ARREST

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NACDL's 1st Annual Presidential Summit and Seminar
"Race Matters: The Impact of Race on Criminal Justice"
September 14-15, 2017
Greektown Hotel, Detroit, MI

Race and Policing

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Why do defense attorneys need to worry about race? (5 mins)

How can institutional defenders advance racial justice *and* their clients' interests? (5 mins)
Barnes v. Camden press release

What role does race play in police behavior: Stops? Searches? Arrests? (25 mins)
Marijuana report
Low level offenses report
Milwaukee blogs

How can attorneys use what they (and their clients) know about race and policing to convince criminal justice decision makers (prosecutors, judges, juries) that things don't work the way those decision makers think that they do? (10 mins)
Commonwealth v. Warren

Discussion/Q&A (15 mins)

Bibliography:

- ACLU press release, *Barnes v. Camden*
  - Complaint is available here: https://www.aclu.org/sites/default/files/field_document/2010-7-29_-_Filed_complaint_Camden.pdf
- Excerpts from: American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* (2013)
- Excerpts from: American Civil Liberties Union of New Jersey, *Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey* (2015)
- Jarrett English, *Want To Know About Racially Motivated Policing? Ask Literally Any Person of Color in Milwaukee* (March 17, 2017)
- Caleb Roberts, *Racial Profiling Raises Its Ugly Head (Again): A Night in the Life of a Black Man in Milwaukee* (February 22, 2017)
  - Complaint is available here: https://www.aclu.org/sites/default/files/field_document/19_-_amended_cmplt.pdf
- *Commonwealth v. Warren*, 475 Mass. 530, 58 N.E.3d 333 (Mass. Sept. 20, 2016)

Published on *American Civil Liberties Union* (https://www.aclu.org)

ACLU Files Lawsuit Against Camden Police Officers Who Planted Drugs On Suspects [1]

Case Highlights Urgent Need For Systemic Reforms

FOR IMMEDIATE RELEASE
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CAMDEN, NJ – The American Civil Liberties Union and the ACLU of New Jersey today announced the filing of a lawsuit on behalf of an innocent Camden, New Jersey man jailed for more than a year as the result of drugs planted on him by police officers later implicated in a wide-scale drug-planting conspiracy affecting nearly 200 other Camden residents.

Joel Barnes was at a friend's house in August 2008 when Camden police officers Robert Bayard and Antonio Figueroa entered the home without a search warrant, detained Barnes, demanded information from him that he did not have and then arrested him for unlawful possession of a controlled substance after planting drugs on him.

Earlier this year, Camden police officers Kevin Michael Parry and Jason Stetser, also at the scene at the time of Barnes' arrest, pleaded guilty to numerous federal charges, including conspiring to deprive others of their civil rights. Parry admitted to a federal judge in March that he and several other Camden police officers, including Stetser, Figueroa and Bayard, planted drugs on innocent people and threatened to arrest individuals on charges related to that planted evidence if they refused to implicate themselves in crimes.

"Planting evidence on innocent people in order to send them to prison is one of the most serious forms of police misconduct, and police who engage in such behavior must be held accountable," said Edward Barocas, Legal Director of the ACLU of New Jersey. "Mr. Barnes deserves to be compensated for the year of his life now lost forever and for the trauma he suffered at the hands of these corrupt officers."

After Figueroa and Bayard entered Barnes' friend's house on August 2, 2008, they unlawfully detained Barnes in a van outside the home for more than an hour despite not being in possession of any illegal drugs or contraband. Every so often, Figueroa would return to the van and ask Barnes, "Where's the shit at?" Surmising that Figueroa was referring to controlled substances, Barnes truthfully responded that he was unaware of any drugs in the house.

Figueroa then pulled out a bag containing drugs and said, "Tell us where the shit at and we'll make this disappear." Barnes was told that the drugs in the bag would carry much more serious criminal charges than any drugs that might be found and that he would receive a shorter period of incarceration if he told police the location of any drugs potentially in the house. But because Barnes could only truthfully say that he knew of no drugs in the house, he was arrested for unlawful possession of a controlled substance, unlawful possession of a controlled substance with an intent to distribute the substance and unlawful possession of a controlled substance within 1,000 feet of a school zone - charges that ordinarily carry between 10 and 20 years imprisonment.

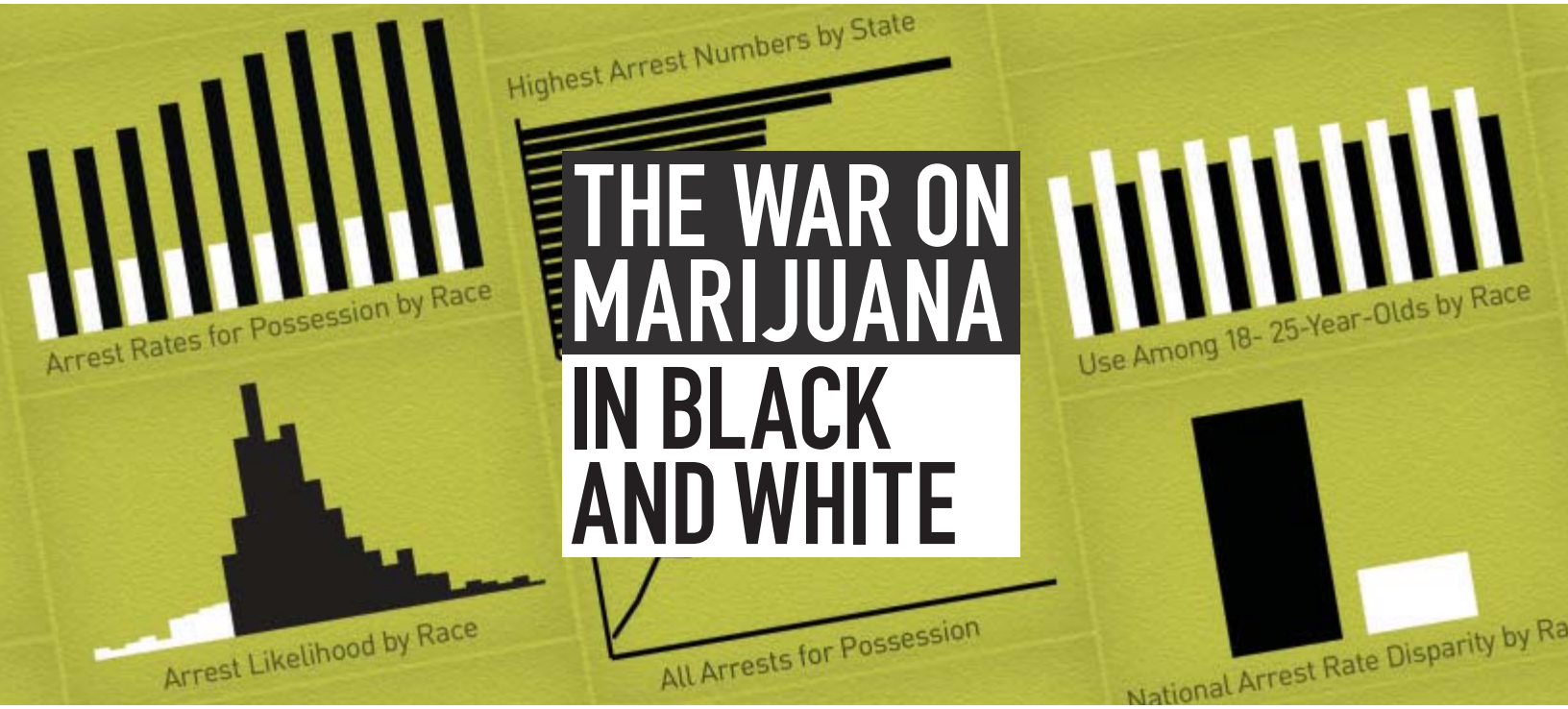
"I felt helpless and didn't know what to do," said Barnes. "I knew I hadn't done anything wrong, but I also knew that the officers had all of the power and I had none. It's disturbing that the police officers who are supposed to protect the community were the ones breaking the law, misusing their power and abusing so many innocent people."

Barnes initially pleaded not guilty to all of the charges against him but, fearing a jury would be far more likely to believe the officers' testimony than his own truthful testimony, and not wanting to risk spending his remaining youth in prison, he ultimately pleaded guilty to one count of unlawful drug possession within 1,000 feet of a school zone. Barnes entered the Camden County Jail on April 17, 2009. However, after Parry and Stetser pleaded guilty to the criminal charges against them, the conviction against Barnes was vacated and he walked out of custody freed on June 8, 2010 – having served one year, one month and 24 days in incarceration.

"The plight of Mr. Barnes highlights the urgent need for far-reaching and systemic reforms in the Camden Police Department," said Jay Rorty, Director of the ACLU Criminal Law Reform Project. "Had there been proper supervision, Camden's police officers would not have been able to plant drugs on Camden residents in the first place. The public's faith in the fairness of the criminal process rests on the integrity of police officers. Concrete steps need to be taken immediately in order to restore the public's trust in its police force."

A copy of the lawsuit on behalf of Mr. Barnes is available online at: www.aclu.org/drug-law-reform/aclu-lawsuit-charging-camden-nj-police-planting-drugs-innocent-man [3]

Links
[1] https://www.aclu.org/news/aclu-files-lawsuit-against-camden-police-officers-who-planted-drugs-suspects
[2] mailto:media@aclu.org
[3] https://www.aclu.org/drug-law-reform/aclu-lawsuit-charging-camden-nj-police-planting-drugs-innocent-man



THE WAR ON MARIJUANA IN BLACK AND WHITE

BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS

June 2013

ACLU
AMERICAN CIVIL LIBERTIES UNION

EXECUTIVE SUMMARY

This report is the first to examine marijuana possession arrest rates by race for all 50 states (and the District of Columbia) and their respective counties from 2001 to 2010. The report relies on the Federal Bureau of Investigation's Uniform Crime Reporting Program and the United States Census' annual county population estimates to document arrest rates by race per 100,000 for marijuana possession.

The report finds that between 2001 and 2010, there were over 8 million marijuana arrests in the United States, 88% of which were for possession. Marijuana arrests have increased between 2001 and 2010 and now account for over half (52%) of all drug arrests in the United States, and marijuana possession arrests account for nearly half (46%) of all drug arrests. In 2010, there was one marijuana arrest every 37 seconds, and states spent combined over $3.6 billion enforcing marijuana possession laws.

Marijuana arrests have increased between 2001 and 2010 and now account for over half (52%) of all drug arrests in the United States

The report also finds that, on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates. Such racial disparities in marijuana possession arrests exist in all regions of the country, in counties large and small, urban and rural, wealthy and poor, and with large and small Black populations. Indeed, in over 96% of counties with more than 30,000 people in which at least 2% of the residents are Black, Blacks are arrested at higher rates than whites for marijuana possession.

