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ISSUES TO DEVELOP AT TRIAL

RACIAL JUSTICE SERIES

July 2021

Has a client ever faced felony charges after what was clearly a race-based pretextual traffic stop? Meaning, for example, your Black or brown client was stopped “officially” because he didn’t signal while switching lanes (at 2 in the morning with no one else around) but really - as you and your client knew, and no doubt the prosecutor and court knew too – because the cops wanted to search the car.

Maybe you established at the suppression hearing that the cops followed him for a quarter mile before stopping him for failing to signal and were members of a task force assigned to get guns off the streets. But despite the obvious, the court upheld the stop: your client violated the traffic laws, after all, so the police had probable cause. Under People v. Robinson, 97 N.Y.2d 341 (2001), the cops’ subjective reasons for stopping the car just don’t matter.

This issue of our Issues to Develop, Racial Justice Series, gives you tools for challenging racial profiling and pretextual traffic stops. One, Robinson should be overruled. Two, Robinson should never apply to mistake-of-law stops. And three, racist stops are unconstitutional under the equal protection clause. Below, we lay out these three challenges, with some templates to assist.

Even if your challenges are unsuccessful, you’ll be making a strong statement on your client’s behalf, make the prosecution’s life just that much more difficult, and set the stage for further litigation that your appellate colleagues would relish pursuing.

Legal Background

In People v Robinson, 97 N.Y.2d 341 (2001), the Court of Appeals held that, where the police have probable cause to believe a driver has committed a traffic violation, the stop doesn’t violate the state constitution even though the underlying reason for the stop is to investigate some other matter. Neither the officer’s primary motivation for the stop, nor what a reasonable traffic officer would have done under the circumstances was relevant to the analysis. In so doing, the Court went lockstep with the Supreme Court, which had held in Whren v. United States, 517 U.S. 806 (1996), that pretext stops don’t violate the Fourth Amendment.

The Court paid lip service to the racial disparities in traffic stops, finding “cause for both vigilance and concern,” but stated that a civil action under the Equal Protection Clause and Search and Seizure clauses of the state constitution provided a remedy. Id. at 354.

Commentators and scholars have blasted Whren (and by extension, Robinson), for its faulty legal

reasoning, policy choices, and consequences.

Challenge #1 - Robinson should be overruled

What you should do: If your client of color was the victim of a pretextual stop, elicit facts supporting that the stop was a pretext at the hearing. (*See box below for things to consider*). Then argue that, even if the police had probable cause to stop the car for a traffic infraction, the stop violated the state constitution (art. 1, § 11), because it was pretextual. Robinson should be overruled as a matter of state constitutional law. It is 20 years old and out of step with achieving racial justice and equity in this State, especially in the wake of the murders of Black people by law enforcement, the extensive data proving racial disparities in traffic enforcement, and the capacity for traffic stops to dangerously and fatally escalate for people of color.

A lower court cannot overrule a Court of Appeals decision but you must ask the court to do so to preserve the issue for appeal.

Challenge #2 - Robinson does not apply to mistake-of-law stops

What you should do: If your client didn't even violate the traffic laws but the prosecutor argues that it was a reasonable mistake of law so there was probable cause (and therefore ok under Robinson regardless of pretext), argue that Robinson doesn't apply because **your client did not actually violate the VTL**. Robinson was predicated on the assurance of an objective standard - an ascertainable violation of the VTL – to protect citizens from arbitrary police conduct. As the Court expressly said, “An officer’s authority to stop a vehicle is circumscribed by the requirement of a violation of a duly enacted law. In other words, it is the violation of statute that both triggers the officer’s authority to make the stop and limits the officer’s discretion.” 97 N.Y.2d at 341.

Robinson's underpinnings fall away where the cop acts on a mistake of law. Absent an actual VTL violation, a pretext stop violates the constitution.

Challenge #3 - Racist Traffic Stops Violate Equal Protection and Require Dismissal of the Charges or Suppression of the Evidence (or a hearing at a minimum).

Robinson left open whether a violation of equal protection can trigger suppression. You should argue that it does where the stop is itself discriminatory – that is, the “But for” cause of the stop was your client’s race.

