NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0529-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM L. SCOTT,

Defendant-Appellant.

APPROVED FOR PUBLICATION
January 31, 2023
APPELLATE DIVISION

———————————————

Argued October 25, 2022 – Decided January 31, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment Nos. 20-02-0189 and 20-03-0215.

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for the appellant (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the brief).

Colleen Kristan Signorelli, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Colleen Kristan Signorelli, on the brief).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

After pleading guilty to robbery, defendant appeals the denial of his motion to suppress an imitation handgun and the victim's cell phone found on his person when he was stopped and frisked by police. The officers detained defendant because he fit the be-on-the-lookout (BOLO) description of the person who had committed a robbery in the vicinity just minutes earlier. The BOLO described the robber as a Black male wearing a dark raincoat. However, the victim did not provide the race of the perpetrator when she reported the crime. The State acknowledges it does not know why the police dispatcher included a racial description of the robber in the BOLO alert.

Defendant contends the dispatcher assumed the robber was Black based on racial prejudice, thus constituting prohibited discrimination in violation of the Fourteenth Amendment Equal Protection Clause and its state constitutional analogues, Article I, Paragraphs 1 and 5 of the New Jersey Constitution. In rejecting defendant's equal protection claim, the motion court focused on the conduct of the responding police officers, rather than the dispatcher, concluding defendant failed to establish a prima facie case of discrimination under the burden-shifting paradigm adopted by our Supreme Court in State v. Segars, 172 N.J. 481 (2002). The motion court also rejected defendant's contention that the stop and ensuing frisk were unlawful under the Fourth Amendment.

This appeal requires us to address three issues of first impression. As a threshold matter, we must decide whether the conduct of a police dispatcher can be the basis for an equal protection violation under the New Jersey Constitution. We hold that decisions made and actions taken by a dispatcher can be attributed to police for purposes of determining whether a defendant has been subjected to unlawful discrimination.

Second, we address whether "implicit bias" can be a basis for establishing a prima facie case of police discrimination under the Segars burden-shifting paradigm. The problem of implicit bias in the context of policing is both real and intolerable. Accordingly, we hold evidence that permits an inference of implicit bias can satisfy a defendant's preliminary obligation to establish a prima facie case of discrimination under Segars. When, as in this case, the evidence supports such an inference, a burden of production shifts to the State to provide a race-neutral explanation. The State's inability to offer a race-neutral explanation for the dispatcher's assumption that a Black man committed the robbery constitutes a failure to rebut the presumption of unlawful discrimination.

Third, we must decide whether and in what circumstances the independent source and inevitable discovery exceptions to the exclusionary rule apply to the suppression remedy for a violation of Article I, Paragraphs 1

and 5 of the New Jersey Constitution. After considering the twin purposes of the exclusionary rule and balancing the cost of suppression against the need to deter discriminatory policing and uphold the integrity of, and public confidence in, the judiciary, we conclude the independent source exception does not apply in these circumstances. That exception allows a reviewing court to redact unlawfully obtained information to determine whether the remaining information is sufficient to justify a search. We conclude the application of any such redaction remedy would undermine the deterrence of discriminatory policing and send a message to the public that reviewing courts are permitted to essentially disregard an equal protection violation so long as police also relied on information that was lawfully disseminated.

With respect to the inevitable discovery doctrine, we hold it may apply to racial discrimination cases only if the State establishes by clear and convincing evidence that the discriminatory conduct was not flagrant. Because the State acknowledges it does not know why the dispatcher assumed the robber was Black, it cannot meet that burden of proof. We therefore reverse the denial of defendant's motion to suppress.

I.

We discern the following pertinent facts from the record. Shortly before 8:00 p.m. on December 9, 2019, a woman reported to police that she had been

robbed. She conveyed that, as she was walking home, a man in a dark raincoat grabbed her by the back of the neck and pressed an object she believed to be a gun against her temple. The man demanded money and her cell phone. The victim did not have money but gave the man her phone. She observed the man fleeing south on Summit Avenue and turning west on Montgomery Street. She then ran into her home and called 911.

The victim described the perpetrator as a male wearing a dark raincoat. When asked whether the man was "Black, white, or Hispanic," she responded she "didn't see." The dispatcher relayed the victim's description of the robber, including his last known direction and possible possession of a gun, to Jersey City Police Department Officers Eric Cirino and Travis Hernandez. However, the dispatcher improperly added to the victim's description that the robber was a Black male.[1]

A minute later, the officers observed a Black male, later identified as defendant, wearing a dark raincoat jogging north on Bergen Avenue about three blocks from the robbery. Defendant was the first Black male wearing a dark raincoat the officers saw in the area. The officers approached defendant, got out of their vehicle, and ordered him to stop. Defendant was directed to

[1] The State does not dispute the racial description in the BOLO alert was not supported by the victim's report. The State did not present evidence or argue that the mistake was made by someone other than the police dispatcher.

put his hands against a wall whereupon Officer Hernandez patted him down. The frisk turned up an imitation handgun and the victim's cell phone.

After the imitation gun and cell phone were discovered, the officers requested detectives arrange a "show up" identification. Before participating in that identification procedure, the victim used the "find my iPhone" app, which showed her cell phone was near the corner where defendant was arrested. When brought to the scene of the arrest, the victim identified the cell phone as hers and stated defendant's raincoat was the one the robber had been wearing.

In February 2020, defendant was charged by indictment with first-degree robbery, N.J.S.A. 2C:15-1(a)(2), and related offenses for a different robbery that took place on November 26, 2019. That indictment is not at issue in this appeal.

In March 2020, a grand jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1(a)(2), and fourth-degree possession of an imitation firearm for an unlawful purpose, N.J.S.A. 2C:39-4(e).

In fall 2020, a Law Division judge convened a three-day hearing on defendant's suppression motion. On November 18, 2020, the judge denied the motion, rendering an eleven-page written decision.

