No. 197PA20-2 DISTRICT 10

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

)

v. ) From Wake County

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JEREMY JOHNSON )

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DEFENDANT-APPELLANT’S NEW BRIEF

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DEFENDANT-APPELLANT’S NEW BRIEF

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**ISSUE PRESENTED**

I. Whether the Court of Appeals erred in finding that Mr. Johnson’s prima facie evidence of selective enforcement of the law was insufficient, and whether the State’s failure to offer any evidence rebutting the presumption of discrimination required the lower court to grant Mr. Johnson’s motion to suppress?

**STATEMENT OF THE CASE**

On March 5, 2018, Jeremy Johnson was indicted for possession of cocaine, possession of marijuana up to one-half ounce, and resisting a public officer. (Rp 4) Mr. Johnson moved to suppress evidence which was obtained in a traffic stop search on both Equal Protection and Fourth Amendment grounds. (Rpp 6-30) An evidentiary hearing was held before the Honorable A. Graham Shirley, II in Wake County Superior Court on September 5, 2018. Judge Shirley took separate evidence in back-to-back hearings on the two claims. Judge Shirley issued separate written orders denying Mr. Johnson’s motion on Fourth Amendment and Equal Protection grounds on September 28, 2018 and November 14, 2018, respectively.[[1]](#footnote-1) (Rpp 32-37, 38-48)

On January 17, 2019, Mr. Johnson pled guilty to felony possession of cocaine and resisting a public officer, specifically reserving his right to appeal the suppression ruling. (Plea Tpp 6-7, 17) The Honorable Carl R. Fox sentenced Mr. Johnson to 6-17 months imprisonment, suspended for 24 months of probation. (Rpp 55-58) Mr. Johnson gave oral notice of appeal from judgment entered, which was further memorialized in a joint stipulation signed on January 19, 2019. (Plea Tp 17; Rp 62)

The first Court of Appeals opinion issued April 21, 2020. Mr. Johnson sought discretionary review, contending the panel erred in failing to properly consider the equal protection issue. This Court issued a special order requiring the Court of Appeals to address the equal protection issue. The second Court of Appeals opinion did so. It was issued December 31, 2020, and Mr. Johnson again sought review.

 **STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Review of the Court of Appeals’ second decision is based on this Court’s Order dated November 1, 2021, allowing Mr. Johnson’s petition for discretionary review. N.C.G.S. § 7A-31.

**STATEMENT OF FACTS**

Officer Kuchen of the Raleigh Police Department arrested Jeremy Johnson on November 22, 2017 at around 12:30 a.m. (Tpp 26, 30-32)[[2]](#footnote-2) Officer Kuchen testified at the suppression hearing that, as he was driving through the Raleigh North Apartment complex on patrol, he saw Mr. Johnson, who is Black, sitting inside a Mustang in a marked parking spot. Kuchen was in his patrol car, about 12-15 feet from Mr. Johnson’s car. The light pole nearest Mr. Johnson’s car was burned out. The interior light on Mr. Johnson’s car was not on. Mr. Johnson’s car was backed into the parking spot. Kuchen estimated he was driving 4-5 miles per hour as he passed Mr. Johnson’s car. Kuchen testified he “observed the subject [Mr. Johnson] slide … under the steering wheel as much as they could to obscure my view of their person inside of that vehicle.” There was an unlit ‘no trespassing’ sign approximately five feet away from Mr. Johnson’s car. Kuchen decided to approach Mr. Johnson “to address the potential of trespassing, being under a no trespassing sign, and the behavior of attempting to obscure himself from me as I drove by.” (Tpp 26-29, 54-55)

Kuchen stopped his car in the road and immediately walked toward Mr. Johnson’s car, shining a flashlight as Mr. Johnson started to get out of his car. Kuchen testified that, from five to six feet away, he smelled raw marijuana. Kuchen ordered Mr. Johnson to get back in the car. Mr. Johnson instead got out of the car, and as he did, he reached into the pocket of the driver’s side door. According to Kuchen, Mr. Johnson then “moved to the rear of his vehicle in a hurried fashion” – “less than a jog” but “faster than a walk.” Kuchen commanded Mr. Johnson to stop and approached to handcuff him. Mr. Johnson pulled away and ran 10 to 15 feet before Kuchen and another officer, who had arrived during the encounter, brought him to the ground. (Tpp 29-33, 46-47, 51) In a search incident to arrest, officers found a small amount of cocaine in a baggy inside Mr. Johnson’s pants pocket and a small amount of marijuana.[[3]](#footnote-3) (Plea Tpp 9-10)

In November 2017, Kuchen was a new officer, having just finished six months of field training. He understood his duties as a patrol officer were to answer 911 calls and “conduct proactive criminal patrol.” This included looking for possible trespassers. (Tpp 19-23)

