



*INTERIM REPORT  
OF THE STATE POLICE REVIEW TEAM  
REGARDING ALLEGATIONS  
OF RACIAL PROFILING*

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New Jersey State Library

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## **PART I.**

### **INTRODUCTION AND OVERVIEW.**

After the April 23, 1998 shooting incident on the New Jersey Turnpike, the Attorney General commenced an intensive investigation into the incident, which is currently ongoing. The Attorney General decided to transfer the matter from a county to state grand jury and to appoint a special prosecutor to ensure the most comprehensive review possible.

During the course of the investigation of the April 23, 1998 incident, an additional inquiry into the practices of state troopers assigned to the Moorestown and Cranbury barracks of the New Jersey State Police was initiated. That investigation is examining stops made by troopers assigned to those barracks for the first four months of 1998 and is still pending. However, some of the data collected as part of that investigation are used in this Interim Report.

On February 10, 1999, based upon growing concerns regarding State Police practices, policies, and procedures, the Attorney General initiated an unprecedented and comprehensive review of the State Police to examine issues such as "racial profiling" and shooting protocols. The Attorney General directed that this comprehensive review be completed in approximately four months.

The Review Team, headed by First Assistant Attorney General Paul H. Zoubek, includes representatives of the Divisions of Criminal Justice, Law, Civil Rights, and the Office of the Attorney General. The Attorney General further directed the Review Team to focus on the State Police procedures for processing complaints from members of the public and internal complaints from troopers,

training programs for supervisors, and the current system of internal discipline. The review encompasses an ongoing study of promotional policies and practices and follows up on a recently-completed review of the agency's recruitment practices. The overriding purpose of this comprehensive review is to ensure that all State Police policies, procedures, and practices promote fairness in enforcement of the laws by all State Police members.

The scope of this Interim Report is generally limited to a discussion of the practice commonly referred to as "racial profiling." This Interim Report specifically focuses on the activities of state troopers assigned to patrol the New Jersey Turnpike. This is appropriate in light of the Soto litigation and because the Turnpike is widely believed to be a major drug corridor, thereby providing the State Police with both the impetus and the opportunity to engage in drug interdiction tactics that appear to be inextricably linked to the "racial profiling" controversy. While the issues related to racial profiling and the disparate treatment of minorities are not unrelated to the other issues that are being examined by the Review Team, given the preliminary findings of the Review Team and the pendency of the appeal in State v. Soto, definitive action on the racial profiling issue should not wait for the completion of the more comprehensive review of State Police policies and practices. The purpose of this Interim Report is to spell out preliminarily the nature and scope of the racial profiling problem and — as importantly — to recommend a series of detailed, specific remedial steps to address this problem.

This Interim Report is just that — an initial statement of the problem; it is not meant to be the final word on the subject. Nor are we naive enough to think that the issuance of a report will be sufficient to solve a complex, multi-faceted problem that is not of recent vintage. Although the racial profiling issue has gained state and national attention recently, the underlying conditions that foster disparate treatment of minorities have existed for decades in New Jersey and throughout the nation and will not be changed overnight. Even so, we firmly believe that this Interim Report represents a major step, indeed a watershed event, signaling significant change. We thus expect and intend that this Report, once fully implemented through the issuance of new and comprehensive Standard Operating Procedures, a monitoring system, training, and other reforms will ensure that New Jersey is a national leader in addressing the issue of racial profiling.

We note at the outset that the great majority of state troopers are honest, dedicated professionals who are committed to enforcing the laws fairly and impartially. No information that we have reviewed contradicts this conclusion, and nothing in this Interim Report should be read as suggesting otherwise. It is regrettable and ironic that a national problem linked to stereotypes and inappropriate inferences drawn from group associations has led the State Police and its members to be typecast as racists. Any such broad-brushed attacks upon this organization or its members would be unfair and unhelpful, perpetuating an

atmosphere of mistrust and impeding the frank dialogue that must occur to restore the full confidence of minority citizens in the integrity of this agency.

Our review, which relied upon multiple sources and statistical as well as anecdotal information, has determined that the State Police has not issued or embraced an official policy to engage in racial profiling or any other discriminatory enforcement practices. To the contrary, the State Police has undertaken a number of steps to prohibit “racial profiling” and other forms of discrimination, including issuing Standard Operating Procedures banning such practices; providing in-service training programs and bulletins; requiring troopers to have a reasonable suspicion before requesting permission to search (thereby imposing a prerequisite to consent searches not required by either state or federal caselaw); issuing stern warnings concerning the falsification of records and data concerning the race of detained motorists, and explaining that such allegations would be thoroughly investigated and referred to the Division of Criminal Justice for review and prosecution; and prohibiting the patrol tactic of “spotlighting” the occupants of motor vehicles at night before deciding whether to initiate a stop.

Despite these efforts and official policies to address the issue of racial profiling, based upon the information that we reviewed, minority motorists have been treated differently than non-minority motorists during the course of traffic stops on the New Jersey Turnpike. For the reasons set out fully in this Report, we conclude that the problem of disparate treatment is real — not imagined. This

problem, as we define it, is more complex and subtle than has generally been reported.

To a great extent, conclusions concerning the nature and scope of the problem will depend upon the definitions we use. We choose to define "racial profiling" broadly to encompass 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. We have thus elected not to limit our review to a trooper's initial decision to order a vehicle to pull over. Rather, we also consider a host of other actions that may be taken by State Police members throughout the course of a traffic stop, such as ordering the driver or passengers to step out, subjecting the occupants to questions that are not directly related to the motor vehicle violation that gave rise to the stop, summoning a drug-detection canine to the scene, or requesting permission to conduct a consent search of the vehicle and its contents.

Having embraced this broad definition, we are constrained to note that there is no statistical analysis of aggregate data that can be used reliably to prove that any particular stop, frisk, arrest, or search was based in part upon a consideration of racial or ethnic characteristics, and we do not attempt in this Interim Report to adjudicate specific instances of State Police conduct. (We note, however, that certain consent-to-search data provided to us are sufficient cause for concern as to warrant a careful case-by-case review to be undertaken by the Superintendent. See Part V, Action Step. No. 7.) It is simply not possible from a



review of raw data to determine on how many occasions state troopers may have conducted "profile stops," much less to determine how often troopers may have considered a motorist's race, ethnicity, or national origin in conjunction with other factors in exercising police discretion. That is why we have interpreted the data provided to us in the context of other sources of information about State Police practices, and it is in light of this other information that we conclude that decisive steps should be taken to prevent any form of discrimination. While we look to the past to understand the nature and scope of the problem, our recommendations look to the future and are designed to establish a comprehensive, multi-faceted system to ensure that public confidence in the impartial enforcement of the laws by the State Police is restored.

While some of the statistics we reviewed are cause for concern and action, we think it necessary and fair to cite another statistic that may help to put the scope of the problem in proper perspective. Our review shows that searches are rare. In the time periods we examined, far less than 1% of all motor vehicle stops on the New Jersey Turnpike resulted in a search. To the extent that the racial profiling problem may be tied to the goal of interdicting drugs, one would logically expect that a profile-minded trooper would be strongly inclined to conduct searches, since a search is the means by which the trooper would ultimately accomplish his or her drug interdiction objective.

We are thus presented with data that suggest that minority motorists are disproportionately subject to searches (eight out of every ten consent searches

conducted by troopers assigned to the Moorestown and Cranbury stations involved minority motorists). At the same time, the overall number of searches is small when compared to the total number of stops that are made by troopers on the Turnpike.

Our review has revealed two interrelated problems that may be influenced by the goal of interdicting illicit drugs: (1) willful misconduct by a small number of State Police members, and (2) more common instances of possible de facto discrimination by officers who may be influenced by stereotypes and may thus tend to treat minority motorists differently during the course of routine traffic stops, subjecting them more routinely to investigative tactics and techniques that are designed to ferret out illicit drugs and weapons.

The effect of any form of disparate treatment, whether obvious or subtle or intentional or not, is to engender feelings of fear, resentment, hostility, and mistrust by minority citizens. (The negative effects of race-based stereotyping are more fully described in Part IV, § A, infra.) This situation is both unacceptable and preventable, and we spell out in Part V of this Report a series of remedial steps that should be taken to address the problem.

The obvious and necessary remedy to deal with those officers who intentionally violate the civil rights of minority motorists is to ensure swift discipline and criminal prosecutions, taking full advantage of New Jersey's official misconduct laws. (As noted below, we further propose remedial legislation to provide prosecutors with additional statutory tools to deal with oppressive police

misconduct. See Part V, Action Step No. 17.) To make this threat real, it is necessary to establish systems to ensure that officers who engage in purposeful misconduct are swiftly detected and brought to justice. These systems, as described more fully below, are designed to make it difficult if not impossible for an officer bent on purposely violating the law to fabricate or tamper with records, forcing any such officer to weave a tangled web of deceit that would easily be unraveled through diligent investigation and prosecution.

As to the problem occasioned by the disparate treatment of minorities based on subtle or even subconscious stereotypes, the solution lies not only in clearly and precisely explaining once and for all what conduct is prohibited, but also, as importantly, in clearly explaining in positive terms how stops are to be conducted. It is also necessary to establish and clearly announce the enforcement priorities of troopers who are assigned to highway patrol, whose overriding mission must be to protect the motoring public.

The sophisticated "early warning system" described in detail in this Interim Report bridges the gap between the two problems and can be used, where necessary, as an investigative tool to ferret out officers engaged in misconduct. This same system can also be used to remedy the problem of racial, ethnic, and national origin stereotypes and the baseless suspicions of criminal activity they may engender by allowing supervisors to quickly identify and address potential problems.

The issues and problems we address in this Report are not limited to the New Jersey State Police. This is an important fact that must not be overlooked. Allegations of racial profiling and disparate treatment have been made in a number of other jurisdictions throughout the United States. (See Part IV, § F, infra.) While we have no control over the investigations and remedial efforts undertaken in these other states, we offer the specific action steps described in this Interim Report as a guide for other state and local jurisdictions throughout the country. Certainly, we are proposing to go further than any other jurisdiction to date in facing up to this problem and in establishing systems to ensure that the laws are enforced impartially by State Police members assigned to patrol duties.

We note that some of the problems described more fully in this Interim Report will require the State Police to supervise the activities of officers on patrol more closely. Police officers necessarily exercise considerable discretion in performing their sworn duties. This is especially true in the context of highway patrol. It is beyond dispute that more vehicles are operated in violation of New Jersey's traffic laws than can possibly be stopped by police. State troopers assigned to highway patrol must therefore exercise reasoned judgment in deciding which vehicles to stop from among the universe of vehicles that are being operated in violation of the law and that are thus subject to lawful detention.

As it turns out, the legitimate criteria for selecting vehicles in these circumstances have never been clearly spelled out in written standard operating procedures or formal training curricula. Rather, the criteria used by troopers in

exercising their discretion have developed in an ad hoc fashion over the years, passed on through informal "coaching," tempered by each trooper's own experiences and enforcement priorities, and strongly influenced by an official policy to reward troopers who find major drug shipments. This situation may invite both intentional and unintentional abuse and provides a management environment that allows the use of stereotypes to go undetected.

We recognize, of course, that no written standard operating procedure can be expected to anticipate every conceivable situation that might develop in the unfolding sequence of events of a traffic stop, even a "routine" one. We certainly do not want State Police members to follow written procedures so mechanistically that they are chilled from reacting and using independent judgment as the circumstances warrant. But certainly, rules and regulations can and should prescribe in greater detail and with greater precision the steps and criteria that ought to be followed by troopers throughout the course of a routine traffic stop. While there will always be room for the exercise of reasoned discretion, troopers should be expected, required, and prepared to explain their actions during a stop.

We recognize that patrol officers, given the nature of their duties, are essentially on their own and, thus, free to pursue their own approach to law enforcement. Some troopers choose to focus more attention on enforcing motor vehicle laws, while others choose to be more aggressive in investigating suspected drug and weapons offenses.

One obvious problem with this approach is that mistakes (both tactical and legal) may not be detected and remedied, and thus can be repeated and eventually institutionalized. A trooper who conducts a motor vehicle stop in a certain way is likely to continue to do so if no one constructively criticizes that approach or provides an example of a better way to accomplish the officer's legitimate objectives. By enhancing training and by providing for closer supervision, we hope and expect to do a better job in sharing the positive experiences of State Police members throughout the Division, ensuring that "best practices" are widely institutionalized, while at the same time ensuring that inappropriate, unwise, or unsafe practices are discouraged and eliminated.

Our review has shown that over the years, conflicting messages have been sent regarding the official policy to prohibit any form of race-based profiling. This situation should be rectified by developing a clear and consistent message. We propose that as a matter of policy for the New Jersey State Police, race, ethnicity, and national origin should not be used at all by troopers in selecting vehicles to be stopped or in exercising discretion during the course of a stop (other than in determining whether a person matches the general description of one or more known suspects). In making this recommendation, we propose going beyond the minimum requirements of federal precedent because, simply, it is the right thing to do and because the Executive Branch, no less than its judicial counterpart, has an independent duty to ensure that our laws are enforced in a constitutional, efficient, and even-handed fashion. Indeed, it is the Attorney General's responsi-

bility “to ensure the uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State.” N.J.S.A. 52:17B-98. See also Eleuteri v. Richmond, 26 N.J. 506, 514-16 (1958) (“The judiciary, of course, is not the sole guardian of the Constitution. The executive branch is equally sworn to uphold it.”).

In light of our independent responsibility to set sound law enforcement policy, we need not wait for a court order before we propose those steps that we deem to be necessary and appropriate to ensure strict compliance with all constitutional rights, to enhance the professionalism of the New Jersey State Police, to restore full confidence of New Jersey’s minority communities in the integrity of the State Police, and to announce in no uncertain terms that disparate enforcement of the law is intolerable and unacceptable.

## **PART II.**

### **ANATOMY OF A TYPICAL TRAFFIC STOP.**

In order to put our findings and recommendations in context, it is appropriate at the outset to describe some of the steps that may occur during a typical traffic stop. Every stop entails a sequence of steps that require a state trooper to make a series of split-second decisions. The exact sequence of events will, of course, vary depending on the circumstances. A stop based upon an observed speeding violation, for example, is handled differently than one that is based upon an initial suspicion that the driver is under the influence of alcohol or drugs, since drunk and drugged drivers are more likely to be combative and will invariably be required to step out of their vehicles to perform certain sobriety tests. A stop that is initially based on a suspicion that a driver or a passenger has committed a crime (sometimes referred to as a "felony" or "high risk" stop) is handled very differently than a so-called "routine" traffic stop that is based upon an observed motor vehicle violation. In addition, different tactics may be used when the officer is alone, isolated, or outnumbered.

The following description by no means represents a comprehensive review of police tactics much less the law of arrest, search, and seizure, and we do not attempt in this portion of the Report to explain in detail all of the legal standards and criteria that officers must comply with. Nor do we cite to the controlling caselaw. Our purpose at this point is simply to demonstrate some of the many



decision points that can arise during a traffic stop where an officer must exercise reasoned discretion.

Under the Fourth Amendment and its state constitutional counterpart, a police officer may not order a person to halt or remain in a particular place (conduct often referred to as a “Terry” stop or an “investigative detention”) unless the officer has reasonable, articulable suspicion to believe that an offense has been or is being committed. This legal standard applies to stops of pedestrians as well as to motor vehicles.

The investigative detention serves a limited purpose: it is a brief, on-the-scene investigation that allows the officer to confirm or dispel the original suspicion of unlawful activity that justified the stop. If a police officer takes too long in conducting this investigation, the encounter escalates into an “arrest,” which would require that the officer be aware of facts constituting full “probable cause” to believe that a crime, a non-motor vehicle offense, or a drunk driving offense has been or is being committed.

The “reasonable, articulable suspicion” standard used to justify a “Terry” stop is lower than the “probable cause” standard used to justify a custodial arrest, but still is more than a mere hunch or supposition. Rather, “reasonable, articulable suspicion” means, quite literally, a suspicion of unlawful activity that is based on objective reasons that the officer can articulate. In determining the existence of reasonable suspicion and/or full probable cause, an officer may rely on all of his senses and all of the relevant information known to him — the so-

called “totality of the circumstances” — including reasonable inferences and deductions that can be drawn based upon the officer’s training and experience.

Troopers assigned to patrol duties may travel along with traffic (usually at a rate of speed greater than most travelers so that the troopers are not limited to observing the same motorists for an extended period of time), or may set up a stationary observation post to view vehicles as they pass by. Not all troop cars are equipped with radar, so that a trooper may have to follow behind or “pace” a vehicle to reliably ascertain its speed.

