

2.3 Equal Protection Challenges to Police Action

This section covers general considerations relevant to all equal protection challenges to police action. For application of these principles to specific investigative actions, such as stops or arrests, see the relevant sections below.

A. Equal Protection Claims May Strengthen Fourth Amendment Challenges

Equal protection challenges to racially-motivated police action and challenges under the Fourth Amendment to the State's assertion of reasonable suspicion or probable cause are often mutually reinforcing, and defense attorneys may benefit by raising them in tandem. Generally, evidence of an officer's racially-motivated purpose cannot be considered in the Fourth Amendment context. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”). However, such evidence is appropriate and even necessary to an equal protection claim. A defendant raising an equal protection violation may introduce evidence such as:

- an officer's racially derogatory statements;
- statistical evidence of an officer's pattern of targeting minorities for traffic stops; and
- results from internal police investigations of the officer in question.

Such evidence, when introduced in connection with an equal protection claim, may cast doubt on whether the officer had the necessary legal justification to make a seizure under the Fourth Amendment. In particular, a judge who is faced with compelling evidence of discriminatory intent by an officer may be inclined to find that the officer's purported reason for a traffic stop is not credible. For example, in *State v. Villeda*, 165 N.C. App. 431, 434 (2004), a Latino defendant charged with impaired driving presented extensive evidence in support of his equal protection claim—including the trooper's statement that “Hispanics are more prone than other races to get in a car after they have been drinking”—casting doubt on the trooper's race-neutral explanations for the traffic stop. The defendant's equal protection and Fourth Amendment claims succeeded in the trial court. The N.C. Court of Appeals reviewed the evidence of racial profiling before upholding the trial court's finding that the stop was not supported by reasonable suspicion because the trooper could not have observed whether the driver was wearing his seat belt, as the trooper had claimed. Even though the appellate court did not reach the equal protection claim, evidence of the trooper's subjective motivations for traffic stops undermined his credibility and strengthened the defendant's Fourth Amendment claim.

In an opinion discussing both equal protection and Fourth Amendment protections, the N.C. Supreme Court concluded that, while it could not determine whether the stop of a car driven by a black male was “selective enforcement of the law based upon race,” which would violate the defendant's right to equal protection, the officer lacked justification for the stop because there were no grounds to stop the defendant for failure

to use a turn signal. *State v. Ivey*, 360 N.C. 562, 564 (2006), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008). Noting concerns over stops for “driving while black,” the court declared that it “will not tolerate discriminatory application of the law” based on race. *Id.* While the court found that it could not determine whether the stop constituted selective enforcement based on race, those concerns appeared to influence the Court’s approach to the case.

These cases suggest that, even when a defendant does not prevail on an equal protection claim, litigating it may be instrumental in getting evidence suppressed on Fourth Amendment grounds.

B. State and Federal Constitutions Guarantee Equal Protection of the Law

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution recognize the right to equal protection under the law. Both provisions prohibit “selective enforcement of the law based on considerations such as race.” *State v. Ivey*, 360 N.C. 562, 564 (2006) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008). In *State v. Ivey*, the North Carolina Supreme Court stated that it “will not tolerate discriminatory application of the law based upon a citizen’s race.” *Ivey*, 360 N.C. at 564. Our Supreme Court has recognized that the principle of the equal protection of the law was “inherent in the Constitution of this State” even before its express incorporation in article I, section 19, which became effective on July 1, 1971. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971). Interpretations of the Equal Protection Clause by federal courts, while persuasive, do not control the North Carolina Supreme Court’s construction of rights guaranteed by the N.C. Constitution’s Equal Protection Clause. *See McNeill v. Harnett County*, 327 N.C. 552 (1990).

An equal protection challenge to police action “does not fit neatly into the various stages of Fourth Amendment search and seizure analysis,” as “the central intention behind the Equal Protection Clause is the prevention of official conduct discriminating on the basis of race.” *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997) (“A citizen’s right to equal protection of the laws, however, does not magically materialize when he is approached by the police. Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion—undeniably, the right not to be exposed to the unfair application of the laws based on their race.”). If law enforcement officers engage in racial discrimination at any point in the criminal process, including during the adoption of a policy or the development of an informal police practice, a challenge may be brought on equal protection grounds. *Id.* at 355.

C. Elements of a Selective Enforcement Claim

A defendant claiming that a law enforcement officer violated his or her right to equal protection of the law must show either that:

1. A law or policy contains an express racial classification that singles out members of the person's race for disfavored treatment, *see Wayte v. United States*, 470 U.S. 598, 610 n.10 (1985); or
2. A facially neutral law or policy was selectively enforced against members of the defendant's race in an intentionally discriminatory manner, *see Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). This is referred to as a “selective enforcement” claim.