According to Kuchen, multiple apartment complexes in Raleigh have trespassing agreements with the police department. Apartment managers ask police to identify people lingering in their parking lots and determine whether they live there, or are visiting, or have any other “authorized” purpose for being there. Officers are to add “unauthorized” people to a no-trespass list, and officers subsequently cite those people if they appear on the property. Kuchen’s practice was to approach people in the parking lots to “have a voluntary encounter to observe if the subject was on a lease of the property.” His understanding was that guests were allowed but should get out of the car and walk to an apartment. Kuchen estimated that once or twice a shift he would ride through Raleigh North and have these “voluntary” encounters. On cross-examination, Kuchen acknowledged that the trespassing agreement did not give him additional legal authority to stop people. (Tpp 23-25, 37-39, 41, 56-61)

At the equal protection portion of the suppression hearing, Mr. Johnson called three witnesses. An attorney at a civil rights non-profit, Ian Mance, testified that he used traffic stop data, the collection of which is mandated by N.C.G.S. § 143B-903, to discover Officer Kuchen had stopped 299 drivers, 245 of whom were Black. Mance testified that, pursuant to the statute, each officer in jurisdictions of over 10,000 people is required to report data from every traffic stop, excluding checkpoints. The data entered does not include the exact location of each traffic stop,[[4]](#footnote-4) so Mance was unable to testify specifically where the stops had occurred. (Tpp 84-90)

Mance reported that 82% of Kuchen’s stops were of Black drivers. By comparison, of all Raleigh Police Department traffic stops entered in the database since 2002, numbering nearly one million stops, 46% were of Black drivers. (Tp 90) Mance also reported that U.S. Census data from 2016 showed Black people then made up 28% of the population of Raleigh. (Tp 90)

An intern at the Wake County Public Defender’s office testified that he searched North Carolina’s criminal court database, ACIS, and found that, of all cases listing Officer Kuchen as a complainant, 166 of 204 people charged (or 81.4%) were Black. (Tpp 103-04)

The defense also called Officer Kuchen. Kuchen had earlier testified his field training began in May 2017 and was split between the Raleigh Police Department’s southeast and northwest districts. When he rode with a supervisor during his training, Kuchen initiated most of the stops. When Kuchen began patrolling on his own in October 2017, he was assigned to the southeast district. He did not have a specific beat; he “floated around the entire district.” (Tpp 19-23)

Kuchen testified that the southeast district included wealthier areas such as Oakwood, Lions Park, and Wake Medical Center. The district included portions of major thoroughfares to downtown, such as New Bern Avenue and Capital Boulevard, which he sometimes patrolled during rush hour. Kuchen did not know the racial makeup of the southeast district, nor of Raleigh as a whole. (Tpp 113-15)

The State did not question Kuchen during the equal protection portion of the hearing, nor did it call any other witness or present any evidence other than the one-page trespass agreement between Raleigh North and the Raleigh police department. (Rp 31) The State did not ask Kuchen whether he was the officer identified in the traffic stop database, nor how Kuchen would explain the statistics that showed he disproportionately stopped and arrested Black people. (Tp 116)

***Appeal***

On appeal, Mr. Johnson challenged the trial court’s ruling on the equal protection claim and argued that Officer Kuchen engaged in selective enforcement by approaching and detaining him. Mr. Johnson argued that his statistical evidence supported an inference of both discriminatory purpose and effect, satisfying the required prima facie showing which then shifted the burden to the State.[[5]](#footnote-5) Mr. Johnson argued the trial court erred by holding his evidence did not raise an inference of discrimination, and that the State’s failure to rebut the prima facie showing should have resulted in granting the suppression motion and excluding the evidence.

***Court of Appeals opinion***

The panel opinion[[6]](#footnote-6) acknowledged that selective enforcement of the law based on race violates both the United States and North Carolina Constitutions. (Slip op at 10-11) It held that a defendant has the initial burden of producing sufficient evidence to raise a reasonable inference of discrimination by showing discriminatory purpose and effect. (Slip op at 12-13) It acknowledged that “courts frequently rely on statistical evidence to establish this prong.” (Slip op at 13) It noted the statistics must contain “adequate population benchmarks from which a court can determine whether the complained-of law enforcement action has a discriminatory effect.” (Slip op at 14) It acknowledged that a discriminatory purpose can be inferred from “stark” statistics showing disparate impact. (Slip op at 17) It found that the statistics presented by Mr. Johnson “certainly appear[ed] ‘stark’ at first glance.” However, it concluded Mr. Johnson did not present a prima facie case of selective enforcement because there was no “adequate population benchmark from which we can assess the racial compositions of individuals and motorists ‘faced by’ Officer Kuchen” and because there was insufficient detail presented about Kuchen’s arrests. (Slip op at 20-21)

**ARGUMENT**

**I. MR. JOHNSON PRESENTED A PRIMA FACIE CASE OF DISCRIMINATION. BECAUSE THE STATE FAILED TO OFFER A RACE-NEUTRAL EXPLANATION, THE EQUAL PROTECTION VIOLATION WAS ESTABLISHED.**

Mr. Johnson introduced prima facie evidence of selective enforcement, including data showing that 82% of the traffic stops initiated by Officer Kuchen were of Black people, in a city where the Black population was 28%. The State did not provide an explanation that refuted unconstitutional racial profiling. Mr. Johnson’s motion to suppress should have been granted.

