THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2019-0057

State of New Hampshire

v.

Ernest Jones

Appeal Pursuant to Rule 7

FINAL AMENDED BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT ERNEST JONES

Respectfully Submitted,

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QUESTION PRESENTED

Was the African-American defendant seized—in particular, "not free to leave"—in the absence of reasonable suspicion of criminal activity in violation of Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution where the defendant was in a stopped motor vehicle in a private driveway, was approached by two uniformed police officers on the driver's side and the passenger's side, was instructed by the officers to provide identification for a warrant check, and was questioned for up to 20 minutes?

IDENTITY OF AMICUS CURIE

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the ACLU—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under state and federal law, including the right to be protected against unreasonable searches and seizures. The ACLU-NH believes that its experience in these issues will make its brief of service to this Court.

STATEMENT OF THE CASE AND THE FACTS

Amicus incorporates by reference the Statement of the Case and Facts in Appellant/Defendant Ernest Jones's Opening Brief.

SUMMARY OF ARGUMENT

This brief raises two arguments. *First*, the police seized Jones without a warrant or reasonable suspicion of criminal activity for perhaps as long as 20 minutes when they demanded and obtained his identification for the purpose of running a warrants check. The fact that the encounter between Jones and the officers took place while Jones was in a parked vehicle is a critical fact in this case. This was a motorist/police officer encounter, not a pedestrian/police officer encounter. The inherent vulnerability to police authority in a motorist/officer encounter and the associated pressures of being approached by an officer while in a vehicle are far more extensive than in the pedestrian context. This unique dynamic makes potential requests seem more like demands and makes

individuals like Jones feel less free to drive off and leave. *Second*, although this Court need not consider Jones's race in order to reverse the trial court's decision, the time has come for courts to acknowledge and incorporate perspectives of people of color in determining how a "reasonable person" would experience officer conduct.

ARGUMENT

1. JONES WAS SEIZED WHEN THE OFFICERS OBTAINED HIS IDENTIFICATION BECAUSE HE HAD NO REAL POWER TO LEAVE.

A. The Issue and the Standard

Because of the unique and independent protections provided under the New Hampshire Constitution, this Court must first address the defendant's claim under Part I, Article 19 of the New Hampshire Constitution. *State v. Ball*, 124 N.H. 226, 235 (1983). Article 19 gives every person in the State "a right to be secure from all unreasonable searches and seizures." N.H. CONST. pt. I, art. 19. Article 19 is in the State Bill of Rights and was enacted in 1784—five years before the enactment of the United States Constitution. As this Court has explained, Article 19 "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization." *State v. Canelo*, 139 N.H. 376, 386 (1995). In many contexts, including automobiles, "this [C]ourt has held that article 19 provides greater protection for individual rights than does the fourth amendment." *State v. Koppel*, 127 N.H. 286, 289, 291 (1985) (citing *Ball*, 124 N.H. at 235).

"In order for a police officer to undertake [a warrantless] investigatory stop, the officer must have reasonable suspicion—based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity." *State v. Hight*, 146 N.H. 746, 748 (2001) (quotation omitted). The analysis of whether a seizure has occurred is an objective one where this Court must ask "whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he … was not free to leave." *State v. Steeves*, 158 N.H. 672, 675 (2009) (quotations and citations

omitted); *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991). The subjective beliefs of an officer or a suspect are irrelevant. *See State v. Riley*, 126 N.H. 257, 262 (1985). In the proceedings below, the State appears to have conceded—and did not argue otherwise—that the police did not have reasonable suspicion to seize Jones or his passenger before discovering the active warrant. *See* App. at 89 (23:21-24:11). Accordingly, the only issue for this Court is determining whether the State can meet its burden of showing that Jones was not seized.

Finally, this Court should view the protections of Article 19 in conjunction with the new privacy protections embedded in Part I, Article 2-b of the New Hampshire Constitution that went into effect on December 5, 2018. As Article 2-b states: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." N.H. CONST. pt. I, art. 2-b. With this statement, New Hampshire voters (approximately 81%) made a strong and unambiguous policy statement that courts must give privacy interests even more protection than that which previously existed when Article 19 stood alone. That this is an Article 19 case does not diminish the significance of the explicit parallel between the privacy interests implicated in an investigatory seizure and the privacy interests implicated in Article 2-b. Article 2-b still acts as an interpretive guide for this Court, even if not a constitutional principle formally at play here. Article 2-b suggests that this Court must analyze Article 19 governmental intrusion cases with an even stronger emphasis on privacy protection under the New Hampshire Constitution than it previously has. From a pure textualist theory of interpretation, to read Article 2-b as merely coextensive with Article 19 would improperly render Article 2-b superfluous. *See State Employees Assoc. of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 345 (2009) (noting that all of the words of a statute must be given effect).

B. The State's reliance on case law involving pedestrian seizure is misplaced, as motorists face unique concerns and constraints making them less likely to feel "free to leave."

Here, one of the critical facts in deciding whether Jones was seized prior to the discovery of the warrant is that Jones and his passenger were within a vehicle and effectively captive during questioning.

The U.S. Supreme Court, as early as 1979, recognized that the motorist/police officer encounter raises issues distinct from the pedestrian/officer encounter. *See Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). "Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities." *Id*. at 662. Thus, there is "a greater sense of security and privacy in traveling in an automobile than … in exposing themselves by pedestrian or other modes of travel." *Id*. The Court further recognized that a motorist/officer interaction is an "unsettling show of authority" that may "create substantial anxiety." *Id*. at 657. As this Court has similarly noted, "[i]t is commonly recognized that the stopping of a motor vehicle is not a mere 'encounter' as described in *Terry* ..., but is a more intrusive seizure subject to greater constitutional limitations." *See Koppel*, 127 N.H. at 289. Numerous other courts have further recognized this distinction and the associated higher restriction on free movements in the vehicle context.[1]

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[1] *See, e.g., Brendlin v. California*, 551 U.S. 249, 257 (2007) (noting that a stop of persons inside a vehicle triggers a "societal expectation of 'unquestioned police command'" (citations omitted)); *United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2012) ("Unlike those situations that may occur in the traffic stop context, pedestrian encounters are much less restrictive of an individual's movements."); *People v. Cosby*, 898 N.E.2d 603, 625 (Ill. 2008) ("[W]here a person's movement is restrained by a factor independent of police conduct such as here, where a person encounters a law enforcement officer while the person is seated in a car [ ] the 'free to leave' test is inappropriate."); *State v. Rankin*, 92 P.3d 202, 206 (Wash. 2004) (elaborating on the rationale suggested in *Prouse*, and stating that people "find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel" (quotation omitted)); *Pyon v. State*, 112 A.3d 1130, 1151 (Md. Ct. App. 2015) (quoting, in a case involving a police officer approaching the defendant in a parked car that had its engine off, a Maryland Supreme Court statement that the comparable situation faced by the

The fact that motorists are subject to a "multitude of applicable traffic and equipment regulations," *see Prouse*, 440 U.S. at 661, also makes it far more reasonable for motorists to feel that they cannot leave when approached by the police. Given the litany of motor vehicle violations that exist, a motorist will often not be aware of what violation is perceived by the police to have occurred. For instance, it is unlawful in New Hampshire to operate a vehicle without one or more working brake lights. *See* RSA 266:38. Given that many drivers are not aware of the operational status of their brake lights at all times, and given the fact that brake lights can burn out at any time, a motorist always risks being arrested if he or she terminates an encounter with a police officer. RSA 265:4 further requires a person "driving or in charge of a vehicle" to "give his name, address, date of birth, and the name and address of the owner of such vehicle" when requested by law enforcement. *See* RSA 265:4, I(a).

