9.3 Constitutional Limits

The constitution forbids the consideration of race in the determination of criminal punishment, and Congress has prohibited explicit race-based punishment since the passage of the Civil Rights Act of 1866. Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27-30 (1866). As one court observed, differential punishment based on an improper factor such as race "obviously would be unconstitutional." *U.S. v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986). In considering challenges to sentences based on unlawful consideration of race, ethnicity, national origin, or immigration status, some courts have applied an equal protection framework, while others have focused on due process guarantees. A number of opinions do not specify the constitutional provision protecting defendants against race-based punishment, but nevertheless recognize that such punishment is constitutionally prohibited. As the following discussion suggests, any time a defendant's sentence appears to have been influenced by race, defendants should raise challenges to the sentence based on both equal protection and due process grounds.

A. Equal Protection

General principles. Criminal sentences based on a defendant's race violate state and federal guarantees of equal protection. U.S. CONST. amend. XIV; N.C. CONST. art. I., § 19; *U.S. v. Smart*, 518 F.3d 800, 804 n.1 (8th Cir. 2008) (a sentence based on race "would violate the Equal Protection Clause of the Fourteenth Amendment, which makes the specific characteristic of race an impermissible government consideration in the absence of compelling reasons to the contrary"); *see also U.S. v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986) (differential treatment at sentencing based on race, nationality, or immigration status would violate due process and equal protection guarantees). A sentencing decision will violate equal protection when similarly situated defendants are subjected to disparate treatment based on race; any proffered justification for such disparate treatment must meet strict scrutiny. *U.S. v. Roberts*, 915 F.2d 889 (4th Cir. 1990).

No North Carolina appellate decisions have addressed race-based equal protection challenges to criminal sentences, but the courts have provided a framework for such a challenge in opinions reviewing other types of equal protection challenges to criminal sentences. In an early ruling based on both former N.C. Constitution article I, section 7 (which is substantially similar to current article I, section 32) and the Fourteenth Amendment to the U.S. Constitution, the North Carolina Supreme Court declared that "every valid enactment of a general law applicable to the whole state shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security, and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions." *State v. Fowler*, 193 N.C. 290, 292 (1927) (statute immunizing residents of five counties from prison sentence applicable to residents in all other counties violated equal protection). In a case addressing an equal protection challenge to punishment without parole eligibility, the North Carolina Supreme Court explained that "equal protection of the laws is not denied by a statute prescribing the punishment to be inflicted on a person convicted of a crime, unless it prescribes different punishments for the same

acts committed under the same circumstances by persons in like situations." *State v. Dunlap*, 298 N.C. 725, 735–36 (1979) (quoting *State v. Benton*, 276 N.C. 641, 660 (1970)).

More recently, the North Carolina Court of Appeals rejected an equal protection challenge by a defendant claiming that he was sentenced differently from other defendants who, like him, had no aggravating or mitigating factors present. *State v. Streeter*, 146 N.C. App. 594, 599 (2001). However, the defendant in *Streeter* did not claim that his sentence was based on an unconstitutional factor such as race. In an earlier case addressing an equal protection challenge to a criminal sentence, the North Carolina Supreme Court held that the mere fact that a statute grants the trial court wide discretion in determining a criminal sentence is not a violation of equal protection. *See State v. Jenkins*, 292 N.C. 179, 191 (1977). As in *Streeter*, the defendant in *Jenkins* did not allege that the trial judge improperly considered race in determining his criminal sentence.