The factual burden set by the panel opinion is contrary to precedent in other contexts and is unfairly onerous. Equal protection violations in the context of traffic stops will be illusory under this standard. If this Court intends to take racial equity in policing seriously, the panel opinion must be overturned.

*Standard of review*

 This Court reviews a Court of Appeals opinion to determine if it contains any error of law. *State v. Brooks,* 337 N.C. 132, 149 (1994). Constitutional errors are reviewed de novo. *State v. Johnson*, 2021-NCSC-165, ¶ 17. If the trial court’s findings of fact are reviewed, the appellate court determines whether they are supported by competent evidence. *State v. Cooke,* 306 N.C. 132, 134 (1982).

**A. Equal Protection principles**

Our federal and state Constitutions require equal protection under the law for all people. U.S. Const. amend. XIV; N.C. Const. art. I, § 19.[[7]](#footnote-7) The Equal Protection Clause “prohibits selective enforcement of the law based on considerations such as race.” *Whren v. United States,* 517 U.S. 806, 813 (1996); *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886) (selective enforcement of a facially neutral law against a particular race of persons violates equal protection). This Court has recognized that selective enforcement based on race in the context of a traffic stop would violate equal protection. *State v. Ivey*, 360 N.C. 562, 564 (2006), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008). Noting concerns over stops for “driving while black,” this Court declared that it would “not tolerate discriminatory application of the law” based on race. *Id*.

To succeed on a claim of selective enforcement based on race, a defendant must show that the challenged police action (1) was motivated by a discriminatory purpose; and (2) had a discriminatory effect on the racial group to which the defendant belongs. *Wayte v. United States*, 470 U.S. 598, 609 (1985); *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662 (1971). Discriminatory intent – just like any subjective intent[[8]](#footnote-8) – may be established through circumstantial evidence, including statistical evidence. *McKleskey v. Kemp*, 481 U.S. 279, 294 (1987) (noting acceptance of statistical evidence as sole proof of discriminatory intent where disparities are “stark”); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (noting that proof of discriminatory impact may demonstrate unconstitutionality where the disparity is “very difficult to explain on nonracial grounds”) (internal citations omitted).

Courts analyze equal protection violations using a burden-shifting approach: the movant must present prima facie evidence of discrimination, after which the burden shifts to the respondent to rebut the presumption of unconstitutional action. *Washington v. Davis*, 426 U.S. 229, 241 (1976) (reviewing discrimination in police entrance exam); *Batson*, 476 U.S. at 94 (reviewing discrimination in jury selection); *State v. Taylor*, 362 N.C. 514, 527 (2008) (applying burden-shifting in claim of discrimination in jury selection); *State v. Brown,* 271 N.C. 250, 256, 277 (1967) (applying burden-shifting in claim of systematic exclusion of Black people from grand jury); *Holmes v. Moore,* 270 N.C. App. 7, 17, 33 (2020) (applying burden-shifting in claim of race discrimination through voter ID law); *N.C. Dep’t of Public Safety v. Ledford*, 247 N.C. App. 266, 288 (2016) (same, in employment discrimination claim); *State v. Ward*, 66 N.C. App. 352, 354 (1984) (same, in selective prosecution claim).

The prima facie burden is low, requiring only evidence “sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *State v. Hobbs*, 374 N.C. 345, 350 (2020) (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)). *See also State v. Bennett,* 374 N.C. 579, 598 (2020) (*Batson’*s first step requires evidence sufficient to support an inference, not evidence to prove the ultimate conclusion that discrimination occurred.) Indeed, this Court has held that statistics alone can be sufficient to raise a prima facie claim, even where “nothing in the record demonstrates or even suggests that the prosecutor expressed or showed any prejudice against minorities.” *State v. Barden*, 356 N.C. 316, 344-45 (2002) (finding a prima facie case and remanding for a hearing where the prosecutor struck 5 of 7, or 71%, of eligible Black jurors).

Once a prima facie case is made, the State must rebut the presumption of discrimination, and if it does not, the equal protection violation is established. *Batson*, 476 U.S. at 94. A court cannot rely on race-neutral reasons that were not offered by the State. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (“The [appellate court’s] substitution of a reason for [the apparent discrimination against a juror] does nothing to satisfy the prosecutors’ burden of stating a racially neutral explanation for their own actions.”)

**B. Mr. Johnson met the prima facie requirement.**

To support his claim of discrimination, Mr. Johnson presented statistical data showing the rate of Officer Kuchen’s traffic stops and arrests relative to the race breakdown of the City of Raleigh and relative to stops made by all Raleigh officers. Mr. Johnson also showed that the full context of the stop supports the inference of discrimination. Mr. Johnson was sitting alone in his car in an apartment parking lot and appeared to slide down in his seat at the time Officer Kuchen drove past. Kuchen’s reason for investigating appeared pretextual: he testified that he chose to investigate a minor misdemeanor offense (trespassing) based on brief observations that did not reasonably suggest criminal wrongdoing. The combination of this evidence was more than sufficient to raise an inference of discrimination and satisfy the prima facie burden.

