

March 5, 2019

Col. Joe Gasper  
Director, Michigan State Police  
P.O. Box 30634  
Lansing, MI 48909

Re: MSP and Race

Dear Col. Gasper:



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aclumich.org

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The ACLU of Michigan is committed to providing all appropriate assistance to efforts to make the Michigan State Police (MSP) responsive and helpful to all of Michigan's residents. In recent years the ACLU of Michigan's engagement with MSP has addressed, among other things, the role race plays in the routine patrol activities of the troopers. We have been pleased by not only the agency's willingness to exchange ideas and information about this topic, but also by a willingness to modify policies and practices when there is mutual agreement that changes will be useful.

Enclosed you will find a report that provides a set of recommendations for MSP. They are based on interactions with MSP leadership and practical consideration of documents and interviews of persons who have had encounters with troopers. We are hopeful that you will accept and implement each of the recommendations – particularly the suggestion that MSP hire an expert to determine whether troopers are engaged in racial profiling. It is our honest belief that without a credible and reliable assessment of the agency's racial practices, MSP will be unable to take further meaningful steps toward establishing relationships of trust with communities of color. I look forward to working with you to both identify and correct any race-related problems that MSP may confront.

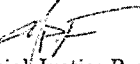
Sincerely,

A handwritten signature in black ink, appearing to read "Mark P. Fancher".

Mark P. Fancher  
Staff Attorney – Racial Justice Project

Cc: Hon. Gretchen Whitmer

**RACE, TRAFFIC STOPS AND THE MICHIGAN STATE POLICE –  
ACLU OF MICHIGAN RECOMMENDATIONS**

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For several years the American Civil Liberties Union (ACLU) of Michigan has examined the traffic stop policies and practices of the Michigan State Police (MSP) by examining agency records obtained through the Freedom of Information Act (FOIA), contacting motorists stopped by MSP troopers, and engaging in ongoing dialogue with MSP leadership. Based on those inquiries and document reviews the ACLU makes the following recommendations:

1. A qualified expert should be engaged to evaluate MSP policies and practices to determine whether the agency engages in racial profiling or other forms of discrimination.
2. MSP should abandon its practice of making “warning stops” and instead make stops only when offenses requiring citations or arrests have been committed.
3. MSP should seek and obtain expert guidance concerning strategies for drug interdiction that do not involve pretext stops and racial profiling.
4. Aspects of trooper performance evaluations that consider the number of stops made by troopers should be abandoned.

**A. The Need for a Racial Profiling Expert’s Evaluation**

The ACLU of Michigan received separate complaints from African American motorists who believe their race was the sole reason they were stopped by Michigan State Police while traveling on Interstate 94. Though these persons are unrelated and unacquainted, the experiences of two motorists are remarkably similar. These drivers were not only stopped by members of MSP’s 5<sup>th</sup> District Home Town Security Team on separate Fridays during Autumn, 2016, but the purported reason for the stops is that they were both allegedly following too closely behind tractor-trailers. They were not accused of offenses that require arrest. Nevertheless they were both asked to exit their vehicles. Their vehicles were searched and they were asked whether they were transporting drugs or other contraband. In both cases a canine officer was called, and a dog sniffed the vehicles.



The ACLU of Michigan submitted a Freedom of Information Act request for documents related to stops made by the troopers who stopped the two referenced drivers. The records show that from Tuesday, Nov. 15, 2016 through Thursday, Nov. 17, 2016, one of the troopers made stops that brought him into contact with 15 individuals who were either drivers or passengers. Seven of these 15 individuals were identified as black, and four were identified as Hispanic. The race of one driver was not identified. The three remaining individuals were identified as white. The encounter with one of the white drivers was apparently not because of actual or suspected violations of the law, but for the purpose of providing assistance with the driver's vehicle.

In response to our concerns, MSP acknowledged there were, at that time, no reliable or consistent records of the racial identities of persons who were stopped. This prompted a new policy of mandatory reporting of racial identity that was implemented in January, 2017. The ACLU of Michigan followed up with Freedom of Information Act requests for records of stops made by other members of the Fifth District Hometown Security Team on six randomly selected Fridays during the first quarter of 2017. The records produced by MSP show that on those days, four of the more active members of that unit made stops that brought them into contact with 82 individuals who were either drivers or passengers. Almost 48 percent of these individuals were identified by the troopers as black, Hispanic or Asian. About 24 percent of these individuals were identified as white. Another 28 percent were reported to be of unknown racial identity. There was special concern about these records, not only because they document racial disproportion, but also because seventeen of the 23 racially unidentified persons have Spanish surnames. In addition the "unknown" designation appears to give troopers attempting to disguise racial profiling the means to obfuscate racial stop patterns notwithstanding the MSP policy on racial reporting.

