THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0197

STATE OF NEW HAMPSHIRE

v.

JUAN ALBERTO MONEGRO DIAZ

Appeal Pursuant to Rule 7 from Judgment
of the 10th Circuit-District Division-Salem

BRIEF FOR AMICUS CURAE NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING DEFENDANT JUAN ALBERTO MONEGRO DIAZ

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STATEMENT OF THE AMICUS CURIAE

The New Hampshire Association of Criminal Defense Lawyers ("NHACDL") is the voluntary, professional organization of the criminal defense bar in New Hampshire. It consists of nearly 300 members including private counsel and state and federal public defenders. Collectively the membership practices in all ten counties, all eleven superior courts, all fourteen district division courthouses, this court, and the federal courts. NHACDL provides its members with continuing legal education and facilitates communication among its members on important issues relating to criminal justice, civil rights, and licensing of motor vehicle drivers.

Like its national affiliate, the National Association of Criminal Defense Lawyers, NHACDL exists to insure, safeguard, and promote the effective assistance of counsel in criminal cases, and more generally, to preserve the integrity and fairness of the criminal justice system. In light of its mission and considering the breadth and depth of the experience of its member attorneys, NHACDL takes public positions with respect to cases, legal issues, or proposed legislation that may affect important constitutional protections for of New Hampshire citizens within the criminal justice system. The important constitutional safeguards implicated in this case are of direct concern to NHACDL, its

members and their clients, and all citizens of the State of New Hampshire. Consistent with those efforts, NHACDL files this brief to urge this court to affirm the district court's judgement in this case.

QUESTION PRESENTED

Whether the court erred by finding the officer lacked reasonable articulable suspicion to seize the Defendant during a motor vehicle stop.

Issue preserved by the defendant's motion to suppress, SA 25*; the defendant's memorandum of law and facts, SA 27; the State's objection to the defendant's motion to suppress, SA 41; the trial court's oral order granting the defendant's motion to suppress, SH; the trial court's written order granting the defendant's motion to suppress, SA 44; the State's motion to reconsider, SA 46; and the Court's written order denying the State's motion for reconsideration, SA 51.

* Citations to the record are as follows:
"A" refers to the Addendum included with this this brief;
"SH" refers to the transcript of the suppression hearing, held on March 10, 2021;
"SB" refers to the State's brief filed August 30, 2021;
"SA" refers to the State's Addendum filed August 30, 2021.

STATEMENT OF THE CASE AND FACTS

I. Facts from the Suppression Hearing

On August 18, 2020, Mr. Juan Monegro Diaz ("Monegro Diaz") was driving a 2000 Honda Accord in the town of Salem, New Hampshire. SH 6. The vehicle had valid New Hampshire license plates and registration, and was registered to a female. SA 11.

On that date at approximately 5:00pm, Officer Michael Carpentier ("Carpentier") drove northbound on Kelly Road, in Salem, N.H. SH 6. The Accord lawfully turned in front of him, lawfully. SH 6. At no time did Monegro Diaz commit a motor vehicle infraction. SH 25, 27.

As soon as Carpentier saw the car, he chose to follow it and run its license plate information through his cruiser's Mobile Date Terminal ("MDT"). SH 7. Carpentier testified that the Accord drew his suspicion because he believes that "small sedans [are] specifically…used for concealment and trafficking of narcotics." SH 25-26. Carpentier further claimed that 2000 Honda Accords are inherently suspicious because they "have natural dead spaces and voids that are commonly used for the concealment and trafficking of narcotics." SH 27. Carpentier credits his "keen eye" for the suspicious nature of 2000 Honda Accords to his "training and experience in criminal narcotics interdiction." SH 25. Although Carpentier

testified that investigating 2000 Honda Accords is "part of [his job]," he admitted he does not "follow every vehicle" but instead does his "due diligence," without further specification. SH 27.

Carpentier discovered that the Accord was "registered to a middle-aged female" and had immediately noticed that the driver was male. SH 10. Carpentier continued to follow the Accord while he searched for more information about the car or its registered owner through his cruiser's MDT. SH 11.

