

ERADICATING RACIAL PROFILING: PRACTICAL GUIDANCE ON HOW POLICE DEPARTMENTS AND OFFICERS CAN PREVENT RACIALLY-INFLUENCED POLICING



SKILLS ASSESSMENT

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The following skills assessment is designed to test your knowledge of constitutional law and New Jersey's statewide policy prohibiting discriminatory policing. It is also designed to test your ability to *apply* your knowledge to various factual situations that law enforcement officers may encounter in the performance of their duties.

The skills assessment consists of three parts. Part I is a series of true/false questions that will examine your knowledge of specific legal or policy principles.

Part II of the skills assessment is more challenging. It consists of a series of factual scenarios that raise difficult, complex and subtle issues concerning the practice of racially-influenced policing.

Part III contains the answer key to the true/false questions in Part I (with detailed explanations), and a discussion of the issues raised by the factual scenarios in Part II.

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PART I

TRUE/FALSE QUESTIONS

SKILLS ASSESSMENT “TRUE/FALSE” QUESTIONS

1. The New Jersey Supreme Court will sometimes interpret the State Constitution to impose stricter limitations on the exercise of police discretion than are imposed under the United States Constitution as interpreted by Federal courts. **(True) (False)**
2. Under Attorney General Law Enforcement Directive 2005-1, one of the critical questions that a police officer must be prepared to answer is whether he or she would have made the same decision, or drawn the same inference, if the defendant had been of a different race or ethnicity. **(True) (False)**
3. Courts automatically suppress evidence whenever officers rely on “hunches.” **(True) (False)**
4. During a routine motor vehicle stop, a police officer in New Jersey is not permitted to ask a motorist for permission to conduct a consent search unless the officer has a reasonable articulable suspicion to believe that the consent search would reveal evidence of criminal activity. **(True) (False)**
5. When making decisions about how to deal with a citizen, a police officer should generally focus on the person’s conduct, rather than on physical characteristics such as skin color. **(True) (False)**
6. A legitimate “profile” focuses on the modus operandi or “methods of operation” of criminals, rather than on the race or ethnicity of individuals. **(True) (False)**
7. The Fourteenth Amendment Equal Protection Clause only applies to police actions that constitute a significant intrusion on a citizen’s liberty or privacy interests. **(True) (False)**
8. You are allowed to consider a person’s race or ethnicity in drawing

inferences of criminal activity so long as you can point to reliable statistics that show that persons of a given race or ethnicity are more likely than others to be arrested or convicted for certain specific crimes. **(True) (False)**

9. It is an absolute defense to a claim of racial profiling that the police officer is not a racist. **(True) (False)**

10. In appropriate circumstances, an officer can consider if a person seems to be “out of place” (i.e., is not a resident of a particular area or neighborhood), so long as the officer does not rely on the person’s race or ethnicity to reach that conclusion or to draw an inference that the person is “up to no good.” **(True) (False)**

11. Because the United States Constitution always takes precedence over a state statute, every violation of the Fourteenth Amendment Equal Protection Clause automatically constitutes a violation of the new crime of “official deprivation of civil rights.” **(True) (False)**

12. The Fourth Amendment prohibits police from “running the plates” of a vehicle unless an officer has already observed a motor vehicle violation, or has some objective reason to believe that this particular vehicle may be stolen, or that the driver of this particular vehicle is on the “revoked” list. **(True) (False)**

13. Because racial profiling is a kind of “prejudice” (“pre judging” persons based on the color of their skin), a minority police officer cannot be guilty of racially-influenced policing when dealing with a minority citizen. **(True) (False)**

14. In a motion to suppress involving a Fourteenth Amendment Equal Protection claim, statistics are generally irrelevant and will not be considered by the reviewing court. **(True) (False)**

15. Under our statewide non-discrimination policy, you would be permitted to consider a minority motorist’s race or ethnicity when deciding whether to “run the plates” of the vehicle in which he or she is driving if arrest or conviction statistics were to show that minority citizens are more likely to be driving stolen vehicles than nonminority citizens. **(True) (False)**

16. If a defendant in a motion to suppress evidence were to establish an inference of racial targeting, the State would be required to come forward with a race-neutral explanation. **(True) (False)**

17. You are permitted to “run the plates” of a vehicle based on nothing more than a “hunch,” so long as race or ethnicity plays no part in your decision. **(True) (False)**

18. Under New Jersey law, the Fourth Amendment prohibits unlawful police conduct, not improper thoughts. **(True) (False)**

19. A police officer may draw an inference of criminality and initiate a consensual “field inquiry” based in part on the race or ethnicity of a citizen, so long as the officer makes it absolutely clear to that person that he or she is free to walk away. **(True) (False)**

20. If a police officer intrudes on a Fourth Amendment right without first obtaining a warrant from a judge, the burden of proof in the motion to suppress is on the State to show that the officer’s conduct was lawful. **(True) (False)**

21. All “pretext” stops (when you have an ulterior reason for making the stop) are automatically illegal. **(True) (False)**

22. Under the Fourth Amendment, an officer is permitted to approach a citizen and engage that citizen in polite conversation (a “field inquiry”) only when the officer has a reasonable articulable suspicion to believe that this person is engaged in criminal activity. **(True) (False)**

23. While you cannot use race or ethnicity to decide who to “stop,” you are permitted to consider race or ethnicity in drawing inferences of criminality after a lawful stop has already been initiated. **(True) (False)**

24. You are authorized to “frisk” a person for illicit drugs provided that you have a reasonable articulable suspicion to believe that the person is carrying concealed drugs. **(True) (False)**

25. The act of approaching an individual under circumstances where the individual would reasonably believe that he or she is free to walk away constitutes a “seizure” for purposes of the Fourth Amendment. **(True) (False)**

26. During the course of a routine traffic stop, you may always consider a person's race or ethnicity in deciding whether it is a prudent precaution to run a criminal history lookup or warrant check. **(True) (False)**

27. In a motion to suppress involving a traditional Fourth Amendment search and seizure issue, statistics are generally irrelevant and will not be considered by the reviewing court. **(True) (False)**

28. The gang problem has gotten worse in recent years in New Jersey. **(True) (False)**

29. All forms of "profiling" are illegal. **(True) (False)**

30. The only purpose of a police report is to refresh your recollection when you eventually testify at trial or in a motion to suppress evidence. **(True) (False)**

31. In some circumstances, a court can draw an inference of impermissible selective enforcement from the fact that an officer's testimony was shown to be inaccurate. **(True) (False)**

32. When a person's conduct matches a race-neutral "profile" of criminal activity, that fact may be considered as part the "totality of the circumstances," but is usually not enough by itself to authorize a "seizure" of the person. **(True) (False)**

33. You are permitted to consider a person's race or ethnicity when determining whether that person matches the description in a "Be on the Lookout" (B.O.L.O.) bulletin. **(True) (False)**

34. In deciding whether something is "suspicious," you are permitted to consider a person's race or ethnicity as long as that is not the sole factor that you rely upon in drawing an inference of criminality. **(True) (False)**

35. Because all traffic stops are potentially dangerous, a police officer in New Jersey is permitted to routinely frisk a detained motorist, so long as the officer does not rely on the person's race or ethnicity to make that decision. **(True) (False)**

36. The Fourteenth Amendment Equal Protection Clause cannot be violated unless you have directly caused harm by subjecting a citizen to either a search or a custodial arrest. **(True) (False)**

37. To avoid even the possibility of being accused of racial profiling, the better practice is to leave a suspect's race or ethnicity out of the description that is broadcast in a "Be on the Lookout" bulletin. **(True) (False)**

38. There are times when you may use an observed minor motor vehicle violation as a "pretext" (ulterior reason) to stop a vehicle to investigate possible criminal activity, so long as your ulterior motive is not itself illegal. **(True) (False)**

39. Suspected membership in a violent street gang is a factor that an officer may consider as part of the "totality of the circumstances" in deciding whether to initiate a Terry stop or a Terry frisk. **(True) (False)**

40. When reviewing a Fourteenth Amendment claim, a court in a motion to suppress may examine the thought processes and motivations of the officer to see whether the officer relied on an impermissible factor, such as race or ethnicity. **(True) (False)**

41. Because auto theft is a serious problem in this State, police officers are always allowed to pull a vehicle over whenever the driver does not seem to "fit" the vehicle that he or she is driving. **(True) (False)**

42. If you were to pose an "accusatorial" question to a citizen (one that presupposes criminal activity, such as "are you carrying any drugs?"), you must always first read Miranda warnings to the person.

(True) (False)

43. Reviewing courts are more likely to be skeptical and probing of a police officer when the officer chooses to extend the duration of a routine motor vehicle stop by posing questions to see if the motorist might possibly be engaged in criminal activity. **(True) (False)**

44. You are always permitted to ask a motorist to waive his or her Fourth Amendment rights by granting permission to conduct a consent search, so long as your decision to ask for permission to conduct the search is not based to any degree on the motorist's race or ethnicity. **(True) (False)**

45. When reviewing a Fourth Amendment claim, the court in a motion to suppress will closely examine the subjective thought processes and motivations of the police officer. **(True) (False)**

46. When an officer relies on a "hunch," a reviewing court may be more skeptical and may be more likely to question whether that hunch had been based on a racial or ethnic stereotype. **(True) (False)**

47. When a prosecutor reviews or "screens" a case, he or she will consider the likelihood that this case may raise a Fourth or Fourteenth Amendment issue.
(True) (False)

48. In some circumstances, a court may conclude that posing an "accusatorial" question to a citizen (one that presupposes criminal activity, such as "are you carrying any drugs?") can convert a consensual "field inquiry" into a "Terry stop."
(True) (False)

49. Because gangs may be comprised of persons of a particular racial or ethnic type, you are always permitted to consider a person's race in determining the likelihood that that person is a member of a gang.
(True) (False)

50. Because you are always authorized to order the driver of a lawfully stopped vehicle to step out, you can consider absolutely any factor you want to in deciding whether to actually order a driver to exit the vehicle. **(True) (False)**

51. Under the Fourth Amendment, you are allowed to stop a car for going just a couple of miles per hour over the posted speed limit, but a reviewing court in these circumstances may be more likely to question why this particular vehicle was selected. **(True) (False)**

52. It is generally a good idea to treat persons stopped for routine motor vehicle violations as if they were criminal suspects, since its better to be safe than sorry. **(True) (False)**

53. A police officer only commits a violation of the new crime of “official deprivation of civil rights” if the officer acts with the purpose to discriminate or intimidate, and the officer *knows* and that his or her conduct is unlawful. **(True) (False)**

54. The “B.O.L.O. Exception” to the general rule prohibiting police in this State from considering a person’s race or ethnicity only applies when the bulletin has been approved by a superior and is broadcast over the radio or in an Amber Alert. **(True) (False)**

55. Because courts will strictly scrutinize police conduct any time that a persons’ race or ethnicity is even mentioned, the “B.O.L.O Exception” only applies with respect to wanted persons who are suspected of committing serious indictable crimes (second degree or higher), or who are subject to an outstanding arrest warrant issued by a judge. **(True) (False)**

PART II

FACTUAL SCENARIOS

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SKILLS ASSESSMENT FACTUAL SCENARIOS

When reviewing the law enforcement conduct described in the following scenarios, you should put yourself in the shoes of a supervisor, whose task is to determine whether the law enforcement conduct is appropriate. In making that determination, you should ask yourself the following questions:

1. Did the law enforcement officers comply at all times with the requirements of the Fourth Amendment and its State Constitutional counterpart (the law governing arrests, searches and seizures)?

2. Did the law enforcement officers comply at all times with the Fourteenth Amendment Equal Protection Clause and New Jersey's policy prohibiting discriminatory policing? In answering this question, you should consider the following:

a. Did the officers rely upon a person's race or ethnicity as a factor in making decisions or drawing inferences of criminality, and is it reasonable to infer that the officers would have handled the situation differently if the citizens had been of a different race or ethnicity? If race or ethnicity did contribute to the officers' decision-making process, did this consideration of race or ethnicity fall within the B.O.L.O. (Be on the Lookout) exception to the general rule that prohibits law enforcement officers in this State from considering a person's race or ethnicity as a factor in exercising police discretion?

b. If the scenario were to be reviewed by a court, what is the likelihood that the reviewing court would conclude that the "burden of production" has shifted to the State to provide a race-neutral explanation for the exercise of police discretion?

c. If the "burden of production" does shift to the State, how would the officers meet that burden?

d. Do you require any additional facts or information to answer any of the foregoing questions? If so, what specific questions would you pose to the officers?

e. If you were one of the officers described in the scenario, how would you document the facts necessary to establish that you had not relied impermissibly upon a person's race or ethnicity in drawing inferences of criminality or in exercising police discretion?

It should be noted that many of these scenarios stop abruptly in the middle of an ongoing police-citizen encounter. We therefore do not know whether those encounters eventually led to an arrest or a search that revealed physical evidence of criminal activity. This is by design. In the real world, of course, a court would have no opportunity to review police conduct in a motion to suppress unless some evidence was actually seized or a criminal prosecution was brought. Law enforcement officers must recognize, however, that their conduct may be subject to review even when there is no criminal prosecution. This review of police discretion may occur in the context of a civil lawsuit claiming discrimination, or in the context of an internal investigation based on a citizen complaint.

The key point to understand is that when you are in the field making decisions, you can never know whether your conduct might become the subject of judicial or supervisory scrutiny. For this reason, you must *always* be cognizant of the limitations imposed by the Constitution on the exercise of police discretion, and you must always be thinking about what you are doing and why exactly you are doing it.