To obtain even more information about the troopers, a follow-up FOIA request was made for records that reflect the racial identities of all persons who were the subjects of traffic stops made by members of the 5<sup>th</sup> District Hometown Security Team on the following dates: January 6, 2017; January 20, 2017; February 3, 2017; February 17, 2017; March 3, 2017; March 17, 2017; March 31, 2017; April 7, 2017; April 14, 2017; April 21, 2017; April 28, 2017; May 5, 2017; May 12, 2017; May 19, 2017; May 26, 2017; June 2, 2017; June 9, 2017; June 16, 2017; June 23, 2017; June 30, 2017; and July 7, 2017. The records show that while all of the racial categories were used as identifiers to some degree, there was a distinct tendency by seven of the 10 troopers to racially classify drivers as either "black" or "white" to the exclusion of other racial identifiers.

Records of stops made by each of the troopers from the 5<sup>th</sup> District Hometown Security Team betray racial disproportion in traffic stops<sup>1</sup> and a considerable number of drivers who were

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<sup>1</sup> Trooper A: 10 whites; 3 blacks; 0 Hispanics; 0 Asians; 2 race unknown. Trooper B: 18 whites; 9 blacks; 0 Hispanics; 1 Asian; 6 race unknown. Trooper C: 14 whites; 6 blacks; 6 Hispanics; 0 Asians; 2 race unknown. Trooper D: 11 whites; 4 blacks; 0 Hispanics; 1 Asian; 3 race unknown. Trooper E: 7 whites; 5 blacks; 0 Hispanics; 0 Asians; 4 race unknown. Trooper F: 9 whites; 5 blacks; 2 Hispanics; 2 Asians; 3 race unknown. Trooper G: 61 whites; 11 blacks; 0 Hispanics; 1 Asian; 7 race unknown. Trooper H: 40 whites; 11 blacks; 0 Hispanics; 1 Asian; 0 race unknown. Trooper I: 43 whites; 12 blacks; 8 Hispanics; 0 Asians; 3 race unknown. Trooper J: 27 whites; 20 blacks; 0 Hispanics; 1 Asian; 15 race unknown.

not identified by race.<sup>2</sup> In an apparent effort to address these concerns, MSP conducted its own study. The results were the subject of media reports, including the following article excerpt:

Michigan State Police data suggests last year's traffic stops correlate with statewide census figures, but some contended inherent bias could be hidden within the numbers. Nearly 75 percent of motorists stopped by troopers last year were identified as white — aligning almost exactly with the percentage of Michiganders who identified as such in the most recent U.S. Census. Those margins show racial profiling isn't an issue, police contended. But some advocates still voiced concerns. "It's essentially meaningless," said Mark Fancher, staff attorney for the American Civil Liberties Union' Racial Justice Project. "That really tells us nothing because there's still so much at play here." Troopers last year updated their electronic reports to introduce a tracking mechanism for the racial identities of those stopped on the road. MSP Capt. Mike Caldwell said the data is gathered entirely from trooper's personal observations and proves that racial profiling isn't tolerated in his department. "I was not surprised by the results of this most recent review," he said. About 93 percent of those stopped last year in the Lower Peninsula's northern 19 counties were identified as white — proportionate statistics in an area populated by 95.34 percent white people. About 3 percent of those stopped were identified as black but account for less than 1 percent of the local population, the data showed. Fancher said racial profiling in northern Michigan isn't his chief concern but the data still creates potentially skewed figures when merged with the hundreds of thousands of traffic stops statewide. "There are vast stretches which are predominately white," Fancher said. "There might be a practice in one part of the state where there is deliberate racial profiling on a consistent basis. You wouldn't know that because those numbers dissolve once they're thrown in with the overall numbers."<sup>3</sup>

If population figures are to be used as a benchmark, it is more instructive to consider the record of stops made by the specific troopers who are subjects of the inquiry. African Americans represent about 14 percent of Michigan's population, but the number of black motorists stopped by all but one of the troopers significantly exceeded 14 percent.<sup>4</sup> The article also addresses the possibility that actual racial statistics are disguised by the troopers' use of the "unknown" category for race.

