THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0057

State of New Hampshire

v.

Ernest Jones

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

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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1. The trial court found, based on the evidence presented at the suppression hearing, that two police officers responding to a call about a suspicious vehicle—in which the defendant was sitting, in the driver's seat—parked their cruiser out of the defendant's sight, did not curtail the defendant's freedom of movement, engaged the defendant in a manner which resulted in relaxed conversation, and asked the defendant's name as was their standard practice. A check on the defendant's name revealed an outstanding warrant for his arrest. Was it error for the trial court to conclude that the defendant was not seized until he was informed of the warrant?

2. Whether the trial court erred by declining to take the defendant's race into consideration as part of its seizure analysis when there is a split in authority over whether race is ever relevant to that analysis, when those courts that have considered race have suggested that its relevance depends on the particular context in which the police encounter at issue arose, and when trial court's determination was supported by the clear weight of the evidence even factoring in the defendant's race.

STATEMENT OF THE CASE

On April 8, 2017, two Concord Police Officers approached the defendant, Ernest Jones, while he was sitting with a friend in a pickup truck in the driveway of a residence. Tr. 6.[1] During the course of this encounter, the officers discovered that there was an outstanding warrant for Mr. Jones's arrest. Tr. 8, 10. After placing Mr. Jones under arrest, one of the officers patted him down and discovered a tub containing fentanyl. *See* Tr. 11. Mr. Jones was indicted on one count of possession of a controlled drug, contrary to RSA 318-B:2 and RSA 318-B:26, II(a). DBA 54.

Mr. Jones moved to suppress evidence of the fentanyl, arguing that he was unlawfully seized, in violation of Part I, Article 19 of the New Hampshire Constitution and the Fourth Amendment to the United States Constitution. DBA 1–7. Specifically, Mr. Jones argued that he was seized without reasonable suspicion before the officers learned of the arrest warrant, and that the subsequent search of his person incident to his arrest was accordingly unlawful. DBA 2–4. The trial court denied the motion, holding that the under the totality of the circumstances a reasonable person in Mr. Jones's position would have felt free to leave up until the point Mr. Jones was informed of the arrest warrant. DB 37–10. In reaching this conclusion, the trial court declined to take into account the fact that Mr. Jones is African-American, concluding that race is irrelevant to the seizure

[1] "AB" refers to the *amicus* brief filed by the American Civil Liberties Union of New Hampshire;
"DB" refers to the defendant's brief;
"DBA" refers to the appendix filed with the defendant's brief; and
"Tr." refers to the transcript of the suppression hearing.

analysis. DB 41–46. A jury subsequently convicted Mr. Jones on one count of possession of a controlled substance. DBA 54.

This appeal followed.

STATEMENT OF FACTS

On April 8, 2017, at just before 8:00 p.m., Concord Police Officer Benjamin Mitchell, along with an Officer Begin,[2] was dispatched to 22 Allison Street in Concord to respond to a report of a suspicious vehicle parked behind the building. Tr. 5–6. Based on the report from dispatch, Officer Mitchell suspected a potential criminal trespass. Tr. 17–18. Both officers were in full uniform and driving a marked police cruiser. Tr. 13–14. When the officers arrived at 22 Allison Street, they observed a black Dodge pickup truck parked in a shared driveway behind the residence. Tr. 6. Rather than park behind the pickup truck in the driveway, Officer Mitchell, who was driving the cruiser, parked on the side of the street in a position he believed was out of view of the pickup truck. Tr. 14.

The officers exited the cruiser and approached the pickup. Tr. 6. As they did so, Officer Mitchell observed two people in the truck: a woman, seated in the passenger seat, and an African-American man, later identified as Mr. Jones, seated in the driver's seat. Tr. 6, 19. Officer Mitchell spoke with the woman, while Officer Begin spoke with Mr. Jones. Tr. 6.

Officer Mitchell asked the woman for identification, which she provided. Tr. 6–7. Officer Mitchell testified at the suppression hearing that asking for identification is standard practice, as it allows officers to know whom they are speaking with and lets them keep records of these interactions. Tr. 7. Officer Mitchell ran the woman's identification through dispatch and learned that she did not have any warrants for her arrest. Tr. 7. Officer Mitchell asked the woman why she and Mr. Jones

[2] Officer Begin's first name is not referenced in the record.

were there, and the woman stated that she lived at 22 Allison Street and that Mr. Jones was visiting her. Tr. 6–7, 16. Officer Mitchell told the woman that the officers were responding to a report of a suspicious vehicle. Tr. 16. The woman's responses, and her explanation for why she and Mr. Jones were there, dispelled any suspicion Officer Mitchell had that the woman and Mr. Jones were engaged in criminal activity. Tr. 11, 16.

