2.6 Traffic and Pedestrian Stops

A. Traffic Stops

The majority of police-civilian interactions in the United States occur during traffic stops. *See* CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 3 (2011) (finding that more than half of all civilian-police contacts occur in the traffic context). Generally, law enforcement officers may stop a vehicle and initiate a brief investigative detention if they have reasonable suspicion of a criminal or traffic violation. *Delaware v. Prouse*, 440 U.S. 648 (1979); *State v. Styles*, 362 N.C. 412 (2008). *See generally* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 15 (Stops and Warrantless Searches) (2d ed. 2013).

Given the prevalence of traffic violations, police officers may lawfully stop nearly any motorist on the road. Thus, "racial profiling," or targeting drivers who are racial minorities, has been identified as a potential concern. *See White v. Williams*, 179 F. Supp. 2d 405, 410 (D. N.J. 2002) (defining racial profiling as "any action taken by a state trooper during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists" (citation omitted)); David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 107 (2007) ("Since violations of the traffic laws are commonplace, police have enormous discretion to effectuate stops of a very high number of cars. This discretion provides the opportunity for pretextual stops and searches" based on race, ethnicity, or national origin.).

B. The Fourth Amendment and Pretextual Traffic Stops

The impact of *Whren v. United States*. Historically, many challenges to racially motivated pretextual stops were raised under the Fourth Amendment. *See, e.g., United States v. Harvey*, 24 F.3d 795, 799 (6th Cir. 1994). However, in 1996, the United States Supreme Court held that an officer's actual motivation in making a stop (for example, to investigate for drugs) is generally irrelevant for Fourth Amendment purposes if the officer has legal justification for the stop and could have stopped the person for a permissible reason (for example, speeding):

> [T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the 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.

Whren v. United States, 517 U.S. 806, 813 (1996). The Supreme Court's holding in *Whren* effectively ended consideration of Fourth Amendment challenges to stops on the basis of pretext. *Accord State v. McClendon*, 350 N.C. 630 (1999) (adopting *Whren* under state constitution); *State v. Hamilton*, 125 N.C. App. 396 (1997) (court recognizes effect of *Whren* under U.S. Constitution).

There are some notable limitations to the *Whren* doctrine, however. First, the defendant may prevail on a Fourth Amendment claim where reasonable suspicion is lacking or evidence of racially biased intent undermines the credibility of the officer's stated reason for the stop. *See supra* § 2.3A, Equal Protection Claims May Strengthen Fourth Amendment Challenges. Second, if an officer stops a defendant because of his or her race, the stop may violate the Equal Protection Clause regardless of whether probable cause or reasonable suspicion exists. *See supra* § 2.3, Equal Protection Challenges to Police Action. Third, a defendant may challenge as pretextual a license or other checkpoint when the real purpose is impermissible under the Fourth Amendment. *See infra* § 2.6C, Challenging Checkpoints as Racially Discriminatory. These three theories are discussed further below.

Officer's "hunch" is not reasonable suspicion, especially where informed by race. North Carolina courts have consistently held that reasonable suspicion may not be based on an "unparticularized suspicion or hunch." *State v. Murray*, 192 N.C. App. 684, 687 (2008) (internal quotations omitted); *see also*, *State v. Chlopek*, 209 N.C. App. 358 (2011) (same). An officer's "hunch" may be viewed with particular skepticism when it is informed by a defendant's race. In *State v. Cooper*, 186 N.C. App. 100 (2007), the N.C. Court of Appeals determined that an officer did not have reasonable suspicion to stop the defendant, a black male, simply because he was in the vicinity of a crime scene in which the suspect was also described as a black male. Similarly, in *In re J.L.B.M.*, 176 N.C. App. 613 (2006), the N.C. Court of Appeals found that reasonable suspicion did not exist where the officer received a dispatch about a suspicious Hispanic male at a gas station, and the officer saw a Hispanic male in baggy clothes who spoke to someone in another car and then walked away from the officer's patrol car. In that case, the Court stated that "the rule is clear under both federal and state law that an officer must have a reasonable and articulable suspicion of 'criminal activity,' not merely suspicious activity." *In re J.L.B.M*, 176 N.C. App. 613, 621; *see also infra* "Innocent behavior cannot support reasonable suspicion" in § 2.6D, The Fourth Amendment and Terry Stops; § 2.6F, Seizures in Reliance on Descriptions of Suspect's Race.

Investigation tips: Pretextual stops. If your client is facing charges arising out of a potentially pretextual traffic stop, the following questions may help you identify Fourth Amendment challenges:

- Were the factors giving rise to reasonable suspicion known to the officer at the time of the seizure or could they be characterized as a post-hoc justification? *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the *facts known to the arresting officer at the time of the arrest.*" (emphasis added)).
- Does the officer have a pattern of stopping minority drivers or targeting minority neighborhoods or locations? *See infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.
- Were the alleged race-neutral grounds for reasonable suspicion not credible, given the totality of the circumstances? *State v. Villeda*, 165 N.C. App. 431 (2004).

- Did the officer asserting reasonable suspicion characterize innocent behavior as suspicious? *See infra* "Innocent behavior cannot support reasonable suspicion" in § 2.6.D, The Fourth Amendment and *Terry* Stops.
- Did the officer's asserted reasonable suspicion rely too heavily on a description of the suspect's race? *See infra* § 2.6F, Seizures in Reliance on Descriptions of Suspect's Race.
- Did the officer's alleged reasonable suspicion rely on proxies for race, such as presence in a predominantly minority neighborhood or age of car? *See infra* § 2.6E, Challenging Proxies for Race Used to Support Reasonable Suspicion.

Case study: Pretextual traffic stops. The following account was provided by an Assistant Public Defender in North Carolina who uncovered evidence that her client was stopped on the basis of his ethnicity.

When a deputy sheriff testified in a probable cause hearing in a cocaine trafficking case that he had stopped the truck for following too close, and that he stopped cars almost daily for following too close, I had a gut sense that he was not telling the truth. In my years of experience in court, I had rarely seen a ticket for following too close unless it was part of a traffic accident case. I checked the deputy's arrest history through the Automated Criminal Infraction System (ACIS) and learned that he had issued only one ticket in nine years for following too close. My suspicions grew. I wanted to get a look at the officer's warning tickets to see if I could uncover impeachment evidence. I was lucky enough to find a judge who was willing to sign an order giving me copies of the last five years of the deputy's warning tickets.