Given the unique nature of this motorist/police officer interaction, Jones had a greater sense of security and privacy that must be recognized under Article 19. And this greater sense of security and privacy was encroached upon by the officers' presence and their ability to visually inspect areas of Jones's passenger compartment. This dynamic would make a person in Jones's situation far less likely to feel free to leave and would make what might be seen as requests in the pedestrian context—*e.g.*, asking for identification, asking questions, and the implied request for Jones not to leave while the warrants check was being conducted—to be interpreted as demands. As such, the cases cited by the State in the proceedings below addressing pedestrian/officer encounters are inapposite. *See State v. Daoud*, 158 N.H. 779 (2009) (finding no seizure where the officer asked for identification, but in a case involving the questioning of a pedestrian *in*

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defendant in that case "was markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier"); *People v. Spencer*, 646 N.E.2d 785, 787 (N.Y. Ct. App. 1995) ("Although the right to stop a vehicle is generally analogous to the right to stop a pedestrian, police/motorist encounters must be distinguished from police/pedestrian encounters when the police are operating on less than reasonable suspicion . . ..").

a motel lobby); *State v. Brown*, 155 N.H. 164 (2007) (no seizure where the officer asked questions, but *in the hallway of an apartment building*).

C. The totality of the circumstances demonstrates that Jones was seized when the officers, in a show of authority that could reasonably have been interpreted as a demand that Jones produce his identification, obtained Jones's identification for the purpose of running a warrant check.

Viewed in light of the totality of the circumstances, Jones was also seized because the officers obtained his identification for the purpose of conducting a warrant check. Whether an encounter with police rises to the level of a stop depends on the reasonable perspective of civilians, not police officers. *State v. Joyce*, 159 N.H. 440, 444 (2009). Some circumstances that indicate an officer's "show of authority" that might lead a reasonable person to believe that he or she cannot leave include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.*

In considering whether a reasonable person would have felt free to leave, this Court has also considered numerous other factors. It has considered whether the officer told the person he was free to leave, *id.*, whether the officer indicated "a measure of investigative pursuit," *id.* at 445-46; *State v. McKeown*, 151 N.H. 95, 97 (2004), whether the officer initiated the contact, *State v. Sullivan*, 157 N.H. 124, 131 (2008), whether the defendant's behavior indicated that he "retained freedom of movement," *id.*, the officer's manner of dress and whether he or she was driving a marked cruiser, *State v. Beauchesne*, 151 N.H. 803, 815 (2005), and the time and location of the encounter (*e.g.*, late at night with no one else around, *State v. Quezada*, 141 N.H. 258, 260 (1996)).

The trial court appears to have determined that Jones was not seized primarily based on three of this Court's opinions. These cases are all distinguishable. In *State v. Licks*, only one officer approached the vehicle (as opposed to two officers here). 154 N.H. 491, 494 (2006). Additionally, all that the officer said to the defendant in *Licks* was "all set?" (as opposed to up to 20 minutes of questioning here followed by a demand for

identification and a warrant check). *Id*. In short, the questioning here was far more extensive than in *Licks*. Similarly, the fact that the officers did not chase Jones and then ask him questions, like in *Beauchesne*, does not mandate the conclusion that the officer did not exhibit a show of authority. *Beauchesne*, 151 N.H. at 809. As this Court's case law, identified above, makes clear, a "show of authority" and the "free to leave" analysis depends on a number of potentially varying factors.

The trial court relied, in part, on *Joyce* to support the proposition that asking a few questions or asking for identification does not amount to seizure. Aside from this not being a complete summary of the actual encounter between Jones and the officers, this analysis ignores numerous other circumstances, such as (i) the location of the encounter (a private driveway), (ii) the fact that there were two officers, and (iii) the lengthy series of questions followed by a request for identification and a warrant check followed by more questions. When examining these additional facts, *Joyce* and its "measure of investigative pursuit" analysis actually supports the conclusion that Jones was seized prior to the discovery of the active warrant.

In *Joyce*, officers approached the defendant's car to investigate whether his passenger was using marijuana. *Joyce*, 159 N.H. at 442. This Court found that, while the initial encounter may not have been a seizure, when the defendant heard the officers call for a narcotics-sniffing dog, the encounter became a seizure. *Id.* at 445. This Court reasoned that "when the defendant heard the officers call for the narcotics-sniffing dog, he reasonably could have concluded that he would not be allowed to leave the scene until [the canine officer] and the dog arrived and completed their investigation." *Id.* Because "a reasonable person in his position would not have felt free to leave" given, in part, the police's "measure of investigatory pursuit," the defendant was seized. *Id.* at 446 (quotation omitted).

This Court's decision in *State v. McKeown*, 151 N.H. 95 (2004) is similarly instructive. There, the officer directly approached the defendant in a kayak, asked if he had a personal flotation device, and "wait[ed] to determine whether" he had such a device. The Court concluded that a seizure occurred because "a reasonable person would

not feel free to decline the officer's request or otherwise terminate the encounter." *McKeown*, 151 N.H. at 97-98 (quotation and brackets omitted).

This Court's decisions in *Joyce* and *McKeown* support the proposition that when an officer (and especially when multiple officers) approaches a person, engages in some sort of inquiry process, and then indicates the initiation of even a limited investigation, the person has been seized. This is precisely what happened to Jones in this case. Officers Mitchell and Begin approached Jones's vehicle and began asking questions of both Jones and his passenger for a period of time that could have lasted up to 20 minutes. The officers then obtained the identification of both Jones and his passenger and called their names into dispatch. Thus, at this point—after potentially 20 minutes of questioning—the officers obtained Jones's identification for the "investigative pursuit" of determining whether he had an active warrant. Just like in *Joyce* and *McKeown*, this indicated to Jones that he was not free to leave until the officers completed their investigation. Indeed, as one court has noted: "Although not determinative, [the fact that the officer immediately asked for the defendant's identification] only reinforces that this was an investigative detention. It defies typical human experience to believe that one who is ordered to produce identification in such circumstances would feel free to leave. That conduct is not a garden-variety, non-intrusive, conversational interaction between an officer and an individual." *State v. Rosario*, 162 A.3d 249, 266, 273 (N.J. 2017) (noting that the defendant found herself blocked in by a patrol car that shined a flood light into the vehicle, and the officer exited his marked car and approached the driver's side of the vehicle).

The fact that this request for identification constitutes a seizure is further supported by New Hampshire law. In fact, as opposed to this being a mere request for identification that Jones could have readily rejected, New Hampshire law likely required Jones to comply and disclose his personal information. Under RSA 265:4, I(a) entitled "disobeying an officer," a person "driving *or in charge of a vehicle*" commits a class A misdemeanor is he refuses to "give his name, address, date of birth, and the name and address of the owner of such vehicle" when requested by law enforcement. (emphasis

added). It is probable that, had Jones—who likely was "in charge of a vehicle" at the time—exercised his right to refuse to comply with this instruction, he would have been arrested for disobeying a police officer under RSA 265:4, I(a). Given the prospect of criminal punishment, it cannot be said that Jones reasonably "would feel free to disregard the police and go about his business." *See Beauchesne*, 151 N.H. at 809 (quoting *Bostick*, 501 U.S. at 434).

The conclusion that Jones was seized when the officers obtained his identification for the purpose of running a warrants check is buttressed by the presence of other relevant circumstances. For instance, Jones was subjected to the "threatening presence of several officers," as two uniformed officers approached his vehicle from both sides. *See Joyce*, 159 N.H. at 444. Further, there is no indication that either officer ever advised Jones that he was free to leave. *See id*. And the fact that Jones never asked whether he was free to leave—which the trial court seemed to suggest was indicative of Jones's freedom to leave—actually supports the inference that he felt he was <u>*not*</u> free to leave, just as a reasonable person would feel in that situation. Jones remained seated in his vehicle, did not place his vehicle into drive, and was compliant. These are all indications that a reasonable person in Jones's situation would feel restricted, would not "retain[] freedom of movement," and would reasonably feel unable to terminate the encounter. *See Sullivan*, 157 N.H. at 131. Other relevant factors noted in this Court's case law were present as well. The officers, not Jones, initiated the encounter, *see id*.; the officers were uniformed and were driving a marked cruiser, *see Beauchesne*, 151 N.H. at 815; and the officers approached Jones at night while Jones was parked in a private driveway with no other people around, *see Quezada*, 141 N.H. at 260. Once again, this was a *private* driveway. There is an added inherent privacy interest which is invaded when an officer approaches a person in a *private* place. This diminishes much of the trial court's reasoning and cited case law, which primarily addresses public areas.