1. Mr. Johnson’s data was sufficient.

The prima facie burden is not intended to be a high hurdle. *State v. Hoffman*, 348 N.C. 548, 553 (1998). It requires only enough to raise an inference of discriminatory purpose and effect. *Hobbs; Bennett.*

The data showed Officer Kuchen stopped Black drivers at a disproportionate rate. Out of 299 stops by Kuchen, 82% were of Black drivers, relative to the Black population of Raleigh which was then 28%. The data showed that Raleigh officers as a whole, during the years 2002-2018, stopped Black drivers at a rate of 46%. This statistic is itself starkly disparate. But Kuchen’s rate of stopping Black drivers was nearly double that of Raleigh police as a whole, and more than triple that of the Black population. The data further showed that, out of 205 arrests by Kuchen, 81.4% were of Black citizens, again disproportionate to the population. The 81% and 82% figures are consistent, lending credibility to the inference that both are reflective of Kuchen’s practices. Under *Batson* and *McKleskey*, these statistics are enough to raise an inference of disparate enforcement, meeting the prima facie burden.

This Court has not yet determined what is required to make out a prima facie case of race discrimination in the specific context of traffic stops.[[9]](#footnote-9) This Court has done so in the context of *Batson* violations, however, and the prima facie requirement standards in that context should apply equally here. In *Batson* cases, the statistics establishing a prima facie case typically involve very small samples, often a handful of peremptory challenges by a prosecutor out of a few dozen qualified jurors. *See, e.g., Barden,* 356 N.C. at 343 (5 of 7 peremptory strikes used against Black jurors); *Hobbs,* 374 N.C. at 347 (8 of 11 peremptory strikes used against Black jurors). Earlier cases held that a defendant had to show strike rates by prosecutors over multiple cases, rather than from a single trial. *See Swain v. Alabama*, 380 U.S. 202 (1965). That “crippling burden of proof” was abandoned in *Batson*. 476 U.S. at 92.

In comparison to the small samples in *Batson* cases, the statistics Mr. Johnson presented were thorough, counting hundreds of events rather than a handful, and listing all of Kuchen’s stops and arrests available in two databases.

The accuracy of Mr. Johnson’s statistics was uncontested, as the State offered no rebuttal evidence at the equal protection hearing. The trial court found the statistics as fact. (Rpp 39-40 ¶¶ 7-11) Further, the source of Mr. Johnson’s data was the State itself. Our statute, one of the first of its kind, was designed to collect complete traffic stop data including race. *See generally* N.C.G.S. § 143B-903; Frank Baumgartner, et al., *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge Univ. Press, 2018) (analyzing data collected under G.S. 143B-903). The State can hardly attack the data it supplies and maintains.

2. It is the respondent’s burden to present responsive data.

A key theme in the State’s argument and the panel’s ruling is that Mr. Johnson should have produced better data. But the moving party is *not* required to “persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination.” *Bennett*, 374 N.C. at 598 (quoting *Batson,* 476 U.S. at 170.) Instead, the prima facie framework requires the movant to make a minimal showing, after which a respondent, who is more likely in possession of the relevant data, must produce evidence.

In a case involving inequitable treatment of demonstrators by federal officials, the Fourth Circuit explained why the burden should shift to the government after a prima facie case is made:

We think when the record strongly suggests invidious discrimination and selective application of a regulation to inhibit the expression of an unpopular viewpoint, and where it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence as to what extent loud and unusual noise and obstruction of the concourse may have occurred on other approved occasions.  **It is neither novel nor unfair to require the party in possession of the facts to disclose them.**

*United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972) (reversing convictions of religious protestors) (emphasis added). *See also Commonwealth v. Franklin*, 376 Mass. 885, 895 (1978) (remanding for further consideration in selective prosecution claim of Black defendants seeking to prove that white individuals living in the same housing project were not criminally charged for comparable acts) (citing *Crowthers*). In light of these principles, the panel clearly erred in finding Mr. Johnson needed better data to make his prima facie showing of discrimination.

3. The *Chavez* opinion is inapt.

Both the trial court and the panel below held that the statistics were not sufficient because additional, more detailed statistics would have allowed better comparison and analysis. (See Rpp 44-47; Slip op at 21) The panel compared Mr. Johnson’s statistics to those evaluated in *Chavez v. Ill. State Police,* 251 F.3d 612 (7th Cir. 2001). The Court in *Chavez* dismissed a civil class action that sought money damages and injunctive relief against the Illinois State Police for racial profiling of motorists. The panel’s reliance on *Chavez* was inapt. A statistical standard set in a civil class action seeking damages is not appropriate or fair in the case of an individual, indigent defendant like Mr. Johnson. Further, North Carolina’s comprehensive traffic stop data is exactly the kind the *Chavez* opinion found lacking. The *Chavez* opinion criticized the data offered because it was not “compiled for every stop” and did not “comprise a … regular sample of motorists stopped” by officers. *Id.* at 641. It held the data was inaccurate and therefore unreliable: some data was generated from partial, random, or undefined samples; and some data was not useful because it did not include the race of the drivers. *Id.* at 642-43. These concerns were not present with Mr. Johnson’s data: pursuant to our statute, the State collects data on every stop by officers in jurisdictions of over 10,000 people and includes the race of every driver. N.C.G.S. § 143B-903.