It is especially important for all supervisors throughout the chain of command to understand that they are responsible for identifying and remediating unconstitutional or problematic police conduct, whether or not that conduct resulted in an arrest or seizure. Law enforcement officers in this State must never embrace a "no harm, no

foul” approach to constitutional violations based on the fact that the citizen whose rights were violated was not arrested or prosecuted.

By the same token, when it turns out that evidence is discovered and seized, police officers must never try to rationalize a constitutional violation by arguing that the ends (taking contraband “off the streets”) somehow justified the means (an illegal arrest or search). That sort of overzealous, reckless approach to constitutional law would only prompt reviewing courts to become even more skeptical of law enforcement, and would provide both an incentive and opportunity for courts to impose even tighter restrictions on the exercise of police discretion and to more closely scrutinize and to more critically second-guess law enforcement decisions.

One of the problems with the traditional approach to law enforcement legal training is that we tend to study published court decisions in criminal cases that involved searches that had resulted in the seizure of contraband or other evidence of crime. (After all, a criminal prosecution and a motion to suppress evidence presupposes, by definition, that there was some relevant evidence that might be subject to the exclusionary rule.) The following training scenarios, in contrast, are designed to show that it does not matter whether the law enforcement conduct at issue fortuitously resulted in a “hit” or a “miss.” Instead, you should focus solely on whether the police decisions described in these scenarios were appropriate or inappropriate at the exact moment that those decisions were made by officers in the field. See Ker v. California, 83 S.Ct. 1623 (1963) (In determining the lawfulness of police conduct, a reviewing court is only concerned with what the officers had reason to believe at the time. “A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from what is dug up subsequently.”)

1. Watching Out for Stolen Vehicles: The Luxury Sedan

Officers Smith and Jones are employed by a mid-sized police department. Their municipality is one of several suburban communities that border on the city of Eastburg, which is a major urban center. Officers Smith and Jones are assigned to patrol duty and are presently enforcing traffic laws in between calls for service. The officers are aware that police departments in the region have recently noted a significant increase in the incidence of motor vehicle theft and “joyriding.” The problem is especially serious in Eastburg. While the motor vehicle theft problem is not nearly as severe as the one that existed a decade ago, police executives throughout the region have expressed concern about the resurgence of this form of criminal activity and hope to nip the problem in the bud. Officers Smith and Jones have been advised by their superiors to watch out for potential stolen vehicles.

Officers Smith and Jones are patrolling Eastburg Avenue – a heavily-traveled four-lane residential road that connects their town to a number of other municipalities, including Eastburg. Officer Smith observes a late model luxury sedan traveling in a line of traffic in the right lane heading towards Eastburg. The following conversation between Officers Smith and Jones ensues:

Officer Smith: “What do you make of that one?”

Officer Jones: “Which one?”

Officer Smith: “The new Mercedes sedan over there. Two black guys -- they appear to be teenagers. Late teens, maybe.”

Officer Jones: “That doesn’t seem quite right, does it? Any violations?”

Officer Smith: “I don’t see any yet. Let me check on that.”

Officer Jones: “Okay. In the mean time, I’ll do a random lookup.”

Officer Jones uses the vehicle’s Mobile Display Computer (MDC) to “run the plates” of the late-model Mercedes Benz sedan.

Officer Jones: “Okay. The vehicle is not reported stolen, and the registered owner is not on the revoked list. Let’s see. The plates match the vehicle. No help there.”

Officer Smith: “Alright, I just clocked him doing 44 in a 40, so it’s okay to run a full check.”

Officer Jones: “Right. Let’s see. Okay, it comes back registered to a John Q. Public, male, date of birth June 1, ’53. That would make him, let’s see, 53 years old.”

Officer Smith: “Well, there’s no middle-aged guy in that vehicle. We better check this one out just to be sure.”

Officer Smith maneuvers behind the Mercedes sedan and activates the police vehicle’s overhead and takedown lights, ordering the Mercedes to stop. The driver of the Mercedes responds promptly, pulling over to the side of the road. Officer Smith approaches the Mercedes on the driver’s side, while Officer Jones positions himself on the passenger side to observe the encounter and watch for suspicious movements. Neither officer observes any evidence of damage to the Mercedes Benz suggesting a forcible entry. Officer Smith engages the driver of the Mercedes sedan in the following conversation:

Officer Smith: “Good afternoon. May I see your license, vehicle registration, and insurance identification card, please.”

The driver of the vehicle reaches over to the glove box to retrieve credentials, and then pulls out his wallet from his pants pocket. The driver hands the three pieces of identification to Officer Smith.

Driver: “Why’d you stop us?”

Officer Smith carefully examines the driver’s license and registration. The photograph on the license matches the driver. The license is in the name of John Q. Public, Jr.

Officer Smith: “Did you know that this was only a 40 mile per hour zone?”

Driver: “I guess, sort of. How fast was I going?”

Officer Smith: “Well, it was over 40. That’s why we stopped you. Is this your car?”

Driver: “No, it’s my father’s car. I’m home from Yale for spring break and he’s letting me use it today.”

Officer Smith: “Okay. Your father’s name seems familiar. Is he a law enforcement officer around here?”

Driver: “No. He’s a Superior Court Judge.”

Officer Smith: “That’s where I heard the name, I guess. Okay, I’m sure your father would want you to slow it down. I’m

gonna let you off with a warning, but please take it easy on these residential streets. They're not interstates, you know."

* * *

2. Protecting Critical Infrastructure: The Citizen “Tip”

Officers Smith and Jones are employed by a large urban police department. The city’s water reservoir is located on the edge of town. The reservoir is considered to be a critical and vulnerable part of the State’s infrastructure. It is essentially a deep, manmade lake. The lake itself is not visible from the adjacent streets because it is protected by a tall stone wall at the top of a steeply sloped grass lawn. The stone wall is capped with a barbed wire fence that is marked with numerous signs that read: “Restricted Area. Keep Out.”

At approximately 4:50 p.m., a citizen uses his cell phone to call the police department to report suspicious activity. The citizen’s conversation with the communications officer is as follows:

Officer Smith: “First precinct, Officer Smith. How can I help you?”

Citizen: “Hello, this is Bob Citizen, 123 Evergreen Road. I’ve seen the signs on the interstates that say we’re supposed to report suspicious activity now, because, you know, because of 9-11 and anthrax and everything. I was just walking my dog along Park Road and I saw these two men – Middle Eastern-type guys, walking right near the stone wall by the reservoir. They, you know, had real dark hair and beards. I think they were from somewhere in the Middle East, you know, Arabs or something. I don’t know what they were doing by the wall. I’ve seen kids climb up there before to try to see the water,

but I've never seen adults climb up the hill. I thought I should report it."

Officer Smith: "Are the two men still in view?"

Citizen: "No, I saw them just a couple minutes ago, but I'm not on Park Road now and they were going the other way. I don't see them right now."

Officer Smith: "Can you describe what they were wearing?"

Citizen: "Yeah. Both were wearing dark pants and white shirts. Dress shirts, but no ties."

Officer Smith: "Do you know whether they climbed the retaining wall, or tried to?"

Citizen: "No. I don't know. Maybe. They were pretty close to it when I saw them. They were walking right up next to it."

Officer Smith: "Can you describe how old they were?"

Citizen: "They were adults. They were not, you know, kids, because they both had beards. Twenty to twenty-five, maybe. Maybe a little older."

Officer Smith: "Were they carrying anything? Any

packages or equipment?”

Citizen: “No. Well, I’m not sure. One might have had a backpack or something. It might have been a camera bag, or for a video camera or something. Come to think of it, I think one of them was holding a camera or camcorder or something. I just thought it was strange for two Arab-looking guys to be walking up on the slope right near the reservoir, what with all you see on the news and all, I just thought I should report it.”

Officer Smith: “I understand. I’ll send an officer to check it out.”

Officer Jones is dispatched to investigate the report of two suspicious men near the reservoir restricted area. Officer Jones is provided with a general description of the two men. As Officer Jones approaches the area, he sees two young men walking on Park Road. The two men are wearing dark pants and white shirts. Both have dark hair and beards. The two men are walking on the sidewalk alongside the road, well away from the wall.

The officer pulls up alongside the two men and gets out of the police vehicle. He approaches the two men to inquire why they had been walking so close to the restricted area.

* * *

3. Train Station Interdiction

Officers Smith and Jones are employed by a municipal police department in an affluent suburban town with a large commuter population. The police department is aware of reports that illicit drugs are being smuggled into the area by train at the local station. Drug dealers who reside in nearby Eastburg are believed to make “runs” into New York City, purchasing illicit drugs and returning on the next available train. (Eastburg is an adjacent urban town with a predominantly minority population.) Intelligence reports indicate that these local dealers typically travel in pairs for protection.

Officers Smith and Jones are on a “park and walk” patrol assignment. They are walking along the platform at the local train station. The platform is crowded with approximately 50 to 100 commuters who are waiting for the next train headed for New York City. It is just before 8 a.m. on a weekday, and most of the persons on the platform are dressed in professional/business attire. The next train to New York is expected to arrive momentarily.

Officer Smith notices two Hispanic males, approximately 20 years old, who are wearing baggy clothing. Officers Smith and Jones approach the two males on the train platform and engage them in the following conversation:

Officer Smith: “Good morning. How are you fellows doing this morning?”

First Male: “Okay.”

The second male seems to be looking the other way, avoiding eye contact with the two officers. This second male has turned away from the officers, facing the track, indicating that he is not willing to engage in conversation.

Officer Jones: “Are you fellows heading to the City?”

First Male: “Yeah. We’re going to visit my cousin.”

Officer Jones: “Do you fellows live here in town?”

First Male: “Nah. We live in the Burg”
(referring to the urban community of Eastburg).

Officer Smith: “What part of the City are you heading to?”

First Male: “Bronx.”

Officer Jones: “The Bronx? That can be a pretty rough place, you know. You don’t have anything on you you shouldn’t have, do you?”

First Male: “No, man. We ain’t that stupid.”

Second Male: “Yo, the train’s pulling in. Let’s get out of here.”

The commuter train has arrived at the station.

First Male: “Hey, man, this is our train. Can we get on, or what?”

* * *

4. Road Stop En Route to the Open Air Drug Market

Officers Smith and Jones are employed by a large, urban police department. They are assigned as partners to discretionary motorized patrol duty in a high drug crime area. The neighborhood is predominantly African-American. Officers Smith and Jones know from experience that out-of-town motorists from nearby suburban communities frequently travel to their patrol jurisdiction to purchase drugs. This problem is especially acute in and around the intersection of Broad and Second Streets, which is at the corner of a public housing complex that is known on the streets as the “Hole.” This location has earned a reputation as an open air drug market.

It is 9:30 p.m. on a Friday night, and the traffic on Main Street is light. Officer Smith notices a late model luxury vehicle with three Caucasian male occupants. They appear to be in their mid to late 20s. The vehicle has just stopped at a traffic light. The following conversation between Officers Smith and Jones ensues:

Officer Smith: “Hey, look over there. I wonder what those three guys could be up to this time of night?”

Officer Jones: “Which guys?”

Officer Smith: “The three white guys in the gray Beemer.”

Officer Jones: “Oh yeah. That’s a tough one alright.”

Officer Smith: “You wanna bet they’re gonna turn right on Second Street to get to Broad. That’s where the action will be tonight.”

The traffic light turns green and the BMW proceeds two blocks, maneuvering into the right lane without signaling a lane change. Officers Smith and Jones follow at a discrete distance. The BMW then proceeds to turn right onto Second Street, again without activating the turn signal.

Officer Jones: “You pegged them, alright, and no turn signal.”

Officer Smith: “You know, sometimes it’s almost too easy.”

Officer Jones: “Like shooting fish in a barrel. Let’s do these kids a favor and stop ’em before they get themselves into real trouble in the Hole.”

Officer Smith activates the patrol vehicle’s overhead and takedown lights, ordering the driver of the BMW to pull over based upon the observed motor vehicle violations.

* * *

5. Pedestrian Encounter in the Town Square

Officers Smith and Jones are employed by a mid-sized police department in an affluent suburban community. It is almost 11 p.m. on a warm Saturday night, and the local playhouse has just let out. Hundreds of theater goers are now walking the streets to return to their parked vehicles, or to patronize the restaurants, coffee houses and nightclubs in the town square.

Officers Smith and Jones are on foot patrol to ensure the safety of the theater patrons and to maintain a visible police presence. In recent weeks there have been several reports of crimes, including pickpocketing as well as several car thefts and vehicle break-ins. No arrests have been made. Local merchants are concerned that the recent crimes may hurt business. In response to these concerns, police officers on patrol have been advised to watch out for potential suspects.

While walking in the crowd on Main Street, Officers Smith and Jones notice a group of five African-American males. They appear to be in their late teens to early 20s. They are walking together, talking loudly, laughing and joking.

Officer Smith: "There's trouble coming."

Officer Jones: "I wonder what these guys could be up to."

Officer Smith: "I don't think they were here to see the show. (Laughing). See how they're bothering other folks. Everyone is crossing the street to get away from them?"

Officer Jones: "Well, can you blame 'em. Let's nip this in the bud and find out why

they're here.”

The two officers approach the five African-American males.

Officer Smith: “Gentlemen. Good evening. What brings you to town tonight?”

One of the Males: “We’re just hanging out.”
(One of the other males laughs.)

Officer Smith: “Who drove you guys here tonight. Do you have any id?”

One of the Males: “What for? We’re just walking.”

Officer Smith: “We’ll you had to get here somehow. I’m gonna need to see a driver’s license. We just want to make certain you gentlemen get home safely.”