By far the most common reason for initiating a stop is an observed motor vehicle violation, such as speeding or weaving between lanes. Once the officer has observed a motor vehicle violation (either a moving violation or an equipment violation), and the officer decides to make a stop, he or she will activate the police vehicle’s overhead and “takedown” lights to attract the motorist’s attention and to order the driver to pull over. Once the detained vehicle has come to a complete halt, the trooper will position his or her vehicle behind it in a manner to protect the detained vehicle from being struck by other traffic.

Before exiting the troop car, the State Police member is required by Standard Operating Procedures to “call in” the stop, providing the communications center (the dispatcher) with a description of the detained vehicle and its occupants. A State Police member at this initial stage of the encounter will not allow a motorist to exit his vehicle and approach the troop car. If the driver attempts to do so, the trooper will order the driver to return to his vehicle.

Once the stop has been “called in,” the trooper will approach the detained vehicle, usually on the driver’s side, but occasionally from the passenger’s side depending upon traffic conditions. (If the trooper is riding with a partner, which typically only occurs during nighttime patrols, the partner will position himself on the passenger side of the detained vehicle to provide support and monitor closely the activities of any vehicle occupant(s).)

Troopers are trained always to approach detained vehicles with caution. The trooper will often ask the motorist to shut off the ignition and may ask the driver and other occupants to keep their hands in view (i.e., e.g., on the steering wheel) for the officer’s safety.

The trooper will request the driver to provide credentials: a driver’s license, vehicle registration, and (with respect to New Jersey-registered vehicle) proof that the vehicle is insured. Information is then provided by radio to the communications center to run a motor vehicle “lookup” to determine whether the driver’s license has been revoked or suspended, whether the vehicle is properly registered, and whether the vehicle has been reported stolen.

State Police members, as with all law enforcement officers, are trained to be alert and vigilant at all times during the encounter, looking into the passenger cabin, watching for suspicious movements, and being alert to whether the driver or any occupants demonstrate extreme, unusual nervousness. The trooper will be watchful for any weapons or contraband that are exposed and out in “plain view” and will smell for any attempt to mask the odor of illicit drugs.

The officer may ask a series of polite questions of the driver and/or the occupant(s), inquiring as to where they are traveling from and as to their final destination. The officer in asking these "routine" questions will be looking for discrepancies or anomalies that suggest that the occupants are lying, which might, in turn, suggest ongoing criminal activity. More importantly, the officer will be trying to determine whether the driver is incoherent, which might suggest that he is under the influence of alcohol or some other intoxicating substance.

The trooper may order the driver to step out of the vehicle. (This will always be done if there is reason to believe that the driver is intoxicated.) This may also be done for the officer's safety, so that the officer may closely monitor the movements of the driver. In addition, the officer may wish to separate the driver from any other occupant(s) so that when he asks questions about their identity or travel itinerary, he can identify anomalies or discrepancies. (It should be noted that under New Jersey law, a police officer is not permitted to order the passengers of a vehicle to step out unless he is aware of "articulable facts warranting heightened caution.")

A police officer during a routine traffic stop is not permitted to conduct a "frisk" or "protective patdown" automatically or routinely as a matter of course; rather, the officer must first have reasonable, articulable suspicion to believe that the person to be frisked may be carrying a weapon. This standard requires more than an inarticulate "hunch" or supposition. Rather, a trooper must be prepared to point to specific facts and the reasonable inferences that can be drawn from

those known facts to support the suspicion that this particular individual may be carrying a concealed weapon.

The frisk constitutes a limited manual patdown of the person's outer clothing solely for weapons. If this patting down reveals the presence of an object that reasonably could be a weapon, the officer would then be authorized to reach into the garment to remove the object. If, in contrast, the patdown of the outer clothing does not reveal an object that reasonably could be a weapon, the frisk is concluded, and the officer would not be authorized to reach into the person's clothing. (To do so at this point would constitute a full-blown "search" and would invoke the higher "probable cause" standard.) If the officer has reasonable suspicion to conduct a frisk of a person, he would also be allowed to order all occupants out and conduct a limited "frisk" of the passenger compartment. This cursory inspection must be limited to looking for weapons.

If at any point during the course of the stop the officer observes (or smells) an item that he immediately recognizes to be contraband or evidence of a crime, this item would be said to be in "plain view," and the officer would at that point have probable cause to make an arrest. If a trooper suspects that a vehicle may be concealing drugs but does not yet have full probable cause, and the driver or other person(s) refuses to give consent, the trooper may summon a drug-detection canine to the scene to attempt to confirm or dispel the suspicion of drug trafficking. The act of "sniffing" the exterior of a vehicle has been held by state and federal courts to be "minimally intrusive" and thus not a "search" under

Fourth Amendment, since the dog can only react to illicit drugs and cannot reveal anything private about the vehicle or its contents. Any such canine unit must be dispatched quickly, however. If the traffic stop takes too long, the courts will deem the encounter to be an arrest and, at that moment, the lawfulness of the continued detention will depend on whether the officer has full probable cause. The positive alert by a drug-detection canine after this point in time cannot be used to justify the protracted detention; rather, the dog's alert and any resultant discovery of drugs would be subject to the exclusionary rule as a so-called "fruit" of the unlawfully protracted "Terry" stop.

A "search," which involves a peeking, poking, or prying, represents a greater intrusion on Fourth Amendment privacy rights. As a general proposition, the police officer is not permitted to conduct a full search (as opposed to the above-described limited "frisk" for weapons) without first obtaining a warrant. There are, however, several recognized exceptions to the warrant requirement.

For example, once an officer has made a lawful arrest, he is entitled to conduct a contemporaneous search of the person who was arrested and the area within that person's "wingspan." Where the arrestee was the driver or passenger in an automobile, this wingspan is generally defined to include the entire passenger compartment of the vehicle (but not the trunk), including any closed containers in the passenger cabin that can be opened without causing damage to them. (Under New Jersey law, if the arrest is based solely on a mere motor vehicle violation rather than a criminal offense, this bright-line rule does not automati-

cally apply, and the scope of the “search incident to the arrest” would be limited to the person’s actual wingspan at the time of the arrest.)

A separate and distinct exception to the warrant requirement arises where the officer has probable cause to believe that the vehicle contains evidence of a crime, and there was no prior opportunity to have obtained a warrant. These probable cause searches under the so-called “automobile exception” are not limited to the passenger compartment, and can extend throughout the vehicle to any place or container where there is probable cause to believe that the sought-after evidence might be concealed.

A police officer is also authorized to request permission to search from any person who has the “apparent authority” over the vehicle or any container in the vehicle. A “consent search” entails a waiver of Fourth Amendment rights, which must be done knowingly and voluntarily. Under New Jersey law, this means that the person giving consent to search must be expressly aware of the right to refuse to give permission.

Under state and federal law, police officers are always authorized to ask for permission to search, and they need not have probable cause or even a mere reasonable suspicion to believe that the search would reveal evidence of a crime. (Note that if the officer has full probable cause to believe that a search would reveal evidence, he need not rely on the consent doctrine at all and could proceed to conduct the search, even over a motorist’s objection, pursuant to the “automobile exception” to the warrant requirement.) However, state troopers are

subject to a State Police Standard Operating Procedure that precludes an officer from requesting permission to search unless the trooper has reasonable suspicion to believe that the search would reveal evidence of a crime.

Standard Operating Procedures for the State Police further require that troopers use an approved Request to Search form, which must be read and signed by the person granting consent before the consent search is conducted. This form clearly spells out the person's right to refuse to give permission to search.

The scope of a consent search is limited to the scope of the permission that was given. Furthermore, the person giving consent has the right to be present during the execution of the search and has the absolute right to withdraw consent without giving any reason. If permission to search is withdrawn, the officer must immediately stop searching, unless he has already discovered evidence of a crime that would provide probable cause to believe that additional evidence is concealed in the vehicle. In that event, the officer may continue to search, although the justification would no longer be under the consent doctrine, but rather under the "automobile exception."

Ordinarily, the driver of a vehicle is deemed to have the "apparent authority" to consent to search the entire vehicle, including all of its contents. If, however, a passenger asserts ownership over a given object (or the driver or other person granting consent denies ownership of a given object), then the officer would not be authorized to open and inspect that object unless its owner gives a separate, written consent.



As it turns out, searches are only rarely conducted. Most traffic stops are concluded by the officer issuing an oral or written warning or a traffic summons. If the trooper develops probable cause to arrest, the arrested person will be taken into custody, will be handcuffed and transported to the nearest State Police station.

When a person is arrested or any evidence is seized, the trooper will prepare an investigation report. In all other cases, the trooper will keep a copy of any written warning or summons that was issued and will record the nature and results of the stop on his patrol log.

### **PART III.**

## **FINDINGS AND INTERPRETATIONS.**

#### **A. *Sources of Information.***

As part of our review of allegations of racial profiling, the Review Team sought production of records from the State Police concerning traffic stops on the New Jersey Turnpike, including analyses, compilations, and internal audits of the racial characteristics of stopped motorists. In mid-March, the Review Team began to receive documents from the State Police pertaining to audits, compilations of data, and analyses of data about the racial characteristics of detained motorists, some of which had not previously been provided to the Office of the Attorney General or the Division of Criminal Justice.

In particular, as outlined more fully below in § B, we received compilations of statistics from the Moorestown and Cranbury stations that track the racial breakdown of stops from April 1997 through November 1998. The State Police also produced compilations describing the racial breakdown of consent searches conducted by troopers assigned to the Moorestown and Cranbury barracks at various times between 1994 through 1998. The consent search information shows that minority motorists were much more likely to be searched than non-minority motorists. (Eight out of every ten consent searches conducted by troopers assigned to these stations involved minority motorists.)

We note that data are only currently available concerning stops, arrests, and searches (both “consent” searches and “probable cause” searches). As noted

throughout this Report, there are a number of other actions or steps that may occur during the course of a motor vehicle stop that involve the exercise of police discretion, such as ordering drivers or passengers out of detained vehicles and conducting routine questioning concerning the motorists' itinerary. The sophisticated "early warning system" established pursuant to our recommendations will in the future allow the State Police hierarchy and the Office of the Attorney General to monitor these kinds of discretionary actions.

Our review does not take place in a historical vacuum. We have examined the information developed during the course of the Soto litigation, as well as allegations of racial profiling and selective enforcement made by members of the public; complaints by state troopers who claim that they were "coached" on the road to use racial profiles; information developed in conjunction with internal affairs and criminal investigations, including the investigation of the shooting incident near Exit 7A of the Turnpike in April 1998; anecdotal information gleaned from interviews of State Police members; and a variety of statistical information obtained by the Review Team from the State Police, as well as data extracted from the Computerized Criminal History (CCH) System.

Certain circumstances that have been reported to us may shed some additional light on the raw numbers. We have, for example, considered complaints received from the public alleging racial profiling and complaining of instances where State Police members subjected minority motorists to the humiliation of criminal suspicion. We also considered reports that some troopers

positioned their vehicles perpendicular to the roadway at night to “spotlight” the occupants of moving vehicles. We cannot in this Report adjudicate specific, individual cases. Suffice it to say that this latter practice (which renders radar guns less effective or useless) would seem to support the suspicion that these officers had taken race and ethnicity into account. We note that the State Police have already issued a policy prohibiting this practice, and this policy must be reaffirmed and strictly enforced.

We are especially disturbed by the fact that some troopers falsified data concerning the race of the occupants of stopped vehicles. While we expect that these incidents are rare, such conduct can only serve to fuel the argument by some that the data are flawed. For this reason, we propose a system that could cross-check multiple sources of information as part of a comprehensive program to restore full public confidence in the integrity of the State Police.

***B. Stop, Arrest, and Search Data.***

***Stops.*** We have received and compiled information regarding stops by troopers assigned to the Moorestown and Cranbury stations from the monthly stop data collected and forwarded by the Division of State Police. The data reported in Table 1 include 19 of the 20 months from April 1997 through November 1998. Information pertaining to stops made in February 1998 is not available.

Table 1.

*Motor Vehicle Stops by Cranbury and Moorestown Stations  
April 1997 through November 1998<sup>1</sup>*

Station	Percent					Total Number
	White	Black	Hispanic	Asian	Other	
Cranbury	60.3	24.6	8.2	3.9	3.0	36,645
Moorestown	58.8	28.7	5.9	3.9	2.7	50,844
Total	59.4	27.0	6.9	3.9	2.8	87,489

As is evident from Table 1, there is little difference between Cranbury and Moorestown in terms of the racial composition of individuals stopped on the Turnpike. Four of every ten stops (40.6%) made during the period for which data are available involved black, Hispanic, Asian or other non-white people. More specifically, 59.4% of these stops involved whites, slightly more than one of every four (27.0%) stops involved a black person, 6.9% involved a Hispanic individual, 3.9% involved Asians, and 2.8% were identified as other.

**Searches.** It is obvious from the data provided that very few stops result in the search of a motor vehicle. For example, in those instances for which we have data permitting comparisons between stops and searches, only 627 (0.7%) of 87,489 stops involved a search.

Table 2 aggregates all the information compiled about searches and includes selected months in 1994, all months in 1996 except February, and every month from April 1997 to February 1999.

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<sup>1</sup> Data for February 1998 are missing.

Table 2.

*Searches Conducted by Cranbury and Moorestown Stations  
Various Time Periods<sup>2</sup>*

Station	Percent					Total Number
	White	Black	Hispanic	Asian	Other/ Unknown	
Cranbury	24.8	52.4	21.4	0.6	0.8	500
Moorestown	18.9	53.7	26.1	0.7	0.6	693
Total	21.4	53.1	24.1	0.7	0.7	1,193

As is evident from this table, the available data indicate that the overwhelming majority of searches (77.2%) involved black or Hispanic persons.<sup>3</sup> Specifically, of the 1,193 searches for which data are available, 21.4% involved a white person, more than half (53.1%) involved a black person, and almost one of every four (24.1%) involved a Hispanic person.

In addition, general information about searches conducted on 30 randomly-selected sample dates were analyzed. According to this internal State Police audit, a total of 38 searches were conducted by the Cranbury and Moorestown stations during these 30 dates, 15 in 1995 and 15 in 1996. Of these, 31 (81.6%) involved minority persons. More specifically, 20 (52.6%) of these 38 searches involved black persons.

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<sup>2</sup> Includes Cranbury searches from January 1994 through March 1994, January 1996, March 1996 through December 1996, April 1997 through February 1999 and Moorestown searches from January 1994 through April 1994, December 1994, January 1996, March 1996 through December 1996 and April 1997 through February 1999.

<sup>3</sup>We have recently received from State Police preliminary tabulations from a more complete data set of Turnpike consent searches for the years 1997 and 1998. Analysis to date is incomplete with respect to the identification of Hispanic ethnicity among those in the data set. The analyses completed to date are, however, generally consistent with those reported in this section.

Not surprisingly, most consent searches do not result in a “positive” finding. (Recall that the standard required of state troopers to request permission to search is “reasonable, articulable suspicion,” which is a lower threshold than the “probable cause” standard required to conduct a nonconsensual search under the so-called “automobile exception” to the warrant requirement. It bears repeating that the reasonable suspicion threshold was imposed by State Police Standard Operating Procedures. Under state and federal caselaw, a police officer need not have any suspicion at all before asking a motorist to waive Fourth Amendment rights.)

Specifically, 19.2% of the searches we considered<sup>4</sup> resulted in an arrest or seizure of contraband. Accounting for race and ethnicity, 10.5% of the searches that involved white motorists resulted in an arrest or seizure of contraband, 13.5% of the searches that involved black motorists resulted in an arrest or seizure, and 38.1% of the searches of Hispanic motorists resulted in an arrest or seizure.

**Arrests.** We have in this report relied upon arrest information extracted from the Computerized Criminal History (CCH) database for the period of

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<sup>4</sup>We note that the sample size relied upon in determining this proportion of “positive” finds is too small to permit general conclusions to be drawn. Specifically, our analysis was limited to information gleaned from an internal State Police audit of 39 searches conducted by troopers assigned to the Moorestown and Cranbury barracks in May 1997 and 39 searches conducted by troopers assigned to these stations in various dates in 1995 and 1996.

We have recently received from the State Police preliminary tabulations from a more complete set of Turnpike consent searches in 1997 and 1998. Analysis to date is incomplete with respect to the identification of Hispanic ethnicity among those in the data set. The analyses completed to date by the State Police nonetheless suggest that a higher proportion of all consent searches resulted in an arrest than is reflected in the information previously provided to us. According to this latest information, of a total of 463 consent searches conducted by troopers assigned to the Turnpike in 1997, 150 (32%) resulted in an arrest. In 1998, this data set shows that 530 consent searches were conducted on the Turnpike of which 155 (29%) resulted in an arrest. We note, finally, that this “find” rate does not account for the seriousness of the charge that resulted from the search or the type, quantity, or value of drugs or other contraband or evidence seized as a result of these “positive” consent searches. Further analysis of the effectiveness of the use of consent searches on the Turnpike will be conducted as part of the development and implementation of a revised statewide drug enforcement strategy as recommended in Part V, Action Step No. 1.