The first type of claim, based on express racial classifications, will rarely arise because express racial classifications have been removed from our criminal laws. Such classifications may occasionally be found in official policies, however. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 263–64 (2005) (describing prosecutor's manual containing reasons for excluding minorities from jury service).

Defendants are more likely to pursue the second type of claim, based on selective enforcement. The U.S. Supreme Court summed up selective enforcement claims in *Yick Wo v. Hopkins*:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. 356, 373–74 (1886). *See also State v. Howard*, 78 N.C. App. 262, 266 (1985) (quoting *Yick Wo*). To succeed on a claim of racially selective enforcement, a defendant must show that the challenged police action:

- was motivated by a *discriminatory purpose*; and
- had a *discriminatory effect* on a racial group to which the defendant belongs.

S. S. Kresge Co. v. Davis, 277 N.C. 654 (1971) (reversing motion to dismiss suit alleging that the City of High Point selectively enforced a law regarding the sale of certain products on Sundays, holding that the facts alleged, if true, would constitute a denial of equal protection of the law). The discussion below addresses these elements of a selective enforcement claim.

Discriminatory purpose. To show that the officer at issue acted with a discriminatory purpose or intent, the defendant must show that the officer selected a particular course of action because of its effect on an identifiable group. *See Wayte v. United States*, 470 U.S. 598, 610 (1985). In other words, a defendant must show “that in the exercise of . . . discretion there has been intentional or deliberate discrimination by design.” *In re Register*, 84 N.C. App. 336, 341, 346 (1987) (prosecutor engaged in selective prosecution in violation of the Equal Protection Clause by making the ability of a juvenile to pay compensation the “determinative factor in the decision of whether to file a complaint as a juvenile petition”). The discriminatory purpose requirement does not require defendants

to prove that race was “the sole, predominant, or determinative factor in a police enforcement action.” *Floyd v. City of New York*, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013). Nor must the defendant show that the discrimination was based on “ill will, enmity, or hostility.” *Id.* (quotation omitted) (citing *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 & n.7 (11th Cir. 1999)). To establish this prong of an equal protection claim, it is sufficient to show that “a discriminatory purpose has been a motivating factor” in the challenged action. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis added).

Generally, evidence of unequal treatment alone, without at least circumstantial evidence of discriminatory purpose, will not be sufficient to establish an equal protection violation. *In re Register*, 84 N.C. App. 336, 341 (1987). The failure of police to avoid or avert unequal treatment is not sufficient to establish discriminatory purpose. *See Wayte v. United States*, 470 U.S. 598, 610 (1985) (“Discriminatory purpose . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.” (internal quotations omitted)); *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 661 (1971) (“Mere laxity, delay or inefficiency of the police department . . . in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable.”). Additionally, when based on considerations other than race, ethnicity, or other impermissible factors, selectivity in enforcement is not unlawful. *S. S. Kresge Co.*, 277 N.C. 654, 661.

A showing of discriminatory intent is sometimes made with direct evidence that law enforcement decisions were based on the defendant’s race, such as an officer’s admission that he approached the defendant because he was a young black male on a street corner who fit the profile of a drug dealer. More typically, however, discriminatory intent is shown through circumstantial evidence. *See United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) (“[o]ften it is difficult to prove directly the invidious use of race,” so “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts” (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (“Discriminatory intent can be shown by either direct or circumstantial evidence.”).

In some cases, “stark” statistical evidence of a racially disparate impact may be sufficient to prove the discriminatory intent element of an equal protection claim. *See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”). For example, in *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886), when the City of San Francisco granted no laundry permits to the over 200 Chinese applicants while granting permits to all but one white applicant, the statistical disparity was so extreme as to “warrant and require” a conclusion of purposeful discrimination. Even when not definitive, statistical evidence of disparate impact is highly relevant and will strengthen a claim of intentional discrimination. “Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful

discrimination.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Generally, evidence that law enforcement action “bears more heavily on one race than another,” provides “an important starting point” in an equal protection inquiry. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (internal quotations omitted).