* * *

6. Drive-by Shooting Investigation

Detectives Smith and Jones are employed by an urban police department and work together in the Homicide/Major Crimes Bureau. Earlier this evening, a 20-year-old African American male was seriously wounded in a “drive-by” shooting in the eastern section of town. The victim is believed to be a member of a street gang known as the “Sovereign Lords of the Righteous Nation.” Intelligence information suggests that the Lords are engaged in an ongoing conflict with other gangs, including a white supremacist “skinhead” group that calls itself the “Northeast Hate Mongers.”

Detectives Smith and Jones have been assigned to investigate the shooting. In the hospital, they encounter three young African-American males who have come to the hospital to check on the victim’s status. The three males are all wearing the “colors” of the Lords gang.

Detectives Smith and Jones approach the three African-American males in the hospital waiting room and engage them in the following conversation:

Detective Smith: “He’s not out of the woods, but it looks like your buddy is gonna make it. Do you guys have any idea who might have done this? Any idea who would want to kill your buddy?”

One of the Males: “Don’t you worry about it. These things just kind of take care of themselves, you know. We don’t need no help from you.”

The next evening, Detectives Smith and Jones go to a bar in the

western section of town that is thought to be frequented by members of the Northeast Hate Mongers gang. The bar is crowded. The officers notice a table with six young white males with shaved heads. Several of them appear to have tattoos, one of which appears to be a Nazi swastika. The officers approach the table and engage the young men in the following conversation:

Detective Jones: “Good evening. I’m Detective Jones, and this is my partner, Detective Smith. Mind if we speak to you gentlemen?”

One of the Males: “It’s a free country, you know.”
(The other patrons at the table laugh.)

Detective Smith: “There was a shooting last night in the east ward. We were just wondering if any of you gentlemen might know something about that?”

One of the Males: “Yeah, I read in the paper that a f-----g n----- was shot last night. I hope they wasted his f-----g ass.”

Another Male: “Yeah. That was a real shame.” (All of the male patrons at the table laugh.)

Detective Jones (turning to the male who had made the first statement): “What ‘they’ are you referring to.”

First Male: “Huh?”

Detective Jones: “You just said you hope *they* wasted him. Who were you referring to?”

Another Male: “Look, we don’t know nothing, so unless you’re here to arrest us, leave us the f - - - alone, okay.”

Detectives Smith and Jones travel to another bar located on the other side of town. This establishment is patronized predominantly by African-American citizens. It is believed that some members of the Lords gang occasionally come to this establishment. The detectives approach the bartender and engage him in the following conversation:

Detective Smith: “We’re looking into the shooting last night.”

Bartender: “I heard about that. Is the kid gonna make it?”

Detective Smith: “We think so. He was hurt pretty bad but it looks like he’ll pull through. We want to put an end to this before it gets any worse. What have you heard about it?”

Bartender: “Hey man, I don’t get involved in no Lords business. No way. But if you stick around, someone may come by who knows the talk on the streets. They sometimes come in around 1.”

Detective Jones: “Okay. We have some other things to check out, but we’ll come back later and maybe you can just point someone out to us we can talk to.”

* * *

7. Residential Burglary Investigation

Lieutenant Smith supervises the Detective Bureau in the Westburg Police Department. Westburg is an affluent suburban “bedroom” community with a predominantly non-minority population. The town borders on the City of Eastburg, which is a much larger and more urban municipality that is comprised predominantly of minority citizens.

In the last couple of weeks, a number of residential burglaries have been reported in Westburg’s East Ward. All of the home invasions follow a nearly identical *modus operandi*: the burglar(s) cuts the phone lines of targeted houses to disable the alarm system and prevent notification to a central monitoring station. The burglar(s) then breaks in through a back door or window and steals cash, jewelry, and silverware. All of these crimes have occurred during the daytime on weekdays. To this point, no one has been present in a house that has been targeted for invasion. The police have not been able to recover fingerprints or any other forensic evidence, and there have been no reports of suspicious persons in the neighborhood at or around the time that the burglaries occurred.

Daytime patrols have been stepped up in the East Ward, but given the layout of the neighborhood, it is difficult to monitor back doors and windows from patrol cars. The Chief of the Westburg Police Department is putting pressure on Lieutenant Smith to solve the crimes and make an arrest.

Lieutenant Smith calls Detective Jones into his office to discuss the status of the investigation. The following conversation ensues:

Lieutenant Smith: “What progress have we made on the East Ward breakins?”

Detective Jones: “We’re working on it. We don’t have a lot of

leads here, and you know we're pretty tied up on that downtown robbery case that looks like its going to trial next week. That'll take a lot of my time for the next few days or so."

Lieutenant Smith: “I know, but the Chief wants to find this burglar right away. The mayor lives in the East Ward and the Chief’s taking a lot of flack from the community. He’s already seen two neighbors apply for gun permits. Folks are getting real nervous out there and the Chief does not want this neighborhood to turn into the Wild West, you know what I mean?”

Detective Jones: “Right. Well, I went through our files and I’ve been working with the prosecutor’s office and a detective in Eastburg PD. We’ve put together about fifty files or so of people in the area who’ve been arrested or convicted of breakins and home invasions. I’m going to go through all the files we have so far to see if anything comes up in terms of M.O. I want to be able to circulate some pictures of possible suspects, you know, to show them around to neighbors, mail carriers and all.”

Lieutenant Smith: “Okay. The Patrol Division has also been told to look out for this guy, so pull together some photos that we can give to them. The Chief is really on my back so I want to be able to give something to the Patrol Division for tomorrow morning’s roll call.”

Detective Jones: “I’ll see what I can put together.

Lieutenant Smith: “I think fifty photos is too much, though. We’ve got to pare that down.”

Detective Jones: “Well, I figure that this guy is probably an

addict fencing stuff to buy dope, so I've reached out to local pawn shops and some of our confidential sources."

Lieutenant Smith: "Good. He's probably selling the stuff right on the street for a few pennies on the dollar. By the way, I'm not sure that saying he's probably an addict really helps all that much. I'll bet you that just about all of those files are dopeheads."

Detective Jones: "Fair enough. I'll still be able to find out which ones have drug priors."

Lieutenant Smith: "Okay, and also check with the County and State Corrections to see if any of those guys just got out of jail or a residential program. These breakins only started two weeks ago. Maybe we'll get lucky and find someone who just got out and hit the streets running."

Detective Jones: "Will do. But that will take a little time. I have to be at the prosecutor's office all afternoon on the robbery case. I may not be able to put too much together for tomorrow's day shift roll call."

Lieutenant Smith: "Understood. Let's start by checking out the black suspects who also had drug charges, and then we'll go from there. I just need to have something to give the Chief today to show him we're making some progress."

* * *

8. Scrutinizing and Intercepting Vehicles Coming From the “Source” City

The Town of Westburg is an affluent suburban community located near the much larger, more urban City of Eastburg. Westburg is a predominantly non-minority jurisdiction, whereas Eastburg is comprised mostly of minority residents.

Several months ago, the Eastburg Police Department started working with County and State authorities to form a task force to enhance street-level drug enforcement efforts. The initiative is designed to close down some of the most notorious open air drug markets in the region. This “Quality of Life” program seems to have been successful in driving some of Eastburg’s street-level drug dealers from their familiar haunts.

The Westburg Police Department has learned from specific and reliable sources that some of these displaced dealers have begun traveling into other communities, including Westburg, to sell drugs directly to local buyers who used to have to go to the open air drug markets in Eastburg. In essence, Eastburg is considered to be a significant “source” city of the drugs that are being sold and consumed in Westburg and other surrounding suburban communities. Intelligence information suggests that these Eastburg-based dealers are driving into suburban communities in groups of two or more.

Westburg Police Officers Smith and Jones are both assigned to patrol duty and are stationed on Eastburg Avenue, which is the principle means of traveling from Eastburg into Westburg. Smith and Jones work in tandem as part of the town’s “tac pac” patrol, and their current assignment is to look out for potential drug dealers coming into town. Their strategy is to pay special attention to those vehicles traveling west on Eastburg Avenue that are likely to be coming from Eastburg. They have determined that the most reliable way to ascertain a vehicle’s likely point of origin is to determine through Motor Vehicle Commission records the address of the vehicle’s registered owner. (The assumption in this instance is that a vehicle

registered to an Eastburg resident would be garaged in Eastburg and would be likely to be traveling from that point of origin and transporting Eastburg residents.) Officer Smith, who is in an unmarked car, first scrutinizes vehicles traveling westbound on Eastburg Avenue and “runs” their plates. He then radios ahead to Officer Jones, who is in a marked patrol car, who will initiate a motor vehicle stop based on information provided by Officer Smith.

Officers Smith and Jones know that while they are allowed to “run the plates” of any vehicle that comes into their view, under New Jersey law, they may not obtain personal information, such as a registered owner’s name and address, unless they first observe a motor vehicle violation, or unless the results of a random lookup were to provide a basis for further inquiry (e.g., if the registered owner has a suspended license). Accordingly, Officer Smith scrutinizes all passing vehicles going westbound looking for any kind of moving or equipment violation, which would then allow him to run a “for cause” motor vehicle lookup so that he can determine the address of the vehicle’s registered owner.

As it turns out, most of the vehicles on Eastburg Avenue are traveling in excess of the posted 30 mile per hour limit. The large number of violators makes it impractical for Officer Smith to run the plates of every vehicle observed to have committed a violation. Smith therefore focuses his attention and runs the plates of the vehicles that have two or more minority motorists, since intelligence reports have suggested that the displaced drug dealers are traveling in groups of two or more, and because most of the displaced Eastburg drug dealers were known to be black or Hispanic.

If the motor vehicle lookup confirms that the vehicle is registered to a person who resides in Eastburg, Officer Smith alerts Officer Jones to initiate a motor vehicle stop based on the observed violation (usually speeding). Jones will then order the driver to exit the vehicle to preserve the option of eliciting inconsistent statements from the driver and the passenger(s). Jones will pose several “itinerary” questions concerning the motorists’ point of origin, destination and purpose for travel into Westburg. If the occupants’ stories check out

(in other words, if there are no material inconsistencies), Jones will let the driver off with a warning unless the observed violation that had justified the initial stop was particularly serious, such as speeding fifteen or more miles over the posted limit.

Officer Jones seeks to complete these on-the-scene investigations as quickly as possible, not only to minimize the level of intrusion, but also because he hopes to stop as many vehicles as possible during his duty shift. The goal of this program is not just to apprehend drug dealers, but also to send a message that is designed to deter displaced Eastburg drug dealers from coming into Westburg to peddle their illicit wares.

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PART III

ANSWER KEY AND ANALYTICAL DISCUSSION OF FACTUAL SCENARIOS

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SKILLS ASSESSMENT “TRUE/FALSE” ANSWER KEY

1. **True.** Our civil rights derive from both the State and Federal Constitutions. The United States Constitution establishes the minimum protections afforded to all persons in the nation. See State v. Hemepele, 120 N.J. 182, 197 (1990). State Constitutions may afford persons with additional rights (and may impose additional limits on police powers), beyond those established under federal law. The New Jersey Supreme Court on a number of occasions has chosen to rely on the New Jersey Constitution to suppress evidence that would have been admissible in federal prosecutions. In State v. Pierce, 136 N.J. 184, 209 (1994), the New Jersey Supreme Court spoke of a “steadily evolving commitment” by our State courts to provide citizens enhanced protections under our State Constitution.

2. **True.** The key test under Attorney General Law Enforcement Directive 2005-1 is whether an officer would have handled an encounter differently if the citizen had been of a different race or ethnicity, since this means that race or ethnicity would have played a contributing role in the officer’s exercise of discretion. Unless the police conduct involves a “B.O.L.O. (“Be on the Lookout”) situation, such a finding would mean that the citizen had been treated “unequally” within the meaning of the Equal Protection Clause and Attorney General Law Enforcement Directive 2005-1.

3. **False.** In State v. Maryland, 167 N.J. 471 (2001), the Court expressly noted that, “We do not intend to suggest that ordinarily a proper field inquiry could not be based on a hunch.” It is important to understand, however, that while police are not prohibited from relying on hunches, an inarticulable hunch would provide no basis for “seizing” a person under the Fourth Amendment (i.e., initiating an investigative detention or so-called “Terry” stop.) The legal standard for justifying an investigative detention, after all is a “reasonable articulable suspicion” – not an inarticulable suspicion. Furthermore, as the Court in State v. Maryland made clear, officers in this State may not rely on a hunch that is, in turn, “at least in part based on racial stereotyping.” Id. at 496.

4. **True.** The New Jersey Supreme Court in State v. Carty, 170 N.J. 632 (2002), interpreted the State Constitution to create a new rule that prohibits police officers during a motor vehicle stop from even asking a motorist to consent to a search unless the officer is aware of facts that constitute a reasonable articulable suspicion to believe that the search would reveal evidence of an offense.

5. **True.** The key to complying with the Fourteenth Amendment Equal Protection Clause and New Jersey's statewide policy prohibiting racially-influenced policing is for police officers when drawing inferences of criminal activity or when otherwise exercising police discretion to focus on a citizen's *conduct*, rather than on immutable physical characteristics that the person was born with and cannot change.

6. **True.** In State v. Stovall, 170 N.J. 346 (2002), the Court made clear that officers in New Jersey may in appropriate circumstances develop and rely upon a "profile." The Court defined a "drug courier profile," for example, as a compilation of objective factors which may be innocent alone, but in conjunction with each other or other facts, lead officers to believe that the suspect is engaging in drug trafficking. It is critical to note, however, that any such profile must not rely to any extent on race or ethnicity. Rather, legitimate profiles are race-neutral, focusing on the modus operandi or "methods of operation" of criminals.