4. The panel’s issues with the data were off-base.

The panel had two specific data-related complaints with Mr. Johnson’s evidence, which it used to conclude that Mr. Johnson’s data was inadequate. First, the panel criticized the lack of an “adequate population benchmark from which we can assess the racial compositions of individuals and motorists ‘faced by’ Officer Kuchen.” The panel contended Mr. Johnson should have presented data showing the racial breakdown of the southeast Raleigh police district, rather than citywide data. (Slip op at 20-21)

This “benchmark” complaint was improper for several reasons. Under the reasoning of *Crowthers*, it was unfair at the prima facie stage for the panel to hold Mr. Johnson responsible for finding and presenting data likely in the State’s possession. Data showing the racial breakdown of Raleigh’s southeast police district is not readily available. If a race breakdown by police district exists at all, it would exist in the possession of the police department, which created the districts and polices them daily.

Moreover, the panel’s premise that only southeast district data should have been used for comparison is flawed. As an initial factual matter, the panel misstated a relevant fact: Officer Kuchen’s traffic stops occurred in two Raleigh police districts, the southeast and northwest.[[10]](#footnote-10) (Tpp 19-22) Therefore, race data solely from the southeast district would not have been the appropriate benchmark. And importantly, as a common sense matter, traffic stops do not only occur in the police district where the driver lives. Kuchen testified that the southeast district includes portions of major thoroughfares such as New Bern Avenue and Capital Boulevard, which he sometimes patrolled during rush hour. Roads in the southeast district, especially these major arteries, would be travelled by drivers from that district as well as drivers from other parts of town, other parts of the county, and beyond.[[11]](#footnote-11) Mr. Johnson had to choose some benchmark, and his choice was reasonable and sufficient for a prima facie comparison.

The panel’s other data-related complaint was that there was no information showing the nature of Kuchen’s involvement in the arrests listed under his name in the ACIS database, including why and where they occurred. (Slip op at 21) This alleged flaw is even less persuasive. The State maintains the ACIS database and has full access to it. The State could have accessed records from ACIS, along with other police records not published in the traffic stop database. Or the State could have asked Officer Kuchen to explain why he arrested so many Black citizens.

The panel noted that some of Kuchen’s arrests likely resulted from 911 calls, rather than from his own initiative. (Slip op at 21) Perhaps this is a fair point; perhaps not. Either way, Mr. Johnson put on prima facie evidence showing a stark disparity, supporting an inference that Officer Kuchen spent a disproportionate amount of time and energy looking for Black people committing crimes. Mr. Johnson had no access to this information. As with the traffic stop data, the State is the party better able to fill out the data, and it was the State’s burden to respond once a prima facie case was made. If the data existed,[[12]](#footnote-12) the failure was the State’s for not producing it.

5. The statistics supported discriminatory purpose.

The panel incorrectly held that the statistics were insufficiently stark to support discriminatory purpose. (Slip op at 21) Kuchen’s rate of stopping and arresting Black citizens was more than triple the Black population of Raleigh; and his rate of stopping Black drivers was nearly double that of other Raleigh officers. These discrepancies are facially stark and therefore constitute a prima facie showing of discriminatory purpose. *McKleskey; Batson; Barden.* Further, in making this determination, the panel ignored other evidence of discriminatory purpose that buttressed the statistical evidence, as discussed in subsection 7 of this argument.

6. Issues not addressed by the panel.

The trial court questioned whether the race of Raleigh drivers differed from the race of Raleigh residents. (Rp 40 ¶12) The panel did not rely on this argument, and rightly so. There is no basis to infer that the *driving* population in Raleigh is more Black than the residential population. In fact, there are credible reasons to believe the opposite is true: “Preliminary national data on race-specific driving patterns, like differences in vehicle ownership by race (*e.g.* 51% of Black households have vehicles vs. 84% of white households), suggests the already disparate rates by race based on residential populations may widely underestimate the true disparities [in traffic stops].”[[13]](#footnote-13)

The trial court held Mr. Johnson’s prima facie showing was insufficient because he did not show that similarly-situated drivers of a different race were not investigated. (Rpp 43-46) The panel expressly declined to address this issue (Slip Op at 15 n. 3) and Mr. Johnson believes it is therefore not ripe for argument. However, if this Court reaches the question in the interests of judicial economy and clarifying standards for courts below, it should hold that the similarly-situated requirement in selective enforcement cases is either not required, or that the requirement may be proved through statistical evidence. *See, e.g., Johnson v. Holmes*, 782 F. App’x 269, 277 (4th Cir. 2019).[[14]](#footnote-14) Mr. Johnson simply would not have been able to prove who Officer Kuchen chose *not* to investigate for trespassing. Officers do not keep records of stops that do not occur.

