperly excluded from the jury.
- During voir dire, the juror shared that he has family members in law enforcement and friends involved with the justice system, either as victims or defendants. The prosecution requested that the juror be removed for cause, arguing that "he had an awful lot of background, he uses all the lingo about the criminal justice system, and it is very concerning that his close friends hustle and are engaged in criminal activity. Defense counsel objected, noting that under the circumstances raised by the state, "no Black man would be able to sit on a jury in Newark!" and initially, the court found no reason to remove the juror for cause. After the court's ruling, the state ran a criminal background check on the juror, found a municipal warrant, and notified the judge. Then, the court removed the juror for cause on a renewed motion by the prosecution.
- The Appellate court held going forward, prosecutors could not unilaterally decide to conduct criminal history checks on prospective jurors without obtaining permission from the judge and presenting a reasonable, individualized, good-faith basis for the request. In this case, the prosecutor did not offer any characteristic that caused concern to remove the juror other than "where he lived exposed him to violence so the juror must have done something wrong himself and lacks respect for the criminal justice system." The court explained, this argument impermissibly stems from racial stereotypes about Black Americans. Moreover, the criminal history check did not reveal any history that would disqualify the juror from jury service under the applicable Batson/Gilmore standard. The state evaded Baston by running the background check and putting the arrest on the record.
- Furthermore, the record reveals by a preponderance of the evidence that the juror's removal and background check stemmed from implicit or unconscious bias by the state, thereby violating Mr. Andujar's constitutional right to be tried by an impartial jury, selected free from discrimination. Additionally, the court also recognized that "implicit basis is no less real and no less problematic than intentional bias because they both lead to jury selection tainted by discrimination. Reversed and remanded for a new trial.

Flowers v. Mississippi, 588 U.S. 1 (2019)

- The Supreme Court held that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of a black prospective juror was not motivated in substantial part by discriminatory intent. The Court reversed the judgment of the Supreme Court of Mississippi and remanded the case. Relying on Batson v. Kentucky, in which the Court ruled that "***a State may not discriminate on the basis of race when exercising peremptory challenges against prospective jurors in a criminal court,"*** Flowers v. Mississippi reinforces several evidentiary and procedural issues raised in Batson about prosecutorial bias in jury selection. Here, the Court determined that four categories of

evidence loomed large in assessing the Batson issue: "(1) the history from Flowers' six trials, (2) the prosecutor's striking of five or six black prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of black and white prospective jurors at the sixth trial, and (4) t***he prosecutor's proffered reasons for striking one black juror while allowing other similarly situated white jurors to serve on the jury at the sixth trial."*** In sum, the ***State's pattern of striking the prospective black jurors through all of Flowers' trials was motivated by discriminatory intent.*** In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. In the majority opinion, written by Justice Kavanaugh, he laments that the ***"State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."***

Commonwealth v. Williams, 481 Mass. 443(2019)

- The Supreme Judicial Court of Massachusetts affirmed the conviction of Mr. Quinton Williams, an African-American man charged with a Class B possession of substance with intent to distribute. Mr. Williams challenged his conviction claiming the judge abused his discretion in dismissing a prospective juror for cause. During voir dire the juror expressed her opinion that ***"the criminal justice system was rigged against young African-American males."*** After further questioning by the judge to determine the juror's impartiality to serve as a juror for an African- American male defendant, the judge ultimately dismissed the juror for cause.
- The court held that a juror may not be excused for cause, based solely on the belief that the criminal justice system is rigged against African-American males. Actually, in this case ***"the jurors' belief is shared by many in our community including most African-Americans" and excusing jurors for this reason runs the "risk of disproportionately excusing African-American" jurors.*** The court concluded that during the colloquy the judge erred when he asked the juror "if she can put aside" her feelings about the system being rigged against African-American males. The court explained ***"a judge should not require a prospective juror to disregard his or her human life experiences and resulting beliefs in order to serve." In doing so, it mistakenly equates an inability to disregard one's life experiences with a task that is "arguably impossible" with an inability to be "impartial."***
- The court held although the voir dire was improper, it did not prejudice Mr. Williams, because the Commonwealth would have likely utilized its peremptory challenge against the juror. The court rejected Mr. Williams' arguments that he was denied the right to a fair and impartial jury from a fair cross section of his community by eliminating an African- American who held his viewpoints about the criminal justice system, because the juror was not excused for solely having the belief itself. Judgment affirmed.

*The cases in each section are arranged in reverse chronological order by year.

Presumed Dangerousness

In re L.B., 73 A.3d 1015 (D.C. 2013)

Editorial Note: Numerous social studies indicate that racial bias causes people to interpret the behavior of black youth as more aggressive, criminal, and threatening than other people. The elements of the offense require the court to examine the subjective experience of the victim and whether it was reasonable to interpret what was said to them as a threat in context.

- L.B. was adjudicated delinquent for making threats to do bodily harm to an officer. L.B. admitted to making the threat, but testified that the threat had instead been directed at the individual standing behind the officer.

*The cases in each section are arranged in reverse chronological order by year.

Prosecutorial Misconduct

State v. Ibarra-Erives, 516 P.3d 1246 (Wash. Ct. App. 2022)

- Ibarra-Erives appealed his conviction in a drug case, arguing that his rights were violated when a prosecutor used racialized language in his closing arguments. Ibarra-Erives was arrested after Drug Task Force officers executed a search warrant to recover drugs in an apartment he temporarily occupied. Officers found a backpack in one of the rooms, which contained seven one-ounce "bindles" of methamphetamine and five bindles of heroin. Ibarra-Erives was subsequently charged with unlawful possession of a controlled substance with intent to deliver.
- At trial, the prosecutor questioned a detective concerning the amount of drugs found in the backpack. The detective testified that each bindle of meth weighed 28 grams (one ounce). He testified, however, that each bindle of heroin was 24.6 grams, but that on the street it is still considered an ounce. He then went on to say that the term on the street is known as a "Mexican ounce" regardless of who is selling or buying the heroin.
- In the prosecutor's closing argument, he twice emphasized the heroin being packaged as a Mexican ounce. Ibarra-Erives was convicted and sentenced to 16 months**. *On appeal he argued that the prosecutor engaged in race-based misconduct by using the term "Mexican ounce" alleging that the term was used to invoke "stereotypes of Mexican drug-dealing and dishonesty against him."***
- The Court of Appeals reversed and remanded, finding that the prosecutor's use of the term "Mexican ounce" constituted race-based prosecutorial misconduct. In the court's analysis of the prosecutor's statements, it makes two important declarations. ***"In cases where race should be irrelevant, racial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible. . .We must recognize that subtle references to racial bias are 'just as insidious' and 'perhaps more effective.' Like wolves in a sheep's clothing, a careful word here and there can trigger racial bias."***
- ***"An objective observer who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination against Latinx people, could view the prosecutor's use of the term as an apparently intentional appeal to jurors potential bias – a suggestion that Ibarra-Erives was more likely to have possessed drugs packaged to a Mexican ounce because he speaks Spanish and appears to be Latinx."***

State v. McKenzie, 508 P.3d 205 (2022)

- The Court of Appeals in the state of Washington reversed a defendant's conviction due to the prosecutorial introduction of racist rhetoric during trial. In 2018, Andre Devoun McKenzie, a Black man, was arrested and charged with one count of attempted second degree rape of a white child and one count of communication with a minor for immoral purposes. During the subsequent trial, the State introduced the concept of a "gorilla pimp," although the term was of minimal relevance to the proceeding and was not mentioned by the defendant, victim, or officers in their testimony. ***"When the State injects racist rhetoric into a trial it can only avoid reversal if it can show beyond a reasonable doubt that the misconduct did not affect the***

jury's verdict." On appeal, the State was unable to show beyond a reasonable doubt that the introduction of the term did not prejudice the jury and thus taint the conviction. ***"A criminal conviction cannot rest on a foundation of racism."*** The conviction was subsequently reversed without prejudice.

Bennett v. Stirling, 170 F.Supp.3d 851 (D. S.C. 2016)

Also included in sentencing cases below.

- Bennett was charged with capital murder. He was initially convicted and sentenced to death by a diverse jury, but his conviction was reversed and remanded for a new sentencing proceeding based on improperly admitting a juror. The jury at Bennett's new trial was exclusively white. During testimony at trial and during closing arguments, the prosecuting attorney repeatedly brought race to the forefront (including describing Bennett as "King Kong" on numerous occasions, describing Bennett's sexual relationship with a white female correctional officer with an emphasis on race, and eliciting a witness's dream regarding a "Black Indian"). Bennett was subsequently convicted and sentenced to death. After which he filed a habeas petition raising seven grounds for relief (for the purposes of this annotation, only claims one and two are relevant): (1) the sentencing proceeding was fundamentally unfair due to the solicitor's repeated racial comments; (2) his right to an impartial jury was violated by the seating of a juror who convicted Bennett based on race.
- The court found all three examples to be improper and prejudicial. The state's argument that the reference to "King Kong" was without any racial connotation ***"ignores the long and ugly history of depicting African-Americans as monkeys and apes, and the pejorative and inflammatory nature of such references."*** Additionally, ***"the Solicitor's eliciting of a comatose crime victim's racially charged dream did not remotely meet any recognizable evidentiary standard and was provided simply for the power of its racialized imagery. The Solicitor's "blonde lady" comment introduced irrelevant and racially inflammatory evidence, and was calculated to slip to the jury the fact that this large Black man had a white lover while incarcerated. The King Kong statement employed the use of long recognized racist imagery and had no proper place in a closing argument concerning a possible death sentence."***
- Bennett's second claim is in regard to a conversation his counsel had with a juror at a post-conviction relief hearing. "Why do you think Mr. Bennett had killed the victim" The juror responded, "because he was just a dumb n*****." ***"The juror's testimony that he stated he thought Petitioner was guilty "because he was just a dumb n*****" is highly probative evidence establishing that the juror viewed Black people as inferior to white people, and that he did not properly consider the evidence presented at trial. . . This court has considerable difficulty accepting . . . that, at this time in our history, people who use the word 'n*****' are not racially biased."***

State v. Kirk, 157 Idaho 809 (Ct. App. Idaho 2014)

- Kirk appealed his conviction, arguing that the prosecutor violated his constitutional rights by invoking race in her closing argument. Four white female youth (JC, MF, AM, MG) ran away

from a group home where they all resided. While "on the run," they encountered Kirk, a Black man, who invited the girls in his motel room. They spent the night there. The four girls left the next morning. When they were apprehended by the police, MF informed police that she had been raped by Kirk and that she was menstruating when the assault occurred and that there would likely be blood found on the comforter. She also alleged that JC had held her down during the incident and helped Kirk rape her. JC told police she had sex with Kirk and didn't hold down MF. AM and MG told police they observed JC and MF having sex with Kirk and that MF willingly participated. All of the girls told police Kirk offered them intoxicating prescription medicine which they ingested. Police obtained a search warrant and recovered the blood-stained comforter. Kirk was arrested, admitted the girls were in his room, but denied sexual conduct. Kirk was charged with several sex crimes and the case was prosecuted largely on the girls' testimony.