7. **False.** The Fourteenth Amendment Equal Protection Clause and New Jersey's statewide policy prohibiting racially-influenced policing applies to *all* police conduct and decisions, and not just those decisions that trigger a Fourth Amendment legal standard (such as an investigative detention (a "stop"), an arrest or a search). In State v. Maryland, 167 N.J. 471 (2001), for example, the New Jersey Supreme Court concluded that the police had violated the Fourteenth Amendment based on the manner in which the officers had initiated a consensual field inquiry, notwithstanding that such a consensual field inquiry does not intrude upon any Fourth Amendment rights,

and, unlike an investigative detention or “Terry” stop, need not be based upon a reasonable articulable suspicion that criminal activity is afoot.

8. **False.** Aggregate statistics cannot be used to justify treating persons of different races differently. It is inappropriate, for example, to use group statistics to infer that a particular individual of a given race or ethnic background is more likely to be a criminal because other persons of that race or ethnicity happen to have been convicted of criminal activity.

9. **False.** One of the greatest myths about the racial profiling controversy is the misguided notion that only bigoted officers engage in this prohibited practice. In reality, a well-meaning, non-bigoted officer can inadvertently engage in racially-influenced policing simply by relying unthinkingly on broad-brushed stereotypes. A minority law enforcement officer may be just as likely as his or her non-minority colleague to allow race or ethnicity to play a role in drawing inferences or exercising discretion.

10. **True.** There are certain circumstances where it is permissible and appropriate for a police officer to take into account that a person is not a resident in a particular neighborhood. For example, this fact might be relevant where the police are aware that non-resident citizens travel to a particular location (such as an open air drug market) to engage in criminal conduct. Police officers must be very careful, however, in how they deduce in the first place that a person is not a resident of a particular area or neighborhood. It is inappropriate for an officer to use a person’s race or ethnicity to support an inference that the person seems to be “out of place” in a particular neighborhood.

11. **False.** The new state crime of “official deprivation of civil rights” requires proof beyond a reasonable doubt that the officer committing this offense acted with the purpose to intimidate or discriminate, and

actually knew that his or her conduct was unlawful. N.J.S.A. 2C:30-6. The Fourteenth Amendment Equal Protection Clause and New Jersey's statewide policy prohibiting racially-influenced policing set forth in Attorney General Law Enforcement Directive 2005-1 is broader in scope than the new criminal statute and bans police conduct that would not necessarily be criminal under this new law.

12. **False.** In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the New Jersey Supreme Court confirmed its earlier decision in State v. Donis, 157 N.J. 44 (1998), holding that mobile display terminal checks are not traditional searches that are subject to Fourth Amendment restrictions. As a result, these computer lookups can be done randomly and need not be based on an observed motor vehicle violation or reasonable suspicion to believe that criminal activity is afoot. The Court in Segars made clear, however, that mobile display terminal checks may *not* be based on impermissible criteria such as race or ethnicity.

13. **False.** It is a myth that only racist or bigoted law enforcement officers engage in the practice of racially-influenced policing. Minority law enforcement officers are by no means immune from the problem of racially-influenced policing. In fact, minority law enforcement officers are just as likely as their non-minority colleagues to rely, perhaps unwittingly or unthinkingly, on racial or ethnic stereotypes in drawing inferences of criminal activity and in exercising police discretion.

14. **False.** When a defendant raises a Fourteenth Amendment Equal Protection claim in a motion to suppress, the reviewing court may examine aggregate statistics in an effort to determine whether the officer(s) involved (or even the entire department) have engaged in a *pattern* of behavior that would suggest that these officers had embraced or tolerated a so-called "de facto policy" to treat persons differently based on their race or apparent ethnicity.

15. **False.** Aggregate statistics may not be used by law enforcement

officers to justify drawing inferences of criminal activity based on a citizen's race or apparent ethnicity. The fact that group statistics may show that a disproportionate percentage of persons of a given race or ethnicity have been convicted of a particular crime cannot be used to support an inference that one or more particular individuals are engaged in criminal activity.

16. **True.** In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the New Jersey Supreme Court established what it called the “burden shifting template” in racial targeting cases. If the defendant establishes a *prima facie* case of discrimination, that is, one in which the evidence, including any favorable inferences to be drawn therefrom, could sustain a judgment in the defendant's favor, the burden of production shifts to the State to articulate a race-neutral basis for its action. If the State is unable to meet this burden of producing a race-neutral explanation, then the defendant's claim of discrimination will prevail, and the seized evidence will be suppressed.

17. **True.** In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the New Jersey Supreme Court confirmed that the act of “running the plates” is not a traditional search that is subject to Fourth Amendment restrictions. This kind of computer inquiry can be done randomly and need not be based upon reasonable suspicion or predetermined objective criteria. An officer may therefore conduct a mobile display terminal check of a vehicle based solely on a “hunch” or “gut feeling,” provided, however, that this inarticulate hunch is not in turn based upon a racial or ethnic stereotype.

18. **True.** In State v. Bruzzese, 94 N.J. 210 (1984), the New Jersey Supreme Court embraced what it called an “objective” test in deciding whether the Fourth Amendment has been violated. The Court held that the Fourth Amendment proscribes unreasonable actions, not improper thoughts. Note, however, that this Fourth Amendment principle does *not* apply to discrimination claims made under the

Equal Protection Clause of the Fourteenth Amendment.

19. **False.** The fact that a citizen understands that he or she is free to walk away from the police means that the encounter is indeed a “field inquiry” and not an “investigative detention” within the meaning of the Fourth Amendment. See State v. Pineiro, 181 N.J. 13 (2004) (field inquiries are permissible so long as they are not harassing, overbearing or accusatory in nature. This means that the person approached in a field inquiry need not answer any question put to him, and the person may decline to listen to the question at all and may go on his way). But just because the Fourth Amendment was not violated does not mean that the police conduct is lawful, since the Fourteenth Amendment Equal Protection Clause establishes its own set of rules governing police conduct, prohibiting officers from using race or ethnicity as the basis for the exercise of police discretion. The Fourteenth Amendment applies to *all* police decisions, including the decision to initiate a consensual field inquiry. See State v. Maryland, 167 N.J. 471 (2001).

20. **True.** Under both State and Federal law, warrantless searches and seizures are deemed by courts to be presumptively unreasonable. This means the State must bear the burden of proof in a motion to suppress to show that the officer’s conduct complied with all applicable Fourth Amendment rules.

21. **False.** Not all pretext stops are illegal. There are times when it is perfectly acceptable for police to resort to a pretext or ruse. However, if the underlying true reason for initiating an encounter with a citizen is itself unlawful for any reason, then the resulting stop is automatically unlawful.

22. **False.** The New Jersey Supreme Court confirmed in State v. Neshina, 175 N.J. 502 (2003), that an officer is permitted to approach a citizen to initiate a “field inquiry” without having to be aware of facts that establish a reasonable articulable suspicion to believe that this person is engaged in criminal activity.

23. **False.** New Jersey’s statewide policy prohibiting racially-influenced policing set forth in Attorney General Law Enforcement Directive 2005-1 applies to *all* police decisions, and not just to the initial decision to initiate an investigative detention. Thus, for example, a police officer may not consider a lawfully stopped motorist’s race or ethnicity in deciding whether to ask that motorist to step out of the vehicle, to pose certain probing or accusatorial questions designed to expose possible criminal activity, or to ask the motorist for permission to conduct a consent search.

24. **False.** The term “frisk” refers to a limited patdown of a detained suspect *for weapons*. There is simply no such thing as a “frisk” for illicit drugs or other nonweapon contraband. Any physical touching of a person to inspect for drugs would instead constitute a full-blown “search,” which must be based upon probable cause and fall under one of the recognized exceptions to the general rule that searches must be authorized by a court-issued warrant. Note that probable cause is a higher standard of proof than the “reasonable articulable suspicion” standard that must be met before an officer may conduct a limited protective frisk for weapons.

25. **False.** In State v. Maryland, 167 N.J. 471 (2001), the Court held that the test for deciding whether an investigative detention has occurred is measured from a citizen’s perspective. The correct inquiry is whether a reasonable person, under all of the attendant circumstances, would believe that he or she could walk away without answering any of the officer’s questions. The court will consider whether the officer’s questions are put in a conversational manner, whether the officer has made any demands or issued orders, and

whether the officer's questions are overbearing or harassing in nature. See State v. Pineiro, 181 N.J. 13 (2004) (field inquiries are permissible so long as they are not harassing, overbearing or accusatory in nature. This means that the person approached in a field inquiry need not answer any question put to him, and the person may decline to listen to the question at all and may go on his way).

26. **False.** Our statewide policy prohibiting racially-influenced policing prohibits a law enforcement officer from considering race or ethnicity as a factor in exercising police discretion (other than when responding to a suspect-specific B.O.L.O. ("Be on the Lookout") situation. This prohibition against the use of race or ethnicity applies to *every* police decision, including the decision to run a criminal history lookup or warrant check.

27. **True.** In contrast to litigation under the Fourteenth Amendment Equal Protection Clause, a court deciding a motion to suppress using traditional Fourth Amendment analysis is concerned only with the conduct of the police officer during the particular encounter with the defendant. Aggregate statistics are therefore irrelevant to the question whether this particular officer's conduct complied with the requirements of the Fourth Amendment during this particular encounter with this specific defendant.

28. **True.** Regrettably, gangs have proliferated throughout the State of New Jersey in recent years. It is critical to note that this problem is by no means limited to urban areas. Many street gangs are expanding their "turf," and are actively recruiting members in suburban communities.

29. **False.** While "*racial* profiling" is illegal and will not be tolerated in this State, other forms of profiling (which focus on conduct and the modus operandi of criminals) are perfectly legitimate. In State v. Stovall, 170 N.J. 346 (2002), for example, the New Jersey Supreme Court approved the use of a "drug courier profile."

30. **False.** Police reports serve many important functions besides refreshing an officer's recollection when he or she testifies at trial or

in a motion to suppress evidence. Most notably, the police report is relied upon by prosecutors as part of the case “screening” process, which determines how the case will be handled. Prosecutors must evaluate all cases to determine whether there are any weaknesses (such as the possibility of losing a motion to suppress evidence) that affect the likelihood of securing a conviction at trial. This evaluation of the strengths and weaknesses of the State’s proofs will, in turn, affect the plea offer that is likely to be tendered by the prosecutor as part of the plea negotiation process. When a police report is imprecise, inaccurate or incomplete, there is a greater likelihood that the case will be dismissed, downgraded, or de-valued in terms of the plea offer that will be tendered to the defendant.

31. **True.** In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the Court’s determination that the arresting officer had given inaccurate testimony raised the inference of racial targeting (*i.e.*, *e.g.*, the inference that inaccurate testimony was an attempt to conceal the fact that the officer had relied upon race because he knew that such reliance was unlawful). In Segars, the State’s failure to produce an explanation for the officer’s inaccurate testimony was deemed by the Court to be the “pivotal point in the case,” and was the basis for the Court’s ultimate legal conclusion that the officer had engaged in racial targeting, warranting the suppression of the seized evidence.

32. **True.** The New Jersey Supreme Court in State v. Stovall, 170 N.J. 346 (2002), recognized that police may develop and use “profiles” in determining whether a person may be engaged in criminal activity. The profile (which is simply a compilation of objective factors that may be innocent but that are nonetheless consistent with criminal activity) becomes part of the so-called “totality of the circumstances” that a law enforcement officer may consider in determining whether criminal activity is afoot. In essence, a profile is simply a type of police “training and experience” which can be used by police to interpret a situation, although a formalized profile is based on the carefully documented experience of a number of officers (or the entire agency)

rather than any one officer. While relevant and useful, these race-neutral law enforcement profiles rarely if ever are sufficient by themselves to establish a basis for initiating an investigative detention under the Fourth Amendment. In Reid v. Georgia, 100 S.Ct. 2752 (1984), for example, the United States Supreme Court observed that a drug courier profile alone does not establish reasonable suspicion. See also State v. Stovall, supra (the mere fact that a suspect displays profile characteristics does not justify a stop.)

33. **True.** Police are permitted and are expected to consider all known physical traits and identifying physical characteristics, including race or apparent ethnicity, when deciding whether a person is the specific individual described in a “Be on the Lookout” (B.O.L.O.) bulletin. In State v. Stovall, 170 N.J. 346 (2002), the New Jersey Supreme Court concluded that the identification of the suspects in that case as Hispanic was only that – an identification.

34. **False.** Under New Jersey’s statewide policy prohibiting racially-influenced policing, law enforcement officers are not permitted to consider a person’s race or ethnicity at all in drawing inferences of criminal activity or in exercising discretion (other than when responding to a suspect-specific B.O.L.O. situation). The policy set forth in Attorney General Law Enforcement Directive 2005-1 can be violated even when race or ethnicity is not the sole factor relied upon by police to draw an inference of criminality. The test, simply stated, is whether the officer would have treated this particular citizen differently had the citizen been of a different race or ethnicity. If the answer to that question is yes, then race or ethnicity played a contributing role in the exercise of police discretion, in violation of our statewide policy prohibiting racially-influenced policing.

35. **False.** The courts in New Jersey have made clear on numerous occasions that police officers in this State are not permitted to routinely frisk detained motorists. See, e.g., State v. Lipski, 238 N.J. Super. 100 (App. Div. 1990). Police officers may not frisk a detained suspect for weapons unless they are aware of facts that constitute a reasonable and articulable suspicion to believe that this particular individual may be armed and dangerous. Because this is a rule arising under the Fourth Amendment and its State Constitutional counterpart, it does not matter that the officers were not also violating the Fourteenth Amendment Equal Protection Clause. It is possible, in other words, to violate one of these distinct constitutional provisions without violating the other.