Officer Begin spoke with Mr. Jones at the same time Officer Mitchell spoke with the woman. Tr. 7, 16. While Officer Mitchell was able to see Officer Begin's interactions with Mr. Jones through the window, he could not hear their conversation. Tr. 17. Officer Begin learned Mr. Jones's name and called it into dispatch. Tr. 8. During the course of his interaction with the woman, Officer Mitchell learned from dispatch of an electronic bench warrant for Mr. Jones's arrest. Tr. 10. Officer Mitchell approached the driver's side of the vehicle and told Mr. Jones he was under arrest. Tr. 10, 11. Mr. Jones walked with Officer Mitchell to the police cruiser, where Officer Mitchell handcuffed Mr. Jones and searched him. Tr. 10, 11. During this search, Officer Mitchell located a tub containing a whitish powder, which the officer suspected was an illicit substance. Tr. 11. The substance in the tub was confirmed to be fentanyl, and Mr. Jones was charged with one count of possession of a controlled substance. DBA 54.

At the suppression hearing, Officer Mitchell testified that Mr. Jones's demeanor prior to his arrest was "very casual," that "it was a very laidback, relaxed conversation," and that "[t]here was no yelling, there were no weapons drawn, no blue lights, [and] no . . . demands or anything like that." Tr. 19. Officer Mitchell further testified that Mr. Jones was "very

cooperative" when informed he was under arrest. Tr. 10. Officer Mitchell testified that if Mr. Jones had not identified himself, he would have been free to leave. Tr. 10–11. Though Officer Mitchell did not communicate this fact to either Mr. Jones or the woman, Tr. 15–16, neither did either individual ask if they could leave, Tr. 18. Officer Mitchell estimated that less than 20 minutes passed between when the officers arrived at 22 Allison Street and when they learned of the bench warrant for Mr. Jones's arrest. Tr. 10.

SUMMARY OF THE ARGUMENT

Few, if any, of the indicia of a seizure recognized by this Court are present in this case. It is undisputed that the officers did not park the cruiser behind the pickup truck, and there is no evidence that either officer displayed a weapon, made physical contact with Mr. Jones, used language or a tone of voice indicating that compliance was required, questioned Mr. Jones in a manner indicating that he could not terminate the encounter, or made any other statements or representations that would suggest to Mr. Jones that he was not free to leave. Indeed, Officer Mitchell testified at the suppression hearing that Mr. Jones's demeanor prior to his arrest was "very casual," that the conversation was "very laidback [and] relaxed," and that "[t]here was no yelling, there were no weapons drawn, no blue lights, [and] no . . . demands or anything like that." Tr. 19. Based on a totality of these circumstances, the trial court properly concluded that Mr. Jones was not seized prior to being informed of the outstanding arrest warrant. Mr. Jones's and the *amicus*'s arguments to the contrary are inconsistent with this Court's seizure jurisprudence or otherwise misplaced. The trial court accordingly did not err in denying Mr. Jones's motion to suppress.

Mr. Jones's and the *amicus*'s contention that the trial court erred by not taking Mr. Jones's race into account is unavailing. While courts are divided on whether race is ever relevant when determining whether an individual was seized during an encounter with law enforcement, no authority suggests that a court is categorically required to consider an individual's race when conducting a seizure analysis. To the contrary, courts that do consider race commonly do so on a case-by-case basis taking

into account the particular circumstances surrounding the police encounter at issue. Neither Mr. Jones nor the *amicus* explains why Mr. Jones's race is relevant in light of the particular circumstances at issue in this case. Additionally, given the clear weight of the evidence in this case, Mr. Jones's race would have to be dispositive for the trial court to have erred in denying the motion to suppress. This proposition finds no support in this Court's seizure jurisprudence and is inconsistent with case law from the United States Supreme Court and at least one Federal Court of Appeals. It would also be unworkable in practice and constitutionally suspect. Accordingly, the trial court was under no obligation to consider Mr. Jones's race when ruling on his motion to suppress.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT MR. JONES WAS NOT SEIZED AT ANY POINT PRIOR TO BEING INFORMED OF THE ARREST WARRANT.

Mr. Jones contends that the trial court erred when it concluded that he was not seized prior to being informed of the outstanding arrest warrant. When reviewing a trial court's order on a motion to suppress, this Court accepts the trial court's factual findings "unless they lack support in the record or are clearly erroneous," but reviews the trial court's legal conclusions *de novo*. *State v. McInnis*, 169 N.H. 565, 569 (2017) (quotation marks and citations omitted). The Court "first addresses the defendant's claim under the State Constitution, and cite[s] federal opinions for guidance only." *Id.* (citing *State v. Ball*, 124 N.H. 226, 231–33 (1983)). Because the Federal Constitution provides "no greater protection than does the State Constitution," a person who was not seized under Part I, Article 19 was likewise not seized under the Fourth Amendment. *Id.* at 571.

