



Making a Record for Race-Based Arguments at the Trial Level

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Record preservation is key to making a claim based on race or disparate treatment on appeal. In many jurisdictions, the absence of a contemporaneous objection at trial means you may be precluded from litigating the issue in a higher court.

If you are making your record for purposes of raising race on appeal:

- ☐ Identify, with specificity, the racial justice claim you are making.¹
 - A law was applied to your client in a racially discriminatory manner.
 - Specify disparate treatment vs. disparate impact.
 - Disparate treatment is intentionally treating a class of persons discriminatorily (e.g., the anti-Asian Chinese Exclusion Act of 1882, which expressly excluded persons from immigration status based solely on their ethnicity and country of origin).
 - Disparate impact is a statute or practice that unintentionally treats a class of persons in a discriminatory manner (e.g., 99 percent of youth subjected to transfer in your state are Black).
 - Practice note: always couple equal protection claims with another amendment, such a due process claim, to widen the net for relief.²
 - Prosecutorial discretion led to a disparate outcome.
 - Selective prosecution:
 - Are only youth with certain racial or ethnic identities being charged with this offense?
 - Is race an aggravating factor for the prosecutor in your jurisdiction?³
 - When Black, Native/Indigenous, and Latino/a youth are charged, are mandatory sentences more frequent than for white youth?
 - Judicial discretion led to a disparate outcome.
 - Disparate rates of transfer where the court is the decisionmaker
 - Dispositional disparities, generally⁴
 - The statute is unconstitutional because of racially discriminatory practices.
 - Specify facially unconstitutional vs. unconstitutional as applied.

1 The following resources provide an overview of racial justice claims and supporting law and are available for youth defenders on the [Racial Justice Toolkit](#): Case Law to Support Specific Racial Justice Arguments & Youth Defense Raising Race Checklist.

2 Please see the *Advancing Racial Justice on Appeal* checklist for further information.

3 CAMPAIGN FOR YOUTH JUST., [WINNING THE CAMPAIGN: STATE TRENDS IN FIGHTING THE TREATMENT OF CHILDREN AS ADULTS IN THE CRIMINAL JUSTICE SYSTEM 2005-2020](#) 27 (2020) (highlighting the disproportionate transfer rates of Black and Latino/a youth in Cuyahoga County, Ohio).

4 See, e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); see also Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Sentencing Outcome*, 17 PSYCH. SCI. J. 383 (2006).

- Racial bias was present in the Fifth Amendment context.
 - Building on the reasonable child standard from *J.D.B. v. North Carolina*,⁵ utilize the “reasonable Black child”⁶ standard to address how Black youth, in particular, may respond to law enforcement during interrogation, including the impact of trauma due to the over-policing of Black communities.⁷
 - Where applicable, include facts about the disproportionate policing of Black and Latino/a youth by school resource officers.⁸
 - Racial bias was present in the Fourth Amendment context.
 - Your client was unfairly racially profiled.
 - The framework of *Terry v. Ohio*⁹ and its progeny is rooted in racism.¹⁰
 - The reasonable Black child standard implicates how a young person perceives their “freedom” to leave.¹¹
 - Cross-racial identification in and out of court was unreliable.
 - Discretion of probation officers led to supervision and violation disparities.
 - Structural racism was instrumental in your client’s arrest/charge.
 - Your client’s neighborhood was historically redlined.
 - Your client’s neighborhood is disproportionately targeted by police.
 - Your client’s neighborhood lacks adequate places for recreation, play, and healthy youth development.¹²
 - Your client’s normative adolescent behavior was perceived as violent behavior because of their race or ethnicity.
- ☐ Raise your objection early.
 - Pretrial motions
 - Motions to dismiss
 - In jurisdictions where jury trials are available, file *Batson*¹³ motions during voir dire
 - Motions to suppress
 - ☐ Reduce your objection to writing.
 - Contemporaneous objections are ideal, but follow them with a written motion couching your objection in specific caselaw and/or constitutional challenge.
 - The goal is to make your issue sufficiently reviewable by a higher court.
 - A written objection forces the trial court to rule in writing, as well.
 - ☐ Repeat your objection where it becomes relevant again.
 - Opening statements
 - Cross-examination
 - Closing arguments
 - Dispositional/sentencing memos
 - Objections to magistrate’s/lower court’s decisions (in jurisdictions where two-tier review is required or permitted)

5 *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

6 See Kristin N. Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018).

7 See Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

8 Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016); see also U.S. DEP’T OF EDUC., OFF. OF C.R., [2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK](#) 1 (2016); Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002); Cory Turner, “Does Your School Arrest Students?” NPR Ed (January 27, 2017), <https://www.npr.org/sections/ed/2017/01/27/511428075/does-your-school-arrest-students>.

9 *Terry v. Ohio*, 392 U.S. 1 (1968).

10 See Adina Schwartz, *‘Just Take Away Their Guns’: The Hidden Racism of Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996).