According to Carpentier, the 2000 Accord he was following was the subject of a 2019 motor vehicle stop in which a male driver was arrested for DWI. ("I noted a reference of a – that vehicle being involved in a 2019 arrest with the Salem Police Department." SH 11 (emphasis added); "I looked into that report to see the involved parties of that vehicle at that time." SH 11 (emphasis added); "I was under the impression it was the same vehicle." SH 20-21.) The vehicle involved in the 2019 arrest was a 2007 Honda CRV, not the 2000 Accord involved here. SH 38; SA 27. Despite defense counsel's clarification of this inconsistency in the written motion to suppress, Carpentier testified that he "had no idea" until that cross examination that the 2019 motor vehicle stop involved a 2007 Honda CRV rather than the 2000 Accord. SH 23.

Carpentier testified that he ran the registered owner's name through the MDT's "local history." SH 33-34. There he could see "any history" that Salem Police Department had with that individual. SH 33. The MDT purportedly associated a prior "call number" with the registered owner's name, and this "call number related to Mr. Monegro-Diaz's 2019 incident or arrest." SH 34. Carpentier did not describe how the call numbers related the two individuals. Carpentier did not participate in the 2019 arrest or investigation. He went further into this system to look at a report of Monegro Diaz's 2019 arrest. SH 12. Carpentier retrieved "a booking photo for an arrest [of] Mr. Monegro Diaz "for allegedly driving under the influence." SH 12.

Carpentier testified that the 2019 report which he discovered through the MDT provided physical descriptions of Monegro Diaz, like his "height, weight, hair color, eye color." SH 12. He also retrieved Monegro Diaz's date of birth. When describing his review of the actual booking photo associated with the report, Carpentier's account is inconsistent. At times he testified that he obtained a single booking photo. SH 12; SH 30. At others, he testified that he viewed "photos." SH 12, 16-17.

After reviewing the 2019 report, Carpentier entered Monegro Diaz's name and date of birth into the MDT—while still driving behind the Accord—to "conduct a license check."

SH 15. Through DMV records obtained through the MDT, Carpentier learned that Monegro Diaz's operating privileges were under suspension. SH 16. At that point, he conducted a motor vehicle stop of the Accord after following him for two miles.[1] SH 17.

II. Arguments and Findings

After testimony concluded, defense counsel made two arguments in favor of suppression: that Carpentier violated Monegro Diaz's statutory rights and his constitutional rights.[2] First, defense counsel argued that Carpentier unlawfully ran the Accord's license and registration information in violation RSA 236:130, I and II. Second, counsel argued that Carpentier did not possess sufficient reasonable, articulable suspicion to justify the warrantless seizure of Monegro Diaz by conducting the motor vehicle stop.

The Court ultimately granted the defendant's Motion to Suppress on the grounds that Carpentier conducted the motor vehicle stop without reasonable articulable suspicion. SH 56; SA 52. The Court articulated its reasoning both orally

[1] Carpentier testified that he first noticed the Accord at the intersection of Cluff Crossing and Kelly Road, in Salem, NH. SH 6. The State's objection notes that Carpentier conducted the stop at 23 Stiles Road, Salem, N.H. SA 41. The distance between these two locations, according to Google Maps, is two miles. https://goo.gl/maps/7JypEwnaoR3ZC4EU8

[2] These arguments were also presented in the Defendant's Memorandum of Law and Facts, submitted in support of the Defendant's Motion to Suppress. SA 27.

on the record and in its subsequent written order. The Court did not find that Carpentier violated RSA 236:130.

A. Arguments on the Statutory Claim under RSA 236:130

The respondent does not assert on appeal that Carpentier violated RSA 236:130. This Court settled this issue in 2007 when it held that this statute does not govern patrol-car computers. State v. Njogu, 156 N.H. 551, 553 (2007). However, neither party, nor the trial court, cited or relied upon this case in any pleadings or oral arguments. Therefore, the arguments and analysis at the suppression hearing treated this issue as an open question. Because the State's brief cites the trial court's oral analysis extensively, it is appropriate to review the arguments and analysis here.

The defense argued that Carpentier unlawfully used his cruiser's MDT to search for information about Monegro Diaz. SH 39, 43. The State addressed the defense's argument, without citing to Njogu, but instead citing to State v. Richter, which was decided six years before RSA 236:130 became law. 145 N.H. 640 (2000). The State argued that Carpentier used "standard investigatory steps" to research the female car owner and 2019 DWI defendant. SH 44. The State argued that Carpentier did not violate the driver's "reasonable expectation of privacy" during his pre-stop investigation. SH 51.