Part I, Article 19 "provides protection against unreasonable seizures." *Id.* (quotation marks, bracketing, and citation omitted); *see also* N.H. Const. pt. I, art. 19 ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."). But "[n]ot all personal interactions between police and citizens involve seizures of persons." *McInnis*, 169 N.H. at 569 (bracketing, quotation marks, and citation omitted). "Indeed, a seizure does not occur simply because a police officer approaches an individual and asks a few questions, or asks to examine the individual's identification." *Id.* at 569–70 (quotation marks and citation omitted). An interaction only

becomes a seizure "when a reasonable person would no longer believe he or she is free to leave." *Id.* at 570 (same omissions). "This occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of the person." *Id.* (same omissions).

"Circumstances indicating a show of authority might 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.* (same omissions). While police officers "may not convey a message that compliance with their requests is required," "mere requests to communicate generally do not amount to an official show of authority." *Id.* (same omissions). This is an objective analysis, "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." *Id.* (same omissions). When conducting this inquiry, this Court is "mindful of all of the circumstances surrounding the incident." *Id.* (same omissions).

None of the hallmarks of seizure exist in this case. The officers did not park the cruiser behind the pickup truck, and the record lacks any evidence that either officer displayed his weapon to Mr. Jones, made physical contact with Mr. Jones prior to placing him under arrest, or used language or a tone of voice that indicated that compliance with the officer's request might be compelled. The record likewise lacks any evidence that the officers questioned Mr. Jones in a manner indicating that he could not freely terminate the encounter or that they made any other statements or representations that would suggest to Mr. Jones that he was not free to

leave. *See, e.g.*, *State v. Joyce*, 159 N.H. 440, 445 (2009) (concluding that a defendant was seized when he overheard a request that a drug-sniffing dog be brought to the scene). In fact, Mr. Jones's own conduct and affect suggest the contrary. Officer Mitchell testified at the suppression hearing that Mr. Jones's demeanor prior to his arrest was "very casual," that the conversation was "very laidback [and] relaxed," and that "[t]here was no yelling, there were no weapons drawn, no blue lights, [and] no . . . demands or anything like that." Tr. 19. And while Mr. Jones points out that two officers approached the vehicle and both were in uniform, neither these facts, nor the fact the officers were driving a marked police cruiser, converts this encounter into a seizure under Part I, Article 19. *See McInnis*, 169 N.H. at 570–71 (holding that a defendant was not seized based on the totality of the circumstances even when "the officer drove a police cruiser and was in uniform); *State v. Brown*, 155 N.H. 164, 168 (2007) (holding that a defendant was not seized when *three* officers initially approached him in the hallway of his apartment building and asked him for identification). This is particularly true given that the officers parked the cruiser out of sight of Mr. Jones and his passenger, and neither activated the cruiser's sirens or any of its lights, nor employed any other feature that could have made anyone feel unable to leave. Based on the totality of these circumstances, viewed through the lens of this Court's precedent, the trial court correctly concluded that a reasonable person in Mr. Jones's position would have believed he was free to leave up until the point he was informed of the arrest warrant. This Court should reach the same conclusion and affirm the denial of Mr. Jones's motion to suppress.

Mr. Jones resists this outcome by arguing that his encounter with the officers was akin to a traffic stop. DB 12–13. This argument misses the mark. Even where this Court reviews the lawfulness of alleged investigatory stops involving motor vehicles, it still begins its inquiry with a determination of whether the defendant was seized. *State v. Steeves*, 158 N.H. 672, 675 (2009). And it is well established in this Court's prior decisions that "when an officer approaches a person in a parked car and asks questions, this in and of itself does not constitute a seizure." *Id.* (quotation marks omitted) (citing *State v. Licks*, 154 N.H. 491, 494 (2006)). As explained above, the totality of the circumstances in this case demonstrate that the officers' interactions with Mr. Jones were consensual until Mr. Jones was informed of the arrest warrant. The mere fact he was in a vehicle, without more, does not tip the scales in favor of a seizure.

This Court's decisions in *Steeves* and *Licks* are instructive. In *Steeves*, a Londonderry Police Officer observed the defendant and a passenger straddling an idling motorcycle on the side of Route 28 in the early morning hours. *Id.* at 673. The officer pulled behind the motorcycle, activated his spotlight and pointed it toward the motorcycle, activated two "takedown" lights, and activated his rear blue lights. *Id.* As he was exiting his cruiser, the officer briefly interacted with the passenger, whom he commanded to stand away from the motorcycle. *Id.* The officer then approached the defendant and engaged him in conversation. *Id.* The officer asked the defendant for his license and registration. *Id.* The defendant produced his registration, and the officer asked twice more for his license. *Id.* During the course of this exchange, the defendant's actions gave the officer reason to suspect that the defendant was driving under the

influence of alcohol. *See id.* at 673–74. The officer administered field sobriety tests before placing the defendant under arrest. *Id.* at 674.