When the copies arrived, I charted them out. Of the 265 warning tickets issued by the deputy over the past four years, 148 of the drivers appeared to be Hispanic based on their surnames. Thus, Hispanics received 55% of the warning tickets in a geographic area in which Hispanics made up only about 8% of the population.

I then focused on the warning tickets for following too close. Of the 265 total, 130 warning tickets were for following too close. It appeared that the officer really was making regular stops for following too close, as he had testified. Of the 130 recipients, 77 appeared to be Hispanic. Thus, Hispanics received 59% of the deputy's warning tickets for following too close. I then uncovered a figure that was even more surprising: of the 130 warning tickets for following too close, 124 of the cars had out of state tags! I studied the warning tickets for charges other than following too close and saw that they also involved a disproportionate number of Hispanic drivers.

The overall pattern revealed that the deputy was targeting non-white people of obvious ethnicity who primarily were driving out of state cars. I surmised that he was making traffic stops in an effort to uncover drug couriers but achieving this goal in only a small percentage of cases. Meanwhile, he was inconveniencing and in all likelihood violating the constitutional rights of a large number of innocent people. I learned that although discriminatory behavior may be occurring, it is rarely uncovered because of obstacles, such as warning tickets not being readily accessible. To his credit, the prosecutor dismissed the case when confronted with these figures, which was a great result for this client, but on a less positive note, prevented the evidence of this officer's bias from coming to light in a public forum.

See Ex Parte Motion and Order to Require Sheriff's Department to Provide Records of Officer's Warning Tickets in the Race Materials Bank at www.ncids.org (select "Training & Resources").

C. Challenging Checkpoints

Constitutional requirements for checkpoints. In *Delaware v. Prouse,* 440 U.S. 648 (1979), the Supreme Court held that officers may not randomly stop motorists to check their driver's license or vehicle registration. The Court indicated, however, that checkpoints at which drivers' licenses and registrations are systematically checked may be permissible. *See also State v. Veazey*, 201 N.C. App. 398 (2009). A defendant who is stopped at a checkpoint has standing to challenge the constitutionality of the checkpoint. *See State v. Haislip,* 186 N.C. App. 275 (2007), *vacated and remanded,* 362 N.C. 499 (2008) (remanded to trial court for written findings of fact and conclusions of law). For further discussion of constitutional challenges to checkpoints, including challenges when a person turns away from a checkpoint and is thereafter stopped, see 1 NORTH CAROLINA DEFENDER MANUAL § 15.3J (Motor Vehicle Checkpoints) and § 15.3K (Drug and Other Checkpoints) (2d ed. 2013); *see also* Jeffrey B. Welty, *Motor Vehicle Checkpoints*, ADMINISTRATION OF JUSTICE BULLETIN NO. 2010/04 (UNC School of Government, Sept. 2010).

Equal protection challenges to checkpoints. In *State v. Burroughs,* 196 N.C. App. 178 (2009) (unpublished), the Court considered an equal protection challenge to the execution of a checkpoint. In that case, two drivers, one black and one white, had been drinking together at a local tavern before each approached the same checkpoint at about the same time. The black driver was subjected to all four screening tests allowed by the checkpoint plan while the white driver was not asked any questions or subjected to any screening tests. The court found that evidence demonstrating that the white male was treated more favorably than the similarly situated black male failed to establish a discriminatory purpose and was therefore insufficient to establish an equal protection violation. The court noted that the "findings may be sufficient to raise a suspicion about the manner in which the checkpoint was conducted," but that "the evidence presented at the hearing was not sufficient to establish intentional racial discrimination." *Id*. at *4. While the N.C. Court of Appeals found that the evidence did not show discriminatory intent, the case provides an example of how the claim may be raised and the potential availability of relief.

Pretextual checkpoints. A license or impaired-driving checkpoint is subject to challenge as pretextual under the Fourth Amendment. *See City of Indianapolis v. Edmond,* 531 U.S. 32 (2000) (checkpoint is unconstitutional if primary purpose is unlawful; checkpoint was unlawful in this case because primary purpose was to investigate for drugs).

Drug checkpoints. The U.S. Supreme Court has refused to uphold drug checkpoints. *See City of Indianapolis v. Edmond,* 531 U.S. 32 (2000); *see also U.S. v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (drug checkpoint unconstitutional); *Wilson v. Commonwealth*, 509 S.E.2d 540 (Va. Ct. App. 1999) (drug checkpoint inside entrance to public housing project unconstitutional); *Commonwealth v. Rodriguez*, 722 N.E.2d 429 (Mass. 2000) (drug checkpoint violated state constitution).

Public housing checkpoints. While there is no North Carolina decision addressing this issue, courts in other jurisdictions have found unconstitutional public housing checkpoints aimed at general crime control. *See, e.g.*, *State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (identification checkpoint at entrance to public housing development violated Fourth Amendment where goal was to reduce crime, exclude trespassers, and enforce lease agreement provisions to decrease crime and drug use; checkpoint was aimed at general crime control).

Location of checkpoints. The location of a vehicle checkpoint plays a large role in determining the racial composition of the population that is stopped. *See* Press Release, Civil Rights Division of the U.S. Dep't of Justice, Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office: Findings Show Pattern or Practice of Discriminatory Policing Against Latinos (Sept. 18, 2012) (finding that Sheriff's Deputies in Alamance County routinely located checkpoints near Latino neighborhoods). *See also* Letter to Raul Pinto, Racial Justice Fellow, American Civil Liberties Union of North Carolina, from Scott Cunningham, Chief of Police, Winston-Salem Police Department (Oct. 27, 2011) (defending location of checkpoints by department in response to ACLU's claim that department did not locate license checkpoints in areas with lower concentrations of Latinos and African Americans; letter acknowledges that 15% of the checkpoints were in areas with Caucasian populations from 44% to 100%). If you believe the location of checkpoints in your community is not race-neutral, consider providing the information to the ACLU of North Carolina. Forms to report possible checkpoint violations can be found at www.acluofnc.org.