B. The Court Found that Carpentier did not Violate RSA 236:130

The Court correctly held that Carpentier's pre-stop investigation did not violate RSA 263:130, even without the guidance of Njogu. The Court stated that law enforcement "can use whatever investigative tools they want if they're investigating potential crime." SH 48. The Court ultimately said, "we all understand how Officer Carpentier got the information" and he "did nothing improper" under RSA 236:130. SH 48, 51-52.

The State's brief misattributes the trial court's analysis on the statutory claim to support its argument on the constitutional claim. For example, the State relies on the trial court's statements that when Carpentier used his MDT he "did nothing improper," SH 52, and he was "appropriate," SH 56, to argue that Carpentier acted with sufficient reasonable suspicion when he seized Monegro Diaz. The State also presents the trial court's statement finding "compliance with Richter" out of context. SB 19; SH 43.

The State's description of the record is misleading. The trial court stated that Carpentier "did nothing improper," but then added, "[b]ut I still don't like it. Something jumps out at me as wrong here. Not that the officer did anything wrong, but wrong in terms of what the Supreme Court would look at in terms of Part 1, Article 19…". SH 49 (emphasis added). The

trial court correctly found that Carpentier "did nothing improper" under RSA 263:130. The State contends that "suppression was not an appropriate remedy because "the trial court noted… 'compliance with Richter.'" SB. 19. The record is clear that the Court was referring to the statutory claim: "I don't think it violates the statute because—I don't see surveillance here. I just see compliance with Richter. Now, the question is whether he went beyond it, did he then leave the confines of Richter." SH 43-44. The Court correctly ruled against the defense's statutory claim, and that issue is not raised on appeal.

Similarly, the State argues the stop was constitutional by relying on the trial court's statement that Carpentier "was appropriate. He used an appropriate investigative tool." SH 56. Again, this takes the trial court's analysis on the statutory claim and misattributes it to the constitutional claim. The trial court stated:

> "But I don't feel -- I don't find under totality of the circumstances, even though he got it right, apparently, because he identified him, that when he made the stop, there was enough reasonable suspicion to stop the Defendant, Juan Alberto Monegro-Diaz, based on some of the arguments Attorney Dixon made [regarding] identification."

SH 56. (emphasis added).

The trial court ruled against the defendant's statutory claim and in favor of its constitutional claim. The trial court's oral analysis relating to the former should not be applied to the latter.

C. The Count Ruled that Carpentier Seized Monegro Diaz without Reasonable, Articulable Suspicion

The State argued that the tenuous link between the car's registered owner and the unidentified Hispanic driver passed constitutional muster. The trial court held that Carpentier seized Monegro Diaz in violation of his constitutional rights.

The trial court found that "under the totality of the circumstances" Carpentier did not possess "enough reasonable suspicion to stop the defendant" "based on some of the arguments [defense] Attorney Dixon made [regarding] identification." SH 56. "I don't think there was enough, under Part 1, Article 19, to make the stop." SH 56. The State thereafter filed a Motion to Reconsider the trial court's ruling, which the court denied through a written order, issued to "make[] a clear record" and "set[] forth the ultimate basis of the decision. SA 52. The trial court's written order states:

> The Court does not find under the totality of the circumstances… that the stop rose to the level of an articulable suspicion to make the stop consistent with Part 1, Article 19 of the State Constitution and the Fourth

> Amendment of the United States' Constitution.

SA 52. The trial court articulated clear reasons for its finding:

> the car that was pulled over was not unregistered or under suspension, there was no observations of motor vehicle violations, there was not enough evidence presented to establish an identity of the Defendant behind the wheel.

SA 52.

SUMMARY OF THE ARGUMENT

Officer Carpentier lacked reasonable articulable suspicion that the defendant was an unlicensed driver when he stopped the 2000 Accord. Carpentier failed to make the necessary corroborating observations and comparisons between the driver of the 2000 Accord and the booking photo of Monegro Diaz, to justify the warrantless seizure of the driver. This Court should affirm.