On appeal, the defendant argued that he was seized without reasonable suspicion when the officer first spoke with him. *Id.* at 674, 677. This Court disagreed. *Id.* at 675. The Court noted that "[p]ulling behind a vehicle stopped on a roadside does not, by itself, constitute a seizure." *Id.* Nor, in this Court's view, did the officer's "*requests* for license and registration . . . effectuate a seizure." *Id.* (emphasis in original). The Court likewise rejected any argument that the defendant was seized because the officer activated his spotlight and takedown lights, noting that "the time and place of the encounter both indicate that such lighting was necessary to view and evaluate the situation." *Id.* at 676 (citation omitted). It also rejected the argument that the officer seized the defendant by activating the cruiser's rear-facing blue lights, concluding that "the totality of the circumstances would have communicated to a reasonable person that the officer was just checking to see what was going on and to offer help if needed." *Id.* at 676–77 (bracketing, ellipsis, quotation marks, and citation omitted). The Court emphasized that the officer "approached [the] vehicle from behind, parked his cruiser so as not to block or restrict the defendant's movement, kept his weapon holstered and refrained from issuing orders to the defendant." *Id.* at 676. The Court accordingly held that, based on a totality of the circumstances, the officer "had not yet seized the defendant upon first speaking with him." *Id.* at 677.

In *Licks*, a Lebanon Police Officer was on patrol shortly after midnight when he observed a car parked, with its engine running, in a parking lot of a club. *Licks*, 154 N.H. at 491. The officer observed that the

defendant was slouched down in the driver's seat of the vehicle, which had no other occupants. *Id.* The car was legally parked, with its front end to the curb and other cars on either side. *Id.* at 491–92. The officer parked his cruiser on the road at the entrance to parking lot and approached the car from the rear with his flashlight "trained on the car and the defendant." *Id.* at 492. When the officer reached the driver's side door, the defendant rolled down the window, and the officer asked if the defendant was "all set." *Id.* The officer asked the defendant for his name and date of birth and, noticing signs of intoxication, asked the defendant to step out of the car. *Id.* The officer administered field sobriety tests, then arrested the defendant for DWI. *Id.*

The defendant moved to suppress, arguing that he was unlawfully seized prior to the point the officer noticed signs of impairment. *Id.* This Court affirmed the trial court's denial of that motion, holding that the defendant was not seized when the officer approached the vehicle. *Id.* at 494. In reaching this conclusion, the Court emphasized that: "[o]nly one officer approached the defendant"; the officer "parked his cruiser away from the defendant's vehicle and did not turn on the blue lights"; the officer "approached the car from the rear and shined the flashlight into the defendant's vehicle"; and the officer "did not draw his weapon, and did not order the defendant to step out of the car, or even to roll down his window, but rather asked if the defendant was 'all set.'" *Id.* The Court concluded that these actions "would not have led a reasonable person to believe that he must submit to the officer's requests." *Id.* The Court accordingly held that "before [the officer] noticed visible signs of impairment and ordered the

defendant out of the car, the encounter was consensual and therefore did not violate . . . the New Hampshire Constitution." *Id.*

In this case, the officers' interactions with Mr. Jones prior to informing him of the arrest warrant were well within the range of conduct this Court held not to amount to seizure in *Steeves* and *Licks*. The officers in this case did not park behind the Mr. Jones's vehicle, did not activate their spotlight, takedown lights, or blue lights, did not draw their weapons, did not raise their voices, and did not order Mr. Jones out of the car. Additionally, the evidence in the record at most supports the inference that Officer Begin asked Mr. Jones to identify himself, not that he provide his driver's license or registration. These circumstances, when viewed through the lens of *Steeves* and *Licks*, clearly do not amount to a seizure within the meaning of Part I, Article 19. As in *Steeves* and *Licks*, the fact the defendant was in a vehicle when he was approached by law enforcement, without more, cannot tip the scales. Because Mr. Jones's argument to the contrary is inconsistent with this Court's prior decisions, and is unsupported by the record in this case, it must be rejected.

The Court should likewise reject Mr. Jones's argument that he was seized because it is a misdemeanor under RSA 265:4 for a person, "while driving or in charge of a vehicle," to refuse a police officer's request "to give his name, address, date of birth, and the name and address of the owner of such vehicle." RSA 265:4, I(a), II. Mr. Jones did not raise this argument below, and this Court generally "do[es] not consider issues on appeal that were not presented to the trial court." *State v. Batista-Salva*, 171 N.H. 818, 822 (2019). While the Court can waive this requirement, it has previously declined to do so when, "the trial court made very few (if any)

relevant findings of fact or rulings of law." *State v. Mouser*, 168 N.H. 19, 28 (2015) (quotations omitted). As the trial court here did not have the opportunity to make any relevant findings of fact or rulings of law with respect to Mr. Jones's RSA 265:4 argument, this Court should similarly decline to waive the preservation requirement, particularly with respect to an argument raise for the first time in a single paragraph in an appellate brief.

