THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0057

State

v.

Ernest Jones

APPEAL PURSUANT TO RULE 7 FROM JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE PETITIONER

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(Fifteen minutes oral argument)

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QUESTION PRESENTED

Whether the trial court erred in denying Mr. Jones' motion to suppress the evidence seized as a result of a search of his person where the record established that Mr. Jones was not free to leave the encounter with the Concord Police on April 28, 2017 and he was therefore seized without just cause.

This issue was preserved by the motion to suppress, defendant's supplemental motion in support of the motion to suppress and the trial court's order. *See* Order 36-46; App. 1-7; 12-53.

STATEMENT OF THE CASE AND FACTS

On April 28, 2017, the Concord Police received a call from Mason Bass reporting a "suspicious vehicle" in a driveway at an apartment building at 22 Allison Street. App. 1- 2. This driveway was shared with other tenants in the apartment building. App. 2. Bass did not live in the apartment and was babysitting at the time of the call. *Id*. The vehicle that Mr. Bass found suspicious was occupied by Ernest Jones, a 6'5" African American male. *Id*.

Based upon Mr. Bass's call, two uniformed Concord Police officers, Officers Mitchell and Begin, were dispatched to the scene in a marked cruiser. *Id*. Officer Mitchell recalled that the call was around 8:00 pm. Tr. 5.[1] The two officers approached the vehicle occupied by Mr. Jones and positioned themselves on each side of the vehicle, which was a black Dodge truck. App. 2. Officer Mitchell walked over to the passenger side of the truck and Officer Begin approached the driver's side of the truck. Tr. 7. The woman in the passenger seat, Kathleen Abelha, explained that she was a tenant in one of the apartments and was just sitting in the car speaking to her friend. App. 2. Officer Mitchell testified that his

[1] References to transcript of suppression hearing will be made a "Tr. __."

conversation with the female dispelled any suspicion of criminal activity. Tr. 11. Despite being given a plausible and valid explanation for parking in the driveway, the Concord Police officers asked the two occupants of the truck to produce identification. App. 2. There was no evidence that Mr. Jones was informed that he was free to leave or that he could decline the request for identification. Tr. 15. After receiving the identification from Mr. Jones, the police ran a criminal record check and learned that Mr. Jones had an active warrant on a charge of driving after suspension. App. 2. Mr. Jones was then taken into custody on the warrant. App. 2. The police conducted a search incident to arrest of Mr. Jones and found a container with white powder that was later determined to be the fentanyl. App. 2.

On January 8, 2018, the defendant filed a motion to suppress the fentanyl. App. 1. The State filed an objection and an evidentiary hearing was held on February 26, 2018. App. 8 & 12. At the beginning of the hearing, the State stipulated that the police did not have reasonable suspicion to detain the defendant based upon the information they had from the caller. App. 12. The hearing therefore focused on the issue of whether the defendant was detained at the time the police asked him to produce identification. Tr. 1-43.

At the hearing, the State called one witness, Benjamin Mitchell of the Concord Police. Tr. 2. The State did not call Officer Begin as a witness at the suppression hearing. *Id*. Officer Mitchell testified that while he was talking to the female, he could see Officer Begin talking to Jones, though the window, but he could not hear their conversation. Tr. 15. Officer Mitchell testified that he estimated the encounter between Mr. Jones and the police lasted less than 20 minutes. Tr. 10. Officer Mitchell overheard the message from dispatch that Mr. Jones had an electronic bench warrant out for his arrest. *Id*. As the State did not call Officer Begin to testify at the hearing, it was not clear whether Officer Begin held onto Mr. Jones' ID during that 20-minute period. Tr. 2.

Officer Mitchell testified that after the two officers received the call about the warrant, he went to the other side of the car and informed Mr. Jones of the warrant. Tr. 10. Officer Mitchell testified that Jones was very cooperative after he was informed of the warrant. *Id*.

On February 28, 2018, after the suppression hearing, the defendant filed a supplemental motion in support of the motion to suppress. App. 12. The trial court issued a decision denying the motion to suppress on March 15, 2018. Mr. Jones went to trial on this charge and was found guilty of the

possession of a controlled drug under RSA 318-b:2. *See* App. 54. The defendant was sentenced on January 3, 2019 and filed a timely notice of appeal on January 24, 2019.

SUMMARY OF THE ARGUMENT

Although this encounter was technically not a traffic stop, it would have felt no less intrusive and intimidating to the occupants of Mr. Jones' vehicle. Where two uniformed and armed police officers approached the vehicle from behind and stood on each side the vehicle and asked for identification from the occupants of the vehicle, the driver would not have been able to safely drive away from the encounter without the officers stepping away from the vehicle. The trial court erred in denying the motion to suppress in this case because a reasonable person would have believed that he was not free to leave the police encounter on April 28, 2017.

Further, the trial court erred in holding that it was impermissible for it to consider the race of the defendant in determining the issue of whether a reasonable person in this situation would have felt free to leave the encounter. The trial court's refusal to consider how race affected this encounter lead to it making inaccurate assumptions about Mr. Jones' conduct. The trial court's reliance on the testimony that Mr. Jones was "calm and relaxed," misinterpreted Mr. Jones' demeanor as acquiescence to the police encounter and ignored widely held societal knowledge that a

person's race has a real and profound effect on interactions between police officers and civilians:

> The legacy of violence by police against African Americans – from the Rodney King incident to beatings in post-Katrina New Orleans – is likely to be in the forefront of an African American's mind when he or she is stopped by the police. These expectations of violence, coupled with the mass incarceration of black males, undoubtedly leads to a sense of helplessness that is not present in law enforcement interactions with whites. Therefore, the courts should take account of an individual's race when determining whether a person has been "seized."[2]

[2] Graham Cronogue, *Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor*, 20 Tex. J. C.L. & C.R. 55, 84 (2015).