January 1, 1996 through December 31, 1998 for arrests made by State Police officers assigned to the three stations that comprise Troop "D" (Turnpike), that is, Newark, Cranbury and Moorestown stations. We note that the CCH system only includes arrests that are verified by fingerprints, and these tend to involve more serious offenses. The CCH database thus generally excludes arrests for drunk driving, but would include all drug-related arrests. Table 3 contains information about arrests made during this three-year time period by each of the three State Police stations responsible for patrolling the New Jersey Turnpike.

Table 3.

*Arrests by Cranbury, Moorestown and Newark Stations  
1996 through 1998*

Station	Percent			Total Number
	White	Black	Other	
Cranbury	29.4	67.0	3.6	779
Moorestown	34.1	61.4	4.5	883
Newark	33.3	58.6	8.2	1,209
Total	32.5	61.7	5.8	2,871

Our review finds that during the three-year period we examined, there were a total of 2,871 arrests. Of these, 932 (32.5%) involved white persons, 1,772 (61.7%) involved black persons, and 167 (5.8%) involved persons of other races.



***C. Interpretations of the Data and Areas of Special Concern.***

***1. Disproportionate Use of the Consent-to-Search Doctrine.***

The data presented to us show that minority motorists were disproportionately subject to consent searches. Information concerning consent searches is particularly instructive in an examination of possible discriminatory practices since, by definition, the decision to request permission to conduct a search is a discretionary one. The only information available to us relates to consent searches that were actually executed, that is, instances where permission to search was granted. No data is available with respect to requests for permission to search that were denied. (The “early warning system” and recordkeeping protocols recommended in Part V of this Interim Report would require that this kind of information be documented for future analysis.)

While the Soto litigation and media attention has focused most intently on the initial decision by state troopers to stop vehicles, as noted throughout this Report, we embrace the notion that police officers may not rely upon inappropriate criteria in making any discretionary decision during the course of a “Terry” stop, including the decision to ask a motorist to knowingly and voluntarily waive Fourth Amendment rights by consenting to a search.

We have concluded, based upon our preliminary review of the allegations and information developed in a number of internal affairs investigations, as well as anecdotal accounts from interviews with state troopers, that race and ethnicity

may have influenced the exercise of discretion by some officers during the course of some traffic stops.

Given the concerns engendered by this data, and because these aggregate data cannot show whether these searches were conducted properly or were based upon racial or ethnic criteria, we propose that a case-by-case review be conducted of every consent search conducted on the Turnpike in 1997 and 1998 to determine whether these searches were predicated upon a reasonable, articulable suspicion that the search would reveal evidence of a crime (as required by State Police Standard Operating Procedures) and that all required procedures were complied with. See Part V, Action Step No. 7. This exhaustive review is necessary to restore public confidence in the manner in which consent searches are conducted.

## ***2. Missing Data About Racial Characteristics of Detained Motorists.***

In past years, information concerning the racial characteristics of detained motorists was sometimes not provided to dispatchers or recorded in accordance with State Police Operating Procedure F-3. To a large extent, this problem has already been rectified. In March 1996, the Superintendent issued a teletype ordering compliance with Standard Operating Procedure F-3, and in April 1996, State Police members were required to read and initial a memorandum concerning the enforcement of this Standard Operating Procedure. Although decisive steps have already been taken to address the missing data problem, and it appears that these steps have caused the situation to improve markedly, we note that in an era

characterized by mistrust, the State Police must be certain to hold troopers, supervisors, and dispatchers accountable for compiling all information that will become part of the database for the proposed "early warning system."

### 3. *Lack of Automation.*

The existing manual system for recording information about stops not only allowed some officers to fail to record all required bits of information, but also made it possible for some troopers to deliberately falsify information. This situation not only affects the validity of the data but, more importantly, undermines the credibility of the entire organization. (We note that deliberate falsification of records is a criminal offense that will be investigated and prosecuted to the full extent of the law.)

The manual system for keeping records and compiling statistics is cumbersome and inefficient, making it difficult for supervisors throughout the chain-of-command to monitor the activities of officers assigned to patrol. This lack of automation must be rectified through the establishment of a computerized system that will become the cornerstone of the "early warning system" described in Part V of this Report. We note that the State Police has already begun to implement a Computer-Aided Dispatch/Records Management System (CAD/RMS) that will eventually be able to capture much of the information necessary to implement the "early warning system."

#### **4. *Correlation of Discretion and Likelihood of Stopping Minority Motorists.***

Information and analysis compiled by the Public Defender's Office during the course of the Soto litigation and relied upon by Judge Francis suggests that troopers who enjoyed a wider ambit of discretion, by virtue of the nature of their duty assignment, stopped and ticketed minority motorists more often. Specifically, the Public Defender's statistical expert compared the tickets issued on 35 randomly-selected days by three different State Police units: (1) the Radar Unit, which uses radar-equipped vans and chase cars and exercises comparatively little discretion; (2) the Tactical Patrol Unit, which focuses on motor vehicle enforcement in particular areas and exercises somewhat greater discretion; and, (3) the Patrol Unit, which is responsible for general law enforcement and exercises the most discretion. Between Exits 1 and 7A of the Turnpike, the Radar Unit was found to have issued 18% of its tickets to African-Americans, the Tactical Patrol Unit issued 23.8% of its tickets to African-Americans, and the Patrol Unit issued 34.2% of its tickets to African-Americans.

Tickets issued south of Exit 3 yielded similar results: the Radar Unit issued 19.4% of its tickets to African-Americans, the Tactical Patrol Unit issued none of its tickets to African-Americans, and the Patrol Unit issued 43.8% of its tickets to African-Americans.

We are concerned by what may be a pattern that when state troopers are permitted more discretion by virtue of their duty assignment, they tended during the time periods examined to ticket African-Americans more often. This analysis

is consistent with the notion that officers who had more time to devote to drug interdiction may have been more likely to rely upon racial or ethnic stereotypes than officers whose principal or overriding concern was to enforce specific motor vehicle violations or to respond to calls for service. This phenomenon highlights the need to find appropriate means to channel officer discretion to ensure that minority and non-minority motorists are treated in an even-handed fashion.

#### **5.     *Significance of Stop Statistics.***

The data we reviewed concerning the proportion of minority motorists who were stopped on the Turnpike are consistent with the data developed during the course of the Soto litigation. There is no way to interpret the significance of this data, however, in the absence of a reliable study of the racial and ethnic characteristics of the persons who travel on the Turnpike to serve as a “benchmark.” Any such survey must account for the time of day, day of week, and exact portion of the Turnpike at issue. For this reason, we propose in Part V to undertake a Turnpike population survey in consultation with the Civil Rights Division of the United States Department of Justice. This survey and the resultant benchmark it provides will become a key component of the automated “early warning system” that will be used to quickly identify potential problems that warrant the attention of supervisors throughout the State Police chain of command.

6. *Significance of Arrest Statistics.*

There has been much confusion concerning the implications of the arrest data, which appears to be comparable to the highway arrest statistics compiled by other states along the I-95 corridor. Viewed in artificial isolation, arrest rates cannot provide conclusive proof of racial profiling or discriminatory practices. Nor are they evidence, as has been suggested by some, that minority citizens are more likely than whites to be engaged in criminal activity.

Specifically, it has been argued that the fact that the vast majority of stops that produced arrests also led to convictions somehow demonstrates that State Police did not engage in selective enforcement on the theory that these arrest figures are not “disproportionate,” but rather accurately reflect the extent to which these motorists were engaged in criminal activity. This argument is untenable for many of the reasons spelled out more fully in Part IV, § G (demonstrating the circular, tautological nature of using proactive arrest numbers to determine crime trends).

For one thing, it is a well-settled principle of law that an unlawful search is not made good by what it fortuitously turns up. Thus, a defendant’s factual guilt (as evidenced by his subsequent conviction on the charges stemming from the arrest) is legally irrelevant to the question whether the arresting officer had inappropriately relied upon race, ethnicity, or national origin in initiating the stop or in conducting the investigation that resulted in the arrest (unless, of course,

this specific issue was raised in the case, and a court found after a fact-sensitive hearing that the officer had not engaged in such practices).

More fundamentally, arrest and conviction rates do not address the critical issue at hand, that is, whether State Police members targeted minorities, using more aggressive investigative tactics that could be expected to lead to a higher percentage of “hits.” Needless to say, if an officer is not looking for drugs, he or she is less likely to find them. The fact that the arrest rates for whites was comparatively low does not mean that white motorists are less likely to be transporting drugs, but rather that they were less likely to be suspected of being drug traffickers in the first place and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search.

***7. Significance of the Proportion of Searches That Result in an Arrest or Seizure.***

As noted above, most of the consent searches that we considered did not result in a “positive” finding, meaning that they failed to reveal evidence of a crime. (See footnote 4 and accompanying text, supra.) Furthermore, the positive find rate revealed in the data provided to us is somewhat misleading, since a positive result is recorded if the search led to any arrest or seizure of contraband without considering the seriousness of the charge or the type, quantity, or value of contraband that was discovered. Based upon anecdotal reports, most arrests

are for less serious offenses, and “major” seizures of significant drug shipments are correspondingly rare.

In the circumstances, we propose that as part of an updated statewide drug enforcement strategy, a study be undertaken to determine the effectiveness of this Turnpike drug-interdiction tactic to determine whether and to what extent the use of the consent-to-search doctrine during the course of routine traffic stops on the Turnpike represents an appropriate and efficient allocation of State Police patrol resources.

***D. Conditions That Foster Disparate Treatment.***

One need not be a racist to violate the Equal Protection Clause. See State v. Patterson, 270 N.J. Super. 550, 559 (Law Div. 1993) (where the court found that the police officer who devised an unconstitutional racial profile was “clearly not a racist”). In his keynote address at the Law Enforcement Summit convened by Attorney General Verniero in December 1998, Charles H. Ramsey, Chief of the Washington D.C. Metropolitan Police Department, noted:

I do not think that bald-faced bigotry and discrimination are the primary problems we face. The issues affecting police-community race relations today are more subtle, more complex and, in some ways, more difficult to address. Weeding out blatant racism in policing was relatively easy, compared with the more elusive and intricate issues we face today.

[ “*Overcoming Fear, Building Partnerships: Toward a New Paradigm in Police-Community Race Relations*,” presentation by Washington D.C. Metropolitan Police Chief Charles H. Ramsey, Law Enforcement Summit, East Rutherford, New Jersey, December 11, 1998.]



Harvard Law School Professor Randall Kennedy makes a similar point and coined the phrase “good faith discrimination” to describe the use of racial characteristics in crime trend analysis that is geared toward identifying the “risk factors” of criminality. *“Race, the Police, and ‘Reasonable Suspicion’,”* presentation by Randall Kennedy, Harvard Law School, February 3, 1998. We think this is an insightful characterization. Many if not most of the problems and concerns we address in this Report will require that the State Police take a new look at the issue of racial profiling precisely because honest, non-bigoted officers throughout the ranks of the State Police could scarcely believe that they were engaged in or tolerated any form of discrimination.

The potential for the disparate treatment of minorities during routine traffic stops may be the product of an accumulation of circumstances that can contribute to the use of race or ethnicity-based criteria by creating the unintended message that the best way to catch drug traffickers is to focus on minorities. To some extent, the State Police as an organization may have been caught up in the martial rhetoric of the “war on drugs,” responding to the call to arms urged by the public, the Legislature, and the Attorney General’s Statewide Narcotics Action Plans of 1987 and 1993.

We are satisfied that the State Police does not embrace an official policy to engage in racial profiling or any other form of intentional disparate treatment of minority motorists. To the contrary, the officially-stated policy has always been to condemn reliance upon constitutionally-impermissible factors. The message in

these official policies, however, was not always clear and may have been undermined by other messages in both official and unofficial policies. What really matters, ultimately, is how official policies are interpreted and translated into actual practices in the barracks across the state and out on the road.

As noted throughout this Report, the major problem we have found (putting aside the intentional misconduct of some troopers) is that some State Police members may have relied on stereotypes in exercising their discretion. These de facto discriminatory practices may have been unwittingly reinforced by a series of circumstances and messages that acted cumulatively and synergistically to bolster the notion that African-Americans and Hispanics are more likely than Caucasians to be transporting illicit drugs or weapons. These circumstances include:

- (1) ambiguities and misunderstandings about the law (see Part IV, § B, supra);
- (2) ambiguities, imprecision, and omissions in Standard Operating Procedures;
- (3) conflicting, subtle messages in otherwise bona fide drug interdiction and gang-recognition training programs;
- (4) the tautological use of statistics to tacitly validate pre-existing stereotypes (see Part IV, § G, supra);
- (5) formal and informal reward systems that encouraged troopers to be aggressive in searching for illicit drugs, thereby providing practical incentives to act upon these stereotypes;
- (6) the inherent difficulties in supervising the day-to-day activities of troopers assigned to highway patrol; and,

- (7) the procedures used to identify and remediate problems and to investigate allegations of disparate treatment.

The State Police official policy prohibiting racial profiling was announced in a 1990 Standard Operating Procedure. Ironically, the problem of the reliance upon stereotypes may have unwittingly been exacerbated by the issuance of this State Police Standard Operating Procedure, even though the policy statement was actually designed to prohibit racial profiling by explaining to State Police members the limitations imposed on them by the Fourth Amendment and its state constitutional counterpart.

Specifically, the 1990 Standard Operating Procedure included a discussion of the “sufficiency of objective facts to establish reasonable suspicion or probable cause,” explaining that:

Physical and personal characteristics such as race, age, sex, length of hair, style of dress, type of vehicle, and number of occupants of a vehicle may not be utilized as facts relevant to establish reasonable suspicion or probable cause unless the [State Police] member can identify and describe the manner in which a characteristic is directly and specifically related to particular criminal activity.  
(Emphasis supplied.)

It seems curious to address the sensitive issue of race in the same breath and under the same legal standard as decidedly less suspect factors such as the “number of occupants of a vehicle.” (The latter factor would seem always to be a legitimate criterion to be considered in the exercise of police discretion on the theory that more people would be at risk of injury by virtue of the dangers inherent in a given motor vehicle violation. This factor would also be relevant

during the course of the stop in terms of appropriate tactics and self-protective steps that troopers should employ when they are outnumbered.)

More importantly, the above-quoted portion of the Standard Operating Procedure, read literally, suggests that a person's race may be relied upon by a State Police member if he or she is able to identify and describe the manner in which race is directly and specifically related to a particular criminal activity. This exception has the very real capacity to swallow the rule, and opens the door (or at least fails to shut the door) to the use of stereotypes, especially those that have been "validated" by tautological and self-serving intelligence reports and profiles. (See discussion in Part IV, § G, supra.)

With respect to training programs, no one can seriously question the right, indeed the obligation, of the State Police to alert troopers to the existence and activities of criminal organizations that they might encounter. It is both necessary and appropriate for troopers to be exposed to training videos, seminars, and bulletins that describe the methods of operation of these criminal organizations, and these programs properly discussed certain objective indicia of criminal activity, such as, for example, the typical locations of hidden compartments used to transport drugs and drug-related cash, as well as certain facially innocent (and race-neutral) circumstances that were determined to be correlated to criminal activity. Such factors include the common use by drug couriers of a single key in the ignition and the presence of certain kinds of debris in the passenger cabin

suggesting that the occupants had spent several days in the vehicle and were unwilling to leave it unattended for fear that a cache of drugs would be stolen.

The problem, however, is that in providing this kind of training, inadequate attention may have been paid to the possibility that subtle messages in these lectures and videos would reinforce preexisting stereotypes by, for example, focusing mostly on criminal groups that happen to be comprised of minority citizens or foreign nationals. These kinds of messages may have been further reinforced by statistics compiled by State Police and disseminated to troopers in seminars and bulletins. The very fact that information concerning the racial characteristics of drug traffickers was provided to troopers assigned to patrol duties could have suggested that such characteristics are a legitimate, relevant factor to be taken into account or "kept in mind" in exercising police discretion during a traffic stop.

The State Police reward system, meanwhile, gave practical impetus to the use of these inappropriate stereotypes about drug dealers. As noted throughout this Report, a police officer need not be a racist to violate the Fourteenth Amendment right to equal protection of the laws. Indeed, evidence has surfaced that minority troopers may also have been caught up in a system that rewards officers based on the quantity of drugs that they have discovered during routine traffic stops. (An internal audit of State Police motor vehicle stops recorded on the Moorestown Station radio logs between May 1, 1996 and July 31, 1996 shows that 34.3% of the 3,524 stops that were conducted by non-minority troopers involved

minority motorists. An essentially identical proportion (33.3%) of the 1,751 total stops that were conducted by minority troopers involved minority motorists.)