Yet, even if the Court were inclined to take up Mr. Jones's RSA 265:4 argument, it should reject that argument as contrary to this Court's seizure jurisprudence. After expressing skepticism in *State v. Brunelle* that a person is seized merely because a police officer "exercised her statutory authority and requested a license and registration of an individual who was already stopped," *State v. Brunelle*, 145 N.H. 656, 658 (2000), this Court held in *Steeves* that an officer's "requests for license and registration did not effectuate a seizure," *Steeves*, 158 N.H. at 675 (emphasis omitted). Mr. Jones has not asked for *Steeves* to be overruled, nor does he provide any basis to conclude that *Steeves* is factually or legally distinguishable from this case, much less on this particular issue. Additionally, Mr. Jones has not cited, and the State has been unable to identify, any case from another jurisdiction in which a court held that an individual was seized solely by operation of a statute such as RSA 265:4. Accordingly, to the extent the Court is inclined to take up Mr. Jones's argument with respect to RSA 265:4—and it should not—then it should reject that argument on the merits.

The *amicus* argues that Mr. Jones was seized when Officer Begin asked him for identification. *See* AB 14–20. The Court should reject this argument for at least three reasons. First, the *amicus*'s suggestion that a

motorist is always seized when an officer asks for his identification is directly at odds with the express language in *Steeves*, where this Court held that an officer's "requests for license and registration did not effectuate a seizure." *Steeves*, 158 N.H. at 675 (emphasis omitted); *see also McInnis*, 169 N.H. at 570–71 ("Indeed, a seizure does not occur simply because a police officer approaches an individual and asks a few questions, or asks to examine an individual's identification." (Quotation marks and citation omitted)). Second, the *amicus*'s apparent assumption that Officer Begin took Mr. Jones's identification from him is unsupported by the record, which at most demonstrates that Officer Begin asked Mr. Jones to identify himself, not that he produce identification. Tr. 8–10. And, finally, even if Officer Begin did secure Mr. Jones's identification, there is no evidence in the record that he ever removed that identification from Mr. Jones's presence, which courts from other jurisdictions have found to be a deciding factor when determining whether an individual is seized. *See, e.g.*, *State v. Adams*, 158 P.3d 1134, 1137–38 (Ut. Ct. App. 2007) (holding that the defendant was not seized when the officer stood near him while performing a warrant check, which took at most a minute, and gave him back his identification before continuing questioning); *State v. Hansen*, 994 P.2d 855, 857 (Wash. App. 2000) (holding that the defendant was not seized when the police never removed his license from his presence and held it for no more than 30 seconds before returning it to him); *accord McInnis*, 169 N.H. at 571 (holding that the defendant was not seized when law enforcement requested a warrant check in his presence); *State v. Daoud*, 158 N.H. 779, 783 (2009) (agreeing with the trial court's legal conclusion "that the defendant was not seized until *after* the officer reviewed his non-

driver identification" (emphasis added)). Accordingly, there is no legal or factual basis for this Court to conclude that Mr. Jones was seized based on a request for his identification.

The *amicus*'s related contention that a higher level of constitutional protection automatically extends to encounters between police officers and motorists is likewise inconsistent with this Court's prior decisions. This Court has on multiple occasions applied the same standard when determining whether a motorist is seized as it does when determining whether a pedestrian's encounter with law enforcement amounts to a seizure. *Compare, e.g.*, *Steeves*, 158 N.H. at 675–77, *and Licks*, 154 N.H at 493–94, *with, e.g.*, *McInnis*, 169 N.H. at 569–71, *and Daoud*, 158 N.H. at 782–84. Additionally, the *amicus* overstates the importance of the duration of Mr. Jones's encounter with law enforcement—"less than 20 minutes" from arrival to arrest, according to Officer Mitchell, Tr. 10—as this Court has previously suggested that a ten-to-fifteen minute encounter only amounted to a seizure based on circumstances not present here, including persistent questioning by police regarding drug use and a request, overhead by the defendant, that a drug-sniffing dog be brought to the scene. *See Joyce*, 159 N.H. at 445.

Finally, this Court should decline to reach the *amicus*'s argument that the new privacy protections afforded in Part I, Article 2-b alter the analysis under Part I, Article 19. This issue was not presented to the trial court, has never been raised by the defendant, and should not be resolved without the benefit of a developed record and fulsome briefing. Moreover, the *amicus* has only referenced Part I, Article 2-b in an introduction section in its brief and has not proposed any analytical framework for this Court to

apply that amendment within its established seizure jurisprudence. It is also worth noting that the Montana Supreme Court has held that the protections afforded under the right to privacy in that state's constitution are only triggered *after* an individual has been seized and employs the same reasonable-person test this Court applies when determining whether an individual has been seized in the first instance. *See State v. Graham*, 175 P.3d 885, 888 (Mont. 2007).