On June 29, 2021, defendant appeared before the motion judge and entered a guilty plea to one count of second-degree robbery—the November 26, 2019 robbery—and one count of first-degree robbery—the robbery at issue here. On October 8, 2021, defendant was sentenced to five years in prison for the second-degree robbery and six years in prison for the first-degree robbery. Both sentences were subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and were ordered to be served concurrently.

Defendant raises the following contentions on appeal:

> POINT I
>
> THE EXCLUSIONARY RULE REQUIRED SUPPRESSION BECAUSE THE EVIDENCE WAS OBTAINED IN VIOLATION OF [DEFENDANT]'S CONSTITUTIONAL RIGHT TO BE FREE FROM RACIALLY[-]INFLUENCED POLICING AND UNREASONABLE SEARCHES AND SEIZURES.
>
> > A. THE DISPATCHER'S DECISION TO ISSUE A BOLO FOR A BLACK MALE, WHEN THE VICTIM EXPRESSLY STATED THAT SHE DID NOT KNOW THE RACE OF THE SUSPECT, ESTABLISHED A PRIMA FACIE CASE OF RACIAL TARGETING THAT THE STATE DID NOT, AND CANNOT, REBUT.
> >
> > B. THE DISPATCHER'S FAILURE TO TRANSMIT AN ACCURATE DESCRIPTION WAS OBJECTIVELY UNREASONABLE AND THUS VIOLATED THE FOURTH AMENDMENT AND STATE CONSTITUTION.

C. THE STOP AND FRISK WAS NOT VALID UNDER AN INDEPENDENT-SOURCE ANALYSIS.

II.

The scope of our review of a suppression hearing is limited. See State v. Handy, 206 N.J. 39, 44–45 (2011). We "must uphold the factual findings underlying the trial court's decision, so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Evans, 235 N.J. 125, 133 (2018) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

In contrast to the deference we owe to a trial court's factual and credibility findings, we review a trial court's legal conclusions de novo. State v. S.S., 229 N.J. 360, 380 (2017). Because issues of law "do not implicate the fact-finding expertise of the trial courts, appellate courts construe the Constitution, statutes, and common law de novo—with fresh eyes—owing no deference to the interpretive conclusions of trial courts, unless persuaded by their reasoning." Ibid. (internal quotation marks omitted) (quoting State v.

Morrison, 227 N.J. 295, 308 (2016)); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (noting appellate courts are not bound by a trial court's interpretations of the legal consequences that flow from established facts). In the event of a mixed question of law and fact, we review a trial court's determinations of law de novo but will not disturb a court's factual findings unless they are "clearly erroneous." State v. Marshall, 148 N.J. 89, 185 (1997).

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Paragraphs 1 and 5 of the New Jersey Constitution, a person's race may not be considered as a basis for making law enforcement decisions other than when determining whether an individual matches the description in a BOLO alert. Segars, 172 N.J. at 492–93; State v. Nyema, 249 N.J. 509, 524 (2022) (citing Attorney General, Directive Establishing an Official Statewide Policy Defining and Prohibiting the Practice of "Racially-Influenced Policing" (June 28, 2005) (Directive 2005-1)).[2]

---

[2] In Nyema, the Court noted:

> The Attorney General appear[ed as amicus] for the limited purpose of reiterating that racial profiling, in all its forms, must be eliminated from policing decisions. The Attorney General asserts that consideration of a person's race or ethnicity—in drawing an inference that an individual may be

In Segars, the Court explained that a defendant advancing a claim of racial discrimination "has the ultimate burden of proving by a preponderance of the evidence that the police acted with discriminatory purpose, i.e., that they selected him because of his race." 172 N.J at 493. In addition to that ultimate burden, a defendant bears the preliminary obligation of establishing a prima facie case of discrimination. Id. at 494. A prima facie case is one in which the evidence, including any favorable inference to be drawn therefrom, could sustain a judgment. Ibid. (citing Pressler, Current N.J. Court Rules, cmt. on R. 4:37-2(b) (2002)). Once a defendant establishes a prima facie case of discrimination through relevant evidence and inferences, the burden of production shifts to the State to articulate a race-neutral basis for the challenged police action. Ibid.

The State's burden of production "has been described as so light as to be 'little more than a formality.'" Ibid. (quoting Mogull v. CB Com. Real Est. Grp., 162 N.J. 449, 469 (2000)). "It is met whether or not the evidence

---

> involved in criminal activity or in exercising police discretion with respect to how the officer will deal with that person—will not be tolerated and is prohibited by Attorney General Law Enforcement Directive No. 2005-1, which established a statewide policy prohibiting the practice of "Racially-Influenced Policing."
>
> [249 N.J. at 523–24.]

produced is found to be persuasive." Ibid. "In other words, the determination of whether the party defending against an [e]qual [p]rotection challenge has met its burden of production 'can involve no credibility assessment.'" Ibid. (quoting Mogull, 162 N.J. at 469). The Court nonetheless stressed that "[f]or the State to prevail, it cannot remain silent once a prima facie case has been established by a defendant because the '[e]stablishment of the prima facie case in effect creates a presumption that the [State] unlawfully discriminated against the [defendant].'" Id. at 495 (second and third alterations in original) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)). However, if the State articulates a race-neutral explanation for the challenged police conduct, the presumption of discrimination "simply drops out of the picture." Ibid. In that event, the defendant retains the ultimate burden of proving discriminatory enforcement. Ibid.

The specific issue in Segars was whether the officer relied on race to conduct a motor vehicle lookup of the defendant's car, which was parked in a bank parking lot. Id. at 493. The officer testified he did not use the automated teller machine (ATM) during the events in question, never saw Segars, and thus he did not know Segars's race when running the search. Id. at 485–86. He said the query was totally random and that he checked and ticketed others, including a Caucasian motorist, during the same period. Ibid. Segars testified

the officer used the ATM immediately before he did and passed him while exiting the bank. Id. at 485. Segars "noticed that [the officer] sort of was looking with sort of a question mark on his face. As [Segars] was getting ready to use the machine, [the officer] was sort of looking back." Id. at 485. The defense presented bank records to establish that the officer did, in fact, use the ATM one minute before Segars. Id. at 487. The officer checked Segars's plates two minutes after he saw him and, thus, did not testify accurately about those occurrences. Ibid.