To require otherwise would create an impossible burden for citizens trying to secure their right to equal protection under the law. Mr. Johnson presented the data reasonably available to him after significant effort by his appointed attorney. Requiring more to merely raise an inference of discrimination is unduly burdensome and unfair. Further, such a framework incentivizes the State to avoid collecting data, and to make it difficult to retrieve.[[15]](#footnote-15) If North Carolina is to meaningfully address race discrimination in policing, the incentives should lead to the exact opposite goal: a thorough collection of data openly available to the public.

7. The ‘other evidence’ supported discriminatory purpose.

Mr. Johnson presented relevant statistics from which a reasonable inference of discrimination could be drawn, and the statistics were so stark that they alone supported the prima facie inference. *See Barden.* But the full circumstances of this stop, including the poor showing of reasonable suspicion by Officer Kuchen,[[16]](#footnote-16) further support Mr. Johnson’s prima facie case. *See Md. State Conf. of NAACP Branches v. Md. State Police*, 454 F. Supp. 2d 339, 349 (D. Md. 2006) (holding that “statistical evidence plus the arguable absence of any legitimate justification for the stop, is sufficient” to establish Fourteenth Amendment violation for summary judgment purposes).

Kuchen testified he was conducting “proactive crime patrol.”[[17]](#footnote-17) (Tp 22)

Mr. Johnson, however, was doing nothing to raise a reasonable suspicion that he was engaged in any crime. He was not driving down the road violating traffic laws. *See State v. Style*s, 362 N.C. 412, 417 (2008). He was not running away from the scene of a crime wearing clothing matching a reported suspect. *See State v. Buie*, 297 N.C. 159, 162 (1979). He was not handing off a package in a high crime location, circumstances just on the edge of reasonable suspicion. *See State v. Mello*, 200 N.C. App. 561 (2009). He was, instead, sitting alone in his car. Bothering no one. And no one had called to complain.

Kuchen’s decision to root out possible trespassing by Mr. Johnson would be a dubious use of police resources even if there was reasonable suspicion of trespassing. But there was not. Trespassing occurs when a person enters or remains on the premises of another after being told to leave, or after disregarding signs prohibiting entry which were likely to come to the person’s attention. N.C.G.S. § 14-159.13.

Raleigh North Apartments was a large complex of about two dozen buildings, with small parking areas surrounding each building. Residents did not have parking permits. (Tpp 41-42) Kuchen observed Mr. Johnson in one of the marked parking spaces, in an unlit car, for a matter of seconds – Kuchen said he drove his patrol car past Mr. Johnson’s parked car at 4-5 miles an hour, stopped his patrol car in the road and immediately got out. This time period was not long enough to infer that Mr. Johnson was lingering. Mr. Johnson could have been a resident or a guest; nothing indicated otherwise. No evidence showed that Kuchen recognized Mr. Johnson as someone on the ‘no-trespass’ list. The no-trespassing sign was unlit, and again, nothing indicated Mr. Johnson did not live there. Thus, Kuchen had zero evidence that Mr. Johnson was trespassing.[[18]](#footnote-18)

Kuchen testified he was also relying on his observation that Mr. Johnson appeared to slide down in his seat. This is ambiguous, innocuous behavior, to which Kuchen supplied a suspicious motive. Such ambiguous action, standing alone, should not be held sufficient to create reasonable suspicion. *See United States v. Foster,* 634 F.3d 243, 245, 248 (4th Cir. 2011) (finding no reasonable suspicion when man in a parked car sat up from a crouched position and the man’s arms were “shifting” and “going haywire”). *Foster* said:

there are an infinite number of reasonable explanations, unrelated to any criminal behavior, to explain why a passenger would not immediately be visible in a car. For example, he may have simply been bending over to retrieve a dropped item from the floor of the car. We therefore are extremely wary of accepting the Government’s argument that an officer may acquire a reasonable suspicion of criminal wrongdoing simply because a person suddenly becomes observable.

*Id.* at 247. Mr. Johnson likewise merely moved in his seat, and likewise might have leaned down for multiple, innocuous reasons.

It is easy for officers to articulate reasonable suspicion no matter what action a citizen is taking. Describing the multitude of actions that might justify reasonable suspicion of illegal conduct, Justice Gorsuch wrote:

History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.

*Nieves v. Bartlett*, 204 L. Ed. 2d 1, 19, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., dissenting); s*ee also Foster,* 634 F.3d at 248 (“We also note our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. . . . [A]n officer and the Government must do more than simply label a behavior as ‘suspicious’ to make it so.”) Mr. Johnson’s actions (sitting in a parked car alone, and leaning down), if done by a white driver in a suburban setting, would never be considered suspicious. Approving reasonable suspicion for ambiguous behavior, especially as innocuous as leaning down in a parked car, allows both conscious and unconscious racism to flourish in policing.