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<sup>2</sup> The surnames of persons whose racial identity was not specified are: Dwarakanatha, Jaber,, Salazar, Gharbavi, Ortega, Adan, Thalanki, Sanabria, Mosquera-Madrid, Velu, Morris, Antonio, Kurian, Barrios Y Barrios, Balasupramaniyan, Patel, Lopez, Serratos, Romero-Colon, Amanuel, Guerrero, Menendez, Siong, Zakieh, Faqihi, Shah, Zuniga, Al Dawood, Faulk, Denha, Arnall, Singh, Espinoza, Munoz, Theandon, Souidan, Al Saif, Aldabet, Gagnon, Alobaidi, Dykas

<sup>3</sup> *MSP Traffic Stops Align With Demographics*, by Kyle Kaminski, *Traverse City Record Eagle* (March 25, 2018).

<sup>4</sup> The percentages of the total number of motorists stopped by each trooper who were African American are as follows: Trooper A – 20%; Trooper B – 26%; Trooper C – 21%; Trooper D – 21%; Trooper E – 31%; Trooper F – 23%; Trooper G – 13.7%; Trooper H – 21%; Trooper I – 18%; Trooper J – 31.7%.

While the ACLU has identified a variety of practices and events that concern us, we have always been very careful to avoid making conclusive assertions that MSP engages in racial profiling. We believe that only an expert analysis by qualified professionals can identify systemic issues of profiling in a police department, and we have suggested that MSP engage a consultant to conduct an agency-wide evaluation. That recommendation is repeated here, and in many ways it is essential to MSP gaining the trust and confidence of communities of color.

### **B. Abandon “Warning Stops”**

According to a media report, in 2015, MSP conducted 405,270 traffic stops. Yet, only 171,219, or 42 percent, resulted in a traffic citation. MSP leadership expressed pride in the agency’s practice of pulling drivers over for minor offenses and then allowing them to leave with only a warning. MSP has suggested that this practice results in greater public safety while avoiding the complications to a citizen’s life caused by a citation. There are good reasons to question whether MSP is driven solely by a concern about traffic safety and drivers’ convenience. Some of the alternative potential motives are considered later in this memorandum. But assuming even the best of intentions, stopping motorists of color for any reason is a very serious event, often with profound implications for an individual’s life.

Law enforcement officers’ uniforms, equipment, weapons and demeanor are designed to intimidate. For a person of color, an encounter with a trooper occurs against a backdrop of police violence and harassment that began during the slave era and continued uninterrupted to the present. In the current era, all are witness to a long series of police-involved shootings and other acts of violence captured live and in real time by portable video recording devices. Few African American adults have been spared of either a direct hostile encounter with a police officer, or the vicarious experience of a family member or friend’s terrifying encounter with the police. Thus, a traffic stop – any traffic stop – conducted by a trooper is a traumatic event for many people of color. One citizen who was stopped by a trooper described his emotional reaction this way:

I knew that we were being profiled because we were two black males in a vehicle. It was very embarrassing for my son to see me being treated like this and it was also embarrassing for me to see my son treated in that manner as well. With the recent controversy with police killing unarmed black men, I was very afraid for my life and my son’s life. I know that it would be a hard task to live, either of us, if one of us had possibly been killed for no reason just simply being black.

Any benefits derived from “warning stops” are offset if not overcome by the emotional disturbance experienced by African American motorists. Unfortunately, the gravity of this experience is not always acknowledged by the law enforcement community. It is however a real phenomenon and MSP is urged to refrain from stopping vehicles unless there is cause to believe that violations worthy of citation or arrest have occurred, and there is also an honest belief that action must and will be taken against the drivers. In cases where a warning stop now occurs because of a belief that an offense is not serious enough to merit a citation, drivers should be allowed to continue their journeys without interruption.

### C. Pretext Stops and Racial Profiling are Improper Drug Interdiction Strategies

It is likely that most civilians are unable to guess how a law enforcement officer determines that a vehicle traveling at a speed of 70 miles per hour contains narcotics or other contraband, and should be stopped and investigated. Yet, this is part of the mission of the 5<sup>th</sup> District Hometown Security unit which has been referenced in various places in this report. MSP has not shared its drug interdiction strategies with the ACLU, but the past director has provided a clue about at least one of the methods employed. She indicated special efforts by criminals to avoid detection lead "...troopers to place special emphasis on less-obvious, but equally concerning driver behaviors such as lane use and following too closely." Presumably, troopers who stop vehicles for these minor offenses use the infractions as a pretext for determining whether the occupants are engaged in more serious criminal activity. A trooper who was not speaking for the record also said troopers will sometimes stop motorists for very minor infractions primarily for the purpose of engaging them and determining whether the driver's behavior suggests a need for further inquiry or a search.

Given these comments, there is reasonable concern about whether troopers purposely or as a consequence of implicit bias also resort to racial profiling to decide which vehicles will be stopped. If MSP lacks the capacity to detect facts providing probable cause for the investigation of drivers suspected of drug crimes without making pretext stops, or possibly engaging in racial profiling, then there should be consultation with law enforcement experts who are able to provide guidance about how to gain that capacity.

Finding alternative methods of detecting drug couriers is important not only for the protection of citizens' rights, but also because making stops on the basis of race is ineffective law enforcement. Authors of the book "Suspect Citizens" offered the following observations about research conducted in North Carolina:

African Americans are much more likely to be searched after a stop than white drivers, but less likely to be found with drugs, guns, alcohol or other forms of contraband after discretionary searches. Hispanic drivers in particular are much less likely to be found with contraband after a search, compared to whites...Contraband hit rates are 36, 33 and 22 percent for whites, blacks and Hispanics, respectively. So, yes, whites are more likely to be found with contraband. Note that all contraband hits do not lead to arrest, as many "hits" are very small amounts. But our general point is that the stereotyping that seems to be widely used — based on race, age and gender — puts young men of color at a distinct disadvantage. They are over-targeted, statistically speaking.<sup>5</sup>

This type of research has been conducted nationally and has yielded similar results. A study of Michigan stops is needed to determine not only whether racial profiling occurs, but also whether any such practices are causing similar ineffective law enforcement results.

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<sup>5</sup> *What data on 20 million traffic stops can tell us about "driving while black,"* by John Sides, The Washington Post (July 17, 2018)

#### **D. Performance evaluations based on stop numbers provide incentive to racially profile**

MSP publicly denied allegations that the department has a 70 percent ticket quota requirement for troopers. The MSP statement said, in relevant part:

The department has an activity analysis program wherein troopers' activity is reviewed on a semi-annual basis. The purpose of the activity analysis is to provide feedback for troopers on their performance in core areas of their job duties and to provide a tool for supervisors to fairly evaluate performance as measured against their peers at the post. The areas subject to the 70% baseline evaluation are: fugitive arrests, investigative and patrol arrests, investigative and patrol complaints, traffic stops (not tickets), and OWI arrests.

What this means is that troopers are expected to make stops at least equal to the average number of stops made by all of the troopers at their post. This evaluation criterion is problematic because it can create an incentive to stop motorists without proper grounds when troopers have deficient stop records and they become desperate to meet supervisors' expectations. Of greater concern is the risk that some troopers will become racially selective when making arbitrary stops. When deciding whether to make an improper stop a trooper must decide whether the driver will complain, and whether he/she will be taken seriously if they do. For example, the likely presumption will be that it is safer to arbitrarily stop a young person of color (or any person who appears to be poor or powerless) than it is to stop a driver who appears to be influential.

In response, a spokesperson for MSP said troopers are trained to make stops only when there is a motor vehicle violation or when there are suspected crimes, and racial profiling is strictly prohibited by several department policies and MSP's code of conduct. The ACLU nevertheless remains concerned about the possibility that troopers determined to engage in misconduct can distort or misstate facts in reports and they can otherwise ignore departmental policies. The only way to ensure that current policies and practices of the agency prevent racial profiling and other forms of discrimination is to engage an outside consultant to conduct an expert review to determine the presence or absence of racial profiling.

#### **Conclusion**

A new administration provides an opportunity to make significant changes in the Michigan State Police. The ACLU of Michigan strongly recommends: engagement of an outside expert consultant to determine whether troopers engage in unlawful racial profiling and other forms of discrimination; abandonment of warning stops; elimination of pretext stops and racial profiling as drug interdiction strategies; and the abandonment of use of stop numbers for performance evaluations.