The Court reasoned, "[f]rom that evidence, a trier of fact could infer that [the officer] checked Segars's plates because of his race and testified falsely about what he did because he knew that racial targeting is wrong. Put another way, Segars met his burden of establishing a prima facie case of selective enforcement." Id. at 496–97.

The Court further explained that the State had presented

> a race-neutral explanation not subject to a credibility assessment at the production phase of the case. Both parties having met their burdens of production, the question then became whether, on the total record, Segars met his burden of persuasion. Because the evidence that raised the inference of racial targeting also impeached [the officer's] race-neutral rationale, a critical part of the State's rebuttal should have been the production of an explanation for [the officer's] inaccurate testimony. No such explanation was forthcoming. That is the pivotal point in the case.

[Id. at 497.]

The Court concluded an inference of discriminatory targeting was established by Segars's testimony and documentary evidence, the officer's inaccurate testimony, and the State's failure to recall the officer for an explanation. Ibid. Because the State did not defeat the inference of discrimination, the Court ruled that Segars established racial targeting and, on that basis, invoked the exclusionary rule to suppress the State's evidence. Id. at 498–99.

III.

Turning to the matter before us, the motion court found defendant had not established a prima facie case of discrimination. In reaching that conclusion, the motion court focused solely on the conduct of Officers Cirino and Hernandez. In doing so, the court misconstrued defendant's equal protection contention. We have no quarrel with the State's argument—and the motion court's finding—that Officers Cirino and Hernandez cannot be faulted for relying on the BOLO alert transmitted to them. But that finding misses the point. Defendant does not argue that the officers themselves engaged in racially-influenced policing. Rather, the gravamen of defendant's equal protection claim is that the dispatcher committed a constitutional violation by providing an unsupported description of the perpetrator's race. The issue

before us is whether the dispatcher's inclusion of an unsupported racial description supports an inference of discrimination sufficient to constitute a prima facie case for purposes of the Segars burden-shifting template.

Before we can address whether the dispatcher's conduct supports an inference of racial discrimination, we must consider the threshold question of whether the actions of a dispatcher can be attributed to law enforcement for purposes of establishing a prima facie case. Although we are aware of no precedents concerning the role of police dispatchers with respect to equal protection claims, we find helpful guidance, indeed clear instruction, in our Supreme Court's decision in Handy, a Fourth Amendment case.

There, a police dispatcher mistakenly informed the police officer of a warrant for the defendant's arrest, even though the first names were spelled differently and the date of birth for the person subject to the warrant was different from the defendant's birth date. Handy, 206 N.J. at 41–42. The officer relied on the warrant information provided by the dispatcher and arrested the defendant. Id. at 42. The Court concluded the dispatcher's error was attributable to police and, on that basis, found the arrest was unlawful, triggering the Fourth Amendment exclusionary rule. Ibid.

The Court reasoned that although the arresting officer's conduct was objectively reasonable, "the dispatcher's actions were plainly unreasonable . . .

in light of what the dispatcher actually knew." Id. at 47. The State conceded that "the dispatcher was not attenuated from the arrest, but was an integral link in the law enforcement chain." Id. at 50. The Court emphasized the dispatcher "was literally a co-operative in [the arrest] along with the officer on the scene." Id. at 52. Relatedly, the majority rejected the notion that a Fourth Amendment exclusionary rule analysis is limited to the conduct of the arresting officer. Id. at 54. It stated, "[u]nder that construct, police operatives, like the dispatcher here, [would be] free to act heedlessly and unreasonably, so long as the last man [or woman] in the chain does not do so. Nothing in our jurisprudence supports that view." Ibid.

We see no reason to limit the Court's rationale to violations of the Fourth Amendment—especially since the Attorney General Directive banning racially-influenced policing expressly applies to "sworn officer[s] or civilian employee[s] of a police agency acting under the authority of the laws of the State of New Jersey." Directive 2005-1, § 2(a) (emphasis added). Because we, no less than the Attorney General, are committed to deterring discriminatory policing in all of its permutations, we reject the notion that a police dispatcher can engage in racial discrimination without tainting ensuing actions taken by sworn officers relying on the dispatcher's discriminatory conduct. Accordingly, we hold a defendant can establish a prima facie case of

discrimination through relevant evidence and inferences that a police dispatcher engaged in impermissible racial targeting.

IV.

We next address the substantive question of whether defendant presented a prima facie case of discrimination. Certainly, an inference can be drawn that the dispatcher assumed the robber was Black, otherwise she would not have included that racial description in the BOLO alert. See Segars, 172 N.J. at 494 (recognizing that inferences favorable to a defendant can be drawn in determining whether a prima facie case has been established). The remaining fact-sensitive question is whether another inference can be drawn that the dispatcher's assumption was the product of racial prejudice. Defendant posits there are only two explanations for why the dispatcher assumed the robber's race: "(1) she deliberately included race based on her belief that Black men are more likely to commit crime; (2) she included race because she unconsciously associates Black men with criminality." Defendant argues that either of these explanations would establish a prima facie case of racially-influenced policing.

There may well be other conceivable explanations for the dispatcher's erroneous inclusion of a racial description. It is not our task, however, to speculate on the State's behalf. The critical point is that a prima facie case "is one in which the evidence, including any favorable inference to be drawn

therefrom, could sustain a judgment." Id. at 494 (emphasis added). It does not matter for purposes of establishing a prima facie case that there may be alternate explanations. Indeed, that would put the cart before the proverbial horse given that once a prima facie case is established, it falls upon the State to offer a race-neutral explanation.

