Minority Report Supplementing the Report of the New Jersey Senate Judiciary Committee's Investigation of Racial Profiling and the New Jersey State Police

The four Democratic members of the Senate Judiciary Committee offer the following minority report to expand upon the report released by the Judiciary Committee.

Consent Searches

The Committee's report recommends that an Executive Order be issued imposing a moratorium on consent searches made in connection with Title 39 violations on major highways. Under the Committee's recommendation, before the use of such searches could be reinstated, the Office of the Attorney General would be required to provide information to the Committee demonstrating that sufficient safeguards exist to monitor the use and prevent the abuse of consent searches.

The Democratic members of the Committee believe, however, that this recommendation should go further. In the event that the Governor fails to end consent searches by Executive Order, the Legislature should enact legislation banning the use of consent searches in connection with traffic stops. Furthermore, any ban on the use of consent searches in connection with traffic stops, whether by Executive Order or legislation, should apply to all law enforcement agencies, regardless of the type of roadway on which the traffic stop takes place.

During his testimony before the Committee, Attorney General John Farmer conceded that consent searches yield "very little" in the way of contraband, thus supporting the view that their questionable utility is outweighed by the significant risk

they pose to the civil liberties of motorists. It should also be noted that the only specific example cited by AG Farmer in defense of the use of consent searches was that of a terrorist who was stopped on his way to New York and a consent search revealed explosives. But AG Farmer's public testimony was incorrect. Later research by the Committee revealed that the case he cited, U.S. v. Kikumura, 706 F. Supp. 331 (1989), did not involve a consent search. It involved a probable cause search because the State trooper who stopped Kikumura for a motor vehicle violation saw cylinders of gunpowder and lead shot in the back seat of the car. AG Farmer also conceded that he himself came close to issuing a directive ending consent searches.

The Committee heard compelling testimony from motorists and troopers illustrating the potential for abuse of consent searches. The Committee reviewed disturbing data concerning consent searches on the Turnpike during 2000. The data showed that despite the extensive attention that has been trained on consent searches since the Interim Report in April, 1999, minorities continued to be subject to consent searches at a widely disproportionate rate and most of the time, those searches yielded nothing. Little had changed in the two years following the Interim Report, despite a federal Consent Decree.

The evidence before the Committee was clear: the marginal value of consent searches in the context of traffic stops is greatly outweighed by the risk they pose to the civil rights of law-abiding motorists. Furthermore, the Committee heard testimony from troopers who also questioned the value of consent searches, and who said they are simply not a substitute for good police work. The Committee also heard expert testimony that was highly critical of the use of consent searches as a law enforcement tool.

The Democratic members of the Committee emphasize that banning consent search does not in any way limit the ability of law enforcement personnel to conduct automobile searches based on probable cause, which has historically been the standard for such searches. In the weeks since the Judiciary Committee's hearings, AG Farmer has not provided any additional information that alters these findings.

Failed Leadership

The Democratic members of the Judiciary Committee are of the belief that the full Committee's report fails to explicitly discuss one of the central problems identified as a result of the Committee's investigation. It is the view of the Democratic members of the Judiciary Committee that a failure of leadership at the highest levels of the Department of Law and Public Safety permitted the racial profiling problem to be ignored or concealed for many years.

The Committee reviewed troubling evidence and testimony indicating that in the years following the March 1996 ruling in State v. Pedro Soto, and during the course of the investigation by the United States Department of Justice (DOJ) investigation in 1997 and 1998, State officials gathered significant evidence suggesting that Judge Francis' conclusions in Soto had been correct. The evidence included statistical data that clearly indicated that on the southern part of the Turnpike, minority drivers were subjected to traffic stops and consent searches at disproportionately high rates. The Committee's investigation also found that this evidence was apparently widely circulated within the highest levels of the Department of Law and Safety, but was not acted upon for at least two years, until it was used to form the basis for the Interim Report in April, 1999.

This evidence demanded greater scrutiny and honest examination as it was

gathered. But instead, it was met with inaction at the highest levels of State government. In the aftermath of Soto, even modest reforms intended to improve training, accountability and supervision were delayed or abandoned midstream. Critically important reforms, such as the Computer Aided Dispatch and Records Management System, were riddled with delays, problems and failure. In the face of an inquiry by the U.S. Department of Justice into the issues identified in Soto, the leadership within the Department of Law and Public Safety again failed to look inward and to investigate whether there was a basis for the federal government's concerns. Rather than attempting to get to the truth, and confronting whatever problems existed, leadership within the Department of Law and Public Safety responded to DOJ with foot dragging, delays, repeated failures to produce relevant information, and efforts to limit the scope of the federal inquiry.

This persistent failure of leadership was a disservice to the public, and a disservice to the rank and file within the State Police.

The Intervening Indictment

The Democratic members of the Committee also believe that specific concerns should be raised concerning the manner in which the indictment of Troopers Hogan and Kenna for records falsification was handled.

Testimony before the Committee indicated that the grand jury investigation into the shooting incident was suspended in order to pursue the indictment for records falsification charges more quickly, and those steps were taken solely to respond to perceived pressure from the public for action in the matter. The candid witness testimony on this issue indicated that the decision to seek the lesser indictment and publicize it was

made against the advice of career prosecutors, and at the risk of tainting the grand jury investigation into the more serious shooting charges. It is troubling that this inappropriate and unusual process has now received the imprimatur of the Appellate Division in State v. Hogan, 336 N.J. Super. 319 (App. Div. Jan. 5, 2001).

That ruling also suggests that State officials left the Appellate Division with the impression that the alternative option -- delaying the false reports investigation until the grand jury investigation into the shooting incident was concluded – was "highly impractical and self defeating," and would have posed a risk to the defendants' rights. This is disturbing because that alternative course, bringing the records falsification charges before a separate grand jury only after the shooting grand jury concluded its work, was exactly the route that had been planned by the career prosecutors who were handling the case, and in their view it was the preferable route. Indeed, it was clear from the testimony that the records falsification indictment was speeded up for precisely the reason Judge Smithson identified in his ruling: "there existed powerful and intimidating forces driving the decision making of the Office of the Attorney General.... the motivation to allow the return of the indictments at that time was considerably more a matter of political expediency then of concern for the substantive rights of defendants Hogan and Kenna."

Senator John A. Lynch

Senator Edward T. O'Connor

Senator John A. Girgenti

Senator Garry J. Furnari