The *amicus*'s remaining arguments are either reiterations of or expansions upon the arguments raised in Mr. Jones's brief. To the extent the Court considers those arguments, they should be rejected for the reasons stated above.

In sum, the totality of the circumstances in this case, when viewed through the prism of this Court's seizure jurisprudence, demonstrates that Mr. Jones was not seized until he was informed of the outstanding arrest warrant. Accordingly, the trial court did not err in denying Mr. Jones's motion to suppress, and this Court should affirm that denial.

II. THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO CONSIDER MR. JONES'S RACE AS PART OF ITS SEIZURE ANALYSIS.

Both Mr. Jones and the *amicus* argue that the trial court erred by not taking Mr. Jones's race into account when conducting its seizure analysis. This Court has never addressed the extent to which an individual's race is relevant, if at all, when determining whether a police encounter amounts to a seizure, and other courts are divided on this question. *Compare, e.g.*, *United States v. Easley*, 911 F.3d 1074, 1081–82 (10th Cir. 2018) (race is not relevant); *Monroe v. City of Charlottesville, Va.*, 579 F.3d 380, 386–87 (4th Cir. 2009) (same) *with, e.g.*, *United States v. Smith*, 794 F.3d 681, 687–88 (7th Cir. 2015) (race is "not irrelevant"); *United States v. Washington*, 490 F.3d 765, 773–74 (9th Cir. 2007) (considering, among other things, "the publicized shootings by white Portland police officers of African-Americans" as part of its seizure analysis). This may be an issue this Court should address in an appropriate case. This, however, is not that case.

Mr. Jones and the *amicus* contend, in essence, that courts are (or at least should be) categorically required to consider race whenever determining whether an encounter with law enforcement amounts to a seizure. Neither Mr. Jones nor the *amicus* has identified any decision from this Court or any other jurisdiction contemplating, much less imposing, such a requirement. Nor has the State's own research identified a case in which any court has applied the broad rule Mr. Jones and the *amicus* urge this Court to adopt.

To the contrary, in the handful of decisions in which courts have suggested that race may be relevant when determining whether an individual is seized, any discussion of race has arisen within the context of the particular circumstances present in that case. Most often, these discussions revolve around the specific community in which the police encounter at issue occurred. *See, e.g.*, *Smith*, 794 F.3d at 687–88 (noting that the defendant "was a young black man confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained); *Washington*, 490 F.3d at 770 (discussing "the publicized shootings by white Portland police officers of African-Americans [and] the widely distributed pamphlet . . . instructing the public to comply with an officer's instructions"); *State v. Johnson*, 440 P.3d 1032, 1042 n.5 (Wash. Ct. App. 2019) (noting that the defendant "was a black man in a high-crime area"); *Commonwealth v. Lewis*, No. SUCR201310859, 2014 WL 2505537, at *1 (Mass. Super. Apr. 29, 2014) (discussing prior Boston Police Department activity in the community where the encounter occurred). They might also arise in the context of a particular defendant's prior interactions with police. *See, e.g.*, *Lewis*, 2014 WL 2505537, at *5 (discussing "the defendant's history of being stopped and questioned by police"). In other words, any suggestion in these cases that a defendant's race may be relevant to the seizure inquiry is tethered to the specific circumstances under which the defendant encountered law enforcement. There is no support in these decisions for a categorical requirement that a court always consider race when determining whether an individual was seized during an encounter with the police.

This point is further illustrated by the fact that in all but one of these decisions the court ultimately determined whether a seizure had occurred without considering the defendant's race at all. *See, e.g.*, *Smith*, 794 F.3d at 688 ("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."); *Johnson*, 440 P.3d at 1042 n.5 ("While we would not assert that race could never be a factor, here it is clear that the officers had no idea as to Johnson's race when they made the decision to initiate the encounter."); *Lewis*, 2014 WL 2465266, at *5 (suggesting that race was relevant to whether the defendant was seized, but ultimately resolving this issue without relying on race); *see also United States v. Easley*, No. 2:17-CR-200, 2018 WL 1882853, at *4 (S.D. Ohio Apr. 19, 2018), *appeal dismissed*, No. 18-3444, 2018 WL 3825399 (6th Cir. May 29, 2018) (suggesting, in the context of a *Terry* stop, that "[t]he case that Mr. Easley was unlawfully arrested becomes even more potent when race is taken into consideration," but ultimately concluding that the seizure was unlawful irrespective of race). Indeed, even in the case Mr. Jones most heavily relies on, *United States v. Washington*, the Ninth Circuit made no mention of the defendant's race when concluding that his *initial* encounter with law enforcement did not amount to a seizure. *See Washington*, 490 F.3d at 770 ("We conclude that although [the officer] conceded he suspected Washington of no criminal activity, [the officer's] initial encounter with Washington was not a seizure and did not implicate the Fourth Amendment."). Thus, while these decisions might reasonably be read to suggest that a court *can* consider race when determining whether a seizure has occurred, they by no means support the proposition that a court *must*. For this reason, too, these

decisions cannot be read as an endorsement of type of categorical approach advocated by Mr. Jones and the *amicus*.