In other jurisdictions, constitutional claims based at least in part on the Equal Protection Clause have succeeded where:

- A judge, in sentencing a defendant from Guinea for heroin trafficking, explained that the sentence was designed in part to send a message to the people of the defendant's background that heroin trafficking isn't tolerated in the United States. The Court of Appeals for the Second Circuit concluded that, even if the judge was not biased, the appearance of a sentence based on race or national origin was unlawful. *U.S. v. Kaba*, 480 F.3d 152 (2d Cir. 2007).
- In sentencing a Chinese-born Canadian citizen, the judge asserted that "[w]e have enough home-grown criminals in the United States without importing them," and expressed hope that the defendant's sentence would send a message to the "Asiatic community . . . that we don't permit dealing in heroin . . . and if people want to come to the United States they had better abide by our laws." *U.S. v. Leung*, 40 F.3d 577, 585 (2d Cir. 1994). The appellate court observed that "[a] defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing," and held that, while it did not believe that the judge was biased against the defendant because of her ethnic origin, "even the appearance that the sentence reflects a defendant's race or nationality will ordinarily require a remand for resentencing." *Id.* at 586.
- A judge based his sentence of a drug trafficker, at least in part, on the defendant's country of origin, Columbia. His statements during two different sentencing hearings reflected his belief that the defendant deserved greater punishment because of his country of origin, which he described as "the total scourge of this country right now, and I am not going to tolerate it, and I want the message to go to Colombia that we are not going to accept this kind of thing." The defense attorney objected at sentencing, noting that the judge had sentenced an "Anglo" codefendant to seven years imprisonment while her Columbian client was sentenced to twelve years imprisonment, to which the judge replied in part, "importantly, he was not from a source country, and I want people in Colombia to know it is not going to be tolerated." *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989).

- A judge stated, in reference to the Columbian defendants before him for sentencing, "[t]hey don't have too much regard for Judges [in Columbia]" and "they should have stayed where they were. Nobody told them to come here." *U.S. v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2d Cir. 1989). In vacating the sentence, the appellate court concluded that the defendant's "plaintive request that she be sentenced 'as for my person, not for my nationality' mirrors what would be the objective reaction of anyone familiar with the above-quoted comments of the district court, namely that ethnic prejudice somehow had infected the judicial process in the instant case." *Id.*
- A judge, "who is Caucasian, use[d] words such as 'ghetto,' 'jungle,' 'animals,' and 'people like Mr. Jackson' who come 'from the city' in describing an African-American defendant," and thereby "called into question, whether his comments might also have constituted racial bias, or the appearance of racial bias." *Jackson v. State*, 772 A.2d 273, 278 (Md. 2001). Maryland's highest court vacated the defendant's sentence and remanded the case for resentencing, concluding that "matters of race and matters of a defendant's place of residence or origins are inappropriate sentencing considerations." *Id.* at 279.

These cases suggest the following bases for equal protection challenges to sentences:

Defendant received more punitive sentence than co-defendant based on race. An equal protection challenge may lie when a non-white defendant receives a harsher sentence than a White codefendant, especially where the defendants are similarly situated in terms of culpability, prior record level, and other factors. *See, e.g.*, *U.S. v. Borrero-Isaza*, 887 F.2d 1349 (9th Cir. 1989).

Before the sentencing hearing, defense counsel may present a memorandum detailing any disparate treatment the defendant experienced at an earlier stage in the case or in past cases. *See, e.g., U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998) (judge granted downward departure to sentencing range based on the possible impact of racial profiling on defendant's criminal history). For example, if you are representing a Black defendant detained pretrial, and a similarly situated White codefendant was released pretrial and consequently had the opportunity to find and secure employment, thereby improving his position at sentencing, you may wish to bring this disparate treatment to the court's attention and request that the sentencing judge correct for it to avoid violating equal protection guarantees. Due process grounds should also be raised. *See infra* § 9.3B, Due Process.

Defendant punished pursuant to statute that produces racial disparities. Courts have generally rejected facial challenges to race-neutral statutes that produce racially disparate sentences. *See, e.g., U.S. v. Rogers*, 409 Fed. Appx. 607, 612 (4th Cir. 2010) (unpublished) ("We have repeatedly rejected claims that the crack-to-powder ratio violates either the Equal Protection Clause or a defendant's due process rights."). However, the U.S. Supreme Court has held that the unwarranted disparities produced by the crack-cocaine ratio constitute a proper consideration at sentencing and a justifiable basis for a downward departure from federal sentencing guidelines. *See Spears v. United States*, 555 U.S. 261 (2009) (per curiam); *Kimbrough v. United States*, 552 U.S. 85

(2007). In a sentencing memorandum, or orally during a sentencing hearing, a defendant may argue that, as applied, statutory schemes that produce racially disparate outcomes violate state and federal guarantees of equal protection. Counsel may ask, in the alternative, that the court correct for disparities caused by the statutes by imposing a sentence in the mitigated range. *See also* G.S. 15A-1340.13(g) (authorizing extraordinary mitigation in some circumstances).

Judge states or implies that race was a factor at sentencing. If the trial judge refers to the race of the defendant, the race of the victim, or makes other statements suggesting that race played a role in the sentencing determination, the defendant should raise an equal protection claim challenging the sentencing process and the sentence imposed. *See, e.g.*, *People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (remanding for new sentencing hearing where trial judge implied that the cross-racial nature of the sexual offense played a role in his sentencing determination). This circumstance should also be challenged on due process grounds. *See infra* § 9.3B, Due Process.

Defendant denied equal protection based on inequitable availability of alternatives to incarceration. An equal protection claim may arise if, for example, English-speaking defendants can be sentenced to a residential treatment facility but there is no such facility available for Spanish-speaking defendants. *See, e.g.*, Jamie Markham, *New Substance Abuse Treatment Center for Female Probationers*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (March 11, 2010) (noting that, before the establishment of Black Mountain Residential Substance Abuse Treatment Center for Women, some wondered if the availability of a residential treatment facility for men but not for women violated equal protection).

B. Due Process

The substantive and procedural due process requirements of the Fourteenth Amendment, along with the parallel provisions of the North Carolina Constitution, require that all defendants have an "'absolute right to a fair trial before an *impartial judge* and unprejudiced jury.'" *State v. Wright*, 172 N.C. App. 464, 468–71 (2005) (emphasis in original) (quoting *State v. Miller*, 288 N.C. 582, 598 (1975)), *aff'd per curiam*, 360 N.C. 80 (2005); *In re Murchison*, 349 U.S. 133, 136 (1955). This includes the right to criminal proceedings untainted by racial bias. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (Marshall, J., concurring).

Due process guarantees have specifically been held applicable to sentencing proceedings. *U.S. v Onwuemene*, 933 F.2d 650 (8th Cir. 1991) (sentence based on race, national origin, or alienage violates due process); *People v. Wardell*, 595 N.E.2d 1148, 1155 (Ill. App. Ct. 1992) (in cross-racial rape case, appellate court vacated defendant's sentence on due process grounds where "defendants' race was considered by the judge when he imposed these long, consecutive sentences[;] [i]f it is on his tongue, it most assuredly must be on his mind").

Even if a judge's statements regarding a defendant's race, ethnicity, or national origin do not establish that the defendant's sentence was based on one of these impermissible factors, due process may be violated on the ground that such statements do not satisfy "the appearance of justice." *Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) (vacating and remanding for resentencing where trial judge observed at sentencing, "[t]here's something that heightens the nature of an offense when people come from foreign lands to do offenses in another land"). Defendants should raise a due process challenge when there are indications that the judge is considering the defendant's race, ethnicity, immigration status, or national origin in making the sentencing determination. *See also supra* § 9.3A, Equal Protection.

C. Prohibitions Against Cruel and/or Unusual Punishment

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Similarly, article I, section 27 of the North Carolina Constitution prohibits cruel or unusual punishment. North Carolina courts have "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." *State v. Green*, 348 N.C. 588, 603 (1998).

Both state and federal constitutional provisions guarantee proportionality in sentencing. The U.S. Supreme Court has held that the right to proportionality in sentencing is violated only when a comparison between the offense gravity and the sentence severity reveals "gross disproportionality." In cases where a court finds gross disproportionality, the court must review both sentences received within the state for more and less serious crimes, and sentences received in other states for the same crime. *Solem v. Helm*, 463 U.S. 277 (1983); *State v. Hensley*, 156 N.C. App. 634, 639 (2003). "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786 (1983); *State v. LaPlanche*, 349 N.C. 279, 284 (1998).

Drug trafficking penalties and those based on an offender's status as a habitual felon have been the subject of Eighth Amendment proportionality challenges in North Carolina. To date, neither of these challenges has succeeded on appeal. *See, e.g.*, *State v. Ford*, 71 N.C. App. 748 (1984) (punishment of 35 years imprisonment and $200,000 fine not disproportionate to the crime of possessing more than 10,000 pounds of marijuana); *State v. Smith*, 112 N.C. App. 512, 514–15 (1993) (sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment); *accord State v. Todd*, 313 N.C. 110, 117–19 (1985); *State v. McDonald*, 165 N.C. App. 237, 241–42 (2004); *State v. Clifton*, 158 N.C. App. 88, 95–96 (2003); *State v. Hensley*, 156 N.C. App. 634, 638–39 (2003).

While not a race-based challenge, a proportionality challenge may be a viable option for challenging a "grossly disproportionate" sentence in an extreme case, and may have a greater chance of success when raised alongside an equal protection or due process claim. For example, in two superior court cases involving Black defendants charged with drug

possession as habitual felons, trial court judges have found that the prohibition against cruel and unusual punishment as well as the guarantees of due process and equal protection prohibited the imposition of the sentence mandated by the habitual felon statute. *See State v. Griffin*, 215 N.C. App. 391 (2011) (unpublished) (finding appellate court had no jurisdiction to hear State's appeal of granting of motion for appropriate relief in defendant's favor); *State v. Starkey*, 177 N.C. App. 264 (2006) (same). In both cases, the trial court imposed the sentence mandated by the habitual felon statute before, sua sponte, entering an order granting its own motion for appropriate relief. In the *Starkey* case, the judge explained that sentencing a defendant with no prior crimes involving drugs or violence to 70 to 93 months for possession of a tenth a gram of cocaine, the smallest quantity measurable by the State's lab, shocked the conscience: "It's unfair. It's inequitable, and it's wrong." *See* Order and Excerpt of Sentencing Transcript in the Race Materials Bank at www.ncids.org (select "Training and Resources") (trial judge noted that defendant's punishment was as harsh as it would have been had his substantive offense been trafficking in 399 grams of cocaine, terrorism by contaminating a public water supply, armed robbery, assault with a deadly weapon with intent to kill inflicting serious injury, malicious castration, second degree rape, voluntary manslaughter, or first degree kidnapping).

D. Raising Constitutional Challenges

The defendant may raise constitutional challenges in a sentencing memorandum or during a sentencing hearing. Constitutional challenges to a sentence that has been imposed also may be raised in a motion for appropriate relief or on appeal. *State v. Curmon*, 171 N.C. App. 697 (2005).

Generally, "constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410 (2004) (quotation omitted). However, a defendant does not appear to waive his right to object to the constitutionality of his sentence if the constitutional challenge is not raised at the trial level. The North Carolina Court of Appeals stated in *State v. Curmon* that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) [of the N.C. Rules of Appellate Procedure]." 171 N.C. App. 697, 703 (citing *State v. Hargett*, 157 N.C. App. 90, 93 (2003)). This approach reflects the practical difficulties that may be involved in objecting to the conduct of the judge at the time of sentencing. *See U.S. v. Kaba*, 480 F.3d 152, 158 (2d Cir. 2007) (concluding that defendant did not waive her argument on appeal because she was "understandably reluctant to suggest to a judge that an ambiguous remark reveals bias just as the judge is about to select a sentence" (quotation omitted)).

Nevertheless, it is important that the defense attorney object if race appears to influence a sentencing determination, both to allow the judge an opportunity to take the objection into consideration and to ensure the issue is preserved for appeal. Defense attorneys may feel reluctant to raise challenges to the improper influence of race at sentencing to avoid appearing to level a charge of racism against the judge. By couching objections in constitutional form, however, counsel may alert the judge to objectionable considerations

without jeopardizing the client's interests. For example, where a judge makes a racial comment in sentencing, defense counsel may object that the statement introduced an unconstitutional factor into the sentencing hearing and determination.