Considering all these factors together, any reasonable person sitting in a vehicle would not feel free to decline the officers' demands for identification, leave after the officers obtained the identification, or otherwise terminate the encounter. This

conclusion is reinforced when considering the unique pressures of a motorist/police encounter. Here, to exit the encounter, Jones would have had to turn his vehicle's engine on, place the vehicle into reverse from a private driveway, pull out while two uniformed police officers are right next to the vehicle, and leave either without replying to a potential demand for identification and with no way of knowing whether the officers had reasonable suspicion of any wrongdoing (including, for instance, that his brake lights were out), or leave his identification (one of a person's most valuable personal possessions in modern society) as he drove off potentially in violation of RSA 263:2.[2] This is not reasonable. A significant number of courts have determined that obtaining a motorist's identification under circumstances similar to those in this case would lead a reasonable person to believe that he or she is not free to leave.[3]

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[2] RSA 263:2 requires that a person possess his or her license while driving.

[3] *See United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) ("Precedent clearly establishes that when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual as a general rule, will not feel free to terminate the encounter."); *United States v. Tavolacci*, 895 F.2d 1423, 1425-1426 (D.C. Cir. 1990) ("[T]he retention of papers under some circumstances may transform an interview into a seizure, where it is prolonged or is accompanied by some other act compounding an impression of restraint.") (citing cases); *State v. Hall*, 115 P.3d 908, 917 (Or. 2005), *abrogated on other grounds by State v. Unger*, 333 P.3d 1009 (Or. 2014) ("When [the officer] took defendant's identification card and radioed the police dispatch for a warrant check, however, the consensual nature of that encounter dissipated, and the encounter evolved from a 'mere conversation' encounter into a restraint upon the defendant's liberty of movement."); *People v. Linn*, 241 Cal. App. 4th 46, 67-68 (2015) ("We have in our own research found numerous well-reasoned cases in other jurisdictions that . . . conclude that an officer's taking of a person's identification card and retention of it while running a record check or engaging in further questioning weighs in favor of a finding of an unlawful detention.") (citing cases); *State v. Affsprung*, 87 P.3d 1088, 1094-95 (N.M. Ct. App. 2004) (deciding, in a case in which the officer "requested and obtained identifying information from both driver and passenger for the purpose of running wants and warrants checks," that "[w]ith no suspicion, much less reasonable suspicion, regarding criminal activity on the part of Defendant, and no particularized concern about his safety, the officer had no legitimate basis on which to obtain the identifying information for the purpose of checking it out through a wants and warrants check" and to decide otherwise would "open[] a door to the type of indiscriminate, oppressive, fearsome authoritarian practices and tactics of those in power that the Fourth Amendment was designed to prohibit"); *State v. Dennis*, 2000 WL

1528698, at *2 (Minn. Ct. App. Oct. 17, 2000) ("Minnesota courts have held that retaining a person's identification may constitute a seizure.") (citing cases); *State v. Garland*, 482 A.2d 139, 142 (Me. 1984) ("Officer Langella by asking Garland for identification, by reason of his authority as an officer of the law, effectively restrained the defendant's resumption of his journey and his driving away; this police action brought into play the protections of the Fourth Amendment against unreasonable seizures . . .."); *State v. Chatton*, 463 N.E.2d 1237, 1240 (Ohio 1984) (holding that detaining a driver and requesting his license and registration after the officer had exhausted any suspicion was "akin to the random detentions struck down by the Supreme Court in *Deleware v. Prouse*"); *see also United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002) ("In the context of a traffic stop, if an officer retains one's driver's license, the citizen would have to choose between the Scylla of consent to the encounter or the Charybdis of driving away and risk being cited for driving without a license. That is, of course, no choice at all, and that is why, in those cases, the retention of one's license is a highly persuasive factor in determining whether a seizure occurred."); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1325-26 (9th Cir. 1997) (concluding, in a case that involved a truck that "didn't appear to belong in the area," that the defendant was "seized within the meaning of the Fourth Amendment when Officer Price obtained and failed to return his driver's license and registration, and proceeded with an investigation"); *United States v. Jordan*, 958 F.2d 1085, 1087-1089 (D.C. Cir. 1992) ("[W]hat began as a consensual encounter... graduated into a seizure when the officer asked Jordan's consent to a search of his bag, after he had taken and still retained Jordan's driver's license."); *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983) (holding a seizure occurred when the officer retained the occupant's driver's license while requesting that the occupant give him a vial containing a white powdery substance); *United States v. Pena-Cantu*, 639 F.2d 1228, 1229 (5th Cir. 1981) ("[A] reasonable driver would not feel free to ignore a situation in which several agents pull up directly behind his stationary car, position themselves on both the driver and passenger sides of the vehicle, and proceed to question him while he and his passengers remain within the confines of the car."); *Rosario*, 162 A.3d at 273 ("A person sitting in a lawfully parked car outside her home who suddenly finds herself blocked in by a patrol car that shines a flood light into the vehicle, only to have the officer exit his marked car and approach the driver's side of the vehicle, would not reasonably feel free to leave . . . It defies typical human experience to believe that one who is ordered to produce identification in such circumstances would feel free to leave."); *Borowicz v. North Dakota Dept. of Transp.*, 529 N.W.2d 186, 188 (N.D. 1995) ("In this case, a stop arguably occurred when Officer Erickson requested Borowicz to open the door of the pickup and asked Borowicz to produce his driver's license. The requests could be interpreted as an order 'to do something' depending on how it was made."); c*f. State v. Rankin*, 92 P.3d 202, 206 (Wash. 2004) (en banc) ("Washington is not alone in holding that a mere request for identification from a passenger [in a vehicle] for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry.") (citing cases).

Because the officers lacked that precise quantum of suspicion at the time of seizure and because Jones was unlawfully seized prior to the discovery of the active warrant, the evidence subsequently obtained was inadmissible.

2. THE "REASONABLE PERSON" STANDARD SHOULD ACCOUNT FOR THE PERSPECTIVES OF PEOPLE OF COLOR IN ASSESSING WHETHER A PERSON IS REASONABLY "FREE TO LEAVE"

In deciding that Jones had not been seized before the discovery of the arrest warrant, the trial court hewed closely to an "objectively reasonable person" test that assumes a fundamental and objective similarity of perceptions shared by everyone interacting with police officers. However, whether a reasonable person in a particular circumstance feels free to leave involves consideration of numerous factors. One factor that must be acknowledged and accounted for is the racial dynamic and the lived experiences of people of color, most notably Black people, when subjected to police interactions. The myth of a generalized objective reasonable person, which often fails to take this reality into account, has long been challenged by legal scholars and, increasingly, by courts.

While the trial court erred in determining that Jones was not seized under the more cramped "free to leave" standard, the facts and circumstances of this case present this Court with an opportunity to clarify that the "free to leave" analysis should acknowledge and take into account the perspectives of communities of color. Differing perceptions of police encounters result from lived experience as well as from data, studies, and well-publicized media reports. Indeed, whether an African-American person feels "free to leave" must naturally be colored by the numerous, well-documented instances where African-Americans have been shot attempting to leave a police interaction.[4]

[4] These recent shootings include the following:

- The shooting of Antwon Rose, a 17-year-old Black boy. *See* Amanda Sakuma, "East Pittsburgh Police Officer Acquitted in Shooting Death of 17-year-old Antwon Rose," *Vox* (Mar. 23, 2019), https://www.vox.com/policy-and-

A. Whether a "Reasonable Person" Feels Free to Leave an Inquiring Police Officer Is a Question About Power Dynamics.

The law asks that Jones be a reasonable person in assessing whether he would have felt free to leave. Absent actual physical restraint, whether a person reasonably feels free to walk away from the police is very different from whether a person feels free to walk away from an inquiring stranger. Police hold inherent power and authority, especially when they have a gun at their hip. How a person responds to any show of that authority, however mild-tempered, will depend on his or her experiences of policing previously. *Amicus* submits that, based on a legacy of disproportionate police contact, Black people reasonably feel disempowered in their interactions with police. The perspective of Black people stemming from this power imbalance should be taken into account by this Court.

