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NON-PUBLIC SAFETY STOP POLICY

The Chittenden County State's Attorney's Office (CCSAO) will presumptively decline to proceed with charges stemming from evidence gathered during a "non-public safety stop", also referred to as a "pretext stop". The CCSAO will also apply a heightened scrutiny to all traffic stops generally, to ensure that "public safety stops" (stops involving a violation of traffic law that endangers others) are not being used as a pretext to perform searches on the drivers that this policy is designed to protect.

Background on the Constitutionality of Traffic Stops and Searches

The Fourth Amendment promises "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹ Any detention by the police, whether it be a person or vehicle and regardless of the detention's duration, "constitutes a 'seizure' of 'persons' within the meaning of this provision."² Despite this, the Supreme Court approved the use of investigatory stops, wherein a law enforcement officer may stop and search a subject so long as the officer has a reasonable suspicion of criminal activity, or in other words "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."³

Later on, the Supreme Court approved non-public safety stops in *Whren v. United States*, reasoning that such a stop is not a violation of an individual's Fourth Amendment right so long as the driver has violated a traffic law.⁴ The Court held that an officer's "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," even if that officer stopped the vehicle to investigate the vehicle and driver for evidence unrelated to the traffic stop itself.⁵ The Supreme Court of Vermont applied this same standard, stating, "the lesser standard of reasonable suspicion of either criminal activity or even a minor traffic violation can form the basis of a valid temporary stop."⁶

¹ U.S. Const., amend. IV.

² *Whren v. United States*, 517 U.S. 806, 809–10 (1996).

³ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

⁴ *Whren*, 517 U.S. at 819.

⁵ *Id.* at 812-13.

⁶ *Zullo v. State*, 2019 VT 1, ¶ 59 (2019).

Once an officer has completed the stop of the vehicle, for what this policy would consider a non-public safety stop, the officer may then use that as an opportunity to search or “fish” for evidence of other offenses.⁷ While officers may not legally require a driver to consent to a search while they are detained, the period during which the officer is in possession of the driver’s documents, officers may ask the driver to consent to a search after the driver’s documentation has been returned.⁸ Once the consent has been obtained, the search is constitutionally permissible since in the eyes of the Court the consent effectuates a waiver of one’s Fourth and Fourteenth Amendment rights.⁹

Racial Bias in the Policing of Traffic Stops

Disproportionate treatment of people of color is a well-established pattern in the American criminal legal system. This fact is borne out in not only our rates of incarceration,¹⁰ but also in who we police and how we police them. Individuals of color are far more likely to be stopped and searched by law enforcement, even though they are not any more likely to be in possession of illegal contraband than White people.¹¹

This disproportionate policing of people of color can be seen in how traffic stops are performed as well. A recent nationwide study of 100 million traffic stops found that Black and Latinx drivers were stopped and searched at a higher rate than White drivers, despite the fact that searches of Black and Latinx drivers turned up contraband at a lower rate.¹² In traffic stops for public safety infractions, such as a DUI, law enforcement officers appear to have very little racial bias in who they arrest.¹³ However, when performing discretionary non-public safety stops, law enforcement officers are far more likely to stop and search people of color.¹⁴ The result is the perpetuation of racial bias in our criminal legal system.

Vermont is no exception to this trend. A recent study found that Black Vermonters were four times more likely to be stopped and three times more likely to be searched during a stop than White Vermonters.¹⁵ Latinx Vermonters also were both stopped and searched at higher rates.¹⁶ This is in spite of the fact that searches of Black and Latinx drivers resulted in lower “hit” rates (the rate at which illegal contraband is found) than White or Asian drivers.¹⁷ The study concluded that “police search behavior is suggestive of over-searching

⁷ Charles R. Epp, Steven Maynard-Moody, & Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* 99 (Kindle ed. 2014).

⁸ *Id.* at 38.

⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973).

¹⁰ Blacks and Latinx account for 33% and 23% of the prison population respectively, despite the fact that Black Americans are only 12% of the population and Latinx Americans account for just 16% of the population. White Americans, meanwhile, make up 64% of the U.S. population, but only make up 30% percent of the U.S. prison population. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, Pew Rsch. Ctr. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

¹¹ Epp, Maynard-Moody, & Haider-Markel, *supra* note 8, at 50.