We next consider whether defendant was required to prove the dispatcher acted with racial animus to establish a prima facie case or whether evidence of "implicit bias" is sufficient to satisfy defendant's preliminary obligation under Segars. We begin by emphasizing that one does not have to be a racist to rely on stereotypes. It is clear in this regard that an officer or civilian police employee can violate Directive 2005-1 by unconsciously relying on such stereotypes. Although we are not bound by either the Directive's broad definition of racially-influenced policing or the training materials developed by the Attorney General pursuant to Section 3 of that Directive, we find the Attorney General's reasoning to be persuasive. We reiterate our Supreme Court recently cited to Directive 2005-1 as authority. See Nyema, 249 N.J. at 524, 529–30. And as former Chief Justice Weintraub commented in Eleuteri v. Richman, "[t]he judiciary, of course, is not the sole guardian of the Constitution. The executive branch is equally sworn to uphold it." 26 N.J. 506, 516 (1958).

In State v. Andujar, a recent case involving the jury selection process, our Supreme Court recognized the nature and scope of the problem of implicit bias, explaining, "[i]mplicit bias refers to . . . attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Such biases . . . are activated involuntarily and without an individual's awareness or intentional control." 247 N.J. 275, 302–303 (2021) (internal quotation marks and citations omitted). The Court acknowledged that the landmark cases on racial discrimination in jury selection—Batson v. Kentucky, 476 U.S. 79 (1986) and State v. Gilmore, 103 N.J. 508 (1986)—address purposeful discrimination. Id. at 302. Even so, and importantly for purposes of this appeal, the Court commented that "implicit bias is no less real and no less problematic than intentional bias." Id. at 303. The Court added that "[f]rom the standpoint of the State Constitution, it makes little sense to condemn one form of racial discrimination yet permit another." Ibid. Accordingly, the Court established a prospective new rule requiring that implicit bias be considered as part of Gilmore analysis. Id. at 315.

In view of the Andujar Court's recognition of the constitutional harm that can be caused by implicit bias, we likewise hold that implicit bias may be considered as part of a Segars analysis notwithstanding that Segars provides that a defendant bears the "ultimate burden of proving by a preponderance of

the evidence that the police acted with discriminatory purpose." Segars, 172 N.J. at 493 (emphasis added). Accordingly, evidence of implicit bias can support an inference of discrimination that would establish a prima facie case under Segars, shifting the burden of production to the prosecutor.

But even if we were to hold that evidence of implicit bias is not sufficient to establish a prima facie case of purposeful discrimination under Segars, the evidence in this case, when viewed in a light favorable to defendant's claim, supports the inference the dispatcher made a conscious decision to infer the robber's race based on a prejudiced assumption about the correlation of race and criminality.[3] While any such inference of intentional discrimination might be rebutted under the Segars burden-shifting paradigm, the State was obliged—and failed—to do so.

To summarize, we believe defendant presented evidence establishing a prima facie case, shifting the burden of production onto the prosecutor to provide a race-neutral explanation for the dispatcher's assumption that the robber was a Black man. As we have noted, the State's burden of production is

[3] Segars explains that in determining whether a defendant has established a prima facie case, a reviewing court may consider "favorable inferences" to be drawn from the evidence. 172 N.J. at 493. In the absence of any explanation for the dispatcher's motivation for assuming the robber was Black, the evidence that supports an inference of unconscious bias would also tend to support an inference of conscious bias.

minimal. But so far as the record before us reflects, the prosecutor did not investigate the circumstances of the dispatcher's decision and certainly never called the dispatcher as a witness at the three-day-long suppression hearing or introduced other evidence to explain why she included a racial description in the BOLO alert. Moreover, as we reiterate throughout this opinion, the State candidly acknowledged in its brief and at oral argument that, to this day, it does not know why the dispatcher added the racial description. Cf. Segars, 172 N.J. at 495 ("For the State to prevail, it cannot remain silent once a prima facie case has been established by a defendant . . . ."). Because defendant presented a prima facie case of racial discrimination and the State failed to meet its burden of production,[4] we conclude defendant established selective enforcement in violation of Article I, Paragraphs 1 and 5.

V.

Our conclusion there was a Segars violation does not end our inquiry. We must next determine whether the exclusionary rule should be applied in

[4] We recognize that because the motion court ruled that defendant had not established a prima facie case, the State's burden of production was not triggered at the trial court level. However, in view of the State's concession on appeal it has no explanation for the dispatcher's inclusion of a racial identifier in the BOLO alert, a remand to allow the State an opportunity to offer a race-neutral explanation would be pointless. The time for the State to determine why the dispatcher included a racial description has long passed.

these circumstances. In Segars, the Court held that "[o]nce it has been established that selective enforcement has occurred in violation of Article I, Paragraphs 1 and 5 of the New Jersey Constitution, the fruits of that search will be suppressed." 172 N.J. at 493 (citing State v. Maryland, 167 N.J. 471, 485 (2001)). The Court added, "[t]he rationales that support the suppression of evidence under Article I, Paragraph 7, namely, deterrence of impermissible investigatory behavior and maintenance of the integrity of the judicial system, apply equally, if not more so, to cases of racial targeting." Ibid. (emphasis added).

However, the Segars Court had no occasion to consider whether any of the recognized exceptions to the exclusionary rule developed in our search and seizure jurisprudence apply when the fruit-of-the-poisonous tree doctrine is triggered by a violation of Article 1, Paragraphs 1 and 5.[5] That task now falls

[5] By our reckoning, putting aside the "good faith exception" rejected by our Supreme Court in State v. Novembrino, 105 N.J. 95, 158 (1987), there are four recognized exceptions to the exclusionary rule: inevitable discovery, see Nix v. Williams, 467 U.S. 431 (1984); independent source, see Segura v. United States, 468 U.S. 796 (1984); attenuation of taint, see Brown v. Illinois, 422 U.S. 590 (1975); and impeachment, see United States v. Havens, 446 U.S. 620 (1980). We focus our attention on the two exceptions raised by the parties—independent source and inevitable discovery. We note those exceptions entail the balancing of different interests and concerns than the attenuation and impeachment exceptions. Both the independent source and inevitable discovery exceptions focus on the need to deter governmental misconduct. The attenuation doctrine, in contrast, also addresses the need to deter private

upon us since the parties dispute whether the independent source and inevitable discovery doctrines apply in this case.