Black people are the subject of police encounters at disproportionate rates compared to White people. In 2015, although Black people comprised only 13 percent

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politics/2019/3/23/18278470/police-officer-acquitted-antwon-rose-unarmed-shooting.

- The shooting of Stephon Clark, a 22-year-old Black man. *See* Eric Levenson, "Sacramento Police Shot Stephon Clark Holding Cell Phone in his Grandmother's Yard," *Philadelphia Tribune* (Mar. 22, 2018), https://www.phillytrib.com/news/sacramento-police-shot-stephon-clark-holding-cell-phone-in-his/article_49538086-2dcc-11e8-b436-e77b273709cb.html.
- The shooting of Michael Jerome Taylor, a 17-year-old Black boy. *See* Gary White, "Lakeland Police Release Video of Shooting that Killed Winter Haven Teen," *Serasota Herald-Tribune* (Dec. 27, 2018), https://www.heraldtribune.com/news/20181227/lakeland-police-release-video-of-shooting-that-killed-winter-haven-teen.
- The shooting of Aaron Bailey, a 45-year-old Black man. *See* Ryan Martin and James Briggs, "No Charges in Federal Investigation into Aaron Bailey Shooting," *Indianapolis Star* (Apr. 12, 2019), https://www.indystar.com/story/news/crime/2019/04/12/no-charges-federal-investigation-into-aaron-bailey-shooting/3451113002/.
- The shooting of Lawrence Hawkins, a 56-year-old unarmed Black man. *See* Olivia Stump, "Details on Prichard Officer Involved Shooting," *WKRG* (Nov. 18, 2017), https://www.wkrg.com/news/local-news/large-police-presence-on-first-ave-and-hanes-st/906187299.

of the United States population, they accounted for 26.6 percent of all arrests.[5] These arrests translate into even greater disparities in incarceration, suggesting further disparities in decisions around prosecution, conviction, sentencing, and/or parole.[6] According to 2010 data, approximately 40 percent of those incarcerated in America are Black. *See* Prison Policy Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, https://www.prisonpolicy.org/reports/rates.html.

New Hampshire is not immune from this racial disparity trend, especially as portions of the State rapidly diversify.[7] The most recent available data from 2014 compiled by The Sentencing Project shows that, in New Hampshire, the rate of Black people incarcerated is 1,040 per 100,000 Black people. *See* The Sentencing Project, *New Hampshire Profile*, https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR. This compares to only 202 out of 100,000 White people. *Id*. The rate for Hispanic people is 398 out of 100,000. *Id*. Moreover, New Hampshire has Black/White imprisonment disparity ratio of 5.2 to 1 and a Hispanic/White ratio of 2 to 1. *See id*. A recent *New Hampshire Public Radio* study has further exposed racial disparities in arrests

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[5] Uniform Crime Report, *Overview of Table 43 – Arrests, by Race and Ethnicity, 2015, Crime in the United States, 2015*, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43.

[6] It is a common misconception that these racial disparities can be explained by different rates of drug involvement among different races or ethnicities. They cannot. As explained in Michelle Alexander's book, "The New Jim Crow," studies show that at a national level people of all colors use and sell illegal drugs at remarkably similar rates. And "[i]f there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color." *See* Michelle Alexander, THE NEW JIM CROW 7, 264 n. 10-11 (2012) (collecting studies).

[7] For example, in Manchester and Nashua — New Hampshire's two largest cities — the White population in each has gone from around 98 percent in 1980 to 86.5 percent and 82.9 percent, respectively, today. *See* Census Data for 1980, *available at* https://www.census.gov/population/www/documentation/twps0076/NHtab.pdf; Manchester 2018 Census Estimate, *available at* https://www.census.gov/quickfacts/fact/table/manchestercitynewhampshire,US/PST045218; Nashua 2018 Census Estimate, available at https://www.census.gov/quickfacts/fact/table/nashuacitynewhampshire,US/PST045218.

and jailing. *See* Emily Corwin, *Data Shows Racial Disparities Increase at Each Step of N.H.'s Criminal Justice System*, *NHPR* (Aug. 10, 2016) https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0. Data from this study shows that Black people have a 5 times greater chance of being jailed compared to White people—a statistic that is well above the United States average where Black people are 3.5 times more likely to be in jail than White people. *Id*. Equally disturbing is that Black people in New Hampshire have a 2.8 times greater chance of being arrested compared to White people. And in Hillsborough County — the most populous and diverse county in the state — African-Americans are nearly 6 times more likely to be in jail than White people. *Id.*

This state and national data correlates with disproportionately negative perceptions about police in Black communities and their relative power in police encounters. A 2014 national survey found that 70 percent of Black people felt that police departments do a poor job of treating racial and ethnic groups equally, whereas only 25 percent of White people reported the same. Carroll Doherty et al., Pew Research Center, *Few Say Police Forces Nationally Do Well in Treating Races Equally* 2 (Aug. 25, 2014), https://www.people-press.org/2014/08/25/few-say-police-forces-nationally-do-well-in-treating-races-equally/. In another study, researchers identified three recurrent themes in Black participants' descriptions of their experience and perception of the police. Participants believed that Black people have a right to be angry about their treatment by law enforcement, that law enforcement has a persistent fear of Black men, and that there is a need to restructure law enforcement training and education to address systemic bias. Michael Brooks et al., *Is There a Problem Officer? Exploring the Lived Experience of Black Men and Their Relationship with Law Enforcement*, 20 J. AFRICAN AM. STUD. 346, 352-53 (2016). Participants described their overall sentiment as hopelessness and a certainty that law enforcement will never view Black men as more than "symbolic assailants." *Id.* at 350.

These negative perceptions of police treatment may stem in part from real experience with police misconduct. In a study of young Black men, 83 percent

reported personal experience with police harassment, and over 90 percent reported knowing someone who had been harassed by the police. Rod K. Brunson, *"People Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 71, 81 (2007). High-profile media reports of police misconduct further exacerbated the negative perception of police bias against people of color. *Id.* at 74; *see also* Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, But No*, WASH. POST, July 11, 2016 (finding a Black person is 2.5 times more likely to be killed by police than a White person).

Social scientists have noted that, to minimize the potential for harm from police encounters, Black people "self-police" their behavior whenever there is an officer in sight. Kevin L. Nadal, *Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study*, 73 J. SOC. ISSUES 808, 825 (2017). When engagement does occur, "Black people … are likely to feel seized earlier in a police interaction than whites, likely to feel 'more' seized in any given moment, and less likely to know or feel empowered to exercise their rights." Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125, 142 (2017). The immediate perception of police intervention triggers a code of behavior that is considered necessary to survive the encounter. *See* PBS, *Get Home Safely: 10 Rules of Survival*, http://www.pbs.org/Black-culture/connect/talk-back/10_rules_of_survival_if_stopped_by_police/ (last visited Apr. 11, 2019). This may include taking on a non-confrontational affect, a lesson taught from early instructions by family to "not question the police." Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL FORUM 295, 341-42 (2016) (referring to "The Talk," information passed on from Black parents to children to inform of certain aspects of the Black experience associated with policing). These findings from social science researchers reflect a truth known by millions in American society—namely, that there is a different understanding of "free to leave" than what the law provides for Americans of color.