ARGUMENTS

I. Mr. Jones was seized without reasonable cause and the trial court erred in denying his motion to suppress.

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) ("Even if it appears that the Federal Constitution is more protective than the State Constitution, the right of our citizens to the full protection of the New Hampshire Constitution requires that we [first] consider State constitutional guarantees"). Article 19 gives every citizen of the State "a right to be secure from all unreasonable searches and seizures." N.H. CONST. pt. I, art. 19. "[T]his court has held that article 19 provides greater protection for individual rights than does the fourth amendment." *State v. Koppel*, 127 N.H. 286, 289 (1985) (citing *Ball*, 124 N.H. at 235). This broader protection especially exists in the context of automobiles.

A. The Issue and Standard

The State must prove by a preponderance of the evidence that the warrantless search in question was reasonable. *State v. Osborne*, 119 N.H. 427, 433 (1979). The search of Mr. Jones was unconstitutional because it was the product of a seizure and the police lacked reasonable cause for the seizure. The fruit of the poisonous tree doctrine requires the exclusion

from trial of evidence derivatively obtained through a violation of Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. *State v. Cobb*, 143 N.H. 638, 650 (1999); *United States v. Leon*, 468 U.S. 897, 907 (1984). The exclusionary rule serves to: (1) deter police misconduct; (2) redress the injury to the privacy of the victim of the unlawful police conduct; and (3) safeguard compliance with State constitutional protections. *State v. Panarello*, 157 N.H. 204, 207 (2008).

At the hearing in this case, the State failed to prove that the defendant was not seized when two uniformed police officers approached both sides of his vehicle, questioned the defendant and his passenger and requested that they produce identification. The State did not call Officer Begin, the officer who had direct contact with Mr. Jones, as a witness at the suppression hearing and therefore there was no evidence as to the tone of the contact with Mr. Jones, whether he was told he was free to leave and the phasing of the request that he produce identification.

In *Terry v. Ohio*, 392 U.S. 1, 88 (1968), the United States Supreme Court recognized the narrow authority of police officers investigating criminal activity to make limited intrusions on an individual's personal

security based on less than probable cause. *Terry* involved a police officer who approached a person on the street because the officer believed that the person was contemplating a robbery. *Id*. at 6.

In *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) the court further defined what constituted a seizure in this type of police encounter by explaining that the test was whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall* involved a situation where the police approached a woman at an airport, whom they suspected of drug activity, and asked her to produce an ID and airline ticket. *Id*. at 547-548.

One factor courts have considered as to whether a seizure has occurred is whether the person's movement was impeded in any way. *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988). When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 251 (2007). Not only is the driver seized, but so is the passenger. *Id*.

The law also recognizes that "…law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place by asking him if he is willing to answer

some questions, by putting questions to him if the person is willing to listen…" *Florida v. Royer*, 460 U.S. 491, 497 (1983). Applying this standard to Mr. Jones, the State did not offer any evidence that Mr. Jones was asked if he was willing to answer any questions.

In denying the motion to suppress, the trial court relied on *State v. Licks*, 154 N.H. 491, 493 (2006) and *State v. Joyce*, 159 N.H. 440, 445 (2009). *Licks* and *Joyce* demonstrate that the factual circumstances of this type of encounter are critical to the issue of whether the driver was seized. In *Licks*, there was a police officer who noticed that the defendant was "slouched down" in the driver's seat of the vehicle parked outside a bar. *Id*. 492. The officer in that case decided to approach the defendant to "check on what he was doing" and to "make sure he was all set." *Id*. When the officer reached the driver's side door, the defendant rolled his window down and the officer asked the driver if he was "all set." *Id*. When the defendant rolled down his window, the officer noticed signs of intoxication. *Id*. 491–92. This Court found that the defendant in *Licks* was not seized in view of all the circumstances of that case including the fact that only one police officer approached the car. *Id*. 494.

This Court reached a different result in *Joyce* where it found that the defendant was seized when he overheard the officer call for another officer to come to the scene with a narcotics-sniffing dog. *State v. Joyce*, 159 N.H. at 445.

In this case, Officer Mitchell testified that after he arrived at 22 Allison Street, he and Officer Begin positioned themselves on each side of the defendant's truck. After speaking with the passenger, Officer Mitchell immediately dispelled any concerns that he had about the call regarding a "suspicious" vehicle. When asked about how much time passed between when he arrived at 22 Allison Street and when he learned about the warrant for Mr. Jones, Mitchell said the time was less than 20 minutes.

B. **A reasonable person would have perceived the contact with the police as a traffic stop and would therefore not feel free to leave the encounter**.

The facts in this case are different than a situation where the police approach a person in the airport or on a street corner and asked them a few questions. Admittedly, the encounter between the Concord Police and Mr. Jones on April 28, 2017 was not technically a traffic stop, but it would have felt no less intrusive and intimidating to the occupants of that truck. This encounter would have been perceived by a reasonable person as a traffic

stop. Two uniformed police officers approach the vehicle from behind, at night, and stand on each side of his vehicle. The officers ask for identification from the occupants of the vehicle. The driver would not have been able to safely drive away from the encounter without the officers stepping away from the vehicle. Except for the blue lights and the encounter being in a driveway, to a reasonable person in this encounter it would have in all other aspects been perceived as a roadside stop. A reasonable person would not have felt free to drive away under the circumstances faced by the defendant that evening.

Further, RSA 265:4 further requires that a person "driving or in charge of a vehicle" must "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). Failure to do so is a class A misdemeanor and may result in license suspension.

Considering all of the circumstances in this case, a reasonable person would not have felt free to leave the police encounter and therefore Mr. Jones was seized without just cause.

II. The trial court erred when it refused to consider the fact that Mr. Jones is an African American male and how that fact affected this encounter.

The trial court erred when it refused to consider the fact that Mr. Jones is African American in its analysis as to whether he was seized by Officers Mitchell and Begin on April 28, 2017:

> In the circumstances of this case, neither the State nor Federal Constitution requires the Court to consider the Defendant's race in making the determination whether or not a reasonable person believes he or she is not free to leave when a police officer interacts with him. (citations omitted). Indeed, to do so would be error. Order at 46.[3]

The order not only suggests that the trial court did not consider the race of the subject of the police contact but the order suggests that the trial court mistakenly believed that it was forbidden from considering race in its analysis in this case.