11 See Henning, *supra* note 6.

12 See generally *How Does Your City’s ParkScore® Rating Stack Up?*, TRUST FOR PUBLIC LAND, <https://www.tpl.org/parkscore> (last visited May 1, 2023).

13 *Batson v. Kentucky*, 476 U.S. 79 (1986).

- ☐ “Protect” your objection throughout the proceedings.
 - If your proceedings are long and multi-leveled (e.g., transfer proceedings), you may need to keep your ongoing objection in a footnote in all motions filed throughout.
 - Ensure that any actions you take subsequent to your initial objection cannot be misperceived as acquiescence or waiving/withdrawing your prior objection.
- ☐ Include data to support your claim.
 - Does your state have data?
 - If not, you may need to collect your own.
 - If it exists, but you do not have it, file a discovery demand and/or a public records request.
 - Cite to statewide data reports.
 - Check your state youth service agency.
 - Check your state supreme court.
 - Check for which agency reports statistics to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) or the Annie E. Casey Foundation.
 - Cite to national trend reports and research.
 - The Gault Center www.defendyouthrights.org
 - Racial Justice Toolkit www.defendracialjustice.org/
- OJJDP www.ojjdp.gov/ojstatbb/
- U.S. Department of Education, Civil Rights Data Collection ocrdata.ed.gov/
- Haywood Burns Institute burnsinstitute.org/
- Annie E. Casey Foundation www.aecf.org/
- ☐ Utilize maps to visually depict current manifestations of structural racism by highlighting racial inequities across various social systems.¹⁴
 - U.S. census data¹⁵
 - Exposure to crime by ZIP code¹⁶
 - Exposure to neurotoxins (e.g., lead,¹⁷ methamphetamine,¹⁸ superfund sites¹⁹)
 - Education disparity data, including graduation and dropout rates, expulsion rates, students on free or reduced lunch, and reading/math/science testing scores²⁰
- ☐ Call an expert to contextualize the data.
 - Explain what the raw numbers mean.
 - Give context to the facts of your case.
- ☐ Call an expert to demonstrate the social significance of racial justice issues at play, for example:
 - The unreliable nature of cross-racial identification²¹
 - Research pertaining to how race impacts system actors²²

14 See, e.g., CAPITAL MAPS, www.capitalmaps.com (last visited May 1, 2023).

15 Quick Facts, U.S. CENSUS BUREAU, www.census.gov/quickfacts/fact/table/US/PST045221 (last visited May 1, 2023).

16 Find the Safest Areas, crimegrade.org (last visited May 1, 2023).

17 Please check your local health department for lead data pertaining to specific neighborhoods.

18 See *Clandestine Drug Labs in the United States*, DRUG ENFORCEMENT AGENCY, www.dea.gov/clan-lab (last visited May 1, 2023) (for data on methamphetamine).

19 See *Search for Superfund Sites Where You Live*, U.S. ENV'T PROT. AGENCY, www.epa.gov/superfund/search-superfund-sites-where-you-live (last visited May 1, 2023).

20 See THE NATION'S REPORT CARD, www.nationsreportcard.gov/ (last visited May 1, 2023).

Please also visit your local state Department of Education website for additional regional data.

21 BRIAN L. CUTLER & MARGARET BULL KOVERA, *EVALUATING EYEWITNESS IDENTIFICATION* 37 (2010); see also BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 49-50, 52-53 (2011).

22 Sandra Graham & Brian S. Lowry, *Priming Unconscious Racial Stereotypes about Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 484 (2004).

- The negative health toll on Black youth from police interaction²³
- The reasonable Black child standard and how it impacts a Fourth Amendment analysis²⁴
- The racialized history of adolescence that created a foundation of unequal opportunities for Black, Native/Indigenous, and Latino/a youth to engage in normative acts of play, recreation, and leisure²⁵

☐ Undermine the unfair elevation of the state's witnesses as "experts" by highlighting:

- Law enforcement's reliance on "hot spots" as a proxy for race
- General police practices in the community
- Policing by ZIP code and the racial makeup of neighborhoods
- Data on the police department's use of force and arrest rate, by race and ethnicity
- Disciplinary history of police officers and school resource officers
- Lack of appropriate and relevant training of police officers and school resource officers (e.g., anti-racism training, implicit racial bias training, adolescent development training)

²³ See generally Monique Jindal et al., *Police Exposures and the Health and Well-being of Black Youth in the US: A Systematic Review*, 176 JAMA PEDIATRICS 78 (2022).

²⁴ See Henning, *supra* note 6.

²⁵ See, e.g., Harrison Pinckney et al., *Black PlayCrit: Examining the Disruption of Play for Black Male Youth*, 13 AM. J. PLAY 210 (2021); Harrison Pinckney et al., *Playing While Black*, 40 LEISURE SCIENCES 675 (2018); Rasul A. Mowatt, *The Case of the 12-Year-Old Boy: Or, The Science of and Relevance to Leisure Research*, 40 LEISURE SCIENCES 54 (2018).

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