We begin by acknowledging a foundational principle: the New Jersey Constitution may afford defendants greater protections than the United States Constitution. Our Supreme Court has relied on independent state constitutional grounds to diverge from United States Supreme Court search-and-seizure precedents on numerous occasions. In State v. Caronna, Justice (then Judge) Fasciale stressed that New Jersey has a "sound tradition and powerful precedent of providing greater protection against unreasonable searches and seizures than those guaranteed by the Fourth Amendment." 469 N.J. Super. 462, 483 (App. Div. 2021). We therefore have an "obligation to apply the heightened constitutional guarantees afforded under the Constitution of New Jersey." Id. at 481.

---

individuals from engaging in dangerous conduct, such as fighting or fleeing from police after a constitutional violation. See, e.g., State v. Herrerra, 211 N.J. 308 (2012) (holding, in a post-conviction relief case concerning racial profiling discovery, the exclusionary rule does not apply to evidence of defendant's attempted murder of a State Trooper regardless of the legality of the initial motor vehicle stop, suggesting the attenuation doctrine applies to racial profiling cases). Relatedly, the impeachment doctrine balances the need to deter police misconduct against the cost of allowing a defendant to commit perjury at trial. See Havens, 446 U.S. at 626 (rejecting the "notion that the defendant's constitutional shield against having illegally seized evidence used against him [or her] could be perverted into a license to use perjury by way of a defense" (internal quotation marks and citations omitted)).

Those heightened constitutional guarantees apply not only to substantive rights but also to the scope and boundaries of the exclusionary rule. For example, our Supreme Court relied on independent state constitutional grounds to reject a "good faith exception" to the exclusionary rule recognized by the United States Supreme Court. Novembrino, 105 N.J. at 145–59. Furthermore, although the New Jersey Supreme Court has accepted the inevitable discovery, independent source, and attenuation exceptions—with respect to Article I, Paragraph 7 violations—it consistently diverged from the corresponding United States Supreme Court precedents by imposing a burden on the State to prove the elements for those exceptions by clear and convincing evidence, rather than the preponderance of the evidence standard used under federal constitutional law. See e.g., State v. Sugar (Sugar II), 100 N.J. 214, 239–40 (1985). Our Supreme Court, moreover, added a flagrancy element to the independent source exception where none exists under federal law. State v. Holland, 176 N.J. 344, 361 (2003); see discussion infra Section VIII.

Under the New Jersey Constitution, "[w]e apply the exclusionary rule when the benefits of deterrence outweigh its substantial costs." Caronna, 469 N.J. Super. at 490 (citing State v. Gioe, 401 N.J. Super. 331, 339 (App. Div. 2008)). "The core purpose of the exclusionary rule is 'deterrence of future unlawful police conduct.'" Id. at 489 (quoting State v. Shannon, 222 N.J. 576,

597 (2015)). But under the State Constitution, the exclusionary rule serves as more than a deterrent. It "also provides an 'indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches.'" Id. at 490 (quoting State v. Carter, 247 N.J. 488, 530 (2021)). Additionally, "[t]he exclusionary rule 'uphold[s] judicial integrity' by informing the public that 'our courts will not provide a forum for evidence procured by unconstitutional means.'" Ibid. (second alteration in original) (quoting State v. Williams, 192 N.J. 1, 14 (2007)); see also State v. Worthy, 141 N.J. 368, 385 (1995) ("Application of the exclusionary rule encourages respect for protected rights and care in following prescribed procedures among law enforcement officials and departments."). We deem the goal of informing the public of the judiciary's stalwart commitment to deterring discriminatory policing to be vitally important.

VI.

There appear to be no published opinions in New Jersey or any other jurisdiction addressing whether the exceptions to the exclusionary rule apply to discriminatory policing in violation of the Equal Protection Clause. However, there are instructive precedents that balance the costs and benefits of these exceptions as they apply in the face of violations of law other than the Fourth Amendment. Notably, our Supreme Court has considered—and rejected—the

State's contention that the inevitable discovery and independent source doctrines apply to violations of the New Jersey Wiretap and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -37 (Wiretap Act), which has its own exclusionary remedy, N.J.S.A. 2A:156A-21.[6]

In Worthy, the Court concluded, "[i]n light of the Legislature's obvious concern for privacy and its express and consistent recognition of the need for an effective exclusionary rule to assure protection of privacy, it is not reasonable to impute a legislative intent to undermine that exclusionary rule with [an inevitable discovery] exception." 141 N.J. at 389. More recently, in State v. K.W., the Court explained that in Worthy, it had "explicitly rejected the State's arguments that we engraft onto the suppression remedy of the Wiretap Act the inevitable discovery exception to the exclusionary rule." 214 N.J. 499, 511 (2013) (citing Worthy, 141 N.J. at 389). The K.W. Court added, "[t]hat holding seemingly encompassed a rejection of the independent-source exception as well." Ibid. (citing Worthy, 141 N.J. at 389–90); see also State v.

[6] The Wiretap Act provides in pertinent part, "[a]ny aggrieved person . . . may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that . . . [t]he communication was unlawfully intercepted." N.J.S.A. 2A:156A-21. If the motion is granted, "the entire contents of all intercepted wire, electronic or oral communications obtained during or after any interception which is determined to be in violation of this act . . . , or evidence derived therefrom, shall not be received in the trial, hearing or proceeding." Ibid.