The typical trooper is an intelligent, rational, ambitious, and career-oriented professional who responds to the prospect of rewards and promotions as much as to the threat of discipline and punishment. The system of organizational rewards, by definition and design, exerts a powerful influence on officer performance and enforcement priorities. The State Police therefore need to carefully examine their system for awarding promotions and favored duty assignments, and we expect that this will be one of the significant issues to be addressed in detail in future reports of the Review Team.

It is nonetheless important for us to note in this Report that the perception persisted throughout the ranks of the State Police members assigned to the Turnpike that one of the best ways to gain distinction is to be aggressive in interdicting drugs. This point is best illustrated by the "Trooper of the Year" Award. It was widely believed that this singular honor was reserved for the trooper who made the most drug arrests and the largest drug seizures. This award sent a clear and strong message to the rank and file, reinforcing the notion that more common rewards and promotions would be provided to troopers who proved to be particularly adept at ferreting out illicit drugs. We submit that an equally forceful message could be sent by bestowing the "Trooper of the Year" Award on an officer who distinguishes him or herself by performing beyond the call of duty in the service of private citizens or a fellow officers in need.

The State Police system for imposing discipline also exerts substantial influence on officer performance by ensuring that rules, regulations, and Standard Operating Procedures are adhered to. We only note in this Interim Report that the entire internal affairs system is being carefully examined by the Review Team and that our findings and recommendations for improving the manner in which the State Police conducts internal affairs investigations will be the subject of a forthcoming report.

## **PART IV.**

### **LAW AND POLICY ON “RACIAL PROFILING” AND THE DISPARATE TREATMENT OF MINORITIES.**

#### ***A. The Negative Effects of Stereotyping on Minority Communities.***

We conclude that racial or ethnic stereotypes are in every meaningful sense a form of prejudice — literally, prejudging criminal behavior not based on an objective assessment of a suspect’s observed conduct (the known methods of operation or “modus operandi” of drug traffickers or other criminals), but rather on physical traits and characteristics that a person cannot change or control. In a society where the instructions of law enforcement officers must be followed, we must in turn require the highest degree of professionalism and absence of de facto as well as de jure prejudice in the men and women who wield the police power.

In State v. Kennedy, 247 N.J. Super. 21 (App. Div. 1991), the court observed that “[w]e live with the legacy of a racist past ... . Perhaps today that discrimination takes a form more subtle than before, but it is not less real or pernicious.” 247 N.J. Super. at 30. At the recent Law Enforcement Summit convened by Attorney General Verniero to discuss race relations between police and the communities they serve, keynote speaker Charles H. Ramsey, Chief of the



Washington D.C. Metropolitan Police Department, summarized the historical significance of race relations in America, observing:

It is an issue that, in many ways, has defined us, divided us, and perplexed us since the very beginning of our nation. The influence of race has been particularly acute in policing — indeed, in the entire criminal justice system... . Despite tremendous gains throughout this century in civil rights, voting rights, fair employment and housing, sizeable percentages of Americans today — especially Americans of color — still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day-to-day application. And despite tremendous reforms in policing itself — with more women and minorities in our ranks and more attention paid to cultural awareness and sensitivity — race continues to loom large over much of what we do — from everyday traffic stops, to drug enforcement and interdiction efforts, to long-term criminal investigations. And the importance of race relations will only grow in significance, as our society continues to grow and become more diverse.

[*"Overcoming Fear, Building Partnerships: Toward a New Paradigm in Police-Community Race Relations,"* presentation by Charles H. Ramsey, Attorney General's Law Enforcement Summit, East Rutherford, New Jersey, December 11, 1998.]

Racial profiling and other forms of disparate treatment of minorities at the hands of government actors has had a devastating effect on African-Americans and other persons of color because such treatment reminds them of the continuing discrimination that they face by virtue of their race or ethnicity. Racial profiling leads African-Americans and other persons of color to live with the threat of detention simply because of their heritage. Over the long term, the situation leaves persons of color with a sense of powerlessness, hostility, and anger.

As Harvard Law School Professor Randall Kennedy recently noted, "nothing contributes more to these poisonous feelings than a knowledge that, as a matter

of policy in many circumstances, the police view black or brown skin as a mark or signal that someone is suspicious." *"Race, the Police, and 'Reasonable Suspicion',"* presentation by Randall Kennedy, Harvard Law School, February 3, 1998. Notably, disparate treatment of minorities at the hands of our criminal justice system reinforces a sense of mistrust. It leaves minority citizens less willing to serve as jurors, less likely to report crime, and less appreciative of the efforts of the vast majority of law enforcement officers who serve the public with honesty and integrity.

It is especially instructive that a nationwide organization of African-American police officers, N.O.B.L.E. (National Organization of Black Law Enforcement Executives), has deemed it necessary to develop and disseminate training materials for young men of color, explaining how minority citizens should act during the course of routine traffic stops as a means of assuaging potentially volatile situations that could lead to an escalation of violence. In essence, these officers are warning young citizens of color that they should expect to be singled-out and subjected to greater scrutiny by police. While these public awareness and education efforts have gained widespread attention only recently as part of the national debate on racial profiling, the dangers to young men of color that N.O.B.L.E. refers to are not new. In 1987, journalist Don Wycliff explained that "a dangerous, humiliating, sometimes-fatal encounter with the police is almost a rite of passage for a black man in the United States." Wycliff, D., *"Blacks and Blue Power,"* New York Times, Feb. 8, 1987.

We restate these concerns because the law enforcement community must be sensitive to the many problems that are related to the country's history of racial discrimination. Aside from the legal issues involved, Professor Kennedy notes correctly that routinely and casually using race and ethnicity as risk factors in exercising law enforcement discretion is profoundly unwise, not only because these factors can be used as a means of racial harassment, but also because this practice increases minority fear and mistrust of the police and reduces the potential for cooperation between minority communities and the police. According to Washington D.C. Metropolitan Police Chief Charles H. Ramsey,

Tragically, in many of the communities where residents are the most fearful of crime, they are also more likely to be fearful of the people who are supposed to protect them — that is, the police. These are fears not so much about getting into physical confrontations with the police, but fears of being treated with suspicion, disrespect and derision.

\* \* \*

Those communities most in need of police services — primarily lower-income and/or minority communities — are also those communities in the best position to help us [the police] be more effective in fighting crime. Residents live in these communities, they have information and intelligence about the communities, and they have a vested interest in making their communities better and safe.

[Keynote presentation at Attorney General's Law Enforcement Summit, East Rutherford, New Jersey, December 11, 1998.]

This phenomenon is described more fully in § J, infra, where we discuss how the disparate treatment of minorities undermines — not advances — the legitimate interests of the law enforcement community in waging the war on drugs.

***B. The Critical Distinction Between Legitimate Crime Trend Analysis and Impermissible Racial Profiling.***

Today we propose to make clear, as a matter of policy if not settled law, that race, ethnicity, and national origin are inappropriate factors that State Police members should not rely upon at all in selecting vehicles to be stopped or in exercising discretion during the course of a stop (other than in determining whether a person matches the general description of one or more known suspects). Regrettably, there has been much misunderstanding and misinformation concerning the present state of the law. Law enforcement officials, the media, and concerned citizens have used technical terms of art, such as the term “profile,” imprecisely and usually in a pejorative context. Such imprecision impedes a rational discussion of the problem and makes it that much more difficult to establish and implement sound law enforcement policy that distinguishes legitimate law enforcement practices from impermissible ones.

In setting the matter straight, we start with a discussion of the legitimate use of law enforcement’s “collective knowledge and experience.” Sophisticated crime analysis is sorely needed if police agencies are to remain responsive to emerging new threats and enforcement opportunities. The law is thus well-settled that in appropriate factual circumstances, police may piece together a series of acts, which by themselves seem innocent, but to a trained officer would reasonably indicate that criminal activity is afoot. State v. Patterson, 270 N.J. Super. 550, 557 (Law Div. 1993). As the court in Patterson correctly noted, “it is

appropriate and legitimate police work to develop a so-called ‘profile’ based upon observations made in investigating the distribution or transportation of illicit drugs.” Id. at 558. Using these and other means, the police can develop a pattern of criminal wrongdoing that justifies their suspicions when they observe features that are in accord with the principal aspects of that pattern. Id.

In developing any such “profile,” police may rely upon intelligence that they have gathered in past circumstances. Id. This point was tacitly acknowledged by the New Jersey Supreme Court in State v. Demeter, 124 N.J. 374 (1991) (per curiam), where the Court “recognize[d] that in some situations a police officer may have particular training or experience that would enable him to infer criminal activity in circumstances where an ordinary observer would not.” The Court in that case found that the police officer had failed to adequately explain the basis for his opinion that 35mm film canisters are commonly used to conceal illicit drugs. The Court in reaching this result made clear that it did “not mean to discourage investigation by police on suspicion of criminal activity. Had there been proof here ... of regularized police experience that objects such as the film canister are the probable containers of drugs, we would have a different case.” 124 N.J. at 385. (Emphasis supplied.)

This “regularized” police experience reflects the collection of historical and intelligence information, careful crime trend analysis, and an examination of the methods of operations, the so-called “modus operandi,” of drug traffickers and others engaged in various types of criminal activity.

In United States v. Sokolow, 109 S.Ct. 1581 (1989), the United States Supreme Court refused to condemn the use of a so-called “drug courier profile.” While holding that police are responsible for articulating the factors leading to their reasonable suspicions, the Court noted that, “the fact that these factors may be set forth in a ‘profile’ does not somehow detract from their evidentiary significance as seen by a trained agent.” 109 S.Ct. at 1587.

While police agencies are permitted, indeed are expected, to conduct crime trend analysis and to train officers as to those facts and circumstances that, while innocent on their face, provide a reasonable basis for suspecting criminal activity, the law also provides that certain factors may not be considered by law enforcement. In State v. Kuhn, 213 N.J. Super. 275 (App. Div. 1986), the court held that police are not permitted to draw any inferences of criminal activity from a suspect’s race. 213 N.J. Super. at 281. The court in State v. Patterson, *supra*, expounded on this point, noting that, “[c]ertainly the police cannot conclude that all young, male African-Americans are suspected of involvement in the illicit drug trade. Therefore, an individual’s race cannot be considered at all when conclusions are reached or assumed as to a ‘profile’ suggesting criminal activity.” 270 N.J. Super. at 559. See also State v. Letts, 254 N.J. Super. 390 (Law Div. 1992).

In developing our response to the racial profiling and disparate treatment problem, our goal must be to preclude the inappropriate use of race, ethnicity, and national origin by state troopers, *not* to chill vigilant police work or to discourage the State Police or any other police agency from collecting, analyzing,

and making appropriate use of race-neutral information that reasonably bears on the likelihood that an individual is engaged in criminal activity. As noted more fully in § J, *infra*, this Interim Report should not be construed in any way as an abdication of the ongoing duty of the New Jersey State Police to use all lawful means to enforce New Jersey's criminal drug laws.

**C. *Emphasizing That Race Should Not Be Considered At All by a Trooper in Exercising Discretion to Stop a Motor Vehicle.***

One need not be a constitutional scholar to understand that race, ethnicity, or national origin cannot be the sole basis for initiating a motor vehicle stop. On this point, everyone seems to agree. The law is far less clear, and opinions within and outside the criminal justice system become far more diverse, with respect to the question whether there are any circumstances when police may legitimately consider these kinds of personal traits and characteristics in drawing rational inferences about criminal activity. No one disputes, of course, that police can take a person's race into account in deciding whether the person is the individual who is described in a "wanted" bulletin; in this instance, race or ethnicity is used only as an "identifier." The issue, rather, and one that has not yet been definitely or at least uniformly resolved by the courts, is whether race, ethnicity, or national origin may be considered as one among an array of factors to infer that a particular individual is more likely than others to be engaged in criminal activity.

We believe that when finally confronted with this issue, the New Jersey Supreme Court would likely embrace the rule set forth in lower court decisions

such as State v. Kuhn, supra, and State v. Patterson, supra, and would hold, based upon independent state constitutional grounds if necessary, that race may play no part in an officer's determination of whether a particular person is reasonably likely to be engaged in criminal activity. In any event, and for the reasons announced in Part I of this Report, we need not wait for the courts to reach this conclusion before we propose a clear rule to be followed by state troopers assigned to patrol duties.

***D. State Police Should Not Take Race, Ethnicity, or National Origin Into Account in Taking Any Step During a Motor Vehicle Stop.***

Although the “racial profiling” problem that has garnered national attention in recent months and years necessarily begins with the decision to stop a vehicle, it does not end there. Rather, the problem as we choose to define it extends to discretionary steps taken by state troopers after a vehicle has been stopped. To some extent, divergent opinions about “racial profiling” within and outside the law enforcement community depend on definitions. We choose to define racial profiling broadly to encompass 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.

Certain steps or actions taken by police during a traffic stop are not deemed under the Fourth Amendment to constitute a separate and distinct privacy or liberty intrusion. Thus, for example, a police officer is automatically permitted under both state and federal caselaw to order the driver of a lawfully-detained



automobile to exit the vehicle. (With respect to ordering passengers to alight from a vehicle, the New Jersey Supreme Court, apparently relying upon independent state constitutional grounds, requires that a police officer be aware of “articulable facts warranting heightened caution” before ordering passengers out of a vehicle. See State v. Smith, 134 N.J. 599 (1994). Compare Maryland v. Wilson, 117 S.Ct. 882 (1997), where the United States Supreme Court held that the rule governing the removal of passengers from a vehicle is no different from the rule governing the removal of a driver.)

However, just because the act of ordering a driver out of an automobile has no Fourth Amendment significance does not mean that State Police members should be permitted to treat minority and non-minority motorists differently in exercising the discretion to take advantage of this option and actually order a driver to exit a vehicle. Simply stated, while the Fourth Amendment caselaw says that an officer need not articulate the reasons for ordering a driver to step out of a vehicle, the policy we propose today would expressly preclude a state trooper from using what we deem to be an inappropriate reason for ordering the driver out.

Similarly, police officers during the initial stages of a routine “Terry” stop are permitted to ask questions of the driver and passengers without having to administer the so-called “Miranda warnings.” See Berkemer v. McCarty, 468 U.S. 420 (1984). It is not uncommon for State Police members engaged in a drug investigation, for example, to separate the driver from the passenger(s) and to ask

questions concerning their itinerary, such as where they are traveling to, the reason for their travel, and where they were coming from. By separating the persons, the officer seeks to discover inconsistencies and discrepancies in their stories, thereby providing objective reasons to support a suspicion of criminal activity.

This practice is sometimes referred to as “routine questioning.” We believe that state troopers must not consider race, ethnicity, or national origin in deciding whether to initiate these kinds of conversations. Rather, to the extent that officers must necessarily exercise reasoned discretion, they should look to objective facts that, while facially innocent, might be consistent with criminal activity and thus warrant some cursory follow-up investigation (e.g., that a vehicle is registered to a person who is neither present nor closely related to the driver or passengers).

The same principle applies to the deployment of drug-scent dogs. In United States v. Place, 462 U.S. 696, 104 S.Ct. 2637 (1983), the United States Supreme Court held that because the use of a law enforcement drug-detector canine to sniff the exterior surface of a container is, at most, a “minimally intrusive” act, this police conduct technically does not constitute a “search” under the Fourth Amendment. *Accord*, State v. Cancel, 256 N.J. Super. 430 (App. Div. 1992). These cases should not be read to mean, however, that a state trooper should rely to any degree on a suspect’s race, ethnicity, or national origin in deciding whether to summon a drug-detection canine. No motorist on the New Jersey Turnpike

should be subject to this kind of law enforcement scrutiny on the basis of such criteria.

Finally, and of special importance to our inquiry, the caselaw makes clear that police officers do not need to articulate a reasonable suspicion before they are allowed to ask a person to consent to a search. See State v. Abreu, 257 N.J. Super. 549 (App. Div. 1992) and State v. Allen, 254 N.J. Super. 62 (App. Div. 1992). Police, in other words, may ask and obtain consent to search without probable cause or even mere reasonable suspicion. (As noted throughout this Report, New Jersey State Police rules and procedures, which are affirmed and amplified in this Interim Report, already go well beyond the minimum requirements of the State and Federal Constitutions by requiring state troopers to have a reasonable, articulable suspicion to believe that the consent search would reveal evidence of a crime before State Police members are authorized to request permission to search.) We propose to make clear that a state trooper should not rely to any degree on a person's race, ethnicity, or national origin in deciding whether to request permission to search.