Nor is such an approach consistent with this Court's seizure jurisprudence. It is well-established that this Court "conduct[s] an inquiry into an alleged seizure while mindful of *all of the circumstances surrounding the incident*." *McInnis*, 169 N.H. at 570 (citing *Daoud*, 158 N.H. at 783) (emphasis added). This is a fact-intensive analysis, where the Court considers the circumstances present in a particular case to determine whether a reasonable person in the defendant's shoes would have felt free to leave. *See, e.g.*, *id.* at 570–71 (discussing, in detail, the particular circumstances surrounding the police encounter); *Daoud*, 158 N.H. at 783 (same); *Steeves*, 158 N.H. at 675–77 (same). This Court's multi-factor analysis does not square with Mr. Jones's contention that race—or any other factor—is always relevant when determining whether an individual is seized. Rather, this Court's prior decisions, similar to the authority from other jurisdictions identified above, at most might support the proposition that determining whether race is relevant is a case-by-case inquiry.

Even if race could be a relevant consideration in some case, neither Mr. Jones nor the *amicus* explains why the trial court committed reversible error in failing to consider Mr. Jones's race under the circumstances present here. They do not, for instance, suggest that Mr. Jones's race was relevant given the particular community—Concord, New Hampshire—in which the police encounter at issue occurred. Nor do they suggest that Mr. Jones's own past interactions with law enforcement would make a reasonable person in his position less likely to feel like he or she was free to leave. And neither Mr. Jones nor the *amicus* points to any evidence suggesting

that either officer's conduct in this case was influenced by the fact that Mr. Jones is African-American. *Accord United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) ("[T]he particular personal traits or the subjective state of mind of the defendant are irrelevant to the objective 'reasonable person' test . . . other than to the extent that they may have been known to the officer *and influenced his conduct*." (Citations and quotation marks omitted) (emphasis added)). Accordingly, they offer no basis for this Court to conclude, under the particular circumstances of this case, that the trial court erred by not taking Mr. Jones's race into account. [3]

While this alone is likely dispositive, there is an additional, and perhaps more fundamental, flaw with Mr. Jones's and the *amicus*'s argument that the trial court erred by not considering race in this case. As discussed above, the evidence introduced at the suppression hearing weighed heavily in favor of the trial court's conclusion that Mr. Jones was not seized until he was informed of the arrest warrant. Given the weight of the evidence, Mr. Jones's race could only change the outcome of this case if it alone was dispositive of whether a seizure occurred. But any such proposition is inconsistent with this Court's seizure jurisprudence, has been

[3] In Part II.E. of his brief, Mr. Jones speculates that racial bias prompted the call that resulted in the officers being dispatched to 22 Allison Lane. *See* DB 31–33. The Court should reject this argument for several reasons. First, Mr. Jones did not raise this argument before the trial court, and it is therefore not preserved. Second, there is no evidence in the record supporting Mr. Jones's assertion that the caller was biased. And third, Mr. Jones fails to explain how any bias harbored by the caller would somehow infect the officers' subsequent interactions with Mr. Jones, particularly given that the officers never spoke with the caller and were sent to 22 Allison Lane by dispatch. *See, e.g.*, Tr. 5, 17 (indicating that dispatch, not the caller, directed the officers to 22 Allison Lane).

rejected by courts in other jurisdictions, and would result in an unworkable, if not unconstitutional, standard.

As previously mentioned, this Court, when analyzing whether a particular police encounter amounts to a seizure under Part I, Article 19, "conduct[s] an inquiry into an alleged seizure while mindful of all of the circumstances surrounding the incident." *McInnis*, 169 N.H. at 570 (citation and quotation marks omitted). Consonant with this charge, the Court has repeatedly rejected the notion that, outside of the context of an investigative stop or formal arrest, any single factor is dispositive of whether a seizure has occurred. For instance, the Court has held that "[p]ulling behind a vehicle stopped on the roadside does not, *by itself* constitute a seizure." *Steeves*, 158 N.H. at 675 (emphasis added). Similarly, the Court has stated that seizure does not occur "*simply because* a police officer approaches an individual and asks a few questions, or asks to examine the individual's identification or for consent to search the individual or his belongings." *Brown*, 155 N.H. at 168 (citation omitted) (emphasis added). This Court has confirmed that the fact that an officer "drove a police cruiser and was in uniform," without more, does not result in a seizure. *McInnis*, 169 N.H. at 570. And while activating blue lights behind a parked vehicle "often constitutes a seizure," even this is not an absolute rule. *Steeves*, 158 N.H. at 676–77. It would be incongruent with these decisions for this Court to adopt a *per se* rule that race automatically tips the scales in favor of seizure.