¹² Emma Pierson, et al., *A Large Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Hum. Behav.* 736 (2019), <https://5harad.com/papers/100M-stops.pdf>

¹³ Epp, Maynard-Moody, & Haider-Markel, *supra* note 8, at 13.

¹⁴ *Id.*

¹⁵ Stephanie Seguino & Nancy Brooks, *Driving While Black and Brown in Vermont*, 4 (2017).

¹⁶ *Id.*

¹⁷ *Id.* at 13.

of Black and Hispanic drivers, relative to White and Asian drivers” and that this result “may be due to officers having a lower threshold of evidence for Black and Hispanic drivers.”¹⁸

Discriminatory policing practices harm those who are being discriminated against and their trust in institutional authority. Psychological research has shown that those who are being mistreated, or in this case over-policed, will eventually begin to view the system itself as deeply unfair.¹⁹ Not only is the system viewed as unfair, but also there is evidence suggesting that experiencing over-policing and discrimination causes serious psychological and emotional harm, and can lead those experiencing this treatment to be more likely to engage in criminal behavior.²⁰

Non-Public Safety Stops Do Not Improve Safety

In addition to increasing racial bias within our criminal legal system, non-public safety stops also do not improve safety in our communities. In the case of *Terry v. Ohio*, the Court reasoned that such stops should be permissible for preserving the safety of law enforcement and the public.²¹ However, there is no indication so far that non-public safety stops make communities or law enforcement safer. In the “vast majority” of these stops, whether it be a vehicle or a person, law enforcement do not discover any contraband or illegally owned guns on the people they are searching.²² A study of stops by police in New York City found that investigatory stops had very little effect on reducing crime, whereas stops stemming from an articulable probable cause had the strongest association in reducing crime.²³ Non-public safety stops are a danger to law enforcement as well, with traffic stops being the most common type of officer-initiated activity that results in the fatality of a law enforcement agent.²⁴

Legal Criticisms of Non-Public Safety Stops

While this policy recognizes that non-public safety stops are constitutionally permissible at this time, it should be noted that this understanding is not absolute. These types of stops are constitutionally banned in both New Mexico and Washington State, and several District Attorney’s Offices have enacted policies declining to prosecute certain charges in which the evidence was discovered during a non-public safety stop.²⁵ Justice Ginsburg also stated an interest in revisiting the *Whren* standard, specifically the “police officer’s reason for acting” and its interaction with individual’s Fourth Amendment rights.²⁶

¹⁸ *Id.* at 30.

¹⁹ Epp, Maynard-Moody, & Haider-Markel, *supra* note 8, at 5.

²⁰ Juan Del Toro, et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 Proc. of the Nat’l Acad. of Sci., no. 17, 8261, 8261-68 (2019).

²¹ *Terry*, 392 U.S. at 27.

²² Epp, Maynard-Moody, & Haider-Markel, *supra* note 8, at 8.

²³ John MacDonald et al., *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLoS One, no. 6, (2016) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4911104/>.

²⁴ Nick Breul & Desiree Luongo, U.S. Dept. of Just.; Cmty. Oriented Policing Servs., *Making it Safer: A Study of Law Enforcement Fatalities Between 2010-2016*, 39 (2017).

²⁵ S.F. Dist. Attn’y’s Off., *Policy Directive: Declination of Contraband Charges Based on Pretextual Stops*, <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Declination-of-Contraband-Charges-Based-on-Pretextual-Stops.pdf>; Washtenaw Cnty. Off. Prosecuting Attn’y, *Policy Directive 2021-09: Policy Regarding Pretext Stops*, <https://www.washtenaw.org/DocumentCenter/View/19235/Pretext-Stops-Policy>; Ingham Cnty. Prosecutor’s Off., *Policy Regarding Heightened Scrutiny of Traffic Stops and Automobile Searches*, (2021).

²⁶ *D.C. v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., dissenting).

Policy Directive

One step to mitigate racial bias in the American criminal legal system is to cease the prosecution of cases that arise out of non-public safety stops. The CCSAO is making the discretionary choice to not proceed with charges resulting from non-public safety stops to help alleviate implicit racial bias, help restore our community's faith in local institutions, and improve safety within our community.

