

Chapter 2

Police Investigation: Stops, Searches, and Arrests

2.1	Scope of Chapter	2-2
2.2	Overview of Racial Profiling Concerns	2-3
2.3	Equal Protection Challenges to Police Action	2-4
	A. Equal Protection Claims May Strengthen Fourth Amendment Challenges	
	B. State and Federal Constitutions Guarantee Equal Protection of the Law	
	C. Elements of a Selective Enforcement Claim	
	D. Gathering Evidence to Support a Claim of Selective Enforcement	
	E. Burden of Proof and Burden Shifting	
	F. Remedy for an Equal Protection Violation	
2.4	Overview of Protections Against Unreasonable Searches and Seizures	2-19
2.5	Consensual Encounters	2-20
	A. Overview	
	B. Relevance of Race to “Free to Leave” Test	
	C. Consensual Encounters Between Officers and Pedestrians	
	D. Consensual Encounters at Home: The “Knock and Talk” Technique	
	E. Practice Tips: Challenges to Alleged Consensual Encounters	
2.6	Traffic and Pedestrian Stops	2-23
	A. Traffic Stops	
	B. The Fourth Amendment and Pretextual Traffic Stops	
	C. Challenging Checkpoints	
	D. The Fourth Amendment and <i>Terry</i> Stops	
	E. Challenging Proxies for Race Used to Support Reasonable Suspicion	
	F. Seizures in Reliance on Descriptions of Suspect’s Race	
	G. Equal Protection Challenges to Seizures	
	H. Types of Statistical Evidence Supporting Equal Protection Claims	
	I. Collecting Traffic Stop Data to Support Equal Protection Claims	

J. Information about Personal Impact of Equal Protection Violation

2.7 Other Selected Aspects of Warrantless Stops 2-43

- A. Questioning
- B. Pretextual Inventory Searches
- C. Vehicle Consent Searches
- D. Roadside Searches of Individuals
- E. Arrests

2.8 Beyond Litigation 2-51

2.1 Scope of Chapter

This chapter explains how a person’s race (as well as proxies for race, such as the geographic area where a person lives) may affect initial encounters with police. The focus of this chapter is on race-based challenges to police action based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the prohibition against unreasonable searches and seizures in the Fourth Amendment to the U.S. Constitution, and parallel provisions in the N.C. Constitution. The focus of the chapter is on warrantless police encounters, by consent or seizure, which for many people are the initial point of contact with the criminal justice system. Race may play a role in other aspects of police encounters not addressed in this chapter.

Most of this chapter is organized according to the type of encounter between law enforcement officers and individuals, such as traffic stops or arrests. However, for several reasons the chapter begins with a discussion of the law on equal protection challenges to selective enforcement. First, claims based on the Equal Protection Clause may be raised in response to all encounters covered in this chapter; readers may therefore find it useful to have a basic understanding of equal protection claims before examining issues unique to particular police encounters. Second, criminal defense attorneys tend to be more familiar with Fourth Amendment claims and less familiar with equal protection claims, the development of which has occurred largely in the civil context. Where appropriate, equal protection principles articulated in the civil context have been incorporated into this section.

This chapter does not repeat all of the applicable Fourth Amendment principles. For this reason, the discussion should be read in conjunction with Chapter 15 of Volume 1 of the North Carolina Defender Manual, which lays out the law on warrantless seizures and searches in greater detail; Chapter 14 of the same manual, which contains guidance on making motions to suppress evidence; and other reference sources on search and seizure law.

2.2 Overview of Racial Profiling Concerns

The U.S. Department of Justice defines the unlawful practice of racial profiling as decisions by law enforcement that “rest[] on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of other races or ethnicities.” U.S. DEP’T OF JUSTICE, [RACIAL PROFILING FACT SHEET](#) 1 (2003). Studies in various jurisdictions indicate that racial profiling may have an impact on decisions made during initial encounters by law enforcement officers. In Maryland, an analysis of traffic stop data concluded that, while 74.7% of those violating traffic laws on Maryland highways were White and 17.5% were Black, Black drivers constituted 79.2% of the drivers searched. DEBORAH RAMIREZ ET AL., U.S. DEP’T OF JUSTICE, [A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED](#) 6–7 (2000). In New York City, a federal judge found that the New York Police Department’s “stop and frisk” program, pursuant to which police officers were instructed to target young Black and Latino men for *Terry* stops, was influenced by racial bias and was unconstitutional. *Floyd v. City of New York*, 959 F.Supp.2d 540, 662–64 (S.D.N.Y. 2013).

In North Carolina, most law enforcement agencies are required by statute to collect traffic stop data encompassing, among other information, 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; see also *infra* § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims. A 2012 study of data from approximately 13 million North Carolina traffic stops concluded that, compared to White motorists, Black and Latino motorists and passengers in North Carolina are almost twice as likely to be searched and twice as likely to be arrested following a traffic stop. North Carolina Advocates for Justice (NCAJ) Task Force on Racial and Ethnic Bias, [Executive Summary](#). The same study concluded that these racial and ethnic disparities appear most pronounced when officer discretion is greatest, as in the case of stops based on seat belt, vehicle equipment, and vehicle regulatory violations. See FRANK R. BAUMGARTNER & DEREK EPP, [NORTH CAROLINA TRAFFIC STOP STATISTICS ANALYSIS: FINAL REPORT TO THE NORTH CAROLINA ADVOCATES FOR JUSTICE TASK FORCE ON RACIAL AND ETHNIC BIAS](#) 5 (2012) [hereinafter “Baumgartner Study”].

In Alamance County, following a two-year investigation, the United States Department of Justice filed a complaint alleging that Latino drivers are between four and ten times more likely to be stopped by Sheriff’s deputies than non-Latino drivers, and that some deputies had been specifically directed by the Sheriff to “go out there and catch [] some Mexicans.” Anne Blythe, [U.S. Justice Department Sues Alamance County Sheriff, Accusing Him of Discriminating Against Latinos](#), NEWS & OBSERVER (Raleigh), Dec. 20, 2012. In support of its claims, the Department of Justice submitted a report in which racial profiling expert Dr. John Lamberth stated that, on three different highways in Alamance County, Latino motorists are between 6 and 7.13 times more likely than non-Latino drivers to be cited for traffic violations, and that these observed disparities are the

largest he had ever measured in the United States. See [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 (2012).