 Finally, even if Mr. Johnson was trying to avoid contact with Officer Kuchen, there are many reasons to avoid police other than hiding a crime – inconvenience, nervousness, outright fear – especially for Black men. A Black person’s attempt to evade police is “not necessarily probative of [his] state of mind or consciousness of guilt” and finding reasonable suspicion without additional evidence undermines the “boundary between consensual and obligatory police encounters.” *Commonwealth v. Warren*, 475 Mass. 530, 538 (2016) (finding insufficient reasonable suspicion to make an investigatory stop, especially given data showing Black men were disproportionally targeted for police encounters in the district.) Avoiding police, as a lone factor, should not constitute grounds for reasonable suspicion.

 In sum, the circumstances of Mr. Johnson’s arrest support the inference that he was investigated because he was Black and that both “trespassing” and “sliding down in his seat” were pretexts for the stop. In making the prima facie determination, these inferences should be considered along with the statistical evidence. As shown above, the statistical evidence was thorough, uncontested, relevant, and sufficient to show discriminatory purpose and effect. It raised a presumption that Kuchen enforced the law in a racially-disparate way. If police only look for trespassers in poor neighborhoods mostly occupied by people of color, that is where they will arrest trespassers. If police only investigate Black citizens in poor neighborhoods for sliding down in their seats, then Black citizens are the ones who will be investigated and searched. Mr. Johnson met his prima facie burden. The stark statistics, along with the paucity of reasonable suspicion, raised an inference of both discriminatory purpose and effect, in violation of the Equal Protection Clause. *McCleskey; Batson*.

**C. The State failed to rebut the presumption of discrimination.**

Once a prima facie case is made, the State must rebut the presumption of discrimination, and if it does not, the equal protection violation is established. *Batson*, 476 U.S. at 94. Further,

The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the State must demonstrate that ‘permissible racially neutral selection criteria and procedures have produced the monochromatic result.’

*Id.* (internal citations omitted).

Given the opportunity, the State did not present its own evidence or statistics in defense of the equal protection claim. Mr. Johnson filed his initial equal protection motion on May 21, 2018. (Rpp 6-15) He filed an amended motion on August 24, 2018. (Rpp 16-30) The State made no apparent request for additional time. The hearing occurred on September 5, 2018. (Rpp 31, 38) At the hearing, Officer Kuchen did not deny he participated in the traffic stops. He did not contend they were initiated by a partner or his supervisor. He offered no explanation for the racially-disparate traffic stops, nor the racially-disparate arrests. The State asked no questions of Kuchen in the equal protection hearing, and offered no other evidence in defense of the equal protection allegations. (Tp 116) Indeed, the State said nothing after the evidence had been presented. (Tpp 118-22)

Thus, Mr. Johnson’s is a rare case where a prima facie showing was made and the State failed to offer *any* race-neutral reason in response. In such a case, discrimination is established because the State failed to meet its burden. *See State v. Wright*, 189 N.C. App. 346, 354 (2008) (granting new trial in *Batson* case where prosecutor gave no race-neutral reason for some of the Black jurors it excused); *State v. Ruth*, 2022-NCCOA-23, ¶¶ 20-21, *temp. stay granted*, 2022 N.C. LEXIS 36 (N.C. Jan. 19, 2022) (same). The Supreme Court explained why this result is proper in such rare cases:

No reason for [the discrimination] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws….

*Yick Wo*, 118 U.S. at 374. The findings by the courts below which suggested potential race-neutral explanations via attacks on the statistics were inappropriate under *Miller-El.* 545 U.S. at 252. Because the State did not attempt to rebut the inference of discrimination at the hearing below, an equal protection violation was established.

**CONCLUSION**

The panel’s ruling creates a prima facie burden so high that most citizens targeted on the basis of race will have no remedy. And law enforcement agencies or individual officers who target citizens on that basis will have no disincentive to continue discriminatory practices. Our Court system ought to protect and police all of North Carolina’s citizens equally. Otherwise, equal protection will be rendered meaningless. *Esse quam videri*. Because Mr. Johnson’s equal protection claim was made as a motion to suppress based on selective enforcement under N.C.G.S. § 15A-974, the appropriate remedy in this case is to order the results of the illegal investigation suppressed and remand for further proceedings. Both the United States and North Carolina Constitutions require this remedy, and Mr. Johnson respectfully asks the Court to grant it.

Respectfully submitted this 2nd day of February, 2022.

Electronically submitted

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**CERTIFICATE OF SERVICE**

I certify this Brief has been served by e-mail to the attorney listed below:

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 This 2nd day of February, 2022.