- During the closing argument, the defense counsel focused on perceived weaknesses in the state's case. In her rebuttal, the prosecutor stated:

> Ladies and gentlemen, when I was a kid we used to like to sing songs a lot. I always think of this one song. Some people know it. It's the Dixie song. . . I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away. And isn't that really what you've kind of been asked to do? Look away from two eyewitnesses. Look away from two victims. Look away from the nurse in her medical opinion. Look away. Look away. Look away. 811.

- On appeal, **Kirk argued that his constitutional rights to due process and equal protection were violated when the prosecutor recited the lines from the old Confederate song "Dixie," which inserted the risk of potential racial prejudice into jury deliberations.** The state disagrees, instead suggesting that the prosecutor simply presented a "personal story of singing in her youth to make a legitimate point that Kirk's closing argument asked the jury to look away from the prosecution's evidence." Under Idaho law, in order to establish that a mistake became a fundamental error, the defendant must persuade the court that the alleged error: (1) violates one or more of the defendant's un-waived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) there is a reasonable possibility that the error affected the outcome of the trial proceedings. *"**An invocation of race by a prosecutor, even if subtle and oblique, may be violative of due process or equal protection**."* In relation to whether there is a reasonable possibility that the error affected the outcome of the proceedings, the court stated "***concerns about fairness should be especially acute where a prosecutor's argument appeals to race prejudice in the context of a sexual crime, for few forms of prejudice are so virulent.****"* The Court of Appeals ruled in favor of Kirk and vacated his conviction and remanded for a new trial.

*The cases in each section are arranged in reverse chronological order by year.

Proximity to Crime Scene/ Presence in High Crime Area

Mayo v. United States, 266 A.3d 244 (D.C. 2022)

- Officers were patrolling in an unmarked car when they observed a group of young men hanging out in an alley. One man, Mayo, was observed by officers talking to a man in a wheelchair while gesturing to what appeared to be his midsection. The officers only saw Mayo's back during this observation. Eventually, the officers pulled up on the group and exited their vehicle, at which point the young men began to spread out and lift their shirts to reveal their waistbands to show they were not carrying weapons. Sergeant Jaquez singled out Mayo and began to follow him down a pathway and other officers attempted to flank him. Mayo then began to run, which prompted Jacquez to try to tackle him, causing Mayo to trip. Other officers apprehended Mayo shortly after. In retracing the flight path of Mayo, officers recovered marijuana bags stashed in a bush and a firearm from a woman. DNA and fingerprints matched the gun to Mayo. Mayo filed a motion to suppress the firearm and it was ultimately denied. Mayo appealed and the court of appeals held that Mayo's arrest was unsupported by reasonable articulable suspicion, and the evidence subsequently recovered as a result of his unlawful arrest must be suppressed.
- The court of appeals found that the officers did not have any reasonable articulable suspicion to conduct a *Terry* stop. Specifically, the court focused on Sergeant Jaquez's justification for the stop, i.e., his observation of Mayo allegedly gesturing near his middle section. The court writes that **"*gestures are capable of too many innocent explanations*" *and gestures that take place in a high crime area do not somehow transform themselves into reasonable suspicion of criminal activity merely because they are taking place in a high crime area***. In relation to Mayo's flight when officers arrived, the court noted that although flight from the police can be a relevant factor in a reasonable suspicion analysis, "flight cannot imply consciousness of guilt in all cases." Furthermore, there exists "myriad reasons" why Mayo might run from the police, all of which "undermine the reasonableness of an inference of criminal activity from all instances of flight." The court explicitly lists some of these reasons: ***"there are many reasons an innocent person, particularly an innocent person in a highly policed community of color, might run from the police. An individual may be motivated to avoid the police by a natural fear…a distaste for police officers based on past experience, a fear of police brutality or harassment… or other legitimate personal reasons."***

United States v. Flowers, 6 F.4th 651 (5th Cir. 2021)

- Flowers and other men were seated in a Cadillac that was parked in front of a convenience store. Officer Stanton observed the vehicle for 10 or 15 seconds. Stanton decided to conduct a "field interview" because the occupants were not exiting the vehicle. At this point, five or six other officers, all in separate patrol cars, converged on the Cadillac with their police lights on. When Stanton walked towards the Cadillac, Flowers lowered the window, at which point Stanton said he smelled marijuana. He then asked the occupants to exit the vehicle. Officers found a .32 caliber pistol in plain sight and arrested Flowers for possessing the firearm. At trial

he moved to suppress the firearm on the grounds that the officers did not have reasonable suspicion to conduct a *Terry* stop but his motion was denied. The 5th Circuit affirmed.

- **(Concurrence in Part)** -- Although the majority does not consider the issue of seizure, the concurring opinion declares that a seizure occurred by the mere placement of the patrol cars, which blocked Flowers's exit from the parking lot. Considering that there was a seizure, reasonable suspicion must be assessed, and in this case **"*there was no reasonable suspicion…Two men sitting in a parked car outside an open convenience store during the early evening for a mere ten seconds…is not suspicious behavior, nor does it transform into suspicious behavior because the convenience store was located in a high crime area*."**
- ***"For citizens to become suspects, they must do more than merely exist in an unsavory neighborhood. . . It defies reason to base a justification for a search upon actions that any similarly situated person would have taken. Otherwise, our law comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment."***

United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000)

- Montero-Camargo was stopped and arrested by Border Patrol agents near a Border Patrol checkpoint in El Centro, California. The agents in this case relied on the following factors in stopping the vehicle: "apparent avoidance of a checkpoint, tandem driving, Mexicali license plates, the Hispanic appearance of the vehicles' occupants, the behavior of [a passenger], the agent's prior experience during stops after similar turnarounds, and the pattern of criminal activity at the remote spot where the two cars were stopped." ***The Court held that "the likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic…is not enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."*** The Court further noted that "the citing of an area as 'high-crime' requires careful examination by the Court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity."

Commonwealth v. Cheek, 413 Mass. 492 (1992)

- The Massachusetts Supreme Court granted Cheek's motion to suppress evidence because his rights were violated under the **Fourth Amendment** as the police did not have sufficient specific and articulable facts to establish a reasonable suspicion that he had committed the crime. ***The suspect was described as a "black male with a black ¾ goose known as Angelo of the Humboldt group." The Court reasoned that that description alone did not provide reasonable articulable suspicion to stop a black male, ½ mile from the scene, wearing a black ¾ length goose down jacket. The description "could have fit a large number of men who reside[d] in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city"*** and the police had no other physical description of the suspect, that would have distinguished him from other men, such as height, weight, presence of facial hair, unique markings on his face or clothes or other characteristics. Furthermore, the Court rejected the government's argument that Cheek was walking at midnight in a "high crime area" because there was no evidence that he was fleeing or engaged in suspicious activity. That factor did not

contribute to the officers' ability to distinguish Cheek from any other black male in that area and there was no suspicious activity of the defendant observed by the police.

*The cases in each section are arranged in reverse chronological order by year.

Qualified Immunity

Estate of Jones v. City of Martinsburg, 961 F. 3d 661 (4th Cir. 2020)

- The U.S. Court of Appeals for the Fourth Circuit rejected qualified immunity for the Martinsburg officers responsible for shooting and killing Wayne Jones, a Black man. The Court found that Mr. Jones was stopped from walking on the street instead of using the sidewalk. The officer immediately escalated the encounter and five officers assaulted Mr. Jones. Mr. Jones was tased multiple times, struck in the neck, and placed in a chokehold. The police obstructed Mr. Jones' breathing and collectively tackled him to the ground. Reportedly, one of the officers was injured by a knife Mr. Jones was carrying under his sleeve. Mr. Jones was completely unresponsive on the ground and the officers fired 22 shots into his body. He posed no threat to the officers and was not welding the knife. In the opinion, Judge Floyd stated ***"[a]lthough we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. The officers crossed the "bright line" in shooting Mr. Jones after he was not moving. …This has to stop."*** Accordingly, the court held that the officers were not protected by qualified immunity and should be held liable because Mr. Jones was secured and incapacitated before he was shot. The officers testified to observing that Mr. Jones did not move after he was tackled to the ground. It is clearly established that even armed suspects can be secured without handcuffs, for example, when they are pinned to the ground, and the use of force against incapacitated suspects violates the Fourth Amendment. Additionally, the Court held that simply being armed is insufficient to justify deadly force. The Court affirmed the lower court's ruling that the city was not subject to liability for failure to train its officers under §1983, reversed the District Court's summary judgement granting qualified immunity for the officers, and vacated the dismissal of Mr. Jones' estate claim.

Clarence Jamison v. Nick McClendon, F.Supp.3d 2020 WL 4497723(2020)

- The United States District Court concluded that a Mississippi police officer's search of a car violated the Fourth Amendment, but granted summary judgment in favor of the officer based on qualified immunity. In July 2013, a White Mississippi police officer stopped Clarence Jamison, a Black man driving a Mercedes convertible for having "folded" temporary tags. After the officer cleared Mr. Jamison, the officer relentlessly tried to extend the traffic stop. The officer repeatedly lied about receiving a phone call that Mr. Jamison had 10 kilos of cocaine in his car. At some point the officer put his arm inside the threshold of the passenger door and patted the interior of the vehicle. Mr. Jamison repeatedly declined consent but reluctantly agreed after five badgering requests from the officer. The stop lasted for one hour and fifty minutes and nothing was recovered. Mr. Jamison filed suit against the officer under §1983 for violating his rights under the Fourth and Fourteenth Amendments. The officer filed a motion for summary judgment on qualified immunity grounds. The District Court held that the officer's insertion of his arm into the vehicle was an intrusion and constituted an unreasonable search in violation of the Fourth Amendment. Although it was reasonable for the officer to question Mr. Jamison during the stop there was no reasonable basis for the officer's conduct thereafter. Moreover, Mr. Jamison's consent was the product of an unconstitutional search. Mr. Jamison's consent was involuntary because he surrendered only after the officer put his arm in

his car. ***Finally, race was a factor for extending the stop, also violating the Fourth Amendment.***

- Judge Reeves stated, ***"This stop cannot be separated from the clear historical and current racial disparities in our country. Black people have endured problems with the police since the states replaced slave patrols with police officers who enforced Black codes. There are no exemptions to Black people being stopped by the police. Black people are acutely aware of the danger traffic stops pose to Black lives." The majority of these traffic stops are fruitless and Black people are disproportionately killed at higher rates. In America, Black skin is considered dangerous and consequently Black male teens report "fear of the police" as their greatest safety concern. Against this backdrop "who can say Mr. Jamison felt free on the side of Interstate 20 or to say no to the armed officer?" Accordingly, the search of the vehicle violated the Fourth Amendment.***
- However, the District Court held that the officers' conduct was protected by qualified immunity and thus shielded from liability. In its analysis, the Court noted that "[i]f a court denies Summary Judgement based on qualified immunity that decision is immediately appealable, reaching SCOTUS before a trial judge or jury hears the facts of the case." SCOTUS has given qualified immunity "sweeping procedural advantages." The origins of qualified immunity protected officers acting in good faith; now the doctrine protects officers no matter how egregious their conduct is. Qualified Immunity is not "exoneration" and there must be some accountability for officers who violate citizen's constitutional rights. "Just as SCOTUS swept away the doctrine of separate but not equal, so too should it eliminate the doctrine of qualified immunity." The officer's motion is granted and the damage to property claim will be set for trial.