New Hampshire is not immune to this reality either. As detailed in the *New York Times*, Rogers J. Johnson—president of the Seacoast N.A.A.C.P.—recently told a conference group that New Hampshire's problem "was 'a lack of recognition as to the seriousness of this problem.' He said that many people in New Hampshire view race as an issue in the South but not in the North." Katharine Q. Seelye, *New Hampshire, 94 Percent White, Asks: How Do You Diversify a Whole State*, N.Y. TIMES, July 27, 2018, https://www.nytimes.com/2018/07/27/us/new-hampshire-white-diversify.html (last visited Mar. 20, 2019). Reena Goldthree, a professor of African and African-American studies at Princeton University (and formerly of Dartmouth College), similarly addressed race as an issue in New Hampshire—specifically in the context of Black peoples' interactions with police officers—and how it can go unrecognized: "I think it might be difficult of some of our white neighbors in New Hampshire to understand the depth of fears that African Americans often experience during encounters with police officers." Peter Biello & Cordelia Zars, *Police, Black Lives Matter, and Violence: A New Hampshire Perspective*, *NHPR*, July 8, 2016, https://www.nhpr.org/post/police-black-lives-matter-and-violence-new-hampshire-perspective#stream/0 (last visited Mar. 20, 2019). Similarly, a 2016 *National Public Radio* interview examined the unique experience of Lakeisha Phelps, who, at the time, was one of only two Black officers on Nashua, New Hampshire's force of more than 170. *See* Emily Corwin, *Black Officer Navigates '2 Incompatible Worlds' on N.H. Police Force*, *NPR*, Oct. 12, 2016, https://www.npr.org/2016/10/12/497637765/black-officer-navigates-2-incompatible-worlds-on-n-h-police-force (last visited Mar. 20, 2019). Officer Phelps discussed how, after she was hired, she was racially profiled by her fellow officers: "[O]ne of the troopers would stop me, like, once every other night." *Id*. Phelps also stated that "I absolutely know that I can get shot just because I'm black." *Id.*

It is, in part, because of these experiences in New Hampshire and elsewhere that many Black parents are forced to give their children "The Talk." *See* Ray Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*, CONCORD MONITOR, July 24, 2016, https://www.concordmonitor.com/If-you-re-black-

in-NH-and-get-pulled-over-do-you-worry-You-bet-3518899 (last visited Mar. 20, 2019); *see also Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."). As Rev. Keith Patterson of St. Paul's Church in Concord explained:

> I understand when you're dealing with law enforcement, you respect them. It's the talk you've been hearing in the news, that African American parents must have with their children, particularly their male children. If you get pulled over, this is what you do: turn the radio off, put your hands where they can be seen, the whole nine yards. If they ask you to jump, say "How high, officer?"

Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*; *see also* Tess Martin, *"The Talk" is Different for Parents of Black Kids*, *Medium* (Apr. 3, 2018), https://medium.com/@tessintrovert/the-talk-is-different-for-parents-of-black-kids-77d5e8238c64 (last visited Apr. 15, 2019).

B. A Body of Scholarship Already Points to the Need for a More Comprehensive and Inclusive "Reasonable Person" Test.

For nearly three decades, scholars have argued that a race-blind or race-neutral "reasonable person" standard in this context is a legal fiction. *Amicus* references just a few such arguments here. For example, Professor Tracey Maclin has argued that courts "should consider the race of the person confronted by the police, and how that person's race might have influenced his attitude toward the encounter" as part of the totality of the circumstances analysis. Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991). Professor Maclin correctly suggests that the "reasonable person" in this context is, in application, a White, law-abiding citizen and asks questions such as:

> When they are stopped by the police, do whites contemplate the possibility that they will be physically abused for questioning why an officer has stopped them? White teenagers who walk the streets or hang-out in the local mall, do they worry about being strip-searched by the police? Does the average white person ever see

himself experiencing what Rodney King or Don Jackson went through during their encounters with the police?

Id. at 256. Another prominent scholar, Bennet Capers, writes,

> [The U.S. Supreme] Court categorized certain "stops" as non-stops and thus outside of the purview of the Fourth Amendment where there has been no show of force and where a reasonable person – even if never advised of his right to leave, which is usually the case – would still feel free to leave. *However, the fact is that minorities are disproportionately singled out for "consensual encounter" and are least likely to "feel free to leave*."

Bennett I. Capers, *Re-thinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 *Harv.* C.R.-C.L. L. REV. 1, 39 (2011) (emphasis added).

Similarly, Professor Omar Saleem has observed that a "reasonable person standard for Fourth Amendment searches and seizures is particularly inappropriate for Black Americans … due to selective race-based *Terry* stops which place Blacks in custody during most police encounters." Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk"*, 50 OKLA. L. REV. 451, 453 (1997). Professor Saleem's contention is laid out in more detail by Professor Maclin, who sets forth the folly of a generalized reasonable person standard:

> The hobgoblin lurking in the shadows of [United States Supreme Court jurisprudence] that the Court does not confront is the anger and mistrust that surrounds encounters between black men and police officers. Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion is naive, it produces distorted Fourth Amendment rules and ignores the real world that police officers and black men live in.

Maclin, 26 VAL. U. L. REV. at 248.

C. Courts Have Considered Other Factors in Applying the "Reasonable Person" Standard to Custodial and Other Settings, Thereby Opening the Door to the Consideration of the Perspectives of People of Color.

Courts have begun to recognize the folly of utilizing a cramped and monolithic basis for what constitutes an "objectively reasonable person." For example, individual

characteristics such as age and cognitive abilities profoundly affect human dynamics and, in particular, the way one perceives and processes interactions with the police. The United States Supreme Court recognized this axiom in the *Miranda* context in *J.D.B. v. North Carolina*, where it held that a child's age is a relevant factor in determining custodial status. 564 U.S. 261 (2011). Looking to social science research, the Court acknowledged that the impact of age and immaturity on perceptions of custodial status is "a reality that courts cannot simply ignore." *Id.* at 277.

The *J.D.B.* Court's rationale for injecting the individualized factor of age into the reasonable person analysis is instructive with regard to the analogous consideration of race. *First*, the Court noted that there are "some undeniably personal characteristics" such as "blindness," which "are circumstances relevant to the custody analysis." *Id.* at 278. Thus, the simplistic categorization of age as a "personal characteristic" was insufficient to exclude it as an appropriate factor for consideration. *Id.* *Second*, the Court rejected the prosecution's claim that the "reasonable person" standard precluded individualized assessment:

> Because the *Miranda* custody inquiry turns on the mindset of a reasonable person *in the suspect's position*, it cannot be the case that a circumstance is subjective simply because it has an 'internal' or 'psychological' impact on perception. Were that so, there would be no objective circumstances to consider at all.

Id. at 279 (emphasis added). *Finally*, the *J.D.B.* Court declined to embrace the prosecution's argument that rejection of the "one-size-fits-all reasonable-person" standard would obfuscate the objective test, which was "designed to give clear guidance to the police." *Id.* (citing *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)). The Court made clear that ignoring a factor as fundamental as age undermined the utility of the inquiry, adding that concerns about injecting some degree of individualized consideration into the process did not justify ignoring age altogether. *Id.* Other courts have reached similar conclusions.[8]

[8] *See, e.g.*, *State v. Jason L.*, 2 P.3d 856, 862 (N.M. 2000) (a young person's age was a relevant factor in determining whether a 15-year-old felt "free to leave" in the

The consideration of unique factors and perspectives in "reasonable person" analyses can be found elsewhere in the law. For instance, courts consider relevant training and education of defendants in negligence cases to determine how that person should be expected to act. This is true even though every individual's ability to learn, understand, and respond to training is influenced by personal characteristics. Nonetheless, despite the possibility that some highly trained individuals will still not be skilled, the reasonable person standard explicitly considers advanced training. Similarly, in sexual harassment law, several courts have adopted a reasonable woman standard to account for women's unique experiences and perspective in determining what behavior qualifies as sexual harassment. *See* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Environment Claims Under Title VII: Who is the Reasonable Person?*, 38 B.C.L. REV. 861, 869-77 (1997) (describing the adoption of the reasonable woman standard in sexual harassment case law).

If courts can consider these perspectives and circumstances in "reasonable person" analyses, they can consider the race of a person confronted by police. And even with this consideration, the analysis remains objective. There is no need to consider personal histories, subjective inferences, or other individualized circumstances. The "free to leave" analysis simply considers the objective Black person perspective as one of many factors in determining whether a person reasonably believed he or she was free to leave, rather than ignoring the realities of the Black experience with police in order to prop up a standard that confines all people to the "White, law abiding citizen" perspective.