A claim of selective enforcement is grounded in equal protection and challenges discriminatory governmental action: when the government acts “with an unequal hand” and “an evil eye” in the enforcement of its laws. 303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686, 693 (1979) (“Klein”). The Court of Appeals has held that claims of selective enforcement should be brought by a pretrial motion to dismiss on constitutional grounds, see People v. Goodman, 31 N.Y.2d 262 (1972), but nothing in CPL 710.20 precludes an argument that the evidence

recovered from your client should be suppressed as resulting from a “search and seizure” that was “unlawful” insofar as it violated your client’s right to equal protection. Whether there is a suppression remedy for equal protection violations is an open question. But selective enforcement claims and suppression claims both go to the very integrity of the judicial and law enforcement processes,” Goodman, at 269, so it makes sense for selective enforcement to provide a basis for suppression.

In your motions to dismiss and suppress, specifically rely on the Fourteenth Amendment’s Equal Protection Clause *and* Article 1, § 11 (the New York State Constitution’s equal protection clause).¹ Argue that the broader text of Article 1, § 11 requires more protection than the federal constitution. Also argue that New York’s unique commitment to racial equality justifies a more expansive state constitutional approach.

A defendant asserting a claim of selective enforcement in New York has a “heavy burden” of showing a grossly disproportionate incidence of nonenforcement against others similarly situated. Matter of Berris GG, 222 A.D.2d 971 (3d Dep’t 1995); Klein, at 693. The litigant must also show that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification. Klein at 693.

The burden has historically required statistical data, but putting aside that the statistical data seemingly required (non-enforcement of the traffic laws against white drivers who commit infractions) does not, to our knowledge, even exist, we question whether such proof should be needed.

To raise at least an inference that the cops enforced the traffic laws against your client because he was Black or Latinx sufficient to require a hearing, we suggest using whatever statistical data you can get your hands on, both generally and case-specific, and that you set forth the specific circumstances of the traffic stop evidencing pretext and racial profiling. (A recent case from the high court in Massachusetts, Commonwealth v. Long, 485 Mass. 711 (2020), held that such circumstances were alone enough to raise an inference of discrimination to support a selective enforcement claim and our template motions assert that too).

A recent [report](#) from New York Law School’s School of Racial Justice has good data from seven New York counties, Suffolk, and Buffalo, showing disparities in traffic enforcement, and the [Stanford Open Policing Project](#) examined about 93 million traffic stops conducted from 2011 to 2017 across 21 state patrol agencies, including New York, and 29 municipal police departments, and concluded that Black drivers are 20% more likely to get pulled over than white drivers. More such reports are cited in our templates.

¹ The Fourteenth Amendment guarantees that “[no State] shall . . . deny to any person . . . the equal protection of the laws.” But Article 1, § 11 has even broader language: “no person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to *any discrimination in his or her civil rights* by any person or by any firm, corporation or institution, or by this state or any agency or subdivision of the state. (Emphasis added).

What you should do: If your client was the victim of racial profiling in the traffic stop:

- Make a discovery request under CPL § 245.30(3)(discretionary discovery) or subpoena information directly from the NYPD to obtain information that would support a claim of selective enforcement. This might include the particular officer's recent traffic stops, information regarding the policies and procedures pertaining to the officer's unit and its record of traffic stops, as well as the officer's typical duties and responsibilities. Also ask for statistical discovery and third-party records regarding traffic citations issued in your county and the State. Argue that this discovery is necessary in contemplation of motions to dismiss and suppress based on selective enforcement. Then ask for the appointment of an expert to interpret the data. Find what you can on your own through reports, public records and FOIL requests.
- Include in your Omnibus Motion motions to dismiss and/or suppress on the grounds of selective enforcement. *See our templates (linked [here](#) to editable word versions available on our website and in hard copy attached to this newsletter) for framing suggestions.* The goals are to raise a sufficient factual dispute to warrant a hearing on your claim of racial profiling and to preserve issues for appeal if your motion is denied.

WAS IT A PRETEXTUAL, RACIST STOP? SOME THINGS TO CONSIDER.