*The cases in each section are arranged in reverse chronological order by year.

Racial Profiling

United States v. Warfield, 727 F. App'x 182 (6th Cir. 2018)

- Warfield was stopped by a police officer, after driving under the speed limit, sitting upright, staring straight ahead, with both hands on the steering wheel. After the stop, the officer asked Warfield if he had been drinking (he had not). He questioned him about his travel plans and asked about the visible cigarette cartons in his backseat. The officer conducted a sobriety test, which Warfield passed. The officer then asked both Warfield and the passenger for identification—which revealed no outstanding warrants or prior convictions. Then, the officer called a trooper and a drug dog to the scene, even though drug dogs were not routinely used during DUI investigations. The dog was led around the car twice and did not indicate the presence of narcotics. After returning Warfield his license, the officer asked Warfield about the cigarettes in his car and asked if he could look in the trunk and passenger compartment. Warfield obliged, and the officer found multiple cigarette cartons in the trunk of his car and many debit cards, credit cards and gift cards in the passenger compartment. Warfield was charged with possessing counterfeit or unauthorized access devices.
- The United States Court of Appeals for the Sixth Circuit held that there was no probable cause to stop Warfield for a marked lane violation nor reasonable suspicion of intoxicated driving, and that the police officers violated Warfield's **Fourth amendment** rights. The Court ruled that "three instances of lawful driving cannot, when viewed together, transform into illegal conduct," and that this case "involve[d] a suspicionless traffic stop where the officer initiated his interactions with Warfield based on legal driving." Warfield argued that he was stopped because of race, and in response the Court found that ***"[w]hile the law allows pretextual stops based on minor traffic violations, no traffic law prohibits driving while black. The protections of the Fourth Amendment are not so weak as to give officers the power to overpolice people of color under a broad definition of suspicious driving."*** The Court reversed the district court's denial of the defendant's motion to suppress and remanded for further proceedings.

Commonwealth v. Buckley, 478 Mass. 861 (Mass. 2018)

Editorial Note: This case is included for its reference to race and acknowledgement of how pretextual traffic stops can fuel racially discriminatory policing.

- In this case, Buckley challenged a pretextual stop, and asked the Court to overturn Whren. The Court declined to overturn Whren, but invited challenges to racial profiling pursuant to the **Fourteenth Amendment** stating ***"[a]lthough we certainly do not dispute, as a general matter, the enormity or relevance of the problem of racial profiling, it is not an appropriate basis for overturning our general Article 14 standard governing the reasonableness of traffic stops where the defendant has expressly disavowed any such argument that race was a factor in the stop at issue.*** At the same time, the defendant and the concurring Justice raise considerable, legitimate concerns regarding racial profiling and the impact of such practices on communities of color."

*The cases in each section are arranged in reverse chronological order by year.

United States v. Smith, 794 F.3d 681 (7th Cir. 2015)

Also included in seizure and consent to search.

- The United States Court of Appeals for the Seventh Circuit held that officers' encounter with a Black defendant in a dark alley at night in a minority-dominated urban area, the threatening presence of multiple officers, the aggressive nature of the questioning, and the fact that Smith's freedom of movement was physically obstructed was a seizure under the **Fourth Amendment**, as a reasonable person would not have felt at liberty to leave. The Court further acknowledged that ***race was relevant in everyday police encounters with citizens in Milwaukee and around the country, and that there existed empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system.***

Floyd v. City of New York, 959 Supp. 2d 540 (S.D.N.Y. 2013)

- The New York Southern District Court found that the city violated the **Fourth and Fourteenth Amendment** rights of the plaintiff class because of the way the City of New York conducted stops and frisks over the past decade. The District Court additionally found that ensuring people were not seized and searched by police without a legal basis was an important interest meriting judicial protection and that specifically eliminating the threat that blacks and Hispanics will be targeted for stops and frisks was an important interest. Noting that ***"targeting racially defined groups for stops — even when there is reasonable suspicion — perpetuates the stubborn racial disparities in our criminal justice system."***

Commonwealth v. Lora, 451 Mass. 425 (2008)

- Lora (the passenger) and a friend (the driver) were stopped one evening by a state trooper; at the time the driver traveled within the speed limit, did not swerve, and made no erratic movements. The state trooper observed that two occupants of the vehicle were dark skinned (Lora is Hispanic) and activated his blue lights to stop the vehicle for traveling in the left lane while the center and right lanes were unoccupied. During the stop, the state trooper approached the vehicle from the passenger's side and asked the driver for his license and registration. The driver explained that his license had been suspended and stated that the vehicle belonged to Lora. The state trooper asked the driver to step out the vehicle and placed him in the back of the cruiser. As Lora exited the car to take a phone call, the state trooper instructed him to get back into the vehicle. Lora returned, and the state trooper then directed a flashlight inside the car, where he saw a small glassine bag on the driver's side. Lora was asked to exit the car, and he was frisked. The state trooper retrieved the glassine bag of cocaine and called for backup. After proceeding with a search of the vehicle the troopers discovered substantially more cocaine in the car.
- Lora was charged with drug trafficking and later filed a motion to suppress the cocaine as the fruit of an unconstitutional search violating his **Fourteenth Amendment** rights and Articles 1 and 10 of the Massachusetts Declaration of Rights. He argued that the trooper stopped the occupants as a result of racial profiling—because they were dark skinned—and not because of any traffic violation. Though the Massachusetts State Supreme Court reversed the appellate court's order to suppress the evidence, the Court held that ***evidence of racial profiling was relevant in determining whether a traffic stop was the product of selective enforcement violative of the equal protection guarantee of the Massachusetts Declaration of Rights***; and that evidence seized in the course of a stop violative of equal protection should, ordinarily, be excluded at trial. The Court also held that statistical evidence demonstrating disparate treatment

of persons based on their race may be offered to meet a defendant's burden to present sufficient evidence of impermissible discrimination so as to shift the burden to the Commonwealth to provide a race neutral explanation for such a stop.

State v. Maryland, 167 N.J. 471 (2001)

- Marlon Maryland and two other individuals were stopped by transit police on graffiti patrol. The initial police account of the event, which changed at the suppression hearing, was that Maryland was observed stuffing a brown paper bag, later found to contain drugs, into his waistband. The New Jersey Supreme Court held that in light of the contradictory nature of police accounts, ***including indications that the youths were stopped because of their age and race ("presence of three young black males at the station a second time in a week")***, the State had the burden to show a permissible basis for the initial field inquiry in order to support a subsequent investigatory stop and protective search. The State failed to meet that burden given that a field inquiry for questioning is impermissible if it is race-based, and the police action here cannot reasonably be understood as anything but a proscribed race-based inquiry. Therefore, the stop and search violated the **Fourteenth Amendment** and was thus an unreasonable search and seizure within the **Fourth Amendment.**

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)

- Border patrol agents stopped Brignoni-Ponce's car because the occupants appeared to be of Mexican descent. Upon questioning Brignoni-Ponce and his passengers, the officers learned that the passengers had entered the country illegally. Brignoni-Ponce was charged with knowingly transporting illegal immigrants. He filed a motion to suppress the testimony of the passengers and claimed that the evidence was fruit of an illegal seizure violating his **Fourth Amendment** rights. The Supreme Court held that except at the border and its functional equivalents, officers on roving patrol cannot stop vehicles unless they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warranted suspicion that the vehicles contained illegal aliens. ***Mexican ancestry, standing alone, did not justify the officers' stop, according to the Court.***

*The cases in each section are arranged in reverse chronological order by year.

Rap Lyrics

United States v. Williams, Slip Copy, 2022 WL17547125 (D. Ariz. 2022)

Editorial Note: This case has extensive testimony from Professor Erik Nielson, who co-wrote *Rap on Trial* with Andrea Dennis.

- A federal grand jury indicted Williams and 18 other individuals on RICO charges in connection with a gang known as the Western Hills Bloods. Williams was charged with murder, drug trafficking, conspiracy to commit murder, racketeering and other offenses. As part of the evidence against Williams and his co-defendants, the prosecution sought to introduce a rap video depicting Williams and other co-defendants rapping "gangsta rap." Defense counsel filed a motion to preclude the rap music and videos arguing that any probative value attributed to the songs and video were substantially outweighed by the danger of unfair prejudice, and furthermore, that the admission of the evidence would confuse the issues and mislead the jury.
- **The court found the admission of the rap video and songs would create a substantial danger of unfair prejudice in light of its relatively low probative value. In coming to this conclusion, the court relied heavily on the testimony of Professor Nielson who classifies rap music as a fictional art form and/or Black artistic expression.** In Nielson's testimony, he cited two studies conducted in 1999 and 2016 finding that study participants perceived lyrics from a rap song to be significantly more threatening than equivalent lyrics from a country song. The studies also found that the perceived race of the author of each song impacted the feelings, views and beliefs of the listener. **In agreement with Professor Nielson, the court found that the admission of rap video and songs in this case "creates a serious risk of prejudice that could deny the defendants their right to a fair trial."**
- IThe court also noted several reasons why the rap music and evidence sought to be admitted was of low probative value: (1) the author of the lyrics and the date the lyrics were written and produced were unknown; (2) the prosecution elected to place a federal law enforcement agent on the stand to interpret the rap lyrics, however, the agent is not an expert in interpreting rap lyrics; (3) rap lyrics tend to heard differently depending on the listener; and (4) the lyrics do not exhibit an unmistakable factual connection to the charged crimes ("probative value of rap lyrics is low when they contain only general or vague references to violence rather than evidence of specific charged crimes").

Bey-Cousin v. Powell, 570 F.Supp.3d 251 (E.D. PA. 2021)

- Philadelphia police officers, Powell and Cherry, responded to a call for back-up which included a physical description of a 160 pound, 21-year-old, light skinned Black man with minimal facial hair who was wearing blue pants and a red hoodie. The officers instead stopped Bey-Cousin, a 200 pound, 32-year-old Black man with a long beard who was wearing black sweats and a red puffer jacket. That stop revealed a firearm, which then led to an arrest and conviction for being a felon in possession of a firearm. The conviction was vacated on appeal several years later. Now Bey-Cousin files a §1983 action against Cherry and Powell alleging they planted the gun. At the time of Bey-Cousin's initial arrest, he was a smalltime recording artist, and officers Powell and Cherry argued that the jury should hear lyrics to several of Bey-Cousin's songs to

assess Bey-Cousin's claim for damages based on harm to his career. Bey-Cousin filed a motion to exclude any evidence of his rap lyrics.