Fourth Amendment context); *State v. Freeman*, 298 S.E.2d 331 (N.C. 1983) (concluding that, where 50-year-old police officer picked up 17-year-old defendant at his home and drove him to police station, "reasonable person" would not have believed he was "free to leave."); *People v. Leonard*, 157 P.3d 973, 997 (Cal. 2007) (holding defendant's age, low intelligence, and developmental disability were relevant factors in "free to leave" test); *People v. Braggs*, 810 N.E.2d 472 (Ill. 2004) (holding that reasonable person standard was subject to modification to take into account defendant's intellectual disability with respect to custody inquiry).

D. The United States Supreme Court Has Suggested that Race is a Relevant Factor.

The United States Supreme Court has also explained in *United States v. Mendenhall* that race is among "the circumstances surrounding the incident" that factor into whether "a person has been 'seized' within the meaning of the Fourth Amendment." 446 U.S. at 554. *Mendenhall* examined whether a Black woman was forcibly seized after federal agents patrolling an airport "asked to see her identification and airline ticket." *Id*. at 548. Even though the Supreme Court ultimately ruled that the defendant was not seized in light of the other circumstances of the encounter (for example, she was "questioned only briefly, and her ticket and identification were returned to her"), it observed that she "may have felt unusually threatened by the officers" because she was "a female and a Negro." *Id*. at 558. The Supreme Court explained that "these factors were not irrelevant" to whether she would have felt free to leave. *Id*.

E. A Growing Number of Courts Explicitly Consider the Perspectives of People of Color in Applying the "Reasonable Person" Standard.

Courts have become increasingly receptive to considering race as a factor in analyses related to police encounters with Black people. This Court has been particularly sensitive to the fact that African-Americans may often be subjected to disparate treatment by law enforcement that White individuals may not experience. *See State v. Hight*, 146 N.H. 746, 751 (2001) ("That the officer was Caucasian, the defendant was African-American and the officer's suspicions did not extend to the defendant's two Caucasian passengers is also troublesome.").

One of the most recent and prominent examples of a court being sensitive to race is *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016), in which Massachusetts's highest court held that a Black man's flight from police cannot alone establish reasonable suspicion of a crime, since this choice can be explained by reasonable fear of police bias. The court explained:

> [W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department [] report

> documenting [that] … black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.

Id. at 342. The court ruled that a "judge should, in appropriate cases, consider the report's findings in . . . the reasonable suspicion calculus." *Id*. Similarly, in *State v. Ashbaugh*, 244 P.3d 360 (Or. 2010), the Oregon Supreme Court observed that "courts and academics across the country" are recognizing that Fourth Amendment analysis of "encounters between police and black males" should "consider how the race of the person confronted by the police might have influenced his attitude toward the encounter." *Id.* at 368, 368 n.15.[9]

F. Integrating Race as a Relevant Factor Is Practicable and Necessary.

Amicus asks this Court to simply consider the role race might play, along with the other factors it considers, when judging the constitutionality of a person's encounter with police. Race is hardly an obscure factor. As with the question of age, police "need no imaginative powers . . . or training in social and cultural anthropology" to recognize that race may play a role in their interactions with civilians. *J.D.B.*, 564 U.S. at 279-80. Further, since race is not in and of itself determinative but merely one factor among other considerations, police officers need not be expected to calculate precisely the effect that race may have in every case. Rather, as in other constitutional and legal contexts, an enhanced test that examines, as one factor, the race of a person in scrutinizing the behavior of so-called reasonable people is appropriate. It is appropriate because it would provide Black people, and other people of color, only what the Fourth Amendment and

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[9] *See also Miles v. United States*, 181 A.3d 633, 641 n.14 (D.C. Ct. App. 2018) (implying, though not stating explicitly, that race may be a consideration in analyses involving police encounters); *D.Y. v. State*, 28 N.E.3d 249, 256 (Ind. Ct. App. 2015) (recognizing that race "might be relevant" in "determining whether a reasonable person would feel free to leave" (citing *Mendenhall*, 446 U.S. at 558)); *United States v. Guzman-Santos*, No. 2:15-CR-00308-JCC, at *8 and n.4 (W.D. Wash. Apr. 6, 2016) (Docket No. 39 in Appendix to this Brief) ("As this Court has ruled previously, the perceptions of law enforcement personnel regarding the relative informality or civility of an interaction may be out of touch with the feelings of a reasonable person, and particularly a reasonable person of color.").

Part I, Article 19 already guarantee: protection against unreasonable seizures. Indeed, the *J.D.B.* court described a child's age as "a fact that generates commonsense conclusions about . . . perception." *J.D.B.*, 564 U.S. at 272. While there are significant differences between race and age, the social science examined in Argument 2.A, *supra*, suggests that race, too, affects perception, reflecting the power imbalances between a Black suspect and an inquiring police officer. Race, like age, is "a reality that courts cannot simply ignore." *Id.* at 277.

The trial court interpreted race as a subjective factor, which it then discounted because the "free to leave" test is objective. App. at 92-93 (26:5-27:11). This is erroneous for two reasons: first, race is not a subjective factor which would taint the objective analysis or otherwise create two standards, one for people of color and one for White people; and second, considering race is consistent with the objective totality of the circumstances test to which this Court and the U.S. Supreme Court are committed.

First, *JDB* already rejects the idea that a factor such as race is subjective. *See J.D.B.,* 564 U.S. at 279 ("[I]t cannot be the case that a circumstance is subjective simply because it has an 'internal' or 'psychological' impact on perception."). A race analysis is no more subjective than the age analysis in *JDB* and it is no more subjective than any other consideration in the "free to leave" test. After all, the test is whether the *person would feel* free to leave. For instance, courts consider the presence or display of weapons; this factor examines the suspect's "subjective" response to display of gun in the same way that courts would consider the response of Black people to police encounters. Courts consider who initiated the encounter and the "subjective" response to police initiation; they consider whether the suspect indicated freedom of movement, which would fall under what the trial court seems to have defined as "subjective." And while these all might have a "subjective" element to them, they are all, as race should be, examined through an objective lens.

Second, considering race is entirely consistent with the "free to leave" test's reliance on the totality of the circumstances. If this is truly a totality of the circumstances analysis, "the Court should include the consideration of race in order to gain a full view

of the circumstances and dynamics surrounding the encounter." Maclin, 26 VAL. U. L. REV. at 273-74. Otherwise, the "[c]ontinued use of a reasonable person test [absent consideration of race] runs the risk that majoritarian values and perceptions of police practices will go unchallenged." *Id*. at 274. "[I]t makes no sense to devise Fourth Amendment rules as if we lived in a nation where there are no differences among us." *Id*.

The other concern the trial court seems to have had is that incorporating race as but one factor in the "free to leave" analysis will open the door to a different standard for a suspect "who's dressed in Hell's Angels colors, and it's summertime, with tattoos all over him." App. at 97 (31:1-5). The concern seems to be this: considering race opens the door to other considerations based on gender, ethnic groups, and social groups. But this concern has no bearing on the appropriateness of race as a consideration. We know that Black people are disproportionately targeted, imprisoned, and subject to violence at the hands of police; we know that Black people have a longstanding, historic, and contemporary tension with law enforcement; and we know that Black people view police encounters differently than White people and adjust their behavior accordingly. "Just because similar claims may be presented by other groups today or at some future date is no reason not to consider the case of [Black people] who have sufficient cause for complaint now." Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. at 273.

Amicus does not ask that this Court upend the "free to leave," reasonable person standard. Rather, we ask that the standard be inclusive of perspectives of people of color. Accordingly, to the extent reversal is not required pursuant to Section 1 *supra* (which it is), this Court should still reverse the trial court's March 13, 2018 order due to the trial court's refusal to take into consideration the perspectives of people of color in assessing whether a person feels "free to leave."

CONCLUSION

The trial court's March 13, 2018 order should be reversed, and this case remanded.

Respectfully Submitted,

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Dated: June 13, 2019

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,491 words (including footnotes) from the "Question Presented" to the "Conclusion" sections of the brief.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 13th day of June 2019 through the electronic-filing system on counsel for the Defendant/Appellant (Donna Brown, Esq.) and the State/Appellee (Lisa Wolford, Esq.).