36. **False.** The Fourteenth Amendment Equal Protection Clause and our statewide policy prohibiting racially-influenced policing applies to *all* police decisions, and not just to those decisions that implicate Fourth Amendment privacy or liberty rights (such as a stop, an arrest, or a search). It is therefore possible to violate the nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1 by engaging in conduct that a citizen never even becomes aware of. For example, if an officer were to “run the plates” of a vehicle based on

the race or ethnicity of the motorist, that decision would constitute a violation of the Equal Protection Clause and our statewide policy prohibiting racially-influenced policing. This would be true even if the motor vehicle lookup did not reveal a basis to stop the vehicle, so that motorist would never know that the officer had checked the license plates.

37. **False.** It is appropriate, indeed necessary for officers to include in a B.O.L.O. description every known identifying characteristic of the specific individual who is being sought. Police are generally required under the Fourth Amendment and its State Constitutional counterpart to use “the least intrusive means” to accomplish their legitimate investigative objectives. Were police to leave out a racial or ethnicity “identifier” from a B.O.L.O. bulletin, then persons who could not possibly be the person being sought might be subjected to police scrutiny and detention. In other words, a B.O.L.O. would cast too broad a net if it failed to include every known physical characteristic that might help police in the field find the wanted person and, as importantly, help the police to eliminate from suspicion persons who do not match the known physical characteristics of the wanted person.

38. **True.** Not all “pretext” stops are unlawful. See, e.g., Whren v. United States, 116 S.Ct. 1769 (1996) (United States Supreme Court refused to examine whether a police officer’s conduct is based on a “pretext”). Police are permitted to make a stop based on a very minor observed motor vehicle violation even though they have an ulterior purpose, provided that that ulterior purpose is itself lawful. (While the motorist in that event is being treated differently than other minor violators, this form of “selective enforcement” does not run afoul of the Constitution so long as a “suspect classification” such as race or ethnicity is not involved.) If, on the other hand, the ulterior reason for actually choosing to make this stop is *unlawful* for any reason, then the resulting stop is unlawful, notwithstanding the general rule under the Fourth Amendment that police may stop a motor vehicle

based upon an observed motor vehicle violation. Thus, for example, if police suspect that an individual is engaged in criminal activity based in part on the individual's race or ethnicity, they may not stop that individual based on a fortuitously observed motor vehicle violation under circumstances where they otherwise would not have initiated a motor vehicle stop for such a minor violation, since the underlying or ulterior reason for bothering to make the stop would have been influenced by a consideration of race or ethnicity in violation of the Fourteenth Amendment Equal Protection Clause and our statewide policy against discriminatory policing. Remember that the test under the Fourteenth Amendment and Attorney General Law Enforcement Directive 2005-1 is whether police are treating a particular individual differently based on the individual's race or ethnicity.

39. **True.** Courts recognize that a person's known membership in a specific criminal organization such as a street gang is relevant and certainly may be considered by the officer as part of the "totality of the circumstances." However, membership in a group commonly thought to be suspicious, such as a gang, is insufficient by itself to establish reasonable suspicion. See Drake v. County of Essex, 275 N.J. Super. 585 (App. Div. 1994), citing to Reid v. Georgia, 100 S.Ct. 2752 (1984) (drug "profile" alone does not establish reasonable suspicion).

40. **True.** A court reviewing a Fourteenth Amendment claim of selective enforcement may conduct a wide-ranging inquiry. A reviewing court may, for example, examine the officer's thought processes to determine whether the officer had, in fact, relied on an impermissible factor such as race or ethnicity. This approach distinguishes Fourteenth Amendment legal analysis from Fourth Amendment jurisprudence. See State v. Bruzzese, 94 N.J. 210 (1983) ("the proper inquiry for determining the constitutionality [under the Fourth Amendment] of a search and seizure is done without regard to the officer's underlying motives or intent.").

41. **False.** Police officers are not permitted to draw any inferences of criminality from the race or apparent ethnicity of an individual (other than when determining whether the individual matches the description of a suspect-specific B.O.L.O. bulletin). The nature, extent or prevalence of a criminal problem is irrelevant to this analysis.

42. **False.** Some courts have held that the act of posing an “accusatorial” question automatically converts a consensual field inquiry into an investigative detention or “Terry stop.” See, e.g., State in the Interest of J.G., 320 N.J. Super. 21 (App. Div. 1999). Compare State v. Rodriguez, 172 N.J. 117 (2002), where the New Jersey Supreme Court declined to decide whether an accusatorial question automatically triggers an investigative detention, with State v. Neshina, 175 N.J. 502 (2003), where the Court suggested that a field inquiry involves questions that are not accusatory in nature. But even if the act of posing an accusatorial question were deemed to transform a consensual field inquiry into an investigative detention, the requirement to administer Miranda warnings does not apply in any event to an investigative detention (as opposed to a full-blown arrest). See Berkermer v. McCarty, 104 S.Ct. 3138 (1984).

43. **False.** Courts in New Jersey have expressed great concern with the police practice that is sometimes referred to as “digging,” that is, when a police officer seeks to use the opportunity of a routine traffic stop to conduct a *criminal* investigation in the hope of fortuitously uncovering evidence of a crime. See, e.g., Hornberger v. American Broadcasting Company, 351 N.J. Super. 577 (App. Div. 2002) (court sought to discourage police from turning a routine traffic stop into a “fishing expedition for criminal activity unrelated to the stop,” citing State v. Carty, 170 N.J. 632 (2002)). To the extent that such “digging” is often based on inarticulable hunches, courts are much more likely to carefully scrutinize the encounter to make certain that impermissible factors such as racial or ethnic stereotypes played no role in the exercise of police discretion. It should be noted that the prolongation of a stop could, depending on the circumstances, result

in a Fourth Amendment violation if a court were later to find that the encounter had escalated into a de facto arrest, which would be unlawful if the officer at that moment was not aware of facts constituting probable cause to believe that a criminal offense had been or was being committed.

44. **False.** The New Jersey Supreme Court in State v. Carty, 170 N.J. 632 (2002), definitively ruled that police officers in this State are not permitted to prolong the duration of a motor vehicle stop by asking a motorist for permission to conduct a search unless the officer is aware of facts that constitute a reasonable articulable suspicion to believe that the consent search would reveal evidence of an offense. The Court's ruling in Carty was based on the State Constitutional counterpart to the Fourth Amendment, and so any violation of this new rule will automatically lead to the suppression of evidence notwithstanding that the officer has not also violated the Fourteenth Amendment Equal Protection Clause.

45. **False.** In State v. Bruzzese, 94 N.J. 210 (1983), the New Jersey Supreme Court held that under the Fourth Amendment, "the proper inquiry for determining the constitutionality of a search and seizure is done without regard to the officer's underlying motives or intent." Note that the approach used in resolving a Fourteenth Amendment selective enforcement claim is very different; when a violation of the Equal Protection Clause is alleged, the reviewing court may conduct a wide-ranging inquiry in an effort to determine the officer's purpose and intent.

46. **True.** The New Jersey Supreme Court in State v. Maryland, 167 N.J. 471 (2001), made clear that it "did not intend to suggest that ordinarily a proper field inquiry could not be based on a hunch." However, as a practical matter, a reviewing court is more likely to closely examine the underlying basis for any such inarticulable hunch to make certain that the police officer was not influenced by a racial or ethnic stereotype. Police officers in this State should always be consciously thinking not only about *what* they are doing, but also *why* they are drawing the inferences that they are drawing or making the

decisions that they are making.

47. **True.** The purpose of “screening” is to determine the strengths and weaknesses of a case and the likelihood of obtaining a conviction at trial. Prosecutors will therefore consider, among other things, the possibility that physical evidence or statements might be suppressed based upon a constitutional violation. In other words, prosecutors may *anticipate* that a defendant would challenge a stop, arrest or search, and prosecutors will consider, based upon the information available, both the risk that the State would ultimately lose a motion to suppress, and the costs and expenditure of resources that would be involved in litigating any such motion.

48. **True.** Some courts have held that posing an accusatorial question automatically converts a field inquiry into an investigative detention. See, e.g., State in the Interest of J.G., 320 N.J. Super. 21 (App. Div. 1999). But even if the courts ultimately do not uniformly establish a strict, bright-line rule concerning accusatorial questions, they will certainly consider the accusatorial nature of questions as part of the “totality of the circumstances” in deciding whether a police-citizen encounter is no longer consensual and has become an investigative detention. In State v. Maryland, 167 N.J. 471 (2001), the New Jersey Supreme Court explained that in making this determination, a reviewing court should consider whether the officer’s questions were “put in a conversational manner,” and whether those questions were “overbearing or harassing in nature.” Most recently in State v. Neshina, 175 N.J. 502 (2003), the New Jersey Supreme Court suggested that a field inquiry involves questions that are not accusatory in nature.

49. **False.** Except when responding to a suspect-specific B.O.L.O. situation, law enforcement officers in this State are prohibited from considering a person’s race or ethnicity to infer that person may be a member of a criminal organization. Law enforcement officers should instead focus on the person’s *conduct*, including, where appropriate, expressive conduct such as the decision to display particular clothing,

jewelry, tattoos, etc. Such physical characteristics might suggest that the person has chosen to affiliate with a particular gang.

50. **False.** Under the Fourth Amendment and its State Constitutional counterpart, law enforcement officers in this State are always authorized to order the driver of a lawfully stopped vehicle to step out, since that police action is not deemed to constitute a further intrusion on Fourth Amendment liberty or privacy rights. See State v. Smith, 134 N.J. 599 (1994). The Equal Protection Clause of the Fourteenth Amendment, however, provides constitutional standards and safeguards that are distinct from the Fourth Amendment right to be free from unreasonable searches and seizures. The rule in New Jersey is that law enforcement officers are prohibited from taking *any* action that is based upon a person's race or ethnicity (other than when responding to a suspect-specific B.O.L.O. situation). Thus, if a police officer were to order the driver of a lawfully detained vehicle to step out of the vehicle based on the motorist's race or ethnicity, that decision would violate New Jersey's strict policy prohibiting racially-influenced policing.

51. **True.** Under the Fourth Amendment, any observed motor vehicle violation, however minor, would provide an objective basis for initiating a motor vehicle stop. Law enforcement officers must expect, however, that reviewing courts would be especially skeptical and probing when a stop is based on a very minor violation, since that situation suggests that the vehicle had been selected for police scrutiny and intervention for some ulterior reason. Remember that the test under the Fourteenth Amendment Equal Protection Clause and New Jersey's statewide policy prohibiting racially-influenced policing is whether the officer would have treated the person/motorist differently had that person been of a different race or ethnicity. Because reviewing courts are concerned about potential abuses of police discretion, they are likely to examine more closely encounters that involve a wide latitude of discretion, as compared to stops for very serious violations (such as drunk driving or excessive speeding),

where officers have less discretion to simply ignore the violation. Whenever an officer makes a stop based upon a comparatively minor infraction, he or she should be prepared to explain exactly why this particular vehicle was selected to be stopped from among the universe of vehicles that were committing motor vehicle offenses that were at least as serious.

52. **False.** Police officers, of course, must *always* exercise caution. After all, “Rule Number 1” of police work is that an officer is expected to go home safe and sound at the end of his or her duty shift. It is nonetheless inappropriate as a matter of sound law enforcement policy for police to treat motorists stopped for mere motor vehicle violations as if they were *criminal* suspects (unless there is some objective basis for believing they are engaged in criminal activity). See, e.g., Hornberger v. American Broadcasting Company, 351 N.J. Super. 577 (App. Div. 2002) (court found that officer’s demand for passengers to produce identification during traffic stop was unreasonable since there was no basis to suspect that the passengers were armed, dangerous or involved in any criminal activity; the court sought to discourage police from turning a routine traffic stop into a “fishing expedition,” citing to State v. Carty, 170 N.J. 632 (2002)). However a police officer may choose to treat citizens in general, the officer must always be aware that the Fourteenth Amendment Equal Protection Clause and our statewide policy prohibiting racially-influenced policing requires that all citizens be treated equally. This means that an officer may not treat a minority citizen differently from the way the officer treats nonminority citizens encountered in a similar situation.

53. **True.** To establish a violation of the new crime of “official deprivation of civil rights,” the State must prove that the officer acted with the purpose to discriminate or intimidate, and that the officer knew that his or her conduct was unlawful. See N.J.S.A. 2C:30-6. It should be noted that the statute expressly provides that the officer’s knowledge may be proved by establishing that the officer had made a false statement or prepared a false report, or had failed to prepare a

report when required to have done so. N.J.S.A. 2C:30-6d. In other words, lying about one's conduct, or trying to conceal one's conduct by not filing a report, establishes an inference that the officer knew that his or her conduct was unlawful.

54. **False.** The "B.O.L.O. exception" applies to a wide range of situations where a law enforcement officer is looking for a particular individual or individuals. Radio broadcasts and amber alerts are only two means by which information may be communicated by and among law enforcement officers. Law enforcement officers may, of course, rely upon information that has not been reviewed or "approved" by a superior officer.

55. **False.** The so-called "B.O.L.O. exception" to the general rule prohibiting law enforcement officers in this State from considering race or ethnicity in exercising discretion applies to any situation where law enforcement officers or agencies have a legitimate interest in identifying and finding a specific individual or individuals. The B.O.L.O. exception is not limited to crimes of any particular degree. Indeed, the B.O.L.O. exception can apply to any person that the police want to find, including people who are not even suspected of criminal activity, such as material witnesses, victims, and missing persons.