- The court writes that **the First Amendment requires the court to begin with the presumption that artistic expression is not a factual admission**. To overcome that rule, "the proponent of evidence must offer some preliminary indicia that the artistic expression is a truthful narrative." **The court notes that this burden cannot be overcome merely by showing an artist used the first person in their lyrics, nor that the artist's expression bears some resemblance to real life events, and nor that the artist wrote in the first person about events that resemble real life.**
- There is additional helpful language from the trial court's decision to suppress Bey-Cousin's rap lyrics at his original criminal trial. **United States v. Bey, (not reported), WL1547006 (E.D. PA. 2017)**
    - As part of the government's evidence, the prosecution sought to admit music videos and songs written and performed by Bey-Cousins. The court found the evidence inadmissible and denied the government's motion to admit.
    - The court stated that the rap music evidence, ***"viewed in [its] broader artistic context…does not have high probative value. Rap lyrics are not necessarily autobiographical statements; rather, rap music is a well-recognized musical genre that often utilizes exaggeration, metaphor, and braggadocio for the purpose of artistic expression. Because rap lyrics may falsely or inaccurately depict real-life events, they should not necessarily be understood as autobiographical statements."***

*The cases in each section are arranged in reverse chronological order by year.

Resisting Arrest / Obstructing Law Enforcement

State v. D.E.D., 402 P.3d 851 (Wash. Ct. App. 2017)

- Officer Deccio responded to a call from a woman complaining about a group of youth who allegedly did not belong in her neighborhood. When Deccio arrived, he did not see a group of youth and instead saw Dennis. Deccio pulled up alongside Dennis and asked him, "what's going on," to which Dennis responded with profanity and accused the officer of bothering him. According to the officer, his body was tense and his fists clenched. Deccio then decided to park his car and further speak to Dennis. As Deccio exited his vehicle, police dispatch advised that another call was placed concerning a group of kids, but also that a gun was displayed. At this point, Deccio detained Dennis while indicating to Denis he was not under arrest. Deccio then attempted to place Dennis in handcuffs, but Dennis pulled his arm away and demanded not to be touched. Deccio instructed Dennis to place his hands behind his back but Dennis refused to comply, and in doing so stiffened his body to pull away from Deccio. Eventually Deccio overpowered Dennis, handcuffed him, and conducted a search for a weapon but no weapon was found. Dennis was eventually charged with obstructing a law enforcement officer and was adjudicated in the juvenile court.
- ***Appeal & Holding:*** Dennis appealed his adjudication on the grounds that his passive resistance to being handcuffed did not amount to obstructing a public servant. The Court of Appeals of Washington agreed with Dennis and reversed, reasoning **"that there exists no general obligation to cooperate with a police investigation,"** and whenever a duty does exist, it is generally imposed by statute. The obstruction statute imposes a duty "not to hinder or delay the police investigation; there is no duty to cooperate." The Court ultimately held that **"resisting handcuffing when a suspect is not under arrest does not constitute obstructing a law enforcement officer."**
- ***Concurrence*: "An authority figure's arbitrary stopping of one's physical movement and indiscriminate feeling of one's body invokes memories of an era of slavery when a member of a race of people lacked any right to be left alone and lacked any entitlement to the possession of his or her corporeal existence.** No one should be surprised or offended by Dennis Davis' response to the unconsented and unlawful handling of his person by a police officer.**"**

*The cases in each section are arranged in reverse chronological order by year.

School Discipline

Arnold v. Barbers Hill Independent School District, 479 F.Supp.3d 511 (S.D. Tex. 2020)

- "K.B.," a high-school student, alleged he faced discriminatory school discipline on account of his locs hairstyle and filed a motion for preliminary injunction seeking to enjoin the school district from enforcing hair-length policies. In seeking this injunction, he alleged he experienced:
    - racial discrimination (as prohibited under the Equal Protection Clause, Title VI of the Civil Rights Act),
    - sex discrimination (as prohibited under the Equal Protection Clause),
    - a violation of the First Amendment right to free speech,
    - and violations of his rights protected by several state anti-discrimination laws.
- The framework for granting a preliminary injunction hinges on a movant being able to satisfy four factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest. K.B. satisfied all four factors and his motion for preliminary injunction was granted.

*The cases in each section are arranged in reverse chronological order by year.

Seizure and Consent to Search

<u>People v. Flores</u>, Opinion No. S267522 (Sup. Ct. CA 2024)
<u>Editorial Note:</u> ***This case has been included for its concurrence in which Justice Evans (joined by four justices, equaling five of the seven on the California Supreme Court) discusses the need to consider experiences of people of color when evaluating whether an individual's behavior supports a finding of reasonable articulable suspicion.***

- The Supreme Court of California held that odd behavior that was not itself criminal could not serve to justify reasonable articulable suspicion, even when conducted in a high crime area at a late hour.
- In May 2019 around 10:00 pm, two Los Angeles police officers patrolling an area known for drug trafficking saw Marlon Flores duck behind a parked car after spotting the officers. The officers parked their car near where Flores was hidden. Flores stood up briefly, then crouched behind the car again. When the officers walked up to Flores with a flashlight, he did not acknowledge them. Flores moved his hands repeatedly as he crouched down, seemingly pretending to tie his shoes. Eventually, Flores stood up after the police commanded him to do so multiple times. The officers handcuffed Flores because they believed that he was loitering for drug-related activity. The officers testified that Flores "acted 'suspicious[ly]' by 'attempting to conceal himself from the police' and then 'pretend[ing] to tie his shoe.'" The officers searched both Flores's person and car, recovering a dollar bill concealing methamphetamine and a revolver.
- Both the trial and appellate courts found Flores's behavior enough to justify the searches and denied his motion to suppress. The California Supreme Court reversed, finding that: ***"[T]he standard to justify a detention is not satisfied simply because a person's behavior is 'odd.' A mere deviation from perceived social convention does not automatically signal criminal behavior."***
- The Court cited United States Supreme Court precedent noting that ***"[i]t is settled that a person may decline to engage in a consensual encounter with police."*** The Court distinguishes the instant case from *Illinois v. Wardlow*, 528 U.S. 119 (2000) in which unprovoked flight at the sight of the police was found to justify reasonable articulable suspicion. Here, Flores's acts – which did not include headlong flight – "suggest an unwillingness to be observed or interact. But they are not the 'consummate act of evasion.'"
- Justice Evans, joined by four other justices, wrote separately in a **concurrence**, discussing race at length. She begins by emphasizing that many people of color avoid even casual police interactions because they fear racialized police violence. She writes ***"As numerous judges before us have recognized, many individuals—including, particularly people of color—commonly hold a perception that engaging in any manner with police, including in seemingly casual or innocuous ways, entails a degree of risk to one's safety."*** Evans names 35 individuals killed by police and references thousands more killed in the last decade alone. She goes on to say ***"[d]ue to this searing history and the present day experience of far too***

many people in the United States, for generations, legions of parents in minority communities have given their children 'the talk'—detailing survival techniques for how to mitigate interactions with police 'all out of fear of how an officer with a gun will react to them'", citing Justice Sotomayor's dissent in *Utah v Strieff* 579 US 232, 254 (2016).

- Evans notes that ***"despite growing recognition of the deep-seated issues in policing in our country, it is still the case that communities of color disproportionately experience heightened levels of police scrutiny and racial profiling."*** She details the findings of a report showing that Black and Hispanic Californians were disproportionately stopped and searched by police and Native Americans were arrested and handcuffed at the highest rates, despite the fact that officers were less likely to discover contraband on people of color compared to white individuals. She concludes ***"[b]ased on the reality illustrated by these statistics, attempting to avoid police officers may also reflect, for some people, a 'desire to avoid the recurring indignity of being racially profiled"*** (citing *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (2016)).
- Evans ends her concurrence by noting that while the opinion in the case at hand does not rely on race, ***"neither does it foreclose future litigants from developing arguments about how racial disparities in policing might inform one's decision to avoid contact with police. While the evaluation of whether an individual's behavior supports a finding of reasonable suspicion is an objective one, a test that fails to account for the realities of so many Californians would not be reasonable."***

State v. Sum, 199 Wash. 2d 627 (2022)

- The Supreme Court of Washington held that based on the totality of the circumstances, petitioner Palla Sum was seized when a sheriff's deputy requested Sum's identification while implying that Sum was under investigation for car theft. The deputy did not have a warrant, reasonable suspicion, or any other lawful authority to seize Sum. As a result, Sum was unlawfully seized, and the false name and birth date he gave to the deputy must be suppressed. It is well established that an encounter with law enforcement rises to the level of a seizure if "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe they are free to leave." In this case, the court determined that "all the circumstances" of the police encounter include the race and ethnicity of the seized person.
- As set forth in the Supreme Court of Washington precedent, the seizure inquiry is an objective analysis and the court reasoned that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contact, investigative seizures, and uses of force against BIPOC [Black, Indigenous, and other People of Color] in Washington." As such the court held that:
    - A court need not find purposeful discrimination; instead the court must consider whether an objective observer could view race or ethnicity as a factor. "Explicit discrimination may be absent or impossible to prove in individual cases because identifying the influence of racial bias generally and specifically, presents unique

challenges." Furthermore "many who consciously hold racially biased views are unlikely to admit to doing so" and "implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness."
    - A defendant is not required to introduce data or statistics to demonstrate that a particular race or ethnic group has been the target of police discrimination or violence. "Requiring an allegedly seized person to produce statistics showing precisely how their race and ethnicity should be factored into the seizure analysis would artificially raise their burden, while unjustly ignoring the "pain, suffering, and distrust that statistics fail to capture."
    - A defendant is not required to establish the race of the officer: The race of the officer could be relevant if known, but the absence of information about the officer's race does not negate the relevance of the defendant's race.
- The court formally recognized "what has always been true: in interactions with law enforcement, race and ethnicity matter" and reversed the Court of Appeals and remanded to the trial court for further proceedings consistent with this opinion.

United States v. Knights, 989 F.3d 1281 (11th Cir. 2021)

- Knights and Keaton and another were smoking marijuana by a car in Tampa, Florida. While on patrol, officers Seligman and Samuel saw two of the car's doors open with Knights and Keaton leaning into the car. They believed the men might be stealing from the car, citing the area was known to be high crime and gang infested. The officers then parked their car parallel but in the opposing direction of Knight's car. Samuel tried to talk to Keaton, but Keaton walked away and entered a house without speaking. The officers then approached Knights who was seated in the car. When Knights opened the door, the officers were confronted with a cloud of marijuana smoke. Officers then arrested Knights and searched the car and found a pill bottle with several different kinds of pills, a firearm cartridge, a ski mask, a scale, marijuana residue, a handgun and a rifle. Knights agreed to an interview after the officers Mirandized him and he admitted to owning the handgun. Before trial, Knights moved to suppress his admissions and the evidence found. He argued that the seizure occurred when the officers, without having established reasonable suspicion, walked up to his car. Defense argued in its motion to suppress that no reasonable person in Knights' position would feel free to leave after the officers parked their car relatively impeding Knights' ability to drive away. The district court, however, disagreed explaining that no seizure occurred until the officers were confronted with the marijuana smoke. Knights was then convicted. **On appeal, Knights argued that his perspective as a young Black man was relevant to the question whether a seizure occurred. In other words, according to Knights, the correct question to be asked is whether a reasonable young Black man would have felt free to dive away from the police in this instance.** The court holds that a race-conscious reasonable-person test runs afoul of the Equal Protection Clause.
- In her concurrence, Judge Rosenbaum agrees with the majority but advocates for a rule "requiring officers to clearly advise citizens of their right to end a so-called consensual encounter." One of the reasons Judge Rosenbaum advocates for this new rule is because of the

*The cases in each section are arranged in reverse chronological order by year.