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

APPENDIX

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. JAVIER GUZMAN-SANTOS, Defendant.	CASE NO. CR15-0308-JCC ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This matter comes before the Court on Defendant Javier Guzman-Santos's Motion to Suppress (Dkt. No. 22), his accompanying memorandum (Dkt. No. 23), the Government's Response (26), the Declaration of Mr. Guzman-Santos (Dkt. No. 31), and Defendant's Reply (Dkt. No. 33). The Court held an evidentiary hearing on April 5, 2016.

Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. FACTUAL BACKGROUND

Defendant Javier Guzman-Santos is accused of inappropriately touching another passenger on a flight from Honolulu to Bellingham on March 30, 2015. (Dkt. No. 4.) Mr. Guzman-Santos maintains that he was asleep at the time of the alleged incident and any touching was accidental. (*See* Dkt. No. 23.) After the flight landed in Bellingham, Mr. Guzman-Santos

spoke with a Washington State trooper at the airport. At that time, Mr. Guzman-Santos was read his *Miranda* rights, requested a lawyer, and allowed to go home.[1] Notably, Agent Greg Leiman, who later interrogated Mr. Guzman-Santos, was on the scene and aware that Mr. Guzman-Santos had requested and spoken with a lawyer. The present dispute pertains to a four-hour interrogation performed by Agent Leiman and another FBI Special Agent, Patrick Gahan.

At about 10:15 a.m. on April 10, 2015, Agents Leiman and Gahan arrived at Mr. Guzman-Santos's home and place of business. (Dkt. No. 23 at 1; Dkt. No. 26 at 3.) The agents identified themselves, showed their credentials, and told Mr. Guzman-Santos that they wanted to speak with him. The agents were armed and Mr. Guzman-Santos reports seeing at least one of their guns, though guns were never aimed at him. Mr. Guzman-Santos did not receive *Miranda* warnings at any point during the interrogation. Their conversation was not recorded until agents took an official statement at 2:55 p.m.—well over four hours after their arrival.

When agents communicated to Mr. Guzman-Santos that they wanted to speak with him, he asked that they speak with his lawyer. (*See* Dkt. No. 23 at 3; Dkt. No. 31 at 1.) Mr. Guzman-Santos showed the agents the lawyer's business card. (*Id.*) The agents replied, "Your lawyer wasn't there, so we need to talk to you and not your lawyer." (*Id.*) Early into this exchange, the possibility of Mr. Guzman-Santos submitting to a polygraph test was suggested.

Agents asked if there was a private place that they could talk, and eventually Mr. Guzman-Santos took them into the living room of his house, which was somewhat empty because it seemed his family was in the process of moving. (Dkt. No. 23 at 3.) Agent Leiman testified that there were no windows in the living room, so neighbors could not see the interrogation taking place.

[1] Where the Court discusses a factual detail without citation, it is referring to the record developed at the evidentiary hearing on April 5, 2016. A transcript of that hearing was not available on the date of this Order.

What ensued was an approximately four-hour conversation. Paradoxically, Agent Leiman testified that he wanted to speak with Mr. Guzman-Santos to "get his side of the story," but also that he and Agent Gahan repeatedly "told [Mr. Guzman-Santos] what we believed had happened." The agents continued to question Mr. Guzman-Santos, employing what they described as "strategies" or "themes," to "continue probing" until they heard the version of events that they deemed to be true. Agent Leiman described some of these strategies as "rationalizing behavior," "minimizing consequences," and "projecting blame elsewhere." One "strategy" or "theme" involved minimizing the allegations against Mr. Guzman-Santos by saying the accusation was "not a big deal," and "things happen." (Dkt. No. 31 at 2.) The agents also claimed to have DNA and video evidence proving his guilt. (*Id.*) The agents repeatedly said, "We know you touched her."[2] (Dkt. No. 23 at 3–4.) Eventually, Agent Gahan told Mr. Guzman-Santos that he could either be a "hero" by "taking responsibility," or a "coward." (Dkt. No. 23. at 4–5.)

Mr. Guzman-Santos was allowed one or two restroom breaks during the interrogation. He was also allowed to take one call, in which Agent Leiman remembers some discussion of "writing a check," possibly related to his business. Twice, Mr. Guzman-Santos's wife called during the interrogation and he was told not to answer it unless it was an emergency. While he was asked if he would submit to a polygraph test, Mr. Guzman-Santos expressed reservations about the validity of such tests and declined. No polygraph test was taken.

At 2:55 p.m., agents took a statement from Mr. Guzman-Santos in which he claimed to have woken up with his hand on the alleged victim's thigh and proceeded to touch her deliberately. He was not provided his *Miranda* warnings prior to making this statement.

II. DISCUSSION

[2] As Agent Leiman testified, "we told him what we believed had happened."

The Fifth Amendment provides that "No person. . . shall be compelled in any criminal case to be a witness against himself. . ." U.S. Const. Amend. V. The privilege against compelled self-incrimination requires that law enforcement give *Miranda* warnings to an accused person prior to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Statements made in a custodial interrogation context absent *Miranda* warnings may not be used in a criminal prosecution against the speaker. *Id.* Where the police fail to administer *Miranda* warnings, courts presume that the privilege against compulsory self-incrimination has not been intelligently exercised. *Oregon v. Elstad*, 470 U.S. 298, 310 (1985).

Given the undisputed fact that Mr. Guzman-Santos was interrogated[3] without *Miranda* warnings, the sole question before the Court is whether he was "in custody."

A. "In Custody"

In assessing whether custodial interrogation has occurred, courts consider whether "a reasonable person in such circumstances would conclude after brief questioning [that] he or she would not be free to leave." *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001). This inquiry is based on the "totality of the circumstances," and can include many factors. *Id.*; *see also United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

The Ninth Circuit has identified five factors which are "among those likely to be relevant" to determining whether or not a suspected person is "in custody." *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002). The five factors are: (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. *Id.*

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[3] Any tactics can be considered interrogation which "the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). This can occur through actual questioning or "its functional equivalent." *Id.* at 300–301. Even where the police conversationally raise a topic, it can be considered interrogation if reasonably likely to elicit incriminating information. *Id.*

1. Language Used to Summon the Individual

Mr. Guzman-Santos was approached by armed FBI agents in suits and told that they wanted to speak with him. Early into that encounter, he saw Agent Leiman's credentials, and Agent Leiman brought up the possibility of a polygraph test. Moreover, when Mr. Guzman-Santos requested an attorney, no matter how firmly, he was still told that he, not his attorney, needed to speak with the agents. There is no indication that the language used by agents was forceful or hostile.

The Court concludes that a reasonable person in Mr. Guzman-Santos's position would not have considered the agents to be requesting a conversation as casually as the Government suggests. Agents made it clear that they wanted to speak with Mr. Guzman-Santos about a criminal allegation, that they would not be speaking with his attorney, and that a polygraph test was going to be discussed. Consideration of this factor weighs slightly in favor of a finding that Mr. Guzman-Santos was "in custody" while being interrogated.

2. The Extent to Which the Defendant is Confronted with Evidence of Guilt

Mr. Guzman-Santos was confronted with much "evidence of guilt" throughout his interrogation. For example, agents told Mr. Guzman-Santos they had his DNA on the alleged victim's pants and a video recording of the flight. Regardless of whether they had such evidence, this constitutes a "confrontation with evidence of guilt." The repeated statements by agents that, "we know you touched her," also contribute to this factor.

Consideration of this factor weighs in favor of a finding that Mr. Guzman-Santos was in custody.

3. The Physical Surroundings of the Interrogation

Whether the physical surroundings suggest that a suspect is "in custody" often turns on whether or not the questioning takes place in public. "[E]xposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] fear that, if he does not cooperate, he will be subjected

to abuse." *Berkemer*, 468 U.S. at 438; *see also U.S. v. Galindo-Gallegos*, 244 F.3d 728, 731 (9th Cir. 2001); *United States v. Kim*, 25 F.3d 1246 at 1432 (9th Cir. 1994). Isolation from one's companions, particularly in a remote location, points towards a finding that a suspect was "in custody" during questioning. *United States v. Beraun-Panez*, 812 F.2d 578, 582 (9th Cir. 1987).