A. **History of United States Supreme Court jurisprudence on police seizure of minorities and African Americans**.

In *Terry v. Ohio*, 392 U.S. 1 (1968), the court considered how to balance an officer's ability to approach a citizen for questioning, where there is no probable cause to arrest the person, with the individual's right to be free from unreasonable government intrusion. *Id*. at 9. One of the factors considered in this analysis was "[t]he wholesale

[3] Order refers to trial court's order on defendant's motion to suppress. The page number refers to the order's location at the end of this brief.

harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain." *Id*. at 14. *Terry* considered the "the degree of community resentment aroused by particular police practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." *Id*. at footnote 14.

The *Terry* court also considered the findings of the President's Commission on Law Enforcement and Administration of Justice noting that "'(i)n many communities, field interrogations are a major source of friction between the police and minority groups.'" *Id*. at footnote 11.

In *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) the court noted that the fact that the defendant was a young female "negro" who was questioned by white police officers was not irrelevant to the issue of whether or not she was seized. *Id*. *Mendenhall* was not the last time the United States Supreme Court considered the race and/or minority status of a those affected by police detention when analyzing the legality of police contact with citizens.

In *Illinois v. Wardlow*, 528 U.S. 119, 135 (2000), the concurring opinion considered the history of fraught relations between the police and minority communities:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves." *Id*. at 132–33. (Justice Stevens concurred in part and dissented in part and filed an opinion in which Justices Souter, Ginsburg and Breyer joined)

Justice Stevens recognized research from numerous jurisdictions that established that "sizeable percentages of Americans today—especially Americans of color—still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day-to-day application." *Id*. at 135 footnote 9. A study by the New Jersey Attorney General found that minority drivers are treated differently and this disparate treatment "engender[s] feelings of fear, resentment, hostility, and mistrust by minority citizens." *Id*. at 135 footnote 10.

In the *Illinois v. Wardlow* decision, Justice Stevens also cited a study by the Massachusetts Attorney General's Office which found that Boston Police officers had engaged in improper conduct with respect to

stopping and searching minorities that included, "forcing young men to lower their trousers, or otherwise searching inside their underwear, on public streets or in public hallways" and that this conduct was "so demeaning and invasive of fundamental precepts of privacy that it can only be condemned in the strongest terms." *Id*.

In 1968, the U.S. Supreme Court cited to research establishing that there was friction during police contact with minority communities.[4] In 1980, the U.S. Supreme Court noted that the fact that the defendant was a female "negro" and the officers involved were white was not irrelevant to the issue of whether she was seized.[5] In 2000, the U.S. Supreme Court recognized that many minority communities believe that contact with the police can be dangerous.[6] In 2016, in a dissenting opinion, Justice Sotomayor observed that persons of color are disproportionately affected by the indignity associated with unconstitutional seizures.[7] Through the jurisprudence of the United States Supreme Court alone, the police officers of this country have

[4] *Terry v. Ohio*, 132 U.S at 14.
[5] *U.S. v. Mendenhall*, 446 U.S at 1879.
[6] *Illinois v. Wardlow*, 528 U.S. at 132-135.
[7] *Utah v. Strieff* 136 S. Ct. 2056, 2070 (2016).

been on notice for over 40 years that persons of color are less likely to feel free to leave an encounter with the police because of their fear and distrust of the police.

B. **Recent events and case law demonstrate the relevance of the history of fear and distrust of police among African Americans and how it affects the perception of whether a person feels free to leave the encounter**.

If anything, the public perception that contact between the police and persons of color may be dangerous has only increased since the decision in *Terry v. Ohio* in 1968. One reason for the increase in this perception is the widespread use of cell phones, which record these encounters and make them part of our national psyche:

> In the digital age, however, images of police violence have never been as widespread. No longer confined to mainstream news coverage, these incidents are on our Facebook and Twitter feeds instantly and continually: police firing at Walter Scott as he bolts away; five-year-old Kodi Gaines telling his mother "They trying to kill us" moments before police shot and killed her and wounded him in their apartment; Eric Garner pleading "I can't breathe" as New York City officers gripped him in a chokehold.[8]

[8] Gregory, Kia, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, The New Republic, February 13, 2019, https://newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice

These videos only reinforce the anxiety and belief among African Americans that encounters with the police are dangerous and possibly life threatening and if they are to survive these encounters, they must be submissive and are not free to leave these encounters.

Recent cases have recognized that the history of negative police conduct involving minority communities is relevant to seizure issues:

> We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor we do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while Smith's race is "not irrelevant" to the question of whether a seizure occurred, it is not dispositive either. Even without taking into account Smith's race, we are able to find on the strength of the other factors discussed that this encounter constituted a seizure. *U.S. v. Smith*, 794 F.3d 681, 688 (Cir. 7th 2015)

In *U.S. v. Washington*, 490 F.3d 765 (9th Cir. 2007), the court considered the African American community's racial tension with the Portland, Oregon Police Department in finding that the defendant was seized and the resulting consent to search was not voluntary.

The facts in *Washington* involved a defendant who was sitting in the driver's seat of his car which was lawfully parked in downtown

Portland. *Id*. at 767. A police officer, who was a white male, saw Washington sitting in the car, did not suspect Washington of any crime, but decided to approach his car and investigate the situation. *Id*. Like Mr. Jones' encounter with the Concord Police, the officer in Washington was in uniform and was wearing a sidearm. *Id*. Unlike Mr. Jones' case, there was only one police officer who initially approached Mr. Washington's car.

The officer parked his car behind Washington's car. *Id*. at 768. The officer asked Washington what he was doing. Washington responded that "he was waiting for a friend." *Id*. The officer asked him if he had anything on his person that he should not have, and Washington answered "no." *Id*. The officer then asked Washington if he would mind if he checked, and Washington responded "sure." *Id*. Washington did not dispute that he consented to the officer's search of his person. The officer then asked Washington to step out of the car and directed him to move away from the car. *Id*. At that point another officer, a white male, arrived at the scene, and parked his vehicle a few car lengths in front of Washington's car. *Id*. The first officer then asked Washington if he had anything in his car that he should not have.