Hayes, 327 N.J. Super. 373, 385 (App. Div. 2000) (rejecting the inevitable discovery exception for violation of the strip/body cavity search statute, N.J.S.A. 2A:161A-1 to -10).

The Court stressed in Worthy that the Wiretap Act seeks "to maximize the protection of individual privacy" and referred to "[t]he powerful privacy concerns generated by the spectre of government-directed wiretapping." 141 N.J. at 379, 383. We recognize the Court was construing a statute, not directly addressing constitutional protections. But the Court did not rely solely on statutory construction principles to reject exceptions to the Wiretap Act's exclusionary remedy. Rather, the Court focused on the need to safeguard personal privacy rights. Although we are not dealing with a question of unambiguous statutory text and legislative intent in this appeal, we believe a sound analogy can be drawn between "[t]he powerful privacy concerns generated by the spectre of government-directed wiretapping," Worthy, 141 N.J. at 379, and the powerful equal protection concerns generated by the spectre of discriminatory policing.

Indeed, the need to deter discriminatory policing is even more compelling than the need to deter Fourth Amendment violations because of the enormous societal costs associated with racially-influenced policing. Cf. Segars, 172 N.J. at 493 ("The rationales that support the suppression of

evidence . . . apply equally, if not more so, to cases of racial targeting."). When the Fourteenth Amendment and Article I, Paragraphs 1 and 5 are violated, the impact is not just felt by the specific defendant whose rights were violated by police. Rather, the harmful impact of discriminatory policing is endured by many, many others. As stated in the prefatory findings of Directive 2005-1, "if a police officer were to rely upon a person's race or ethnicity when making decisions and exercising law enforcement discretion, the result would be to undermine public confidence in the fairness and integrity of the criminal justice system [and] alienate significant segments of our society." Directive 2005-1, at 1.

It is no exaggeration to state that all minority citizens are victimized when police engage in racial profiling or other forms of racially-influenced policing. Aside from the widespread alienation and loss of public confidence in police integrity, the failure to redress violations of equal protection rights would erode public confidence in the integrity of the judiciary and our unwavering commitment to ensuring equal protection under the law.

In Caronna, we recognized the need to "send[] the strongest possible message that constitutional misconduct will not be tolerated." 469 N.J. Super. at 490 (quoting Williams, 192 N.J. at 14). Although that admonition was made in the context of a serious Fourth Amendment violation, the need to send "the

strongest possible message" is equally, if not more, important in the context of Fourteenth Amendment/Article I, Paragraphs 1 and 5 violations.[7] It goes without saying that all constitutional rights are precious and must be scrupulously safeguarded. We nonetheless consider the public's right to be free from discriminatory policing to be a matter of transcendent importance, comparable to, if not greater than, the right of privacy threatened by government interception of communications under the Wiretap Act. Cf. Worthy, 143 N.J. at 379.

VII.

With these foundational principles in mind, we next address whether the independent source doctrine applies to the exclusionary rule contemplated in Segars. The independent source exception "allows admission of evidence that

[7] We also note that, in contrast to the voluminous caselaw explaining the boundaries of police conduct under the Fourth Amendment, the prohibition of racially-influenced policing is comparatively straightforward. As explained in the Attorney General Directive, police "shall not consider a person's race or ethnicity as a factor in drawing an inference or conclusion that the person may be involved in criminal activity, or as a factor in exercising police discretion as to how to stop or otherwise treat the person." Directive 2005-1, § 2(a). The gravamen of the non-discrimination rule is that police should not treat people differently because of their race or ethnicity. That unambiguous rule should be easy to comply with, provided officers have incentive to pay attention to whether their decisions are influenced by stereotypes or are otherwise based on impermissible considerations of race or ethnicity. The critical question before us is whether and to what extent exceptions to the exclusionary rule weaken the incentive to pay attention to compliance with the straightforward non-discrimination rule.

has been discovered by means wholly independent of any constitutional violation." Holland, 176 N.J. at 348 (quoting Nix, 467 U.S. at 443). Thus, in a typical example, the independent source exception allows for warrants that are based on both lawfully and unlawfully obtained information to be upheld if the warrant application would have been granted without the unlawfully obtained information. See State v. Chaney, 318 N.J. Super. 217, 221–22 (App. Div. 1999).

To obtain relief from the exclusionary rule under this exception, the State must prove by clear and convincing evidence that: (1) "probable cause existed for the challenged search without the unlawfully obtained information"; (2) the police would have sought a warrant without knowing the information they gained through tainted evidence; and (3) "regardless of the strength of their proof under the first and second prongs" the State must prove the impermissible search was not the result of "flagrant police misconduct." Holland, 176 N.J. at 360–61. The prosecutor's failure to satisfy any one prong will result in suppression. Id. at 362.

We hold that under Article I, Paragraphs 1 and 5 of the New Jersey Constitution, the independent source exception does not apply to Segars violations to the extent this exception would permit a reviewing court to simply excise the information directly resulting from an equal protection

violation. Were this exception to apply to the present matter, the unsupported racial description of the perpetrator would be redacted, and we would determine whether the remaining information provided by the dispatcher established a lawful basis to initiate an investigative detention and conduct a frisk for weapons.

The problem with that remedy is it fails to recognize that discriminatory policing does not just taint specific bits of information; rather, it infects an entire police-citizen encounter in a way that cannot be cured with surgical redaction. To the extent the independent source exception relies on such redaction to circumvent the exclusionary rule, that doctrine would undermine, if not eviscerate, the distinctive protections afforded under Article I, Paragraphs 1 and 5.

Put another way, the goal of deterring discriminatory policing cannot be achieved by essentially disregarding an equal protection violation. Police departments would have little incentive to train dispatchers on the principles of non-discriminatory policing or to hold them accountable for complying with that training were we to permit Segars violations to go unchecked so long as a dispatcher gets it mostly right when providing information to officers. Cf. Worthy, 141 N.J. at 385 (noting the exclusionary rule "encourages . . . care . . . among law enforcement officials and departments").