The report concludes that the War on Marijuana, like the larger War on Drugs of which it is a part, is a failure. It has needlessly ensnared hundreds of thousands of people in the criminal justice system, had a staggeringly disproportionate impact on African-Americans, and comes at a tremendous human and financial cost. The price paid by those arrested and convicted of marijuana possession can be significant and linger for years, if not a lifetime. Arrests and convictions for possessing marijuana can negatively impact public housing and student financial aid eligibility, employment opportunities, child custody determinations, and immigration status. Further, the War on Marijuana

has been a fiscal fiasco. The taxpayers' dollars that law enforcement agencies waste enforcing marijuana possession laws could be better spent on addressing and solving serious crimes and working collaboratively with communities to build trust and increase public health and safety. Despite the fact that aggressive enforcement of marijuana laws has been an increasing priority of police departments across the country, and that states have spent billions of dollars on such enforcement, it has failed to diminish marijuana's use or availability.

To repair this country's wrecked War on Marijuana, the ACLU recommends that marijuana be legalized for persons 21 or older through a system of taxation, licensing, and regulation. Legalization is the smartest and surest way to end targeted enforcement of marijuana laws in communities of color, and, moreover, would eliminate the costs of such enforcement while generating revenue for cash-strapped states. States could then reinvest the money saved and generated into public schools and public health programs, including substance abuse treatment. If legalization is not possible, the ACLU recommends depenalizing marijuana use and possession for persons 21 or older by removing all attendant civil and criminal penalties, or, if depenalization is unobtainable, decriminalizing marijuana use and possession for adults and youth by classifying such activities as civil, not criminal, offenses.

The ACLU also recommends that until legalization or depenalization is achieved, law enforcement agencies and district attorney offices should deprioritize enforcement of marijuana possession laws. In addition, police should end racial profiling and unconstitutional stop, frisk, and search practices, and no longer measure success and productivity by the number of arrests they make. Further, states and the federal government should eliminate the financial incentives and rewards that enable and encourage law enforcement to make large numbers of arrests, including for low-level offenses such as marijuana possession.

In sum, it is time to end marijuana possession arrests.

VII. RECOMMENDATIONS

A. Marijuana Policy

i. Legalize Marijuana Use and Possession

The most effective way to eliminate arrests for marijuana use and possession, the racial disparities among such arrests, and the Fourth Amendment violations that often accompany such arrests, is to legalize marijuana. For instance, in Washington, Blacks were almost three times more likely to be arrested for marijuana possession as whites, and the Black/white racial disparity in marijuana possession arrests increased by 42% between 2001 and 2010. By passing Initiative 502, which legalized possession of marijuana for people 21 years or older and thus ended arrests of adults for possession, Washington has also ended such racial disparities with respect to marijuana possession arrests of people 21 years or older.

Marijuana legalization should occur through a system of taxation, licensing, and regulation under which private businesses licensed and regulated by the state can sell marijuana subject to a sales tax. Legalization through taxing and licensing would not only solve the arrests epidemic and its attendant racial disparities by removing marijuana possession and use from the criminal justice system, it would also save cash-strapped state and local governments millions of dollars in decreased police, jail, and court costs that could be redirected to supporting public health approaches to drug addiction and confronting more serious crime. For example, in 2010, 61% of all drug arrests in Colorado were for marijuana possession, the ninth highest percentage share in the country. Following passage of Amendment 64, which legalized marijuana possession for adults, police can reinvest those resources toward other more important public health and safety objectives. At the same time, legalization through taxation and regulation would raise new revenue that states could apportion to public schools, substance abuse prevention, including community- and school-based programs, as well as to general funds, local budgets, research and health care.

Legalization would not only solve the arrest epidemic and its attendant racial disparities, it would save cash-strapped state and local governments millions of dollars.

The legalization of marijuana will also provide more seriously ill patients with critical access to a medicine that can alleviate their pain and suffering without the harmful side effects – such as nausea or loss of appetite – of many prescription medicines. Currently there are 19 states, along with the District of Columbia, that allow marijuana for medicinal purposes.

Legalization would also reduce the demand for marijuana from Mexico, thereby removing the profit incentives of the Mexican marijuana trade and reducing its associated violence.[146] Indeed, one study estimates that the marijuana legalization laws in Colorado and Washington will deprive Mexican drug cartels of $1.425 and $1.372 billion in profits, respectively.[147]

Therefore, states should:

- **License, tax, and regulate marijuana production, distribution, and possession for persons 21 or older[148]**
- **Remove criminal and civil penalties for activities so authorized**
- **Tax marijuana sales**
- **Earmark marijuana-related revenues to public schools and substance-abuse prevention, including community- and school-based programs, as well as general funds, local budgets, research and health care**

The specific contours of regulation will vary from jurisdiction to jurisdiction, depending on local laws and public opinion. For instance, in Washington, Initiative 502 prohibits home growing of marijuana except for medical marijuana patients, whereas in Colorado, home growing is permitted. Therefore, this report offers examples of regulations for potential consideration as opposed to endorsing a fixed set of rules for every jurisdiction. Initiative 502 in Washington provides one regulatory model: it ensures

146 In 2009, California recognized "the linkages between drug demand in the US and violence in Mexico, as well as the recent fiscal deficit, [prompting] the State Board of Equalization to prepare estimates of the potential revenue from a regulated marijuana market." Dan Werb et al., Int'l Ctr. for Science in Drug Pol'y, Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from A Scientific Review 20 (2010) [hereinafter Werb et al.], *available at* http://www.icsdp.org/docs/ICSDP-1%20-%20FINAL.pdf. Vicente Fox, the former president of Mexico, has has also advocated for the legalization of marijuana in Mexico to end the drug violence caused by organized crime. *See* Rafael Romo, *Former Mexican President Urges Legalizing Drugs*, CNN.com, Jul. 26, 2011, http://articles.cnn.com/2011-07-26/world/mexico.drugs_1_drug-cartels-drug-policy-drug-violence?_s=PM:WORLD (last visited Apr. 10, 2013).

147 Olga Khazan, *How Marijuana Legalization Will Affect Mexico's Cartels, in Charts,* Wash. Post (Nov. 9, 2012, 4;24 PM), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/ (citing the Mexican Competitiveness Institute's 2012 study). The RAND Corporation estimates that the Mexican cartels stand to lose $1.5 billion per year if the United States were to legalize marijuana, a slightly lower yet still significant figure. *See* Kilmer et al., *supra* note 95, at 3.

148 Since legalization for persons over 21 still exposes persons under 21 to criminal sanctions, and given that 42% of people arrested for marijuana possession in 2010 were 20 and younger, when legalizing use and possession for persons 21 or older, states should decriminalize marijuana use and possession for persons under 21 by reclassifying such activity as a civil offense subject only to a fine. If decriminalization for persons under 21 is unobtainable, police departments and prosecutors should make marijuana use and possession for people under 21 a low enforcement priority.

that establishments licensed to sell marijuana are located at least 1,000 feet from schools, playgrounds, and parks, and do not display marijuana in a way that is visible to the public; limits availability to stores that sell no products other than marijuana; prohibits public use and display of marijuana; prohibits sales to minors; restricts advertising generally and bans advertising in places frequented by youth;[149] and establishes a standard for driving under the influence of marijuana (i.e., active THC content) that would operate like the alcohol DUI standards. State agencies can also regulate the numbers of stores per county, operating hours, security, quality control, labeling, and other health and safety issues.

If legalizing marijuana is unobtainable, states can significantly reduce marijuana arrests and their damaging consequences through depenalization. Decriminalization is a viable third option.

Marijuana legalization through a tax and regulate system should not mandate state employees to grow, distribute, or sell marijuana, as such conduct would require state officials to violate federal law and thus likely be preempted by federal law (the Controlled Substances Act, 21 U.S.C. §801) as it now stands. But legalization laws can require state officials to perform administrative, ministerial, and regulatory duties necessary to implement and oversee state laws and regulations.

As a society, we permit the controlled use of alcohol and tobacco, substances that are dangerous to health and at times to public safety. We educate society about those dangers, and have constructed a system of laws that allow for the use and possession of these substances while seeking to protect the public from their dangers. There is no reason, particularly given the findings of this report, that such a system cannot and should not also be constructed for marijuana use and possession.

ii. Depenalize Marijuana Use and Possession

If legalizing marijuana through taxation and licensing is unobtainable, states can take significant steps toward reducing marijuana arrests and their damaging consequences

149 When drafting legalization legislation to regulate the possession and sale of marijuana, proponents should be cognizant of federal — and often similar state — laws regarding drug-free school zones, see 21 U.S.C. § 860(a), which enhance penalties for violating federal drug laws if such violations occur within 1,000 feet of a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority. Jurisdictions should also be aware of local laws regulating liquor sales, advertising, and licenses, as they may provide a helpful if not necessary guide to regulating marijuana sale, advertising, and licenses.

by removing all criminal and civil penalties for marijuana use and possession.[150] Under depenalization, there would be no arrests, prosecutions, tickets, or fines for marijuana use or possession, as long as such use and possession complied with any existing regulations governing such activity.[151]

Depenalization not only removes marijuana possession and use from the grasp of the criminal justice system, it avoids the pitfalls associated with replacing criminal penalties with civil penalties (see Recommendation #3 below).

Therefore, states should:

- **Amend their current criminal and civil statutes to remove all penalties for persons 21 or older for possession of marijuana for personal use (the amount could be, for example, limited to an ounce or less, but this can be determined on a state by state basis)**

iii. Decriminalize Marijuana Use and Possession

If both legalizing marijuana use and possession through taxation and regulation and depenalization are unobtainable, states can take steps toward reducing marijuana arrests by decriminalizing marijuana possession for adults and youth.[152] Decriminalization replaces all criminal penalties for marijuana use and possession with civil penalties. Massachusetts provides a useful case study on the impact that decriminalization can have on reducing marijuana arrests.[153] In 2009, Massachusetts decriminalized adult possession of an ounce or less of marijuana for personal use, with a maximum civil penalty of a $100 fine and forfeiture of the marijuana (anyone

150 For the reasons stated in footnote 148, since depenalization for persons over 21 still exposes persons under 21 to criminal sanctions, states should decriminalize marijuana use and possession for persons under 21 by reclassifying such activity as a civil offense subject only to a fine. If decriminalization for persons under 21 is unobtainable, police departments and prosecutors should make marijuana use and possession for people under 21 a low enforcement priority.

151 In Alaska, marijuana possession and use inside of the home has long been protected from penalty as a matter of privacy under the state constitution. *See Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975).

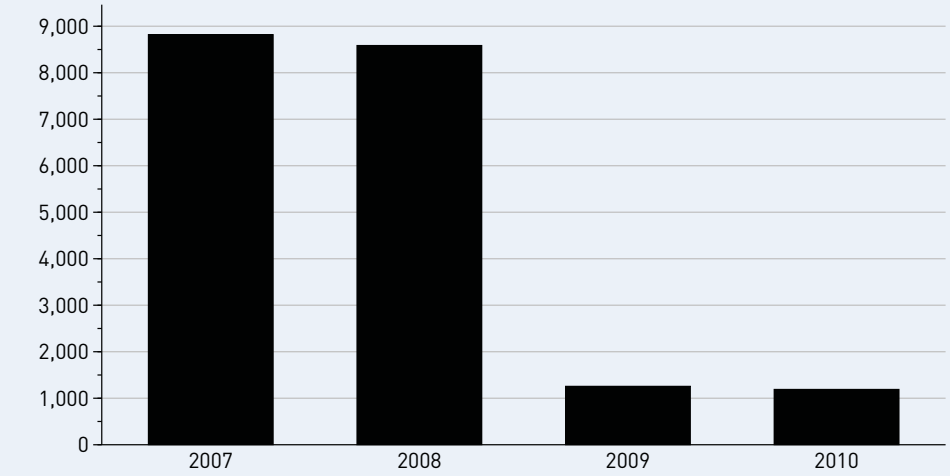
152 Passed in 2010 and taking effect in January 2011, California's SB 1449 reduced simple marijuana possession for adults and youth to an infraction involving a citation rather than a criminal arrest. A research brief by the Center on Juvenile and Criminal Justice found that the new law reduced marijuana possession arrests of youth by 61% in just one year, from 15,000 in 2010 to 5,800 in 2011, and contributed to the 20% overall drop in arrests of youth under 18. Mike Males, Ctr. on Juv. & Crim. Just., California Youth Crime Plunges to All-Time Low 7 (2012), *available at* http://www.cjcj.org/files/CA_Youth_Crime_2011.pdf. While proponents of zero-tolerance policing might predict an attendant spike in youth crime, the opposite occurred. Crime among youths fell in all categories in 2011 — felony arrests by 17%, both violent and property felonies by 16%, misdemeanor and status offenses by 21%, and homicide by 26%, indicating that marijuana decriminalization not only reduces arrests, but can be accompanied by a simultaneous decrease in crime. *See id.* at 1.

153 Other jurisdictions that have recently decriminalized possession of small amounts of marijuana include Rhode Island, which passed legislation in 2012 that will take effect in April 2013 making possession of an ounce or less of marijuana a civil violation subject to a fine of $150, *see* Mike McKinney, *R.I. Gov. Chafee Signs into Law Decriminalization of Small Amounts of Marijuana*, Providence J., June 13, 2012, *available at* http://news.providencejournal.com/breaking-news/2012/06/ri-gov-chafee-s-6.html, and Chicago, which in 2012 allowed police to issue tickets instead of make arrests for possession of 15 grams or less of marijuana. *See* Mack, *supra* note 25.

under 18 must also complete a drug awareness program). In 2008, the year before decriminalization took effect, Massachusetts arrested 8,502 people for marijuana possession; in 2009, that figure dropped to 1,240 — an 85% decrease — and dropped again to 1,181 in 2010. **See Figure 26.** Indeed, the arrest rate for marijuana possession in Massachusetts (18 per 100,000) is the lowest in the country. Despite being one of the 15 most populous states, in 2010 Massachusetts made the third fewest total marijuana possession arrests nationwide behind only North Dakota and Vermont. Not surprisingly, marijuana arrests now make up less than 10% of all of drug arrests in Massachusetts, by far the smallest percentage of any state in the country. Although the racial disparities in marijuana possession arrests did not improve — in fact, they grew worse: the arrest rate in 2010 was 61 per 100,000 Blacks and 16 per 100,000 whites, a ratio of 3.81 — the actual number of Blacks arrested declined 83% between 2008 and 2010 (while the number of whites arrested dropped 87%).

FIGURE 26

Number of Marijuana Possession Arrests in Massachusetts (2007-2010)



Source: FBI/Uniform Crime Reporting Program Data

Although reclassification of marijuana possession and use from a criminal to a civil offense is a far better alternative to the criminalization of marijuana possession, it is important to recognize that replacing marijuana possession arrests with fees, fines, and/or tickets is not an ideal solution for a number of reasons. First, the same racial disparities that exist nationwide in arrests for marijuana possession would likely be replicated in citations for civil offenses for marijuana possession. Second, the monetary fines that accompany civil offenses can place a substantial burden on those fined, particularly the young and/or poor, groups that are disproportionately targeted by police.

Third, individuals who are unable to make payments in a timely fashion, or at all, or who do not appear in court to answer to the civil charge, are subject to arrest — often by a warrant squad — which results in individuals being brought to court, and in some cases jailed, for failing to pay the fines or to appear. In addition to placing significant personal and financial burdens on the individual, this also imposes significant costs on the state, possibly exceeding the original fine imposed. Therefore, at the very least, whenever anyone is unable to pay a fine levied for marijuana possession or use, there should be alternatives to cash payments. Further, under no circumstances should the state be permitted to detain or incarcerate anyone as a penalty for failure to pay a civil fine for possessing marijuana. Fourth, allowing cities and counties to generate revenue through civil fines provides an incentive for police to enforce such civil laws aggressively.

If legalization and depenalization are unobtainable, states should:

- **Amend their current criminal statutes so that possession of an ounce or less of marijuana for personal use by adults and youth would be a civil offense only, for which the maximum penalty is a small fine, with alternative penalties available for people unable to pay**
- **Earmark revenues generated from marijuana-related civil penalties to public schools, substance abuse prevention, including community- and school-based programs, as well as to general funds, local budgets, research and health care**

B. Policing

i. Police Departments Should Make Marijuana Possession Arrests a Lowest Enforcement Priority

Aggressive enforcement of low-level offenses such as marijuana possession unnecessarily draws hundreds of thousands of people into the criminal justice system, primarily young people of color, for nonviolent activities. Such enforcement is a waste of precious law enforcement time, money, and resources.

Indeed, in 2010, 52.8 % of violent crimes and 81.7 % of property crimes nationwide went

unsolved. Among violent crimes, 35.2 % of murder offenses went unsolved, along with 59.7 % of forcible rapes, 71.8 % of robberies, and 43.6 % of aggravated assaults.[154]

Until marijuana possession is legalized or otherwise decriminalized, municipalities, district attorneys,[155] and police departments should make the investigation, arrest, and prosecution of marijuana offenses, particularly when intended for personal use, a lowest enforcement priority. Over the past several years, certain cities, including Seattle (prior to legalization) and San Francisco, made marijuana possession a lowest enforcement priority. Such a policy allows police departments to focus resources on serious crimes while their municipalities address drug use through public health and education initiatives.[156]

ii. Police Departments Should End Racial Profiling

"Racial profiling" refers to the act of selecting or targeting a person(s) for law enforcement contact (including stop, frisk, search, and arrest) based on the individual's real or perceived race, ethnicity, or national origin rather than upon reasonable suspicion that the individual has or is engaged in criminal activity. Racial profiling includes policies or practices that unjustifiably have a disparate impact on certain communities.

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154 *Uniform Crime Reports, Offenses Cleared*, clearance fig., Fed. Bureau of Investigation, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearances (last visited Apr. 10, 2013).

155 District attorneys have discretion as to which arrests they prosecute. In 2010, the Harris County District Attorney's Office implemented a policy to stop prosecuting drug paraphernalia possession cases as felonies. *See* Brian Rogers, *Crack Policy puts Harris County DA at Odds with Police*, Houston Chronicle, Dec. 5, 2011, *available at* http://www.chron.com/news/houston-texas/article/District-Attorney-and-police-divided-on-crack-2346724.php. Under the old practice, officers would arrest people found with paraphernalia with felony drug possession if there was any drug residue. The change in policy resulted in a drop of 7,800 felony drug possession cases between 2008 and 2011. Rebecca Bernhardt, Tex. Crim. Just. Coal., Harris County Communities: A Call for True Collaboration, Restoring Community Trust and Improving Public Safety 9 (2013), *available at* http://www.texascjc.org/sites/default/files/uploads/Harris%20County%20Communities%20A%20Call%20for%20True%20Collaboration.pdf. Additionally, both violent and property crimes dropped during this period, challenging opponents' claim that arresting and prosecuting people for possessing drug paraphernalia prevents more serious crime. *See id*. at 9-10. Despite the precipitous drop in arrests, and the attendant decline in violent and property crimes, the newly elected Harris County district attorney reversed the policy in January 2013. *See* Brian Rogers, *DA Anderson Reverses Trace Case Policy*, Houston Chronicle, Jan. 24, 2013, *available at* http://www.chron.com/news/houston-texas/houston/article/DA-Anderson-reverses-trace-case-policy-4221910.php. Similarly, Bronx District Attorney Robert Johnson recently announced that his office would no longer prosecute people arrested for trespassing in public housing projects unless the prosecutor first interviewed the arresting officer to ensure that the arrest was proper. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. Times, Sept. 25, 2012, *available at* http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html?pagewanted=all&_r=0. This change in policy came after allegations that people were being stopped and charged with trespass when they were legitimately on the premises. The month after the policy took effect, arrests fell 25% from the same month one year before. Such "stop-prosecution" policies — particularly if adopted by district attorneys in counties with significant racial disparities in marijuana possession arrests — can be used to end such arrests and their attendant racial disparities.

156 For instance, a study found that police reallocation of resources toward drug arrests in Florida resulted in a 41% increase of Index I crimes over the same data period. Bruce L. Benson, David W. Rasmussen & Iljoong Kim, *Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources*, 18 Int'l Review of L. and Econ. 77, 78 (1998), *available at* http://mailer.fsu.edu/~bbenson/IRL&E1998.pdf. By shifting "resources away from alternative uses, thereby reducing patrolling to prevent nondrug crimes and/or the ability to respond and make arrests after such crimes have been committed[,]" serious crime increased. *Id*. at 97.

Racial profiling can lead to the aggressive enforcement of minor offenses in communities of color, disproportionately and needlessly entangling such communities — particularly their youth members — in the criminal justice system for nonviolent activities that are not enforced in other communities. Such targeted enforcement of petty offenses, including marijuana possession, not only engulfs hundreds of thousands of people into the criminal justice system, it creates mistrust of the police by targeted communities, thereby reducing public safety, as these communities avoid police interaction and are less likely to report criminal activities or to cooperate with police in solving serious crimes. Even when utilizing geographic crime-mapping of serious crime, police departments should work with communities to address and prevent those crimes rather than simply target large swaths of those communities for enforcement of low-level offenses.

Targeted enforcement of marijuana possession engulfs hundreds of thousands of people into the criminal justice system and creates mistrust of the police, thereby reducing public safety.

Therefore, police departments should adopt model racial profiling policies that strictly prohibit law enforcement from engaging in profiling of persons — drivers, passengers, and pedestrians alike — and make clear that enforcement of state and federal laws must be carried out in a responsible and professional manner, without regard to race, ethnicity, or national origin. Police departments must ensure that all department personnel receive training about the harms of racial profiling and discrimination; investigate all complaints in a thorough and timely manner; in concert with appropriate disciplinary action, require additional diversity, sensitivity, and implicit bias training of all officers with sustained bias profiling or other discrimination complaints filed against them; and implement appropriate discipline for non-compliance with such policies, up to and including dismissal.

iii. Police Procedures Must Be Fair and Constitutional

Police departments must end suspicionless stops, suspicionless frisks, and searches without probable cause. Such stop, frisk, and search policies violate the Fourth Amendment's prohibition against unreasonable searches and seizures and disproportionally impact innocent Blacks and Latinos. They are humiliating and can be traumatic. They are also ineffective and foster community resentment against the police.

Police departments must establish explicit guidelines outlining the specific, limited circumstances under which the Fourth Amendment permits a stop, frisk, and subsequent search, and train officers on the guidelines annually. No pedestrian or motorist shall be detained beyond the point when there is no reasonable suspicion of criminal activity, and no person or vehicle shall be searched in the absence of a warrant, a legally recognized exception to the warrant requirement, or the person's informed voluntary consent.

Suspicionless stops, suspicionless frisks, and searches without probable cause violate the Fourth Amendment and disproportionately impact innocent Blacks and Latinos.

iv. Police Should Adopt, Whether Voluntarily or as Required by State Law, Model Consent Search Policies

A law enforcement officer may only seek consent to search when he or she has articulable suspicion, i.e., when an officer possesses knowledge of sufficient articulable facts at the time of the encounter to create a reasonable belief that the person in question has committed, or is about to commit, a crime.

A police officer should conduct a consensual search only after advising a civilian of his or her right to refuse. Prior to a search, the police must articulate the following factors to, and subsequently receive consent from, the person subject to the search or the person with the apparent or actual authority to provide permission to search: (1) the person is being asked to voluntarily consent to a search; and (2) the person has the right to refuse the request to search.

After providing the advisement, a police officer may conduct the requested search only

if the person subject to the search voluntarily provides verbal or written consent in a language understood and, where applicable, read by the person. If consent is obtained orally, a law enforcement agent shall make an audio recording of the person's statement consenting to the search voluntarily.[157]

v. Police Departments and the Federal Government Should Eliminate Policies That Incentivize Arrests for Minor Offenses

a. Police Departments Should Cease Using Raw Numbers of Stops, Citations, Summons, and Arrests as a Metric to Measure Their Productivity and Effectiveness in Serving Communities and Addressing Crime

Evaluating law enforcement agencies based on the numbers of stops, citations, summons, and arrests does not properly measure public safety and increases pressure on police officers and departments to aggressively enforce criminal laws for nonviolent offenses. Including arrests as a measure of productivity creates an incentive for police to selectively target poor and marginalized communities for enforcement of low-level offenses, as low-level offenses are committed more frequently than serious felony crimes, the arrests are less resource- and time-intensive than investigating arrests for serious felony crimes, and such arrests can be made most easily and at the least political cost.

By relying heavily on stops, citations, summons, and arrests, COMPSTAT encourages police departments to target their resources on low-level offenders to increase their arrest statistics and thus appear highly active, while discouraging police to pursue and record serious crimes accurately for fear of impugning the police department's crime-reducing reputation. The pressure on police officers to "make their numbers" results in a focus on aggressive stops and searches that often flaunt the suspicion-based requirements of the Fourth Amendment and lead to arrests for minor offenses, including marijuana possession. The end results are heavily policed communities that are not necessarily safer and in which many law-abiding people are subject to stops, frisks, and searches; heightened animosity between the communities and the police; a de-emphasis on procedural justice and police legitimacy;[158] and pushing minor rule-breakers into the criminal justice system unnecessarily, often at an immense

157 If a policy requiring recording is unobtainable, written consent remains an option.

158 *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. of Crim. L. 231, (2008) (finding that for police to be successful addressing crime, police need cooperation from communities, which is achieved when communities perceive police actions and decisions as legitimate, and police treatment of the community as fair and respectful).

(and sometimes lifelong) personal cost to individuals and their families as well as at a pecuniary cost to taxpayers.

Therefore, while the crime-mapping components of COMPSTAT can identify where serious crimes are occurring with greater frequency, thus focusing police departments' resources on those areas to address serious crimes, it need not and indeed should not be accompanied by unconstitutional stop and search practices or a focus on generating high numbers of arrests for minor offenses in those areas. To move away from evaluating progress and productivity through arrest numbers, police departments should reduce the reliance on stops, citations, summons, and arrests and broaden their benchmarks of success, relying instead more heavily on other measurements of community safety and police-community relations.

b. The Federal Government Should Not Include Marijuana Possession Arrests in its Performance Measures for Byrne Justice Assistance Grants

Justice Assistance Grants were created with the purpose of curtailing serious, violent crime and cracking down on drug kingpins. However, because arrest statistics — which include any arrest, including any drug arrest — are included in law enforcements' performance measures, police departments are likely encouraged to increase their arrest numbers by targeting their limited resources on low-level drug users and possessors. By including marijuana possession arrests in performance assessments of a states' use of federal funds, the federal government is relying upon an unreliable measure of law enforcement's effectiveness in fighting crime and reducing the traffic and availability of drugs. Indeed, such arrests reduce neither the use nor availability of marijuana.

Therefore, the Bureau of Justice Assistance should take the following steps to reform the existing JAG process:

- **Cease including marijuana possession arrests as a performance measure for purposes of federal funding**
- **Ensure that federal funds are not provided or used by state and local law enforcement agencies to make arrests for marijuana possession**
- **Require law enforcement agencies receiving federal funding to enforce a ban on racial profiling and document their pedestrian and traffic stops, arrests, and searches by race, ethnicity, and gender (designating money for data collection if needed)**
- **Reform performance measures to include factors such as the numbers of citizen complaints, surveys measuring community satisfaction with the police, including community views on the legitimacy and fairness of police actions and decisions, and the rates of violent crime**

vi. Police Should Increase Data Collection and Transparency Regarding Stop, Frisk, Search, and Arrest Practices

Police departments should promote accountability and transparency by collecting stop, frisk, search, citation, and arrest data; making the aggregate data publicly available; creating evaluation systems to analyze such data to identify and address racial disparities in enforcement practices; and developing policing strategies that reduce such racial disparities in enforcement practices.

Whether or not a citation is issued or an arrest is made, the police officer must document the following information consistent with existing or adopted local reporting protocols and technology:

- **The age, gender, race, and ethnicity of the individual stopped and the date, time, and location of the stop**
- **The duration of and reason for the stop**
- **Whether a search was conducted, and if so, whether the person stopped consented to the search**
- **Whether and what type of contraband was recovered**
- **Whether and what type of citation or summons was issued or arrest made; and**
- **The identification of the officers involved**

To guarantee statewide uniform arrest and citation documentation, state legislatures should require all police departments to electronically record information regarding stops, frisks, searches, citations, and arrests by race and locality, share the information with a central state agency, and publish the data in biannual or quarterly reports (on their website or in print available upon request). Personally identifiable information about the person stopped should not be recorded. The reports should be easily searchable. Such transparency will provide the public — community members, local and state policymakers, criminologists, lawyers, academics, the media, etc. — with a meaningful empirical basis for determining what precipitates a police action, and, in particular, for determining whether race, ethnicity, and gender have been used inappropriately, and to raise concerns where warranted. This would provide more objective and understandable information for assessing crime and the police response to crime; inform community-police discussions about the nature and appropriateness of police practices and allocation of police resources; promote more respectful and productive police-civilian encounters and build community trust in local police

departments; better ensure accountability for police departments; and prompt the development of training programs that educate police officers about the conscious and subconscious uses of racial and ethnic stereotypes.

vii. External Oversight Agencies Should Conduct Regular Audits and Reviews of Police Departments and Practices

An external oversight agency, such as an Inspector General or civilian review board, should regularly analyze data regarding police departments' stops, frisks, searches, citations, and arrests, by race and locality, to assess whether there are any unjustified racial disparities in enforcement practices. All such analyses and findings should be made available to the public.

DECEMBER 2015

Selective Policing

Racially Disparate Enforcement of Low-Level Offenses in New Jersey

A Report by the American Civil Liberties Union of New Jersey

ACLU
AMERICAN CIVIL LIBERTIES UNION of NEW JERSEY

Executive Summary

Police departments across the country increasingly have come to rely on the aggressive enforcement of low-level offenses to maintain social order and deter more serious crimes. Such a strategy involves the exercise of unfettered discretion by individual police officers. They decide whether and when to make arrests for minor misbehaviors that pose little or no harm to the community. This can lead to the uneven enforcement of low-level offenses, which falls disproportionately on Black and Latino communities.

The origins of this report stem from a 2013 American Civil Liberties Union national study of racial disparities in the context of marijuana possession arrests. That report found that Blacks in New Jersey were nearly three times more likely to be arrested than Whites. The American Civil Liberties Union of New Jersey decided to further examine those findings by taking a closer look at the arrests for numerous low-level offenses, specifically disorderly conduct; defiant trespass; loitering; and marijuana possession. We examined the most recent data available from police departments in four cities. The cities were chosen to reflect New Jersey's diversity in population density, demographics, and geographic location. The four cities are Jersey City, Elizabeth, New Brunswick, and Millville.

The results of the study demonstrate a pattern of racially disparate enforcement practices in all four cities. In each case, the study identified extreme racial disparities in the number of arrests of Black and White people for low-level offenses. We were unable to gauge the full extent of the disparities because of serious flaws in the data collection practices of each police department.

Key findings from the report:

- **Racial disparities between Black and White arrests exist in every city studied.** For the most recent years available, the data show Blacks in Jersey City are 9.6 times more likely to be arrested than Whites for the low-level offenses studied. In Millville, it's 6.3 times more likely; in Elizabeth, it's 3.4 times more likely; and in New Brunswick, 2.6 times more likely.

- **Racial disparities between Hispanic/Latino and White arrests are present where data are available.** Arrest data for Hispanics/Latinos are not kept in a consistent manner from jurisdiction to jurisdiction. Where data were available, however, the study found disparities. For example, for the most recent years available, in Jersey City, Hispanics/Latinos were 2.9 times more likely to be arrested than Whites for the offenses studied. In Millville, Hispanics/Latinos were 6.3 times more likely to be arrested for marijuana possession.

- **Some law enforcement agencies do not track Hispanic/Latino data.** For example, the Elizabeth Police Department does not track Hispanic/Latino arrests, despite serving a population that is 60% Hispanic/Latino.

- **Police departments are not keeping records in accessible, reliable formats.** Some departments were simply missing arrest data for several years. Haphazard record keeping was evident in all four police departments. Jersey City, for example, conducted a hand count of its arrest records for 2011 and discovered significantly more marijuana possession arrests than were found by a computer search. The lack of accurate, reliable records makes evaluating the departments' practices difficult (sometimes impossible), hindering transparency and accountability.

- **Individuals charged with low-level offenses are generally not involved in serious crimes.** For example, 95% of the low-level arrests in Jersey City did not involve any other offense classified as "serious" by the FBI's Uniform Crime Report. Because the study focused on low-level offenses, arrests that included charges for more serious offenses were excluded from the analyses.

The study data revealed a clear pattern of Black and Hispanic/Latino communities disproportionately bearing the brunt of policing practices that focus on a strict enforcement of low-level offenses. The human cost of these arrests and convictions can include having to pay court costs and fines; criminal records that follow individuals for the rest of their lives; and the loss of income, housing, child custody, or immigration status. In extreme cases, a confrontation with police over a low-level offense can escalate into an episode of violence.

Almost as troubling as the revelations about the disparity in the number of arrests, is the routine lack of diligence in record keeping and the haphazard collection of enforcement data.

Without full, careful, and transparent reporting of the arrests made by a city's police department, the public cannot be adequately informed about the work of the department; the community cannot hold officials accountable for the actions being taken; and the police departments cannot determine the effectiveness of its policing strategies.

Despite incomplete data from the police departments due to breakdowns in their reporting practices, a clear picture emerged. The effort to fight crime with an aggressive strategy of arresting people for low-level offenses served mainly to create unacceptable disparities in the number of Blacks and Hispanics/Latinos arrested.

The racial disparities uncovered by this study are deeply troubling and call for immediate action to identify their causes. Only then can law enforcement agencies begin to

understand the impact such arrests have on communities of color, and implement the appropriate changes.

Key recommendations from the report:

Local Reforms

- Municipal officials, police chiefs, and prosecutors should formally place enforcement of offenses that have a minimal impact on public safety among their lowest enforcement priorities.

- Municipalities should pass robust anti-racial profiling laws. One such law recently passed in New York City provides a private cause of action for injunctive relief for disparate impact claims and expands the categories of protected classes.

- Police departments should stop using arrests as a measure for evaluating officer performance. This practice can induce officers to make unnecessary low-level arrests that do nothing to strengthen the public safety.

- Municipalities should institute strong, independent oversight of police departments, such as Civilian Complaint Review Boards. They must have the authority to independently investigate police officers and ensure that discipline sticks when wrongdoing is found to have occurred. CCRBs should also include an office of the Inspector General to monitor police practices and policies. The recently-created police civilian review board in Newark should serve as a model for the rest of the state.

- Police departments should adopt tools that lead to greater accountability, such as dashboard and/or body cameras, with appropriate privacy and First Amendment protections.

State Reforms

- The Attorney General of New Jersey should formally investigate the existence of racial disparities in low-level arrests in New Jersey.

- The Attorney General of New Jersey should improve data collection by requiring law enforcement agencies to track and report data on summonses, arrests, and stops, and by issuing a directive for police departments to record Hispanic/Latino arrests according to specific guidelines. This would create uniformity, which is currently lacking, across municipalities in their reporting of Hispanic/Latino arrest data.

- State lawmakers should recognize that some laws for minor offenses should be repealed, especially marijuana possession. This report finds racial disparities for the offense in all four cities, despite evidence that Blacks and Whites use marijuana at similar rates. Legalizing marijuana use would end its disparate enforcement, and properly treat it as a public health issue.

Data Reforms

- Police departments should improve the collection and management of arrest data, and systematically analyze the data collected. The principles of good policing demand that departments take stock of how resources are allocated and how enforcement decisions impact New Jersey communities.

- Police departments should report arrest data for low-level offenses to the public by posting the information online on a regular basis.

- Reporting should include data on both pedestrian and vehicular searches and "Terry" stops (also known as "stop-and-frisk"), where police may temporarily detain someone if they have a reasonable suspicion that person is involved in a crime, and search the person if police believe the person is armed.

By taking these steps, New Jersey can move toward ending the unfair enforcement of low-level offenses in all of our communities, relieving people of the damaging consequences they face for behaviors that pose little to no public safety threat.

The study shows that disparities exist in large and small New Jersey communities when it comes to the police enforcement of low-level offenses. A shift in those policies and priorities would not only end the disparate treatment of Black and Hispanic/Latino community members, it would allow police departments to redirect their scarce resources and valuable time toward addressing serious crimes that represent a real threat to the communities they serve.

I. Introduction

A 2013 ACLU study found that Black New Jerseyans are 2.8 times more likely to be arrested for marijuana possession than their White neighbors,[1] despite federal government data that show Blacks and Whites use marijuana at similar rates.[2] The marijuana arrest data suggest that the disparity is the result of policing decisions that focus on the aggressive enforcement of marijuana possession in communities of color, while seemingly turning a blind eye to the same behavior among Whites.

While marijuana possession arrests have become a staple of police activity in departments across the county, they also often indicate a larger pattern of aggressive and racially disparate enforcement of low-level offenses. Such offenses are often enforced according to a "broken windows" theory of policing, which posits that arrests for minor violations prevent more serious crime.[3] In practice, though, broken windows policing often leads to the criminalization of behavior, sometimes including legal behavior, in neighborhoods disproportionately inhabited by low-income Black and Latino residents.[4] In extreme cases, the over-aggressive enforcement of minor offenses can lead to police brutality, as epitomized by Eric Garner's death in Staten Island, New York on July 17, 2014.[5] Mr. Garner was killed after he was placed in a chokehold by a New York City police officer in violation of departmental rules banning such chokeholds. The interaction began when police officers tried to arrest Mr. Garner for allegedly selling loose, untaxed cigarettes.

Department-level analyses of arrests provide insights as to how arrests are made at the neighborhood level, and offer detailed information about the age, gender, and race/ethnicity of the targets of police enforcement.

This report examines disparities in police enforcement of four low-level offenses in New Jersey.[6] The four offenses, chosen after speaking with civil rights advocates and defense attorneys, observing municipal court hearings, and studying publicly available federal government data, are: marijuana possession (possession of 50 grams or less, the lowest possession offense),[7] disorderly conduct (public behavior thought to disrupt the public peace or cause annoyance),[8] defiant trespass (being on property without permission, often a business, store, or neighbor's property),[9] and loitering (wandering or remaining in public with the "purpose" of obtaining a controlled substance).[10] Previous studies have documented the differential treatment of Blacks and Whites by police in the context of low-level arrests in other jurisdictions,[11] and this report documents the problem in New Jersey through the study of four cities chosen to reflect the State's diversity in demographics, population size, and geographic location.

A. *Why Arrests for Low-Level Offenses Matter: The Human and Fiscal Costs*

Every aspect of policing involves a measure of choice and decision-making: which offenses to prioritize; where to patrol; whether to investigate, stop, detain, question, caution, arrest, or charge.[12] Officers often exercise the greatest degree of discretion in the context of low-level offenses. Unlike serious crime, where there is often a victim or some form of property damage, low-level offenses are violations that rest primarily on the officer's observations and subjective decision to enforce. The nature of these encounters creates ample opportunity for arbitrary and unfair enforcement of low-level offenses, often based on an officer's implicit bias. Enforcement often involves a one-on-one interaction between an officer and an individual, and the application of oftentimes vague or overbroad statutes.[13] The outcome of the interaction depends on the officer's perception of innocuous behavior that can be construed as a violation of the law.

The human costs of a low-level arrest are often significant. Low-level arrests carry a host of collateral consequences that can deeply entangle individuals in the criminal justice system. While low-level offenses are technically not considered crimes under the New Jersey Constitution or New Jersey criminal code, a conviction carries with it the possibility of jail time or probation, and the imposition of hefty fines. These burdens mire individuals with a criminal record and stigmatize people for engaging in nonviolent conduct that poses little to no public safety threat. Someone arrested can lose income, if not employment, and face childcare hardships because of required court appearances. Nonappearance for a court date can result in the issuance of a warrant—a crime in the fourth degree.[14] An arrest can also affect a person's immigration status,[15] limit employment opportunities,[16] lead to eviction,[17] mandate the loss of licensing in certain professions,[18] and result in a drivers license suspension.[19] These hardships are compounded in communities of color, which bear the brunt of heavy-handed enforcement policies.

The fiscal costs of low-level arrests further necessitate scrutiny of aggressive enforcement. Particularly in times of budget constraints, police departments must make difficult decisions about the allocation of scarce resources. Arrests cost taxpayers money and consume officers' time, which could be better spent focusing on serious and violent crimes that *do* pose serious public safety threats. Working to strengthen community relations and finding alternatives to arrest, instead of focusing on the enforcement of minor offenses, could pay dividends for community safety and police departments' budgets in the long run.

Understanding who is being arrested for low-level offenses, in comparison to who is *not* being arrested, is critical to evaluating the fairness, effectiveness, and perceived legitimacy of law enforcement practices.

B. *Why Police Departments' Data Collection Practices Matter: Transparency and Accountability Depend on Accurate and Reliable Data*

Data analysis is a primary mechanism by which law enforcement agencies can evaluate their practices and address concerns and allegations of discriminatory or unfair policing practices. By collecting data on "the nature, character, and demographics of police enforcement practices," as recommended by the United States Department of Justice (DOJ), police departments can assess the appropriate application of the authority and broad discretion entrusted to them.[20] In the spring of 2014, former Attorney General Eric Holder announced that the DOJ would begin collecting data about stops, searches, and arrests to address racial disparities in the criminal justice system, recognizing that "to be successful in reducing both the experience and the perception of bias, we must have verifiable data about the problem."[21]

Racial disparities are a red flag that a particular community may be the target of unfair enforcement. This can foster resentment in the community,[22] and reduce community cooperation with police.[23] Law enforcement training and policies that take such disparities into account can reduce those disparities, encouraging police-community collaboration and increasing confidence in police work.

This study relied on analyses of arrest records from New Jersey police departments. What the ACLU-NJ found, however, was that all of the departments from which records were requested had difficulty producing complete or accurate data. This raises significant transparency and accountability concerns, since communities, oversight bodies, and even police departments themselves can only hold police accountable if they know what the police are doing: how many arrests they are making, who is being arrested, and for what.

By collecting arrest and other criminal justice data, both the public and police departments can accurately assess the appropriate application of the authority and broad discretion entrusted to law enforcement.[24] Access to accurate criminal justice data is critical to preventing miscarriages of justice and to ascertaining the scope of potential problems, and police departments bear responsibility for collecting and maintaining these data. The data problems encountered in New Jersey are discussed in detail in the methodology and case studies sections that follow.

II. Findings

A. *Extreme Racial Disparities Exist Between Black and White Arrests in the Four Cities Studied*

The data revealed racial disparities in arrests in all four cities, with Blacks on average between 3.2 to 5.7 times more likely to be arrested than Whites for the study offenses.[25]

For the four low-level study offenses, Blacks in Jersey City were on average nearly 5 times more likely to be arrested than Whites from 2005 to 2013, with the disparity peaking in 2013, when they were 9.6 times more likely to be arrested.[26] In Elizabeth, Blacks were 3.6 times more likely than Whites to be arrested, and in New Brunswick they were 3.3 times more likely to be arrested. Blacks in Millville fared even worse: they were 5.8 times more likely than Whites to be arrested for the study offenses.

Similar racial disparities in Hispanic/Latino arrests are present in certain offense categories. In 2013, Hispanics/Latinos in Jersey City were 2.9 times more likely to be arrested than Whites for all study offenses. Hispanics/Latinos in Millville were 6.3 times more likely than Whites to be arrested for marijuana possession in 2013, and 2.1 times more likely to be arrested for disorderly conduct. The New Brunswick Hispanic/Latino data indicate low disparities, and in some instances no disparity. Data for Hispanics/Latinos in Elizabeth is not collected, making it impossible to assess the extent of any disparities. Specific problems with Hispanic/Latino arrest data are discussed in each case study.

B. *Individuals Charged with Low-Level Offenses Are Generally Not Involved in Serious Crimes*

A common refrain from law enforcement agencies is that cracking down on petty offenses leads to catching individuals involved in more serious crimes.[27] The data received from police departments for this report, however, indicate that this is not the case for the majority of low-level arrests. In Jersey City, 95% of the arrests did not involve serious crimes as classified by the FBI, 84% of the total arrests involved low-level charges exclusively (i.e., there were no charges for an indictable offense), and 56% of these arrests were for a stand-alone charge for one of the four low-level offenses studied only.[28] More than 93% of the total arrests in Elizabeth did not include a charge that the federal government classifies as serious offenses.[29] In New Brunswick, 97% of the total arrests did not include a charge for a serious crime and 74% of the arrests had low-level offense charges only (i.e., no indictable offense was charged). Finally, 95% of the total arrests in Millville did not involve charges for a serious crime, and nearly 70% did not involve an indictable offense.

C. *Police Departments Fail to Keep Arrest Records for Low-Level Offenses in Accessible, Reliable Formats*

All four of the police departments in this report use some form of electronic record management system. However, each one encountered varying degrees of difficulty in producing the records requested. At first, Jersey City could not provide information about the other offenses charged for each arrest, and then estimated the cost of retrieving the records at more than $10,000.[30] Elizabeth changed its process for coding arrests in 2010, which affected the accurate cataloging of arrests. New Brunswick could not isolate the study offenses from all other arrests, and could only provide records in printed format. Data for 2010 and 2011 in Millville are missing after being lost in a data transfer.[31]

The central purpose of modern electronic record keeping is to improve the collection and management of records, and to facilitate easier access and use. In the context of arrest records, every department fell short of these objectives.

D. *Some Cities Fail to Track Hispanic/Latino Arrest Data Consistently, If at All*

Elizabeth does not record Hispanic/Latino arrests despite having a 60% Hispanic/Latino population.

The departments studied do not appear to have uniform systems for recording ethnicity data in arrest records, specifically for Hispanics/Latinos, which also causes discrepancies in the racial data from jurisdiction to jurisdiction. Elizabeth, for example, does not record Hispanic/Latino arrests at all—despite having a 60% Hispanic/Latino population. Millville tracked race and ethnicity for Hispanics/Latinos (e.g., Hispanic-Black or Hispanic-White) until 2010, and then stopped. Where Hispanic/Latino arrest data are not recorded, those arrests are most likely recorded as White arrests,[32] skewing arrest rates and disparities for other racial groups. Given New Jersey's large Hispanic/Latino population, it is critical that police departments systemize their record keeping practices for Hispanic/Latino data so that they can accurately track arrest patterns and disparities.

E. *Data Provided by Police Departments Varied from the Data They Reported to the Federal Government*

The ACLU-NJ found discrepancies between the data provided for this report and the data the departments reported to the FBI/UCR Program.[33] The FBI/UCR Program collects and

publishes crime and arrest data, including arrest data for two of the study offenses: marijuana possession and disorderly conduct. In many instances the ACLU-NJ received records that reflected far fewer arrests than reported to the FBI/UCR.[34]

As of the writing of this report, the departments with whom we attempted to resolve the inconsistent data issues have not been able to explain what accounts for the discrepancies. For example, after months of guess work, the JCPD conducted a manual review of all arrest records to provide an accurate count of its marijuana possession and disorderly conduct arrests for 2011. The results were shocking: the manual count produced many more marijuana possession arrests, and significantly more disorderly conduct arrests than the computer searches had counted. Thus, the JCPD's current data management system obscures the breadth of the over-enforcement of low-level offenses and its racially disparate effects.

None of the departments were able to explain the discrepancies between the data reported to the FBI/UCR Program and the data given to the ACLU-NJ. The data discrepancies are presented in Appendix B.

Want To Know About Racially Motivated Policing? Ask Literally Any Person of Color in Milwaukee

By Jarrett English, Youth Organizer, ACLU of Wisconsin

MARCH 7, 2017 | 4:00 PM

TAGS: Reforming Police Practices, Criminal Law Reform


Photo: ArtOlympic / Shutterstock

Racial profiling in Milwaukee is as common to Black men as manhood itself.

I'm a lifelong Milwaukeean and a Black man. Born at the old Mount Sinai, raised in the Rufus King and Sherman Park neighborhoods, I'm a unicorn — a Black man between 14 and 40 years old who does not have a felony, misdemeanor, or record of any kind. I'm the exception to a rule that should have long ceased to exist.

Since 2012, over half of Milwaukee's Black men in their 30s are, or have been, locked up. I won't go into the horrible details of socioeconomic and political disenfranchisement, but let's just say we started from the bottom, and, for a lot of people, we're still there.

Being Black in Milwaukee means having the constant specter of police haunting your life.

One night I was carrying takeout pizza to my mom's house. They came at me, guns drawn. Mistaken identity they said. Another time I was standing at a bus stop in a white neighborhood on my way to work. There were two white people, also waiting for the bus. The police chose to stop me.

After that, I felt violated and angry. I filed complaints with the mayor, an alderman, and a U.S. senator. Eventually an internal affairs officer called me to follow up. After a brief conversation, she simply asked, "Well, wouldn't YOU stop a Black man standing at a bus stop at 6 a.m.?"

If it isn't obvious, my answer was "No!"

Black and Latino people are magnets for police harassment in this city. Police abuse of people of color here isn't imagination. It's reality. This has been true for a long time. From 1967 to 2017, not much has

changed.

It wasn't until I began working for the ACLU, talking to Black and Latino residents about Milwaukee police, that I realized there were thousands of stories like mine — stories from the mundane to the maddening to the horrible.

What follows is just a very small portion of what I've heard:

A teenager walking home from playing basketball:

ADD YOUR NAME

> **"I saw the cops following in an unmarked (the 'jump out boys'). They stopped in front of my house and both of them got out of the car. The driver had his hand on his gun but he didn't take it out. The cop asked, 'How old are you?' I said, '15.' 'You look suspicious. What's in the bag?'"**

A young man leaving work:

> **"They stopped me saying 'you fit the description of a robbery'. They frisked me (without asking), put me in a squad, ran my name, and let me go."**

A 20-year-old walking home from the park:

> **"We were walking to a friend's house. The cops drove up and stopped. A bike cop came at us yelling, 'Lay on the ground before I shoot you! ...If it's more than two of you, we have the right to stop you.' They took out all of my stuff and asked me for ID afterwards. I just finished playing ball, so I didn't have it on me. After an hour they uncuffed me, let me out of the squad, gave me a $200-plus ticket for not having ID, then they let me go."**

Over the last two years, I've personally interviewed hundreds of people about their interactions with police. Overwhelmingly they tell me the same story of police harassment and intimidation. The evidence I've gathered is the basis of the lawsuit the ACLU recently filed against the Milwaukee police for its racially biased stop-and-frisk program

What stands out when talking to people is how many Black and Latino folks aren't just having one or two stops every few years, as I've had. Some are getting profiled and detained almost weekly. Imagine being stopped multiple times a week by police for no good reason and how it would affect your life and how you go about the world. You'd begin to feel that some suspect your very existence.

These feelings don't disappear because a police spokesperson comes forward and says racial profiling doesn't exist in Milwaukee. Black and Latino People here see that statement for what it is.

A lie.

Whatever the Milwaukee Police call it, they're engaging in a prejudicial, targeted, and invasive stop-and-frisk policy, focused on Black and Latino communities. These hundreds of thousands of incidents aren't just an inconvenience. They have created life-long trauma, job loss, destruction of dignity, and sometimes incite the

destruction of life itself. If you doubt that, Google Officers Vagnini, Manney, and Heaggan-Brown.

Milwaukee, it seems, has déjà vu from another era. Does the Constitution apply to Black and Latino people? Yes it does, and we're going to make sure this city finds that out in court.

We either respect everyone's rights and humanity, with equity under the law, or allow our city to remain a low-level apartheid state, with the inevitable consequences and upheaval to follow.

ADD A COMMENT (22)

Read the Terms of Use

Anonymous

Want to know who commits most of the crime in Milwaukee causing the them to have to be policed and treated like barbarians? People of color.

REPLY | MARCH 7, 2017 | 7:15 PM

Anonymous

Most violent crime is perpetrated by men, not those of color. Most terrorism in the United States history has been perpetrated by white males! The ACLU should check out the non-fiction movie "Deacons for Defense".

MARCH 7, 2017 | 8:07 PM

Anonymous

Wait, I take back that ignorant comment. Sorry.

MARCH 7, 2017 | 11:08 PM

David Kaczmarek

How brave of you to make such a stupid generalization without giving your name. Kudos to you!

Racial Profiling Raises Its Ugly Head (Again): A Night in the Life of a Black Man in Milwaukee

By Caleb Roberts

FEBRUARY 22, 2017 | 9:00 AM

TAGS: Racial Profiling, Race and Criminal Justice, Racial Justice


Photo: Tiko Aramyan / Shutterstock

When I was 18, my friends and I were stopped when driving home from a concert. Our crime? Driving while Black.

I was leaving Milwaukee's annual Summerfest concert with friends and family. The show was amazing. We walked back to my minivan and headed on our way. After dropping off one friend, I continued toward my cousin's house. On the way, I passed two Milwaukee police squad cars that were driving in the opposite direction.

In that moment, I felt that familiar spike of worry that most young Black men feel when they encounter the police. But I quickly convinced myself it was nothing.

That's when I saw them turn their lights on.

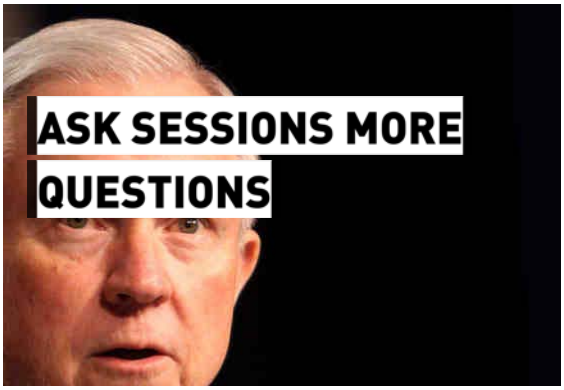
Maybe my minivan was too black. Maybe I was too Black. Maybe there were too many Black men in one car for us not to be up to no good. Whatever the "reason," the squad cars made an abrupt U-turn and, with those lights flashing, pulled my car over. When this happened we were just about in front of my cousin's house, in a neighborhood I knew well, in a city I was born in. And I was being treated like a criminal for no reason.

Four cops got out of the squad cars and came toward my minivan with flashlights on and guns drawn. In that moment, suddenly the world didn't make sense. I was driving home from a concert, and now there were police with their guns out coming toward me. It was surreal, and it was scary.

One officer opened the driver's side door, told me to put my hands on the steering wheel, and demanded my driver's license, which I provided. The other officers told the passengers to open the other doors of the minivan and get out. They told my cousin to sit on the curb while they ran my plates for information and our IDs for

warrants.

None of it felt right. None of it was right. We were young people coming home from a concert. And we were terrified.



MAKE THE CALL

I asked them why they stopped me. One of the officers told me it was because the vehicle registration was faulty. A second officer told my friend that it was because he had appeared to be reaching for something under the back seat. A third officer told another friend that it was because a person in the back seat wasn't wearing a seat

belt.

Three different answers to a very simple question. None of them made any sense.

I'm not sure how the officers could have seen my car's registration number before pulling me over. That number was written in small print on the windshield, and the officers had been driving toward me in the opposite direction — at night. I'm even less sure how the officers could have seen a back-seat passenger's seatbelt (or lack thereof) or whether the person bent down to get something through the tint on the windows in the minivan. The tint is so dark you can't even see the backseat from the outside.

It was just the latest version of the same story I'd heard, seen, and experienced in Milwaukee my whole life. The cops want to pull you over, so they pull you over. They don't need a reason. They can make up a reason. And they will, especially if you're Black.

After they conducted their warrant check, the officers returned our IDs and let us leave. We weren't charged or cited. Some might say we were lucky. But if being lucky means not being physically hurt or killed by police when you're stopped for no reason, then that's a terrible commentary on policing in Milwaukee and our country.

The truth is, we weren't lucky. While we didn't lose our lives, we were humiliated and wrongfully targeted by Milwaukee police simply because we were Black.

That stop did not make my community safer. It made me fear the police.

Sadly, this is far from the only negative experience I have had and not nearly the worst people in my life have experienced with the police. As

I grow older, I realize my view of law enforcement will always be affected by this experience.

But I won't give in to pessimism, and I won't stay silent. Today, I am joining five others to bring a lawsuit against the City of Milwaukee for violating our constitutional right to fair and equitable policing. I'm speaking out for the reforms that can protect not only Black and brown people but all Americans from police harassment. We need these reforms to protect our rights, and our very lives.

ADD A COMMENT (36)

Read the Terms of Use

Katie Walczak

Go get 'em! The good cops - of which there are many - will thank you!!
REPLY | FEBRUARY 22, 2017 | 10:24 AM

Mike Smith

The good cops will be silent. Guaranteed.
FEBRUARY 26, 2017 | 5:16 PM

Anonymous

The cops should be charged bc why would they have their guns drawn when there was no need too..
REPLY | FEBRUARY 22, 2017 | 10:58 AM

Andrea

Thank you for speaking up and fighting to protect not just your constitutional rights, but also the rights of others, Mr. Roberts! Appreciate you sharing your story.
REPLY | FEBRUARY 22, 2017 | 11:00 AM

Dr Amy Raml

As someone who was born, raised and schooled in Milwaukee, I heard

SJC 11956

COMMONWEALTH vs. JIMMY WARREN.

Suffolk. February 9, 2016. - September 20, 2016.

Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & Hines, JJ.[1]

Firearms. Practice, Criminal, Motion to suppress. Constitutional Law, Search and seizure, Reasonable suspicion. Search and Seizure, Reasonable suspicion.

Complaint received and sworn to in the Roxbury Division of the Boston Municipal Court Department on December 19, 2011.

After transfer to the Central Division, a pretrial motion to suppress evidence was heard by Tracy-Lee Lyons, J., and the case was heard by Annette Forde, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Nelson P. Lovins for the defendant.
Michael Glennon, Assistant District Attorney, for the Commonwealth.

[1] Justices Spina, Cordy, and Duffly participated in the deliberation on this case prior to their retirements.

HINES, J. After a jury-waived trial in the Boston Municipal Court, the defendant, Jimmy Warren, was convicted of unlawful possession of a firearm, G. L. c. 269, § 10 (a).[2] The complaint arose from the discovery of a firearm after an investigatory stop of the defendant in connection with a breaking and entering that had occurred in a nearby home approximately thirty minutes earlier. Prior to trial, the defendant filed a motion to suppress the firearm and statements made after his arrest, arguing that police lacked reasonable suspicion for the stop. The judge who heard the motion denied it, ruling that, at the time of the stop, the police had reasonable suspicion that the defendant was one of the perpetrators of the breaking and entering. The defendant appealed, claiming error in the denial of the motion to suppress.[3] The Appeals Court affirmed, Commonwealth v. Warren, 87 Mass. App. Ct. 476, 477 (2015). We allowed the defendant's application for further appellate review and conclude that because the police lacked reasonable suspicion for the

[2] The trial judge allowed the defendant's motion for a required finding of not guilty on a trespass charge, G. L. c. 266, § 120.

[3] Given our conclusion, we need not address the defendant's argument about the sufficiency of the evidence supporting his conviction.

investigatory stop, the denial of the motion to suppress was error. Therefore, we vacate the conviction.

Background. We summarize the facts as found by the judge at the hearing on the motion to suppress, supplemented by evidence in the record that is uncontroverted and that was implicitly credited by the judge. Commonwealth v. Melo, 472 Mass. 278, 286 (2015). On December 18, 2011, Boston police Officer Luis Anjos was patrolling the Roxbury section of Boston in a marked police cruiser when, at 9:20 P.M., he received a radio call alerting him to a breaking and entering in progress on Hutchings Street, where the suspects were fleeing the scene. The dispatcher gave several possible paths of flight from Hutchings Street, one toward Seaver Street and the other toward Jackson Square, locations that are in the opposite direction from one another.[4]

Anjos went to the scene and spoke to the victims, a teenage male and his foster mother. The male reported that as he was leaving the bathroom in the residence, his foster mother said that she heard people in his bedroom. The victim opened his

[4] The record contains a map of the area in question, providing geographical context for our review of the judge's ruling that the police had reasonable suspicion for the seizure of the defendant. We may take judicial notice of the location. See Commonwealth v. Augustine, 472 Mass. 448, 457 n.14 (2015), citing Federal Nat'l Mtge. Ass'n v. Therrien, 42 Mass. App. Ct. 523, 525 (1997) ("facts that are verifiably true, such as geographic locations, are susceptible to judicial notice").

bedroom door and saw a black male wearing a "red hoodie" (hooded sweatshirt) jump out of the window. When the victim looked out the window he saw two other black males, one wearing a "black hoodie," and the other wearing "dark clothing." When the victim checked his belongings, he noticed that his backpack, a computer, and five baseball hats were missing. The victim saw the three males run down Hutchings Street, but he could only guess which direction they took thereafter. Anjos peered out the window but could only see twelve to fifteen yards up the street to the intersection of Hutchings and Harold Streets. After speaking to the victims for approximately eight to twelve minutes, Anjos left the scene and broadcast the descriptions of the suspects.

For the next fifteen minutes or so, Anjos drove a four to five block radius around the house, searching for persons fitting the suspects' descriptions. Because of the cold temperature that night, Anjos did not come across any pedestrians as he searched the area. At around 9:40 P.M., Anjos headed back toward the police station. While on Martin Luther King Boulevard, he saw two black males, both wearing dark clothing, walking by some basketball courts near a park. One male wore a dark-colored "hoodie." Neither of the two carried a backpack. Anjos did not recognize either of the males, one of

whom was the defendant, as a person he had encountered previously in the course of his duties as a police officer.

When Anjos spotted the defendant and his companion, he had a hunch that they might have been involved in the breaking and entering. He based his hunch on the time of night, the proximity to the breaking and entering, and the fit of the males to the "general description" provided by the victim. He decided "to figure out who they were and where they were coming from and possibly do [a field interrogation observation (FIO)]."[5] He rolled down the passenger's side window of the cruiser and "yelled out," "Hey guys, wait a minute." The two men made eye contact with Anjos, turned around, and jogged down a path into the park.

After the two men jogged away, Anjos remained in the police cruiser and radioed dispatch that three men[6] fitting the descriptions provided by the victim were traveling through the park toward Dale Street. Boston police Officers Christopher R.

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[5] "A 'field interrogation observation' (FIO) has been described as an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area." Commonwealth v. Lyles, 453 Mass. 811, 813 n.6 (2009). FIOs are deemed consensual encounters because the individual approached remains free to terminate the conversation at will. See id. at 815, and cases cited.

[6] During cross-examination, Officer Anjos admitted that he observed only two males.

Carr and David Santosuosso, who had heard the original broadcast of the breaking and entering, were very near Dale Street and headed in that direction. Arriving quickly, Carr and Santosuosso observed two males matching Anjos's description walking out of the park toward Dale Street. Carr parked the cruiser on Dale Street and both officers approached the defendant and his companion as they left the park. The defendant and his companion walked with their hands out of their pockets. Carr saw no bulges in their clothing suggesting the presence of weapons or contraband.

Carr was closer to the two males, approximately fifteen yards away. When he uttered the words, "Hey fellas," the defendant turned and ran up a hill back into the park. His companion stood still. Carr ordered the defendant to stop running. After the command to stop, Carr observed the defendant clutching the right side of his pants, a motion Carr described as consistent with carrying a gun without a holster.[7]

Ignoring the command to stop, the defendant continued to run and eventually turned onto Wakullah Street. Carr lost sight

[7] The Commonwealth persists in claiming that the police observed the defendant clutching the right side of his pants before the command to stop. As did the Appeals Court, see Commonwealth v. Warren, 87 Mass. App. Ct. 476, 479 n.7 (2015), we reject this view of the facts where the judge explicitly found that "[t]his observation was after a verbal command to stop."

of the defendant for a few seconds before catching up with him in the rear yard of a house on Wakullah Street. Carr drew his firearm, pointed it at the defendant, and yelled several verbal commands for the defendant to show his hands and to "get down, get down, get down." The defendant moved slowly, conduct that Carr interpreted as an intention not to comply with his commands. After a brief struggle, Carr arrested and searched the defendant but found no contraband on his person. Minutes after the arrest, police recovered a Walther .22 caliber firearm inside the front yard fence of the Wakullah Street house. When asked if he had a license to carry a firearm, the defendant replied that he did not.

Discussion. The defendant challenges the judge's denial of the motion to suppress, claiming error in the judge's ruling that at the time of the stop on Dale Street, the police had a sufficient factual basis for reasonable suspicion that the defendant had committed the breaking and entering.[8] In sum, he argues that the police pursued him with the intent of

[8] Although the defendant argues in his brief that a stop occurred "when Officer[s] Anjos and Carr approached the defendant . . . with the intent of questioning the defendant," we assume that this was a typographical error because it is undisputed that Anjos never left his vehicle. Rather, it was Officers Santosuosso and Carr who approached the defendant and his companion as they exited the park. Therefore, we do not address whether the first encounter, when Anjos called out to the defendant from his cruiser, was an investigatory stop.

questioning him, while lacking any basis for doing so. Accordingly, he claims that any behavior observed during the pursuit and any contraband found thereafter must be suppressed.

1. Standard of review. "In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing" (citation omitted). Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). However, "[w]e review independently the application of constitutional principles to the facts found." Id. We apply these principles in deciding whether the seizure was justified by reasonable suspicion that the defendant had committed the breaking and entering on Hutchings Street. Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

2. Reasonable suspicion. The judge ruled, and the Commonwealth concedes, that the seizure occurred when Officer Carr ordered the defendant to stop running and pursued him onto Wakullah Street. If a seizure occurs, "we ask whether the stop was based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime." Commonwealth v. Martin, 467 Mass. 291, 303 (2014). "That suspicion must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a

hunch." Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007), quoting Scott, 440 Mass. at 646. The essence of the reasonable suspicion inquiry is whether the police have an individualized suspicion that the person seized is the perpetrator of the suspected crime. Commonwealth v. Depina, 456 Mass. 238, 243 (2010) (stop is lawful only if "information on which the dispatch was based had sufficient indicia of reliability, and . . . the description of the suspect conveyed by the dispatch had sufficient particularity that it was reasonable for the police to suspect a person matching that description").

According to the judge's ruling, the following information established reasonable suspicion for the investigatory stop: the defendant and his companion "matched" the description of two of the three individuals being sought by the police; they were stopped in close proximity in location (one mile) and time (approximately twenty-five minutes) to the crime; they were the only persons observed on the street on a cold winter night as police canvassed the area; and they evaded contact with the police, first when both men jogged away into the park, and later when the defendant fled from Carr after being approached on the other side of the park.[9]

[9] The judge also cited her finding that the police observed the defendant engaging in behavior suggestive of the presence of a firearm. That finding must be discounted in the reasonable

We review the judge's findings as a whole, bearing in mind that "a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief" that a person has, is, or will commit a particular crime. Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005), cert. denied, 546 U.S. 1187 (2006), quoting Commonwealth v. Fraser, 410 Mass. 541, 545 (1991). We are not persuaded that the information available to the police at the time of the seizure was sufficiently specific to establish reasonable suspicion that the defendant was connected to the breaking and entering under investigation.

a. The description of the suspects. First, and perhaps most important, because the victim had given a very general description of the perpetrator and his accomplices, the police did not know whom they were looking for that evening, except that the suspects were three black males: two black males wearing the ubiquitous and nondescriptive "dark clothing," and one black male wearing a "red hoodie." Lacking any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics, the victim's description "contribute[d] nothing to the officers' ability to distinguish

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suspicion analysis, however, as the judge explicitly found that this conduct occurred after the police commanded the defendant to stop.

the defendant from any other black male" wearing dark clothes and a "hoodie" in Roxbury. Commonwealth v. Cheek, 413 Mass. 492, 496 (1992) (insufficient detail in generalized description of suspect to justify stop where defendant was observed walking on street approximately one-half mile from scene of reported stabbing, without indication he was fleeing crime scene or had engaged in criminal activity).

With only this vague description, it was simply not possible for the police reasonably and rationally to target the defendant or any other black male wearing dark clothing as a suspect in the crime. If anything, the victim's description tended to exclude the defendant as a suspect: he was one of two men, not three; he was not wearing a red "hoodie"; and, neither he nor his companion was carrying a backpack.[10] Based solely on this description, Anjos had nothing more than a hunch that the defendant might have been involved in the crime. He acknowledged as much when he explained that the purpose of the stop was "to figure out who they were and where they were coming from and possibly do an FIO." As noted, an FIO is a consensual encounter between an individual and a police officer. Therefore, the defendant was not a "suspect" subject to the

[10] There is no suggestion in the judge's findings that the defendant and his companion changed clothing or jettisoned the backpack before being stopped by the police.

intrusion of a threshold inquiry. Unless the police were able to fortify the bare-bones description of the perpetrators with other facts probative of reasonable suspicion, the defendant was entitled to proceed uninhibited as he walked through the streets of Roxbury that evening.

b. Proximity. We agree with the motion judge that proximity of the stop to the time and location of the crime is a relevant factor in the reasonable suspicion analysis. Commonwealth v. Foster, 48 Mass. App. Ct. 671, 672-673, 676 (2000) (reasonable suspicion established where police observed persons matching physical description on same street and headed in same direction as indicated by informant). Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close. See Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 555 n.8 (2002), and cases cited. Here, the defendant was stopped one mile from the scene of the crime approximately twenty-five minutes after the victim's telephone call to the police. Several considerations, however, weigh against proximity as a factor supporting an individualized suspicion of the defendant as a suspect in the breaking and entering.

The location and timing of the stop were no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere

conjecture. Although the police appropriately began their investigation with the information available to them, this lack of detail made it less likely that a sighting of potential suspects could be elevated beyond the level of a hunch or speculation. As noted by the dissenting Justices in the Appeals Court opinion, given the nearly thirty-minute time period between the breaking and entering and the stop on Dale Street, the suspects could have traveled on foot within a two mile radius of the crime scene, a substantial geographic area comprising 12.57 square miles.[11] Warren, 87 Mass. App. Ct. at 499 n. 1 (Rubin, J., dissenting). See id. at 488-489 (Agnes, J., dissenting). Other than the victim's report that the perpetrators fled toward Harold Street, the responding officers had nothing more than the information in the dispatch suggesting that the perpetrators could have fled toward Seaver Street or Walnut Avenue. Depending on the direction taken, these paths of flight would lead to different Boston neighborhoods, Dorchester or Jamaica Plain, in different areas of the city.

In addition, Anjos testified to two important geographical facts that undermine the proximity factor. He acknowledged that

[11] Because the map of the area is part of the record, we are persuaded by the observation of a dissenting Justice in the Appeals Court opinion that the suspects could have been anywhere within twelve square miles of the crime scene by the time of the encounter with Anjos. See Warren, 87 Mass. App. Ct. at 499 n.1 (Rubin, J., dissenting).

Dale Street is in the opposite direction from where either of the reported paths of flight might lead. And, most important, Anjos also stated that if the perpetrators had headed in the direction of Dale Street, they likely would have reached that location well before his first encounter with the defendant and his companion. Thus, where the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus.

c. Lack of other pedestrians. The judge considered in her analysis that the defendant and his companion were the only people observed on the street as Anjos canvassed the four to five block radius of the Hutchings Street address, traveling "up and down Harold Street, Walnut Avenue and Holworthy Street" before turning onto Martin Luther King Boulevard to return to the station.[12] This factor also is of questionable value in the analysis given the lapse of time and the narrow geographical scope of the search for suspicious persons. Anjos spoke to the victim for approximately fifteen minutes and thereafter

[12] One of the police officers testified during the motion to suppress hearing that another officer reported seeing a different young black male with a backpack in a nearby neighborhood. Thus, we agree with one of the dissenting Justices in the Appeals Court opinion that if the judge credited this testimony, the fact that Anjos saw no other pedestrians on the street that night was not a factor supporting reasonable suspicion that the defendant was involved in the breaking and entering. See Warren, 87 Mass. App. Ct. at 489-490 (Agnes, J., dissenting).

canvassed only four to five blocks surrounding the location of the breaking and entering. The lapse of time between the victim's report and the canvassing suggests that the perpetrators could have fled the immediate area before Anjos began his search. Thus, the defendant's presence on the street, some distance away from the crime, within a time frame inconsistent with having recently fled the scene, is hardly revelatory of an individualized suspicion of the defendant as the perpetrator of the crime.

d. Flight. We recognize that the defendant's evasive conduct during his successive encounters with police is a factor properly considered in the reasonable suspicion analysis. Commonwealth v. Stoute, 422 Mass. 782, 791 (1996) (failure to stop combined with accelerated pace contributed to officer's reasonable suspicion). But evasive conduct in the absence of any other information tending toward an individualized suspicion that the defendant was involved in the crime is insufficient to support reasonable suspicion. Commonwealth v. Mercado, 422 Mass. 367, 371 (1996) ("Neither evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support . . . reasonable suspicion"); Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) (quick maneuver to avoid contact with police insufficient to establish reasonable suspicion). "Were the rule otherwise, the police could turn a

hunch into a reasonable suspicion by inducing the [flight] justifying the suspicion." Stoute, supra at 789, quoting Thibeau, supra. Although flight is relevant to the reasonable suspicion analysis in appropriate circumstances, we add two cautionary notes regarding the weight to be given this factor.

First, we perceive a factual irony in the consideration of flight as a factor in the reasonable suspicion calculus. Unless reasonable suspicion for a threshold inquiry already exists, our law guards a person's freedom to speak or not to speak to a police officer. A person also may choose to walk away, avoiding altogether any contact with police. Commonwealth v. Barros, 435 Mass. 171, 178 (2001) (breaking eye contact and refusing to answer officer's initial questions did not provide reasonable suspicion for detention or seizure as "[i]t was the defendant's right to ignore the officer"). Yet, because flight is viewed as inculpatory, we have endorsed it as a factor in the reasonable suspicion analysis. See Commonwealth v. Sykes, 449 Mass. 308, 315 (2007) (defendant's abandonment of bicycle in "effort to dodge further contact with the police was significant" in determining reasonable suspicion); Commonwealth v. Grandison, 433 Mass. 135, 139-140 (2001) (attempt to avoid contact with police may be considered with other factors in establishing reasonable suspicion). Where a suspect is under no obligation to respond to a police officer's inquiry, we are of

the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined. Thus, in the circumstances of this case, the flight from Anjos during the initial encounter added nothing to the reasonable suspicion calculus.

Second, as set out by one of the dissenting Justices in the Appeals court opinion, where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston. Warren, 87 Mass. App. Ct. at 495 n.18 (Agnes. J., dissenting), citing Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results [https://perma.cc/H9RJ-RHNB].[13] According to the

[13] See also Warren, 87 Mass. App. Ct. at 495 n.18 (Agnes, J., dissenting), citing American Civil Liberties Union, Stop and Frisk Report Summary, https://www.aclum.org/sites/all/files/images/education/stopandfrisk/stop_and_frisk_summary.pdf [https://perma.cc/7APK-8MG9] ("[sixty-three per cent] of Boston

study, based on FIO data collected by the department,[14] black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.[15] Black men were also disproportionally targeted for repeat police encounters.[16] We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's state of mind or

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police-civilian encounters from 2007-2010 targeted blacks, even though blacks made up less than [twenty-five per cent] of the city's population").

[14] The study by the Boston Police Department (department) reviewed all field interrogation and observation (FIO) reports, approximately 205,000 in total, submitted by Boston police officers from 2007 through 2010. Warren, 87 Mass. App. Ct. at 495 n.18 (Agnes, J., dissenting).

[15] "[T]he targets of FIO reports were disproportionately male, young, and Black. For those 204,739 FIO reports, the subjects were 89.0 percent male, 54.7 percent ages 24 or younger, and 63.3 percent Black." Final Report, An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports, at 2 (June 15, 2015).

[16] The department's study revealed that five per cent of the individuals repeatedly stopped or observed accounted for more than forty per cent of the total interrogations and observations conducted by the police department. Warren, 87 Mass. App. Ct. at 495 n.18 (Agnes, J., dissenting), quoting Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results [https://perma.cc/H9RJ-RHNB].

consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.

Here, we conclude that the police had far too little information to support an individualized suspicion that the defendant had committed the breaking and entering. As noted, the police were handicapped from the start with only a vague description of the perpetrators. Until the point when Carr seized the defendant, the investigation failed to transform the defendant from a random black male in dark clothing traveling the streets of Roxbury on a cold December night into a suspect in the crime of breaking and entering. Viewing the relevant factors in totality, we cannot say that the whole is greater than the sum of its parts.

Conclusion. For the reasons stated above, the police lacked reasonable suspicion for the investigatory stop of the defendant. Therefore, we vacate the judgment of conviction and

remand the matter to the Boston Municipal Court for further proceedings consistent with this opinion.

So ordered.