Washington responded that he did not. *Id*. The officer then asked Washington if he minded if they searched the car and he responded, "go ahead." *Id*. During the search, the officers found the firearm that was the basis of Washington's prosecution and conviction. *Id*. It was undisputed that neither officer informed Washington that he could decline to consent to either the search of his person or the search of his car.

The court in *Washington* found that Mr. Washington's "consent" to search his car was the product of an illegal seizure. *Id*. at 775.

At the hearing on this case, Mr. Jones relied on *U.S. v. Washington*, 490 F. 3d 765 (9th 2007) for the argument that the fact that the defendant was African American was relevant to the consideration as to whether he would have felt free to leave the encounter to the Concord Police. Tr. 25-26. In its orders denying Mr. Jones' motion to suppress, the trial court found that *Washington* was not controlling because the Ninth Circuit found that the defendant was not improperly seized until *after* the police asked him a serious of questions. Order at 41.

At the hearing in this case, the defendant did not argue that *Washington* was controlling as to the point where the seizure occurred in this case, though there are some similarities. Tr. 24. The defendant argued that *Washington* was important because that court found that the fact that defendant was African American, combined with recent publicity about African Americans being shot by white police officers, was relevant to the issue of whether Washington would have felt free to leave the encounter with the police. *Id*. at 773-774. The trial court in this case tried to distinguish the fact that *Washington* considered race to be a relevant factor as to whether there was a seizure by noting in a footnote that the circumstances in Portland were "unique." Order at 42, at footnote 2. The cases, data, articles and studies discussed thus far in this brief demonstrate that nothing could be further from the truth.

The trial court's attempt to portray the negative police relations with persons of color in Portland as an aberration is without merit. Concord, New Hampshire, where Mr. Jones was arrested, is a little over an hour's drive from Boston, Massachusetts. In *Commonwealth v. Warren*, 58 N.E.3d 333, 338 (Mass. 2016), the court dismissed

prosecution arguments that evidence of the defendant's flight upon seeing a police officer justified his detention because:

> According to [a study by the Boston Police Commission], based on [Field Interrogation and Observation] data collected by the department, 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. Black men were also disproportionally targeted for repeat police encounters. *Id*. at 342.

In weighing the relevance of flight as to the reasonable suspicion to detain the defendant, the *Warren* decision also considered the fact that the defendant was African American. The *Warren* court noted that the lower court erred in failing to consider data on racial profiling that established that Black men were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations when it considered the relevance of flight under the circumstances in the case. *Id*.

The perception and reality of negative interactions involving police contact with African Americans is not unique to Portland, Milwaukee, New Jersey, Boston or any of the other places that were the subject of the research studies cited in this brief. Most African Americans in New Hampshire have also either themselves had negative

encounters with police or have close friends or family members who have had the same experience.[9]

Reena Goldthree, a professor of African and African American studies at Princeton University (and formerly of Dartmouth College), addressed the issue of Black peoples' interactions with police officers in New Hampshire in an interview with New Hampshire Public Radio:

> I think it might be difficult for some of our white neighbors in New Hampshire to understand the depth of fears that African Americans often experience during encounters with police officers. During routine traffic stops, many people are simply worried about receiving a citation, but African Americans wonder if they will be able to drive off with their lives. And I think that that deep sense of fear is still present here in New Hampshire.[10]

This Court has also considered the race of the defendant when deciding the constitutionality of a search and seizure. In *State v. Hight*, 146 N.H. 746 (2001), an African American male was pulled over by the police for going 12 miles over the speed limit and having a defective taillight. In *Hight*, it was undisputed that the initial stop of Mr. Hight's

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[9] Biello, Peter & Zars, Cordelia, 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.

[10] *Id.*

vehicle was a valid investigatory stop. The *Hight* decision found that the police officer's unlawful continued detention of defendant during a motor vehicle stop "tainted" his consent to search his vehicle and his person and the State failed to purge this taint. *Id*. at 749. In analyzing this issue, this Court found that the fact that Mr. Hight was African American and the officer who detained him was Caucasian was relevant to the issue of consent. *Id*. at 751.

In his supplemental pleading filed after the suppression hearing, the defendant relied on the case of *U.S. v. Easley*, 293 F.Supp.3d 1288, 1292 (D.N.M., 2018) which held that "[r]ace influences the likelihood of a person asserting their constitutional rights…[g]iven the backdrop of fear between people of color and law enforcement." *Id*. 1306. App. 14. The *Easley* case was reversed by the Tenth Circuit Court of Appeals after the hearing on this case.

In reversing the district court decision, the appellate court rejected Ms. Easley's argument that the court should consider subjective characteristics like race as part of our reasonable person analysis. *U.S. v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018). The *Easley* court acknowledged that the U.S. Supreme Court had previously considered

individual characteristics when it considered the age of the subject of the police encounter in applying the objective reasonable person standard. *See J.D.B. v. North Carolina*, 564 U.S. 261 (2011). The *Easley* court explained that considering the age of the person in question, when applying objective reasonable person standard, was permissible because the officer applying the standard "was once a child himself. *Id*. 1082.

The *Easley* court rejected the idea of considering the race of the subject in addition to considering age because doing so would "seriously complicate Fourth Amendment seizure law." *Id*. The error it this analysis is best summarized by the quote attributed to Aristotle that "the worst form of inequality is to make unequal things equal." The *Easley* court's refusal to consider race as a factor in applying the reasonable person standard for a seizure has the effect of making two unequal things equal. The two unequal things in this case being the disparity between how persons of color perceive their ability to leave a police encounter and how everybody else perceives their ability to leave a police encounter.