Initial encounters with police represent the entry point into the criminal justice system. Stop, search, and arrest practices, where discriminatory, risk introducing racial disparities at the outset of the case that may be compounded at later stages and affect outcomes. See *supra* § 1.3E, Discretionary Decision-Making and the Cumulative Nature of Disparities. Criminal defense attorneys should therefore seek to identify and raise challenges to law enforcement conduct where it appears that race played an improper role in the investigation.

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](#), 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”).

2.4 Overview of Protections Against Unreasonable Searches and Seizures

The Fourth Amendment to the U.S. Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV. The parallel state constitutional provision provides that “[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.” N.C. CONST. art. I, § 20. Both constitutional provisions “require[] the exclusion of evidence obtained by unreasonable search and seizure.” *State v. Carter*, 322 N.C. 709, 712 (1988).

Attorneys should raise challenges to unreasonable searches and seizures under both state and federal constitutional provisions and argue specifically that the protections afforded by the state constitution are broader than those guaranteed by the federal constitution. North Carolina appellate courts have ordinarily construed search and seizure provisions in the North Carolina and federal constitutions as protecting the same rights, but state courts may interpret their state constitutions as providing greater protections. *See, e.g., Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 475 (1999) (stating that “the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution”); *Jones v. Graham Cnty. Bd. of Educ.*, 197 N.C. App. 279, 289–93, (2009) (noting that “[i]f we determine that the policy does not violate the Fourth Amendment, we may then proceed to determine whether Article I, Section 20 provides basic rights in addition to those guaranteed by the [Fourth Amendment]” (quotation omitted)).

2.5 Consensual Encounters

A. Overview

The protections of the Fourth Amendment do not come into play during consensual encounters in which no seizure has taken place. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not “free to leave.” *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person’s freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer’s requests or terminate the encounter). For a further discussion on how to distinguish between a consensual encounter and a seizure, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.2A (Did the Officer Seize the Defendant?) (2d ed. 2013).

B. Relevance of Race to “Free to Leave” Test

Courts consider the totality of the circumstances in evaluating whether a reasonable person would have felt free to leave an allegedly consensual encounter. *See INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992). In some cases, a defendant’s race may be a factor in the totality of relevant circumstances. The U.S. Supreme Court has held that the individual’s responses to police actions are not relevant to whether a reasonable person would have felt free to leave, which is an objective determination. *See Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (holding that the reasonable person standard “ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached”). Nevertheless, some courts have indicated that a defendant’s characteristics—such as race or immigration status—may play a role in determining whether a reasonable person in the defendant’s position would have felt free to leave.

For example, the Ninth Circuit Court of Appeals held that an encounter between two White police officers and an African American defendant was not consensual, as a reasonable person in the defendant’s circumstances would not have felt free to leave. *U.S. v. Washington*, 490 F.3d 765 (9th Cir. 2007). In that case, the court relied on, among other things, the strained relations between police and the African American community and the reputation of police among African Americans. *Id.* *See also* DONALD HAIDER-MARKEL ET AL., [CONSTRUCTING DISTRUST: THE CONSEQUENCES OF AFRICAN AMERICAN ENCOUNTERS WITH POLICE](#) (2012) (finding, for example that Black people are far more likely than White people to agree with the statement “the police are out to get me”); NATIONAL INSTITUTE OF JUSTICE, [MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETINGS](#) 135 (Robert H. Langworthy ed., 1999) (reporting that only 32% of African Americans hold a great deal or quite a lot of confidence in the police, as opposed to 66% of whites).

In the context of police encounters in airports, the Fourth Circuit Court of Appeals included “the characteristics of the particular defendant” as one of three main factors to

consider when determining whether an encounter was consensual. *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989) (citing *United States v. Black*, 675 F.2d 129, 134–35 (7th Cir. 1982), in which the Seventh Circuit noted in “free to leave” analysis, that defendant was an articulate, intelligent college graduate and therefore “not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment”). *But see Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009) (“[t]o agree that [the defendant’s] subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures. Such a rule should be rejected.”). One federal district court within the Fourth Circuit discussed without deciding whether a defendant’s particular attributes—including limited English proficiency, limited formal education, and unfamiliarity with American police procedure—may be relevant to determining whether the defendant’s encounter with a police officer constituted a seizure. *Santos v. Frederick County Bd. of Comm’rs*, 884 F. Supp. 2d 420, 427 n.5 (D. Md. 2012) (unpublished), *aff’d in part, vacated in part by* 725 F.3d 451 (2013) (recognizing that defendant’s limited English proficiency “may have added to the coerciveness of the situation” but finding that “the language barrier, on its own, [was] insufficient to turn the otherwise consensual encounter into a seizure”). The U.S. Supreme Court has held analogously that a child’s age is a relevant factor to consider in determining whether the child was in custody for *Miranda* purposes, even though whether a suspect is in custody is an objective inquiry. *See J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2399 (2011).

C. Consensual Encounters Between Officers and Pedestrians

Race-based “consensual” encounters. Even if an encounter is consensual and therefore not subject to Fourth Amendment protections, an officer may violate the Equal Protection Clause of the Fourteenth Amendment and article I, section 19 of the N.C. Constitution if the defendant is selected for such an encounter because of the defendant’s race. *See Whren v. U.S.*, 517 U.S. 806, 813 (1996) (“the Constitution prohibits selective enforcement of the law based on considerations such as race[;] [b]ut the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment”); *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997); *U.S. v. Travis*, 62 F.3d 170 (6th Cir. 1995); *U.S. v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also supra* § 2.3, Equal Protection Challenges to Police Action.

If you suspect that “Officer Jones” singled out your client for a consensual encounter on the basis of race, you may want to review court files in which Officer Jones was the arresting officer for evidence of racially discriminatory practices. By recording data such as the race of the person charged for a relevant time period, e.g., a one-year period before your client’s encounter, you may be able to discern a pattern of enforcement decisions. If the charges initiated by the officer in question appear to be racially skewed, they may be compared to (1) census data reflecting the demographics of the area patrolled by the officer, and/or (2) the enforcement patterns of other officers responsible for patrolling the same area during approximately the same hours. *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, 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 made by other officers who work the same assignment in the same general area and at approximately the same time of day.”). This sort of information may be obtained by pulling court files in which other officers were the arresting officers. If you see a disparity in enforcement, you may have grounds for obtaining additional discovery about departmental practices. *See supra* “Discovery” in § 2.3D, Gathering Evidence to Support a Claim of Selective Enforcement. Ultimately, an equal protection claim of selective enforcement arising out of a consensual encounter must be supported by evidence demonstrating that the officer’s consensual encounters were driven by racial motivations and resulted in racially disparate effects. *See supra* § 2.3D, Gathering Evidence to Support a Claim of Selective Enforcement.