I. The trial court properly granted Monegro Diaz's motion to suppress evidence because the police seized the defendant without requisite reasonable articulable suspicion

Officer Carpentier unlawfully seized Monegro Diaz without the requisite reasonable articulable suspicion required to satisfy the protections afford by the New Hampshire and Federal constitutions. The New Hampshire Constitution protects "all people, their papers, their possessions and their homes from unreasonable searches and seizures." N.H. Const. Part I, Article 19; See also U.S. Const. amends. IV and XIV. "A warrantless seizure is *per se* unreasonable unless it falls within a recognized exception to the warrant requirement." State v. Dalton, 165 N.H. 263, 265 (2013) (quotation omitted). "Evidence obtained in violation of a defendant's rights under Part I, Article 19 of the State Constitution is inadmissible under the exclusionary rule." State v. Blesdell-Moore, 166 N.H. 183, 187 (2014). "If the evidence in question has been obtained only through the exploitation of an antecedent illegality, it must be suppressed." Id. at 191 (quotation omitted).

"When reviewing a trial court's ruling on a motion to suppress," the Court accepts "the trial court's factual findings unless they lack support in the record or are clearly

erroneous." State v. Gates, 173 N.H. 765, 770 (2020) Clear error review grants "significant deference" to the trial court's findings, which will not be disturbed unless this Court possesses "'a definite and firm conviction' that a mistake was made." United States v. Tiru-Plaza, 766 F.3d 111, 115 (1st Cir. 2014).

This Court reviews the trial court's legal conclusions de novo. Gates, 173 N.H. at 770. Even under de novo assessment, the appellate court gives "appropriate weight to the inferences drawn" by the trial court, which possessed "immediacy and familiarity with the witnesses and events." Tiru-Plaza, 766 F.3d at 155. This Court "defer[s] to the factual findings of the trial court on events leading up to the [warrantless motor vehicle] stop, unless those findings are clearly erroneous." State v. Reno, 150 N.H. 466, 467 (2004) (citing Richter, 150 N.H. at 641). This Court "will not overturn the trial court's findings of historical facts unless they are contrary to the manifest weight of the evidence." State v. Sachdev, 171 N.H. 539, 548 (2018).

"On a motion to suppress, the State bears the burden of establishing the legality of" any seizure or search. State v. Lantagne, 165 N.H. 774, 776 (2013) (seizure); State v. Newcomb, 161 N.H. 666, 670 (2011) (search). The State must prove, by a preponderance of the evidence, that a motor

vehicle seizure was a constitutional investigatory stop. State v. Maya, 126 N.H. 590, 595 (1985).

A traffic stop is a seizure. State v. Francisco Perez, 173 N.H. 251, 257 (2020); Blesdell-Moore, 166 N.H. at 187 (2014). An officer may conduct an investigatory seizure of a motor vehicle only if there is "'reasonable suspicion' based on specific, articulable facts taken together with rational inferences from those facts, that the particular person stopped has been, is, or is about to be engaged in criminal activity." Francisco Perez, 173 N.H. at 259; State v. Joyce, 159 N.H. 440, 446 (2009). The officer's "suspicion must have a particularized and objective basis in order to warrant that intrusion into protected privacy rights." Joyce, 159 N.H. at 447 (quoting State v. McKinnon-Andrews, 151 N.H. 19, 26 (2004)). An officer's "reasonable suspicion must be more than a hunch," and this Court has recognized that while an experienced officer's perceptions may be entitled to some deference, "this deference should not be blind." Francisco Perez, 173 N.H. at 259.

A. The holdings of State v. Richter and Kansas v. Glover do not apply to the facts of this case

The State cites Richter and Glover to contend that an officer may seize an individual when the "officer reasonably suspects that an individual is driving on a suspended license." SB 16. See State v. Richter, 145 N.H. 640 (2000);

Kansas v. Glover, 140 S.Ct. 1182 (2020). However, the dispute here is not whether an officer may seize an individual he reasonably suspects of unlicensed driving, but whether his suspicion of unlicensed driving was reasonable and articulable. Richter and Glover establish a two-part reasonableness test that answers "yes" to this question only in a narrow set of circumstances: when a car in transit is registered to an unlicensed owner, and an officer observes no evidence that the driver is not the owner. The Richter and Glover test does not apply to this case, and even if it did, it would invalidate the officer's actions as unreasonable.