The *Easley* court refused to consider race in the analysis of the "free to leave" test because it would too difficult for police officers to consider this information in making decisions on this issue due to their lack of

experience on this issue. *Id*. This decision was an error. In *Illinois v. Wardlow*, 528 U.S. at 132-133, the court noted that not only do members of minority communities believe that police contact can be dangerous, but that the police are aware of this perception as well.

C. Consideration of the race of the subject of the police encounter is consistent with the objective "reasonable person" standard.

The defendant does not argue that there is one standard for defendants who are African American and another standard for those who are not. The issue is whether a reasonable person would feel free to leave the police contact and considering race will only make this consideration a more informed decision. Ignoring issues related to race in police encounters will only lead to mistaken conclusions and unjust results.

For example, consider a hypothetical situation, similar to the facts in this case, where the female, who was not African American, was seated in the driver's side of the truck and Mr. Jones was the passenger. When the officer asks the woman for her ID, she wants to tell the officer that she wants to leave the encounter. She does not feel free to leave the encounter because, as a reasonable person who follows current events, she is aware of issues such as racial profiling and police aggression involving traffic stops

with African Americans males. Despite her desire to leave the encounter with the police, she feels seized and does not feel free to leave out of fear that leaving the encounter could result in some sort of aggressive action by the officers and put both her own safety and that of her passenger at risk. This feeling of "seizure" on her part is not subjective, but objective, because a reasonable person would view contacts between the police and African Americans as having the potential for racial bias and having the potential for a dangerous outcome.

In this scenario, it is appropriate to consider that a reasonable person would not feel free to leave this encounter because of widely available information about police encounters with persons who are African American. Even though she is not African American, applying the reasonable person standard to these facts would result in a finding that she was seized.

This Court's analysis must include all of the relevant circumstances of the police encounter, including the fact that a reasonable person would not have felt free to leave this encounter because of the shared societal knowledge of the problematic history involving police contact with persons of color.

D. **The trial court erred in refusing to consider the fact that Mr. Jones was African American in its analysis of this case.**

The trial court's refusal to consider how race affected this encounter lead to it making inaccurate assumptions about Mr. Jones' conduct. In its order, the trial court relied on Officer Mitchell's testimony that Mr. Jones was "calm and relaxed." Order at 38-39. The trial court misinterpreted Mr. Jones' calm demeanor as acquiescence to the police encounter:

> 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.
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> *Utah v. Strieff*, 136 S.Ct. at 2070 (Sotomayor dissenting), citing W.E.B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).

As mentioned previously, the trial court's order relying on *State v. Licks*, 154 N.H. 491,493 (2006) was in error because the facts in that case are distinguishable from the facts in this case as there was no evidence in *Licks* that the person who was the subject of the police contact was African American. Further, there was only one police officer involved in that case.

The fact that some courts either ignore or refuse to consider race as a relevant circumstance in deciding whether a person has been seized has

been the subject of much scholarly criticism.[11] Many of these treatises recommend abandoning the objective test in deciding whether a person is free to leave an encounter with the police. A closer look at cases like *Terry v. Ohio*[12] and *U.S. v. Mendenhall*[13] demonstrates that the objective test was not intended to ignore the race of the subject of the encounter. Further, when courts fail to consider how race is relevant to police encounters, they may contribute to the racial disparity experienced by persons of color when they encounter the police:

> To the extent that the application of the free-to-leave test avoids this racial difference, masks it, or both, it legitimizes racial asymmetries in people's vulnerability to and perceptions of police authority. In other words, eliding the ways in which race structures how people interact with and respond to the police leaves people of color in a worse constitutional position than whites. Carbado, *supra* note 5, at 1002-03.

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[11] Webb Lindsey, *Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 Seton Hall L. Rev. 403 (2018); Maclin, Tracey, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 340 (1998); Carbado, Devon, *Eracing the Fourth Amendment*, 100 Mich. L. Rev. 946, 968 (2002) Leipold, Andrew D., *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 Chi.-Kent L. Rev. 559, 570 (1998) Butler, Paul, *The White Fourth Amendment*, 43 Tex. Tech. L. Rev. 245, 247 (2010); Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 Wash. & Lee J. Civil Rts. & Soc. Just. 315, 318 (2012).

[12] *Terry v. Ohio,* 132 U.S at 14.

[13] *U.S. v. Mendenhall*, 446 U.S at 1879.

The trial court's failure to consider race in its analysis of this case was contrary to existing United States Supreme Court precedent, as set forth in *US v. Mendenhall*.[14] This Court has already considered race a factor in deciding whether a driver consented to a search. *See State v. Hight*, at 750. A consideration of all of the circumstances in this case, including the race of the defendant, suggests that a reasonable person in his situation would not have felt free to leave the encounter on April 28, 2017.

E. Relevance of the fact that this was a 911 call about a "suspicious" vehicle occupied by an African American male.

It is also relevant to the analysis of this case that the police responded to a call that was devoid of any information that a crime had been committed and the call was likely the product of racial bias on the part of the caller.[15] Over the last couple of years, this country has started to realize how the police too often respond to baseless 911 calls about suspicious Black people.[16]

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[14] *Id.*

[15] In his book, *The Presumption of Guilt: The Arrest of Henry Louis Gates Jr. and Race, Class and Crime in America*, Charles J. Ogletree Jr. collects statements from numerous highly educated African American males who have experienced similar scenarios where neighbors contacted the police upon seeing them entering their own buildings or apartments or entering places where they were visiting others. *Id*. at 207-221.

[16] *There's No Cost to White People Who Call 911 About Black People. There Should Be*. Washington Post, May 16, 2018, Stacey Patton and Anthony Paul

Some have suggested that the police reconsider how they respond to these calls because:

> Black people and other people of color shouldn't have to endure police intrusions that lack a legal basis. When police enforce the racial biases of private citizens, they convert those biases into governmental discrimination. Furthermore, such arrests undermine the legitimacy of the police and carry disturbing historical echoes of when the law explicitly relegated nonwhite people to second-class status.[17]

When the police respond to calls such as the call from Mr. Bass reporting "suspicious" African Americans and then determine that no criminal activity has occurred, they should advise the person who is the victim of these calls that they are free to leave and/or immediately cease contact with the subject.