D. The Fourth Amendment and *Terry* Stops

In *Terry v. Ohio*, 392 U.S. 1 (1968), the U.S. Supreme Court held that a law enforcement officer may initiate a brief investigatory detention of a pedestrian if the officer has reasonable suspicion that criminal activity is afoot, and may pat down the person's outer garments to check for weapons if the officer has reasonable suspicion that the person is armed and dangerous. These stops are typically referred to as "*Terry* stops" or "stop and frisks."

Both defense lawyers and prosecutors have suggested that, in some localities, minorities are more likely than whites to be subjected to "stop and frisk" tactics. *See, e.g.*, Joseph Goldstein, *Prosecutors Deal Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, September 25, 2012. In New York City, the practice produced dramatic racial disparities. For example, a 2009 study found that 87 percent of people stopped were Black and Latino. CENTER FOR CONSTITUTIONAL RIGHTS, STOP-AND-FRISK: FAGAN REPORT SUMMARY (2010). In response to these practices, a class action lawsuit, *Floyd v. City of New York*, was filed challenging the city's "stop and frisk" practices as violations of the Fourth and Fourteenth Amendments. *Id.* In August, 2013, Federal District Judge Shira Scheindlin found that the department engaged in a "practice of making stops that lack individualized reasonable suspicion," and let racial bias guide police decision making. Judge Scheindlin ruled that the city's stop and frisk program was unconstitutionally applied, and appointed an independent monitor to oversee changes to the program. *See Floyd v. City of New*

York, 959 F. Supp. 2d 540 (S.D.N.Y 2013). On January 30, 2014, the City agreed to drop its appeal of that ruling and begin the joint remedial process ordered by the district court. *See* Press Release, Center for Constitutional Rights, City of New York and Center for Constitutional Rights Announce Agreement in Landmark Stop and Frisk Case (January 30, 2014).

Generally, the concerns arising in the *Terry* stop context resemble those arising in the traffic stop context. As in the traffic stop context, an officer's asserted grounds of reasonable suspicion may be insufficient to support an investigative detention of a pedestrian. *See supra* § 2.6B, The Fourth Amendment and Pretextual Traffic Stops. Obtaining comprehensive records of an officer's *Terry* stops of pedestrians may be more difficult than obtaining those relating to traffic stops, as there is no statutory requirement for law enforcement agencies to document and report to the State Bureau of Investigation all *Terry* stops. In other words, it is likely that in many cases, there may be records of only those *Terry* stops that resulted in an arrest or the issuance of a citation or warning citation. Where an attorney has concerns that an officer is influenced by race or ethnicity in determining when to initiate a *Terry* stop, she may submit a public records request to the relevant officer's law enforcement agency for all arrests, citations, warning citations, and other records of stops involving pedestrians during a specific period of time that includes the time of the client's *Terry* stop. Agencies may not currently maintain such information, however. *See, e.g.*, Center for Constitutional Rights, *Synopsis of Daniels, et al. v. City of New York*, CCRJUSTICE.ORG (last visited Jun. 24, 2014) (settlement of class action lawsuit alleging selective enforcement required NYPD, among other things, to maintain and audit stop-and-frisk records, and to maintain a written, binding, and constitutionally compliant anti-racial profiling policy).

Innocent behavior cannot support reasonable suspicion. In several recent *Terry* stop cases, the Fourth Circuit Court of Appeals admonished the Government for mischaracterizing "innocent facts as indicia of suspicious activity," especially when the police appeared to be targeting African Americans. *United States v. Black*, 707 F.3d 531 (4th Cir. 2013) (citing *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011); *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011); and *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011)). In *Foster*, a police officer noticed the African American defendant rise from the passenger seat of a parked SUV in a low crime area and make sudden arm movements. Officers blocked the SUV with two vehicles, approached the SUV with a gun drawn, ordered the occupants to show their hands, and conducted a pat-down search of the driver. The *Foster* court found that the stop was not supported by reasonable suspicion and criticized official descriptions of innocent behavior as suspicious:

> We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity . . . . [A]n officer and the Government must do more than simply label a behavior as "suspicious" to make it so . . . Moreover, we are deeply troubled by the way in which the Government attempts to spin these largely mundane facts into a web of

> deception. . . . [T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happened to turn up contraband.

634 F.3d 243, 248–49 (4th Cir. 2011). In *United States v. Massenburg*, also involving an African American defendant, the court rejected the State's assertion that looking down while refusing to grant consent to search gave rise to reasonable suspicion. 654 F.3d 480 (4th Cir. 2011); *see also United States v. Powell*, 666 F.3d 180 (4th Cir. 2011) (an individual's prior record, standing alone, is insufficient to support reasonable suspicion).

In *United States v. Black*, the Fourth Circuit clarified that the recurring failure to provide facts sufficient to support claims of individualized reasonable suspicion raised concerns about the presence of racial bias. 707 F.3d 531 (4th Cir. 2013). In that case, the court found that characterizing innocent behavior in an allegedly "high crime area" at night as suspicious puts minorities at greater risk of police intrusion:

> To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept carte blanche the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion. . . . The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic.

Id. at 542. In light of these concerns, the Court reversed the denial of the defendant's motion to suppress evidence.

In *Black*, the officers made several judgments that may have been influenced by the defendant's race or the race of his acquaintances. First, officers became suspicious about possible drug activity simply based on an individual's presence at a gas station; the Court found that this characterization "borders on absurd." *Id.* at 539. Second, the officers seized the gun of one of the defendant's acquaintances because, though legally possessed and displayed, the officers assumed its possessor was in violation of laws preventing felons from possessing guns, raising concerns that officers were relying on a racial profile. The Court recognized that this assumption was impermissible, as "[b]eing a felon in possession of a firearm is not the default status." *Id.* at 540. Third, the officers attempted to rely on the lawful possession of a handgun by the defendant's acquaintance to support reasonable suspicion that the defendant was engaged in criminal activity. The Court "refuse[d] to find reasonable suspicion merely by association." *Id.* Finally, the officers characterized the defendant's "overly cooperative behavior" as suspicious. *Id.* at 541. The Court observed that if reasonable suspicion can be based on cooperation with the police, individuals belonging to vulnerable minority populations may face a quandary:

> In certain communities that have been subject to overbearing or harassing police conduct, cautious parents may counsel their children

> to be respective, compliant, and accommodating to police officers, to do everything officers instruct them to do. If police officers can justify unreasonable seizures on a citizen's acquiescence, individuals would have no Fourth Amendment protections unless they interact with officers with the perfect amount of graceful disdain.