First, Richter and Glover involved unlicensed car owners. Both considered whether it is reasonable for an officer to presume that an unlicensed owner of a moving car is the current driver. In both cases, the officers knew the owner of a moving car was unlicensed before seizing the driver. Richter, 145 N.H. at 641; Glover, 140 S.Ct. at 1188. This factual basis, absent here, directed and limited the Courts' holdings.

Richter and Glover held that officers may reasonably infer that a driver is unlicensed once they establish the car's owner is unlicensed. The Courts permit this inference because of the "common sense presumption that a vehicle is being driven by its owner." Richter, 145 N.H. at 642; Glover, 140 S.Ct. at 1188. The State seeks to rely on this

commonsense presumption (the "owner/driver presumption"), but this presumption's factual basis does not exist here: the owner's license was not suspended or revoked.

Second, the owner/driver presumption is fragile, subject to part two of the test: whether any evidence indicates the unlicensed owner may not be driving. Both Courts explicitly stated the owner/driver presumption arises only in the "narrow" circumstance where "the officer observed nothing that would indicate that the driver was not the owner." Glover, 140 S.Ct. at 1191; Richter, 145 N.H. at 641. This Court reiterated this two-part test four years after Richter. Reno, 150 N.H. at 467 (affirming a motor vehicle seizure where the officer "knew the registered owner was under suspension" and observed nothing indicating the driver was not the unlicensed owner).Even if the "narrow" owner/driver presumption existed here, it is destroyed by contrary evidence: the officer's knowledge that the male driver was not the female registered owner.

The owner/driver presumption is an aberration in the reasonable suspicion context because it is based on a single factor. But because the presumption does not apply here, the Court must examine whether Carpentier's seizure was reasonable, based on specific, articulable facts under the

totality of the circumstances.[3] See State v. Wiggin, 151 N.H. 305, 308 (2004) (Courts determine the sufficiency of an officer's suspicion by examining the totality of the circumstances); State v. Sage, 170 N.H. 605, 610 (2018) (court evaluates "the articulable facts in light of all surrounding circumstances."). "A suspect's conduct and other specific facts must create a specific possibility of criminality" to establish reasonable articulable suspicion. State v. Vadnais, 141 N.H. 68, 70 (1996) (quotations omitted).

When an officer seizes a driver absent the owner/driver presumption, the Court evaluates factors such as whether the officer is familiar with the driver or the car, whether the officer knows the driver is unlicensed, the age and particularity of the tip reporting unlicensed driving, and whether the officer's observations align with the tip. See State v. Mortrud, 139 N.H. 423, 424 (1995). Carpentier's information was inadequate in both quality and quantity at the time he seized Monegro Diaz.

[3] Although the record does not discuss race, nor were arguments presented to the trial court based on racial profiling, it still bears mentioning that recent decisions in this and other Courts have recognized that race may be relevant in the search and seizure context. See, e.g., State v. Jones, 172 N.H. 774, 780 (2020); Commonwealth v. Long, 485 Mass. 711 (2020). In cases where race is implicated, it may be relevant to consider "recent research indicating that police are more likely to stop, and arrest, people of color due to implicit bias." United States v. Mateo-Medina, 845 F.3d 546, 553 (3d. Cir. 2017).

B. Carpentier lacked reasonable articulable suspicion that the driver was Monegro Diaz

The fact that the MDT displayed Monegro Diaz's license as suspended would only be relevant if Carpentier had reasonable and articulable suspicion based on specific facts that the driver *was* Monegro Diaz. Based on the totality of circumstances, he did not.

This case lacks an officer's corroborating knowledge of an individual's identity that this Court has previously relied on to support such a seizure. See e.g., Mortrud, 139 N.H. at 424; State v. Perri 164 N.H. 400 (2012); State v. Giddens, 155 N.H. 175 (2007). In Mortrud, the officer received a tip that an unlicensed driver familiar to the officer was operating a vehicle in the vicinity. Mortrud, 139 N.H. at 424. The tip, made just hours before the seizure, disclosed the suspect's name and described the type of car. Id. Officers verified that the suspect's license was under suspension. Id. Several hours later, an officer observed the defendant driving this car. Id. The officer could credibly identify the defendant because he had previously stopped the defendant in that very car. Id. Armed with this information, the officer developed reasonable suspicion of unlicensed driving when he "spotted the defendant, whom he recognized, driving the defendant's vehicle, which he also recognized." Id.; see also Giddens, 155

N.H. at 182 (officer knew the suspect "was familiar with the wooded areas" where he was seized).