"trick dilemma [experienced by] Black citizens who studies indicate historically have disproportionately suffered violence in law-enforcement encounters." **She notes it is worth considering why Black and white individuals do not equally feel free to leave citizen-police encounters, and says courts should consider "*what can be done to improve the ability of people of all races to feel equally able to exercise their Fourth Amendment rights to leave a legally consensual citizen-police encounter."***

State v. Nyema, Superior Court of New Jersey Appellate Division Docket No. A-0891-18T4 (2020)

Note: Amici and appellate briefs for this case can be found in the Case Advocacy: Racial Justice Motions and Pleadings section of the Toolkit.

- The New Jersey Appellate Division Court ruled in favor of Appellant, Peter Nyema, an African American man who was subjected to an illegal Terry stop in May 2011. The Court of Appeals vacated Mr. Nyema's conviction and sentence, holding that the state failed to establish reasonable articulable suspicion for stopping Mr. Nyema's motor vehicle and that the subsequent seizure of physical evidence was unlawful. The Court of Appeals concluded that the state did not provide sufficient evidence the car was stolen; therefore, Mr. Nyema had a reasonable expectation of privacy in his father's car. Additionally, the officer acted on a hunch and did not have any reasonable and articulable suspicion to stop the vehicle. The officer had no physical description of the suspects at the time he made the stop; he had no description of the vehicle, and in fact, the officer was told the suspects fled on foot. The only information the officer had was that the 7-Eleven had been robbed by two-black men who fled on foot and a vehicle with three Black men driving from the 7-Eleven had been reported. When the officer spotlighted Mr. Nyema's car, he shined his police car spotlight on the vehicle and observed three African- American males. Allegedly none of the males flinched or had any reaction to the spotlight being shined into their vehicle. The men's non reaction to the spotlight was not enough to conduct an investigatory stop. Further, ***"[k]nowledge of the race and gender of criminal suspects, without more, is insufficient suspicion to effectuate a seizure. A random stop based on nothing more than a non-particularized racial description of the person sought is especially subjected to abuse."***

State v. Clinton-Aimable, No. 2018-355 (Vt. 2020)

- The Vermont Supreme Court ruled that the trial court erred in denying Henry M. Clinton-Aimable, a Black man, a motion to suppress evidence. In July 2016, officers stopped Mr. Aimable's vehicle for failure to use a directional signal and acting on an unreliable tip. The officers contended that Mr. Aimable's "extreme nervousness and smell of marijuana" justified extending the traffic stop and seizing the vehicle. Following the traffic stop, Mr. Aimable was charged and convicted of possession of cocaine. The Vermont Supreme Court held: (1) The facts did not provide probable cause to seize Mr. Aimable's vehicle based on the suspicion that it contained illicit drugs or related items. (2) The totality of the circumstances was insufficient to provide probable cause that the vehicle contained drugs and seized it. (3) The tip did not meet the standards of Vt. Criminal Procedure whereby the tip was vague and unreliable, the officer testified he did not believe the tipster information, and the facts from the tipster were not used to support the warrant to seize the vehicle. Justice Reiber issued a concurring opinion highlighting how race played a role in the traffic stop. ***"Black drivers are four times more***

likely to be searched, subsequent to a stop, than White drivers. A Black driver, impacted by the entirety of the Black American experience, may likely become extremely nervous when face–to-face with a police officer while stopped on the side of the road. I question whether nervous behavior exhibited by a person of color should ever be used as a factor in determining whether police have reasonable suspicion or probable cause."The order denying Mr. Aimable's motion is reversed and his conviction is vacated.

State v. Jones, No. 2019-0057, N.H. LEXIS 4 (2020)

- Jones appealed an order of the Superior Court denying his motion to suppress evidence that led to his conviction on one count of possession of a controlled drug. Jones argued that the trial court erred by 1) concluding that he was not seized during his encounter with two police officers and 2) refusing to consider his race in its seizure analysis. The Supreme Court of New Hampshire reversed and remanded the case finding that the State failed to meet its burden of showing that Jones was not seized. Of importance in this case is the court's consideration of race. ***Specifically, the court ruled, "[a]lthough we reach our conclusion irrespective of the defendant's race… we observe that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis." Citing the Seventh Circuit, the court concluded that race is not irrelevant to the question of whether a seizure occurred, but it is not dispositive either.***

Dozier v. United States, 220 A.3d 933 (D.C. 2019)

- The District of Columbia Court of Appeals reversed Dozier's conviction for one count of possession of cocaine with intent to distribute, ruling that the officers did not have reasonable, articulable suspicion to seize Dozier and the pat-down conducted was in violation of the **Fourth Amendment.** Applying the totality-of-the-circumstances analysis, the court concluded that Dozier's encounter with the police was nonconsensual. They further concluded "even assuming that the officers' interaction with appellant began in a consensual manner, there was a Fourth Amendment seizure by the time appellant submitted to the officers' request to a pat-down." The court emphasized that an innocent person in Dozier's situation would not have felt free to decline the request to speak after approached by "two uniformed and armed police officers who engaged in repeated questioning and escalating requests, culminating with a request to put his hands on the wall for a pat-down, at a time when he was alone, at night, in a secluded alley partially blocked by a police cruiser with two additional offers standing by." The court noted other factors, *including race*, that they believed "relevant in evaluating the coercive character of the overall setting of the encounter. First, that it took place in a 'high crime area' and involved an African-American man." ***The court explained that even an innocent person might fear that he is perceived with particular suspicion by hyper-vigilant police officers expecting to find criminal activity in a particular area; and that fear is particularly justified for persons of color, who are more likely to be subjected to this type of surveillance ("An African-American man facing armed policemen would reasonably be especially apprehensive").***

Utah v. Strieff, 136 S. Ct. 2056 (2016)

Editorial Note: This case is included for its fabulous dissent by Justice Sotomayor which touches on the racial dimension of suspicionless stops and unconstitutional searches.

- Majority opinion: The U.S. Supreme Court held that where an officer made an unconstitutional investigatory stop, learned during the stop that the suspect was subject to a valid arrest warrant (unpaid parking ticket), arrested the suspect, and seized incriminating evidence during a search incident to that arrest, the evidence the officer seized as part of the search incident to the arrest was admissible under the **Fourth Amendment** because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.
- In Justice Sotomayor's **dissent**, however, she less forgivingly laments that "this case allows the police to stop you on the street, demand your identification, and check it for outstanding warrants—even if you are doing nothing wrong." She argues that the existence of a warrant not only gives an officer legal cause to arrest a person, but it also forgives the officer who, with no knowledge of the warrant at all, unlawfully stops the person on a "whim or hunch." More importantly, Justice Sotomayor's dissent ***touches on the racial dimension of suspicionless stops and unconstitutional searches, contending that people of color are disproportionately victims of suspicionless stops.*** ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.")

United States v. Smith, 794 F.3d 681 (7th Cir. 2015)

Also included in racial profiling.

- The United States Court of Appeals for the Seventh Circuit held that ***officers' encounter with a Black defendant in a dark alley at night in a minority-dominated urban area was a seizure under the Fourth Amendment, and that he was not free to leave***. The Court further acknowledged that race was relevant in everyday police encounters with citizens in Milwaukee and around the country, and that there existed empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system.

State of North Carolina v. Twanpree Newshawn Ivey, 633 S.E.2d 459 (2006)

- The North Carolina Supreme Court held that the officer did not have probable cause to believe the defendant violated any traffic law and therefore was not justified in stopping and searching his vehicle. In September 2002, an officer stopped Twanpree Newshawn Ivey, a Black man, for failing to use a turn signal. The officer's description of the vehicle is relevant in this summary because it reinforces Mr. Ivey's argument that he was stopped for "driving while black." The vehicle was a "white Chevrolet Tahoe sport utility with tinted windows and expensive fancy chrome wheels, in an urban area." Mr. Ivey consented to the search, a firearm was recovered, and he was later convicted of possession of a firearm by a felon and carrying a concealed weapon. The Court ruled that police must have "probable cause to believe a traffic violation occurred" to stop a vehicle. In North Carolina. failing to give a signal during a turn is not a violation unless some other vehicle or pedestrian is affected by such movement. Accordingly, Mr. Ivey did not violate the traffic law because there were no other cars in the intersection or pedestrians. Therefore, the officer lacked probable cause to stop Mr. Ivey's vehicle. Since there was no probable cause for the stop, the subsequent search was unconstitutional and the fruit that arose from the illegal stop should have been excluded. Mr. Ivey's convictions were vacated and the case reversed and remanded.

*The cases in each section are arranged in reverse chronological order by year.

United States v. Bellamy, 619 A.2d 515 (1993)

- The District of Columbia Court of Appeals found in favor of four young African-American appellees, suppressing evidence seized in an unjustified Terry stop. In 1991, four young men pulled up next to an undercover police car. Tommy Murray, one of the young men in the car made a gun gesture with his hand looking at the officer and mouthed the word "pow." When the light changed the young men drove away. The officers followed the young men for five blocks. No traffic laws were violated but the officers called for backup. Eventually the officers stopped the vehicle, ordered the young men out of the car and forced them to the ground. One officer recovered a gun in "plain view." All of the young men were charged with possession of an unlicensed firearm, carrying a pistol without a license, and unlawful possession of ammunition. The Court of Appeals affirmed the trial court's decision granting the motion to suppress. The government argued the officer felt threatened and the "finger gun" gesture was objectively indicative there was a gun in the car and justified a *Terry* stop.
- The Court held that Mr. Murray's gesture did not give the officers reasonable articulable suspicion to justify a *Terry* stop. "SCOTUS clearly established that an officer must have more than a hunch, can point to specific and articulable facts, taken together with rational inferences to warrant intrusion." The gesture was rude and childish, but it was not threatening, and "there is an understanding that police officers must have thicker skin than others because they are subjected to rude treatment." Moreover, there was no flight or traffic violation that gave rise to the stop and Mr. Murray likely had no idea the plain clothed officers were cops. The officer testified that the incident occurred in a high crime area known for prostitution, not drugs and violence. The Court held that this argument was insignificant to justify stopping the young men. Additionally, ***there was discussion from the government regarding racial animosity in support of the officer feeling threatened by "four African-American men and two White officers." The trial court did not give this argument much credence, "I'm very sorry, it's another sad day for race relations."*** Accordingly, the Court of Appeals affirmed the order granting the motions to suppress.

*The cases in each section are arranged in reverse chronological order by year.

Selective Prosecution

Commonwealth v. Long, 485 Mass. 711 (Mass. 2020).