***E. The Importance of Perceptions.***

Our findings and our proposed remedial steps are based in part on statistics compiled and provided by the New Jersey State Police that document actual practices and procedures. We think it important to add, however, that law enforcement policy cannot be divorced from public opinion and public perceptions. The New Jersey State Police, no less than any other law enforcement agency, must

remain responsive to public needs and expectations if it is to achieve its ultimate mission to protect and to serve.

The phenomena of racial profiling and other forms of disparate treatment of minorities that we describe in this Report are not just a matter of perception; the evidence we have compiled clearly shows that the problem is real. Even so, perceptions concerning the magnitude and impact of the problem vary widely, and these opinions matter, especially to the extent that the success of law enforcement efforts to reduce and respond to crime depend to a large extent on each agency's ability to maintain the trust and confidence of the community it serves, and to enlist public support for its anti-crime efforts.

To help to explain the nature of these issues we now confront and to put the problem and the proposed remedial steps in perspective, we find it useful to cite to a *Star Ledger/Eagleton* poll that was conducted in early May 1998. The poll showed that while the overall job performance rating of the State Police is quite positive in New Jersey, there is a major racial divide among Garden State residents. Black and white New Jerseyans have markedly different views of troopers' fairness in the enforcement of the laws, even-handed treatment of all drivers, judgment in deciding whom to pull over, and courteousness in dealing with stopped motorists. The poll revealed that the vast majority of African-Americans in New Jersey feel that State Police members treat minorities worse than others, and that troopers target cars to pull over based on the race and age of the people in the cars. In stark contrast, the majority of white New Jerseyans

feel that troopers treat all motorists the same and seem highly satisfied with all aspects of their job performance.

Consider the following specific poll results:

- ▶ White New Jerseyans give the State Police high marks for treating “all drivers the same regardless of race, sex, or age” (60% positive to 25% negative). Black New Jerseyans offer a severe mirror-image assessment (20% positive to 72% negative).
- ▶ Positive assessments of the State Police for “using good judgment in deciding who to pull over and ticket” outnumber negative ones by 66 to 27% among white New Jersey residents (a positive difference of 39 percentage points). The vast majority of black Garden State residents feel the reverse is the case by 66 to 28% (a negative difference of 38 percentage points).
- ▶ Whereas the vast majority of white New Jerseyans give positive ratings to the State Police for “treating all drivers with courtesy” by a margin of 70 to 18%, a clear majority of black New Jerseyans give negative ratings to troopers on this score (54 to 34%).
- ▶ Three-quarters of white residents give state troopers high marks for “enforcing the rules of the road in a fair manner” (77%) compared to less than half of black residents (46%). Almost two-thirds of blacks (64%) feel that state police engage in “profiling,” while just one-quarter feel that everyone who commits a traffic violation has an equal chance to be pulled over. In contrast, 62% of white New Jerseyans feel all violators have the same chance of being pulled over regardless of other factors. Just 29% of whites believe that the State Police use characteristics of car occupants in deciding whom to stop.
- ▶ A clear majority of state residents feel that “profiling” is an unacceptable law enforcement technique, although a far greater number of blacks object to the practice than do whites. Specifically, three-quarters of African-American New Jerseyans believe that profiling is a bad law enforcement tool, while 18% think it is a good idea, and the remaining 7% express no opinion. While still in

opposition, white residents of New Jersey are more closely divided: 40% think this practice is a good idea; 52%, a bad idea, and the remaining 8% express no opinion.

According to Cliff Zukin, director of the poll and professor of public policy at Rutgers University, "these results are remarkable. In my 20 years of conducting public opinion polls in New Jersey, I have never seen a schism as wide as this between any two groups in the electorate. It is as though black and white New Jerseyans are living in different worlds in terms of their perceptions of the State Police."

This sharp divide in opinions drawn along racial lines was recently confirmed by a poll conducted by the Quinnipiac College Polling Institute. This survey, which was announced on April 1, 1999, found that whites approve of the way the State Police are doing their job 72 to 16%, while black approval is a negative 22 to 66%. Forty-five percent of all respondents believe that the State Police target minority drivers for car stops rather than treating everyone the same, while 41% think otherwise. Black respondents believe 84 to 12% that racial profiling occurs, while only 39% of white respondents believe that profiling is used. According to Maurice Carroll, Director of the Quinnipiac College Polling Institute, "white and black perceptions of the troopers are a mirror image... . While 76 percent of all voters say racial profiling is a bad idea, white voters aren't convinced it occurs, while black voters feel overwhelmingly that they are targets."

**F.     *Racial Profiling as a National Problem.***

The vexing issues that we address in this Interim Report are by no means limited to the New Jersey State Police. Other states along the I-95 corridor report similar arrest statistics for minorities. This is hardly surprising, since training and information-sharing programs administered by the DEA and other federal agencies (e.g., "Operation Pipeline," EPIC, the Regional Information Sharing System [RISS] and its local affiliate, the Mid-Atlantic Great Lakes Organized Crime Law Enforcement Network [MAGLOCLLEN]) establish and reinforce practical incentives and opportunities for police agencies to use proactive methods to interdict drugs in transport from so-called "source" cities to major metropolitan areas along I-95 and other major interstate highways.

The truly national scope of the problem is perhaps best evidenced by the spate of remedial legislation that has been proposed in other jurisdictions. Since December 1998, several states (including Florida, North Carolina, Maryland, Virginia, Rhode Island, Massachusetts, Arkansas, Illinois and California) have introduced legislation that would require law enforcement to maintain comprehensive data on traffic stops. Most of the bills are similar to one that had been introduced last session by Congressman John Conyers entitled the "*Traffic Stops Statistics Act of 1997*." (That bill, H.R.118, expired in the last session, but was reintroduced on April 15, 1999 by Congressman Conyers and co-sponsored by

New Jersey Congressman Robert Menendez. The bill is now known as H.R. 1443, the "Traffic Stops Statistics Act of 1999.") The legislation provides as follows:

The Attorney General shall, through appropriate means, acquire data about all stops for routine traffic violations by law enforcement officers. Included in this data shall be information pertaining to:

- (1) The number of individuals stopped for routine traffic violations;
- (2) Identifying characteristics of the individual stopped, including the race and or [sic] ethnicity as well as the approximate age of that individual;
- (3) The traffic infraction alleged to have been committed that led to the stop;
- (4) Whether a search was instituted as a result of the stop;
- (5) How the search was instituted;
- (6) The rationale for the search;
- (7) Whether any contraband was discovered in the course of the search;
- (8) The nature of such contraband;
- (9) Whether any warning or citation was issued as a result of the stop; and,
- (10) Whether an arrest was made as a result of either the stop or the search.

If enacted, the bill would limit use of the data "for research or statistical purposes" and prohibit disclosure of any information that may reveal the identity of any individual who is stopped or any law enforcement officer. The Attorney General would also be required to publish an annual summary of the data acquired under the Act.



A bill similar to H.R.118 (now H.R.1443) was introduced on June 6, 1999 in the Massachusetts Senate (S.B.1180). Unlike the legislation in other states, however, the Massachusetts bill would expressly prohibit the use of collected data for “any legal or administrative proceeding to establish an inference of discrimination on the basis of particular identifying characteristics (such as race).”

Rhode Island (H.B.4943 and S.B.131), Arkansas (HB.1261), and Illinois (H.B.1503) all have legislation pending that mirrors the federal bill. As to the use of the data, the Rhode Island and Arkansas legislation provides that “[e]xcept pursuant to court order, data acquired under this section shall be used only for research or statistical purposes. Notwithstanding the foregoing, information collected pursuant to this chapter shall be public for those stops where a citation was issued or an arrest made.”

Florida legislation (H.B.0769 and S.B.1456) would require analysis of “the benefit of traffic stops with regard to the interdiction of drugs and the proceeds of drug trafficking, including the approximate quantity of drugs and value of drugs proceeds seized” and a list of items seized.

Pending Connecticut joint house legislation (Bill No.1282) would require every organized police department to “adopt written policies prohibiting the stopping, detention or search of any person when such action is motivated by the law enforcement officer’s perception of the person’s race, color, sex or national origin and when the action would constitute a violation of the person’s civil rights.” The stated purpose of the Connecticut legislation is not only to provide

directives to law enforcement officers, but also to establish a process for investigating civilian complaints of such stops and imposing disciplinary actions against offending officers.

In North Carolina, pending legislation would require the establishment of the Division of Criminal Statistics in the Department of Justice that would collect data on motor vehicle stops. In addition to adopting the substantive provisions of the federal bill, North Carolina S.B.76 would require the collection of data on whether motorists exercised physical resistance, whether the officer used force against the driver or passengers for any reason, and whether any physical injuries resulted from police/motorist confrontations.

On January 21, 1999, two resolutions were introduced in the Virginia Assembly (House Joint Resolution No.687 and House Joint Resolution No.736) calling for the establishment of a joint subcommittee to study traffic stops and pretextual traffic stops of minority drivers and certain police practices. The joint subcommittee would be composed of 11 members, including six members of the House of Delegates to be appointed by the Speaker of the House and five members of the Senate to be appointed by the Senate Committee on Privileges and Elections. The Virginia bill requires not only a comprehensive analysis of traffic stops, but also an examination of the impact such stops have on constitutional rights of persons of color.

A motor vehicle stop bill was recently reintroduced in the California Legislature (S.B.78). A similar bill had previously passed both houses of the State

Legislature, but was vetoed by the Governor. The ACLU responded by establishing a toll-free number for minority motorists to report suspected discriminatory stops.

In Maryland, the ACLU in 1998 filed a class action lawsuit on behalf of the Maryland NAACP and 11 individual minority motorists alleging that the Maryland State Police had engaged in race-based discrimination with its drug interdiction activities along Interstate 95. The data used to support the lawsuit were based on statistics that were maintained by the Maryland State Police as part a 1995 settlement decree that arose out of a lawsuit filed against the State Police by Robert L. Wilkins, an African-American lawyer from Washington, D.C. The state police denied using race as a factor to stop motorists, but agreed to conduct training and to maintain records so that the plaintiffs could monitor compliance.

As part of the 1995 settlement, the State of Maryland collected data on motorist stops between 1995 and 1997. The statistics showed that African-American motorists constituted 77% of the persons stopped and searched on Interstate 95 — this among a group of persons who represent only 17% of the motorists who traveled that highway.

In February 1999, a bill was introduced in the Maryland Senate (S.B.430) which called for the establishment of a "Task Force to Study Stops for Routine Traffic Violations." The ten-member task force would consist of the Attorney General, the Secretary of the State Police, along with four citizens appointed by the Governor "who represent the rich ethnic, gender, and regional diversity of the

State.” The Governor would also appoint the chairman of the task force, which would be provided a staff by the Attorney General’s Office. The proposed task force mandate is similar to the provisions set forth in the federal and Massachusetts bills, except that the task force would be specifically charged with studying “the benefit of traffic stops with regard to the interdiction of drugs and the proceeds of drug trafficking, including the approximate quantity of drugs and value of drug proceeds seized on an annual basis as a result of routine traffic stops.”

In addition to the civil actions in Maryland and California, lawsuits that allege racial profiling by the police have been filed in other states, including Pennsylvania, Florida, North Carolina, and Indiana. The ACLU and other civil rights organizations have spearheaded this litigation.

#### ***G. The Circular Illogic of Race-Based Profiles.***

Throughout the course of the national debate on “racial profiling,” some law enforcement executives have argued that it is appropriate for police officers on patrol to rely upon racial characteristics provided that objective crime trend analysis validates the use of these characteristics as “risk factors” in predicting and responding to criminal activity. As noted by the Eighth Circuit Court of Appeals in United States v. Weaver, “[f]acts are not to be ignored simply because they may be unpleasant ... we [must] take the facts as they are presented to us, not as we would wish them to be.” 966 F.2d 391, 394, n.4 (8th Cir. 1992), cert. den. 507 U.S. 1040 (1992).

Many of the facts that are relied upon to support the relevance of race and ethnicity in crime trend analysis, however, only demonstrate the flawed logic of racial profiling, which largely reflects a priori stereotypes that minority citizens are more likely than whites to be engaged in certain forms of criminal activity. This form of “scientific” analysis, in other words, is hardly objective. This is not to suggest that profile-minded analysts are biased, but rather that some of the numbers they rely upon are self-selected and thus inherently misleading.

In fact, many longstanding stereotypes are contradicted by the empirical evidence. Consider the assumption that minority citizens are more likely than whites to use illicit substances. While it is certainly true that the “drug problem” is especially vexing in certain urban communities, this is not because of the prevalence of drug use by minorities, but rather due to the way in which drugs are openly sold in these neighborhoods, attracting violence (and police attention) and degrading the quality of life for the law-abiding residents of these communities.

Studies of alcohol and other drug use among New Jersey high school students conducted by the Division of Criminal Justice every three years since 1980 have repeatedly and consistently shown that many of the stereotypes about drug use are simply wrong. The latest published survey, released in 1996, shows, for example, that white students are actually more likely than black or Hispanic students to report having ever used alcohol, marijuana, cocaine, amphetamines, or hallucinogens. *“Drug and Alcohol Use Among New Jersey High School Students”* (1996) (Table 9 at p. 47). The studies also show that, in general, there

is little overall difference in drug or alcohol use with respect to socioeconomic status and where differences do exist, students from schools in the lower socioeconomic category were somewhat less likely to report using substances than those in the high or medium socioeconomic categories. *Id.* (Tables 9, 10 at pp. 47-48.)

The New Jersey high school findings are consistent with national research conducted by the Federal Substance Abuse and Mental Health Services Administration's (SAMHSA) *"National Household Survey on Drug Abuse."* The 1997 survey found that the rate of illicit drug use for blacks (7.5%) was only slightly higher than for whites (6.4%) and Hispanics (5.9%). Among youth, the survey revealed that the rates of use are about the same for these three racial/ethnic groups.

We turn now to the specific assumption that is at the heart of the racial profiling controversy: the notion that a disproportionate percentage of drug traffickers and couriers are black or Hispanic, so that race, ethnicity, or national origin can serve as a reliable, accurate predictor of criminal activity. The proponents of this view point to empirical evidence, usually in the form of arrest and conviction statistics, that would appear at first blush to demonstrate quite conclusively that minorities are disproportionately represented among the universe of drug dealers.

The evidence for this conclusion is, in reality, tautological and reflects as much as anything the initial stereotypes of those who rely upon these statistics.

To a large extent, these statistics have been used to grease the wheels of a vicious cycle — a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.

The most obvious problem in relying on arrest statistics, of course, is that these numbers refer only to persons who were found to be involved in criminal activity (putting aside for the moment the presumption of innocence). Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons. Consistent with our human nature, we in law enforcement proudly display seized drug shipments or “hits” as a kind of trophy, but pay scant attention to our far more frequent “misses,” that is, those instances where stops and searches failed to discover contraband. (Recall that among the universe of stops, searches are quite rare, and searches that reveal evidence of crime are rarer still.) Logically, of course, one cannot hope to judge the overall effectiveness of any practice or program by looking solely at its successes, any more than by looking only at its failures.

In gauging crime rates and crime trends, our Uniform Crime Reporting System recognizes a distinction between so-called “index” and “non-index” offenses. Index offenses are those that are likely to be reported by citizens and include murders, robberies, and rapes. It is thought that the number of index

offenses reported to police reflects, albeit imperfectly, the actual extent of particular crime problems.

The non-index or vice offenses, in contrast, are usually only detected as a result of proactive law enforcement efforts. This is especially true with respect to drug possession and distribution. Only a negligible percentage of drug offenses that are actually committed ever come to the attention of law enforcement agencies. The vast majority of drug sales, for example, are accomplished in private or otherwise out of law enforcement's view and, thus, never lead to an arrest, prosecution, or conviction. It is for this very reason that the non-index offenses, such as drug use and trafficking, are never relied upon in determining crime rates and trends. The number of drug arrests and seizures reflects, if anything, only the extent and nature of law enforcement's proactive efforts.

It follows, therefore, that the fact that a disproportionate percentage of drug arrests are of minorities does not mean that any particular minority citizen is more likely than a non-minority citizen to be committing a drug offense. Minorities are disproportionately arrested for selling drugs largely because urban drug dealers tend to operate in open-air drug markets, making them far easier to identify and arrest than their colleagues who are operating more discreetly behind closed doors in suburban and rural jurisdictions.

For this reason, it is hardly relevant (and, as noted above, inappropriate as a matter of sound policy if not constitutional imperative) to consider the racial or ethnic characteristics of persons who were determined during road stops to be



carrying drugs if the purpose of this exercise is to permit or encourage officers to draw inferences about minority motorists generally. Indeed, this practice utterly begs the question. To the extent that State Police and other law enforcement agencies arrest minority motorists more frequently based on stereotypes, these events, in turn, generate statistics that confirm higher crime rates among minorities, which, in turn, reinforces the underpinnings of the very stereotypes that gave rise to the initial stops. In short, police officers may be subjecting minority citizens to heightened scrutiny and more probing investigative tactics that lead to more arrests that are then used to justify those same tactics.