In *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987), the U.S. Supreme Court observed that “statistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution.” The *McCleskey* Court’s refusal to treat a death penalty study reflecting racial disparities in capital sentencing as evidence of discriminatory purpose has led some courts to conclude that statistics alone are typically insufficient to prove discriminatory intent. *See, e.g., United States v. Barlow*, 310 F.3d 1007, 1011 (7th Cir. 2002) (statistics alone are rarely sufficient to prove an equal protection violation); *Chavez v. Illinois State Police*, 251 F.3d 612, 647–48 (7th Cir. 2001) (statistics may not serve as sole proof of discriminatory intent in a racial profiling case). This reading of *McCleskey* may be overbroad, however, and narrowly tailored statistical evidence may be distinguishable from the statewide study that was offered in *McCleskey*. *See, e.g.,* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 247 (2005) (while the “*McCleskey* Court believed that the Baldus study was insufficient to support an inference of discrimination, a properly conducted analysis of an individual officer’s traffic stop patterns can produce exceptionally clear evidence of purposeful discrimination” (quotation omitted)). The data in *McCleskey* encompassed statewide statistics from over 2,000 Georgia death penalty cases involving multiple decision-makers; in contrast, a selective enforcement claim typically names only a single police officer, unit, or department. In more tailored selective enforcement claims, the court is not confronted with the difficult task of “deducing purposeful discrimination . . . based on the aggregate analysis of decisions made by many other entities.” *Id.* at 246.

Police officers exercise broad discretion in making stops and arrests. In other contexts involving the broad exercise of discretion, discriminatory intent has been inferred from statistical proof presenting a stark pattern of racial disparities. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (a “pattern of strikes against black jurors” may give rise to an inference of discrimination, as may a “prosecutor’s questions and statements during voir dire”); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (courts have frequently relied on statistical evidence to prove employment discrimination, which in many cases is “the only available avenue of proof . . . to uncover clandestine and covert discrimination by the employer or union involved” (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (1971))); *Castaneda v. Partida*, 430 U.S. 482, 494–95 (1977); *see also* David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 111 (2007).

While statistical evidence showing that an officer stops, searches, or arrests a disproportionate number of minorities may not suffice alone to show discriminatory

intent, discriminatory purpose may be demonstrated with some combination of the following direct, statistical, and circumstantial evidence:

- data demonstrating a significant disparity between the overall population and the population targeted by the officer;
- data demonstrating a significant disparity between the population of violators and the population targeted by the officer;
- data demonstrating a significant disparity between the population targeted by the officer and the population targeted by similarly situated officers;
- an officer's failure to comply with department training and supervisory policies;
- an officer's failure to comply with state law mandating reporting of traffic stop data;
- an officer's questions or statements to the defendant or others related to race during the encounter;
- an officer's history of racially motivated behavior, as evidenced by interviews with community members or internal affairs investigations;
- a police department's history of racially motivated behavior, as reflected in reports, investigations, or complaints;
- data demonstrating that when the suspect is a racial minority, an officer more frequently conducts *Terry* stops, consent searches, discretionary stops (for reasons such as seat belt or vehicle regulatory violations), or canine searches; and
- any other relevant evidence supporting an inference of discriminatory purpose.

Practice note: *Washington v. Davis*, 426 U.S. 229 (1976), in which the U.S. Supreme Court announced the requirement of proving “discriminatory intent” in equal protection claims, was decided long before social scientists studying implicit bias recognized the influence of race on decision-making. In light of empirical studies on the subject, *see supra* § 1.3.D, Implicit Bias, defendants should incorporate into their equal protection claims the impact of implicit racial bias.

For example, Professors Ralph Richard Banks and Richard Thompson Ford argue that existing equal protection jurisprudence prohibits state action prompted by either implicit or explicit racial motivation, and contend that evidence of either will satisfy the “discriminatory purpose” prong of an equal protection claim. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L. J. 1053, 1089–1100 (2009) (“One might conclude that the [claimant] need not prove bias at all, but instead simply that the decision would have been different but for the races of the parties”); *see also* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1094–97 (1998) (explaining that, in the peremptory challenge context, strikes motivated by race may be challenged successfully without proof of conscious intent to discriminate).

While it is still relatively rare for courts to consider implicit bias in criminal cases, some judges reviewing equal protection claims raised by criminal defendants have

acknowledged the possible problems caused by unconscious bias. *See, e.g., Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (in reviewing equal protection claim, court noted that grand jury foreperson selection involves “subjective judgments entail[ing] subtle and unconscious mental processes susceptible to bias”); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994) (“[A]s we have recognized in prior cases, racial stereotypes often infect our decision-making processes only subconsciously. . . . Thus, Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so.”); *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J. dissenting) (“It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”).

Introducing social science evidence concerning implicit bias in support of your equal protection claim may help inform the court, present a more complete picture of discrimination faced by your client, and develop jurisprudence that takes into account racial bias as it is understood today. For more information on introducing evidence of implicit bias when litigating equal protection claims, see the [Equal Justice Society Scholar Packet](#), EQUAL JUSTICE SOCIETY (last visited June 24, 2014) (downloadable packet of materials including scholarship and jurisprudence addressing implicit bias and the intent doctrine).