Other courts have reached this same conclusion. For instance, in *United States v. Mendenhall*, the United States Supreme Court stated that although the respondent's age, education level, gender, and race "were not

irrelevant" when determining whether she voluntarily accompanied DEA agents to their office to be searched, "neither were they dispositive." *United States v. Mendenhall,* 446 U.S. 544, 558 (1980).[4] Similarly, the Fourth Circuit relied on *Mendenhall* to conclude that, while an individual's age and education are relevant to determining whether he voluntarily consented to a search, they are not outcome determinative. *United States v. Rankins*, 941 F.2d 1208 (Table), 1991 WL 160128, at *4 (4th Cir. 1991). And the Seventh Circuit, "echo[ing] the sentiments of *Mendenhall*," held that although "race is 'not irrelevant' to the question of whether a seizure occurred, it is not dispositive either." *Smith*, 794 F.3d at 688. These decisions align with this Court's precedents holding that no single factor is decisive when determining whether a seizure has occurred.

A contrary holding would prove unworkable, as it would, in the words of the Fourth Circuit, "result in a rule that all encounters between police and minorities are seizures." *Monroe*, 579 F.3d at 387. It would also have potentially significant constitutional implications, as "a seizure analysis that differentiates on the basis of race raises serious equal

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[4] Both Mr. Jones and the *amicus* rely on *Mendenhall* for the proposition that race is relevant when determining whether an individual is seized under the Fourth Amendment. Federal Courts of Appeals are split over whether *Mendenhall* supports that proposition. *Compare Easley*, 911 F.3d at 1081 ("*Mendenhall*'s discussion of race, however, was in the context of assessing voluntariness, not seizure. While the test for voluntariness of consent accounts for some subjective characteristics of the accused, the Fourth Amendment's seizure analysis has always been an objective one." (Citations omitted.)), *with Smith*, 794 F.3d at 688 ("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."). As discussed *supra*, this Court need not decide the extent to which, if at all, race is relevant to the seizure inquiry in order to resolve the instant appeal. Accordingly, the Court also does not need to consider the scope of *Mendenhall*'s reach.

protection concerns if it could result in different treatment for those who are otherwise similarly situated." *Easley*, 911 F.3d at 1082. These concerns further militate against a conclusion that race can ever be dispositive of whether a seizure has occurred. Rather, this Court should conclude that race is, at most, one factor a trial court *can* consider when analyzing whether an individual is seized.

In sum, this Court's prior decisions, and the decisions of the United States Supreme Court and Federal Courts of Appeals cited above, support the established principle that no single factor is dispositive when determining whether under a *totality* of the circumstances an individual was seized during a particular encounter with police. The totality of the circumstances in this case demonstrate that Mr. Jones was not seized until he was informed of the arrest warrant, regardless of race. Again, there is no evidence in the record here that either officer restrained Mr. Jones, that either officer made physical contact with Mr. Jones prior to placing him under arrest, that either officer used language or a tone of voice with which a reasonable person would believe he had to comply, or that either officer questioned Mr. Jones in a manner indicating that he was not free to leave. Rather, the evidence presented at the suppression hearing demonstrated that the encounter was "casual" and "laidback." Tr. 19. The fact Mr. Jones is African-American cannot overcome the clear weight of this evidence, particularly in light of this Court's decisions in *Steeves* and *Licks*. It therefore would not have changed the outcome below.

For all of these reasons, the Court should conclude that the trial court did not err in declining to consider Mr. Jones's race as part of its seizure analysis and affirm the denial of the motion to suppress.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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September 3, 2019

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CERTIFICATE OF COMPLIANCE

I, Samuel R.V. Garland, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7, 300 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

September 3, 2019 *<u>/s/ Samuel R.V. Garland</u>*
Samuel R.V. Garland

CERTIFICATE OF SERVICE

I, Samuel R.V. Garland, hereby certify that a copy of the State's brief shall be served on Donna J. Brown, Esquire, counsel for the defendant, and Gilles R. Bissonnette, Esquire, Henry Klementowicz, Esquire, Michael G. Eaton, Esquire, and Albert E. Scherr, Esquire, counsel for amicus filers, the American Civil Liberties Union of New Hampshire, through the New Hampshire Supreme Court's electronic filing system.

September 3, 2019 *<u>/s/ Samuel R.V. Garland</u>*
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