In State v. Perri, the Court upheld the seizure of an unknown rape suspect based on a two-day old tip in part because of the officer's observations of the suspect, that matched the tipster's detailed description "too a tee." 164 N.H. at 411. The tipster comprehensively described a white male suspect with an "unshaven face with goatee,…smoker's breath…who may be a painter [with a] hooded sweatshirt." Id. Before seizing the suspect, the officer determined that he was "wearing a hooded sweatshirt and dark jeans with paint on them,… smoking a cigarette, and had a goatee." Id.; See also Giddens, 155 N.H. at 175 (tip supported seizure where officer corroborated car's distinctive features like its color and unique air freshener). Moreover, the suspects in Mortrud, Perri, and Giddens were both found in the same unpopulated locations as the reported crimes for which they were suspected. Perri, 164 N.H. at 411; Giddens, 155 N.H. at 175; Mortrud, 139 N.H. at 424.

Unlike the detailed descriptions and corroborating observations relied upon in these cases, here, the single attenuated link between the 2019 DWI defendant and the current driver suffers from the age of the prior offense and shallow and vague corroborating information. Carpentier did not receive a tip reporting unlicensed driving. Cf.

Motrund,139 N.H. at 424. Carpentier had never encountered the driver before, and he had no familiarity with him. Cf. id.; Giddens, 155 N.H. at 182. Carpentier did not positively observe any of 2019 defendant's physical features on the driver before seizing him.

On this issue, the State's brief presents a specious account of the record. When describing Carpentier's supposed identification of the driver, the State recounts that Carpentier testified that he "could see the defendant's face and profile" and that "he primarily relied on the booking photo from the DUI arrest file to identify the defendant." SB 9.

The State argues: "Defense counsel also questioned Officer Carpentier's ability to accurately compare physical descriptors such as height, weight, and eye color from the defendant's arrest record with the individual in the car while following in his cruiser." SB 9. While this is literally correct—defense counsel *did* question Carpentier on this subject—the State's insinuation that Carpentier identified the driver by accurately comparing the two, is not.

There is no question that Carpentier read the 2019 defendant's "height, the weight, [and] eye color" logged in the 2019 arrest report. SH 29. But when asked specifically about positively viewing the physical features of the driver to link them to 2019 report's descriptors, Carpentier conceded that he "didn't do those things" and "didn't use those steps." SH

30. Carpentier admitted he did not confirm the driver's height ("I didn't do those things") or the driver's eye color ("I cannot testify that I used those steps because I didn't."). SH 30, 31. And although Carpentier testified, initially, that he could "give an approximation" of the driver's weight, when asked to elaborate he responded that he "did not use these specific steps, I just referred to a booking photo of his face." Even if Carpentier did estimate the driver's weight (without viewing anything below the driver's chest, SH 30), he did not testify that his estimation matched the description from the 2019 report:

> Q: Now -- and you testified that this information that you were able to obtain before the stop looking at the record, you're able to obtain the height, the weight, eye color, correct?
>
> A: Yes.
>
> Q: And following him in the car, you're able to obtain his height, whether that was consistent with what the driver was?
>
> A: I am. Listed it in my report that I was able to do that.
>
> Q: Okay. So you were able to -- he's sitting down in the car, driving the car. You're able to tell how high – how tall he was?
>
> A: I -- I didn't list that in my report. I -- I didn't do those things.

Q: How (indiscernible) were you able to do that while you're chasing -- following the car?

A: I can't answer for every situation, but for this one, I didn't do that, no.

Q: Okay. And you're able to -- following him, you're able to tell his weight, while he's in the car driving?

A: Give an approximation, sure.

Q: Okay. Were you able to see his chest all the way down?

A: Again, I did not use these specific steps, I just referred to a booking photo of his face.

Q: My question was, were you able to see his chest all the way down, because he was sitting down?

A: No.

Q: No. Were you able to see his legs, whether they were thin or thick?

A: I didn't use those steps, but no.

Q: And then, the eye color, were you able to -- were you able to determine the eye color as you were following him from behind?

A: Again, I cannot testify that I used those steps because I didn't, but you can do those. You can determine that, absolutely.

SH 29-31.