Id.

E. Challenging Proxies for Race Used to Support Reasonable Suspicion

"High-crime area" or "high-drug area" as a proxy for race. A defendant's presence in a "high crime area" is closely correlated with both socioeconomic status and race. *See United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances."). For this reason, concerns arise when a defendant's presence in a "high crime area" is cited as the sole or primary basis for an officer's reasonable suspicion of criminal activity. "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." *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000); *see also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994) ("African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas."). As one commentator notes,

> '[H]igh crime area' becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops. Location in America, in this context, is a proxy for race or ethnicity. By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase 'high crime area' has the effect of criminalizing race.

Lewis R. Katz, *Terry v. Ohio at Thirty Five: A Revisionist's View*, 74 MISS. L.J. 423, 493–94 (2004).

In *United States v. Massenburg*, the Fourth Circuit Court of Appeals condemned this practice, stating that the government's generalized justification for stopping and frisking the defendant would effectively sanction "a regime of general searches of virtually any individual residing in or found in high-crime neighborhoods." 654 F.3d 480, 488 (4th Cir. 2011). The court observed that "general searches" had been decried as "'instruments of slavery . . . and villainy,' which 'place the liberty of every man in the hands of the petty officer.'" *Id*. The court concluded that the officer "lacked the reasonable suspicion needed to conduct a lawful nonconsensual frisk." *Id.* at 496.

Presence in a "high-crime area", in the absence of other suspicious factors, does not constitute reasonable suspicion. *See, e.g., Brown v. Texas*, 443 U.S. 47 (1979); *State v.*

Butler, 331 N.C. 227, 234–35 (1992) (defendant's presence with others on a corner known for drug-related activity would not, standing alone, justify investigatory stop); *State v. Blackstock*, 165 N.C. App. 50, 58 (2004) (defendant's presence in a high-crime area is a factor that may support reasonable suspicion, but is not sufficient to support a claim of reasonable suspicion on its own). The North Carolina Court of Appeals has also held that running in a "high-crime area" does not give rise to reasonable suspicion when it is not clear that the defendant is fleeing from officers: "To conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running." *State v. White*, 214 N.C. App. 471, 480 (2011). *Cf. Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (presence in "area of heavy narcotics trafficking," along with headlong, unprovoked flight upon noticing the police provided reasonable suspicion of criminal activity). Recently, the North Carolina Court of Appeals held that walking away from one's companion twice after observing law enforcement officers in an area known for drug activity does not create reasonable suspicion. *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39 (2014) (distinguishing *Butler*, 331 N.C. 227, 234 (defendant's flight after making eye contact with officers gave rise to reasonable suspicion)), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Jun. 6, 2014).

Courts have struggled with the question of how to evaluate testimony that an area is "high-crime" or "high-drug." The North Carolina Court of Appeals has held that trial courts may not take judicial notice of an area's status as a "high-crime area" since that determination is "no doubt a matter of debate within the community." *Hinkle v. Hartsell*, 131 N.C. App. 833, 837 (1998) (suggesting that the trial court could have determined that the area in question was "high crime" on the basis of testimony to that effect). The U.S. Supreme Court in *Wardlow*, 528 U.S. 119, did not clarify whether an officer's subjective impressions are sufficient to establish the "high-crime area" factor, or whether it must be substantiated with objective proof. As Judge Kozinski explained, "the question is not *whether* the characteristics of the area may be taken into account, but *how* these characteristics are established." *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring) (emphasis in original). Considerations include: "(1) what type of evidence should courts require to determine if an area is a high-crime area; (2) what standard of proof should courts adopt to evaluate that metric of crime; and (3) how should courts cabin the 'area' so designated to make it a meaningful and relevant description for Fourth Amendment purposes." Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable And Quantifiable Evidence For Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1607 (2008).

Some courts have adopted fairly exacting tests for assessing officers' testimony about "high crime areas." For example, the First Circuit Court of Appeals held that, when considering an officer's testimony that a stop occurred in a "high crime area," a court must identify the relationship between the charged offense and the type of crime the area is known for, the geographic boundaries of the allegedly "high crime area," and the temporal proximity between the evidence of criminal activity and the observations allegedly giving rise to reasonable suspicion. *United States v. Wright*, 485 F.3d 45 (1st

Cir. 2007) (cited with approval in *United States v. Swain*, 324 Fed. Appx. 219, 222 (4th Cir. 2009) (unpublished) (observing that "'the high-crime-area' factor, like most [other factors pertaining to reasonable suspicion], can be implicated to varying degrees . . . an open-air drug market location presents a different situation than a parking lot where an occasional drug deal might occur")). *But see State v. Morgan*, 539 N.W.2d 887 (Wis. 1995) (holding that courts should defer to officers' perceptions of "high crime" areas).

Practice note: At present, officers' contentions that a stop occurred in a "high crime area" appear to be escaping careful scrutiny. Counsel should inform the court about approaches taken by courts such as the First Circuit Court of Appeals, and argue that requiring objective proof under articulable standards may discourage unjustified stops and frisks.

If the reasonable suspicion supporting the seizure of your client relates to your client's presence in a "high-crime" or "high-drug" area, you should consider developing evidence that the "high crime area" label is a proxy for "Black neighborhood" or "Latino neighborhood." You may want to seek discovery on, and consider investigating, the following questions:

- Was your client's presence in a "high-crime area" the only or primary factor supporting the officer's alleged reasonable suspicion?
- How strong are the other factors supporting the officer's alleged reasonable suspicion?
- What facts support the officer's characterization of the area in question as a "high crime area"? How recent are those facts?
- What is the relationship between the grounds for reasonable suspicion supporting the officer's stop of your client and the criminal activity for which the area is allegedly known?
- What are the geographic boundaries of the allegedly "high crime area"?
- What is the demographic composition of the allegedly "high crime area"?
- Does the investigating officer know of any Black or Latino neighborhoods in the county/city that would not be considered "high crime areas"?
- How familiar with the area is the officer in question? How long has he or she worked in or around that area?

Other proxies for race. Vehicle age may act as a proxy for race or ethnicity. *See, e.g.*, *United States v. Harvey*, 16 F.3d 109, 110–12 (6th Cir. 1994) (police officer testified that he stopped the car because three young Black males were occupants in an old vehicle). For example, police officers may target older model cars in order to investigate low-income Latinos for drinking or immigration offenses. *See* Memorandum of Law Racial Profiling – Motion to Dismiss and Motion to Suppress in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Similarly, vehicles with after-market extras such as large rims, tinted windows, and loud audio systems may be targeted based on a perception that these features fit the profile of Black or Latino drivers and so are

more likely to contain contraband. *See, e.g.*, *United States v. Ferguson*, 130 F. Supp. 2d 560, 563 (S.D.N.Y. 2001) (evidence suppressed where officers stopped an African American male because they believed him to be driving a car with "excessively tinted windows"); *see also* Michael L. Birzer, RACIAL PROFILING: THEY STOPPED ME BECAUSE I'M ---------- 97–130 (2012). A prior criminal record could also be seen as a proxy for race, considering that Black people are overrepresented in the population of people with criminal records. *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011) (an individual's prior record, standing alone, is insufficient to support reasonable suspicion).

Defense attorneys concerned that one or more of these vehicle features may have been used as a proxy for race should investigate the types of vehicles the officer has targeted over a representative time period (such as one year before the client's stop) and any departmental training materials on spotting suspicious vehicles. This sort of allegation could be supported by statistics showing the percentage of older model cars on the road in a certain area compared to the percentage of older model cars stopped by a particular officer. *See* Memorandum of Law Racial Profiling – Motion to Dismiss and Motion to Suppress in the Race Materials Bank at www.ncids.org (select "Training & Resources") (where, during an 18-month time period including defendant's stop, 60.9% of an officer's 905 traffic citations were issued to Latinos and 72.5% were issued to drivers of cars over 10 years old, defendant argued that this data, along with data showing that only 35.4% of cars on the road are over 10 years old, supported his argument that the officer unlawfully used vehicle age as a proxy for low-income, Latino drivers). Counsel can develop cross-examination questions to elicit any pattern of using proxies, and present social science research (such as the articles cited in this section) or expert testimony to link reliance on proxies to racial bias. *See, e.g.*, John Knowles et al., *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203, 204 n.2 (2001) (describing Illinois Police training manual informing officers that "tinted windows . . . leased vehicles, [and] religious paraphernalia used to divert suspicion," should arouse officer suspicion).

F. Seizures in Reliance on Descriptions of Suspect's Race

A Fourth Amendment claim may arise when a seizure is based on a description of the suspect that relies primarily or entirely on race. The U.S. Supreme Court has held that race alone does not justify a stop or an arrest. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975), the Court declared that "standing alone [Mexican ancestry] does not justify stopping all Mexican-Americans to ask if they are aliens." *See also Brown v. Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000) ("a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure"); *Buffkins v. City of Omaha*, 922 F.2d 465, 467, 470 (8th Cir. 1990) (holding that a tip that a black person or persons arriving on a flight from Denver would be importing cocaine to the Omaha, Nebraska, area before 5:00 p.m. on March 17, 1987, was not sufficient to justify *Terry* stop of a Black woman carrying toy animal); *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994) (no reasonable suspicion justified seizure where sole basis was racial background or national origin, assumed from defendant's "foreign-sounding" surname); *Brown v. United States*, 590 A.2d 1008, 1019 (D.C. 1991) (no reasonable suspicion

supported *Terry* stop; general race-based description of suspect could have matched many neighborhood residents and "no meaningful similarities had been positively established except that Brown . . . is a black male"); *see also* Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49 (2010) (arguing that, while judges and scholars generally view reliance on race-based suspect descriptions as legitimate, they will become harder to defend as advances in forensic technology allow more reliable identifiers of an offender's appearance).

G. Equal Protection Challenges to Seizures

North Carolina defendants have relied on the rights guaranteed by the Equal Protection Clause and article I, section 19 of the N.C. Constitution to challenge practices such as stopping motorists for "driving while black," *State v. Ivey*, 360 N.C. 562, 564 (2006), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008), and targeting Hispanic drivers for traffic stops, *State v. Mendez*, 216 N.C. App. 587 (2011) (unpublished); *see also* Order Allowing Motion to Suppress in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Claims based on the state and federal guarantees of equal protection must show that the challenged police action was motivated by a discriminatory intent and produced a discriminatory effect. *See supra* § 2.3, Equal Protection Challenges to Police Action. This subsection addresses procedures for raising equal protection challenges to the use of racial profiling in traffic and pedestrian stops, along with considerations that arise in these contexts.

Direct evidence of discriminatory intent. Defendants are in the best position to demonstrate discriminatory intent when they possess direct evidence that an officer's action was racially motivated. Such evidence is often hard to uncover. *U.S. v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) (noting that "discrimination can be proved through direct evidence, which seldom exists"). However, there are times when officers candidly acknowledge that a defendant's race played a role in the officer's decision to initiate a stop. *See United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992) (officers testified that they stopped defendant at least in part because he was a young black male who fit the racial profile of a drug trafficker); *United States v. Condelee*, 915 F.2d 1206 (8th Cir. 1990) (same); *Chavez v. Illinois State Police*, 251 F.3d 612, 625 (7th Cir. 2001) (officer "asked if he could search [African American defendant's] car, twice stating that one can never tell with 'you people'"); *State v. Villeda*, 165 N.C. App. 431 (2004) (trooper at issue stated personal opinion that "Hispanics are more prone than other races to get in a car after they have been drinking").

While such evidence may not immediately be evident, it sometimes can be uncovered through investigation. The first place to start is with the client. Counsel should seek a detailed narrative of the stop to learn the nature of the interaction. In addition to the usual considerations, including the length of the stop, questions unrelated to the initial purpose of the stop, the use of drug dogs on a routine traffic stop, calls for backup, requests to step out of the car, rough treatment, requests to search, or roadside searches, be alert to whether the officer:

- questioned the client about matters such as gang membership or immigration status not relevant to the asserted ground for the stop;
- questioned the client about his reason for being in the present location, or suggested that the client should not have been in the area (if predominantly white);
- stopped the client in an area frequented primarily by members of the defendant's race, for example, near the Mercado Latino; or
- made reference to minorities or a minority group.

Statistical evidence of discriminatory intent. In addition to direct evidence of discriminatory intent, attorneys may use statistical evidence, typically along with other circumstantial evidence, to support claims of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another"); *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) ("While defendants have the burden of proving 'the existence of purposeful discrimination,' discriminatory intent may be inferred from statistical proof presenting a stark pattern or an even less extreme pattern in certain limited contexts" (quoting *McCleskey v. Kemp*, 481 U.S. 279 (1987))). *See supra* "Discriminatory purpose" in § 2.3C, Elements of a Selective Enforcement Claim; *infra* § 2.6H, Types of Statistical Evidence Supporting Equal Protection Claims.

Statistical evidence of discriminatory effect. Defendants raising selective enforcement claims in the context of pretextual stops will almost always need to support their motions with statistical evidence of a discriminatory effect. In most cases, statistical evidence will be required to show that the challenged practice had a discriminatory effect on a discrete racial group to which the defendant belongs. *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (2001). Factors to consider when assembling statistical evidence are discussed in greater detail below.

H. Types of Statistical Evidence Supporting Equal Protection Claims

Not all statistical evidence carries the same weight. "[S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In claims of selective enforcement, "[t]he statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez v. Illinois State Police*, 251 F.3d 612, 638 (7th Cir. 2001). Defendants have attempted to make this statistical showing in a number of different ways; there is no one approach.

Surveys of traffic law violators compared to traffic stop data supported claim of selective enforcement. In *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996), the court considered comprehensive surveys covering both the racial composition of motorists on a particular stretch of the New Jersey Turnpike (the "traffic survey") and the racial composition of motorists observed violating speeding and other moving

violation laws along the same stretch of the interstate (the "violation survey"). These surveys indicated that the motorist population was 13.5% black and the violator population was 15% black, while the traffic stop data indicated that 46.2% of motorists stopped on this particular stretch of highway were black. Black motorists were thus 4.85 times more likely than white motorists to be stopped on this particular stretch of interstate. The judge found that the unrebutted surveys were well designed and statistically reliable and that they supported a finding that the state troopers engaged in a "de facto policy" of targeting black motorists in violation of the Equal Protection Clause. The judge therefore granted the defendants' motion to suppress evidence obtained through traffic stops of black motorists on this stretch of highway. *See also State v. Kennedy*, 588 A.2d 834 (N.J. Super. App. Div. 1991); *Wilkins v. Maryland State Police*, No. MJG-93-468 (D. Md. 2003) (lawsuit that concluded in a Consent Decree outlining a new Maryland State Police policy to prevent racial profiling); *United States' Reply in Support of its Motion to Modify the Expert Disclosure Deadline as to a Single Expert*, Exhibit C at 2–3, *United States v. Terry Johnson*, No. 12-cv-1349.

In cases where a comparison of bare traffic stop data to census data reflects racial disparities in traffic stops, you may be able to petition the court for funds for an expert to conduct the type of study described above. For sources of basic statistical information that may be part of a claim or support a request for funds for further study, see *infra* "Data sources relevant to North Carolina traffic stops" in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims. For a discussion of obtaining an expert for an indigent defendant, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5 (Experts and Other Assistance) (2d ed. 2013).

Comprehensive statistics of stops may be enough to satisfy both effect and intent prongs of equal protection claim. *See State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) ("While defendants have the burden of proving the existence of purposeful discrimination, discriminatory intent may be inferred from statistical proof presenting a stark pattern or an even less extreme pattern in certain limited contexts. . . . [D]iscriminatory intent may be inferred from statistical proof in a traffic stop context probably because only uniform variables [violations of New Jersey motor vehicle statutes] are relevant to the challenged stops and the State has an opportunity to explain the statistical disparity.") (internal quotation and citation omitted).

Comparisons of officers' patterns more significant when officers conduct similar work. *See United States v. Hare*, 308 F.Supp.2d 955, 966 (D. Neb. 2004) (defendants' general statistics comparing all troopers within a troop area rather than similarly situated troopers with similar patrols "prove almost nothing") (citing *United States v. Alcaraz-Arellano*, 302 F.Supp.2d 1217 (D. Kan. 2004) (evidence that a deputy stopped more Latinos than others in the sheriff's department was not meaningful because deputy in question patrolled I-70 almost exclusively while other deputies did not)); *see also* 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) ("A promising technique for assessing potential discrimination in the traffic stop practices of a particular officer is to compare the racial composition of the officer's

stops to the racial composition of stops make by other officers who work the same assignment in the same general area and at approximately the same time of day."). When collecting data about officers conducting similar work, "sound methodological practice requires comparing officers' stops to a cohort of other officers by similar job assignment, geographic location, and time of day." *Id.* at 250–56 (providing an example of a study that accounted for such variables). This approach has been referred to as "internal benchmarking," and it has been accepted by at least one federal court as partial evidence of selective enforcement. *Id.*; *United States v. Mesa-Roche*, 288 F. Supp. 2d 1172, 1190 (D. Kan. 2003).

Statewide census data not a proxy for the racial composition of motorists on a particular stretch of highway. *See Chavez v. Illinois State Police*, 251 F.3d 612, 644 (7th Cir. 2001) (no prima facie case of selective enforcement because benchmark data used for comparison with traffic stop data were statewide census figures, which "tell us very little about the number of Hispanics and African Americans driving on [the] Illinois interstate highways [at issue in this case], which is crucial to determining the population of motorists encountered by the . . . officers"). Tailored benchmarks, such as census data regarding the population in a specific area within a city or survey data reflecting the demographic composition of motorists on a particular stretch of road, will be more persuasive than generalized statewide census data. For further discussion of traffic-specific data available in North Carolina, see *infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

Defendant's statistical evidence should be from a relevant time period including the defendant's case, or as contemporaneous as possible. *See United States v. Barlow*, 310 F.3d 1007, 1011–12 (7th Cir. 2002) (citing with approval surveys conducted in *Soto*, which were conducted two years after the end of the time period relevant to the selective enforcement claims, but were relevant for comparative purposes because "there was no evidence that traffic patterns had changed between 1991 and 1993").

I. Collecting Traffic Stop Data to Support Equal Protection Claims

North Carolina requirements for collection of traffic stop data. North Carolina lawmakers responded to concerns over possible racial profiling in traffic stops by passing legislation mandating the collection of traffic stop data encompassing, among other statistics, the "[i]dentifying characteristics of the drivers stopped, including the race or ethnicity" and "the race or ethnicity . . . of each person searched." *See* G.S. 114-10.01. Pursuant to this law, the Division of Criminal Information of the North Carolina Department of Justice must collect statistics on traffic stops by state troopers and other state law enforcement officers. *Id.* This statute also requires the Division to collect statistics on many local law enforcement agencies. *Id.* In 2009, the law was amended by "An Act . . . to Prevent Racial Profiling and to Provide for the Care of Minor Children When Present at the Arrest of Certain Adults." S.L. 2009-544. As a result of this amendment, agencies that fail to submit traffic stop statistics to the Division of Criminal Statistics in compliance with the data collection law shall be penalized and ineligible to

receive any state law enforcement grants until the required data is submitted. G.S. 114-10.01(d1).

Data sources relevant to North Carolina traffic stops. Defense attorneys seeking data relevant to North Carolina traffic stops may consult a number of relevant sources. Traffic stop reports reflecting traffic stop data collected pursuant to G.S. 114-10, including reports identifying the race and ethnicity of drivers or passengers stopped and/or searched, may be accessed on the North Carolina Traffic Stop Statistics section of the department's website. This web-based tool allows users to create reports reflecting stops, searches, and enforcement actions taken by various law enforcement agencies during time periods designated by the user. The Baumgartner study, analyzing approximately thirteen million North Carolina traffic stops made between January 1, 2000 and June 14, 2011, may be accessed on the website of the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System, which also contains additional publications and resources potentially relevant to North Carolina traffic stops. Traffic stop data collected by the U.S. Bureau of Justice Statistics is available on the Traffic Stops section of the Bureau of Justice Statistics website. U.S. Census Data, which in some circumstances may be relevant to selective enforcement claims, may be found on the U.S. Census Bureau's website. *See* 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, 251–56 (2005) (describing study in which traffic stops were mapped and aggregated by census area, allowing for comparison with census data).

An additional resource for lawyers seeking North Carolina traffic stop data is currently under development by the Southern Coalition for Social Justice ("SCSJ"). SCSJ is developing a website to help users analyze possible racial disparities in traffic stops, searches, and arrests conducted by North Carolina law enforcement officers. The website will allow users to:

- generate statistical reports, drawn from the aggregate data reported to the SBI pursuant to G.S. 114-10.01, detailing the relative probability of Black, White, and Latino motorists being searched when stopped by a particular department for a given offense;
- access statewide averages for comparative purposes;
- generate reports on contraband discovery rates, broken down by race, age, and gender;
- identify any departments in North Carolina that are not in compliance with the requirements imposed by the data collection statute;
- use the website as a management tool within law enforcement agencies to identify officers generating the largest racial disparities.

The website, which will be available beginning in late 2014 or early 2015 and updated regularly, will include all reported traffic stops that have occurred in the state of North Carolina since January 1, 2000—currently an estimated 14 million. Questions about the

website may be directed to SCSJ attorney and Soros Justice Fellow Ian A. Mance at ianmance@southerncoalition.org, who, at the time of publication, was available to assist attorneys in analyzing traffic stop data as necessary.

In some cases, attorneys may be able to enlist academics, researchers, consultants, or graduate students to assist with statistical analyses. *See, e.g.*, Lamberth Consulting, LAMBERTHCONSULTING.COM (consulting firm providing racial profiling assessment, training, and communication services to a range of clients). Traffic stop data study author Frank Baumgartner may be able to either assist attorneys in analyzing traffic stop data or direct attorneys to someone else who can do so. For a list of other relevant data sources, see *infra* Chapter 10, Sources of Information about Matters of Race.

Gathering, interpreting, and analyzing traffic stop data. Data collected pursuant to the traffic data collection law is an important source for attorneys litigating equal protection challenges to traffic stops. In addition to accessing traffic stop data and data analysis through the NC DOJ website and, eventually, SCSJ's website, attorneys may obtain the underlying information used to create the reports required under G.S. 114-10.01 by submitting a request to the SBI Traffic Stop Unit for the information collected on SBI-122 forms. *See* SBI-122 Traffic Stop Form in the Race Materials Bank at www.ncids.org (select "Training & Resources"). The SBI-122 forms contain data entered by the officer and forwarded electronically to the SBI Traffic Stops Unit by the officer's agency. This data is likely to be more extensive than the data contained in court files for cases arising out of traffic stops. A subpoena or court order should not be necessary to obtain these records. Unless a specific statutory exception exists, records maintained by state and local government agencies are public records. *See generally News and Observer Publishing Co. v. Poole*, 330 N.C. 465 (1992). Counsel may tailor the request by asking for data for all stops made by the law enforcement agency in question during the time period and in the geographic location in which the client was stopped. *See* Sample Request for SBI-122 Records in the Race Materials Bank at www.ncids.org (select "Training & Resources"). Alternatively, counsel may submit a public records request to the relevant law enforcement agency for the traffic stop data sought. *See* Request for Public Records and Affidavit in Support of Motion to Suppress Illegal Stop and Illegal Search (noting that the contents of the affidavit were based in part on materials provided by the sheriff's department in response to a public records request) in the Race Materials Bank at www.ncids.org (select "Training and Resources").

In recent years, officers have begun to use additional numeric codes when entering the required data on the SBI-122 forms. For example, a motorist's race may be recorded as "3" and sex may be identified as "1". Thus, attorneys must use a glossary of codes to decipher the recent forms. A glossary may be found in the Race Materials Bank at www.ncids.org (select "Training & Resources").

The officer's name is not included on the SBI-122 forms. In place of a name, the officer enters a number that is assigned by the officer's employing agency. G.S. 114-10.01(d) states that the "correlation between the identification numbers and the names of the officers shall not be a public record." Although this information is not available to the

public generally, the statute allows the officer's employing agency to disclose this information when required by a court order to resolve a claim or defense before the court. Motions for disclosure of an officer's identification number may be made before or alongside motions to suppress evidence arising out of a stop or search. See Motion to Suppress Illegal Stop and Search and Motion to Disclose Officer's ID Number in the Race Materials Bank at www.ncids.org (select "Training & Resources"). In addition to seeking disclosure of such information through a court order, some North Carolina attorneys have determined the identity of individual stopping officers associated with the SBI-122 numbers by comparing public court files with the data in the SBI-122 forms. For example, Durham attorney Kerstin Walker Sutton of Sutton & Lindsay, PLLC, has compared data from SBI forms, ACIS, and court files to determine an officer's SBI-122 number and analyze whether the evidence supported a claim of selective enforcement. *See* Attorney Kerstin Walker Sutton's Method for Analyzing Traffic Stop Data and Example from Litigated Case in the Race Materials Bank at www.ncids.org (select "Training & Resources"). In these cases, identifying the officer listed on the SBI-122 forms allowed her to examine possible enforcement patterns across all traffic stops by the officer, not just those that resulted in the filing of formal charges. *See id.*

Examples of traffic stop data collection using ACIS. In a case that was eventually heard in the North Carolina Court of Appeals, defense attorneys overheard a trooper discussing racially profiling Latino drivers for vehicle stops. An attorney who represented a Latino man who had been stopped by this trooper used ACIS to obtain the numbers of all of the citations issued by the trooper. Still using ACIS, she learned the race of the individuals who had received the citations. Based on this data, the attorney concluded that over a 14-month period, 71% of DWI citations issued by the trooper in question were issued to Latinos. In contrast, 2000 Census data revealed that Latinos made up approximately 32% of the population in one of the concentrated areas of the trooper's stops. This data, along with the statements heard by defense attorneys, formed the basis of a successful motion to suppress in the trial court based on the Equal Protection Clause of the Fourteenth Amendment and Article I, Sec. 19 of the North Carolina Constitution. Although the North Carolina Court of Appeals did not reach the equal protection claim, it concluded that the trooper had no reasonable suspicion of criminal activity because, contrary to his testimony, he was not able to observe the defendant's seat belt. *State v. Villeda*, 165 N.C. App. 431 (2004); *see also supra* § 2.3A, Equal Protection Claims May Strengthen Fourth Amendment Challenges. For materials about ACIS data, see Discovery Order in Selective Enforcement Case; Order for Production and Review of Evidence; and AOC Computer Instructions in the Race Materials Bank at www.ncids.org (select "Training & Resources").

Case study: Using traffic stop data as a management tool. In the following anecdote, Chapel Hill Police Chief Christopher Blue explains how his office uses the traffic stop data collected on SBI-122 forms as a management tool. *See supra* "Gathering, interpreting, and analyzing traffic stop data" in this subsection I (explaining contents of SBI-122 forms).

In 2012, the Chapel Hill Police Department developed a process to conduct reviews of our officers' traffic stops to identify any irregularities or patterns in them. At the time, some law enforcement

agencies were beginning to think about how to address the problem of disproportionate minority contact, and we wanted to get a clearer picture of our own officers' encounters with citizens. We also wanted to raise awareness with our officers about the possible influence of bias on their decisions because concerns about the possible influence of bias on law enforcement decision-making were being raised around the country in the media and in studies.

The process we created involves quarterly reviews of each officer's stops by his/her supervisor to review data from the officer's traffic stops. Supervisors review the SBI-122 traffic stop forms that the officer has submitted and, if those forms suggest some irregularity, the supervisors may consult other documents, such as incident reports. The supervisor compares demographic information from the officer's encounters (vehicle stops, searches, and arrests) with the demographics of the community as a whole. Supervisors also have the option of comparing an officer's data with data submitted by other officers under their supervision. Following the reviews, and any subsequent meetings as needed, the supervisors must certify that the audits are complete. They must identify any irregularities or trends, and detail any resulting actions. Thankfully, as of this writing, this review process has not resulted in any disciplinary actions.

This process has helped us ensure that our officers are submitting their traffic stop forms in a timely manner and it has afforded us excellent opportunities to have important conversations with our officers about how we interact with our community. Personally, I think it is healthy for organizations to build systems that require periodic reviews of all processes, particularly those involving the potential for bias, whether intentional or not. Finally, the review process reinforces two of our most important departmental values, Mutual Respect and Accountability.

J. Information about Personal Impact of Equal Protection Violation

When raising an equal protection violation, attorneys should consider including information about the personal impact of unwarranted traffic stops. While not an element of an equal protection claim, such information may reinforce to the court the deleterious effect of racial profiling. Usually, "only those on whom contraband is found are charged with crimes, and those charged with crimes have the strongest incentive to challenge the stop." *U.S. v. Mubdi*, 691 F.3d 334, 345 (2012) (Davis, J., concurring in part), *judgment vacated*, __ U.S. __, 133 S.Ct. 2851 (2013). But, legal literature, including case law, has noted the wider impact of racial profiling on minorities. *Mubdi*, 691 F.3d 334, 347 n.4 (collecting sampling of recent literature). *See also* Ian Mance, *Racial Profiling in North Carolina: Racial Disparities in Traffic Stops*, 2000–2011, NCAJ TRIAL BRIEFS, June 2012, at 23 (describing humiliation and trauma experienced by African American male who was stopped); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 27 n.7 (2011) (citing compilations of stories about impact of stops on minorities); Michael L. Birzer, RACIAL PROFILING: THEY STOPPED ME BECAUSE I'M ---------- 97–130 (2012) (discussing interviews with 87 minority citizens who believed they were racially profiled by law enforcement officers and reporting that the subjects (1) perceived that stereotypes influenced an officer's decision to stop them for a pretextual reason, (2) reported experiencing accusatory or demeaning treatment from officers, and (3) described emotional distress resulting from the interaction).

Jay-Z's song "99 Problems," which expresses the perception of many Black men that they are targeted by law enforcement officers on account of their race and youth, has even made it into the legal literature:

> So I . . . pull over to the side of the road
> And I heard 'Son do you know what I'm stopping you for?'
> 'Cause I'm young and I'm black and my hat's real low?'
> Do I look like a mind reader sir, I don't know
> Am I under arrest or should I guess some mo'?

See Caleb Mason, *Jay-Z's 99 Problems, Verse 2: A Close Reading With Fourth Amendment Guidance For Cops And Perps*, 56 ST. LOUIS U. L.J. 567 (cited in *Davis v. City of New York*, 902 F. Supp. 2d 405, 411 n.22 (S.D.N.Y. 2012); *United States v. Schuett*, 2012 WL 3109394 (E.D. Mich. July 31, 2012) (unpublished)).