- ◆ What are the regular duties of the officer involved in the stop - i.e., an officer assigned to a specialized unit, such as a gang unit or the domestic violent unit, suggests that the traffic enforcement is not a primary objective;
- ◆ What was the sequence of events prior to the stop - i.e., if the officer followed the vehicle for an extended period of time or staking out a house;
- ◆ What was the manner of the stop - i.e., whether the officer's conduct, or the duration of the stop, was consistent with enforcement of a motor-vehicle violation;
- ◆ What safety interests were involved in enforcing the motor-vehicle violation - i.e., did the driver's conduct impact public safety, such as operating under the influence); and
- ◆ What were the specific police department's policies and procedures regarding traffic stops - i.e., if an officer's conduct deviates from specific policies.

[INSERT IN YOUR OMNIBUS MOTION AS A BASIS FOR DISMISSAL, ALONG WITH ANY OTHER GROUNDS FOR DISMISSAL

[These template allegations are only meant to assist you in formulating your own motion to dismiss on grounds of selective enforcement. Conform to the facts of your case, consider carefully and admissions you make on your client's behalf, and include any other challenges to the indictment].

MOTION TO DISMISS ON THE GROUND OF SELECTIVE PROSECUTION.

x. This affirmation is made in support of my client's motion to dismiss the indictment on the ground that s/he was the victim of selective enforcement of the laws, in violation of his/her right to equal protection under the state and federal constitutions, because law enforcement's stop of his/her car was motivated in part or in full by my client's race rather than the traffic infraction he/she was alleged to have committed. U.S. Const., amend. XIV; N.Y. Const., art. I, § 11. Unquestionably, the police may not stop a motorist based on race or any other invidious classification.

x. My client is [race/ethnicity].

x. The sources of my information and belief include [e.g., court records, public records, conversations had with my client and with various Assistant district Attorneys, data provided through discovery, etc].

x. My client stands charged with [charges]. These charges are subject to dismissal as the direct fruit of the constitutional violation my client suffered at the hands of the police. See U.S. Const., amend. XIV; N.Y. Const., art. I, § 11; Wong Sun v. United States, 371 U.S. 471, 477-78 (1963).

x. On information and belief, my client was stopped by officers [provide circumstances of the stop - include any relevant circumstance showing that your client was singled out and that it was a pretext. For example, if the stop was supposedly for speeding, were

there other cars that passed your client's car immediately before the stop that weren't stopped?
Can you allege that those drivers were white?]

x. Selective enforcement rules protect citizens where the government acts “with an unequal hand” and “an evil eye” in the enforcement of its laws. 303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686, 693 (1979) (“Klein”). It is a constitutional argument grounded in equal protection. Id. The principle has been recognized in cases involving the enforcement of the criminal laws. Id. The Court of Appeals has held that claims of selective enforcement should be brought by a pretrial motion to dismiss on constitutional grounds. See People v. Goodman, 31 N.Y. 2d 262 (1972). On a motion to dismiss, the court must conduct a hearing if, on the papers before it, “a strong showing of selective enforcement, invidiously motivated, appears.” Klein, at 693.

x To prove discriminatory purpose, it has been suggested that motorists of color alleging that a traffic stop constituted a denial of equal protection must show that similarly situated white motorists who could have been stopped, were not. United States v. Armstrong, 517 U.S. 456, 465 (1996). While there is extensive and compelling data and scholarship establishing racial disparities in traffic enforcement in the State¹ – including in observations by

¹ Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* 2 [2014] [each year about 12% of all drivers are stopped by the police, and the share of Black drivers stopped is about double]); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, *Nature Human Behaviour* [2020], available at <http://web.stanford.edu/~csimoiu/doc/traffic-stops.pdf> [study of 95 million traffic stops finding Black drivers were more likely to be stopped, ticketed, searched, and arrested than white drivers, and that Hispanic drivers, when stopped, were more likely to be ticketed, searched, and arrested than white drivers]; Robert E. Worden et al., *Traffic Stops by Suffolk County Police* 7, 48 [Sept.2020], available at <https://suffolkcountyny.gov/Portals/0/formsdocs/police%20reform/Traffic%20Stops%20by%20Suffolk%20County%20Police%2010.19.2020.pdf> [study of over 130,000 traffic stops by Suffolk police finding that, compared to white drivers, Black and Hispanic drivers were more likely to be stopped for equipment violations, Black drivers were over three times more likely to be subjected to physical force, and Hispanic drivers were 16% more likely to be searched and 16% more likely to be arrested]; New York Law School, Racial Justice Project, *Driving while Black and Latinx: Stops, Fines, Fees, and*