So, too, the imperative of judicial integrity would be undermined were we to tolerate racial discrimination by a police dispatcher so long as he or she also relays information to officers that is not the product of impermissible racial bias. We presume that if a police dispatcher were to engage in racial targeting, not every bit of information he or she relays to officers will be a product of such discrimination. Because other information will typically be transmitted, in practical effect, application of the independent source "exception" in these circumstances might swallow the exclusionary rule, leaving many, if not most, equal protection violations unsanctioned. Were that to occur, we would hardly be sending the "strongest possible message," see Caronna, 469 N.J. Super. at 490, that racial discrimination will not be tolerated.

We add that even were we to accept that the independent source exception can apply in some selective enforcement cases, here, the State cannot establish by clear and convincing evidence the violation was not the product of flagrant misconduct. Because the State has acknowledged it has no explanation for why the dispatcher included a racial description, the prosecutor has no way to gauge flagrancy and thus is unable to meet even the minimal burden of production under Segars. See Segars, 172 N.J. at 493. That being so, the State cannot possibly meet the far more onerous clear-and-convincing

standard of proof pertaining to the flagrancy of the misconduct under the third prong of the independent source doctrine.

VIII.

We next turn our attention to the inevitable discovery doctrine, which was first elaborated in Nix and embraced by the New Jersey Supreme Court in Sugar II, 100 N.J. at 238–40. Under this exception to the exclusionary rule, evidence is admissible even though it was the product of an illegal search "when . . . the evidence in question would inevitably have been discovered without reference to the police error or misconduct, [for] there is no nexus sufficient to provide a taint." Nix, 467 U.S. at 448.

Although it has been described as being "related to" the independent source doctrine, see Caronna, 469 N.J. Super. at 501, the inevitable discovery doctrine operates differently as it does not depend on simple redaction of information learned from the constitutional violation. For that reason, we believe it presents a closer question than the independent source doctrine as to whether it may be used to salvage evidence found as a result of racial discrimination.

We are mindful that in Worthy and K.W., our Supreme Court categorically rejected both the independent source and inevitable discovery

exceptions as a matter of statutory interpretation of the Wiretap Act.[8] We are not convinced, however, it is necessary to categorically preclude application of the inevitable discovery exception for all equal protection violations. Rather, we believe the inevitable discovery exception can be available in at least certain racial discrimination cases, although, as we explain, we deem it necessary to adopt a more restrictive formulation of the doctrine than the one that applies to routine search-and-seizure violations.

The purpose of the inevitable discovery doctrine is to "prevent[] the prosecution from being in a better position than if the illegal conduct had not taken place" not to "punish the prosecution by putting it in a worse place." Caronna, 469 N.J. Super. at 500 (alteration in original) (emphasis omitted) (quoting State v. Camey, 239 N.J. 282, 302 (2019)). That is an important principle—one that is consistent with the need to balance the purposes of the exclusionary rule against the substantial cost of suppressing reliable evidence of guilt.

To invoke the inevitable discovery exception, the State must demonstrate:

---

[8] We reiterate that Worthy did not rely solely on principles of statutory construction. Rather, it emphasized that exceptions to the exclusionary rule would undermine the individual privacy rights encompassed in the Wiretap Act. Worthy, 141 N.J. at 383–84.

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
>
> [Ibid. (quoting Sugar II, 100 N.J. at 238).]

Unlike the independent source and attenuation exceptions, the flagrancy of the police misconduct is not one of the traditionally enumerated elements of the inevitable discovery doctrine. Ibid. In Nix, the United States Supreme Court expressly rejected a requirement that the prosecution prove "the absence of bad faith." 467 U.S. at 445. It reasoned that such a limitation on the inevitable discovery exception "would put the police in a worse position than they would have been in if no unlawful conduct had transpired" and that the societal cost imposed by suppressing evidence outweighs the need to deter potential bad faith by police. Id. at 445–46.[9]

[9] That reasoning is not universally accepted. For example, noted constitutional scholar Professor Wayne LaFave commented, "[b]ecause one purpose of the exclusionary rule is to deter [unconstitutional] shortcuts, there is much to be said for the proposition that the 'inevitable discovery' rule should be applied only when it is clear that 'the police officers have not acted in bad faith to accelerate the discovery.'" 6 Wayne R. LaFave et al., Search and Seizure, § 11.4(a) (6th ed. 2020) (quoting Brian S. Conneely et al., Inevitable

In State v. Sugar (Sugar III), 108 N.J. 151 (1987), our Supreme Court ultimately authorized the application of the inevitable discovery exception notwithstanding that police had committed an egregious constitutional violation by eavesdropping on a confidential conversation between the defendant and his attorney while defendant was in police custody. 108 N.J. at 154–56. A close examination of the protracted Sugar litigation, however, shows the inevitable discovery doctrine was not applied to salvage the fruits of that egregious violation.

In Sugar III, the Court explained, "[d]espite the egregious violations of constitutional guarantees involved in the police's conduct, the Court [in Sugar I] ruled that if the prosecution was 'carefully purged of all taint from investigatory excess,' it could continue." 108 N.J. at 154–55 (quoting State v. Sugar (Sugar I), 84 N.J. 1, 15 (1980)). To redress the egregious eavesdropping violation, the Court ordered that tainted witnesses and evidence would be excluded from the grand jury and at trial. Ibid. (citing Sugar I, 84 N.J. at 25–26). The Court, exercising its original jurisdiction, nonetheless allowed the State to introduce the victim's body under the inevitable discovery doctrine. Id. at 165. The body had been buried in a shallow grave in the yard of the

---

Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule, 5 Hofstra L. Rev. 137, 160 (1976)).