- Officers with the Boston Police Department's Youth Division came across a vehicle being driven by a Black man (the driver did not commit a traffic violation). Based on this they decided to look up the car's license plate and found that the car was registered to a Black woman and that it lacked an inspection sticker. The officers then stopped the vehicle, upon which time they discovered the driver had warrants and his license was suspended. They subsequently searched the vehicle and discovered a gun. The driver, defendant Long, was charged with firearm offenses that he moved to suppress on the ground that the car stop was the product of selective enforcement based on race. The trial court determined that he had not met his initial burden to raise a reasonable inference that the stop had been motivated by race and his motion was denied. On appeal, the Massachusetts Supreme Court concluded that the lower court abused its discretion by denying the motion to suppress because the defendant did actually produce sufficient evidence to raise a reasonable inference that the stop was racially motivated. **"A defendant seeking to suppress evidence based on a claim that a traffic stop violated principles of equal protection bears the burden of establishing, by motion, a reasonable inference that the officer's decision to initiate the stop was motivated by race or another protected class."** ***Id*** **at 713.**
- As part of the defendant's motion to suppress, he provided an expert in statistics (a mathematics professor who had published several articles and reports, and had previously testified in Massachusetts courts). The Supreme Court found the expert witness's testimony particularly compelling, noting that discriminatory enforcement of traffic laws are toxic. **"The discriminatory enforcement of traffic laws is not a minor annoyance to those who are racially profiled. To the contrary, these discriminatory practices cause great harm."** ***Id*** **at 718.**

United States v. Lopez, 415 F.Supp.3d 422 (S.D.N.Y. 2019).

- Lopez, Crispin, Batista, Brito, Dominguez, Hernandez and Cirino (all Black or Latino), were accused of crimes committed during the course of what is known as a reverse sting operation. A reverse sting operation is typically conducted by a law enforcement agency where an undercover agent or informant poses as a drug courier or armed robber (someone with inside information of a drug stash house) and offers the target of the investigation an opportunity to steal drugs that do not actually exist. The target of the investigation then helps plan and recruits other individuals to participate in the robbery of fictitious drugs. Immediately before the investigative targets carry out their plan, agents arrest them for conspiracy to commit the robbery and any other associated crimes.
- As their defense, defendants allege that the use of the reverse sting against them was part of a practice by which the DEA limits such operations in the Southern District of New York to persons of color. Specifically, the defendants assert that the DEA's use of reverse stings only against people of color constitutes selective enforcement in violation of the Fifth Amendment's

Equal Protection Clause. To illustrate this, the defendants **"presented evidence that not a single one of the 179 individuals targeted in DEA reverse sting operations in SDNY in the past ten years was white, and that all but two were African-American or Hispanic."** ***Id*** **at 427.** This evidence presents itself in stark contrast to the racial makeup of New York and Bronx Counties as well as in contrast to the disproportionate racially stratified NYPD crime and enforcement data for felony drug arrests. The defendants also provided expert analysis conducted by a Harvard law professor which concluded that it was "highly unlikely" that the "racially disparate impact of the DEA's reverse sting operations [were] random." *Id*. The court ordered discovery on the issue of selective enforcement in this case.

United States v. Mumphrey, 193 F.Supp.3d 1040 (N.D. Cal. 2016).

- Operation Safe Schools (OSS) was a multijurisdictional program seeking to aggressively prosecute drug traffickers around schools in the Tenderloin District of San Francisco. OSS was undertaken by the U.S Attorney's Office, the Drug Enforcement Administration (DEA) and the San Francisco Police Department (SFPD). This case arose out of two drug "sweeps" that culminated in the arrest of 37 individuals, all of whom were African-American. Subsequently, 12 of the defendants filed a joint motion to compel discovery alleging that law enforcement targeted them for arrest based on their race and that prosecutors prosecuted them based on their race.
- The court granted the motion on the defendants' selective law enforcement claim but denied their selective prosecution claim. The court noted that dismissal is an available remedy not only for a selective prosecution claim, but also for a selective enforcement claim. The court goes on to say that, **"Racially selective action by law enforcement inflicts harm whether it is perpetrated by law enforcement in the streets or by a prosecutor in an office – both inflict substantial injury on the victim and society: in addition to violating the victim's rights to equality and liberty, such discriminatory conduct impugns the integrity of the criminal justice system and compromises public confidence therein. . . [R]acially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment"** ***id*** **at 1055.**

U.S. v. Correa-Gomez, 160 F.Supp.2d 748 (E.D. Ky. 2001).

- Correa-Gomez, a Hispanic business owner, was indicted for encouraging and inducing seven illegal aliens to enter the United States and harboring them during their tenure as employees at his restaurants. In response to the indictment, Gomez filed a motion to dismiss for selective prosecution. Discovery on the issue of selective prosecution was granted and the government was ordered to produce records all Immigration and Naturalization Service (INS) raids within the Eastern District of Kentucky from 1996 to present. Between 1996 and 2000, INS conducted 17 raids against businesses within the Eastern District of Kentucky; 14 of these businesses were owned or operated by non-Hispanic people. The raids of these businesses resulted in the apprehension of 218 illegal aliens. 199 presented false immigration paperwork to their employer when they were hired and the other 19 had no paperwork. These 14 raids resulted in

six fines, six warnings and zero criminal prosecutions. *Id* at 752. Aside from the fact that Gomez was prosecuted, his case is factually similar to the other businesses that were raided. In other words, the facts show that Gomez was similarly situated to those non-Hispanic business owners who were not prosecuted. Based on these disclosures, the courts finds that **"…[T]he defendant is not unlike those whom the government has chosen to simply fine or warn. The prosecution of [Gomez] will have some deterrent effect as to all business owners, but its impact will be most chilling to Hispanic business owners who must rely upon the apparent genuineness of the work papers and verification cards presented to them by prospective workers. Furthermore, the government's unwillingness to proceed against the defendant administratively indicates a heightened level of prosecutorial awareness not present in previous cases presenting similar facts. This awareness is made more critical by the government's admission that at the time the decision to prosecute was made, this was believed to be a first offense. The stark and dramatic difference between this case and previous cases demonstrates that something other than the allegation of his employment of illegal aliens motivated the government's decision to prosecute Mr. Correa-Gomez. *Id* at 753.**

U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).

- The defendant, Jones, was charged with multiple drug and firearm offenses. Prior to trial Jones filed several motions seeking evidence suppression and dismissal based on selective prosecution. All of his motions were denied and he was subsequently sentenced to 262 months in federal prison. On appeal, Jones' unsuccessful motion to compel discovery regarding his selective prosecution claim was reversed by the 6th circuit.
- As part of Jones' motion to compel discovery on his selective prosecution claim, Jones cited the government's decision to prosecute him in federal court as opposed to state court and also the unprofessional conduct of the law enforcement officers who arrested him. This conduct included the arresting officers wearing shirts that had Jones and his wife's picture with words taunting him, as well as a post card to Jones while he was in jail complete with more taunting language and a picture that Jones perceived was racist (a Black woman holding a basket of bananas on her head).
- The 6th circuit concluded that Jones established a *prima facie* case of discriminatory intent based on the conduct of the arresting officers, and that the postcard specifically illustrated racial animus. **"The officer sent to an African-American man a postcard of an African-American woman with bananas on her head, and did not choose any other available postcards such as the sunset or the beach…Given the history of racial stereotypes against African-Americans and the prevalent one of African-Americans as animals or monkeys, it is reasonable – perhaps even an obvious – conclusion that [officer] Spence intended the racial insult that Jones perceived in receiving the postcard" *Id* at 977.**
- In relation to discriminatory intent, Jones was not able to establish that law enforcement failed to refer similarly situated non-African-Americans for federal prosecution, therefore, he did not establish a *prima facie* case of discriminatory effect. However, considering that Jones did show some evidence tending to show the existence of a discriminatory effect (that eight non-African-

Americans who were arrested and prosecuted for crack cocaine were not prosecuted federally), the 6th circuit finds that the district court was wrong to deny Jones's request for discovery. *Id* at 978. The court remands and orders the lower court to compel discovery. If Jones can obtain evidence through discovery that would establish a *prima facie* case, he may then renew his motion to dismiss. *Id.*

United States v. Armstrong, 517 U.S. 456 (1996)

Editorial Note: Even when discriminatory intent is hard to prove, defenders may file selective prosecution motions anyway to educate the judge about the presence of bias even if the legal standard will ultimately be difficult to meet.

- After defendants were indicted on charges of conspiring to possess and distribute cocaine, and federal firearms offenses, they ***filed a motion for dismissal alleging that they were selected for federal prosecution because they were African-American.*** The defendants supported their claim of selective prosecution with a study showing that all 24 crack-cocaine cases closed by the district's federal public defender in the preceding year involved Black defendants. The United States Supreme Court denied the defendant's claim of selective prosecution because they failed to show that the government declined to prosecute similarly situated suspects of other races.

*The cases in each section are arranged in reverse chronological order by year.

Sentencing

<u>In the Matter of the Personal Restraint of Asaria Justice Miller</u>, D2 No. 52119-9-II, Court of Appeals of the State of Washington, Division II, March 8, 2022.

- The Court of Appeals of the State of Washington granted Asaria Miller's Personal Restraint Petition (PRP) arguing that she was entitled to resentencing under *State v. Houston-Sconiers*, 188 Wn 2d 1, 391 P. 3d 409 (2017). In 2013, Miller, a 16-year-old Black girl, was sentenced to 390 months for first-degree murder with a firearm enhancement. Miller's father recruited her to carry out the act. To obtain relief in a PRP, the petitioner must show actual and substantial prejudice resulting from the alleged constitutional errors by a preponderance of the evidence. When a PRP is filed more than one year after the date of judgment, the petitioner must also identify a significant change in the law that is material to the conviction or sentence and applies retroactively. The Court of Appeals held that the sentencing court's failure to meaningfully consider Miller's youth at her sentencing resulted in actual and substantial prejudice to Miller. Moreover, it is more likely that Miller would have received a lesser sentence had the sentencing court complied with *Houston-Sconiers*.
- When sentencing a youth as an adult, the Eighth Amendment requires courts to consider the "hallmark features" of youth, including immaturity, impetuosity, the failure to appreciate risk and consequences, the nature of the youth's environment and family circumstances, and peer pressure. (citing *Houston-Sconiers*, 188 Wn.2d 1 at 23 (quoting *Miller v. Alabama*, 567 U.S. 460, 477, 132 S. Ct. 2455, 183 L. Ed. 407 (2012)). Although the appellate court declined to apply a standard of *per se* prejudice, ***it did acknowledge that "adultification is real and can lead to harsher sentences for children of color" and urged courts at all levels to "remain vigilant when sentencing Black, Indigenous, and children of color to avoid the real bias that has long plagued our justice system." The Court further noted that "girls of color are perceived differently than white girls," and that "Black girls are seen as more adult, needing less protection and nurturing, and being more knowledgeable about sex; and youth offenders of color are seen as more blameworthy and deserving of harsher punishment."*** (quoting GENDER & JUSTICE COMM'N, WASH. COURTS, 2021: HOW GENDER AND RACE AFFECT JUSTICE NOW at 453 (Sept. 2021).) Miller's petition was granted, and the lower Court was ordered to resentence her consistent with *Houston-Sconiers*.