New York Court of Appeals Judges² – on information and belief, no data is maintained showing whether law enforcement does not enforce the traffic laws against similarly situated white drivers.

x. The Court of Appeals has stated that “[I]atititude should be allowed in this complex area of proof.” Klein, 46 N.Y.2d at 693. In Commonwealth v. Long, 485 Mass. 711 (2020), the Massachusetts high court attacked this very problem in the context of racial profiling in traffic stops. Recognizing that “the right of drivers to be free from racial profiling will remain illusory unless and until it is supported by a workable remedy,” the court created a framework which allows a defendant to show that he or she was the victim of selective enforcement without the necessity of statistical data – data either unavailable or inaccessible. The court identified six, non-exclusive, factors that a court should consider in determining whether the defendant raised a “reasonable inference” of selective enforcement:

1. Patterns in enforcement actions by the particular officer - i.e. if a significant percentage of stops the officer made involved drivers of the same race for minor traffic violations.
2. Regular duties of the officer involved in the stop - i.e., an officer assigned to a

Unjust Debts (Feb. 2020), available at <https://finesandfeesjusticecenter.org/content/uploads/2020/02/RJP.-Drivers-License-Suspension.-Final.pdf> [noting that although statewide data is not available, state police data compiled in seven New York Counties, as well as data from Suffolk County and Buffalo, show that people of color are disproportionately stopped by law enforcement. In 2017, Black individuals accounted for 31.38 percent of the New York State Police’s traffic stops in Monroe county, yet made up just 14.4 percent of the county’s population. In 2018, Black individuals accounted for 17.69 percent of the Suffolk County Police Department’s traffic stops, yet made up just 7.2 percent of the county’s population); Rushin and Griffin, An Empirical Assessment of Pretextual Stops and Racial Profiling, 73 Stn. L. Rev. 637 (March 2021)(employing a novel analysis of a newly available dataset, the Article analyzes almost 9 million traffic stops in Washington State, from 2008-2015, to illustrate empirically that judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers).

² See People v. Robinson, 97 N.Y.2d at 366-67 (Levine, J., dissenting); People v. Pena, 36 N.Y.3d 978, 990, 997-98 (Wilson, J. and Rivera, J. dissenting).

specialized unit, such as a gang unit or the domestic violent unit, suggests that the traffic enforcement is not a primary objective;

3. Sequence of events prior to the stop - i.e., if the officer followed the vehicle for an extended period of time;

4. The manner of the stop - i.e., whether the officer's conduct, or the duration of the stop, was consistent with enforcement of a motor-vehicle violation;

5. The safety interests in enforcing the motor-vehicle violation - i.e., did the driver's conduct impact public safety (such as operating under the influence); and

6. The specific police department's policies and procedures regarding traffic stops - i.e., if an officer's conduct deviates from specific policies.

x. My client has made a prima facie, "colorable" showing" of the merits of his/her claim of selective enforcement, Klein, 46 N.Y.2d at 695 – that the traffic laws were enforced with an "unequal hand and an evil eye" – to warrant an evidentiary hearing on his/her motion to dismiss.

x. Specifically, the defense sets forth the following:

a. My client is a [race/ethnicity] person such that the selective enforcement of the laws that he/she alleges is based on an impermissible standard, see Klein at 693.

b. Black and Latinx drivers in New York State and throughout the country are disproportionately stopped for committing traffic infractions. See fns. 1 and 2, ante [If you are in one of the seven New York Counties, or Suffolk or Buffalo, the areas specifically referenced in New York Law School's Fines and Fees report, reference that data).

c. Relevant statistical data obtained in connection with this case includes the following: [explain any data you obtained about traffic stops in your community, or the officer's specific history, how accumulated, determine what the data means statistically if possible- this may require an expert. If you were not able to obtain data, explain your efforts and the results].

d. In connection with the stop of my client's car, certain facts stand out: [list any

facts that support racial profiling and pretext]. These circumstances alone give rise to an inference of discriminatory purpose sufficient to require a hearing, consistent with the “latitude” the Court of Appeals has said is appropriate in this area. Klein, 46 N.Y.2d at 693. Even if deemed a departure from current law regarding the proof burden, this court should adopt this framework under state and federal constitutional principles of equal protection and due process and in light of our state’s unique commitment to achieving racial justice and equity, as reflected in the broader language of our state constitution’s equal protection clause.³ U.S. Const., amends., IV; N.Y. Const., art. 1, §§ 6, 11; see Commonwealth v. Long, 485 Mass. 711 (2020).

x. Wherefore, [Client name] seeks an order dismissing the charges against him/her, or, alternatively, a hearing on this motion.

³ The Fourteenth Amendment guarantees that “[no State] shall . . . deny to any person . . . the equal protection of the laws.” But Article 1, § 11 has even broader language: “no person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to *any discrimination in his or her civil rights* by any person or by any firm, corporation or institution, or by this state or any agency or subdivision of the state.” (Emphasis added).

[INSERT IN YOUR OMNIBUS MOTION AS A BASIS FOR SUPPRESSION, ALONG WITH ANY OTHER ARGUMENTS YOU HAVE].

[These template allegations are only meant to assist you in formulating your own motion to suppress on grounds of racial profiling. Conform to the facts of your case, consider carefully any admissions you make on your client’s behalf, and include any other challenges to the stop, search, and seizure in your omnibus motion]

MOTION TO SUPPRESS PHYSICAL EVIDENCE AS OBTAINED IN VIOLATION OF EQUAL PROTECTION.

x. This affirmation is made in support of my client’s motion to suppress evidence on the ground that it was the fruit of law enforcement’s traffic stop of my client in violation of his/her right to equal protection of the laws under the state and federal constitutions. U.S. Const., amend. XIV; N.Y Const., art. I, § 11; see Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments”); United States v. Jennings, 985 F.2d 562; 1993 WL 5927 at *4 (6th Cir. 1993)(“[E]vidence seized in violation of the Equal Protection Clause should be suppressed. ‘[N]o distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted in either case.’”). Specifically, my client, who is [race/ethnicity], alleges that s/he was racially profiled by law enforcement and a victim of selective enforcement of the laws. Unquestionably, the police may not stop a motorist based on race or any other invidious classification.

x. The sources of my information and belief include [e.g., court records, public records, conversations had with my client and with various Assistant district Attorneys, data provided through discovery, etc].

x. My client stands charged with [charges].

x. On information and belief, my client was stopped by officers [provide

circumstances of the stop - include any circumstances showing that your client was singled out and that it was a pretext. For example, if the stop was supposedly for speeding, were there other cars that passed your client's car immediately before the stop that weren't stopped? Can you allege that those drivers were white?]

x. Selective enforcement rules protect citizens where the government acts "with an unequal hand" and "an evil eye" in the enforcement of its laws. 303 West 42nd Street Corp. v. Klein, 46 N.Y.2d 686, 693 (1979) ("Klein"). It is a constitutional argument grounded in equal protection. Id. The principle has been recognized in cases involving the enforcement of the criminal laws. Id.

x. Criminal Procedure Law § 710.20 permits a court to suppress or exclude evidence upon the ground that it "[c]onsists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action. . . ." Law enforcement's profound interference with my client's liberty and privacy in violation of my client's constitutional right to equal protection of the laws (i.e, racial profiling) is an "unlawful search and seizure" that entitles him/her to suppression of the evidence the prosecution intends to use against him/her at trial, or a hearing on that ground. The court must grant a hearing on a motion to suppress if the motion raises a factual dispute. The sufficiency of the allegations should be evaluated by "the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." People v. Mendoza, 82 N.Y.2d 415, 426 (1993); CPL § 710.60(4).

x. Under analogous pre-trial procedures,¹ New Jersey entertains suppression claims