D. Consensual Encounters at Home: The “Knock and Talk” Technique

Race-based “knock and talks.” The “knock and talk” practice is one in which law enforcement officers, acting without a warrant and often without probable cause, knock on the door of a dwelling in order to question its inhabitants and often ask for consent to search their home. This practice has been criticized as one that allows targeting of minorities or other vulnerable populations. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 340 (2010) (observing that “when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail”). Attorneys may raise Equal Protection Clause challenges to race-based decisions to initiate “knock and talks.” Such challenges might be considered, for example, if it appears that police officers are targeting predominantly minority neighborhoods for “knock and talks.” These challenges should also be raised under article I, section 19 of the N.C. Constitution. *See supra* § 2.5C, Consensual Encounters Between Officers and Pedestrians and *supra* § 2.3, Equal Protection Challenges to Police Action.

Consent to search following a “knock and talk.” Searches following “knock and talks” are permissible when the occupant freely, voluntarily, and unequivocally consents to the search. *U.S. v. Miller*, 933 F. Supp. 501, 505 (M.D.N.C. 1996). In *U.S. v. Johnson*, 333 U.S. 10 (1948), the Supreme Court characterized a defendant’s alleged permission to search following a “knock and talk” as a “submission to authority rather than as an understanding and intentional waiver of a constitutional right” and rejected it as non-consensual. The burden is on the State to demonstrate that the defendant’s consent was voluntary. *See, e.g., United States v. Morrow*, 731 F.2d 233, 236 (4th Cir. 1984) (where the State argues that defendant consented to a search of his or her home, it must prove that the defendant “freely and intelligently [gave his or her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied” (internal quotation omitted)).

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the Supreme Court recognized that characteristics of the accused are relevant in the determination of whether consent to

search was voluntarily given. “[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents”). *Id.* at 229. Based on this authority, defense counsel could argue that a defendant’s race, ethnicity, age, limited education, or limited English proficiency should be taken into consideration in determining whether consent was freely given. Challenges to the validity of consent should be raised under the Fourth Amendment as well as article I, sections 19, 20, and 23 of the N.C. Constitution.

For a fuller discussion of the “knock and talk” technique, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 14.2E (Knock and Talk) (2d ed. 2013).

E. Practice Tips: Challenges to Alleged Consensual Encounters

If your client is facing charges arising out of an allegedly consensual encounter with an officer and you believe race may have played a role in the encounter, the following questions may help you identify viable Fourth Amendment or Equal Protection challenges on which to base a motion to suppress evidence or dismiss charges:

- Is there evidence, direct or circumstantial, that your client may have been approached for a consensual encounter because of his or her race? For example, is there a pattern of police officers engaging in such encounters more often in predominantly minority neighborhoods? If so, the encounter may have violated your client’s right to equal protection guaranteed by the N.C. Constitution and U.S. Constitution, even if the encounter did not constitute a seizure.
- Was there a show of force or other coercive action by the officer? If so, the court will be more likely to find that the encounter was a seizure requiring reasonable suspicion or an arrest requiring probable cause.
- Was your client in a particularly vulnerable state when approached by the officer, or was your client subjected to police pressure, making his or her consent involuntary and therefore invalid?
- Is there evidence that your client is a member of a minority community with a particularly strained relationship with the police? If so, those attributes may be relevant in determining whether, given the totality of the circumstances, a reasonable person would have perceived the encounter as consensual.
- Does your client have a history of traumatic interactions with police officers? For example, has your client ever been tasered or treated in any fashion that may have rendered him or her more likely to have his or her will overborne?

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 § 2.6D, 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, [Prosecutor Deals 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. Massenbarg*, 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 respectful, 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. Massenburt*, 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 un rebutted 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)).

2.7 Other Selected Aspects of Warrantless Stops

A. Questioning

To comply with the Fourth Amendment, an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. The U.S. Supreme Court has held that an officer may inquire into "matters unrelated to the justification for the traffic stop . . . [without] convert[ing] the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Some North Carolina cases have held that officers need additional reasonable suspicion to extend a stop once the original purpose of the stop has been addressed. See, e.g., *State v. Jackson*, 199 N.C. App. 236 (2009). However, recent cases have found that the Fourth Amendment is not implicated if the delay is de minimis. See, e.g., *State v. Sellars*, ___ N.C. App. ___, 730 S.E.2d 208 (2012) (finding delay of four minutes and 37 seconds de minimis). The length of any delay caused by questions or investigation unrelated to the purpose of the stop is an important factor in determining whether officers acted within the lawful scope of the stop. See *State v. Branch*, 194 N.C. App. 173 (2008) (ten minute delay unlawful); *United States v. Perez*, 526 F.3d 1115, 1119–20 (8th Cir. 2008) (thirteen minute delay for questions unrelated to justification for stop unconstitutionally extended the detention). Also, the reason for the delay may be a significant factor. See also *State v. Cottrell*, ___ N.C. App. ___, 760 S.E.2d 274 (2014) (officer violated the defendant's Fourth Amendment rights by detaining the defendant after the purpose of the traffic stop was met, without having developed reasonable suspicion of criminal activity).

The Fourth Circuit Court of Appeals has adopted a potentially fruitful way to assess questioning and other investigative actions unrelated to the purpose of the stop. The court has held that an officer exceeds the limits of a lawful traffic stop when, without reasonable suspicion, he drops the investigation of the originally suspected traffic offense and "embark[s] on another sustained course of investigation." *United States v. Guignon-*

Ortiz, 660 F.3d 757, 766 (4th Cir. 2011) (quotation omitted). Under this approach, the reasonableness of prolonging a traffic stop is judged not merely on the duration of the stop but also on whether the officer diligently pursued the purpose of the stop, during which time it was necessary to detain the defendant. *Id.* at 770 (“Possessing probable cause that a driver has committed a traffic infraction does not give an officer free rein to keep the vehicle and its passengers on the side of the road while the officer investigates any hunch, whether through questioning or other methods, so long as the stop is shorter than the time it would have taken to conduct the ordinary incidents of a traffic stop.”)

These principles provide some Fourth Amendment protections to motorists against pretextual stops because they limit an officer’s actions following the stop. A lengthy detention following an otherwise routine traffic stop also may raise concerns that the stated reason for the stop masks an actual purpose of generalized criminal investigation in reliance on a criminal profile. For example, a trooper in one case “testified that he began to follow [the defendant] to ‘see if I could find a violation,’ and admitted ‘in an attempt to find a violation on [defendant’s] vehicle . . . I was going to conduct a pretextual stop, stop him for a traffic violation, conduct a brief interview of him, [and] see if I observed any indicators of other criminal activity.’” *United States v. Foreman*, 369 F.3d 776, 786–87 (4th Cir. 2004) (Gregory, J. concurring in part and dissenting in part) (emphasis in original) (internal citation omitted). Admissions such as these will be rare, since, as Judge Davis of the Fourth Circuit Court of Appeals observed, “[a]t an earlier time, some law enforcement officers freely employed the term ‘pretextual stop’ although, with increased sensitivity over racial profiling, the terms seems to have fallen from favor.” *United States v. Mubdi*, 691 F.3d 334, 347 n.3 (4th Cir. 2012) (Davis, J., concurring in part), *rev’d on other grounds*, 133 S. Ct. 2851 (2013). Even with such admissions, the defendant must ultimately show that the stopping officer did not have an objective ground for the stop in order to make out a Fourth Amendment violation (in both *Foreman* and *Mubdi*, the majority found a basis for the stop) and will have to show discriminatory intent and effect to make out an equal protection violation.

Attorneys may want to review police policies regarding traffic stops, if any, to determine the extent to which they permit employing drug-sniffing dogs on traffic stops, asking that vehicle occupants step out of their cars, requesting permission to search, and other techniques that may extend traffic stops and increase their potential consequences. Such a review may reveal areas in which officers are exceeding their authority or treating similarly situated drivers differently, or areas in which officer discretion is unregulated. For example, in a recent Cleveland County case, testimony revealed that the arresting law enforcement officers had followed an informal practice—directly contradicting the Sheriff’s written policy—by which deputy sheriffs would turn off the audio recording equipment during a search in order to prevent defense attorneys from discovering the techniques used in executing a search. This and other evidence led the court to discredit the arresting officer’s asserted reason for the stop. Order Allowing Motion to Suppress in the Race Materials Bank at www.ncids.org (select “Training & Resources”).

Arguments that a delay exceeded the scope of the stop. In arguing that questioning was beyond the scope of the stop, and that information discovered as a result must be

suppressed pursuant to the Fourth Amendment and article I, sections 19, 20, and 23 of the N.C. Constitution, the defendant is in the strongest position if the following factors are present:

- The original purpose for the stop was a discrete matter that would not require additional investigation following the stop, e.g., failure to signal.
- The original purpose for the stop was met before the additional questioning began—for example, the officer issued a citation or warning and returned the defendant’s driver’s license.
- A reasonable person would not have felt free to leave at the time of the questioning, e.g., because officers blocked the defendant’s car, maintained possession of the defendant’s license or other documents, or instructed him not to leave, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.2A (Consensual Encounters) (2d ed. 2013).
- The questions were not related to the basis for the stop and instead constituted a new criminal investigation, e.g., for drug possession.
- The amount of time spent questioning the defendant on matters unrelated to the basis for the stop was not de minimis.
- The amount of time spent questioning the defendant on matters unrelated to the basis for the stop exceeded the amount of time spent questioning the defendant on matters related to the basis of the stop.
- The officer had not developed reasonable suspicion of additional criminal activity.
- The officer detained the defendant after the purpose of the stop was met to summon a drug-sniffing dog to the scene. *See State v. Cottrell*, ___ N.C. App. ___, 760 S.E.2d 274 (2014).

See generally State v. Hernandez, 170 N.C. App. 299 (2005) (trooper expanded scope of stop for seat belt violation by asking defendant about contraband and weapons, but reasonable suspicion of criminal activity supported further detention); *State v. Sutton*, 167 N.C. App. 242 (2004) (questioning of defendant during stop was permissible; questions were brief and directly related to suspicion that gave rise to stop); *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011) (unreasonable to spend ten minutes of a fifteen minute traffic stop asking drug-related questions); *United States v. Everett*, 601 F.3d 484 (6th Cir. 2010) (holding that whether delay is de minimis turns on totality of circumstances, including whether officer is diligently moving toward completion of stop and ratio of stop-related to non-stop-related questions).

Involuntary confessions. Police questioning following a traffic stop may result in confessions, which are admissible only when made voluntarily. *See, e.g., State v. Campbell*, 133 N.C. App. 531, 537–38 (1999) (“Incriminating statements obtained by the influence of hope or fear are involuntary and thus inadmissible.”). In some cases, North Carolina defendants have claimed that a law enforcement officer’s exploitation of race during questioning rendered their confessions involuntary and therefore inadmissible. *See State v. Graham*, ___ N.C. App. ___, ___ 733 S.E.2d 100, 104 (2012) (where a detective asked the defendant, “brother to brother,” to tell the truth, the court rejected the

defendant’s argument that the detective’s reliance on their shared racial background constituted evidence of coercion); *State v. Campbell*, 133 N.C. App. 531, 538 (1999) (while it may have been “manipulative” to select a detective to interrogate the defendant based on his shared race and sex, the defendant did not demonstrate that this choice raised defendant’s hopes or fears so as to make defendant’s confession involuntary); *State v. White*, 68 N.C. App. 671, 675 (1984) (court rejected Black defendant’s argument that his confession was involuntary where he was arrested by four White officers and was alone with one of the officers in an interrogation room at the time of the confession). See also *State v. Wilson*, 322 N.C. 91, 95 (1988) (explaining that in *State v. Whitfield*, 70 N.C. 356 (1874), the defendant’s confession “was held involuntary . . . because of the coercive circumstances resulting from racial tension manifest in the confrontation”).

Confessions secured following suggestions that, because of a suspect’s race, he or she will not be treated fairly by the criminal justice system, may be ruled involuntary and inadmissible. Recently, the Indiana Supreme Court considered a case in which a detective interrogating a Black suspect warned him:

Don’t let twelve people who are from Schererville, Crown Point—white people, Hispanic people, other people that aren’t from Gary, from your part of the hood—judge you. Because they’re not gonna put people on there who are from your neck of the woods. You know that. They’re not gonna be the ones to decide what happens to you. You know that. I know that. Everybody knows that. All they’re gonna see is, oh, look at this, another young motherf***** who didn’t give a f***.

Bond v. State, 9 N.E.3d 134, 136–37 (Ind. 2014). The court unanimously held that, because the detective suggested that the defendant “might not receive a fair trial because of his race and the likely [racial and ethnic] composition of a prospective jury,” the defendant’s subsequent confession was involuntary and inadmissible. *Id.* at 138. The *Bond* court found that the detective’s statement constituted “an intentional misrepresentation of rights ensconced in the very fabric of our nation’s justice system—the rights to a fair trial and an impartial jury, and the right not to be judged by or for the color of your skin—carried out as leverage to convince a suspect in a criminal case that his only recourse was to forego his claim of innocence and confess.” *Id.* While the court acknowledged that, in the past, it had allowed the admission of confessions secured in spite of an officer’s misleading or deceptive tactics during questioning, it held that such tactics were impermissible where a suspect is “intentionally deceived as to the fairness of the criminal justice system itself because of the color of [the defendant’s] skin.” *Id.* at 140.

For additional considerations regarding coerced confessions, see 1 NORTH CAROLINA DEFENDER MANUAL § 14.3 (Illegal Confessions or Admissions) (2d ed. 2013).

B. Pretextual Inventory Searches

In certain instances, searches may be challenged as pretextual in violation of the Fourth Amendment's prohibition on unreasonable searches. For example, in *Florida v. Wells*, 495 U.S. 1, 4 (1990), the Court stated that warrantless inventory searches "must not be a ruse for a general rummaging in order to discover incriminating evidence." The Court indicated that inventory searches should be "designed to produce an inventory" and must not be "turned into a purposeful and general means of discovering evidence of crime." *Id.* (internal quotation omitted). See also *Whren v. United States*, 517 U.S. 806, 813 (1996) (noting the Court's disapproval of pretextual inventory searches and administrative inspections); *Fair v. State*, 627 N.E.2d 427 (Ind. 1993) (inventory search violated Fourth Amendment where vehicle presented only a "marginal threat," and "several indicia of pretext" raised a question about whether search was conducted in good faith); *United States v. Matthews*, 591 F.3d 230, 235 (4th Cir. 2009) (inventory searches must be "performed in good faith"). Allegations that an inventory search violates the Fourth Amendment will be stronger where the law enforcement agency responsible for the search has no written policy on impoundment or inventory searches, the State is unable to produce evidence that the officer employed a standardized procedure, and the State fails to identify a legitimate rationale for impoundment. See *United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996) ("An impoundment must either be supported by probable cause, or be consistent with the police role as 'caretaker' of the streets and completely unrelated to an ongoing criminal investigation.").

C. Vehicle Consent Searches

In recent years, "consent searches" during traffic stops have become increasingly commonplace. See Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005) (reporting that "[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment"). In a case reviewed by the Fourth Circuit Court of Appeals concerning the voluntariness of a defendant's consent to search, a state trooper testified that he searches 97% of the cars he pulls over, suggesting to one judge that the trooper "rarely takes no for an answer." *U.S. v. Lattimore*, 87 F.3d 647, 653 n.1 (4th Cir. 1996) (en banc) (Hall, J., dissenting). "Consent searches are no longer an occasional event" in which people suspected of a crime may inform the police of their willingness to be searched; they are "now a wholesale activity accompanying a great many traffic stops." 3 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 9.3, at 397 (3d ed. 2007).

In deciding when to ask for consent to search, law enforcement officers have broad discretion. Some drivers have raised challenges in racial profiling lawsuits to the alleged misuse of this discretion. See *Maryland State Conference of NAACP Branches v. Maryland State Police*, 454 F. Supp. 2d 339, 353–54 (D. Md. 2006) (rejecting state troopers' motions for summary judgment on plaintiffs' claims that (1) trooper stopped African-American motorist in violation of Fourteenth and Fourth Amendments and (2) trooper coerced African-American motorist's consent to search in violation of the Fourth

Amendment). Concerns about misuse of this discretion have prompted some states to pass legislation banning the use of consent searches; and the California Highway Patrol voluntarily adopted a policy prohibiting its officers from requesting consent to search from drivers. Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187–88 (2006). In North Carolina, the Fayetteville City Council issued a moratorium on consent searches amid concerns about racial profiling. Following a court order temporarily halting the ban, the Mayor announced that police officers would begin using consent forms requiring a driver’s signature when seeking consent to search. See, e.g., Andrew Barksdale, [City Manager Dale Iman’s reversal on Fayetteville police consent searches stirs criticism](#), FAYETTEVILLE OBSERVER, March 3, 2012 (reporting concerns that 75% of motorists whose vehicles were searched by police in Fayetteville in 2011 were minorities). In Durham, the City’s Human Relation Commission (HRC), charged by Durham Mayor Bill Bell with investigating allegations of racial profiling by the Durham Police Department, voted to recommend that the city implement a mandatory written consent to search policy for all vehicle consent searches by Durham Police. Jim Wise, [Durham panel urges additional training for Durham police](#), NEWS AND OBSERVER (Raleigh), March 11, 2014. After this proposal received support from the City Council, City Manager Tom Bonfield ordered the implementation of a new policy, effective October 1, 2014, requiring officers to receive written consent before conducting consent searches of a vehicle or building. Ray Gronberg, [City adopts written-consent policy for searches](#), THE HERALD SUN (Durham), September 16, 2014.

Practice note: The North Carolina Department of Justice makes traffic stop data available to the public, as required by G.S. 114-10.01. If you are developing a claim that an officer’s request for consent to search your client’s vehicle constituted a denial of his or her right to equal protection, you will want to discover data concerning the use of consent searches by the officer or police department responsible for the search. You may obtain data on the race and ethnicity of motorists and passengers searched by particular law enforcement agencies during specific time periods by running reports on the [NC DOJ’s website](#). The search data on the NC DOJ’s website currently is disaggregated by basis for search (for example, consent, probable cause, or search incident to arrest), but currently “basis for search” data is not disaggregated by race and ethnicity (although this information may be obtained by requesting SBI-122 forms directly from the State Bureau of Investigation). The web tool currently under development by the Southern Coalition for Social Justice will eventually allow users to determine the race and ethnicity of motorists and passengers asked for consent to search. See *supra* “Data sources relevant to North Carolina traffic stops” in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

North Carolina appellate decisions may impose an important limitation on an officer’s ability to ask for consent to search. In *State v. Parker*, 183 N.C. App. 1, 9 (2007), the North Carolina Court of Appeals stated that “[i]f the officer’s request for consent to search is unrelated to the initial purpose for the stop, then the request must be supported by reasonable articulable suspicion of additional criminal activity.” In that case, the court determined that, because the request for consent to search was “based on reasonable

articulable suspicion that [the officer] would find additional contraband . . . his request did not exceed the scope of the traffic stop and continuation of the detention to complete the search did not violate the Fourth Amendment.” *Id.* at 13. *See also State v. Myles*, 188 N.C. App. 42 (2008) (nervousness of defendant and other passenger did not justify continued detention, questioning, and request for consent to search after officer considered traffic stop complete), *aff’d per curiam*, 362 N.C. 344 (2008). *Parker* suggests that requests for consent to search may differ from other types of questioning, which are not impermissible if they do not unduly prolong the stop. *See supra* § 2.7A, Questioning; “Requests for consent and questioning” in 1 NORTH CAROLINA DEFENDER MANUAL § 15.4E (Nature, Length, and Purpose of Detention) (2d ed. 2013); *see also State v. Cottrell*, ___ N.C. App. ___, 760 S.E.2d 274 (2014) (consent to search vehicle was not valid where officer had addressed original purpose of stop and obtained defendant’s consent by threatening to conduct dog sniff that officer did not have legal right to conduct; intrusion was not justified as “de minimis”). Other decisions indicate that the issue is in dispute in North Carolina. *See, e.g., State v. Jacobs*, 162 N.C. App. 251 (2004) (holding that, despite defendant’s contention that reasonable suspicion is required to request defendant’s consent to search, “[n]o such showing is required”). The U.S. Supreme Court has not specifically addressed the question.

Other states have specifically recognized that reasonable suspicion of additional criminal activity is required if the request for consent to search is not related to the initial purpose of the stop. *See, e.g., State v. Estabillio*, 218 P.3d 749, 757–61 (Haw. 2009); *Commonwealth v. Torres*, 674 N.E.2d 638, 641–43 (Mass. 1997); *State v. Fort*, 660 N.W.2d 415, 418–19 (Minn. 2003); *State v. Elders*, 192 N.J. 224, 927 A.2d 1250, 1260–61 (N.J. 2007). A smaller number of states have held that consent searches in the context of traffic stops are valid unless the duration of the seizure is unduly extended. *See, e.g., State v. Jenkins*, 3 A.3d 806, 826 (Conn. 2010).

For additional considerations regarding consent to search, such as factors bearing on the voluntariness or withdrawal of consent, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.4E (Nature, Length, and Purpose of Detention) and 15.5D (Consent) (2d ed. 2013).

D. Roadside Searches of Individuals

The decision to conduct roadside searches or strip-searches represents a discretionary determination that may, at times, be influenced by race. *See Baumgartner Study* at 5 (concluding that Black and Hispanic individuals are more likely to be searched following a traffic stop). In determining whether the decision to search your client may have been influenced by race, consider:

- Was the search conducted in accordance with the law enforcement agency’s policies concerning roadside searches?
- Do any of the facts of the client’s case suggest that race may have been a factor in the search? For example, was your client asked to step out of the car for a search while another passenger of a different race was not?

- Was the officer’s unit tasked with using routine traffic stops to search for indicators of criminal activity?
- How frequently do officers from the arresting law enforcement agency conduct roadside searches of drivers and passengers stopped? This information may be obtained by running a report of “Drivers and Passengers Searched by Sex, Race, and Ethnicity” by the relevant law enforcement agency on the [NC Department of Justice’s Traffic Stop Statistics website](#). In addition to accessing data about searches through the NC DOJ 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 information on the forms extends beyond what is currently accessible through generating a report on the NC DOJ website, and includes (1) the type of search; (2) the basis for the search; (3) the person/s or vehicle searched; and (4) the sex, race, and ethnicity of each person searched. This sort of information will eventually be available on the website under construction by the Southern Center for Social Justice. *See supra* “Data sources relevant to North Carolina traffic stops” in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims.

Interviews with clients and witnesses, discovery requests, and public records requests may prove useful in obtaining the information identified above. For a discussion of legal restrictions on roadside searches of individuals, *see* “Warrant requirement and exceptions” in 1 NORTH CAROLINA DEFENDER MANUAL § 14.2B (Search Warrants) (2d ed. 2013); “Strip search during search incident to arrest” in 1 NORTH CAROLINA DEFENDER MANUAL § 15.6C (Other Limits on Searches Incident to Arrest) (2d ed. 2013); “Strip searches based on probable cause” in 1 NORTH CAROLINA DEFENDER MANUAL § 15.6D (Probable Cause to Search Person) (2d ed. 2013).

E. Arrests

Equal protection claims based on arrest patterns. If an individual officer or law enforcement agency engages in a discriminatory pattern of arresting drivers following traffic stops, this action may be challenged under the Equal Protection Clause and article I, section 19 of the North Carolina Constitution as an unconstitutional selective enforcement of the law. A recent study of data made available as a result of G.S. 114-10.01, which reviewed 13 million traffic stops conducted between January 1, 2000 and June 14, 2011, indicated that minorities are more likely to be arrested, and correspondingly less likely to be issued a warning, for the same offenses as whites. According to the study, “disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues.” [Baumgartner Study](#) at 2. Arrest data disaggregated by race and ethnicity may be accessed by running a report of “Enforcement Action Take by Driver’s Sex, Race, and Ethnicity” concerning the relevant law enforcement agency on the [NC Department of Justice’s Traffic Stop Statistics website](#). For data reflecting arrests of passengers as well as drivers, attorneys may submit 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”). This sort of information will eventually be available on the website under construction by the Southern Center for Social Justice. *See supra* “Data sources relevant to North Carolina traffic stops” in § 2.6I, Collecting Traffic Stop Data to Support Equal Protection Claims. Additional arrest statistics reflecting the number of arrestees by race, age, sex, law enforcement agency, year, and offense type is collected by the U.S. Bureau of Justice Statistics and is searchable on the [Bureau’s website](#).

To establish a Fourth Amendment or equal protection violation, counsel will need additional supporting information. The courts have found that the Fourth Amendment does not prohibit a pretextual arrest if objective grounds exist for the arrest. In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the Court held that an officer’s decision to arrest a person for a traffic violation, if supported by probable cause, is not invalid even though the arrest is a pretext for a narcotics search incident to arrest. (On remand, the Arkansas Supreme Court held that a pretextual arrest violates the state constitution. *See State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002)). Therefore, consistent with the approach discussed previously for stops (*see supra* § 2.6, Traffic and Pedestrian Stops), counsel will need to show either that grounds did not exist for the arrest or that the officer engaged in selective enforcement within the meaning of equal protection law.

Arrests in reliance on descriptions of suspect’s race. A description of a suspect that is based on race alone is not sufficient to justify a seizure. *See supra* “Officer’s ‘hunch’ is not reasonable suspicion, especially where informed by race” in § 2.6B, The Fourth Amendment and Pretextual Traffic Stops; § 2.6F, Seizures in Reliance on Descriptions of Suspect’s Race; *see also Washington v. Lambert*, 98 F.3d 1181, 1183–84 (9th Cir. 1996) (invalidating arrest of two Black individuals whose only resemblance to wanted robbery suspects was their race, noting that the descriptions were “exceedingly vague and general” and that such general descriptions could lead to demeaning treatment of African Americans). An arrest requires probable cause, a higher level of justification than the reasonable suspicion required for a stop. *See State v. Joe*, ___ N.C. App. ___, 730 S.E.2d 779 (2012) (rejecting State’s argument that suppression was erroneous because officer had reasonable suspicion to conduct an investigatory stop and finding that an arrest, not an investigatory stop, had occurred, and that no probable cause supported the arrest). Thus, even more meaningful similarities between a suspect and a description, beyond a general race-based description, may be required to justify an arrest.

2.8 Beyond Litigation

Police departments, along with individual police officers, enjoy significant discretion in deciding how to monitor and enforce compliance with the law. Law enforcement “polices regarding geographic deployment, enforcement priority, and enforcement tactics determine how the benefits and burdens of policing are distributed.” Nirej S. Sekhon, *Criminal Law: Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1225 (2011). For example, before a patrol officer decides who to approach, police department administrators determine that it is appropriate for that officer to be in that particular

location at that particular time. Departmental decisions may play a significant role in determining where to deploy law-enforcement resources.

Responses to police practices that have a racially disparate impact may involve not only challenges in individual cases, but also efforts outside of the courtroom. Examples of different approaches, by community groups, law enforcement officials, and elected leaders, are described here.

In Fayetteville, the Fayetteville City Council issued a moratorium on consent searches in response to complaints from citizens, including a minority lawyer association and the NAACP, that police were using racial profiling to stop and search black drivers three times more often than white drivers. A superior court judge lifted the moratorium, but the Fayetteville Police Department changed its consent search procedure in response to the public's concerns, requiring officers to use written forms when requesting consent. A driver must affirmatively represent on the form that he or she voluntarily agreed to the search and was not intimidated or coerced into making the decision.

In Durham, the FADE ("Fostering Alternatives to Drug Enforcement") coalition of residents has organized to address "the interrelated issues of racial profiling, selective enforcement, excessive force, and police harassment in our city." See FADE Coalition Policy Recommendations to the Durham Human Relations Commission in the Race Materials Bank at www.ncids.org (select "Training & Resources"). FADE members appeared several times before the Durham Human Relations Commission (HRC), in which they presented their views on the Durham Police Department's policing practices. For example, FADE presented information that black men comprise 17.4% of the city's population but account for 65.2% of all people searched during traffic stops; and that Durham police conduct "consent searches" of black motorists at twice the rate of white motorists. *Id.*; see also Durham Police Department Stop-and-Search Data compiled by the Southern Coalition for Social Justice (SCSJ) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). In light of this data, FADE recommended the following policy proposals:

- (1) mandate that written consent be sought and obtained before any and all consent searches undertaken by DPD officers;
- (2) openly repudiate the department's current practice of racial profiling and selective enforcement in the context of both traffic stops and drug law enforcement;
- (3) make marijuana enforcement Durham's lowest law enforcement priority (LLEP) and increase the availability of pre-trial diversion programs;
- (4) mandate racial equity training for DPD leadership and rank-and-file officers alike; and
- (5) create an inclusive task force—one including HRC members, FADE members, PAC [Partners Against Crime] chairs, representatives of the DPD, as well as persons directly affected by police misconduct—to investigate and make formal recommendations regarding best practices for the Durham Civilian Review Board."

See FADE Coalition Policy Recommendations to the Durham Human Relations Commission in the Race Materials Bank at www.ncids.org (select “Training and Resources”). In response to information presented by the FADE Coalition and others concerning allegations of racial profiling, the Human Relations Commission voted to recommend the adoption of over 50 measures to the City Council, including requiring officers to document and make public the reasons for each traffic stop and each search, requiring officers to obtain written consent for searches, and creating an independent entity to regularly review traffic-stop data to identify unusual trends. Jim Wise, [Durham panel urges additional training for Durham police](#), NEWS AND OBSERVER (Raleigh), March 11, 2014. With the support of the City Council, City Manager Tom Bonfield ordered the implementation of a new policy, effective October 1, 2014, requiring Durham police officers to receive written consent before conducting consent searches of a vehicle or building. Ray Gronberg, [City adopts written-consent policy for searches](#), THE HERALD SUN (Durham), September 16, 2014. Updates on the efforts of the FADE Coalition can be found at <http://www.southerncoalition.org/>.

Local police civilian review boards provide an avenue for community oversight of and feedback about policing practices. In North Carolina, four cities have civilian police review boards: Charlotte, Durham, Greensboro, and Winston-Salem. Some state lawmakers, including Charlotte-based Representative Rodney Moore, have expressed interest in sponsoring legislation to grant additional authority to police civilian review boards. Trish Williford, [Lawmaker wants to take action after officer-involved fatal shooting](#), WSOC-TV.COM, (Jan. 30, 2014) (reporting that Representative Moore plans to sponsor such reform as part of a comprehensive legislative response to concerns over racial profiling). Charlotte recently went through a process of reforming their civilian police review board. See [Charlotte Police Complaint Review Program](#), CHARMECK.ORG (last visited Sept. 25, 2014). In Durham, the Civilian Police Review Board sometimes holds public hearings to consider suggestions for improvement of the board’s mission, duties, responsibilities, processes, and jurisdiction. See Email Listserv Announcement-Civilian Police Review Board to Hold Public Information and Feedback Session in the Race Materials Bank at www.ncids.org (select “Training & Resources”); see also Ray Gronberg, [Police review board not seeking additional powers](#), THE HERALD SUN (Durham), April 7, 2014. Civilian review boards, because of their potential to facilitate resolution of complaints, increase trust, and improve police practices, are not only of interest to civilians, but may be welcomed by law enforcement organizations as well. When Durham’s Civilian Police Review Board was formed in 1998, former Durham police officer and former N.C. Police Benevolent Association President Andy Miller supported the formation of the board, stating that “[w]e think that it brings an air of transparency that you often don’t get within the normal channels of the city.” Samiha Khanna, [From the INDY Archives: Durham Civilian Police Review Board](#), INDYWEEK (Jan. 8, 2014). For more information about national efforts to establish and strengthen civilian review of police departments, see [National Association for Civilian Oversight of Law Enforcement](#), NACOLE.ORG (last visited Sept. 25, 2014).

In North Carolina, organizations to address racial disparities in the criminal justice system have been formed both within and beyond the indigent defense community. The

recently formed [North Carolina Public Defender Committee on Racial Equity \(NC PDCORE\)](#) is a state-wide organization of defenders focused on the public defender's unique role in creating a fair, just, and racially-equitable criminal justice system. Public defenders may join NC PDCORE and review weekly updates by visiting the organization's website. The [North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System](#), a collaborative research-based organization whose mission is to identify, document, and address racial and ethnic disparities in the criminal justice system, is comprised of an array of criminal justice system stakeholders, including prosecutors, judges, defense attorneys, and community members. Its current areas of focus include implicit bias training, pretrial release, and juvenile justice.

Collaborative efforts to address concerns over racial profiling have been undertaken in other parts of the country. In 1999, attorneys from the Defender Association in Seattle, Washington founded the Racial Disparity Project (RDP) to address racial bias in the criminal justice system. *See* Racial Disparity Project Website, [Mission, History, Funding](#), RACIAL DISPARITY PROJECT (last visited July 8, 2014). While the RDP originally focused on selective enforcement litigation addressing racial disparities in street-level drug law enforcement, it eventually developed a community-based, collaborative pre-booking diversion pilot project to steer people accused of low-level drug and prostitution crimes out of the criminal justice system and into treatment. *See* Racial Disparity Project Website, [Projects](#), RACIAL DISPARITY PROJECT (last visited July 8, 2014). This project aims to reduce the harm caused by drug use, the drug trade, and drug law enforcement practices that produce racial disparities in criminal processing. *Id.* The Law Enforcement Assisted Diversion Program (LEAD) is supported by the RDP, the Seattle City Mayor, the King County Executive, the King County Prosecuting Attorney's Office, the Seattle City Attorney, the King County Sheriff's Office, the Seattle Police Department, the Washington State Department of Corrections, Community Advisory Boards representing members of the communities served, and the ACLU of Washington. The program authorizes police officers to exercise their discretion in a manner that may reduce (1) disparities in arrest and incarceration rates, (2) reliance on incarceration for low-level offenses, and (3) barriers to accessing community-based treatment programs. *See* Law Enforcement Assisted Diversion Website, [Law Enforcement Assisted Diversion](#), LEADKINGCOUNTY.ORG (last visited July 8, 2014). The program, which began in 2011, has been established through the support of foundation grants at no cost to the public; evaluation of its impact will begin shortly. *Id.*

In New York City, stop and frisk litigation by the Center for Constitutional Rights (discussed *supra* in § 2.6D, The Fourth Amendment and *Terry* Stops) led to the formation of Communities United for Police Reform, a group focused on non-litigation strategies to reduce racial profiling in the city. One of the efforts supported by the coalition was the passage of two pieces of legislation aimed at addressing racial profiling: the End Discriminatory Profiling Act and the NYPD Oversight Act. Two additional proposed bills that may be considered by New York's City Council in the future would (1) impose limitations and regulations on consent searches, and (2) require officers to identify and explain their identity and the purpose of their law enforcement activity to all individuals approached. Communities United for Police Reform reports that similar laws governing

consent searches exist in Colorado and West Virginia, and that similar laws requiring officers to identify themselves and the purpose of their law enforcement activity exist in Arkansas, Minnesota, and Colorado. See Communities United for Police Reform Website, [About the Community Safety Act](#), COMMUNITIES UNITED FOR POLICE REFORM (last visited July 8, 2014); see *supra* § 2.7C, Vehicle Consent Searches.

Community groups and individual community members often become aware of a problematic police practice before attorneys perceive its impact in individual criminal cases. For this reason, defense attorneys may wish to engage in an exchange of information and concerns with community-based groups and individuals in minority communities to learn more about police practices that may be of concern and develop strategies for addressing such practices inside and outside court. For example, the ACLU of North Carolina has asked community members to provide it with information about possible racial profiling practices and locations in North Carolina. Individuals who have information about racial profiling may provide the information to the ACLU using the following link: <https://www.acluofnorthcarolina.org/index.php/English/racial-profiling-complaint-formhtml>. More information, resources, and strategies regarding the potential for community engagement in defenders' efforts to address racial disparities in the criminal justice system can be found in the following resources: ASHLEY NELLIS ET AL., [THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1](#) (2d ed. 2008); [Communities United for Police Reform](#), CHANGETHENYPD.ORG (last visited Sept. 25, 2014); and the [Racial Disparity Project](#), RDP.DEFENDER.ORG (last visited Sept. 25, 2014).