<u>State of Connecticut v. Keith Belcher</u>, (SC 20531) January 21, 2022

- The Connecticut Supreme Court held that the trial court abused its discretion when it denied the youth's motion to correct an illegal sentence of sixty years, finding the trial court substantially relied on false information about a mythical group of teenage "superpredators" and labeled the youth a "charter member" of the group. ***The court concluded that the "superpredators" myth is a baseless, discredited theory that disproportionately demonized Black teens.*** Moreover, the reliance on the false "superpredator" myth in sentencing a Black teenager was detrimental to the integrity of sentencing. The myth invokes racial stereotypes and calls into question whether the youth would have received a lengthy sentence if he was not Black. Furthermore, the trial court's reliance on the "superpredator" myth ran afoul on the Constitutional mandate in *Roper*

because it supported treating the characteristics of youth like impulsivity, deficient judgment, and submission to peer pressure as aggravating factors rather than mitigating factors, thus justifying a harsher punishment. ***In invoking the "superpredator" theory in sentencing a young Black male, the court relied on materially false racial stereotypes that perpetuate systemic inequalities, demanding harsher sentences that date back to the founding of our nation.*** The trial court's judgment is reversed, and the case is remanded.

State v. D.L., 197 Wash.2d 509 (2021)

- D.L., a 14-year-old boy, pleaded guilty to a single count of child molestation. The commissioner sentenced D.L. to an extended sentence known as a manifest injustice disposition. By pleading guilty, D.L. agreed that the court could use the probable cause affidavit to establish the facts that constituted D.L.'s conviction. But when the court imposed the manifest injustice disposition, it relied on three facts that were not in the probable cause affidavit: (1) that D.L.'s victim had a cognitive disability, (2) that D.L. refused accountability, and (3) that D.L. would not cooperate with treatment.
- The appellate court examined whether due process requires that the State give a youth notice of these specific facts before pleading guilty if they will be used to justify a manifest injustice disposition.
- The court held that manifest injustice dispositions cannot be based on facts that the juvenile did not have notice of at the time of plea. Allowing introduction of facts after a plea to justify a longer sentence serves only to undermine the critical strategic decision to forgo trial. Without adequate notice, youth and their attorneys cannot predict which facts might be unearthed and weaponized to extend the juvenile's sentence after the plea.
- In a concurrence, Justice C.J. Gonzáles stated: ***"requiring notice of aggravating factors will give juveniles a more meaningful opportunity to defend against outcomes that might in fact be based on racial bias. Given what we know about disproportionate outcomes for people of color in our legal system, we must take steps to ensure that all juveniles have meaningful notice and opportunity to defend against allegations that expose them to a higher sentence."***

State v. Burke, 843 S.E.2d 246 (2020)

- The North Carolina Supreme Court ruled that the defendant, Rayford Lewis Burke, a Black man convicted of first-degree murder and sentenced to death by an all–white jury can challenge his death sentence under the North Carolina Racial Justice Act (RJA). In 1993, Mr. Burke was convicted of first-degree murder and sentenced to death. Mr. Burke appealed and the trial court denied review stating the defendant's claims were "without merit and procedurally barred." The North Carolina Supreme Court held that the trial court abused its discretion by summarily denying the claims without an evidentiary hearing. RJA allows defendants to seek relief from a death sentence if race played a significant role in the decision. Mr. Burke presented ***"significant evidence that race was a large factor in the jury selection, sentencing, and capital charging decisions in the relevant jurisdictions at the time of his trial and sentencing."*** Mr. Burke used studies, statistical evidence, from Michigan Law School, expert testimony, voir dire, and jury questionnaires from capital cases to bolster his argument. ***The defendant also showed a pattern of race-based strikes the state used in the same office in connection with other litigation. This case opened the door for other Black death row defendants to challenge their sentence on the***

bases of race under the RJA statute. The Supreme Court vacated the judgment of the trial court and remanded the case.

State v. Ramseur, 347 N.C. 658 (2020)

- The North Carolina Supreme Court retroactively applied the Racial Justice Act [hereinafter RJA] and reversed Andrew Ramseur's conviction. In 2010, Andrew Ramseur, a Black man was convicted of two counts of first-degree murder and sentenced to death. During jury selections the trial court denied two defense objections to the prosecutor's peremptory challenges excluding Black jurors. During trial Mr. Ramseur renewed his motion for a venue change citing an all-White jury would lead to an unfair verdict. He filed additional race-based motions stating the rows behind the defense table were blocked off with yellow crime scene tape and the area was effectively segregated by race. The yellow crime tape forced his Black family members to sit in the back behind the tape, while the victim's White family members sat in the front. The trial court denied every motion. Mr. Ramseur then filed a post-conviction motion seeking relief under North Carolina RJA, which was amended in 2012 and repealed in 2013. ***RJA provides "no person shall be subjected to or given a sentence of death or shall be executed pursuant to any judgement that was sought or obtained on the basis of race."*** The trial court concluded the repeal of the RJA rendered Mr. Ramseur's motion void.
- On appeal, the Supreme Court evaluated the constitutionality of whether applying repeal of the RJA retroactively violates the prohibition on *ex post facto* laws. The Supreme Court held that based on the plain language in the RJA appeal, the General Assembly intended for RJA to have retroactive application. "This section is retroactive and applies to any motion for appropriate relief filed, prior to the effective date of this act." The Court declined to address whether the "retroactive application of the Amended RJA's waiver provision violates the prohibition against *ex post facto* laws because the trial court erred in its ruling." ***Mr. Ramseur showed race was a significant factor in the prosecutor's use of peremptory challenges, the imposition of the death penalty, the prejudicial pre-trial publicity, racial tension in the community, use of yellow crime tape in the court room, removing Black jurors without cause, and not conducting an evidentiary hearing on the RJA claims.*** Accordingly, the trial court erred in denying defendant's motions on the pleadings. The Court reversed and remanded for further proceedings consistent with the ruling.

Ramos v. Louisiana, 590 US 140 S.Ct. 1390 (2020)

- The U.S. Supreme Court held that the Sixth Amendment right to jury trial requires a unanimous verdict to convict a defendant of a serious crime. Mr. Evangelisto Ramos was convicted of second-degree murder and sentenced to life without the possibility of parole in Louisiana based on 10- to-2 jury verdict. The Court ruled that the Sixth Amendment "trial by an impartial jury has one such requirement that a jury must reach a unanimous verdict in order to convict." In 48 states and federal courts, juror unanimity is the standard for criminal conviction. Accordingly, ***"Ramos would have received a mistrial almost anywhere else."*** The Court rejected Louisiana's suggestion to perform a cost-benefit/government interest analysis, preserving precedent. The Court also rejected Louisiana's reliance interest of maintaining the security of their final criminal judgments, stating both Louisiana and Oregon may need to retry pending appellate felony convictions by non-unanimous verdicts. *"**This case is significant because it eliminated an old Jim Crow law that allowed for racial discrimination in juries by allowing white jurors to outvote Black jurors and diminish the power of Blacks on juries."***

*The cases in each section are arranged in reverse chronological order by year.

Bennett v. Stirling, 170 F.Supp.3d 851 (D.S.C. 2016).

Also included in prosecutorial misconduct.

- Bennett was charged with capital murder. He was initially convicted and sentenced to death by a diverse jury, but his conviction was reversed and remanded for a new sentencing proceeding based on improperly admitting a juror. The jury at Bennett's new trial was exclusively white. During testimony at trial and during closing arguments, the prosecuting attorney repeatedly brought race to the forefront (including describing Bennett as "King Kong" on numerous occasions, describing Bennett's sexual relationship with a white female correctional officer with an emphasis on race, and eliciting a witness's dream regarding a "Black Indian"). Bennett was subsequently convicted and sentenced to death. After which he filed a habeas petition raising seven grounds for relief (for the purposes of this annotation, only claims one and two are relevant): (1) the sentencing proceeding was fundamentally unfair due to the solicitor's repeated racial comments; (2) his right to an impartial jury was violated by the seating of a juror who convicted Bennett based on race.
- The court found all three examples to be improper and prejudicial. The state's argument that the reference to "King Kong" was without any racial connotation ***"ignores the long and ugly history of depicting African-Americans as monkeys and apes, and the pejorative and inflammatory nature of such references."*** Additionally, ***"the Solicitor's eliciting of a comatose crime victim's racially charged dream did not remotely meet any recognizable evidentiary standard and was provided simply for the power of its racialized imagery. The Solicitor's "blonde lady" comment introduced irrelevant and racially inflammatory evidence, and was calculated to slip to the jury the fact that this large Black man had a white lover while incarcerated. The King Kong statement employed the use of long recognized racist imagery and had no proper place in a closing argument concerning a possible death sentence."***
- Bennett's second claim is in regard to a conversation his counsel had with a juror at a post-conviction relief hearing. "Why do you think Mr. Bennett had killed the victim" The juror responded, "because he was just a dumb n*****." ***"The juror's testimony that he stated he thought Petitioner was guilty "because he was just a dumb n*****" is highly probative evidence establishing that the juror viewed Black people as inferior to white people, and that he did not properly consider the evidence presented at trial. . . This court has considerable difficulty accepting . . . that, at this time in our history, people who use the word 'n*****' are not racially biased."***

***Buck v. Thaler*, 565 U.S. 1022 (2011)**

Editorial Note: This case is included for its dissent by Justices Sotomayor and Kagan, quoted below.

- Buck was convicted of capital murder and sentenced to death based on the jury finding that the state of Texas had proved Buck's future dangerousness to society. Buck's appellate claims centered on the testimony of the defense witness, Dr. Quijano, who stated that several factors, including race, help determine whether a person constitutes a continuing danger to the community. Dr. Quijano mentioned that Black and Hispanic people are overrepresented in the criminal justice system. In relation to Buck's institutional record, Quijano explained that given

Buck had no violent incidents, it shows he is controllable within a prison setting. He also explained that considering Buck's victim was not random, and there was a previous relationship, the likelihood that he would commit further violent acts if sentenced to life in prison were a low probability. On cross-examination, the prosecution asked if "the race factor, black, increases the [prospect of] future dangerousness." The Court denied certiorari.

- In their dissent from the denial of certiorari, Justices Sotomayor and Kagan stated, **"*The context in which Buck's counsel addressed race differed markedly from how the prosecutor used it. On direct examination, Quijano referred to race as part of his overall opinion that Buck would pose a low threat to society were he imprisoned. . . Buck did not argue that his race made him less dangerous, and the prosecutor had no need to revisit the issue. But she did, in a question specifically designed to persuade the jury that Buck's race made him more dangerous and that, in part on this basis, he should be sentenced to death."***

State v. Harris, 326 Wis.2d 685 (2010)

Note: The trial court's ruling was ultimately upheld by the Wisconsin Supreme Court. However, Harris made an interesting argument on appeal (reasonable observer standard) that might work in other jurisdictions.