The interrogation took place in Mr. Guzman-Santos's home, not in a public place. While certainly not a "remote" environment, it was established during the evidentiary hearing that onlookers could not see into the room where agents were questioning Mr. Guzman-Santos as there were no windows. Moreover, while the interrogation broke for a restroom break and Mr. Guzman-Santos answered one phone call, at two other times he was told not to answer an incoming phone call from his wife. The Government seems to minimize this occurrence because Agent Leiman did not go so far as to "forbid" the call from being answered. This point is not well taken. A reasonable person in Mr. Guzman-Santos's circumstance, instructed by an armed law enforcement officer not to answer a phone call—particularly after hours of interrogation—would feel unable to do so.

While limited by the fact that Mr. Guzman-Santos took a separate call and was allowed a restroom break, the Court concludes that Mr. Guzman-Santos was removed enough from public view and isolated from his family such that consideration of this factor weighs slightly in favor of the conclusion that he was "in custody."

4. Duration

The Court places particular emphasis on the duration factor. The duration of questioning is a key reason that *Miranda* rights are required in some contexts but not others. For example, in *Berkemer v. McCarthy*, the Supreme Court emphasized the "presumptively temporary and brief" nature of an investigative stop as grounds for declining to extend *Miranda* rights to the *Terry* context. 468 U.S. 420, 437–438 (1984). Investigative stops are treated differently for Fourth and Fifth Amendment purposes *because* they "constitute such limited intrusions on the personal security of those detained. . ." *Michigan v. Summers*, 452 U.S. 692, 699 (1981).

The Ninth Circuit has deemed lengths of time far less than four hours long enough to render a suspect "in custody." *See Beraun-Panez*, 812 F.2d at 579 (questioning estimated to last between thirty and ninety minutes); *United States v. Kim*, 292 F.3d at 977 (total questioning estimated to last fifty minutes); *United States v. Wauneka*, 770 F.2d 1434, 1439 (9th Cir. 1985) (interview that lasted over an hour was custodial); *United States v. Lee*, 699 F.2d 466, 467–68 (9th Cir. 1982) (60–90 minute interview was custodial).

The duration of this interrogation weighs strongly in favor of a finding that Mr. Guzman-Santos was "in custody." The Government argues that this was a relaxed, voluntary conversation and that there were breaks in the agents' questioning of Mr. Guzman-Santos. It is true that a four-hour interview does not render a criminal suspect *per se* in custody. For example, in *United States v. Manning*, the Ninth Circuit found under the totality of circumstances that a four-hour interview did not render the defendant in custody. 312 F. App'x 34, 35–36 (9th Cir. 2009). The facts of *Manning* are, however, distinct; there, the defendant "made her first confession 70 minutes into the interview," "was given numerous breaks throughout the interview," and she "was not threatened, restrained, or subject to any physical or psychological pressure during the interview." *Id.* As distinct from the facts in *Manning*, Mr. Guzman-Santos only provided a "confession" after agents had been present on his property for over four hours, was given only one or two breaks, and was subject to considerable psychological pressure during the interview.

The Court finds consideration of the duration factor weighs strongly in favor of a finding that Mr. Guzman-Santos was "in custody."

5. Degree of Pressure

Finally, the Court considers the degree of pressure applied to Mr. Guzman-Santos during his interrogation. The record before the Court demonstrates that, while much of his interrogation by Agents Leiman and Gahan was civil and conversational, a reasonable person in Mr. Guzman-Santos's position would have felt a moderate degree of pressure. Many elements of the interrogation added pressure to the environment, including (1) the initial contact with the agents

in which they refused to call his lawyer and mentioned a polygraph, (2) agents' admitted use of various interrogation strategies to manipulate Mr. Guzman-Santos into providing them a confession, (3) Agent Leiman asking Mr. Guzman-Santos not to answer his phone, and (4) the agents' insistence that they had substantial evidence against Mr. Guzman-Santos and saying, "we know you touched her." The steady, albeit relatively mild, pressure applied to Mr. Guzman-Santos over his four-hour interrogation leans in favor of a finding that he was "in custody."

As this Court has ruled previously, the perceptions of law enforcement personnel regarding the relative informality or civility of an interaction may be out of touch with the feelings of a reasonable person, and particularly a reasonable person of color.[4] The fear of being deemed in violation of a police order, particularly if concerned about implicit racial bias, is a legitimate one. A reasonable person in Mr. Guzman-Santos's circumstances would have felt a reasonable degree of pressure to comply with the instructions of armed law enforcement agents.

The Court pauses to note that the tactics used by FBI agents in an interrogation in April 2015 closely resemble those condemned by the U.S. Supreme Court in *Miranda v. Arizona*. 384 U.S. 436 (1966). *Miranda* discussed law enforcement manuals that, "instruct the police to display an air of confidence in the suspect's guilt . . . [t]he interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it." *Id.* at 450. Agents in this case raised suggestions about alcohol use, Mr. Guzman-Santos's family life, and his desires towards women; all are mentioned in the *Miranda* opinion. *Id.* Tactics identified as problematic by the Court in *Miranda* also

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[4] This Court has included an acknowledgment of racially-charged police violence in conducting a similar "in custody" analysis before. *See* CR14-0228-JCC, *United States v. Smith*, Dkt. No.46 at 14. ("Particularly in light of recent high-profile instances of violence towards persons perceived by police to be defying their instructions, a reasonable person in [Defendant's] circumstances would feel a high degree of pressure to comply. The Court is not aware of [Defendant's] race or ethnicity. However, the Court points out that this reasonable perception of pressure would be exacerbated if [he] is not Caucasian. To experience a high degree of pressure from law enforcement does not require drawn guns or flashing lights.") *See also* CR15-0169-JCC, *United States v. Magana, et al.*, Dkt. No. 68 at 8.

included instructions to officers "to minimize the moral seriousness of the offense [or] to cast blame on the victim or on society." *Id.*

Deceptive interrogation tactics are not unconstitutional.[5] However, the practices used by agents in this case bear striking resemblance to those supporting the original creation of clear, prophylactic *Miranda* warnings. While agents may use these tactics, consistent with their training, they must administer *Miranda* warnings when a suspect is in custody. Absent such warnings, the confession provided by Mr. Guzman-Santos cannot be used in the Government's case against him.

In conclusion, based on the totality of the circumstances, the Court finds that a reasonable person in Mr. Guzman-Santos's position would not have felt free to leave, and he was "in custody" when FBI Agents Leiman and Gahan interrogated him for four hours. The statements made without receipt of *Miranda* warnings, including the statement recorded by Agent Leiman, are hereby SUPPRESSED.

B. Failure to Record Interrogation

The Court briefly notes its frustration with the fact that the lengthy interrogation of Mr. Guzman-Santos was not recorded. Determining whether a criminal defendant's constitutional rights were violated would be considerably easier with the benefit of a full recording. Other courts have criticized the FBI for failing to record in similar circumstances, thus necessitating court intervention and fact-finding. *See U.S. v. Azure*, 1999 WL 33218402 at *1 (D.S.D. Oct. 19, 1999) ("There is no good reason why F.B.I. agents should not follow the same careful practices unless the interview is being conducted under circumstances where it is impossible to tape or record the interview"); *U.S. v. Perez*, 2014 WL 5460452 at *2 (D.S.D. 2014). Agent Leiman's testimony that he was afraid recording might "chill" the conversation with Mr. Guzman-Santos is

[5] *See Oregon v. Mathiason,* 429 U.S. 492, 495–496 (1977); *Moran v. Burbine,* 475 U.S. 412 (1986); *Illinois v. Perkins*, 496 U.S. 292, 297–98 (1990).

particularly telling. This fear—that the presence of a recorder would make it harder to interrogate Mr. Guzman-Santos and elicit a confession—only serves as further justification for recording these interviews, or at the very least, providing *Miranda* warnings prior to custodial interrogation.

II. CONCLUSION

For the foregoing reasons, Defendant Javier Guzman-Santos's motion to suppress (Dkt. No. 22) is GRANTED.

DATED this 6th day of April 2016.

John C. Coughenour
UNITED STATES DISTRICT JUDGE