Discriminatory effect. Police action has a “racially discriminatory effect when members of a protected racial group . . . receive less favorable treatment than nonmembers.” *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002). The U.S. Supreme Court has “repeatedly relied on statistics” to prove discriminatory effect. *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001) (citing *Hunter v. Underwood*, 471 U.S. 222, 227 (1985)). Statistical evidence of discriminatory effect may be found in court files, State Bureau of Investigation (SBI) files, surveys or analyses conducted by statisticians or other academic researchers, and other public records such as traffic stop data. *See infra* § 2.3D, Gathering Evidence to Support a Claim of Selective Enforcement; § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims. For example, in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), discriminatory effect was demonstrated with evidence that the New York Police Department (1) carries out more stops in areas where there are more Black and Latino residents, even when other variables are constant; (2) is more likely to stop Blacks and Latinos than Whites, even controlling for other relevant factors; (3) is more likely to use force against Blacks and Latinos, even controlling for other relevant factors; and (4) stops Blacks and Latinos with less justification than Whites. Anecdotal evidence also supported a finding of discriminatory effect in *Floyd*.

At least one court has found that discriminatory effect can be presumed where there is proof of discriminatory purpose. *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006) (“Once racially discriminatory intent infects the application of a neutral law or policy, the group that is singled out for discriminatory treatment is no longer similarly situated to any other in the eyes of the law, so adverse effects can be presumed.”).

Discriminatory effect and the “similarly situated” requirement. In *United States v. Armstrong*, 517 U.S. 456, 465 (1996), the Court held that plaintiffs claiming *selective prosecution* based on race must demonstrate that “similarly situated individuals of a different race were not prosecuted.” Courts have differed in their application of this holding to claims of *selective enforcement*, the focus of the discussion in this chapter. Within the Second Circuit, the similarly situated requirement only applies to claims of selective prosecution, not to other equal protection claims such as claims of selective enforcement. The Second Circuit Court of Appeals has held that, unless the plaintiff or defendant complains of selective prosecution, he or she is not “obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.” *Pyke v. Cuomo*, 258 F.3d 107, 109–10 (2d Cir. 2001) (to prevail on a claim of selective prosecution, plaintiffs must “establish the existence of similarly situated individuals who were not prosecuted; that is because courts grant special deference to the executive branch in the performance of the ‘core’ executive function of deciding whether to prosecute”). In an unpublished opinion, the Fourth Circuit Court of Appeals, citing *Armstrong*, stated that defendants pursuing selective enforcement claims must “show that the law enforcement practice was not enforced against similarly situated individuals of a different race.” *United States v. Suarez*, 321 F. App’x 302, 305 (4th Cir. 2009) (unpublished). In jurisdictions that apply the “similarly situated” requirement to selective enforcement claims, this requirement is generally treated as an aspect of the “discriminatory effect” element. *See, e.g., United States v. Barlow*, 310 F.3d 1007, 1012 (7th Cir. 2002); *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001).

North Carolina appellate courts have not addressed this question conclusively. In an early case, the North Carolina Court of Appeals stated that “to establish a prima facie case of selective enforcement or selective prosecution defendant was required at least to show that others similarly situated have not been proceeded against,” but that observation was dicta with regard to selective enforcement because the claim before the court was for selective prosecution. *State v. Ward*, 66 N.C. App. 352, 354 (1984) (quotation omitted). In a recent unpublished decision analyzing a claim of selective enforcement, the North Carolina Court of Appeals acknowledged the “similarly situated” requirement articulated in *Armstrong*, but did not apply that requirement to the facts before the court. *State v. Mendez*, 216 N.C. App. 587 (2011) (unpublished) (quoting *Armstrong*, 517 U.S. 456, 465). In a claim of selective enforcement, the defendant’s obligation to identify similarly situated individuals of other races who were not subjected to the challenged law enforcement action therefore appears to be an open question in North Carolina. When arguing that no such requirement exists, defendants should advance the logic articulated in *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001), and argue that it is only in cases of selective prosecution, where separation of powers concerns are most pronounced, that this requirement should apply.

If the trial court requires the defendant to identify similarly situated individuals of another race who were not subjected to the challenged enforcement action, the defendant should be prepared to identify such individuals or articulate a definition of the class of similarly situated individuals. *See Washington v. Johnson*, 125 Wash. App. 1040 (Wash.

Ct. App. 2005) (unpublished) (holding that the trial court's decision to adopt defendants' definition of the class of similarly situated individuals in a case alleging racially selective enforcement of drug laws was not reversible error); *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (no "magic formula" for determining who is similarly situated for purposes of selective enforcement cases; the inquiry is a common sense one and the class should not be defined too narrowly; this requirement may be satisfied by identifying a similarly situated individual of a different race who received more favorable treatment). For example, in *Chavez*, 251 F.3d 612, 636, a white female driver following a Latino motorist was similarly situated for purposes of establishing the discriminatory effect prong of the Latino motorist's selective enforcement claim, where both motorists drove the same stretch of highway at the same time, both were visible to the officer who stopped the Latino driver, and neither committed a traffic violation.

D. Gathering Evidence to Support a Claim of Selective Enforcement

Attorney's investigation. An attorney pursuing a selective enforcement claim should conduct an investigation to determine whether evidence exists that the client was targeted by police for a racially motivated reason. Sources of evidence include:

- interviews with your client regarding officers' statements, demeanor, and questions;
- interviews with your client's family members regarding the client's early account of the encounter;
- interviews with community members in the area where the encounter took place about officers' habits and law enforcement patterns;
- interviews with other defense attorneys and court personnel regarding officers' attitudes and practices;
- information concerning the unit responsible for your client's arrest (for example, evidence that your client was pulled over by a unit that specifically targets drug trafficking even though the stated purpose of the stop was a vehicle regulatory issue or seatbelt violation);
- data available in court files, SBI records, and the Automated Criminal Infraction System (ACIS), *see infra* § 2.6I, *Collecting Traffic Stop Data to Support Equal Protection Claims*;
- studies and statistical analyses performed by academic researchers, *see, e.g.*, Katherine Beckett, *Race, Drugs, and Law Enforcement: Toward Equitable Policing*, 11 CRIMINOLOGY & PUB. POL'Y 641 (2012); KATHERINE BECKETT, [RACE AND DRUG LAW ENFORCEMENT IN SEATTLE](#) (2008).

Discovery. Sometimes evidence obtained through an attorney's independent investigation will not be enough to make out a prima facie claim of selective enforcement; often it will be necessary for an attorney to obtain discovery from the State. Through discovery, an attorney may obtain evidence such as:

- videotapes of traffic stops, along with information identifying the date, time, location and person stopped;

- information about the patrol area of the officers in question;
- results of internal affairs investigations, including responses to citizen complaints of racial profiling, *see* Sample Letters Sustaining Complaints from the Durham Police Department’s Professional Standards Division in the Race Materials Bank at www.ncids.org (select “Training & Resources”). To obtain an officer’s personnel records, the defense will need to make a showing to the court that the information is necessary to the defense and outweighs any confidentiality interest in the information. *See* 1 NORTH CAROLINA DEFENDER MANUAL Ch.4 (Discovery) (2d ed. 2013); *see also* *Maryland Dep’t of State Police v. Maryland State Conference of NAACP Branches*, 59 A.3d 1037 (Md. 2013) (upholding order requiring State Police to disclose redacted copies of internal affairs investigation records in an action filed under Maryland Public Information Act for purpose of determining whether the Maryland State Police were in compliance with a consent decree entered in an earlier racial profiling lawsuit);
- the law enforcement agency’s standard operating procedures, e.g., for setting up vehicle checkpoints, using audio or video recording equipment, conducting surveillance, or requesting consent to search;
- the names and races of all individuals stopped by the officer in question during the time period of the defendant’s arrest, including the date and time of stop; length of stop; reason for stop; location of stop; outcome of stop and names of all other law enforcement officers involved in the stop.

See Discovery Order in Selective Enforcement Case in the Race Materials Bank at www.ncids.org (select “Training & Resources”). For a general discussion of the defendant’s right to discovery in criminal cases, *see* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 4. (Discovery) (2d ed. 2013).

Some defenders have sought court-ordered depositions of police officers where evidence of discriminatory effect is strong but evidence of discriminatory purpose is not as strong. For example, public defenders litigating claims of selective enforcement in Seattle, after presenting statistical evidence of racially disparate enforcement of drug laws, successfully moved for an extensive discovery order. That discovery order, affirmed by a state court of appeals, permitted the attorneys to depose numerous police commanders about the department’s drug enforcement priorities, policies, and resource allocation. *See* Public Defender Association: Racial Disparity Project, [Past Projects](http://PastProjects.RDP.DEFENDER.ORG), RDP.DEFENDER.ORG (last visited Sept. 25, 2014).

In *United States v. Armstrong*, 517 U.S. 456, 458–60 (1996), the U.S. Supreme Court held that a defendant must make a threshold showing “that the Government declined to prosecute similarly situated suspects of other races” before the court may order discovery of the prosecutor’s charging practices in a *selective prosecution* claim. In reliance on federal rules governing discovery, the Court stated that discovery will only be ordered on a “credible showing of different treatment of similarly situated persons.” *Id.* at 470 (holding that the requisite showing had not been made when defendants presented evidence that all 24 crack cocaine possession or conspiracy cases prosecuted in one court in a single year involved black defendants, because defendant failed to show that

similarly situated offenders of other races were treated more favorably). It is unclear whether North Carolina courts would require such a showing before ordering broad-ranging discovery on a claim of *selective enforcement* based on state rules of discovery. *See supra* “Discriminatory effect and the ‘similarly situated’ requirement” in § 2.3C, Elements of a Selective Enforcement Claim; *infra* “Discovery related to selective prosecution claims in North Carolina courts” in § 5.4A, Obtaining Discovery Relating to a Selective Prosecution Claim.

Case study: Pursuing public records requests alongside discovery. In addition to requests for discovery in support of selective enforcement claims, defense attorneys may file a public records request seeking the same materials. In the following anecdote, Shelby attorney Calvin Coleman reflects on a selective enforcement case in which he employed this strategy after his motions to obtain discovery were denied. The motions and orders described in the case study are listed at the end of the discussion and are available in the Race Materials Bank at www.ncids.org (select “Training and Resources”).

In a recent case, I became concerned that my Latino client may have been subjected to unlawful selective enforcement based on both the facts of his case and evidence from a prior case showing that the Highway 85 traffic stop patterns of at least one deputy sheriff involved in my client’s case disproportionately impacted Latinos. In the earlier case, the deputy sheriff had testified that (1) he had been involved in 29 stops where seizures were made since the creation of the Cleveland County Sheriff’s Department Immigrations and Customs Enforcement team in 2004; (2) all but one of these stops involved a person of color; and (3) the vast majority involved Latinos. I filed a motion to suppress and several discovery motions relating to the selective enforcement claim.

Soon thereafter, the State decided to pursue federal charges concerning the same conduct against my client, and the case was pending in both forums for months. In federal court, I filed a motion to stay proceedings until the proper forum could be determined and for the federal court to maintain jurisdiction. I sought to keep the case in federal court because, under the circumstances, my client would face less time under federal criminal law. I also filed a Freedom of Information Act (FOIA) request in federal court, which the magistrate judge stated he intended to grant. The government subsequently dropped the federal case, and the State prosecuted the case in Cleveland County Superior Court only.

When the case was again in superior court, I filed additional discovery motions relating to the defendant’s claim of selective enforcement. When the court denied our discovery motions, I filed a request for public records pursuant to G.S. 132.1 with the Sheriff, seeking documentation of the citations and warning tickets written by the officers involved in the case over a two-and-a-half year period (concluding at the end of the month in which the defendant was pulled over) and where the initial observations of the people receiving citations or warning tickets were made on Highway 85.

After consulting with the county attorney, the Sheriff released several documents we had not been able to obtain through discovery. These documents helped the defendant prevail on his claim of selective enforcement. Ultimately, the trial court found that “[t]he ICE team wrote a disproportionate number of citations and/or warning tickets to Hispanic persons as compared to other races. This evidence circumstantially shows that the ICE team stopped more Hispanic drivers than any other race, that the ICE team targets Hispanics, and that the ICE team selectively enforced the law based on race.” *See Order Allowing Motion to Suppress in the Race Materials Bank*

at www.ncids.org (select “Training and Resources”); see also Rebecca Clark, [Judge says sheriff's deputy used racial profiling in I-85 stops](#), THE SHELBY STAR, May 15, 2013. The State did not appeal the court’s dismissal of the charges against my client and his co-defendant. See Motion to Suppress Illegal Stop and Illegal Search and Motion to Disclose Officer’s ID Number; Affidavit in Support of Motion to Suppress Illegal Stop and Illegal Search; Motion to Suppress; Motion to Stay Proceedings; Motion for Additional Discovery; Request for Public Records; Order Allowing Motion to Suppress; and Dismissal; all in the Race Materials Bank at www.ncids.org (select “Training and Resources”).

Practice note: If the law enforcement agency responds to your motion to suppress and/or motion to dismiss by initiating an investigation of the officer in question, it may be in your client’s interest for you to provide the results of your investigation to the agency and agree to allow the client to be interviewed. Be sure to obtain client consent before disclosing any confidential information. In addition to addressing possible discrimination within the law enforcement agency, the results of the agency’s internal investigation may be available to you in discovery in the criminal case. For example, in *State v. Villeda*, 165 N.C. App. 431 (2004), following the defendant’s motion to suppress, the State Highway Patrol initiated an internal affairs investigation of the trooper. The defense obtained information about the investigation through discovery. See Order for Production and Review of Evidence in the Race Materials Bank at www.ncids.org (select “Training & Resources”) (ordering production of, among other materials, “Copies of all materials, memoranda, notes, reports, interview, and findings that have been collected, produced and generated pursuant to the Highway Patrol Internal affairs investigation of Trooper XXX” for *in camera* review); Order Producing and Disclosing Material Information to Defendant in the Race Materials Bank www.ncids.org (select “Training & Resources”) (concluding that the materials reviewed *in camera* were relevant to defendant’s constitutional claims and ordering their production to the Office of the Public Defender).

Additionally, some law enforcement agencies have a specific process for investigating citizen complaints about law enforcement actions, the results of which either may be available through discovery or be provided directly to the complainant. If your client believes he or she was the target of racial profiling, you may want to inform your client of this procedure where available. See Sample Letters Sustaining Complaints from the Durham Police Department’s Professional Standards Division in the Race Materials Bank at www.ncids.org (select “Training & Resources”).

E. Burden of Proof and Burden Shifting

Burden of proof. In a selective enforcement claim, the defendant bears the burden of proving, by a preponderance of the evidence, that the challenged police action violates the Equal Protection Clause of the Fourteenth Amendment and article I, section 19 of the North Carolina Constitution. *State v. Howard*, 78 N.C. App. 262, 266 (1985). That burden is met when a *prima facie* case of selective enforcement is established and the State fails to rebut the defendant’s evidence of discriminatory purpose and discriminatory effect. See, e.g., *State v. Segars*, 799 A.2d 541 (N.J. 2002).

Selective enforcement distinguished from selective prosecution. A defendant’s burden of proof may be lighter when challenging selective police enforcement than when

challenging selective prosecution. This is so because the two claims involve different considerations. *See supra* “Discriminatory effect and the ‘similarly situated’ requirement” in § 2.3C, Elements of a Selective Enforcement Claim (discussing possible difference in obligation to show similarly situated individuals receiving more favorable treatment for the two types of claims). Courts reviewing selective enforcement claims have often applied the standards articulated by the Supreme Court in *United States v. Armstrong*, 517 U.S. 456, 465 (1996), but *Armstrong* was a selective prosecution case and therefore arguably involved a heightened standard of deference. *See, e.g., Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003); *Bradley v. United States*, 299 F.3d 197, 205–06 (3d Cir. 2002). The *Armstrong* court emphasized that the standard of review it employed turned on the principle of deference to prosecutorial discretion; the court described the standard for making out a claim of selective prosecution as a “demanding one,” since the claim “asks a court to exercise judicial power over a ‘special province’ of the Executive.” *Armstrong*, 517 U.S. 456, 464 (citation omitted).

In contrast, police discretion typically is more circumscribed than prosecutorial discretion. In selective enforcement challenges to police action, separation of powers considerations are not present to the same extent, and challenges to racially biased police practices do not have to overcome the presumption of prosecutorial correctness. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (holding that a city ordinance was void for vagueness when it permitted police to break up loitering “criminal street gang members” in public places, in part because the ordinance encouraged arbitrary, discriminatory enforcement).

Several cases in which North Carolina appellate courts have rejected criminal defendants’ equal protection claims have involved concerns specific to selective prosecution. *See, e.g., State v. Spicer*, 299 N.C. 309, 314 (1980); *State v. Howard*, 78 N.C. App. 262 (1985), *State v. Garner*, 340 N.C. 573 (1995). Defense attorneys raising selective enforcement claims should distinguish challenges to police action from those involving the exercise of prosecutorial discretion. *See generally* David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 112 (2007).

Burden shifting. If you file a motion to suppress evidence or a motion to dismiss charges on equal protection grounds, once you have made out a prima facie case of selective enforcement, “the burden of proof shifts to the State to rebut the presumption of unconstitutional action” by demonstrating that the racially disparate impact was not the result of racially motivated state action. *Alexander v. Louisiana*, 405 U.S. 625, 631–32 (1972); *see also Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (internal quotations omitted) (“Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the [government] to show that the same result would have been reached even without consideration of race. If the [government] comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.”); *Marshall v. Columbia Lea Regional Hospital*, 345 F.3d 1157 (10th Cir. 2003) (in a § 1983 claim involving allegations of racial profiling by a police officer, court

applied a burden shifting test and reversed trial court's entry of summary judgment against plaintiffs on racial profiling claims). Essentially, the State must show that the same law enforcement decision or practice would have occurred had race not been a factor. *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 n.2 (4th Cir. 1995). Alternatively, the State must demonstrate a compelling State interest in the racial classification that is narrowly tailored to the accomplishment of that legitimate purpose. *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

When proffering race-neutral explanations for disparities, “mere denials or reliance on the good faith of the officers [will not] suffice.” *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (citing *Castaneda v. Partida*, 430 U.S. 482, 498 n.19 (1977)). As the Supreme Court has recognized in a related context, if mere assertions of good faith and denials of discriminatory intent were enough to defeat a claim of discrimination, “the Equal Protection Clause would be but a vain and illusory requirement.” *Batson v. Kentucky*, 476 U.S. 79, 98 (U.S. 1986) (internal quotation omitted). In other words, it is the court's job, in evaluating an equal protection claim, to look behind alleged race-neutral reasons to determine whether official action was undertaken for a racially discriminatory reason.