This insidious cycle has served to create an ever-widening gap in the perception of fairness that persons of color and whites have about law enforcement and the criminal justice system, and the resultant costs (the loss of confidence and trust in law enforcement by members of minority communities) must be weighed carefully against the benefits of seizing drugs in interstate transport. See discussion in § J, infra.

We are especially concerned in this regard that during the course of our review, we received information that at times the State Police Patrol Drug Response Unit disseminated information to State Police barracks concerning the racial and ethnic characteristics of persons who were found to be in possession of drugs. The dissemination of this information, while no doubt done in good faith and in accordance with the spirit if not the letter of "Operation Pipeline" and other federal drug interdiction initiatives, would tend to reinforce inappropriate

stereotypes, leading officers to believe that they would be more likely to encounter illicit drug traffickers by preferentially stopping, questioning, and searching the vehicles of minority motorists.

Further evidence of this basic approach to crime analysis can be found in the Uniform Crime Reports that are compiled and published by the State Police. These publications include "typical scenarios" for various index crimes, such as rape; robbery; aggravated assault; burglary; theft; motor vehicle theft; and arson. The scenarios describe not only the month when these kinds of offenses are most frequently committed, but also the "most frequent offender" in terms of age, sex, and race. Obviously, there is nothing intrinsically wrong in compiling information concerning the racial characteristics of persons arrested for various offenses. The danger, however, is that these same statistics could be used tautologically to describe a typical offender, which, in turn, could be used impermissibly to predict the likelihood that a person meeting these characteristics has, in fact, committed an offense.

We would be remiss at this point not to mention another variation of the "typical offender" typecasting that sometimes arises in the context of highway patrol: the notion that a motorist does not seem to "match" the vehicle he is driving, considering the value of the vehicle, and the driver's race, ethnicity, national origin, or manner of dress. We have heard numerous complaints that men of color who happened to be driving expensive vehicles were subjected repeatedly to traffic stops, sometimes for the most minor of offenses or no

apparent or explained offense at all. This form of de facto discrimination — based upon stereotypes about the expected income level of minority motorists and the profile characteristics of auto thieves — must also be addressed as part of the comprehensive reforms we recommend. See Part V, Action Step No. 5.

One of the real problems with many forms of “profiling” is that the characteristics that are typically compiled tend to describe a very large category of presumably innocent motorists. This point was expressly recognized by the United States Supreme Court in Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam). Indeed, using profiles that rely on racial or ethnic stereotypes is no better, and in many respects is far worse, than allowing individual officers to rely on inchoate and unparticularized suspicions or “hunches,” which is clearly not permitted under Fourth Amendment jurisprudence.

While we have no doubt that federal, regional, state, and local intelligence reports reliably indicate that a large number of minority narcotics and weapons offenders are traveling between urban areas in and through New Jersey, so too are innocent minority motorists engaged in such travels, and in far, far greater numbers.

To underscore this point, it is appropriate to consider some of the crime trend analyses that have been conducted in an effort to enhance the efficiency of highway drug interdiction. The El Paso Intelligence Center (EPIC), which is one of the components of the Federal Drug Enforcement Administration’s intelligence program, provides state law enforcement agencies with bulletins concerning the

occupants of so-called "load" vehicles, that is, vehicles that were found to contain substantial quantities of illicit drugs. Typical information includes a finding that in 1998, the largest number of load vehicles (43%) were occupied by a lone male, followed by a male driver traveling with a male passenger (25%). The same bulletin reports that couples were most likely to transport heroin (19%) or methamphetamine (19%). In this same reporting period, the age group most frequently involved and responsible for the transportation of the majority of drugs and drug-related cash were persons between the ages of 20 and 29 (45%) and 30 to 39 (27%).

EPIC bulletins also describe driver nationality, noting that in 1998, most drugs and related currency were found in load vehicles that were driven by foreign nationals. With respect to marijuana, for example, 49% of the load vehicles were driven by US nationals, while 51% were driven by foreign nationals. With respect to cocaine, EPIC reports that 39% of load vehicles in 1998 were driven by US nationals, while 61% of the vehicles were driven by foreign nationals.

The bulletins also describe the state residence of the drivers of load vehicles, noting that the majority of drivers (61%) were from states identified by the Federal Government as "points of origin and destination for drugs," including Arizona, California, Florida, Illinois, New York, and Texas. The report suggests that the "next most active group (13%) were residents of Georgia, Louisiana, Michigan, North Carolina, New Mexico, and Ohio."

Finally, EPIC also compiles and disseminates information concerning the makes and models of the so-called “load” vehicles. The top ten automobile models were the Ford Taurus, Nissan Sentra, Honda Accord, Ford Thunderbird, Oldsmobile Cutlass, Chevrolet Lumina, Lincoln Towncar, Pontiac Grand Am, Toyota Camry and Mercury Cougar. Seventy-three percent of the load vehicles were privately owned, while 21% were leased or rented vehicles.

We certainly do not cite to these findings to reveal state secrets or to “tip off” drug traffickers that we are on to them. (As was noted by United States Supreme Court Justices Marshall and Brennan in their dissent in United States v. Sokolow, supra, even if profiles have reliable predictive value, their utility might be short-lived as drug couriers adapt their behavior to sidestep detection from profile-focused officers. 109 S.Ct. 581, 589, n.1 (Marshall and Brennan, J.J., dissenting). Rather, we cite this information to demonstrate that much of the information that might become part of a so-called “profile” would actually provide very little help to state troopers patrolling the Turnpike in winnowing the chaff from the wheat (i.e., major drug couriers from the universe of innocent motorists) or in articulating a reasonable suspicion to believe that any particular vehicle is involved in criminal activity.

The value of some of these potential profile factors may have been overstated in part because some law enforcement officials, no doubt frustrated by the inherent inefficiencies in highway drug interdiction, fail to recognize that information gleaned in hindsight (i.e., e.g., the characteristics of persons and

vehicles that fortuitously were found to be carrying large quantities of drugs) does not always translate into a reliable means of predicting future occurrences of a given behavior or outcome. If one out of a thousand stops results in a major “hit,” and that hit happened to involve a minority motorists, that fact does not mean that preferentially stopping minority motorists is likely to result in more seizures than would occur by stopping and scrutinizing motorists without regard to race, ethnicity, or national origin.

In the circumstances, and for the reasons described more fully in § J, *infra*, we are entirely satisfied that the policies and procedures announced in this Interim Report need have no adverse affect on New Jersey’s ongoing drug enforcement efforts.

***H. Legal and Policy Pitfalls in Relying on “Group Associations” to Establish Suspicion of Criminal Activity.***

In setting out a clear statement of law and policy, we would be remiss were we to avoid the delicate and complex issues concerning when and under what circumstances a law enforcement officer may consider a person’s possible membership in a group that is commonly associated with criminal activity (e.g., a “gang,” “set,” “posse,” or “family”). Clarification is necessary at this point because State Police members and other law enforcement officers as part of their in-service training are sometimes shown training videos of various groups, organizations, and criminal enterprises that are engaged in commercial drug trafficking as a substantial source of income.

The bona fide purpose of this training is to alert officers to the existence, activities, defining characteristics, and methods of operation (the aforementioned modus operandi) of these groups and to urge officers to exercise heightened caution when dealing with members of these organizations, who are often armed and are predisposed to commit acts of violence. The unintended, subtle effect of this training, however, may be to paint an inaccurate and misleading picture that persons of color should be treated differently than non-minorities on the tacit assumption that they are likely to be gang members. For the reasons set out below, these inferences of criminal activity are only legitimate when officers have reasonable grounds to believe that a particular individual is, in fact, a member of one of these criminal organizations.

We start our analysis by recognizing a simple and undeniable fact: Many criminal organizations are composed of persons of like racial, ethnic, and national origin characteristics. Many (but not all) of these groups are exclusionary. (Some gangs appear to be more territorial than racially selective, recruiting from select neighborhoods rather than select races or ethnicities.)

Ordinarily, a stop or ensuing frisk or search may not be based solely on the fact that a person is a member of a particular group, even if other members of that group are often associated with criminal offenses, such as drug trafficking, armed robberies, or loansharking. As the court in Drake v. County of Essex, 275 N.J. Super. 585 (App. Div. 1994) noted, “the courts have consistently held that a person’s membership in a group commonly thought to be suspicious is insufficient

by itself to establish reasonable suspicion.” 275 N.J. Super. at 591 (citing to Reid v. Georgia, supra.)

By the same token, however, a person’s membership in a criminal organization, such as a “gang” or “set,” is relevant and may be considered by a police officer as part of the so-called “totality of the circumstances.” For obvious reasons, gang membership is especially relevant in the context of an officer’s reasonable suspicion that a person may be armed and dangerous, at least where members of the group that the person is believed to be associated with typically carry firearms or other weapons.

The legal and practical problem lies in reconciling this limited rule of relevance with the more fundamental principle we embrace that state troopers should not be permitted to draw any inferences of criminal activity from a suspect’s race. We accomplish this by concluding that while known membership in a criminal organization is a legitimate factor that an officer may use in determining whether a person is presently engaged in criminal activity, the officer is not permitted to use the person’s race, ethnicity, or national origin in assessing the likelihood that a person is, in fact, a member of any such criminal organization. To do otherwise would be to practice a form of legal bootstrapping, placing the cart before the horse by drawing inferences from a fact that has not yet been established.

On closer inspection, this rule makes perfect sense. It is certainly true that a person could not be a member of a particular exclusionary gang or group unless



the person shares the racial or ethnic characteristics of that group. It does not follow, however, that a significant percentage of persons of like characteristics are, in fact, members of the criminal organization. In fact, the percentage of persons who are actually members of criminal organizations is so negligible that an officer could make no rational (much less legally sufficient) conclusion about a person's membership based to any degree on the person's race or ethnicity.

Consider, by way of example, law enforcement's persistent efforts to deal with so-called "traditional" organized crime groups sometimes referred to collectively as "La Cosa Nostra" or the "The Mafia." The La Cosa Nostra families that continue to operate in the New York, New Jersey, and Philadelphia areas are comprised almost entirely of persons of Italian descent. Needless to say, it would be ludicrous for a police officer to treat a person stopped for a motor vehicle violation who appears to be an Italian-American as if he were a suspected soldier, associate, or "made" member of a La Cosa Nostra family. All but the most unenlightened bigot understands that the percentage of Italian-Americans who are associated with organized crime is negligible.

But these same logical restraints must apply to all colors, ethnicities, and national origins. This does not mean that there are not, by way of example, organizations composed of Nigerian nationals who traffick in heroin, but only that there is no basis to automatically and reflexively conclude that any individual Nigerian national is associated with a heroin smuggling operation.

Regrettably, and as a reflection of the inherently tautological nature of stereotypes, some members of our society might not be aware that the percentage of young African-American or Hispanic males who are members of organized “street” gangs is so small that no officer could harbour an objectively reasonable suspicion that a motorist is a member of a gang on the basis of the motorist’s race or ethnicity. While gang membership is a relevant circumstance that should and must be considered by officers (for their own safety), an officer must first be aware of objective facts that reasonably suggest that a particular individual is, in fact, a member of a gang before the officer could rely upon that circumstance to justify certain investigative or self-protective steps including, but not limited to, ordering person(s) to alight from a vehicle; conducting a “frisk” for weapons; ordering a person to keep his hands in view; running a criminal history check or outstanding warrant lookup; or requesting permission to conduct a search.

For this reason, it is absolutely essential that state troopers be trained as to the objective criteria and indicia of criminal group associations, since it would be relevant for officers to consider that an individual is “flying the colors” of a gang or is wearing clothing or bearing a tattoo signifying street or motorcycle gang membership. Some criminal groups are far more organized and hierarchial than others; some proudly announce their affiliations, while others operate clandestinely as secret organizations.

The point is simply that a state trooper must be prepared to articulate why he or she harboured the suspicion of gang membership, and if suspected gang

membership is to be relied upon, the officer must be prepared to spell out all of the factors and observations that led to the officer's reasonable belief, going beyond the mere fact that the person was not excluded from the possibility of being a member of a particular criminal organization by virtue of his race or ethnic background.

***I. The Impact of Ongoing and Anticipated Litigation.***

This Interim Report is not written on a clean slate. It follows on the heels of litigation in which a number of alleged drug dealers have sought to suppress proof of their guilt by claiming that they were the victims of racial profiling. The exclusionary rule that these defendants hope to invoke is designed principally to deter police misconduct by creating practical incentives for law enforcement agencies to ensure that their officers strictly comply with the requirements of the Constitution.

We expect that this Report will be cited by other defendants who will seek to overturn or preclude their convictions by claiming selective enforcement. We cannot prevent defendants from raising these issues in future motions to suppress evidence, but we wish to make clear that as to any such future challenges, we will be prepared to fully and fairly litigate the question whether any particular defendant was, in fact, a victim of unconstitutional conduct by the State Police warranting the suppression of reliable evidence of guilt. The law is well-settled in this regard that constitutional rights, whether arising under the Fourth or Fourteenth Amendments, cannot be asserted vicariously. (We expect that as a

practical matter, a defendant who was traveling greatly in excess of the legal speed limit would have a much more difficult task in convincing a judge that he had been targeted by State Police on account of his race, than would a defendant who had been stopped for a comparatively minor or technical infraction. These are the kinds of individualized, fact-sensitive arguments that we will be fully prepared to litigate in future motions to suppress.)

The county prosecutors will be asked to examine closely any case involving a State Police member in which the defendant claims selective enforcement in violation of the Equal Protection Clause and the prosecutors will be asked to recommend to the Division of Criminal Justice how these cases should be handled, considering the individual facts and circumstances of each case. To promote uniformity in dealing with these issues, the Division of Criminal Justice will seek input from county prosecutors in developing protocols and criteria to properly analyze cases and determine when litigation is appropriate. See Part V, Action Step No. 16.

Further, we intend to argue in all appropriate cases that a reflexive invocation of the exclusionary remedy is unnecessary in light of the extraordinary procedures and safeguards that will be adopted and fully implemented as a result of this Report. The exclusionary rule, as noted by former United States Supreme Court Justice Potter Stewart, is “intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the Fourth Amendment.” Stewart, “The Road to Mapp v. Ohio and

Beyond: the Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,” 83 Colum. L.Rev., 1365, 1400 (1983). The United States Supreme Court in the landmark case of Stone v. Powell, 428 U.S. 465 (1976), remarked that “the demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies and the officers who implement them to incorporate Fourth Amendment ideals into their value system.” 428 U.S. at 492-93.

We believe that the policies and procedures that we propose to incorporate in a series of new State Police Standard Operating Procedures, training programs, and internal affairs reforms will prove to be a particularly effective and appropriate systemic remedy to address the problems addressed in this Interim Report. See State v. Novembrino, 105 N.J. 95, 158, n.39 (1987) (the Court “acknowledge[d] the obligation of the Judiciary to evaluate carefully the effect of any legislative or executive initiative intended to afford a source of enforcement distinct from or supplementary to the exclusionary rule”).

***J. Continuing Commitment to Interdict Illicit Drugs in Transport.***

We anticipate that the strong message that we are sending in this Interim Report might be misinterpreted by some as an abandonment or repudiation of New Jersey’s drug enforcement efforts, or as an abdication of the State Police responsibility to vigorously enforce all criminal laws. We think it would be ironic and unfortunate to substitute one misinterpreted message with another, and for this reason, we are prepared to explain what State Police members are allowed

and expected to do (i.e., positive training) and not just to focus on what officers are prohibited from doing by law or Standard Operating Procedures.

The enforcement of our drug laws must remain an urgent priority of the State Police and all law enforcement agencies. It is simply wrong to suggest, moreover, that our laws can only be enforced at the expense of violating federal and state constitutional rights.

The original Statewide Narcotics Action Plan of 1987 recognized that the strategic objective of choking off the supply of illicit drugs cannot realistically be achieved solely by physically interdicting drugs in transport, since it is only possible to seize a tiny fraction of the total quantity of drugs that are actually being transported every day into and through New Jersey, a so-called "corridor" state. Given the inherent limitations of any highway interdiction drug enforcement strategy, the original action plan and ensuing state strategies concluded that all drug seizures must lead to successful prosecution and the imposition of appropriate punishment by the courts, thereby furthering the goal of general deterrence and significantly increasing the "risk premium" borne by drug traffickers.

This sound approach, in turn, requires that all evidence seized by law enforcement be admissible in court and not be subject to the exclusionary rule, which generally mandates the suppression not only of physical evidence that is illegally seized, but also the suppression of all information and investigative leads

that are directly derived from an illegal search — the so-called “fruits” of the search.