An example of this approach is exemplified by an incident in May of 2018 when the Memphis Police Department was dispatched to a call from a woman reporting a suspicious Black man at the property next to her house. When the police arrived, they immediately determined that the Black man

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Farley. *See* https://www.washingtonpost.com/news/posteverything/wp/2018/05/16/theres-no-cost-to-white-people-who-call-911-about-black-people-there-should-be/?utm_term=.ecdb9651a7de.

[17] *How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls*, ACLU's Trone Center for Justice and Equality, Carl Takei, June 18, 2018. *See* https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated.

had a legitimate right to be on the property because he was a real estate developer whose company had purchased the property. *Id*. Instead of asking the Black man to produce identification and detain him for up to 20 minutes to make a criminal record check thereby legitimizing the baseless 911 call, the Memphis Police instead went next door and talked to the woman who made the call and told her that the man had every right to be where he was and that she should not bother him any further. *Id*.

Racial bias most likely impacted Mr. Bass's decision to call the police. The history of negative police conduct involving minority communities certainly impacted whether Mr. Jones felt free to leave the encounter with the Concord Police. This Court cannot put blinders on as to how racial bias impacted the interaction between the Concord Police and Ernest Jones on April 28, 2017. Considering all the circumstances of the encounter between Mr. Jones and the Concord Police on April 28, 2017, Mr. Jones was seized without reasonable cause and the resulting arrest and search incident to arrest were a product of the unreasonable seizure. Therefore, the fruits of that seizure must be suppressed.

Accordingly, this Court should reserve the decision below.

CONCLUSION

Considering all the relevant circumstances of the encounter between Mr. Jones and the Concord Police on April 28, 2017, Mr. Jones was seized pursuant to Part I, Article 19 of the New Hampshire Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. As there was no reasonable cause for this seizure, this Court should reverse the order of the trial court.

The Defendant requests a fifteen-minute oral argument.

Under Supreme Court Rule 16(3)(i), the Defendant certifies that the appealed decision is in writing and is appended to this brief. Order at 36-46.

Respectfully submitted,

Ernest Jones

By his attorneys,

Wadleigh, Starr & Peters P.L.L.C.

Dated: May 22, 2019

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CERTIFICATE OF SERVICE

I hereby certify on this 22nd day of May, 2019 that I e-filed a copy of the Defendant's Brief to counsel for the defendant, Stephen Fuller, Esquire, of:

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New Hampshire Department of
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By: /s/ Donna J. Brown

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **State v. Ernest Jones**
Case Number: **217-2017-CR-00708**

Enclosed please find a copy of the court's order of March 13, 2018 relative to:

Order

March 15, 2018

Tracy A. Uhrin
Clerk of Court

(922)
C: Donna Jean Brown, ESQ; Susan M. Venus, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

State of New Hampshire

v.

Ernest Jones

No. 2017-CR-708

ORDER

The Defendant, Ernest Jones, has been charged with Possession of a Narcotic Drug and Possession of a Narcotic Drug with Intent to Distribute. He has filed a Motion to Suppress evidence obtained following a search incident to arrest which occurred on April 28, 2017. The State objects. The Court held a hearing on February 26, 2018. For the reasons stated in this Order, the Motion is DENIED.

I

The only witness at the suppression hearing was Concord Police Officer Benjamin Mitchell ("Mitchell"). Mitchell has been a Concord police officer since 2012. He is a graduate of the New Hampshire Police Academy, and is certified as a police officer. He was engaged in patrol duties on April 28, 2017. He was advised by dispatch of report of a suspicious vehicle at 22 Allison Street in Concord. The Police Department had been informed that the vehicle, a Dodge pickup, was parked behind a multifamily residence in a shared driveway. The caller told police that the vehicle did not belong to a resident of the building, according to the landlord. Two officers were dispatched to do a vehicle check.

Mitchell observed a black Dodge pickup behind the residence's shared driveway. He saw a female in the passenger seat and a male, later identified as the Defendant, in the driver's seat. He initiated contact with the female. Because of the call, he wanted to find out what the vehicle was doing at the location. The female passenger told him that she lived at a nearby apartment building, and the Defendant, who owned the car, was visiting her and they were talking. She testified that since the Defendant did not live there, his vehicle was probably not recognized. Mitchell asked for her identification, and she gave it to him. Asking for identification is standard practice because Concord police officers want to keep a record of the individuals they have contact with.

Concord Police Officer Begin ("Begin") was also at the scene with Mitchell. He approached the driver, the Defendant, on the other side of the vehicle, while Mitchell talked to the female passenger. The Defendant gave Begin his name. Once Begin got the driver's name, he called it into Concord Police dispatch. Mitchell was informed by dispatch that there was a bench warrant out for the Defendant. Accordingly, he asked the Defendant to exit the vehicle and put him in handcuffs. Mitchell testified that the Defendant was cooperative and pleasant throughout the interaction. Once placed under arrest, Mitchell searched the Defendant and found what he believed was an illegal substance, which forms the basis of the present charges against the Defendant.

Mitchell testified that if the Defendant had not identified himself, he would have been free to leave. While both police officers were wearing uniforms, and arrived in a marked police cruiser, they did not block the Defendant's vehicle with their cruiser. In fact, Mitchell testified that he parked his cruiser out of the view of the Defendant. He testified that the Defendant never asked if he could leave and that his demeanor was

very casual and relaxed. At no point during the encounter was a weapon displayed or brandished. Mitchell could not remember if he used a flashlight to illuminate the vehicle Mitchell stated that the Defendant would have been free to leave until they learned that there was a warrant out for him, at which point he was placed under arrest.