Additionally, if the defendant makes out a prima facie case of selective enforcement, the State generally cannot rebut the defendant's evidence by simply pointing out unmeasured variables in the defendant's statistics. Instead, the State must introduce evidence demonstrating specific flaws in the defendant's evidentiary showing or by proffering convincing explanations of reasons for the disparities. *Bazemore v. Friday*, 478 U.S. 385 (1986). For example, if a defendant presents evidence demonstrating that the percentage of black people arrested for drug crimes is significantly higher than the percentage of black people in the population at issue, the State may rebut this evidence with evidence that the drug arrest rates reflect the racial makeup of the population of offenders, if such evidence exists.

F. Remedy for an Equal Protection Violation

When raising equal protection claims of selective enforcement, defense attorneys should seek both suppression of evidence seized in violation of the state and federal guarantees of equal protection, as well as dismissal of all charges arising out of the equal protection violation.

Suppression. If the State has obtained evidence by violating a suspect's constitutional rights, the usual remedy is exclusion of the evidence at trial. *See Mapp v. Ohio*, 367 U.S. 643 (1961); G.S. 15A-974; *State v. Carter*, 322 N.C. 709 (1988). The procedure for invoking the exclusionary rule is to file a motion to suppress the illegally obtained evidence, pursuant to G.S. 15A-971 through 15A-980. The exclusionary rule is frequently applied to unreasonable searches and seizures in violation of the Fourth Amendment. In North Carolina, the exclusionary rule also applies to equal protection claims, as G.S. 15A-974(a)(1) requires suppression of all evidence obtained in violation of the United States or the North Carolina Constitution. Additionally, our Supreme Court

has held that, “[u]nder the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence.” *Carter*, 322 N.C. 709, 722–23 (explaining that North Carolina, justifies the exclusionary rule, in part, on “the preservation of the integrity of the judicial branch,” rejecting good faith exception to exclusionary rule, and holding that “our constitution demands the exclusion of illegally seized evidence”); *see also State v. Villeda*, 165 N.C. App. 431, 435 (2004) (noting that the trial court suppressed all evidence seized as a result of a traffic stop after finding that the stop amounted to “intentional racially discriminatory law enforcement conduct” in violation of the Equal Protection Clause of the Fourteenth Amendment, and an unlawful detention in violation of the Fourth Amendment).

Some states have differed over application of the exclusionary rule to equal protection violations. *Compare, e.g., Commonwealth v. Lora*, 886 N.E.2d 688, 699 (Mass. 2008) (concluding that “the application of the exclusionary rule to evidence obtained in violation of the constitutional right to the equal protection of the laws is entirely consistent with the policy underlying the exclusionary rule”), *with People v. Fredericks*, 829 N.Y.S.2d 78, 78 (N.Y. App. Div. 2007) (“Suppression of evidence is not a recognized remedy for [an equal protection violation] . . .”). However, North Carolina law, cited above, clearly supports exclusion for an equal protection violation. The exclusionary rule also has served as a remedy for violations of other constitutional rights beyond those guaranteed by the Fourth Amendment, including confessions in violation of the right against compelled self-incrimination, as protected by the Fifth Amendment to the United States Constitution, *see, e.g., Dickerson v. United States*, 530 U.S. 428, 432, (2000), and evidence obtained from government interrogations in violation of the Sixth Amendment to the United States Constitution, *see, e.g., Maine v. Moulton*, 474 U.S. 159, 179–80 (1985). The following articles may prove useful should attorneys find it necessary to argue that the exclusionary rule applies to evidence obtained in violation of the Equal Protection Clause and N.C. Constitution article I, section 19: Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341 (2012); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (2000).

Dismissal. Defendants raising claims of selective enforcement also should seek dismissal of all charges. In North Carolina, when a criminal defendant raising a selective enforcement claim “sustains his heavy burden [of proving discrimination by a clear preponderance of the evidence] he is entitled to dismissal.” *State v. Howard*, 78 N.C. App. 262, 266 (1985); *see also State v. Villeda*, 165 N.C. App. 431, 435 (2004) (noting that the trial court dismissed all charges arising out of a traffic stop after finding that the stop amounted to “intentional racially discriminatory law enforcement conduct” in violation of the Equal Protection Clause of the Fourteenth Amendment, and an unlawful detention in violation of the Fourth Amendment). In cases of flagrant violations of constitutional rights, North Carolina law provides that dismissal is the appropriate remedy. G.S. 15A-954(a)(4) (providing that when “defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case . . . there is no remedy but to dismiss the prosecution”).