As importantly, there are other vital public policy reasons, independent of the threat of the exclusionary rule, for taking decisive steps to ensure strict compliance with all search and seizure rules and equal protection principles. Notably, it is imperative that the New Jersey State Police and all other members of the New Jersey law enforcement community fully embrace the notion that the so-called “war on drugs” must be waged with — not against — the communities that the New Jersey State Police and other law enforcement agencies are sworn to protect. It is therefore essential to balance the risks of any particular enforcement strategy or tactic against its benefits.

Accordingly, it is now necessary and appropriate to review and refine Standard Operating Procedures and protocols in order to enhance public confidence in the commitment of the State Police to make certain that no officer makes a decision to stop a vehicle, to approach a suspect, to conduct a frisk, or to request permission to conduct a search based upon inappropriate criteria, such as race, ethnicity, or national origin. To the extent that some citizens, and particularly members of minority communities, believe that such practices routinely occur or are expressly or even tacitly tolerated, public confidence in law enforcement is eroded and this, in turn, interferes with the critical objective of enlisting public support for drug enforcement programs and initiatives.

Simply stated, for law enforcement and prosecuting agencies to be effective in combating the scourge of illicit drugs, they must earn and maintain the respect and confidence of all citizens.

To underscore this point, we recommend that the Attorney General release an updated drug strategy pursuant to Governor Whitman's Drug Enforcement, Education and Awareness Program and this Report. This updated strategy should explain in detail how each and every law enforcement and prosecuting agency in the state will be expected to contribute to a comprehensive, multi-disciplinary and multi-faceted effort to address both the demand for and supply of illicit drugs.

We recommend that the updated drug strategy ensure that drug enforcement resources and efforts are focused so as to have the greatest possible impact on New Jersey's evolving drug problem. We also recommend that a study be conducted on the tactics used in highway interdiction to determine, for example, whether the present use of the consent-to-search doctrine by state troopers represents an effective and efficient use of their time. (As noted throughout this Report, State Police Standard Operating Procedures already impose significant limitations on the use by troopers of consent searches, going well beyond the caselaw and the policies of most jurisdictions in limiting the situations where troopers are authorized to request permission to search.)



## **PART V. REMEDIAL STEPS.**

### **A. *General Considerations.***

Having identified in the previous sections of this Report the nature and scope of the problem, it is necessary without delay to initiate a series of reforms to ensure that all routine traffic stops made by the State Police are initiated and conducted in an impartial, even-handed manner. In developing these specific remedial steps, we are aware of the actions that have already been taken in a number of other jurisdictions. While we have carefully reviewed these models, our proposed reforms go well beyond the remedial steps that have been undertaken in any other jurisdiction. We do this not because we have reason to believe that the problem of disparate treatment of minorities traveling on the New Jersey Turnpike is more pervasive or intractable than in other jurisdictions, but rather because we believe that the New Jersey State Police has always embraced “cutting edge” law enforcement policies and practices.

Some of the policies and procedures described in the following action steps are new. Others are a reaffirmation or clarification of existing State Police policies and practices. We expect to recommend additional and complimentary reforms as part of the more comprehensive review of State Police recruiting, training, and internal affairs policies and practices.

We think it is also important to emphasize we are not writing on a clean slate in that the State Police has already undertaken a series of initiatives to

address these issues, beginning in 1990 with a comprehensive Standard Operating Procedure governing the conduct of motor vehicle stops. That SOP included a number of important and innovative safeguards, including a requirement that state troopers have a reasonable, articulable suspicion to believe that evidence of a crime would be found before asking for permission to conduct a consent search, and a requirement that all consents to search be reduced to writing.

The State Police have also issued policies and procedures that require troopers to advise the dispatcher as to the racial characteristics of motorists who are stopped, that require troopers to record this information on patrol logs, and that prohibit the practice of "spotlighting" vehicles to ascertain the racial characteristics of the occupants of vehicles that have not yet been ordered to pull over. The State Police has also provided in-service training programs to explain that racial profiling is prohibited and that falsification of records concerning the racial characteristics of detained motorists will not be tolerated.

Most recently, pursuant to the Governor's and Attorney General's initiative, State Police vehicles were equipped with video cameras that can be used to provide conclusive evidence of the conduct of motor vehicle stops. These video records, when coupled with the other data-collection systems described hereinafter, will provide the basis for a reliable and trustworthy system to detect problems, to prevent abuses, to protect officers and citizens alike, and to restore full public confidence in the State Police.

We recognize that troopers who have consistently performed their duties in accordance with the law and in an impartial fashion may take umbrage at our proposal to issue new Standard Operating Procedures that are designed to monitor more closely the exercise of their discretion. We hope and expect that all well-intentioned troopers will understand that procedures of the type described in this Report (like the video cameras that were recently installed in troop cars) will serve many purposes, and will actually help to protect constitutionally-compliant officers, insulating them from unfair and unfounded allegations. As importantly, the new recordkeeping systems we establish in this Report will help the prosecution in future motions to suppress evidence to show in individual cases that defendants were not the targets of impermissible selective enforcement.

The constitutional requirement of reasonableness — the foundation of all Fourth Amendment jurisprudence — is satisfied, literally, when a government actor can articulate legitimate and sufficient reasons to justify an invasion of privacy or intrusion upon a private citizen's recognized liberty interest. Most constitutional violations, as it turns out, are thoughtless ones. For the most part, our recommendations would not actually restrict the exercise of police discretion, but rather would only require an officer to be prepared to explain the reasons for his or her discretionary decisions. This is hardly an unreasonable or insuperable impediment to effective law enforcement.

We have in this Report made an earnest attempt to balance the need to establish such a system as against the need to avoid creating unwarranted

paperwork burdens that could distract officers from performing their other duties. Our goal in this regard is to channel police discretion, but not to eliminate discretion or to go so far as to require, for example, that a patrol supervisor be present at all critical stages of every motor vehicle stop, to require a police legal advisor be consulted before a trooper may conduct a search, or to ban the use of consent searches.

The procedures that we propose proceed from the assumption that much of the current problem is based upon the goal of interdicting drugs in interstate transport, recognizing that some law enforcement officers may have been influenced by stereotypes in trying to increase the odds of finding significant drug shipments. Our review has identified certain common characteristics of these efforts that provide the template for designing appropriate reforms.

Notably, a trooper who is bent on finding drugs will be more likely to rely on the consent-to-search doctrine. Furthermore, it is reasonable to expect that any such officer would engage in comparatively protracted patrol stops, since his or her objective would not be simply to issue a summons or warning, but rather to undertake a full-blown criminal investigation. For this reason, we propose the establishment of a system that would allow supervisors and the State Police hierarchy to monitor the duration of road stops. If, for example, the median length of patrol stops by a given officer is shown to be correlated to the race, ethnicity, or national origin of motorists, that circumstance would trigger the “early warning system” and require appropriate follow-up investigation and

explanation. With respect to these follow-up investigations, moreover, the systems we propose would permit, indeed require, supervisors to act promptly so that an officer would have the opportunity to provide any legitimate explanations for his or her conduct.

Finally, the proposed remedial steps call for the establishment of multiple, independent sources of information, so that these records could be cross-checked through random and automated auditing procedures. This would help to ensure the integrity of all records and thereby help to maintain public confidence that a reliable “early warning system” has been established that would not only serve to detect potential problems, but that would serve to deter violations from occurring in the first place by making it difficult if not impossible for an officer bent on relying on inappropriate criteria to do so without subjecting him or herself to heightened scrutiny, prompt follow-up investigation, and remedial and/or disciplinary action.

Ultimately, the cornerstone of this system is to enhance professionalism through enhanced accountability. The comprehensive system we propose will send a strong message that racial profiling and other forms of disparate treatment of minorities will not be tolerated, but, as importantly, will provide an opportunity to demonstrate conclusively that the overwhelming majority of state troopers are, indeed, dedicated professionals who perform their sworn duties with integrity and honor.

## **B. Goals and Objectives.**

### GOAL:

*To enhance public confidence in the New Jersey State Police by ensuring that all motor vehicle stops are conducted in a professional, courteous, and constitutional manner, and by providing assurances that state troopers do not rely to any degree on race, ethnicity, or national origin in selecting vehicles to be stopped or in exercising police discretion at any point during the course of a motor vehicle stop.*

### OBJECTIVES:

1. *To ensure that all state troopers assigned to patrol duties are properly trained in the methods for conducting lawful stops, while reaffirming the need to ensure officer safety and to be vigilant in enforcing all laws.*
2. *To ensure that State Police patrol supervisors provide appropriate supervision.*
3. *To ensure that state troopers and supervisors are held accountable for the appropriate exercise of police discretion by carefully documenting the legitimate reasons for exercising discretion during the course of a motor vehicle stop.*
4. *To establish a reliable and efficient recordkeeping system, using multiple, independent sources of information and records (e.g., radio logs and recordings; officer reports; and patrol vehicle video tapes) that can be cross-checked to ensure the integrity and accuracy of all recorded information.*
5. *To ensure that all necessary information is accurately recorded while minimizing unnecessary paperwork burdens on patrol officers and supervisors.*
6. *To establish a database and automated audit program to serve as an "early warning system" to identify reporting discrepancies or anomalies or other circumstances that would warrant a prompt follow-up investigation and/or remedial action.*

### **C. *Specific Action Steps.***

We recommend that it be the responsibility of the Office of the Attorney General and the Review Team assembled by Attorney General Verniero and headed by First Assistant Attorney General Zoubek to ensure that the following action steps are implemented. All new or revised policies, procedures, training and orientation programs, and written materials developed pursuant to this Report including, but not limited to, formal State Police Standard Operating Procedures, should be made at the direction of the Attorney General or his designee and should not be issued or disseminated unless final approval, on recommendation of the Review Team, has been given by the Attorney General or his designee.

#### **1. *Updated Statewide Drug Enforcement Strategy.***

We recommend that the Attorney General issue an updated statewide drug enforcement strategy to define the enforcement priorities and contributions of all law enforcement agencies as part of a comprehensive, coordinated, and multi-disciplined response to New Jersey's drug problem. The last such strategy, the Statewide Narcotics Action Plan II, was released in 1993. In the intervening years, the nature of the drug problem and enforcement opportunities and technologies have evolved significantly, and much has been learned about the comparative effectiveness of various strategies and tactics.

The new strategy should be designed to ensure the most efficient and effective use of resources by focusing drug enforcement efforts on carefully-

identified “impact cases.” By targeting and coordinating resources (as opposed to pursuing more random “targets of opportunity”), state and local law enforcement agencies can put significant offenders at greater risk, while ensuring that concerted efforts are made to shut down the open-air drug markets that degrade the quality of life for the residents of many communities across the state.

The strategy should review recent developments and state-of-the-art crime-fighting technologies with a view toward replacing ineffective or counterproductive tactics with ones that have been proven to be successful. The strategy should also make certain that the enforcement activities of one agency do not unwittingly interfere with or undermine the efforts of other agencies. (As noted throughout this Report, certain highway interdiction tactics, for example, can have the unintended and counterproductive effect of alienating law-abiding members of minority communities, leading to mistrust and causing these citizens to be less willing to work cooperatively with other law enforcement agencies in disrupting local drug-distribution operations.) The revised strategy should thus clarify the role of highway interdiction and reinforce the message that racial profiling and other forms of discrimination will not be tolerated. In addition, the new strategy should call for an evaluation of the effectiveness of the use of consent searches on the New Jersey Turnpike to determine whether these searches represent an appropriate and efficient deployment of State Police resources.

Importantly, the new strategy should outline steps to enhance public confidence in narcotics enforcement efforts, embracing and adapting the



principles of community or “problem solving” policing and enlisting the full support and cooperation of the residents and businesses in those neighborhoods that are most directly affected by the illicit drug trade.

As part of the new drug strategy, we recommend that the Attorney General, in consultation with the county prosecutors, issue a policy statement to the law enforcement community clearly explaining the law and policies recommended in this Interim Report concerning “racial profiling” and any other form of disparate treatment of minorities during the course of traffic stops.

**2. *Quarterly Publication of State Police Statistics.***

The Department of Law and Public Safety should prepare and make public on a quarterly basis aggregate statistics compiled pursuant to the databases created in accordance with the recommendations of this Interim Report, detailing by State Police station the proportion of minority and non-minority citizens who were subject to various actions taken by State Police members during the course of traffic stops.

**3. *Establishment of an “Early Warning System” and Enhanced Computerization of Records.***

The Superintendent should within 120 days of this Report issue a comprehensive Standard Operating Procedure creating and establishing a protocol for the use of an “early warning system” to detect and deter the disparate treatment of minority citizens by State Police members assigned to patrol duties. The system should utilize all available automated, video and manual sources of

information regarding State Police personnel duty assignments, officer-initiated enforcement activity, and the performance and disposition of such activity. The system should be designed and employed to provide early identification of individual officers whose performance suggests a need for further review by supervisory personnel. The system will also be constructed and utilized to provide early identification of agency policies or Standard Operating Procedures that result in enforcement practices or recurring patterns warranting heightened scrutiny by State Police management and executives.

The protocol for use of the "early warning system" should provide for the routine supervisory review of videotapes, patrol officer logs, Traffic Stop Report forms, Search Incident forms, and any other patrol work product. The protocol should also provide for regularly-conducted audits of enforcement patterns including traffic stops, the issuance of motor vehicle summons, and search and arrest activity. A system of station and officer sampling and selection should be devised to maximize the effectiveness of the audit program in providing early identification of potential problems.

The Superintendent, in cooperation with the Office of the Attorney General, should take steps to ensure that the CAD/RMS System is made operational as soon as possible to support the "early warning system." The system should be designed so that all appropriate "incident transactions" (e.g., DMV lookup; NCIC check; ordering driver/passenger out of vehicle; frisk; summoning drug-detection canines; etc.) can be easily and accurately recorded. In addition, the Superinten-

dent should take such other steps as are necessary and appropriate to enhance the computerization of records and data concerning the activities of State Police members assigned to patrol and patrol supervision duties.

**4. *Revised Standard Operating Procedure for Traffic Stops.***

The Superintendent should within 90 days of this Report issue a single, comprehensive Standard Operating Procedure to replace, update, and supersede all existing Standard Operating Procedures regarding traffic stops. The newly promulgated Standard Operating Procedure will apply to all motor vehicle stops made by the State Police. It will explain in detail how the State Police should initiate and conduct traffic stops based upon observed motor vehicle violations, suspicion of driving while intoxicated, and suspected criminal activity.

In preparing the Standard Operating Procedure, the following should be considered:

1. Before exiting his or her police vehicle, a State Police member will inform the dispatcher of the exact reason for the stop (e.g., speeding, 70mph), a description of the vehicle and, when possible, a description of its occupants (i.e., the number of occupants and the apparent race and gender).

2. A system should be established to monitor the exact duration of all stops.

3. When the patrol vehicle is equipped with a video camera, the State Police person will ensure that the camera is activated before exiting the patrol

vehicle and will not turn the camera off until the detained vehicle has been released and departs the scene.

4. In the case of routine stops, the State Police member will at the outset of the stop introduce him or herself by name and inform the driver as to the reason for the stop. The member should not wait for the driver to inquire as to the reason for the stop, which may not be readily apparent to the driver. The failure at the outset of the encounter to explain the basis for the stop can lead to misunderstandings and a feeling of resentment.

5. When the vehicle or occupant description provided to the dispatcher was inaccurate or incomplete, the State Police person will as soon as possible provide the dispatcher with corrected or additional information.

6. At the conclusion of the vehicle stop, the State Police person will inform the dispatcher as to the stop outcome (e.g., warning, summons, etc.), and the dispatcher will close the vehicle stop incident number. This notification must be provided before the trooper leaves the scene and returns to patrol duties so that the exact duration of the stop can be determined.

7. All State Police members conducting a motor vehicle traffic stop must utilize a Traffic Stop Report form, which shall record all officer action information necessary for immediate supervisory review or to supplement information recorded by the Computer Aided Dispatch System. This form shall be designed to record all significant events that occurred during the course of the stop that entailed the exercise of officer discretion.

8. All Traffic Stop Report forms are to be reviewed by supervisory personnel at the conclusion of all duty shifts. The information contained in the reports should be entered into the "early warning system" database by means of the CAD/RMS System or otherwise.

**5. *Development of Practical Stop Criteria.***

The Superintendent, as part of the Standard Operating Procedure issued pursuant to Action Step No. 3, should develop a comprehensive set of criteria to be used by State Police members in exercising discretion in selecting vehicles to be stopped from among the universe of vehicles that are being operated in violation of the law (e.g., seriousness of violation; "aggressive" driving; number of occupants; age or condition of vehicle; multiple violations [combination of moving and equipment violations]; proximity to troop car; etc.). These criteria should be incorporated into the comprehensive Standard Operating Procedure issued pursuant to Action Step No. 3 and should be incorporated into all future basic and in-service training curricula and materials provided to officers assigned to patrol duty.

It is vitally important to provide precise guidance and direction to state troopers assigned to patrol duties on how lawfully, safely, and effectively to exercise their discretion; this important function should not be left to informal "coaching" or to the predilections and enforcement philosophies of individual State Police members. The Standard Operating Procedure should also clearly and precisely explain those criteria and factors that State Police members may not

consider in selecting vehicles to be stopped, including race, ethnicity, and national origin of occupants of the vehicles. Nor should a State Police member consider that the driver or occupants do not appear to “match” the type of vehicle, since such assumptions are, by definition, based upon stereotypes and invariably rely upon the racial or ethnic characteristics of the occupants.

In addition, specific, comprehensive criteria should be developed governing the exercise of officer discretion during the course of a motor vehicle stop with respect to certain significant events, such as running a computerized check for outstanding warrants or to determine the criminal history of a detained motorist. Recently, the Divisions of State Police and Criminal Justice prevailed upon the Federal Bureau of Investigation to revise the policies governing the administration of the National Crime Information Center (NCIC) database so as to make it easier for officers assigned to patrol duties to gain access during routine traffic stops to information concerning prior crimes that were committed by the persons who are stopped. These recent revisions are designed to enhance officer safety by providing accurate, objective information relevant to the appropriate self-protective steps that officers should take during the course of the encounter. The specific criteria to be developed by the Superintendent should be designed to allow and encourage troopers to have access to and rely upon objective information (i.e., the record of a detained motorist’s actual criminal history), whenever possible, rather than to rely on inferences based solely on training and experience. It is important that safeguards be established to make certain that the decision to run a

computer check for outstanding warrants and/or a motorist's criminal history is never based to any degree upon the person's race, ethnicity, or national origin. It is also important to make certain by means of a detailed Standard Operating Procedure and training programs that officers understand how this computerized information may be used so that, for example, they are made aware of and comply with the rule established by the New Jersey Supreme Court in State v. Valentine, 134 N.J. 536 (1994), which explains that an officer's knowledge about a detainee's prior record of armed offenses is relevant, but not sufficient by itself, to justify a protective frisk for weapons.

**6. *Procedures Governing Consent Searches.***

The Superintendent should within 120 days of this Report issue a single, comprehensive Standard Operating Procedure to replace, update, and supersede all existing Standard Operating Procedures regarding consent searches. The Standard Operating Procedure should reaffirm the existing policy that a State Police member may request permission to conduct a search only when facts are present that constitute a reasonable, articulable suspicion to believe that the search will uncover evidence of a crime. The approved State Police Consent to Search form should be reviewed and revised as necessary to account for the provisions of the revised Standard Operating Procedure.

The Standard Operating Procedure should also include provisions to require that:

1. All State Police members initiating a consent search incident must utilize a Search Incident form which includes all information necessary to document and record the search incident.

2. The Search Incident Form will provide that all consent searches require written authorization before the search is initiated.

3. In all instances, written authorization on the Search Incident form will be obtained before any search is begun.

4. The Search Incident form must be completed whether or not permission to search was granted and must include all circumstances which constituted the reasonable suspicion giving rise to the request.

5. No consent searches shall be conducted on the basis of verbal or "implied" consent.

6. Notwithstanding the holding in Ohio v. Robinette, 117 S.Ct. 417 (1996), all State Police members must advise any person being asked to give permission to search that he or she is free to leave when, in fact, such is the case.

7. The Search Incident form should specifically inform the person being asked to give permission to search that he or she has the right to be present during the consent search.



8. The immediate supervisor of the State Police member initiating a consent search incident is responsible to review the circumstances and outcome of the incident within 24 hours.

9. Where a State Police vehicle is equipped with a video camera, the entire consent search incident will be recorded.

**7. *Case-by-Case Review of 1997-1998 Consent Search Incidents.***

In light of the consent search data examined by the Review Team, State Police personnel designated by the Superintendent should review all available reports concerning all of the consent searches that were conducted by State Police members assigned to the Turnpike in 1997 and 1998 to determine whether reporting requirements and Standard Operating Procedures were complied with and to verify that these consent searches were conducted after a written consent form had been signed by the person giving consent and to verify that an adequate factual basis for requesting permission to search (i.e., reasonable, articulable suspicion to believe the search would reveal evidence of a crime) was fully documented in accordance with Standard Operating Procedures. Apparent deviations from accepted practices should be reported to the Review Team.

**8. *Enhanced Training.***

The Superintendent should within 120 days provide for the completion of steps required to compile curricula and conduct the training programs necessary to implement the provisions of this Report.

Training efforts and activity should include:

1. The content of all patrol-related and drug-interdiction training programs conducted or attended by State Police personnel should be reviewed to ensure that the message provided is consistent with the policies proposed in this Interim Report.

2. Components of training programs that include discussions of the law regarding arrest, search and seizure, and custodial interrogations should be taught by a deputy attorney general, assistant attorney general or an assistant prosecutor.

3. As soon as practical after the issuance of the Standard Operating Procedures recommended in this Interim Report, an in-service training program should be provided to all State Police personnel assigned to patrol or dispatch duty. The program should provide orientation to the Traffic Stop and Search Standard Operating Procedures, Consent Searches Procedures, as well as any other operational issues arising from the Interim Report.

4. As soon as practical after the issuance of the Standard Operating Procedures recommended in this Interim Report, an in-service training program should be conducted for all personnel who supervise patrol activities. The program should communicate supervisory responsibilities to ensure compliance with the Standard Operating Procedures and the principles contained in this Report.

5. A training program should be developed for members assigned to conduct or review internal affairs investigations concerning the law of arrest, search and seizure, and custodial interrogation.

**9. *Criteria for Summoning Drug-Detection Canines or Equipment.***

The Superintendent should within 120 days of the issuance of this Interim Report develop specific, objective criteria for when a State Police member would be authorized to summon a drug-detector dog and/or ion mobility spectrometry equipment. These criteria must be designed to recognize the psychological impact on persons who are subjected to this procedure. These protocols should also be designed to account for the rule established by the New Jersey Supreme Court in State v. Dickey, 152 N.J. 468 (1998), which makes clear that an investigative detention based upon mere reasonable suspicion (as opposed to full probable cause to arrest) must be brief, and that protracted detentions will be deemed by the courts to constitute an arrest requiring full probable cause.

**10. *Requirement to Inform Dispatcher of Intention to Conduct a Probable Cause Search.***

Whenever a State Police member executes a probable cause “automobile exception” warrantless search, the member should be required, where practicable, to alert the communications center before initiating the search. Because probable cause searches are, by definition, bona fide criminal investigations based on an objective assessment that a search would reveal contraband or evidence of a crime, a patrol supervisor should ordinarily be dispatched to the scene and should

be present prior to the execution of the search when feasible. Note that since these searches must be predicated upon full probable cause, the encounter at this stage would no longer be considered to be a mere investigative detention or “Terry” stop, so that any resulting delay in the actual execution of the probable cause search while awaiting the arrival of a patrol supervisor would create no legal problems under State v. Dickey, 152 N.J. 468 (1998), which recently confirmed that investigative detentions must be “brief.”

In addition, the State Police member should be required to set out all of the facts and circumstances known to the officer constituting probable cause in a formal report whether or not the probable cause search revealed contraband or other evidence of a crime. An unlawful search that reveals no evidence may not implicate the exclusionary rule, since there is nothing to suppress, but still must be remedied through internal procedures to ensure that constitutional violations do not recur.

#### ***11. Criteria for Making Custodial Arrests.***

The Superintendent, as part of the comprehensive Standard Operating Procedure to be promulgated pursuant to Action Step No. 3, should establish specific criteria explaining when and under what circumstances a State Police member can make a custodial arrest rather than issue a summons. These criteria must comply with the requirements of State v. Pierce, 136 N.J. 184 (1994) and the principles established in R. 3:3-1.

## ***12. Availability of Legal Advisors.***

The Division of Criminal Justice and the county prosecutors should make available deputy attorneys general and assistant prosecutors to serve as police legal advisors and to answer search and seizure, custodial interrogation, and other legal questions on a 24-hour, 7-day per week basis. The Superintendent, in consultation with the Director of Criminal Justice, should implement procedures to explain when State Police members assigned to patrol duties or to patrol supervision will be expected and/or required to consult with the police legal advisor on duty. The Director and the county prosecutors should make certain that these deputy attorneys general and assistant prosecutors have sufficient training and experience to perform this critical function.

## ***13. System to Report Suppression of Evidence.***

The Director of the Division of Criminal Justice should consult with the county prosecutors and should within 120 days of the issuance of this Report establish a reporting system that would require a county prosecutor to alert the Superintendent where evidence seized during the course of a patrol stop made by a State Police member is suppressed by a court. In addition, the prosecutors should be required to alert the Superintendent and Director if their review of a State Police case results in the dismissal, downgrading, or less favorable plea offer by the prosecutor based upon the anticipated suppression of evidence. (More egregious violations may not lead to a formal court order to exclude evidence because the prosecutor will not attempt to defend the officer's unlawful conduct.)

The county prosecutors should be required to direct municipal prosecutors within their jurisdictions to alert the county prosecutor's office in the event of a successful suppression motion heard in Municipal Court involving a State Police patrol stop. Information concerning stops, frisks, arrests, or searches found by courts or prosecutors to be illegal should be entered into the "early warning system" database. The Superintendent should establish a system to counsel troopers found to have made unlawful stops, arrests, frisks, or searches with a view toward preventing future violations.

***14. Development of Inventory and Impoundment Policy.***

The Superintendent should within 120 days of the issuance of this Report develop a written inventory and impoundment policy. This policy should go beyond the minimum requirements of the Federal and State Constitutions. The inventory and impoundment exception to the warrant requirement is based solely on the need to protect police departments from civil liability claims with respect to the handling of property that was lawfully taken into custody. Such inventories may not be used as a pretext or subterfuge to conduct a search for evidence of criminal activity, and any such criminal law searches must be done pursuant to a warrant or another recognized exception to the warrant requirement. To the extent that the State Police have entered into contractual arrangements with private vendors to tow and to store disabled vehicles, the proposed inventory and impoundment policy should generally preclude State Police members from conducting an inventory search where the risk of civil liability can be avoided by

requiring the vendors to indemnify the State Police in any resulting lawsuits. Therefore, unless it is necessary and appropriate for the State Police (rather than a vendor summoned by the State Police) to take control and custody of a vehicle or other property, State Police members should not be permitted to conduct an inventory and impoundment search. Furthermore, criteria should be established as part of the new Standard Operating Procedure to explain when it would be appropriate for State Police, rather than the vendor, to take custody of the vehicle or other property, and procedures should be established that require the written approval of the officer in charge of the station before any such inventory or impoundment search is conducted.

***15. Interim Procedures Concerning Internal Affairs Investigations of Selective Enforcement Allegations.***

Subject to the release of future reports and recommendations of the Review Team, the Superintendent should develop a comprehensive Standard Operating Procedure for handling all complaints involving allegations of racial profiling, selective enforcement or disparate treatment of minorities. The revised procedures should be designed to ensure the full and fair investigation of such complaints with a view toward enhancing public confidence in the objectivity, professionalism, and integrity of the internal affairs process. In the interim, all allegations of discriminatory practices should be reported promptly to the Review Team and a deputy attorney general should review the complaint before the internal affairs investigation is commenced. The Standard Operating Procedure should further

provide that no internal investigation of any complaint, whether lodged by a private citizen or a State Police member, alleging "racial profiling," selective enforcement, or any other form of disparate treatment of minority citizens should be administratively concluded (whether by means of a finding of sustained, not sustained, or unfounded) until the investigation results have been reviewed by the Division of Criminal Justice.

***16. Uniform Handling of Selective Enforcement Litigation Involving State Police Members.***

The Division of Criminal Justice, in consultation with the county prosecutors, should establish protocols setting forth factors to be considered in evaluating pretrial claims of selective enforcement by State Police members and in determining whether a case will be litigated. The Appellate Bureau of the Division of Criminal Justice should be available for consultation in any pretrial selective enforcement case. Post-conviction or appellate issues arising with respect to selective enforcement issues should, in cases where a county prosecutor is handling the matter, be litigated only after consultation with the Appellate Bureau of the Division of Criminal Justice. Any legal position taken by a county prosecutor's office should comport with the position developed by the Division of Criminal Justice.

***17. Legislative Initiative.***

The Director of the Division of Criminal Justice should within 30 days report to the Attorney General on specific recommendations for legislation that



would create new official misconduct offenses to deal specifically with the use of police authority to knowingly or purposely violate a citizen's civil rights.

***18. Development of a Reliable Benchmark.***

Throughout the course of the Soto litigation, the Attorney General's Office posed bona fide criticisms of the Turnpike population survey methodology that was developed by the Public Defender's Office. It is therefore necessary to develop an accurate and reliable survey to put State Police stop and arrest statistics in proper context. The Department of Law and Public Safety is in a far better position than the Public Defender to design and implement a means of accurately compiling information about persons and vehicles that travel on the New Jersey Turnpike and other major roadways. The goal would be to develop an objective, accurate snapshot of certain characteristics of persons and vehicles that travel on the Turnpike and other interstate highways patrolled by the State Police that can then be used as a benchmark to trigger heightened scrutiny and supervision of the exercise of police discretion as part of the automated "early warning system" described in Action Step No. 3.

The Superintendent and the Director of the Division of Criminal Justice should within 120 days of the issuance of this Report develop a suitable survey methodology in consultation with an independent statistical expert and the United States Department of Justice. The statistical expert would also be responsible for designing a weighted sampling plan, that is, a means for random sampling so as to minimize the burdens of survey administration while establishing a sufficient

sample size to ensure maximum comparability and to create a useful benchmark for stops occurring at different times of day and along the entire length of the Turnpike.

In developing a meaningful benchmark, we are mindful of a series of state and federal cases that hold that it is not possible to determine whether a police agency has made a disproportionate number of traffic stops of a particular group of people without first producing a statistically-valid violator survey, establishing the percentage of violators from each relevant classification. See e.g., United States v. Armstrong, 517 U.S. 456, 465, 116 S.Ct. 1480, 1486 (1996); see also State v. Kennedy, 247 N.J. Super. 21, 33 (App. Div. 1991) (noting that the defendant's survey should have contained information on the racial composition of the group of persons who violate the traffic laws on roadways patrolled by the New Jersey State Police). While the law on this point seems clear, we are aware of no study that supports the hypothesis that minority motorists are more likely to violate motor vehicle laws than non-minority motorists, or that violations committed by minority motorists tend to be more serious than violations committed by non-minority motorists. In the absence of any plausible reason to believe that race, ethnicity, or national origin is in any way correlated to driving behavior, we question the need to undertake the difficult task of conducting a violator population survey. For this reason, the Superintendent and the Director of the Division of Criminal Justice should consult with and work cooperatively with the United States Department of Justice in determining whether it is necessary and appropriate to develop any such violator survey methodology.

## **PART VI. CONCLUSION.**

After considering voluminous records concerning activities on the New Jersey Turnpike, as well as anecdotal information from a number of sources, we have concluded that while the New Jersey State Police has never issued an official policy to engage in racial profiling or any other discriminatory enforcement practices, minority motorists have been treated differently than non-minority motorists at various stages of motor vehicle stops. This Interim Report has carefully reviewed the issue of racial profiling and some of the potential causes and sources of this problem. Most importantly, this Interim Report has recommended a series of remedial steps to ensure that all citizens are treated fairly and with dignity and respect.

Although the racial profiling issue has gained state and national attention recently, the underlying conditions that foster disparate treatment of minorities have existed for decades in New Jersey and throughout the nation, and will not be changed overnight. Even so, we firmly believe that this Interim Report represents a major step, indeed a watershed event, signaling significant change. We thus hope that this Report, once fully implemented through the issuance of new and comprehensive Standard Operating Procedures, a monitoring system, training, and other reforms, will ensure that New Jersey is a national leader in addressing the issue of racial profiling.

### ACKNOWLEDGMENT

The members of the State Police Review Team include Assistant Attorneys General Jeffrey J. Miller, Director of the Division of Law, Alfred Ramey, Jr., of the Office of the Attorney General, Debra L. Stone, Deputy Director of Operations for the Division of Criminal Justice, and Rolondo Torres, Jr., Director of the Division on Civil Rights, under the leadership of Paul H. Zoubek, First Assistant Attorney General and Director of the Division of Criminal Justice.

The Attorney General wishes to thank the members of the Review Team for their time and effort and to particularly recognize Assistant Attorney General Ronald Susswein, Deputy Director of Policy of the Division of Criminal Justice, for his extraordinary efforts in preparation of this Report.