Sugar residence and would eventually have been discovered by new owners. Id. at 157–58. The body was recovered by police pursuant to a consent search conducted before the unlawful eavesdropping. Id. at 164. The consent search, therefore, while held by the trial court to be invalid,[10] was not a fruit of the eavesdropping misconduct. Furthermore, the consent search violation, in contrast to the eavesdropping conduct, was not egregious. Id. at 154–56.

With respect to the admissibility of the victim's body, the Court in Sugar III explained:

> We are satisfied that the admissibility of [the victim's body] will not minimize or denigrate the constitutional interests that are at stake. We recognize that the State should not be able to take advantage of constitutional violations. See State v. Novembrino, 105 N.J. 95 (1987). It should not be able to secure the prosecutorial benefit that could have been realized only by the police misconduct that initially required the suppression of evidence. In this case the major constitutional violation, the impermissible eavesdropping, which occurred after the discovery of

[10] The trial court ruled the prosecutor had not shown the consent was unequivocal, voluntary, knowing, and intelligent. Id. at 155. The Supreme Court commented, "[w]e have strong reservations that the search . . . , which actually led to the discovery of the body, can be sustained under all of the circumstances as a consensual search." Id. at 156. The Court also determined that the State's evidence regarding an alternate "implied" consent theory "may fall short of establishing an implied consent to search." Id. at 163. The Court concluded, "[b]ecause we rule that the trial court should have admitted the body as evidence under the inevitable discovery doctrine, we do not reach the State's contention . . . that the trial court should have admitted that evidence under a theory of implied consent to the search." Id. at 156.

> the body, has already been redressed through the application of the exclusionary rule to the tainted witnesses and evidence. See Sugar I; Sugar II. It need not be stretched further.
>
> [Id. at 164.]

The Court added, "[w]e are confident that this conclusion is consistent with remedying the police's constitutional violations without leaving the State worse off than it would have been had no violation occurred." Id. at 165.

Nothing in the text or rationale of Sugar III precludes a consideration of flagrancy in determining whether the inevitable discovery doctrine should be invoked. To the contrary, the ultimate result in the Sugar trilogy suggests that reviewing courts may differentiate constitutional violations based on their egregiousness. Furthermore, as then-Judge Fasciale noted in his careful analysis of inevitable discovery precedents, "[i]n determining the applicability of the inevitable discovery doctrine to an unjustified entry of a dwelling, our courts have previously considered the flagrancy of the illegal conduct." Caronna, 469 N.J. Super. at 503.

Building on the foundation laid in Caronna, we believe flagrancy analysis is an important safeguard that can help ensure on a case-by-case basis that the exclusionary rule's twin goals of deterring constitutional violations and upholding judicial integrity outweigh the costs of suppressing evidence. As we noted above in Section VI, as a general matter, racial discrimination

violations are inherently more troubling than typical Fourth Amendment violations. But not all Segars violations are the same; some are more flagrant than others.

Given the heightened importance of deterring equal protection violations and the imperative to send the strongest possible message that discriminatory policing will not be tolerated, we deem it necessary to establish a more restrictive formulation of the inevitable discovery exception when Article I, Paragraphs 1 and 5 rights have been violated. We hold that for the inevitable discovery exception to apply to racial discrimination violations under the New Jersey Constitution, the State must prove by clear and convincing evidence that the constitutional misconduct was not flagrant.

We recognize that in balancing the principle of not putting police in a worse position than if there was no constitutional violation against the need to fulfill the twin purposes of the exclusionary rule, we reach a different result than that in Nix. 467 U.S. at 445–46. But there is compelling precedent to include a flagrancy requirement under the New Jersey Constitution when none exits under federal law. In Holland, our Supreme Court established a requirement that prosecutors demonstrate "the initial impermissible search was not the product of flagrant police misconduct" in order to invoke the independent source exception in the Article I, Paragraph 7 context. 176 N.J. at

361. There is no analogous requirement under the federal formulation of that exception. See Murray v. United States, 487 U.S. 533, 537–38 (1988). We now apply that same reasoning to import flagrancy analysis to the inevitable discovery exception as applied to equal protection violations under the New Jersey Constitution.

Ultimately, we borrow the flagrancy analysis required under the Article I, Paragraph 7 independent source and attenuation doctrines because it is needed to ensure that application of the inevitable discovery doctrine does not denigrate the exclusionary rule as adapted for racial discrimination violations. Furthermore, the more restrictive formulation of the inevitable discovery doctrine we adopt today for racial discrimination cases will not only provide greater incentive for police departments to train their sworn and unsworn employees to guard against implicit bias, see Worthy, 141 N.J. at 385, but will also provide prosecutors with greater incentive to promptly and fully investigate racial discrimination claims to help ensure the exclusionary remedy is tailored to the nature and seriousness of the constitutional violation. See Sugar III, 108 N.J. at 164 (noting exclusionary rule should not be "stretched further" than needed).

We reiterate yet again the State acknowledges it cannot explain why the dispatcher included a racial description of the robber when none had been

provided by the victim. Absent such an explanation, the State has no way to measure the level of constitutional misconduct. We acknowledge that for purposes of flagrancy analysis, implicit bias, while unacceptable, can be distinguished from conscious prejudice. But that distinction must be based on facts, not speculation. Here we have no facts to explain why the dispatcher assumed the robber was Black.

We add that had the State undertaken a timely investigation of the dispatcher's error, it may have revealed a race-neutral explanation, which would have satisfied the State's burden of production and shifted the burden back to defendant. By failing to determine what happened and why, the prosecutor cannot show that the equal protection violation was not flagrant and, therefore, cannot rely upon the inevitable discovery doctrine to avoid the exclusionary rule contemplated in Segars. Cf. Sugar II, 100 N.J. at 239 ("The State itself is directly responsible for the loss of the opportunity lawfully to obtain evidence.").

Because we conclude the evidence seized from defendant's person must be suppressed under Article I, Paragraphs 1 and 5 of the New Jersey Constitution, we need not address defendant's contention that the trial court erred in not suppressing the fruits of the stop and frisk under the Fourth Amendment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION