CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

RACIAL JUSTICE SERIES

September 2021

This edition in our Issues to Develop/Racial Justice Series addresses another common scenario whose unfairness falls heavily on Black and Brown clients – the trial penalty imposed on clients at sentencing who had the temerity to reject a plea offer and insist on their constitutional right to a trial.

You know it when it happens - and we see it on appeal: a startling disparity between the plea bargain offered and rejected, and the sentence imposed after trial. It is vindictive and punitive, and sends a coercive message going forward - no matter how strongly your client wants to put the prosecution to its proof and maintain their insistence, he or she will reject a plea at their peril.

This is so wrong. Clients should never be punished for going to trial nor should the system tolerate such abuses.

Below we give you some simple suggestions for meeting this issue head on. Nothing fancy - just a sentence or two when you believe it is happening. Even if the sentencing court self-righteously denies it's doing anything of the sort, with your objection in place, we can raise this issue on appeal without fear of being swatted away on preservation grounds. At the least, it may shame the appellate court into reducing simply on the ground that the sentence is excessive, even if the court declines to find vindictiveness.

Read to the end for some exciting updates to July's ITD proposing challenges to pretext traffic stops and racial profiling.

Background

Caselaw

It is to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea. People v. Martinez, 26 N.Y.3d 196 (2015); People v. Pena, 50 N.Y.2d 400 (1980).

Nonetheless, by the same token, a trial court may not impermissibly increase an individual's punishment solely for asserting his right to proceed to trial, nor may retaliation or vindictiveness play any role in sentencing following a conviction. Corbitt v. New Jersey, 439 U.S. 212 (1978);

People v. Brown, 70 A.D.2d 505, 505-06 (1st Dep't 1990); People v. Patterson, 106 A.D.2d 520 (2d Dep't 1984). A disparity between offer and sentence imposed after trial conviction may be so great and so otherwise not explained by other factors as to "create the appearance that the defendant was being punished for proceeding to verdict, rather than receiving merely the sentence which his crime and record justified." Brown, at 506.

Preservation of such claims is required. See People v. Hurley, 75 N.Y.2d 887 (1990); People v. Moncayo, 195 A.D.3d 750 (2d Dep't. 2021)(declining to review claim that sentence imposed penalized defendant for exercising his right to trial "because he did not set forth the issue on the record at the time of sentencing"). An appellate court can avoid deciding the claim, or give it very short shrift, if not raised at the trial level.

The NYSACDL Report

In March 2021, the New York State Association of Criminal Defense Lawyers (NYSACDL) and the National Association of Criminal Defense Lawyers (NACDL) issued a ground-breaking report entitled *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*. The report blames the trial penalty – defined as the substantially greater sentence a defendant receives after trial than the plea offer before trial – as a key reason for the decline of trials and the diminution of other rights associated with trials. To investigate the trial penalty phenomenon, NYSACDL conducted a statistical analysis of criminal convictions in New York State assembling a sample of 79 cases from Manhattan criminal defense organizations where plea offers had been declined and there was a subsequent conviction on the top count.

The conclusion from even this relatively small sample was irrefutable: rejecting a plea offer, whether in a felony case or a misdemeanor, will result in a higher sentence most of the time, with the disparity becoming greater with felony charges carrying longer prison terms. (For example, when the length of sentence offered in the plea offer is one year, the expected resulting sentence will be about 1.6 years; when the length of sentence offered is five years, the expected resulting sentence will be about 7.5 years; and when the length of sentence offered is 20 years, the expected resulting sentence will be about 28 years). Thus, turning down plea offers involving long prison terms results in even longer sentences after the trial conviction.

Statistical modeling also indicated that age and race may impact who received a trial penalty – people who were less than 25 years old and Black were more likely to receive a trial penalty than those who were older or white.

What to do if the prosecutor recommends and/or the court imposes a substantially longer sentence after trial than was offered in a plea bargain before trial

- Make sure you put the prior plea offer (and all plea offers) on the record: if the offers aren't on the record somewhere, your appellate colleagues won't have the necessary record to challenge the sentence imposed as a trial penalty;

- **Object!** State that the disparity punishes your client for exercising his constitutional right to a trial;

- Cite the NYSACDL Report as substantiating that individuals who reject plea bargains routinely receive harsher sentences after trial and (if relevant to your case) that the data further indicates that the disparity is greater for young Black individuals than older white individuals;

- if possible, prophylactically refute any potential justifications for the bump-up (i.e, nothing unknown/no new facts came out at trial; the case did not involve putting a traumatized victim on the stand).

— UPDATES—

- In our July ITD, we proposed several ways to challenge pretext stops and racial profiling:(1) argue that People v. Robinson should be overruled; (2) argue in mistake-of-law cases that Robinson doesn't apply; (3) move for a hearing on the grounds that the pretextual stop of your Black or Brown client violated Equal Protection.

The momentum for overruling Robinson and recognizing a suppression remedy for an Equal Protection violation now finds additional support in the strong concurring and dissenting opinions in United States v. Weaver, 9 F.4th 129 (2d Cir. August 16, 2021), an *en banc* decision upholding the frisk of a Black man after a traffic stop.

The concurrence agreed the search was lawful, but also agreed with the dissent that Whren (which Robinson followed lockstep) should be revisited because it facilitates racial discrimination in policing. "Whren and later cases have unfortunately given police officers a green light to make pretextual stops based on racial profiling." Weaver, at 158-9. The concurrence cited Commonwealth v. Long (cited in our ITD) as evidence that a departure from Whren is judicially administrable.

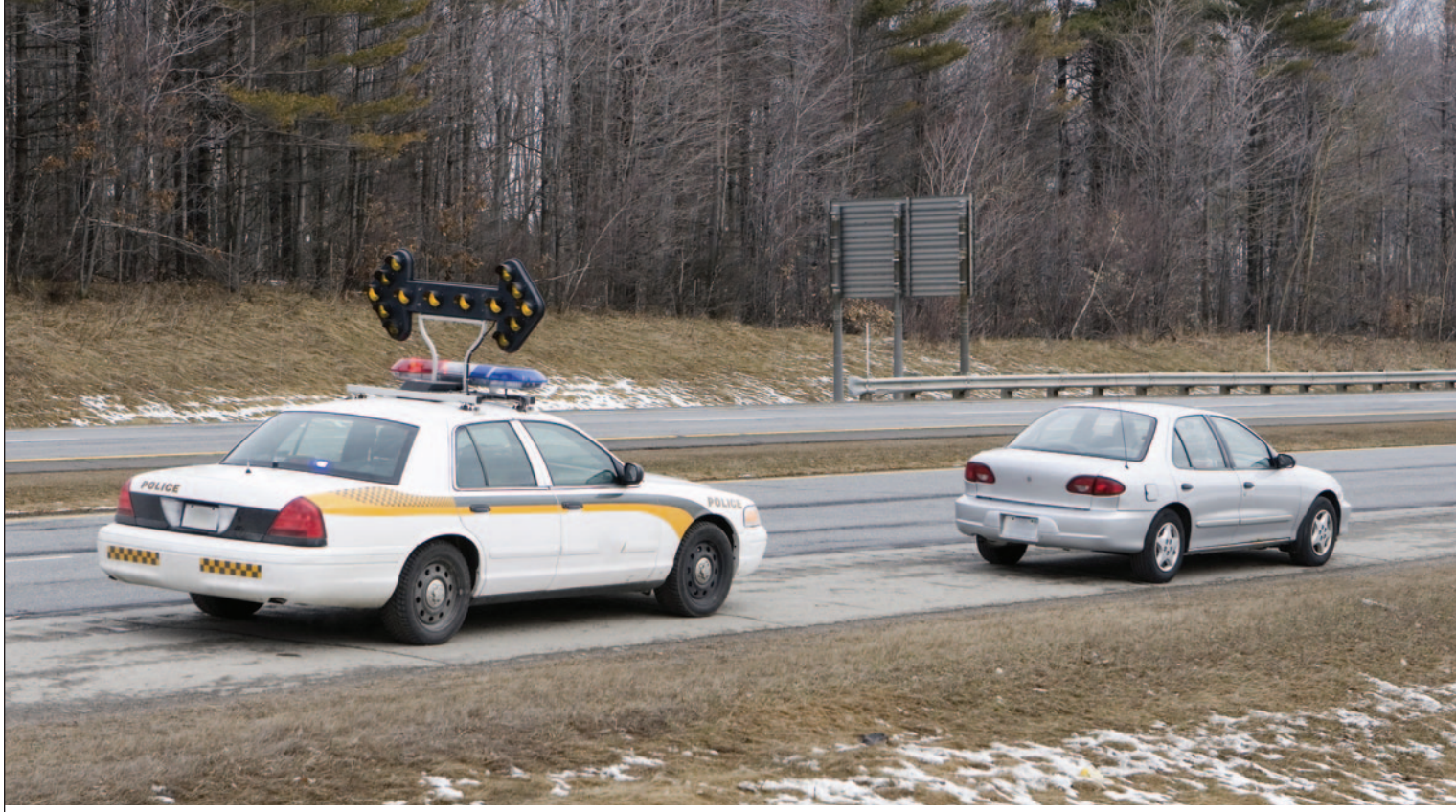
Consistent with our ITD proposal, the concurrence wrote, "Criminal defendants must be able to raise the issue of selective enforcement where the presence of racial bias is unmistakable, and they should not have to do so in a separate civil proceeding." Id. At 159. The concurrence stated:

> Allowing the fruit of a stop tainted by racial bias to be admitted at a trial or hearing undermines the integrity of judicial proceedings, imperils trust in the justice system, and decreases public safety. Residents of affected communities, especially young people targeted by law enforcement, are "less likely to cooperate with the police, even when they are in danger or have been the victim of crime." Whren should be reconsidered. Id. at 160 (footnotes omitted).

The strong language used by these Second Circuit judges is yet more evidence supporting a frontal attack on Robinson. We've also updated our selective enforcement suppression template (available on our website at https://www.appellate-litigation.org/forms-for-trial-practitioners/) to include Weaver.

- The July 2021 issue of NACDL's publication, The Champion, published an excellent article by Andre Vitale, of the New Jersey Office of the Public Defender, entitled *Fighting Racial Bias by the Police Through Suppression Litigation.* With the kind permission of NACDL and Andre, we have attached it hereto. It details how to bring a suppression motion based on Equal Protection and provides suggestions that helpfully supplement our ITD suggesting same.

* * *



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Fighting Racial Bias by the Police Through Suppression Litigation

Every day, criminal defense lawyers see the negative impact of racial bias in the criminal court system. It can be seen in every decision, starting with police encounters and continuing to discrepancies in sentencing. People of color are far more likely to be stopped and arrested than white people.[1] Police target enforcement and surveillance efforts in communities in which people of color are most concentrated, causing minority communities to unfairly be classified as "high crime areas."

The negative effect of discrimination does not end on the streets. White people are granted desk appearance tickets at a higher rate than people of color. A person of color is more likely to be detained after arraignment. Bails set for those detained are higher for people of color than white defendants. Prosecutors make probationary offers to white defendants at a greater rate than to people of color. When recommending jail sentences, prosecutors offer white defendants less time in jail than they offer people of color. Judges hand down harsher and longer sentences to similarly situated defendants of color than white defendants. There is not one single area of the criminal prosecution system in which people of color are not negatively impacted by racial bias. Sadly, the negative effect of bias can also be found in the actions and decisions of defense lawyers.[2]

If the defense community understands that racial bias is systemic in criminal courts, why hasn't more been done to end it? Anyone who has tried to talk to prosecutors and judges about the need to make changes has witnessed a complete refusal to accept reality. What has been witnessed in the wake of the murders of George Floyd and Breonna Taylor at the hands of the police is a microcosm of what has historically occurred for decades in the effort to address systemic racism in the courts. Prosecutors and judges make statements about reform, only to make little to no attempt to support any fundamental effort to effect positive change. If the players in the system refuse to accept the truth about what is happening to clients of color, then in the words of the late, great Jeff Adachi, "If the system won't indict cops, then [criminal defense lawyers] must indict the system."

Criminal defense is a fundamental part of today's civil rights movement.[3] Defense lawyers are on the front lines of this battle. Since the system will not change on its own, the criminal defense community must create a movement that fights to tear down the pillars of racial injustice in the courts. This movement cannot be effective if only a minority of defense lawyers join. All must be part of this movement. It must be the mission of the criminal defense community to fight against the racial bias clients face during every step of the process. Racial bias harms clients of color. It is therefore unethical for criminal defense lawyers not to address race in their cases, exposing its effects on those human decisions that negatively impact clients.[4]

The police regularly target people of color using pretextual vehicle and traffic violations, including dis-

BY ANDRE VITALE

obeying a crosswalk signal, illegal window tint,[5] no bell on bike,[6] failure to signal,[7] and obstructed view,[8] to justify their initial interaction. The goal of the police in making targeted stops is to escalate the encounter with false allegations of the smell of marijuana or furtive movements to enable them to conduct a full blown search. The challenge faced in seeking to suppress evidence seized during these encounters is that under *Whren v. United States,*[9] the subjective intent of an officer does not matter, provided there is a legally valid, objective basis for the stop.

The *Whren* Fallacy

Whren is used to argue an officer's subjective intent in making a stop is not relevant in determining the legality of a search. Prosecutors claim that provided there is a legally objective basis to justify the stop, any resulting seizure of contraband is valid. This argument is partially correct.

In *Whren*, undercover officers observed an SUV with a temporary license tag being driven by a youthful individual. The vehicle was parked at a stop sign in a "high crime area."[10] As the officers made a U–turn, the SUV pulled away from the curb without signaling, driving away at an "unreasonable speed."[11] After making a stop, the officers saw Michael Whren holding two plastic bags of narcotics.[12]

The defense challenged the stop as pretext. While admitting the officer had probable cause, the defense claimed the drugs should be suppressed because the officers' true basis for stopping the SUV was their subjective belief the occupants possessed narcotics.[13] The defense asserted that a mere traffic violation should not amount to probable cause to stop the motor vehicle.[14]

In a unanimous decision, the Supreme Court rejected the defense argument. The Court ruled the stop was justified because the observed vehicle and traffic violations provided the undercover officers probable cause to make the stop. The Court ruled that the officers' subjective intent could not be considered in determining whether the stop and search violated the Fourth Amendment.[15]

Prosecutors argue *Whren* stands for the precedent that subjective intent can never be considered when seeking to suppress evidence. This argument is not valid. *Whren*'s holding is limited to challenges based upon alleged violations of the Fourth Amendment. The *Whren* Court specifically stated the subjective intent of the officer could be relevant in seeking to challenging an officer's actions. Writing the opinion of the Court, Justice Scalia stated:

> We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. *We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.* **...** Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[16]

The Supreme Court left open the ability to challenge the actions of the police based upon a claim that an officer's subjective motivation in conducting a stop was based upon racial targeting.

Proper Basis to Challenge

If a challenge cannot be made under the Fourth Amendment, how can a motion to suppress evidence based upon an allegation of racial targeting be made? The answer: This challenge should be based upon an alleged violation of the Fourteenth Amendment of the U.S. Constitution. The Supreme Court in *Whren* endorsed using the Equal Protection Clause to challenge racially motivated actions by the police, stating: "The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[17] The ability to challenge racial targeting of individuals by the police under the Fourteenth Amendment is limited to actions that proceed in State court.

Procedure

Step One:
The defense must present evidence that raises an inference the law was applied in a racially discriminatory manner.

The first step in making a challenge based upon a claimed violation of the Equal Protection Clause is to present evidence that raises an inference the officer's actions were based upon a discriminatory enforcement of the law. When challenging an officer's actions as a violation of Equal Protection, it is important to cite both the Fourteenth Amendment as well as the particular State's Equal Protection provision.[18] Many States afford greater protection under their Equal Protection Clause than that afforded by the Fourteenth Amendment.

The most persuasive manner in which to raise the inference is to present evidence establishing that the officer making the stop has historically applied the law in a discriminatory manner.[19] The most common manner in which to raise an inference of discriminatory enforcement is through the use of statistics. However, the inference can also be raised by presenting any data or information that demonstrates similarly situated people were treated differently or the particular officer has a pattern of targeting people of color for stops, searches, or the use of force.[20] For example, video evidence that compares the way police treat white people with the way police treat people of color can raise the inference of discriminatory application. In addition, affidavits from people in the community familiar with a particular officer's history of biased actions can raise the inference as well.

If defense counsel uses statistics, the focus should be on the particular officer. However, a challenge can be made based upon statistics relevant to the entire police force.[21] This latter approach should be accompanied by evidence that shows the officers were trained to target minorities or that a culture of racial targeting exists in the force in general.[22] Training and culture can be established through the introduction of written training materials or testimony of officers familiar with the force's culture.

Statistical evidence of discrimination can be developed using the department's own records. In a case involving a person stopped for jaywalking, arrest reports in which the discovery of contraband was started by a stop for jaywalking should be subpoenaed. In addition, the defense should obtain reports from police interactions that did not lead to an arrest.[23] Further, traffic tickets for individuals charged with jaywalking should be collected.[24] With these records, a comparison can be made regarding the number of stops of individuals by race. Information that the police stopped African Americans for jaywalking 35 percent of the time, while they make up only 10 percent of the population, would successfully raise the inference the law is being enforced in a racially selective manner. Further, evidence showing that people of color were searched at a greater frequency than white people (either as a result of an escalated encounter or pursuant to a consent search) would raise an inference of racial targeting.

Every step of the police interaction should be analyzed. The frequency of stops, frisks, requests to search, and arrest should be compared. Statistics show police officers discriminate against people of color in every phase of their interaction. African Americans behind the wheel are 20 percent more likely to be stopped than white drivers.[25] However, stop decisions are not where racial disparity ends. The police search people of color at a far greater frequency than white people. African American drivers are three times more likely to be searched following a routine traffic stop than white drivers.[26] Police are far more likely to claim a person of color made "furtive movements," "acted nervously," or "avoided eye contact," which they use to escalate a pretext stop to a *Terry* search. It is important to subpoena the stopping officer's arrest reports to see if the officer frequently uses the same claims to justify searches of people of color in contrast to his or her interactions with white people. When comparing an officer's interactions with white people to the officer's interactions with people of color, many times a review of these records will reveal common language in the officer's reports that is used to justify the escalation of an encounter with persons of color.

The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

It is unknown whether claims of furtive movements or avoiding eye contact are the product of intentional misrepresentation or an officer's implicit bias. In challenging police actions as racially motivated, the cause does not matter, only the effect. That effect is that the police stop and search people of color at a far greater rate than white people. One statistic that definitively shows the bias of the police involves consent searches. African American and Latino drivers are two and one-half times more likely to be asked to submit to a consent search than white drivers.[27] No nonbiased reason explains this disparity. Selective enforcement is based upon the false assumption by the police that people of color commit crimes at a higher rate than white people.

Police claim increased targeting of people of color is justified because they are more likely to possess contraband. These claims are patently false.[28] While white people use drugs at the same or greater frequency,[29] people of color are six times more likely to be stopped. Analysis of "hit rates"[30] shows that white people who are stopped are found to possess contraband more than people of color.[31]

Step Two: The burden shifts to the prosecution to produce evidence that the stop or search was race neutral.

Once the inference of discriminatory enforcement is raised, the burden shifts to the prosecution.[32] To rebut the inference, the prosecution must present objective evidence the police action was not racially motivated. This burden cannot be met merely by arguing the officer was legally justified to make the stop.[33] The inference will not be rebutted by presenting testimony the stop was not racially motivated. Instead, the prosecution must present objective evidence that overcomes all reasonable inferences and proves the stop was not racially motivated in any manner.[34] Even if the stop was only partially motivated by race, the prosecution cannot overcome the inference.

Step Three: Move to suppress the discriminatorily seized evidence.

If the prosecution fails to rebut the inference, the proper action is not to move to dismiss the charges, because it does not strike at the heart of the action. Rather, the proper sanction for a successful claim of selective enforcement is to suppress the evidence seized.

Prosecutors incorrectly argue suppression only applies to violations of the Fourth Amendment and not the Fourteenth Amendment. This argument is not valid.[35] The Exclusionary Rule is not found anywhere in the Constitution. Rather, it is a judicially created remedy, designed to protect constitutional safeguards.[36] The purpose underlying the Exclusionary Rule is to deter impermissible behavior by the government and maintain integrity in the judicial system. These purposes apply equally, if not

more, to cases in which evidence is seized as a result of racially discriminatory enforcement of the law.[37]

Conclusion

The police stop, search, and arrest people of color in a discriminatory manner. Their decisions are the result of bias (both implicit and explicit), the training they receive, and the biased culture in law enforcement. Systemic racism in the criminal courts must end. It is the ethical and moral duty of criminal defense lawyers to be part of the movement to change this racist system. Criminal defense lawyers should challenge the discriminatory actions of the police under the Fourteenth Amendment, which will change the focus from objective bases for police actions to their subjective intent.

Notes

1. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020) (analysis of approximately 95 million stops nationwide found that "[r]elative to their share of the residential population, … [B]lack drivers were, on average, stopped more often than white drivers," and that Black drivers comprised a smaller share of drivers stopped at night when it is harder for officers to detect race, "suggest[ing] [B]lack drivers were stopped during daylight hours in part because of their race").

2. L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

3. Jonathan Rapping, *Building a New Generation of Public Defenders*, TEDX ATLANTA (May 2015).

4. Abbe Smith, *Nice Work If You Can Get It: Ethical Jury Selection in Criminal Defense*, 67 FORDHAM L. REV. 523 (1998).

5. N.Y. VEH. & TRAF. § 375 (12-a).

6. N.Y. VEH. & TRAF. § 1236.

7. N.Y. VEH. & TRAF. § 1163.

8. N.Y. VEH. & TRAF. § 1213.

9. *Whren v. United States*, 517 U.S. 806 (1996).

10. *Id.* at 808.

11. *Id.*

12. *Id.* at 808–809.

13. *Id.* at 810.

14. *Id.*

15. *Id.* at 819 ("[W]e think there is no realistic alternative to the traditional common law rule that probable cause justifies a search and seizure. Here the district court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible.").

16. *Id.* at 813.

17. *Id.*

18. U.S. CONST. amend. XIV (*No state shall* make *or enforce any law* which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*) (emphasis added).

19. *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990).

20. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019); *Commonwealth v. Wilbur W.*, 479 Mass. 397, 409 (2018).

21. *Commonwealth v. Lora*, 451 Mass. 425 (Mass. 2008); *State v. Soto*, 324 N.J. Super. 66 (N.J. Super. Ct. App. Div. 1996).

22. *Soto*, *supra* note 21.

23. The names of these records differ for police agencies. In Rochester, New York, for example, they were called Field Information Forms (FIF).

24. The difficulty with traffic tickets is that in many jurisdictions the race of the accused is not recorded, and it will require additional work to develop that information.

25. 4 NATURE HUM. BEHAV. 736.

26. Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops; The Case for an Equal Protection Exclusionary Rule*, 71 U. COL. L. REV. 255, 275 (Winter 2000). A study conducted in Erie, Pennsylvania, revealed that while drivers accounted for 67 percent of people stopped, they only amounted to 37 percent of drivers who were searched. Thomas Gamble et al., ANALYSIS OF POLICE STOPS AND SEARCHES, CITY OF ERIE, PA, at 28, note 89 (2002).

27. Eamon Kelly, *Race, Cars and Consent: Re-evaluating No-Suspicion Consent Searches*, 2 DEPAUL J. SOC. JUST. 253 (2009).

28. Kia Makarechi, *What the Data Really Says About Police Racial Bias*, VANITY FAIR (July 14, 2016).

29. Eric Schlosser, *The Prison Industrial Complex*, ATLANTIC MONTHLY, December 1998, at 51.

30. Hit rates are the percentage of people found in possession of contraband when police search them either pursuant to a *Terry* stop or a consent search. These statistics do not include individuals searched incident to arrest, inventory searches, or when police search an individual pursuant to a warrant.

31. Walter, *supra* note 26; David Harris, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002); *State v. Carty*, 790 A.2d 903 (N.J. 2002).

32. *Commonwealth v. Lora*, 451 Mass. 425, 438 (Mass. 2008).

33. *Commonwealth v. Long*, slip op. at 28 (Mass. Sept. 17, 2020).

34. *Id.*

35. *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997).

36. *United States v. Leon*, 486 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338 (1974); *Mapp v. Ohio*, 367 U.S. 643 (1961).

37. *State v. Segars*, 172 N.J. 481, 493 (2001).

About the Author

Andre Vitale is the First Assistant Deputy Public Defender and Trial Chief, Hudson Trial Region, at the NJ Office of the Public Defender. He has tried 97 cases to verdict and has expertise in homicide and sex cases.

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