

OVERVIEW OF NEW JERSEY'S RACIAL PROFILING POLICY

1. The Non-Discrimination Rule in a Nutshell. Except when an officer is trying to determine whether an individual matches the physical description in a B.O.L.O. (“Be On the Lookout”), or is pursuing specific leads in an ongoing criminal investigation, a police officer in this State may not consider a person’s race or ethnicity as a factor in deciding whether that person may be involved in criminal activity, or in deciding how to treat that person. Unless an officer is responding to a suspect-specific or investigation-specific B.O.L.O. situation, a person’s race or ethnicity may play **no part** in the exercise of police discretion. See Companion Guide, Unit 8.

2. The Scope of the Non-Discrimination Rule. The general rule prohibiting any consideration of race or ethnicity applies to **all** police decisions, and not just the decision by a patrol officer to initiate a “stop.” The rule applies, for example, to earlier decisions (e.g., whether to “run the plates” of a vehicle, or whether to approach a person as part of a consensual “field inquiry”), and also applies to all decisions made after a stop has begun (e.g., whether to order the driver out, whether to pose probing questions, whether to ask for consent to search, etc.). See Companion Guide, Unit 8.2.

3. The Test for Determining Compliance With the Non-Discrimination Rule. The test for determining whether an officer has complied with the State’s non-discrimination policy is very simple: would the officer have treated this individual or group of individuals differently if he/she/they had been of a different race or ethnicity? If the answer to this question is yes, then unless the “B.O.L.O. exception” applies, the police conduct would constitute “Racially-Influenced Policing” in violation of Attorney General Law Enforcement Directive 2005-1. See Companion Guide, Unit 8.

4. The Importance of Focusing on *Conduct*, Rather Than on Race/Ethnicity. The key to complying with the State’s non-discrimination policy is that when a police officer is trying to determine whether an individual may be engaged in criminal activity, the officer should not focus on personal characteristics that the person was born with and can’t change, but rather should focus on the person’s **conduct** -- what the person is doing, or saying, or, in certain situations, expressive forms of conduct such as the person’s manner of dress (e.g., whether the person is “flying the colors” of a criminal street gang). Police officers, in other words, should be looking out for “suspicious *conduct*,” not for “suspicious-*looking*” persons. See Companion Guide, Units 8 and 8.1.

5. Rejecting the Myth That Only Racists Can Practice Racial Profiling. A police officer need **not** be a racist to engage in “Racially-Influenced Policing.” Any officer can unwittingly or subconsciously fall prey to racial or ethnic stereotypes about who is more likely to be involved in criminal activity. One need not be prejudiced to unwittingly “pre judge” a person based on a broad-brushed stereotype of what a typical criminal looks like. See Companion Guide, Unit 7.

6. The Importance of Thoughtful (Reasoned) Policing. While police officers are not prohibited from relying on a “hunch,” officers should always be thinking about what they are doing, and why they are drawing inferences of suspicion about an individual. In other words, an officer should ask himself/herself what it is about this particular person that has led the officer to suspect that this person may be up to no good. (The key to being reasonable is to be reasoning, that is, to be consciously aware of and able to articulate the reasons for making important decisions.) Officers must make certain that a person’s race or ethnicity plays no part in the exercise of police discretion, and officers should be prepared to explain and document the legitimate, race-neutral reasons for their suspicions. See Companion Guide, Unit 13.

7. Meeting the “Burden of Production” Through Careful Documentation. Police officers can protect themselves from lawsuits, legal challenges, and internal investigations by carefully documenting the legitimate reasons for the exercise of police discretion, and supervisors in turn can help to protect their subordinates by making certain that all police reports are thorough, precise and accurate. This will allow the State to meet any “burden of production” that might arise if a citizen were to claim that he or she had been the victim of discriminatory policing or an unlawful search and seizure. See Companion Guide, Units 13 and 17.2.

8. Understanding When Courts Will Closely Scrutinize Police Decisions. Police officers and their superiors should be aware of those types of situations when reviewing courts are more likely to be skeptical and probing in terms of possible Fourth or Fourteenth Amendment issues, and in those types of situations, such as high discretion encounters, or where police appear to be “digging” or “fishing” for evidence of criminality, officers must be especially careful to document the legitimate reasons that demonstrate that their decisions were lawful and appropriate. See Companion Guide, Unit 13.1 through 13.7.