- Harris pleaded guilty to possession of cocaine with intent to deliver. At sentencing, and in relation to Harris's presentence investigative report, the trial court judge asked Harris a series of questions. These questions related to Harris's potential gang involvement, his education and his lack of employment with a curious focus on the fact that his daughter's mother works while he stays at home and takes care of their child. The trial court subsequently sentenced Harris to two years in prison and three years supervision upon release. . . The following are some of the comments made by the sentencing judge:
  - "Where do you guys find these women, really, seriously. I'd say about every fourth man who comes in here unemployed, no education, is with a woman who is working full-time, going to school. Where do you find these women? Is there a club?"
  - "The men are always out of the picture; they are on the street corners with Mr. Harris here smoking pot and throwing gang signs with their idiot buddies."
  - "People Mr. Hariss's age are enlisting in the Marines and Army and National Guard, putting their lives at stake while Mr. Harris sits at home, gets high while his baby mama works and goes to school. I swear there's a club where these women get together and congregate."
  - "There are jobs that will pay benefits; paid vacation, medical care for your daughter. I'm sure your wife already is providing that – not your wife, your baby mama – is already providing that."
- Harris filed a motion for resentencing, arguing that the trial court did not adequately consider mitigating factors and that the court made inappropriate comments based on stereotypes during sentencing. The motion was denied. The judge pointed out that the original sentencing judge's comments were merely meant to express incredulity over a 21-year-old man allowing his child's mother to work instead of himself finding a job and financially taking care of his family. **On appeal, the Court of Appeals held that although they believed the Circuit Court did not harbor bias against Harris, several of the court's comments "*suggest to a reasonable observer, or a reasonable person in the position of the defendant, that the trial***

court was improperly considering Harris's race [and gender] when it imposed sentence." The Court of Appeals suggested that based on this reasonable observer standard, the trial court erroneously exercised its discretion. Harris's sentence was vacated and remanded for resentencing. Ultimately, the Washington Supreme Court reversed the Court of Appeals decision and upheld the trial court's sentence.

Williams v. State, 811 N.E.2d 462 (Ind. Ct. App. 2004)

- Williams and two others were alleged to have broken into the home of Virginia Brooks in search of a large amount of money. During the commission of the robbery, Brooks was strangled to death and her body was removed from the home and left in a wooded area. Williams was subsequently charged with murder, felony murder and forgery and ultimately pled guilty to felony murder.
- At sentencing, during a discussion of the aggravating circumstances, the trial court made several statements concerning the race of Williams, his co-defendant and the victim: "I think Mr. Williams's behavior has set back racial relations to some extent because an African-American, apparently two, Mr. Tindall [his codefendant] I believe is African-American as well, murdered an elderly woman;" "…[I]n light of these facts of this case, it's going to make people every [sic] more concerned about people of color being in their neighborhoods because of what has happened in this particular case." Williams was then sentenced to 60 years in prison.
- On appeal, Williams argued that his sentence was improper because the trial court abused its discretion when it considered his race to be an aggravating circumstance.
- The court of appeals found that ***"the trial judge's concern over race relations in the community is laudable, [but] his use of Williams's race to address that concern during the sentencing proceedings was impermissible."*** The court did note, however, that when a trial court improperly applies an aggravating circumstance, but where other valid aggravating circumstances exist, an aggravated sentence may still be upheld. This, however, is not such a case. **"[*G]iven the lengthy discussion of Williams's race during the sentencing proceedings, [the court] cannot conclude that the invalid aggravating circumstances played an unimportant role in the trial court's decision to aggravate Williams's sentence. Because [the court is] unable to say with confidence that the trial court's consideration of the permissible aggravating circumstances would have led to the same result"*** the sentenced is reversed and remanded.

United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998)

- Mr. Alexander Leviner, a 33-year-old Black man, was convicted of Felon in Possession of a Firearm. Leviner was a passenger in a car that was pulled over by police. The police would have let the car go but for the fact that the driver's registration did not match the vehicle that was being driven. The police asked the passengers to get out of the car. They found a holster on Leviner, and later they found a gun in the car.
- The United States District Court for the District of Massachusetts found that following the United States Sentencing Commission Guidelines in this case would significantly overstate Leviner's culpability and the likelihood of his recidivism.

*The cases in each section are arranged in reverse chronological order by year.

- The Guidelines system assigns points for past convictions. The majority of Leviner's points came from non-violent convictions for operating a vehicle with a suspended license. However, the Guidelines do not accurately account for differences in the seriousness of the prior convictions. For example, Leviner's eighteen month term for possession with intent to distribute would receive the same points as would an eighteen year sentence for murder.
- "***By counting imprisonment that the defendant has received for prior offenses, the Guidelines system effectively replicates disparities in sentencing in the state system…[including] racial disparities.***
- ***"Motor vehicle offenses, in particular, raise deep concerns about racial disparity….The scholarly and popular literature strongly suggests that there is racial disparity in the rates at which African Americans are stopped and prosecuted for traffic offenses."***
- ***"While the Sentencing Guidelines were designed to eliminate unwarranted disparities in sentencing, and constrain a judge's discretion, they are not to be applied mechanistically, wholly ignoring fairness, logic, and the underlying statutory scheme."***

*The cases in each section are arranged in reverse chronological order by year.

Transfer/Waiver

<u>State v. Quijas</u>, 457 P.3d 1241 (Wash. Ct. App. 2020)
Appellant's briefs for this case can be found in the Case Advocacy: Racial Justice Motions and Pleadings section of the Toolkit.

- Quijas, a 15-year-old Hispanic male, was charged with murder in the second degree. After a hearing on the State's motion for a discretionary decline of juvenile court jurisdiction, he was transferred to adult court, where he pled guilty and was sentenced to confinement for 180 months. Quijas appealed the juvenile court's decision for discretionary decline contending (1) that the juvenile court based its decision solely on the seriousness of the crime and (2) that the court did not rule on his claim that the declination process was tainted by racial prejudice. In his briefing for the motion on discretionary decline, he alleged that in ***"Washington State, and locally in Skagit County, Hispanic youth [we]re being declined and tried in adult court at a rate disproportionate to their percentage of the population. This should be a concern to the court, as it raises both equal protection and due process concerns."*** The Court of Appeals of the State of Washington denied Quijas first claim, but on his second claim ruled that the ***transfer of his case to adult court was done improperly because his claim of racial bias was never addressed by the juvenile court***. "Our Supreme Court has made clear that ***trial courts must be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial***… [w]hen confronted by such a claim…the trial court must rule." The Court reversed in part and remanded the matter to superior court for further proceedings.

*The cases in each section are arranged in reverse chronological order by year.

Warrantless Searches

In re Edgerrin J. 57 Cal.App.5th 752 (2020)

- The California court of appeals held that three minors were detained and not free to leave when four officers approached their vehicle, blocked each door preventing the boys from leaving, and ran a check on all three minors. The detention was not supported by reasonable suspicion when the boys were legally parked in a residential neighborhood and a white woman flagged down the police and reported that there were ***"black males in a parked black Mercedes on her street who were acting shady."*** The woman's tip alone was not enough to support the officers' detention and the allegation of "shady" behavior was far too vague to suggest criminal activity. Although the officers learned during their check that Mr. Edgerrin was on probation and subject to a "Fourth Amendment waiver" as a condition of that probation, the court held that the officers did not know about the waiver before the stop and did not know that Mr. Edgerrin was a "known gang member." As the court noted, "[a]fter-acquired knowledge of a probation search condition cannot justify an otherwise unlawful detention or search."
- The concurring opinion noted that judges and courts must be compelled to acknowledge and confront issues of racial injustices when they arise. Here, "three Black male teenagers sitting in a legally parked vehicle were detained by four police officers, based on an unreliable tip from a white woman that the minors were acting shady." ***"Officers and judges must be vigilant about how implicit biases may have influenced the perception that the Black males were a threat." As our society continues to grapple with "racial inequalities that have resulted in state-sanctioned violence, including lethal violence, against Black people throughout our history to this very day;" and "it is no secret that people of color are disproportionate victims of this type of scrutiny in suspicion less stops.***" There are many ways "in which racial perceptions and biases might surface in a given criminal case, as in everyday life. As such, our opinion in this case ***"appropriately highlights the dangers of relying solely on this type of report as a basis to detain."*** Accordingly, the lower court judgments denying Mr. Edgerrin's motion to suppress a firearm and other evidence recovered from the vehicle was reversed, and the matters were remanded to juvenile court.

People v. Rubio, 43 Cal.App.5th 342 (2019)

- The California Court of Appeals held that the police could not avail themselves of the emergency aid exception to enter Mr. Rubio's home because they had no evidence that someone in his home was injured or in danger. The officers also could not rely on exigent circumstances because they had no evidence that a shooter was inside the residence or that evidence would be destroyed before or after Mr. Rubio's arrest.
- In October 2016, a shot spotter alerted the police about gunfire near Mr. Rubio's home. The officers observed shell casings on the ground near the garage of the home and arrested another male walking from the backyard of Mr. Rubio's property. The officers banged on Mr. Rubio's garage door, thought they heard someone inside trying to block the entrance, and eventually kicked down the door to Mr. Rubio's apartment and seized a pistol. The lower court denied Mr. Rubio's motion to suppress evidence based on the warrantless entry.
- In reversing the lower court and holding that the police had no justification for kicking down Mr. Rubio's door, the court noted that "***we cannot ignore that as a practical matter neither society nor our enforcement of the laws is yet color-blind, and the resulting uneven policing***

may reasonably affect the reaction of certain individuals-including those who are innocent-to law enforcement." As such, although the shot spotter led the officers outside Mr. Rubio's home, there was no evidence that the gunfire was directly from his home, and "evidence that two people in this high-crime neighborhood were antagonistic towards the police" was not enough to justify a warrantless entry. "Mr. Rubio, as much as any American, has the right to retreat into his own home and be free from unreasonable governmental intrusion, and he should not need a barricade to fortify that right." The judgment is reversed, and the case is remanded for further proceedings.

U.S. v. Washington, 490 F.3d 765 (9th Cir. 2007)

- Washington was parked in his vehicle when officers stopped him. One of the officers asked Washington if he would consent to a search of his person and then his vehicle, which revealed a firearm. He was subsequently charged with being an "ex-felon in possession of a firearm." Washington filed a motion to suppress the seizure of his firearm, but the trial court denied his motion. The 9th Circuit reversed.
- The 9th Circuit ultimately held that officers did not have reasonable articulable suspicion or probable cause to stop Washington. The court found he was illegally seized by police officers in violation of the 4th amendment and the firearm was the fruit of this illegal seizure and inadmissible.
- Importantly, within the 9th circuit's discussion of whether a seizure had occurred, and whether Washington had freely given consent to officers to search his vehicle, ***the court considered the Black community's relationship with law enforcement in light of recent police shootings***. *Id.* at 773 ("the publicized shootings by white Portland police officers of African-Americans" and 775 ("the unique situation in Portland between the African-American community and the Portland police").