II

The Defendant's argument is that the police officers' conduct was unlawful because even merely asking the Defendant for his identification constituted a seizure:

> 4. *When the Concord Police approached the vehicle occupied by the defendant, which was legally parked in a private driveway on April 28, 2017, he was seized by the police* without probable cause that any crime had occurred. See State v. Boutin, 161 N.H. 139 (2010) (Warrantless searches and seizures are per se unreasonable, unless they fall within the narrow confines of a judicially crafted exception).
>
> 5. When the police made contact with the occupants of the vehicle, they were able to determine that one of the occupants lived in one of the nearby apartments. *The police should have immediately ceased the detention of the vehicle at this point. Instead the police expanded the scope of the detention* by requiring the occupants to produce identification.

(Mot. to Suppress, ¶¶ 4, 5 (emphasis added).)

However, the Defendant's position is inconsistent with settled law under both the both the State and Federal Constitutions. In the seminal case of United States v. Mendenhall, 446 U.S. 544, 554 (1980), the United States Supreme Court held that an individual is seized for Fourth Amendment purposes, only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In 1985, the New Hampshire Supreme Court adopted this test to determine the lawfulness of seizures under the State Constitution, abandoning its prior subjective test holding that "[a]lthough still possibly relevant to the issue of *when* an arrest occurs, any subjective beliefs of the arresting officer and the arrestee will no

longer be determinative of that issue." State v. Riley, 126 N.H. 257, 263 (1985) (emphasis in original). The Court stated that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . ." Id. (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

The New Hampshire Supreme Court has dealt many times with police-citizen contact since Mendenhall and Riley were decided. It is well established that "[n]ot all personal interactions between the police and citizens involve seizures of persons." See State v. McInnis, 169 N.H. 565, 569 (2017). Under either the State of Federal Constitution, a seizure does not occur simply because a police officer approaches a person seated in a parked car and asks a few questions or asks to examine the person's identification, the officer's conduct does not constitute a seizure under either the State or the Federal Constitution. State v. Licks, 154 N.H. 491, 493 (2006); State v. Joyce, 159 N.H. 440, 445 (2009). Rather, a seizure occurs for constitutional purposes "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of the person." State v. Sullivan, 157 N.H. 124, 130 (2008); see also State v. Brown, 155 N.H. 164, 168 (2007) ("So long as a reasonable person would feel free to leave, or to terminate the encounter, the citizen is not seized under Part I, Article 19 of the State Constitution." (citations omitted)).

In this case, there was no show of authority; for example, the Defendant was never chased by a police officer and ordered to stop before being asked questions. Compare State v. Beauchesne, 151 N.H. 803, 809 (2005). The officers did not curtail the

Defendant's freedom of movement. Their cruiser was parked out of sight and there is nothing in the record to suggest the Defendant felt uncomfortable or threatened. Mitchell testified credibly that the Defendant was cordial and cooperative throughout the brief interaction with the Defendant. Therefore, no seizure occurred.

The Defendant sought to avoid the principles of Mendenhall and Riley by asserting at oral argument that the fact the Defendant is African-American should be considered in whether or not he believed he was reasonably free to leave. However, the law is settled under the State and Federal Constitution that the analysis of this issue "is an objective one, requiring a determination of whether the Defendant's freedom of movement was sufficiently curtailed by considering how a reasonable person in the defendant's position would have understood his situation." State v. Sullivan, 157 N.H. at 130 (quoting Beauchesne, 151 N.H. at 809–810). Moreover, the cases upon which the Defendant relies do not support his argument

III

At oral argument defense counsel advised the Court that she believed the most relevant authority governing these circumstances was United States v. Washington, 490 F.3d 765 (9th Cir. 2007). But in that case, the Ninth Circuit found that police officers improperly seized the defendant *after* lawfully asking him a series of questions. The court specifically found that several factors escalated the encounter into a seizure, stating that "[p]erhaps most important, the manner in which [the police officer] searched [the defendant's] person was authoritative and implied that the [defendant] 'was not free to decline his request.'" Washington, 490 F.3d at 772. The court concluded that:

> [U]nder the totality of the circumstances -- [the officer's] authoritative manner and direction of [the defendant] away from [the defendant's] car to another location, *the publicized shootings by white Portland police officers of African-Americans, the widely distributed pamphlet with which [the defendant] was familiar*, instructing the public to comply with an officer's instructions, that the [responding officers] outnumbered [the defendant] two to one, the time of night and lighting in the area, that [an officer] was blocking [the defendant's] entrance back into his car, and that neither [of the officers] informed [the defendant] he could terminate the encounter and leave -- we conclude that a reasonable person would not have felt free to disregard [the officer's] directions, end the encounter with [the officers], and leave the scene.

Id. at 773 (emphasis added).

In Washington, the court held that police conduct escalated a consensual encounter into a seizure after a defendant was detained and taken from his car to another location to be violative of the Fourth Amendment.[1] Id. at 769–74. None of the factors involved in Washington are present here. There is no evidence that the police limited the Defendant's freedom of movement in an authoritative way, or directed the Defendant away from his car to another location or that there were widely publicized shootings by white Concord police officers of African-Americans or a widely distributed pamphlet suggesting that the public should comply with an officer's instruction.[2] Indeed, the Ninth Circuit specifically found that the mere questioning, which preceded the detention and Terry frisk,[3] did not violate the defendant's rights, quoting Florida v. Royer, 460 U.S. 491, 497 (1983), which has been quoted by the New Hampshire

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[1] The standards under the Fourth Amendment and Part 1, Article 19 of the New Hampshire Constitution are, for the most part, the same. See, e.g., State v. Parker, 127 N.H. 525, 529 (1985); but see Beauchesne, 151 N.H. 803, 813 (2005) (declining to follow the United States Supreme Court decision in California v. Hodari D., 499 U.S. 621, 626 (1991), which held that a defendant is not seized when he runs away from a police officer until he falls and so submitted to a officer's show of authority).

[2] In determining whether the defendant in Washington voluntarily consented to a search of his vehicle, the court considered, among other things, "the *unique situation in Portland* between the African-American community and the Portland Police." See Washington, 490 F.3d at 775 (emphasis added).

