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*Policy Directive*  
*San Francisco District Attorney's Office*  
*Declination of Contraband Charges Based on Pretextual Stops*

## I. INTRODUCTION

Racial profiling undermines law enforcement legitimacy. It creates animus and distrust in communities of color and decreases public safety. It is the duty and obligation of the District Attorney's Office to protect the constitutional rights of every San Franciscan and to increase the fairness of our system of justice. To ensure the protection of all our communities, we will discourage "stop and frisk" style policing strategies.

The 2016 Report from the Department of Justice's Office of Community Oriented Policing Services (COPS) validated previous studies that have shown racially disparate treatment in traffic stops and post-stop searches. The report recommended several policy changes in this area that have yet to be implemented.

According to the 2020 Racial Identity and Profiling Advisory Board Report, in San Francisco, Black people were **stopped at rates over five times their representation** in the city's overall population -- a greater disparity than Los Angeles or San Diego.

This policy rebuilds trust and cooperation with affected communities in order to facilitate crime prevention and addresses the ongoing problem of racial disparities in the criminal justice system.

## II. POLICY

The San Francisco District Attorney's Office has a presumption against filing possession of contraband crimes when the search stemmed from an infraction-related stop, and no other independent probable cause (such as observed contraband in plain view) or other legal justification exists to justify the search and seizure of the contraband.

This policy encompasses "consent-only" searches because of the long-standing and documented racial and ethnic disparities in law enforcement requests for consent to search.

This policy also encompasses any search that is initiated after a detention is prolonged based on an otherwise unrelated inquiry from an officer regarding whether the person stopped for the infraction is "on probation or parole."

This policy only applies to infraction-related stops and post-stop searches for contraband where there is no other articulable suspicion of criminal activity, and to any potential criminal possessory charges that result from this investigative action.

This policy does not prevent any prosecution wherein a law enforcement agency has conducted a valid and legal stop to facilitate investigation of a non-possessory crime, such as, for example, homicide, sexual assault, aggravated assault, assault with a firearm, or driving under the influence.

This policy is an exercise of discretion by the San Francisco District Attorney's Office and does not purport to affect the legality or propriety of any other law enforcement officer's actions.

This policy does not, in any way, discourage the continued enforcement of traffic offenses that affect the safety of San Francisco residents. Rather, this policy is only intended to discourage the use of traffic laws as a pretext to stop and search people of color based on implicit or express bias.

The San Francisco District Attorney will continue to support forensic processing or confiscation and destruction of any contraband seized as a result of any law enforcement action.

This policy will be periodically reevaluated after data collection and review of SFPD's compliance with the DOJ COPS recommendations or any other effective change to traffic stop or consent-search procedures that addresses racial disparity.

### **III. DATA COLLECTION**

All ADAs shall assist with the District Attorney's Office procedures to collect data related to this policy. Any case that is discharged or dismissed because of this policy shall be recorded. The data will be analyzed to evaluate the effectiveness of this policy, and to ensure that the policy is applied consistently. Additionally, the data will be shared with the arresting agencies as a feedback to them for training purposes.

### **IV. EXCEPTIONS**

Deviation from this policy should be made in writing in the limited circumstances where necessary and requires the approval of a Chief of the Criminal Division or the District Attorney.

## **Appendix**

### **PRETEXT STOP AND SEARCH**

A "pretext" or "pretextual" stop and search occurs when a law enforcement officer detains a person for a minor offense (i.e. traffic or other infraction) because the officer seeks to investigate the person for potential involvement in another, unrelated crime (i.e. drug possession),[1]

## CRITICISM

Pretext stops have been criticized because they give “carte blanche” for police to stop motorists due to “innumerable traffic laws, many of which are vague and subjective.”[2] Pretext stops are prohibited under the state constitutions of Washington and New Mexico.[3]

The California Vehicle Code contains hundreds of equipment and moving violations that can result in a stop and citation or arrest for an infraction.[4] Similarly, there are also hundreds of local San Francisco ordinances that can form the basis of a citation for an infraction.[5] For these reasons, in San Francisco law enforcement has almost unfettered discretion to stop an individual for an infraction when the actual goal is to conduct a subsequent search for contraband.

Pretext stops are similar to other discretionary police tactics, such as the disavowed and discriminatory “stop and frisk” practices that ensnared millions of Black and Latinx persons in major cities across the United States. The use of pretext stops creates a situation wherein law enforcement officers can exercise their unfettered discretion based on conscious or unconscious bias, and they can profile individuals based on perceived race, ethnicity or other social category.[6] This practice has become so commonplace that the term “DWB” or “Driving While Black or Brown” has become part of the everyday vernacular.

Though too often *unreported*, the media continues to report cases where an innocent person of color was targeted because of the color of his or her skin.[7]

Scholar/writer Michelle Alexander has decried the use of pretext stops and resulting “consent-searches” in her groundbreaking work “The New Jim Crow.”

## PERSISTENT AND ONGOING RACIAL DISPARITY IN SAN FRANCISCO

For almost twenty years, there have been numerous reports that have highlighted the gravity of the problem of racial profiling caused by pretext infraction stops and searches in San Francisco:

### **2002 ACLU Traffic Stop Analysis and Report[8]:**

A 2002 analysis of traffic stop data collected by SFPD, and obtained through Public Records Act requests for a complete year (covering over 50,000 traffic stops in all regions of the city) found that Black motorists were significantly more likely to be stopped by San Francisco police officers in every police district in the city, Black motorists were 3.3 times more likely to be searched following a traffic stop than whites, and Latinos were 2.6 times more likely. Black motorists were more than twice as likely as whites to be asked their “consent” to be searched without any probable cause of a crime, and though Black and Latinx individuals were disproportionately subjected to intrusive stops and searches, San Francisco police officers were significantly less likely to find any evidence of criminality as a result of searching Black and Latinx individuals.

**2016 Report of the Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement.[9]**

Analysis of 2015 SFPD traffic stop data showed that Black and Latinx individuals were more likely to be searched than any other group following a traffic stop. Of those stopped in 2015, searches were conducted on 1.1 percent of Asian people, 13.3 percent of Black people, 5.3 percent of Hispanic people, 1.7 percent of White people, and 1.3 percent of “Other” races/ethnicities. The report also highlighted the community perception that police officers disproportionately asked Black or Latinx individuals if they were on probation or parole as a part of their traffic stop encounter.

**2016 U.S. Department of Justice Office of Community Oriented Policing Services Report and Recommendations.**

Black people were 24% more likely to be stopped for a traffic violation than their estimated population in the driving community and 9% more likely than their estimated population among potential traffic violators. Black and Latinx drivers were disproportionately arrested and searched following traffic stops and **less** likely to be found with contraband than White drivers. The report noted: “The racial disparity in traffic stops and post-stop outcomes appears to be large and statistically significant.”

The DOJ report highlighted several policy recommendations that have not, as of the date of this policy’s effect, been fully implemented. [10]

Since the DOJ study, there has been no update to the SFPD Department General Order regarding consent searches. The Department Bulletin 19-136 (issued 6/25/19) 1) only applies the existing written consent search policy to a search of a person’s residence, 2) does not require that the consent be read in the appropriate language, 3) does not require documented approval by a superior officer and 4) does not require additional safeguards to ensure consent is knowing and voluntary.

**2020 Racial Identity and Profiling Advisory Board Report[11]**

The report analyzed 1.8 million traffic stops statewide, from July through December 2018 from the state’s eight largest law enforcement agencies — including California Highway Patrol and officers in jurisdictions in Los Angeles, San Francisco, San Diego, Riverside and San Bernardino. In San Francisco, SFPD analyzed over 50,000 stops from 2018 and found that Black people were **stopped at rates over five times their representation** in the city’s overall population -- a greater disparity than Los Angeles or San Diego. White individuals were **stopped at a lower rate** than their representation in the population. Statewide, Officers searched Black people whom they stopped at a rate that was **2.9 times** the rate they searched White individuals. When law enforcement officers were granted greater discretion to conduct a search (such as asking for “consent”), yield rates for racial/ethnic groups of color were lower than for White individuals.

Of note, the RIPA report found that, state-wide, narcotics were seized in approximately 1.3% of all traffic stops, and weapons or ammunition seized in 0.6% of all traffic stops.

**The effect on community relations and engagement.**

The use of pretext stops contributes to the racial disparity in our jail and prison populations. Numerous studies show that Blacks and Whites consume and sell drugs at similar rates, but our jails and prisons are disproportionately filled with Black and Latinx individuals charged with these and other possessory offenses. [12] While the reasons for this disparity are numerous, relative to their portion of the population, racial and ethnic minorities are overrepresented among the individuals involved in the criminal justice system. In the City and County of San Francisco, Black people accounted for 41 percent of those arrested between 2008 and 2014, 43 percent of those booked into jail, 38 percent of cases filed by the San Francisco District Attorney's Office, and 39 percent of new convictions despite only accounting for 6 percent of the population of the county.

The use of pretext stops as an investigative tactic breeds distrust of law enforcement and the prosecution when individuals feel targeted. [13] As a result, while the overall efficacy of this law enforcement tactic is questionable, the cost to profiled individuals and communities is great. Justice Sonia Sotomayor recently stated in a dissent: "Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more." [14]

Based on the numerous studies cited above, the use of this enforcement tactic causes great harm to individuals and communities in relation to the minimal yield rate associated with this invasive law enforcement tactic, has a negative effect on building necessary trust with affected communities and has hindered the effective prosecution of criminal cases.

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[1] The use of pretext stops was sanctioned by the Rehnquist Supreme Court in the 1996 *Whren* decision. *Whren v. United States* (1996) 517 U.S. 806. Justice Ginsburg has recently suggested that it may be appropriate to reevaluate *Whren* in light of the criticism that the decision promotes improper police arbitrariness. See *District of Columbia v. Wesby* (2018) 583 U.S. \_\_\_, dissenting opinion of J. Ginsburg.

[2] <https://www.cato.org/blog/pretextual-traffic-stop-should-require-sufficient-pretext>

[3] *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999). There has been no data to suggest that these jurisdictions have suffered from greater criminal activity as a result of their added constitutional protections

[4] The extensive list of statutory moving violations and equipment violations can be found at: <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=VEH>

[5] San Francisco has numerous and voluminous Municipal Codes that can result in citations for infractions. The San Francisco Municipal Police Code contains many of these potential violations, and can be found at [https://codelibrary.amlegal.com/codes/san\\_francisco/latest/sf\\_police/0-0-0-2](https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-2)

[6] See e.g., “LET’S GET REAL: BEHAVIORAL REALISM, IMPLICIT BIAS, AND THE REASONABLE POLICE OFFICER” Megan Quattlebaum, Stanford Journal of Civil Rights and Civil Liberties 2018, <https://law.stanford.edu/wp-content/uploads/2018/05/Quattlebaum-FINAL.pdf>

[7] For example, former Attorney General of the United States Eric Holder: <https://thehill.com/homenews/news/215627-holder-tells-ferguson-students-he-was-a-victim-of-racial-profiling>; Florida’s first and only State’s Attorney Aramis Ayala: <https://www.washingtonpost.com/news/post-nation/wp/2017/07/13/police-stop-a-woman-for-her-tinted-windows-then-learn-shes-a-florida-state-attorney/>;

[8] See <https://www.aclunc.org/sites/default/files/A%20Department%20in%20Denial%20-%20The%20San%20Francisco%20Police%20Department%27s%20Failure%20to%20Address%20Racial%20Profiling.pdf>

[9] [https://sfdistrictattorney.org/sites/default/files/Document/BRP\\_report.pdf](https://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf)

[10] [https://cops.usdoj.gov/html/dispatch/11-2016/assessment\\_of\\_san\\_francisco\\_pd.asp](https://cops.usdoj.gov/html/dispatch/11-2016/assessment_of_san_francisco_pd.asp)

[11] <https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>

[12] See e.g. Brookings Institute: [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice)

[13] Baumgartner, Epp, and Shoub, *Suspect Citizens* 2018.

[14] *Utah v. Strieff*, 579 U.S. \_\_\_\_ (2016); dissenting opinion of J. Sotomayor.