ANALYTICAL DISCUSSION OF FACTUAL SCENARIOS

Unlike the true/false questions in Part I, there are not necessarily “right” or “wrong” answers to the issues raised by the factual scenarios described in Part II. Any ruling issued by a reviewing court might depend in part on the court’s assessment of the credibility of witnesses, and on additional information that is not set forth in the text of these factual scenarios.

Discussion of Factual Scenario #1: Watching Out for Stolen Vehicles: The Luxury Sedan

This scenario examines the practice of inferring that a vehicle may be stolen because the occupants do not appear to “match” the vehicle. If any such suspicion were to be based on the race or ethnicity of the occupants, then this inference would constitute racially-influenced policing in violation of our statewide policy prohibiting police discrimination set forth in Attorney General Law Enforcement Directive 2005-1. But before examining the Fourteenth Amendment Equal Protection Clause issues raised in this scenario, we will first address the relevant Fourth Amendment issues.

In State v. Donis, 157 N.J. 44 (1998), the New Jersey Supreme Court ruled that a police officer may conduct a motor vehicle/NCIC inquiry (i.e., “run the plates” of a vehicle) before observing any motor vehicle violation. This is sometimes referred to as a “random” check. The Court in Donis interpreted a state statutory provision, however, to restrict a patrol officer’s access to “personal information” such as the name, address, and criminal history of the registered owner unless the initial information provided during a random check discloses a basis for further police action. Accordingly, the computer system administered by the New Jersey State Police will only provide limited information to police officers running a “random” check, namely, whether the vehicle had been reported stolen, whether the registered owner of the vehicle has a revoked or suspended operator’s

license, and whether the license plates of the vehicle match the description of the vehicle from MVC records.

Once the officers in this scenario observed a motor vehicle violation, they were at that point entitled to run a more complete computer inquiry and were authorized to access so-called personal information from the database, including the name, gender and date of birth of the registered owner. (Note that MVC computer records do not document the race of licensed drivers and registered owners.)

In this case, the ensuing motor vehicle stop was essentially a “pretext.” The officers were obviously relying upon a comparatively minor violation to justify the stop, even though ordinarily, they would probably not bother to stop a vehicle that was traveling in a line of traffic and that was going only a few miles per hour over the posted speed limit. The ulterior reason for the stop, of course, was to investigate the possibility that this vehicle may have been stolen.

A pretext stop is not necessarily unlawful, so long as the true reason for the stop is not itself unlawful. Under the Fourth Amendment, courts use what is called an “objective” test of reasonableness, meaning that reviewing courts are generally not concerned with underlying or ulterior reasons for initiating a Fourth Amendment seizure, so long as the officers had actually observed a motor vehicle violation. See Whren v. United States, 116 S.Ct. 1769 (1996) (Court refused to examine whether a police officer’s conduct was based on a “pretext”); see also State v. Bruzzese, 94 N.J. 210 (1984) (the Fourth Amendment proscribes improper conduct, not improper thoughts).

It should be noted that the limited facts recited in this scenario do not suggest that a B.O.L.O. (“Be on the Lookout”) had been issued for this particular vehicle, or for any specific individual or individuals who are suspected of automobile theft.

Furthermore, the officers had not observed any *conduct* consistent with theft. The vehicle was not being operated in a reckless manner that might suggest that the driver was unconcerned for the welfare of the vehicle or was otherwise engaged in “joyriding.”

There was also no indication that the vehicle had been damaged in a way that would suggest that it had recently been broken into. (The officers confirmed that the vehicle was not damaged when they were able to approach it on foot and examine it at close quarters. It should be noted that at this point, if they had observed some form of damage consistent with theft, they would only have become aware of that fact *after* the stop had already been initiated. In that event, any such observation could not be used to justify their initial decision to stop this vehicle.)

This brings us to the more difficult question whether the police conduct described in this scenario constitutes racially-influenced policing. In State v. Segars, 172 N.J. 481 (2002) (*per curiam*), the New Jersey Supreme Court made clear that while police do not have to have a reasonable suspicion before they conduct a computer lookup, such checks cannot be based upon impermissible motives such as race.

To address the Fourteenth Amendment Equal Protection issue, we must examine and interpret the officers’ intentions and the true reason(s) for their exercise of discretion in first “running the plates” and later in ordering the vehicle to pull over. When Officer Smith referred to “two black guys” who appeared to be teenagers, we must determine whether he was merely describing the vehicle occupants, or whether the fact that the occupants were African-American played a role in precipitating or bolstering his “hunch” that this vehicle might be stolen. In the same vein, when Officer Jones remarked, “That doesn’t seem quite right.” we must determine exactly what it was about the situation that seemed to him to be suspicious or at least odd. Was Officer Jones suggesting that it was unusual for a teenager

to be driving a luxury sedan, or was he suggesting that it was unusual for an *African-American* teenager to be driving such a vehicle?

The critical question that must be answered in this case, of course, is whether the officers were in fact relying to any degree on a racial stereotype, and specifically the notion that young minority citizens are more likely than young non-minority citizens to steal vehicles. Relatedly, we must determine whether the officers were relying on the notion that minority citizens tend to be less affluent, and therefore would be less likely to be able to afford to lease or purchase a new Mercedes Benz sedan. This stereotype might also be premised on the closely-related notion that a minority citizen who is able to lease or purchase such a vehicle is more likely than a nonminority citizen to be engaged in some illicit profit-making enterprise, such as drug trafficking.

Reviewing courts in New Jersey will be sensitive to these issues, and will be looking closely to see whether the police relied upon such broad-brushed, race-based stereotypes to justify initiating a motor vehicle stop for a comparatively minor violation, especially if other vehicles at the same time and place were committing the same violation but were not targeted for police scrutiny. Always remember that the gist of a “selective enforcement” claim under the Fourteenth Amendment is that the individual was “selected” for police intervention based on some impermissible criterion.

Some courts reviewing this factual scenario would be likely to draw an inference that race had played a role in the exercise of police discretion. In that event, the “burden of production” would shift to the officers to provide a race-neutral explanation for the way in which they exercised their discretion.

The key question raised by this scenario is whether these officers would have “run the plates” of this vehicle, and would have stopped it, had the occupants instead been Caucasian teenagers, rather than African-American teenagers. If the answer to that question is no, then the race of the occupants would have played a role in the exercise of police discretion in violation of our statewide nondiscrimination policy.

This question can best be answered simply by asking the officers to explain their reasons. It should also be noted that in the course of litigation, a court might consider evidence of other encounters involving these officers, and might also consider aggregate statistics to see if there is a “pattern” of treating minority citizens differently from nonminority citizens when investigating the possibility that a vehicle might be stolen.

Finally, it is important to note that if, in fact, the officers in this scenario had impermissibly relied on the vehicle occupants’ race to draw or support an inference of criminality, it would not matter that the driver had not been issued a summons for the minor motor vehicle

violation. Whenever a law enforcement officer engages in racially-influenced policing, it cannot be said that “no harm” was done, since the prohibited practice is itself harmful.

Discussion of Factual Scenario #2: Protecting Critical Infrastructure: The Citizen “Tip”

We begin our analysis of this factual scenario by considering the Fourth Amendment implications of the police conduct. Law enforcement officers are, of course, authorized -- indeed are *expected* -- to investigate possible criminal activity, and are also authorized to respond to unusual situations under the so-called “community caretaking” doctrine.

In this instance, the suspicious conduct described by the citizen (who provided his name and therefore is not an “anonymous” tipster) may not be criminal per se. Based on the description of the area surrounding the reservoir and the location of the warning signs on the fence, it is by no means clear that the act of walking up the grassy slope toward the stone retaining wall constitutes defiant trespass in violation of N.J.S.A. 2C:18-3b. For purposes of the Fourth Amendment, however, it does not matter that there may have been a perfectly innocent explanation for why these adults climbed the hill to observe (and perhaps photograph) the reservoir. That is what an investigation would ultimately determine. See State v. Arthur, 149 N.J. 1 (1997) (“it must be rare indeed that an officer observes behavior consistent only with guilt and incapable of innocent interpretation.”). See also State v. Pineiro, 181 N.J. 13 (2004) (the fact that purely innocent connotations can be ascribed to a person’s actions does not mean that an officer cannot base a finding of reasonable suspicion for an investigatory stop on those actions so long as a reasonable person would find the actions are consistent with guilt).

Because the observed conduct in this instance was consistent with a possible threat posed to public safety, the police clearly had a legitimate basis under the Fourth Amendment to investigate the situation, and to initiate a consensual field inquiry if not an investigative detention. See State v. Neshina, 175 N.J. 502 (2003) (Officer was permitted to approach defendant and ask for credentials

where defendant was on school property late at night when school was closed, defendant's vehicle was not parked in lighted school parking lot, and defendant offered no legitimate explanation for being on school grounds).

We must next consider the Fourteenth Amendment Equal Protection Clause implications of the police decisions that were made. The more difficult question raised in this scenario is whether the police had inappropriately relied upon ethnicity, that is, the fact that the two men walking near the reservoir appeared to be of Middle-Eastern ancestry. Officer Jones (the officer who was dispatched to the scene) was only responding to a description of two specific individuals that was part of a B.O.L.O. ("Be on the Lookout") alert. Officer Jones had no choice but to look for the persons described in the radio dispatch. The real question, therefore, is whether Officer Smith had inappropriately relied upon ethnicity in exercising police discretion by dispatching another officer to investigate the citizen's tip.

In this instance, Officer Smith's conduct appears to be appropriate. A police officer in these circumstances is permitted, indeed would be expected to act upon the information provided by the private citizen.

It is certainly conceivable, of course, that the private citizen had himself relied at least in part on apparent ethnicity in concluding that the two men near the reservoir were "suspicious." It may well be true that the citizen was reacting to the tragic events of 9-11, and that he may have been suspicious of the two individuals that he observed by virtue of their apparent ethnicity or national origin. The Fourteenth Amendment Equal Protection Clause, however, does not apply to the inferences drawn or actions taken by private citizens. Rather, the Equal Protection Clause only imposes limits on the exercise of governmental authority.

That does not mean that police can automatically rely upon all information provided by citizens without regard to the Equal Protection Clause or the nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1. Rather, it means that law enforcement authorities when using information provided by citizens must conduct their *own* analysis to determine whether there is an adequate, race-neutral basis for taking further governmental action. The critical question in this case is whether Officer Smith would have dispatched another officer to the scene if the citizen had merely reported that he saw two adult males walking near the reservoir retaining wall, and had not described their apparent ethnicity.

In addressing that critical question, it is important to note that the citizen reported observed *facts* that, while not necessarily criminal *per se*, are nonetheless suspicious or at least unusual. (Had the citizen instead reported that two “Arab-looking” men were simply walking on the sidewalk, that information would, of course, provide no legitimate basis for police action.) In sum, the citizen’s “tip” included factual information regarding unusual *conduct*, which in turn would justify Officer Smith’s decision to dispatch another officer to investigate the situation. (The citizen tipster had related that it was unusual for adults to climb up the steep hill, and also provided information suggesting the possibility that one of the men had a camera or video recorder. The possible use of a camera raises security concerns since terrorists are known to photograph their targets so they can identify security weaknesses and infrastructure vulnerabilities when planning an attack.)

Once again, the critical Fourteenth Amendment question in this case is whether Officer Smith would have handled the situation differently if the two men had not been described by the citizen tipster as appearing to be from the Middle East (referring to their apparent ethnicity). This question forces us to speculate as to the thought processes of Officer Smith. A supervisor in this situation could

address the issue simply by asking Officer Smith whether he would have reacted differently if the two adult males had not been described by the citizen tipster as being “Arab-looking guys.” We might also consider other information about different encounters that would allow us to consider how Officer Smith has handled similar situations in the past.

If we were to conclude that Officer Smith would not have bothered to dispatch an officer had the suspicious males not appeared to be of Middle-Eastern ancestry, then the officer’s decision would have been based at least in part on an ethnicity-influenced stereotype (the notion that “Arab-looking” persons are more likely to be terrorists), in violation of the statewide nondiscrimination policy.

Discussion of Factual Scenario #3: Train Station Interdiction

The factual scenario begins by reciting what is essentially a race-neutral “profile” based upon police experience, namely, the documented historical fact that drug dealers from Eastburg travel by train to New York City to purchase illicit drugs for local redistribution. It is further believed that these dealers travel in pairs when making “runs” into New York City.

This “profile” essentially describes the modus operandi or “method of operation” of local drug traffickers. Note that this profile focuses on conduct, rather than on race or ethnicity. (By way of example, travel to or from a known “source city” of illicit drugs is a form of conduct that may be considered as part of a legitimate, race-neutral drug courier profile.) Police agencies are permitted to collect, analyze and rely upon this kind of information when drawing inferences of criminal suspicion when officers encounter persons whose conduct is consistent with the essential features of the modus operandi profile. See State v. Stovall, 170 N.J. 346 (2002). The real challenge, of course, lies in how that information is actually used out in the field when making police decisions.

From a Fourth Amendment perspective, police officers are always permitted to conduct a consensual “field inquiry.” See State v. Maryland, 167 N.J. 471 (2001). In other words, police officers are allowed under the Fourth Amendment to approach citizens under circumstances where the citizens would reasonably believe that they are free to walk away or ignore the officers. In this instance, a reasonable person would probably understand that he or she is not required to engage the police officers in conversation, and in fact, one of the males essentially turned his back on the police. See State v. Pineiro, 181 N.J. 13 (2004) (field inquiries are permissible so long as they are not harassing, overbearing or accusatory in nature. This means that the person approached in a field inquiry need not answer any question put to him, and the person may decline to listen to the question at all and may go on his way).

It thus appears that the officers had not conducted an investigative detention or so-called “Terry” stop, at least at the outset of the encounter. It should be noted, however, that once Officer Jones posed what could be described as an “accusatorial” question, that is, a question that presupposes criminal activity (“You don’t have anything on you you shouldn’t have, do you?”), the encounter may have escalated into an investigative detention. Compare State in the Interest of J.G., 320 N.J. Super. 21 (App. Div. 1999) (posing an accusatorial question converted a field inquiry into a “Terry” stop requiring articulable suspicion) with State v. Rodriguez, 172 N.J. 117 (2002) (Court declined to decide whether an accusatorial question automatically transforms a field inquiry into an investigative detention) and State v. Neshina, 175 N.J. 502 (2003) (Court suggested that a field inquiry involves questions that are not accusatory in nature).

If a reviewing court were to conclude that the encounter had become an investigative detention, then the police conduct would be unconstitutional, since the officers did not have a reasonable articulable suspicion that these two individuals were engaged in criminal activity. While race-neutral modus operandi profiles are relevant as part of the “totality of the circumstances” and may be considered by police in drawing inferences of possible criminal activity, they rarely, if ever, are sufficient by themselves to justify an investigative detention or “seizure” under the Fourth Amendment. See, e.g., Reid v. Georgia, 100 S.Ct. 2752 (1984) (*per curiam*) (drug courier profile by itself did not establish reasonable suspicion).

The more complex issue raised in this scenario is whether and to what extent the officers had relied on apparent ethnicity in determining whether these individuals “fit the profile.” While a consensual field inquiry does not constitute an intrusion of Fourth Amendment rights, the New Jersey Supreme Court has made clear that this exercise of police discretion is subject to limitations based on

the Equal Protection Clause of the Fourteenth Amendment. See State v. Maryland, 167 N.J. 471 (2001). If, in fact, the officers had relied on ethnicity in selecting these two individuals for police scrutiny from among the many other travelers on the train platform, then the State's policy prohibiting racially-influenced policing would have been violated. The critical question that must be answered under Attorney General Law Enforcement Directive 2005-1 may be simply stated: would the officers have chosen to approach and converse with these two individuals if they had been young *non*minority males rather than Hispanic males?

Were this scenario to be reviewed by a court, it is likely that the so-called "burden shifting template" would be invoked. This means that it would be incumbent upon the State to produce evidence suggesting a race-neutral explanation for the officer's exercise of discretion. In that event, these officers would be expected to explain why exactly they selected *these* two individuals to initiate a field inquiry. (We simply do not know how many other persons on the train platform (if any) were approached by these officers before (or after) they selected the two Hispanic males.)

It is important to note that it does not appear from the limited facts recited in the scenario that the officers recognized these particular individuals from prior dealings or observations. This was not a case, for example, where the officers had reason to believe that these specific individuals had boarded an earlier train to New York City that day. (The fact that specific individuals would travel repeatedly on the same day to a drug source city would be consistent with the modus operandi profile of individuals making frequent "runs" to purchase drugs. Cf. State v. Maryland, 167 N.J. 471 (2001) (Court found that the officer had approached the defendant only because he was one of three black males that the officer had seen at the train station *a week earlier*, raising an inference of selective enforcement)). Nor is there any indication that the officers were aware that these two specific individuals had previously been involved in or suspected of

drug trafficking.

Finally, it is important to note that the fact that the officers conducted the encounter in a polite and professional manner would by no means rectify the situation if, in fact, the initial decision to target these two individuals had been based to any degree on their apparent ethnicity.

Discussion of Factual Scenario #4: Road Stop En Route to the Open Air Drug Market

This scenario raises a number of issues that are discussed throughout the training program, including the legitimacy of using law enforcement “profiles,” and when police are permitted to infer that an individual appears to be “out of place” in a particular neighborhood. This scenario also raises the issue of when and under what circumstances police may use a “pretext” to justify a motor vehicle stop.

The “profile” used in this case is that out-of-town motorists travel to a particular neighborhood to purchase drugs in a notorious open air drug market. This information describes the modus operandi or method of operation of drug purchasers and is based upon historical knowledge that is, on its face, race-neutral. The real issue, of course, is how such historical or intelligence information is actually used by law enforcement officers in the field to target individuals for police scrutiny and intervention.

From a Fourth Amendment perspective, it is clear that police officers are permitted to initiate a motor vehicle stop based on an observed motor vehicle violation (in this case, changing lanes and making a turn without giving a proper signal). The observed motor vehicle violation, in other words, provides an objective basis to justify a motor vehicle stop under the Fourth Amendment. The real question raised by this scenario, however, is whether the officers’ conduct violates the Equal Protection Clause of the Fourteenth Amendment and New Jersey’s policy prohibiting discriminatory policing set forth in Attorney General Law Enforcement Directive 2005-1.

Relying upon this “profile” of the known modus operandi of criminals, it would be appropriate for police officers on patrol to focus attention on out-of-town motorists who are traveling toward the open air drug market at a time of day when the market is active. The

practical problem, however, is how police officers would go about determining in the first place that individuals in a particular vehicle are not local residents. The statewide policy prohibiting racially-influenced policing prohibits officers from considering a person's race or ethnicity as the basis for drawing an inference that the person seems to be "out of place" because he or she does not match the racial or ethnic composition of a particular area or neighborhood.

One of the critical questions that must be asked in this scenario, therefore, is why exactly the officers focused their attention on the three individuals in the gray BMW. Put another way, would the officers have acted differently had the gray BMW contained three African-American citizens?

Because this vehicle first came to the officer's attention while it was stopped at a traffic light, their decision to scrutinize this vehicle could not have been based on unusual conduct of the vehicle itself, that is, the manner in which it was being operated. This is not a case, for example, where the officers focused their attention on this vehicle because it was cruising slowly through the open air drug market, or had pulled over to engage suspected drug dealers in conversation as a prelude to an illegal drug transaction. Rather, it appears that the officers' attention was focused on the vehicle because the vehicle and its occupants appeared to be "out of place." Therefore, we must consider what led the officers to suspect that these three individuals were en route to the open air market.

It should be noted that there is no indication in this factual scenario that the officers recognized these specific individuals or this particular vehicle from any prior encounters. Nor is there any indication in this limited "record" that the officers had any objective reason to believe that these particular individuals had previously engaged in criminal or even suspicious activity.

When Officer Smith referred to "[t]he three white guys in the gray

Beemer,” we must determine whether he was merely providing his partner with a description of the occupants (just as the use of the term “gray” was used to describe the vehicle), or whether instead the officer’s suspicions had actually been aroused by the occupants’ race. A fair inference can be drawn that in this case, the occupants’ race did indeed play a role in the manner in which the officers drew an inference of criminality and thereafter exercised police discretion. It is therefore likely that a reviewing court would conclude that the burden of production has shifted to the State to provide a race-neutral explanation for why the officers focused their attention on this vehicle and decided to follow it. In other words, it will be incumbent on these officers to explain their actions, demonstrating that race was not involved in their decision-making processes.

If race did in fact play a role in the exercise of police discretion, it is irrelevant that the officers were acting in good faith, and may have earnestly believed that they were doing these citizens a “favor” by initiating a motor vehicle stop before the individuals had an opportunity to engage in conduct that might have led to an arrest and criminal prosecution, or that may have put these citizens at risk of injury given the dangers inherent in illicit drug transactions. It seems evident, moreover, that these officers earnestly hoped to prevent the commission of a crime, and sought to discourage these individuals from attempting in the future to purchase illicit drugs in this town. Certainly, there is no indication at all that these officers are bigoted, or that they in any way sought to harass these individuals based on their race. That is not the test, however, for determining whether the officers had inappropriately relied upon race in exercising police discretion. In the absence of a race-neutral explanation, it appears that these officers violated the State’s strict policy prohibiting racially-influenced policing set forth in Attorney General Law Enforcement Directive 2005-1.

Finally, it should be noted that this scenario also involves what could be described as a “pretext” stop, that is, a stop that purports to be a routine motor vehicle stop based on an observed motor vehicle violation, when, in reality, the decision to select this vehicle to be stopped was based on a suspicion of anticipated *criminal* activity. It is critical to note that pretext stops are not automatically illegal. Indeed, the general rule is that it is legally irrelevant that officers have an ulterior or pretextual reason for exercising police discretion, provided that the true reason for the exercise of police discretion is itself permissible. If, in contrast, an ulterior reason for making a stop is based to any degree on the impermissible use of race or ethnicity, then the ensuing exercise of police discretion is tainted to the extent that the officers would not have initiated the stop if the motorists had been of a different race or ethnicity, and in that event, the pretext stop would be deemed to be illegal under the Fourteenth Amendment Equal Protection Clause. In other words, the fact that the officers

actually observed a motor a vehicle violation (which would ordinarily automatically justify a motor vehicle stop under the Fourth Amendment) would *not* salvage the legality of the stop if the decision to actually stop the vehicle was based to any degree on the race or ethnicity of the vehicle occupants.

Discussion of Factual Scenario #5: Pedestrian Encounter in the Town Square

This scenario provides yet another example of a police determination that certain individuals appear to be “out of place” in a particular neighborhood. Although the officers had been instructed to be alert for “suspicious” individuals, they were not responding to a B.O.L.O. (“Be on the Lookout”) bulletin for specific suspects. There is simply no description in the scenario of specific individuals who were believed to have committed any of the prior crimes in the town square area. There is no indication in this scenario that Officers Smith and Jones recognized any of the five African-American citizens from an earlier encounter, which might provide some objective basis to believe that they were engaged in inappropriate or illegal conduct. Nor is there anything in the scenario to suggest that the culprits for the prior crimes were believed to be traveling in groups of five or more (which might conceivably distinguish such a group from other persons or couples walking the streets).

Furthermore, while the five African-American males were “talking loudly,” there is no indication that they were engaged in disorderly conduct. In other words, these individuals’ *conduct* does not appear to provide a basis for police scrutiny or intervention.

Under the Fourth Amendment, police officers do not need to have an articulable suspicion before they can initiate a consensual field inquiry. See State v. Maryland, 167 N.J. 471 (2001). The Fourth Amendment question, therefore, is whether a reasonable citizen in these circumstances would believe that he or she would be free to walk away from the approaching police officers. Even if a reasonable citizen would come to that conclusion at the outset of this encounter, the situation might well have changed once the officer “requested” to see a driver’s license. Compare State v. Sirianni, 347 N.J. Super. 382 (App. Div. 2002) (a police request for identification does not, by itself, constitute a seizure or detention within the meaning of the Fourth

Amendment and thus need not be based on reasonable articulable suspicion to believe the person has committed a crime). However, it is likely in these circumstances that many citizens would believe that this request (“I’m gonna need to see a driver’s license”) was in fact a “demand,” and that they would not be permitted to simply walk away without displaying a valid driver’s license. See State v. Maryland, 167 N.J. 471 (2001) (an officer would not be deemed to have seized another if his questions were put in a conversational tone, he did not make demands or issue orders and his questions are not overbearing or harassing in nature).

If a reasonable person would interpret the officer’s statement as a demand to produce a driver’s license, then this encounter would be deemed to be a “Terry” stop – one that would be illegal under the Fourth Amendment because the officers did not at that moment in time have a reasonable articulable suspicion to believe that criminal activity was afoot. Compare State v. Davis, 104 N.J. 490 (1986) (suspects were not free to leave when officer encountered two individuals reported by a citizen informer to be loitering on bicycles at a closed gas station; the officer has posed several questions, including a request for identification; in this case, the “Terry” stop had been based upon reasonable articulable suspicion, and the scope and duration of the stop was held to be reasonable).

As importantly, the police conduct in Factual Scenario #5 appears on its face to violate the Fourteenth Amendment Equal Protection Clause and our statewide nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1. The facts in this scenario raise a clear inference that race played a role in the exercise of police discretion, and that the officers had targeted these five African-American males for police scrutiny and intervention by using their race to distinguish them from the hundreds of other individuals who were walking the streets that night. The limited facts recounted in this scenario suggest that the officers sought to send a clear message to these citizens that they would be closely watched,

and that they are not welcome in the town square district. In these circumstances, it is highly likely that a reviewing court would conclude that the “burden of production” has shifted to the State to provide a race-neutral explanation for the officers’ decision to initiate a field inquiry. This means that the officers would be required to explain why they had selected these five individuals from among the others on the street, and to show that they had not relied on race as a factor in making this decision.

It should be noted that it is irrelevant that other citizens out on the street that night appeared to have been intimidated or at least annoyed by the presence of these five African-American males (as evidenced by some citizens choosing to cross to the other side of the street). There is no indication in this scenario that the African-American males had done anything (besides merely being present) to harass other citizens. Private citizens, of course, are not subject to the Fourteenth Amendment Equal Protection Clause and are free to draw any inferences and harbor any suspicions they want to, including fears based on broad-brushed stereotypes. Law enforcement officers, in contrast, are duty bound to comply with all provisions of the Constitution and may not treat citizens as potential criminals or troublemakers based on their race.

It should be noted, finally, that community business leaders clearly wanted and expected the police department to be aggressive in preventing and deterring criminal activity. It is possible that these community leaders might applaud rather than criticize Officers Smith and Jones for the way that they handled the situation. However, police officers in this State are strictly prohibited from using tactics that violate the statewide policy prohibiting racially-influenced policing.

Discussion of Factual Scenario #6: Drive-by Shooting Investigation

The two detectives in this scenario were “following leads” as part of an ongoing investigation of a reported crime, and were not inappropriately relying on race or ethnicity to draw inferences of criminality. Most examples of racially-influenced policing tend to involve spontaneous police-citizen encounters where police officers are first trying to determine proactively whether a crime is being committed. (This typically occurs when an officer is trying to turn a routine encounter such as a traffic stop into a broader criminal investigation.) Police officers in this State are permitted and are expected to pursue leads during the course of an ongoing criminal investigation, wherever they may go, and detectives may focus their attention on any and all persons who may have information about a particular crime or about a particular criminal organization that may be involved in that crime.

In this case, the detectives had reason to believe that the shooting victim was a member of a particular gang. That gang, in turn, was believed to be engaged in ongoing conflicts with other gangs. Furthermore, there is a basis to believe that the shooting itself may have been racially motivated. Race, in other words, is part of this investigation and cannot be ignored or discounted.

The detectives were clearly permitted to speak to the three African-American males in the hospital waiting room. Their very presence at the hospital demonstrated a relationship with the victim, suggesting that they might have pertinent information concerning the circumstances or motivation for the shooting. So too, the detectives could consider the fact that these persons were wearing the “colors” of the Lords gang, again suggesting that they might be aware of information concerning the ongoing intergang rivalry.

It was also entirely appropriate for the detectives to visit locations where other members of the victim’s gang are known to congregate. Similarly, it was appropriate for the detectives to go to locations that are believed to be frequented by members of any rival

gang that might have been involved in the shooting. Once at these locations, the detectives would be permitted to canvas patrons in the hope of developing information useful to the ongoing criminal investigation. While this might be described by some as a kind of “fishing expedition,” this is appropriate and necessary police work as part of an ongoing criminal investigation.

A question might be raised concerning the manner in which Detectives Smith and Jones selected the individuals sitting at a particular table at the first bar that they visited. (There is nothing in this scenario to suggest that either detective personally recognized any of the persons at this table from prior dealings. Nor does it appear that the detectives had randomly selected this table, or that they were methodically going from table to table seeking information.)

In this scenario, the detectives could properly focus their attention on those persons in the bar who might reasonably be associated with the Northeast Hate Mongers gang. In this instance, the physical appearance of the persons sitting at the table was consistent with gang affiliation irrespective of their race. Their shaved heads and tattoos are physical characteristics that are considered to be a form of expressive *conduct* that the officers could certainly consider in deciding who inside the bar might have information relevant to the ongoing criminal investigation.

But even if the officers had not observed physical traits such as shaved heads and tatoos, they would still have been permitted to choose to first approach the persons at this table as a means of efficiently “pursuing leads” in this particular investigation. It is important to recognize that this scenario does not present a situation where officers on proactive patrol are watching out for “generic” gang members who they might happen to encounter by chance. Rather, these detectives are investigating a specific crime involving a specific gang -- one that has specific membership eligibility criteria. In essence, the detectives were “on the lookout” for persons who could be members of this specific gang as part of an ongoing investigation

of a specific criminal event. In these circumstances, the officers could certainly scan all of the persons present in the bar, and the detectives could properly exclude from further consideration or interaction those persons present in the bar who could not possibly be members of the Northeast Hate Mongers skinhead group by reason of the group's known membership eligibility criteria.

(In this particular example, it is conceivable that *everyone* in the bar was Caucasian, making race simply irrelevant as a "selection" criterion. But if some African American patrons happen to have been present, the detectives certainly need not have perfunctorily approached such minority customers to inquire whether they are aware of Northeast Hate Monger activity, since those minority patrons could not possibly be members of the particular group that is the focus of this part of the ongoing homicide investigation.)

In sum, it seems clear that the detectives in this scenario at no time relied inappropriately upon race in violation of Attorney General Law Enforcement Directive 2005-1.

Discussion of Factual Scenario #7: Residential Burglary Investigation

The police conduct described in this scenario was perfectly lawful and appropriate up to the point where the Lieutenant instructed his subordinate to focus attention initially on those files pertaining to African-American individuals (“Let’s start by checking out the black suspects . . .”). That instruction constitutes a violation of the State’s nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1. There were no eyewitnesses to the burglaries who reported that the perpetrator was African-American. The Lieutenant in this scenario thus essentially relied on a hunch as a shortcut to expedite the investigation. While law enforcement officers are not prohibited from pursuing hunches, in this instance it would be inappropriate to exercise police discretion based on a race-influenced stereotype of who is more likely to be a burglar, or an addict. See State v. Maryland, 167 N.J. 471 (2001) (police may not rely on a hunch that is “at least in part based on racial stereotyping”).

It is important to recognize that the general rule in this State prohibiting any consideration of race or ethnicity in drawing inferences of criminality is not limited to police officers who are assigned to patrol duty. It is true that most examples of racially-influenced policing are likely to involve spontaneous or unplanned encounters with citizens, such as motor vehicle stops where officers are first trying to determine whether any criminal activity may be afoot. It is certainly possible, however, for detectives to violate Attorney General Law Enforcement Directive 2005-1 while investigating one or more crimes that have already been reported.

While detectives (and all other law enforcement officers) are permitted and in fact are expected to diligently pursue leads during the course of the investigation of a specific crime, those officers are generally prohibited from using race or ethnicity as a factor in

exercising discretion when deciding who to place under suspicion and how to treat one or more individuals. (In this instance, the police decision at issue was to put black individuals at the top of the list of suspects to be scrutinized).

The State's non-discrimination policy was violated in this scenario notwithstanding that the Lieutenant's instructions on how to winnow down the list of suspects also included non-racial factors, such as whether the individuals whose files had been collected are likely to be addicts based on prior drug arrests, and whether any of these individuals had recently been released from a jail or prison.

Police officers in this State may *not* consider a person's race or ethnicity to any degree in inferring the likelihood that an individual is more or less likely to be engaged in criminal activity. This strict prohibition applies notwithstanding any anecdotal experience or aggregate statistics concerning the racial or ethnic characteristics of persons who, in the past, committed the same type of crime that is now the subject of ongoing investigation. It is simply inappropriate to use either personal experience or aggregate statistics based on *past* crimes committed by persons of a given race or ethnicity to support an inference that *other* specific individuals of that race or ethnicity are *presently* engaged in criminal activity.

Finally, it should be noted that the conduct described in this scenario would constitute a violation of Attorney General Law Enforcement Directive 2005-1 notwithstanding that, as yet, there has been no Fourth Amendment intrusion. In this scenario, the persons described in the suspect files would not even be aware that they were being scrutinized by police as part of an ongoing criminal investigation. The violation of the State's nondiscrimination policy nonetheless occurred and was complete at the moment that the Lieutenant directed that race be used as a screening factor to winnow down the list of possible suspects.

Discussion of Factual Scenario #8: Scrutinizing and Intercepting Vehicles Coming from the “Source” City

In this scenario, the police conduct violated the statewide nondiscrimination policy set forth in Attorney General Law Enforcement Directive 2005-1 because Officer Smith used the race of vehicle occupants as one of several screening factors to decide which plates to “run,” and which vehicles to stop. Attorney General Law Enforcement Directive 2005-1 makes clear that police may not consider a person’s race or ethnicity as a factor in drawing an inference that the person may be involved in criminal activity, or as a factor in exercising police discretion as to how to treat the person. The violation of that policy occurred in this scenario notwithstanding that the act of “running plates” does not intrude on *Fourth* Amendment privacy or liberty interests.

In this scenario, the police in Westburg were responding to a problem caused by aggressive enforcement in the nearby town of Eastburg, which resulted in the displacement and relocation of drug traffickers. These urban drug sellers were believed to be popping up in other areas, having adapted their criminal *modus operandi* in response to the Eastburg law enforcement initiative so that they could continue to reach and service their lucrative suburban market. The Westburg Police Department in these circumstances was certainly permitted to develop a “profile” based on the new *modus operandi* of the displaced drug traffickers, which could then be used to help identify potential suspects. See State v. Stovall, 170 N.J. 346 (2002). In this instance, moreover, police would be allowed to try to determine a vehicle’s point of origin to see if that vehicle matches the profile characteristic of recent travel from the specific jurisdiction known to be a source of drugs. So too, officers would be permitted to consider the number of occupants in a vehicle, consistent with the new *modus operandi* of the displaced Eastburg drug dealers.

Under New Jersey law, police are permitted under the Fourth

Amendment to “run the plates” of a vehicle and this can be done either “randomly” or “for cause.” Police in this State, however, are not permitted to access personal information during a so-called “random” lookup (i.e., e.g., a situation involving a vehicle that had not been observed to have committed a violation). See State v. Donis, 157 N.J. 44 (1998). Because Officers Smith and Jones were attempting to determine the likelihood that vehicles traveling westbound on Eastburg Avenue were coming from the City of Eastburg, they needed to access such personal information from the computer database, and so it was necessary for them to limit their scrutiny to vehicles that were observed committing some kind of motor vehicle violation.

This kind of investigation would have been lawful had the officers not considered race in exercising discretion. In this instance, however, a violation of the statewide nondiscrimination policy occurred at the moment the officers decided to explicitly use race as a suspicion factor, notwithstanding that race was not the only factor being considered in deciding which vehicles to target for a “for cause” computer lookup. See State v. Patterson, 270 N.J. Super. 550, 559 (Law Div. 1993) (“ . . . an individual’s race cannot be considered at all when conclusions are reached or assumed as to a ‘profile’ suggesting criminal activity”).

It is important to note that in this scenario, the officer’s conduct would not fall under the so-called “B.O.L.O. (Be on the Lookout) exception” to the general rule prohibiting any consideration of race or ethnicity. It is true that the officers were “looking out” for displaced drug dealers, and it may well be true that many of those dealers were minority citizens. However, the officers had no information pertaining to *specific* individuals. (If, in contrast, the Westburg Police Department had been provided with a list of individuals who were suspected of being Eastburg-based drug dealers who were no longer plying their trade in Eastburg’s displaced open air markets, then the Westburg officers would have been allowed to consider an individual’s race in determining whether or not that individual was one of the

persons on the specific B.O.L.O. list.) But in this scenario, the Westburg officers were actually relying on a generalized profile, and not a B.O.L.O. list.

Had the Westburg Police Department developed and implemented a *race-neutral* profile, then such conduct would not be deemed to violate Attorney General Law Enforcement Directive 2005-1. If, for example, the officers had “run the plates” of *every* vehicle observed to have committed a violation, or had used some neutral plan (such as random selection) designed to limit officer discretion and provide assurances that the officers were not relying on an impermissible criterion in deciding which plates to check, then our statewide nondiscrimination policy would not have been violated. For example, if Officer Smith had performed a lookup on every third or every fifth observed violator, then he would be able to establish that race or ethnicity had in fact played no role in deciding which plates to run and which violators to ignore.

It should also be noted that by preferentially stopping those vehicles that had been determined to be likely to be traveling from Eastburg, it is conceivable that a comparatively large proportion of those detained vehicles would be transporting minority citizens, reflecting the racial composition of Eastburg. It would be reasonable to anticipate that at least some reviewing courts might in that event be skeptical of the manner in which police exercised discretion, and so officers in those circumstances should be prepared to provide a race-neutral explanation for the exercise of police discretion. (As noted above, this could be done simply by showing that the police had established and scrupulously implemented a race-neutral plan of operation, such as one that relied on random selection, to identify persons who might be displaced Eastburg drug traffickers.)

This scenario also raises questions concerning the use of so-called “pretext stops.” The general rule is that police are not prohibited from having an ulterior reason for initiating a motor vehicle

stop, provided that the ulterior reason is not itself unlawful. See, e.g., Whren v. United States, 116 S.Ct. 1769 (1996) (plainclothes narcotics detectives in an unmarked police vehicle stopped defendant's vehicle for a motor vehicle violation for the ulterior purpose of pursuing a drug investigation). In this case, the ulterior purpose was to afford an opportunity to investigate whether the vehicle occupants are engaged in serious criminal activity. Because the police in this scenario had explicitly used racial characteristics in deciding which plates to run (and thus which violators would be more likely to be stopped), the resulting motor vehicle stops were tainted by the Equal Protection violation, notwithstanding that under the Fourth Amendment, an observed motor vehicle violation always provides an "objective" basis to initiate a traffic stop.

It should be noted in this regard that from a *Fourth* Amendment perspective, the police conduct was lawful. Officers who have stopped a vehicle for speeding are generally permitted to pose itinerary questions in an effort to determine why the vehicle was traveling in excess of the speed limit. So too, an officer would be permitted under the Fourth Amendment to order the driver of a lawfully stopped vehicle to exit the vehicle in order to preserve the option of posing similar itinerary questions to other occupants so as to determine whether there are any materially-inconsistent answers that might suggest ongoing criminal activity.

It is true that some reviewing courts today are skeptical when police engage in the practice of "digging," that is, when police use a traffic stop based on an observed motor vehicle violation as a platform from which to launch a *criminal* investigation, resulting in detained motorists being treated as if they were criminal suspects. See Unit 13.5 in the Companion Guide. But in this scenario, the questioning was not protracted (under the Fourth Amendment, courts are mostly concerned with the duration of the liberty intrusion) and was not based on an inarticulable hunch, but rather was predicated upon a determination that the detained motorists matched essential

characteristics of a drug courier profile. (All of this assumes, of course, that any such profile was race-neutral, that is, that race or ethnicity played no part in the officer's decision to stop the vehicle in the first place, the officer's decision to order the driver to exit the vehicle, and the officer's decision to pose probing questions designed to ferret out possible criminal activity.)

But just because the *Fourth* Amendment may not have been violated does not mean that the police conduct was lawful. Indeed, in this scenario, it makes no difference that the police conduct may have complied with the requirements of the Fourth Amendment. By initially considering race in violation of the Equal Protection Clause of the Fourteenth Amendment and Attorney General Law Enforcement Directive 2005-1, all of these encounters would likely be considered to be "fruit of the poisonous tree" and would likely be deemed by a reviewing court to constitute examples of impermissible racial targeting.