 Electronically submitted

 Kathryn L. VandenBerg

1. Mr. Johnson did not challenge the Fourth Amendment ruling on appeal. [↑](#footnote-ref-1)
2. Transcript cites refer to the September 5, 2018 suppression hearing, unless otherwise noted. [↑](#footnote-ref-2)
3. The record does not say exactly where the marijuana was found. [↑](#footnote-ref-3)
4. An officer is to record the geographic location of each traffic stop only by the “city or county in which the stop was made.” N.C.G.S. § 143B-903(a)(15). [↑](#footnote-ref-4)
5. In proceedings below, Mr. Johnson also argued, in the alternative, that the trial court erred by placing the initial burden of proof for this violation on him. He has since abandoned that argument. [↑](#footnote-ref-5)
6. Referring to the second panel opinion issued December 31, 2020. [↑](#footnote-ref-6)
7. This Court has generally analyzed equal protections claims without distinguishing between the federal and State Constitutions. Mr. Johnson contends he is entitled to relief under both. See Brief of Amicus Curiae The Decarceration Project for further discussion of increased protections under the North Carolina Constitution. [↑](#footnote-ref-7)
8. *See, e.g., State v. Thorpe*, 326 N.C. 451, 455 (1990) (criminal intent may be inferred from circumstances). [↑](#footnote-ref-8)
9. As noted above, the Court of Appeals used the *Batson* burden-shifting framework in a selective prosecution claim in *Ward*. [↑](#footnote-ref-9)
10. An online map of the City of Raleigh Police Districts is available here: <https://raleighnc.gov/safety/content/Police/Articles/PoliceDistricts.html> [↑](#footnote-ref-10)
11. One could also consider using all of Wake County, or adding neighboring Johnston County as a benchmark. This would likely make statistics worse for Officer Kuchen. The area beyond the City of Raleigh has fewer Black citizens, so that Kuchen’s stops would appear even more racially-unequal: according to U.S. Census data, in 2019, the Black population of Raleigh was 29%; the Black population of Wake County was 21%; the Black population of Johnston County, which neighbors the southeast district, was 17%. The Black population of North Carolina was 22.2%. [↑](#footnote-ref-11)
12. Collecting such data could be quite burdensome – possibly a body camera plus a GPS tracker showing an officer’s every movement and encounter; and even that would not capture the officer’s subjective thoughts. [↑](#footnote-ref-12)
13. Michael Dolan Fliss, *Racial Disparities in Law Enforcement Traffic Stops: Measurement, Interpretation, & Intervention Possibilities* (2019) (Ph.D. Dissertation, University of North Carolina at Chapel Hill (on file with University Libraries, University of North Carolina at Chapel Hill)

Available at: <https://cdr.lib.unc.edu/concern/dissertations/8049g994g>

*See also Driver Factors in Fatal and “A” Injury Crashes in North Carolina, 2001-2005*, at p. 40 (a five-year investigation by the N.C. Department of Transportation into the causes of the State’s serious vehicle crashes revealed that “Black drivers were under-represented . . . in multi-vehicle at-fault crashes.”) [↑](#footnote-ref-13)
14. This opinion overruled *Hubbard v. Holmes*, 2018 U.S. Dist. LEXIS 67278 (W.D. Va. 2018) on the issue of similarly-situated evidence. The trial court in Mr. Johnson’s case relied heavily on the now-overruled *Hubbard* opinion. (See Rpp 43-46) [↑](#footnote-ref-14)
15. *See Johnson*, 782 F. App’x at 281 (“the very entity who decides what data to record is the same entity that would benefit from vague or incomplete statistics in selective enforcement cases.”) [↑](#footnote-ref-15)
16. Mr. Johnson did not appeal the stop on Fourth Amendment grounds because there was, arguably, reasonable suspicion based on the odor of marijuana after Kuchen approached Mr. Johnson’s car. Even this reason may now be suspect. *See State v. Parker*, 2021-NCCOA-217, ¶ 30 (“Defendant’s appeal raises the possibility that these holdings may need to be re-examined. If the scent of marijuana no longer conclusively indicates the presence of an illegal drug (given that legal hemp and illegal marijuana apparently smell the same), then the scent of marijuana may be insufficient to show probable cause to perform a search.”) [↑](#footnote-ref-16)
17. Approaching people to interrogate them about their reasons for being somewhere is a questionable method of ‘proactive crime control.’ *See*, Williamson, Jason D.,

*If You’re White, You’re a Customer. If You’re Black, You’re Trespassing.*  ACLU Criminal Law Reform Project, April 15, 2015. Available at:

<https://www.aclu.org/blog/criminal-law-reform/reforming-police/if-youre-white-youre-customer-if-youre-black-youre>. Trial counsel here explicitly argued Officer Kuchen’s testimony seemed to “imply that people at this apartment complex enjoy a lesser degree of protection from being stopped without a particularized suspicion of criminal wrongdoing.” (Tpp 82-83) [↑](#footnote-ref-17)
18. Notably, Mr. Johnson was not charged with trespassing. (Rpp 2-4, 49-52) [↑](#footnote-ref-18)