For these reasons, the CCSAO will presumptively decline to proceed with charges where the individual is stopped for a non-public safety violation. The CCSAO will continue to proceed with charges resulting from public safety stops subject to the guidance below.

This policy does not focus on the outcome of the stop, but the basis for probable cause or the independent legal justification for the stop itself.

1. **Heightened scrutiny of all traffic stops:** The CCSAO will apply heightened scrutiny to all traffic stops to ensure these stops are not being used for pretextual purposes.
2. **Treatment of "public safety stops" by this Office:** Any evidence stemming from the search of a driver following a stop in which there is probable cause of a public safety violation will be considered for charges, barring other discretionary policies and factors the CCSAO may want to consider. However, if it appears that a public safety stop was made only for the purpose of "fishing" for evidence of other crimes, the CCSAO may decline to proceed with charges. For example, the CCSAO may decline charges when an officer conducts a public safety stop, searches the vehicle based on the driver's consent without any other legal justification, and finds evidence unrelated to the original justification for the stop.
3. **Treatment of "non-public safety stops" by this office:** If law enforcement stops a vehicle for any of the enumerated non-public safety violations (see below), the CCSAO will presumptively decline to proceed with any charges resulting from evidence discovered during the stop.
4. **Treatment of "public safety stops" that included a "non-public safety" violation:** If there is the presence of a public safety violation and non-public safety violation simultaneously, i.e., reckless driving plus a missing taillight, the state will consider the case, so long as the alleged public safety violation is not being used as a "pretext" to search a driver's vehicle.
5. **Exceptions:** This policy is presumptive, so the CCSAO may make exceptions to this policy. If a Deputy State's Attorney seeks to proceed with a charge resulting from a non-public safety stop, they must demonstrate that an exception is necessary to protect an identifiable member of the community and seek permission from the State's Attorney before doing so. The CCSAO may proceed with warrant requests that come from such a stop even if the prosecution of charges stemming from that search may be declined.
6. **"Public safety stops" defined:** Public safety stops are stops resulting from a traffic violation or violations that harm or threaten to harm other people in the community. Examples of violations that

could be the basis for a public safety stop include excessive speeding (defined here as 7 miles per hour or more over the speed limit), suspicion that the driver is operating their vehicle while intoxicated by drugs and/or alcohol, running through a red light, and reckless operation of a vehicle in a way that makes the road unsafe for others.

7. **“Non-public safety stops” defined:** Non-public safety stops are stops resulting from a traffic violation or violations that do not cause harm to others. The following violations shall be considered non-public safety violations:

- having one broken taillight or brake light (23 V.S.A. § 1248(a))
- failing to signal a lane change (23 V.S.A. § 1064)
- operating a vehicle too slowly (23 V.S.A. § 1064)
- operating a vehicle with an expired inspection (23 V.S.A. § 1222(a))
- operating a vehicle without registration (23 V.S.A. § 304)
- operating a vehicle with a civilly suspended license (23 V.S.A. § 674(a)(2) and 23 V.S.A. § 601(g))
- operating a vehicle with an excessively loud muffler 23 V.S.A. § 4(37)
- operating a vehicle with improperly assigned plates (23 V.S.A. § 511)
- operating a vehicle with tinted windows (23 V.S.A. § 1125(a))
- prolonged idling of a vehicle (23 V.S.A. § 1110)
- operating a vehicle with an object hanging from the rearview mirror (23 V.S.A. § 1125(a))
- operating a vehicle in the left lane of a two-lane highway when the right lane is unoccupied (23 V.S.A. § 1031), and:
 - stops done strictly to conduct a warrant check.

For the purposes of this policy, stops in which law enforcement have no justification for the stop will be treated as a non-public safety stop. The CCSAO reserves the right to adapt and adjust the above list as the CCSAO sees fit.

8. **“Consent Search” defined:** A consent search occurs when a driver gives the consent for an officer to search their vehicle, even when he may not have a warrant or the necessary probable cause to do so. Drivers often feel legally obligated to consent to a search even when they are no longer under seizure.