Supreme Court in State v. Riley:

> It is well established, however, that the Fourth Amendment is not implicated when law enforcement officers merely approach an individual in public and ask him if he is willing to answer questions. No Fourth Amendment seizure occurs when a law enforcement officer merely identifies himself and poses questions to a person if the person is willing to listen. This is true whether an officer approaches a person who is on foot or a person who is in a car parked in a public place.

Id. at 770 (citations omitted).

The police officer's initial conduct in Washington, which was remarkably similar to Mitchell's conduct here, was found by the Ninth Circuit *not* to be violative of the defendant's constitutional rights:

> We conclude that although [the officer] conceded he suspected [the defendant] of no criminal activity, [the officer's] initial encounter with [the defendant] was not a seizure and did not implicate the Fourth Amendment. In approaching the scene, [the officer] parked his squad car a full length behind [the defendant's] car so he did not block it. [The officer] did not activate his sirens or lights. [The officer] approached [the defendant's] car on foot, and did not brandish his flashlight as a weapon, but rather used it to illuminate the interior of [the defendant's] car. Although [the officer] was uniformed, with his baton and firearm visible, [the officer] did not touch either weapon during his encounter with [the defendant]. [The officer's] initial questioning of [the defendant] was brief and consensual, and the district court found that [the officer] was cordial and courteous. Under these circumstances, the district court correctly concluded that a reasonable person would have felt free to terminate the encounter and leave.

Id. Washington is therefore of no aid to the Defendant.

Following the hearing on the Motion to Suppress, the Defendant submitted the decision of the United States District Court for the District of New Mexico in United States v. Easley, Crim. No. 16-1089-MV, 2018 U.S. Dist. LEXIS 4472, at *24–25 (D.N.M. Jan. 10, 2018), in which the court held that, considering the totality of the circumstances, a person

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[3] Terry v. Ohio, 392 U.S. 1 (1968).

in the defendant's position would not have felt free to terminate the encounter and that accordingly, the defendant's abandonment of her suitcase was involuntary. However, examination of the facts in Easley establishes that it has little to do with the circumstances here.

The encounter between the police officers and the defendant in Easley took place on a bus. The district court based its analysis upon Florida v. Bostick, 501 U.S. 429, 436 (1991), in which the United States State Supreme Court rejected a *per se* rule that due to the cramped confines on board a bus, any questioning of a person on a bus would deprive a person of his or her freedom of movement as to constitute a seizure under the Fourth Amendment. But the United States Supreme Court in Bostick noted a person on a bus is, by definition, confined on the bus, and a passenger may not want to get off the bus if there is a risk that it would depart before the opportunity to re-board. Id. at 436. The United States Supreme Court held that a totality of the circumstances analysis must be used to determine whether encounter of a police-citizen contact on a bus escalates into a seizure. Id. at 436–37.

In Easley, two Drug Enforcement Agency (DEA) agents were involved in intercepting drugs at public transportation. 2018 U.S. Dist. LEXIS 4472, at *4. They went to a Greyhound bus station, after receiving a list of passengers on the bus. Id. The two agents watched the bus pulling into the Greyhound station, watched the passengers disembark, and then "observed" the luggage that was stored underneath the bus. Id. at 4–5. The passengers left the bus to use the restroom, and after the bus was refueled, the defendant and the other passengers reboarded. Id. The agents then entered the bus and questioned about 15 of the 35 to 40 passengers, and then approached the defendant. Id. at

5–6. After the agents finished speaking with the passengers, they exited the bus and pulled from the cargo hold a suitcase with a luggage tag showing the defendant's name and a suitcase with a luggage tag displaying the name of another passenger who was traveling under the same reservation number as the defendant. Id. at 4, 8–9. The agents asked the defendant to step off the bus, interrogated her about her travel plans, asked to see her identification, and search her purse. Id. at 8–9. The defendant identified the suitcase with her name on the tag, but denied ownership of the second suitcase. Id. After confirming that the other passenger named on the tag of the second suitcase never boarded the bus, the agents concluded that the suitcase had been abandoned and proceeded to search it. Id.

The police conduct in Easley was far more intrusive than the conduct in this case, but the court specifically held that the questioning on the bus was lawful:

> The Court rejects [the defendant's] argument that the bus and its passengers experienced an unreasonable investigative stop. Although the bus may have been delayed in departing the Albuquerque station due to the agents' activities, the agents' detention of [the defendant] and the other bus passengers was not unreasonable. An investigative detention is reasonable under the Fourth Amendment if the officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity,' and if the detention is 'reasonably related in scope to the circumstances' justifying the stop.

Id. at 23 (citations omitted).

It was only after the initial questioning that the court in Easley found a constitutional infirmity, when she was asked to leave the bus, and asked whether certain luggage which was checked the longest to her. The issue in Easley involved whether or not the defendant's whether the defendant's abandonment of the second suitcase was involuntary. Id. at 24–25. The court found that when an agent re-boarded and asked the defendant to step off the bus for more questioning, the agent's instructions "could be

interpreted as either a request or a demand, depending on contextual factors such as race, gender, and economic or social status." Id. at 38. But like Washington, the case is easily distinguishable from the instant case because the Concord police officers never requested the defendant to go anywhere, and did no more than ask him questions about his identity, conduct which is universally recognized as lawful.

In the circumstances of this case, neither the State nor Federal Constitution requires the Court to consider the Defendant's race in making the determination whether or not a reasonable person believes he or she is not free to leave when a police officer interacts with him. See Mendenhall, 446 U.S. at 554; Riley, 126 N.H. at 262. Indeed, to do so would be error. The police officers were courteous and professional throughout their brief interaction with the Defendant, and the Defendant was courteous and cooperative as well. No show of authority was made; no weapons were brandished, and the police officers did not block the defendant's vehicle with their cruiser. The Defendant was not asked to leave his vehicle. Cf. Washington, 490 F.3d 765; Easley, 2018 U.S. Dist. LEXIS 4472. The encounter lasted only long enough so that the police could obtain the names of the individuals they were speaking to, pursuant to the Concord Police Department policy.

It follows that the Motion to Suppress must be DENIED.

SO ORDERED

3/13/18
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/