¹ Before trial in New Jersey, a defendant claiming to be aggrieved by an unreasonable search or seizure may apply to suppress the evidence seized, whether the search or seizure was executed with a warrant or constitutes a warrantless search. R. 3:5-7(a). Subsection (b) of that rule allocates the

under federal and state constitutional guarantees of equal protection where the aggrieved party has alleged that they were the victim of racial profiling and selective enforcement. See State v. Soto, 734 A.D.2d 350 (N.J. Super. Ct 1996). In Soto, the court entertained a consolidated motion to suppress evidence by 17 Black defendants who were arrested after being stopped on the highway by the New Jersey state police. The court allowed discovery concerning the relative incidence of traffic stops by New Jersey state troopers involving various racial groups, and reviewed additional statistical evidence unearthed by defense counsel. The totality of the evidence revealed compelling statistical proof that Black motorists were disproportionately targeted for traffic enforcement. The court then held a hearing at which experts for both the defense and the prosecution analyzed the statistical evidence, and the court concluded that the state had failed to rebut the defendants' proof that members of the defendants' race were unfairly targeted for search and seizure. The court suppressed the evidence used against all 17 defendants.

x. To prove discriminatory purpose, it has been suggested that motorists of color alleging that a traffic stop constituted a denial of equal protection must show that similarly situated white motorists who could have been stopped, were not. United States v. Armstrong, 517 U.S. 456, 465 (1996). However, that data that is not even available. While there is extensive and compelling data and scholarship establishing racial disparities in traffic enforcement in the

evidentiary burden as to searches based on whether they are or are not supported by a warrant, and subsection (c) prescribes that “[i]f material facts are disputed [in suppression motions], testimony thereon shall be taken in open court.” R. 3:5–7(c). Rule “3:5–7 ... contemplate[s] pre-trial hearings on Fourth Amendment issues which are collateral to guilt or innocence. In addition, evidence relating to the propriety of a stop or seizure is generally separate from issues of guilt or innocence. Usually, judicial economy is best served by resolving these issues pre-trial.” State v. McLendon, 331 N.J. Super. 104, 109, 751 A.2d 148 (App. Div. 2000).

State and across the country² – including in observations by New York Court of Appeals judges³ – on information and belief, no data is maintained showing whether law enforcement does not enforce the traffic laws against similarly situated white drivers.

x. Addressing the proof burden for claims of selective enforcement, the Court of Appeals in Klein stated that “[I]atititude should be allowed in this complex area of proof.” 46 N.Y.2d at 693. In Commonwealth v. Long, 485 Mass. 711 (2020), the Massachusetts high court attacked this very problem in the context of racial profiling in traffic stops. Recognizing that “the right of drivers to be free from racial profiling will remain illusory unless and until it is supported by a workable remedy,” the court created a framework which allows a defendant to

² Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship 2* [2014] [each year about 12% of all drivers are stopped by the police, and the share of Black drivers stopped is about double]); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, Nature Human Behaviour* [2020], available at <http://web.stanford.edu/~csimoiu/doc/traffic-stops.pdf> [study of 95 million traffic stops finding Black drivers were more likely to be stopped, ticketed, searched, and arrested than white drivers, and that Hispanic drivers, when stopped, were more likely to be ticketed, searched, and arrested than white drivers]; Robert E. Worden et al., *Traffic Stops by Suffolk County Police 7*, 48 [Sept.2020], available at [https://suffolkcountyny.gov/Portals/0/formsdocs/police% 20reform/Traffic% 20Stops% 20by% 20Suffolk% 20County% 20Police% 2010.19.2020.pdf](https://suffolkcountyny.gov/Portals/0/formsdocs/police%20reform/Traffic%20Stops%20by%20Suffolk%20County%20Police%2010.19.2020.pdf) [study of over 130,000 traffic stops by Suffolk police finding that, compared to white drivers, Black and Hispanic drivers were more likely to be stopped for equipment violations, Black drivers were over three times more likely to be subjected to physical force, and Hispanic drivers were 16% more likely to be searched and 16% more likely to be arrested]; New York Law School, Racial Justice Project, *Driving while Black and Latinx: Stops, Fines, Fees, and Unjust Debts* (Feb. 2020), available at [https://finesandfeesjusticecenter.org/content/uploads/2020/02/RJP.-Drivers-License-Suspension.-Final. pdf](https://finesandfeesjusticecenter.org/content/uploads/2020/02/RJP.-Drivers-License-Suspension.-Final.pdf) [noting that although statewide data is not available, state police data compiled in seven New York Counties, as well as data from Suffolk County and Buffalo, show that people of color are disproportionately stopped by law enforcement. In 2017, Black individuals accounted for 31.38 percent of the New York State Police’s traffic stops in Monroe county, yet made up just 14.4 percent of the county’s population. In 2018, Black individuals accounted for 17.69 percent of the Suffolk County Police Department’s traffic stops, yet made up just 7.2 percent of the county’s population); Rushin and Griffin, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637 (March 2021)(employing a novel analysis of a newly available dataset, the Article analyzes almost 9 million traffic stops in Washington State, from 2008-2015, to illustrate empirically that judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers).

³ See People v. Robinson, 97 N.Y.2d at 366-67 (Levine, J., dissenting); People v. Pena, 36 N.Y.3d 978, 990, 997-98 (Wilson, J. and Rivera, J. dissenting).

show that he or she was the victim of selective enforcement without the necessity of statistical data – data either unavailable or inaccessible. The court identified six, non-exclusive, factors that a court should consider in determining whether the defendant raised a “reasonable inference” of selective enforcement:

1. Patterns in enforcement actions by the particular officer - i.e. if a significant percentage of stops the officer made involved drivers of the same race for minor traffic violations.
2. Regular duties of the officer involved in the stop - i.e., an officer assigned to a specialized unit, such as a gang unit or the domestic violent unit, suggests that the traffic enforcement is not a primary objective;
3. Sequence of events prior to the stop - i.e., if the officer followed the vehicle for an extended period of time;
4. The manner of the stop - i.e., whether the officer's conduct, or the duration of the stop, was consistent with enforcement of a motor-vehicle violation;
5. The safety interests in enforcing the motor-vehicle violation - i.e., did the driver's conduct actually impact public safety (such as operating under the influence);
6. The specific police department's policies and procedures regarding traffic stops - i.e., if an officer's conduct deviates from specific policies.

x. In support of my client’s request for suppression of physical evidence on the ground that the traffic laws were selectively enforced on the basis of race, the defense sets forth the following:

a. My client is a [race/ethnicity] person such that the selective enforcement of the laws he/she alleges is based on an impermissible standard, see Klein at 693.

b. Black and Latinx drivers in New York State and throughout the country are disproportionately stopped for committing traffic infractions. See fns. 1 and 2, ante [If you are in one of the seven New York Counties, or Suffolk or Buffalo, the areas specifically referenced in New York Law School’s Fines and Fees report, reference that data).

c. Relevant statistical data obtained in connection with this case includes the following: [explain any data you obtained about traffic stops in your community, or the officer's specific history, how accumulated, determine what the data means statistically if possible- this may require an expert. If you were not able to obtain any data, explain your efforts and the results].

d. In connection with the stop of my client's car, certain facts stand out: [list any facts that support racial profiling and pretext]. These circumstances alone give rise to an inference of discriminatory purpose sufficient to require a hearing, consistent with the "latitude" the Court of Appeals has said is appropriate in this area. Klein, 46 N.Y.2d at 693. Even if deemed a departure from current law regarding the proof burden, this court should adopt this framework under state and federal constitutional principles of equal protection and due process and in light of our state's unique commitment to achieving racial justice and equity, as reflected in the broader language of our state constitution's equal protection clause.⁴ U.S. Const., amends., IV; N.Y. Const., art. 1, §§ 6, 11; see Commonwealth v. Long, 485 Mass. 711 (2020).

x. At a minimum, in light of the context of the motion. the defense's limited access to data, and the circumstances of the stop, the court must order a hearing at which the prosecution must rebut the inference of racial profiling my client has raised. See Mendoza, 82 N.Y.2d at 426

x. Wherefore, [Client name] seeks an order suppressing [detail the evidence]

⁴ The Fourteenth Amendment guarantees that "[no State] shall . . . deny to any person . . . the equal protection of the laws." But Article 1, § 11 has even broader language: "no person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to *any discrimination in his or her civil rights* by any person or by any firm, corporation or institution, or by this state or any agency or subdivision of the state." (Emphasis added).

recovered by law enforcement as a direct consequence of law enforcement's unlawful and unconstitutional traffic stop, or alternatively, a hearing on this motion, at which the prosecution must rebut the inference that law enforcement selectively enforced the traffic laws against my client on account of his/her race.