Carpentier's inability to meaningfully observe the driver's features is supported by his description of his own conduct during the short two mile stretch in which he followed the Accord. Carpentier's testimony shows that he used his MDT extensively while behind the vehicle. For example, he ran the car's plate number, then researched the owner's license status, then reviewed several other layers of information, including reading the 2019 police report. SH 11-12. Carpentier's testimony indicates that he devoted significant attention to his MDT screen, necessarily hindering his opportunity to view the driver to form a sufficient basis for reasonable suspicion.

When Carpentier seized Monegro Diaz, he only had a hunch connecting the Accord with an unfamiliar individual arrested the previous year for DWI. Carpentier had minimal information about this individual, and he even misunderstood portions of that information. Carpentier testified he was unable to verify whether the driver possessed the same physical features listed in the 2019 DWI report. SH 29-31. Carpentier did not point to any other specific or verified facts to support a reasonable suspicion that he sufficiently identified the driver as Monegro Diaz.

C. The circumstances surrounding the seizure do not elevate the officer's vague justifications to the requisite level of specificity

The attenuated connection Carpentier relied upon to identify the driver fails to suggest "a significant possibility of criminality" because the surrounding circumstances do not involve any supportive facts that this court finds relevant in such circumstance. Vadnais, 141 N.H. at 70. For example, Carpentier did not observe any traffic infractions or other suspicious or furtive driver movements. While Carpentier followed the Honda for two miles, the Honda drove at a "reasonable" speed "within the speed limit." SH 28. The driver did not attempt any erratic or evasive driving maneuvers which might contribute to a reasonable suspicion. Cf. State v. Oxley, 127 N.H. 407, 412 (1985) (A "driver's evasive actions [may be related] to…unlawful activity," when combined with other factors). The absence of relevant behavior or maneuvers detracts from any suspicion Carpentier may have had. See State v. Kennison, 134 N.H. 243, 248 (1991) (unlawful seizure based on tip where officers observed "no suspicious or incriminating activity" of a suspect driving a car).

The fact that the 2019 driver was arrested for DWI carries little weight in an investigation for unlicensed driving. There is no evidence or allegation that the 2019 driver was driving without a license at the time of his DWI arrest. At

least eight-and-a-half months passed between the 2019 DWI arrest and the arrest here.[4]

Moreover, the Accord had nothing to do with the 2019 DWI arrest. Carpentier conflated a 2000 Honda Accord and a 2007 Honda CRV, which was an objectively unreasonable error. Whether a seizure is supported by reasonable suspicion is governed by an objective standard, and Carpentier's error cannot be the defendant's loss. Joyce, 159 N.H. at 446; State v. Thorp, 166 N.H. 303, 307 (1976); United States v. Espinosa, 490 F.3d 41, 47 (1st Cir. 2007) (the court will focus "on what a reasonable officer in his position would have thought."). A reasonable officer would have known that the 2019 arrest involved a different car than the one he was following. However, even if the reading error is considered reasonable, nothing connected the Accord's driver to the 2019 defendant other vague references to a booking photo and an unknown relation to a woman who owned at least two cars.

II. The State's Arguments

The State's arguments rely exclusively on the trial court's oral statements and ignore the trial court's subsequent written order. The state argues that the "trial court's decision was motivated by its discomfort." SB 19. This Court need not speculate what motivated the trial court's

[4] The record does not include a specific date of the DWI beyond "2019." The arrest in question occurred on August 18, 2020. SH 3.

decision because the written order clearly holds that Carpentier's justifications for the seizure, "under the totality of the circumstances…[did] not "r[i]se to the level of an articulable suspicion to make the stop consistent with Part 1, Article 19 of the State Constitution and the Fourth Amendment of the United States' Constitution." SA 52. The trial court articulated clear reasons for its finding: First, "the car that was pulled over was not unregistered or under suspension;" second, "there was no observations of motor vehicle violations;" and third, "there was not enough evidence presented to establish an identity of the Defendant behind the wheel." SA 52.

Referencing only the oral record, the State seeks reversal because it alleges, in part, that the trial court "speculat[ed]" improperly about facts, SB 17, "undermine[d] its decision to suppress the evidence" through its own statements made during oral arguments, SB 18, and "did not apply the correct legal standard." SB 20.[5]

This trial court applied the correct legal standards at the hearing and in its written order, stating it assessed the

[5] The State's argument begins by misstating the burden of proof, incorrectly arguing that the trial court "had to find that Officer Carpentier lacked reasonable suspicion" and "had to find" that Carpentier acted on a "mere hunch." SB 17-18. Here the State reverses the "basic" maxim that the State carries the burden to prove that a warrantless seizure was reasonable and based on more than a hunch. See, e.g., State v. Martin, 145 N.H. 362, 364 (2000); State v. Maya, 126 N.H. 590, 595 (1985).

evidence's constitutional sufficiency under the "totality of the circumstances." This is the proper authority and test under which to evaluate the reasonableness of a warrantless seizure. SH 56; SB 52; See e.g., State v. Wiggin, 151 N.H. 305, 308 (2004); State v. Sage, 170 N.H. 605, 610 (2018). Alleging the trial court applied the wrong legal standard is the first of the State's misleading claims, but not its most significant.

The State's central claim is presented in its Summary of the Argument: the "[trial] court erred when it concluded, based on speculation that the defendant might have been wearing a face mask, that the officer's identification was not certain enough to establish reasonable suspicion." SB 13. (emphasis added). The State repeats this misleading claim three more times, asserting that the court "concluded" the officer lacked reasonable suspicion by "hypothesiz[ing]" and "speculat[ing]" that the driver was wearing a mask. SB 11, 17, 18. This argument misrepresents the court's legal conclusion and asks this Court to ignore the trial court's credibility determination.

The State misrepresents the court's holding. The State contends, without citation, that the trial court granted the motion to suppress because of one alleged finding: "speculation that the defendant could have been wearing a mask." SB 17. The "court's speculation on this point," the

state alleges, "is not a sufficient reason to suppress an otherwise valid, reasonable stop." SB 18. However, the trial court did not make affirmative conclusions that the driver was wearing a mask or that the officer's identification was stymied by a mask. Rather, the Court made these statements while assessing the credibility of the testimony.

The State thereby asks this Court to ignore the trial court's credibility determination by distorting the trial court's statements on the weight of the evidence by characterizing them as findings of positive fact. The trial court was "free to credit the testimony as it saw fit." State v. De La Cruz, 158 N.H. 564, 568 (2009). This Court "defer[s] to the trial court's judgement" on issues such as "measuring the credibility of witnesses" and "determining the weight to be given evidence." Vincent v. MacLean, 166 N.H. 132, 135 (2014). Trial courts evaluate the weight of evidence by considering the circumstances and details of a witness' testimony, and this evaluation is not disturbed "unless no reasonable person could have come to the same conclusion after weighing the testimony." State v. Livingston, 153 N.H. 399, 402 (2006).

This case turned on the central evidentiary question of whether Carpentier observed enough commonality between the physical features of the driver and the physical features of the defendant documented in the 2019 arrest report. This assessment required the court to determine how much weight

to ascribe Carpentier's alleged identification and, thereby, Carpentier's credibility.

Carpentier's testimony included only vague descriptions of the driver, limiting its probative value. As previously discussed, Carpentier did not observe important physical features of the driver, like eye color, weight, or height, or connect those features to the 2019 DWI defendant. Carpentier also testified he had no previous knowledge or familiarity with the driver or with the car's owner. SH 18, 34. Although Carpentier testified that he could see the driver's "face when we were making turns or [in] his review mirror," SH 16-17, Carpentier did not describe a single physical feature of the driver. Whether the officer sufficiently identified the driver prior to the seizure is a finding of historical fact, and on such findings this Court defers to the trial court unless they were clearly erroneous. Reno, 150 N.H. at 467.

Carpentier's assertion that he could see the driver's face also conflicts with his admission that did not know whether the driver was wearing a mask. SH 34. Resolving "conflict in testimony" is the established prerogative of the trial court when evaluating the weight to give to evidence. MacLean, 166 N.H. at 135. The trial court could consider this conflict when making its ultimate determination that "there was not enough evidence presented to establish an identity of the Defendant behind the wheel." SA 52.

The State's argument urges the Court to defer to a factual finding the trial court never made, that Carpentier possessed sufficient information prior to the seizure, to reverse the legal finding the court did make, that Carpentier did not possess "enough evidence…to establish an identify of the Defendant behind the wheel…[under] Part I, Article 19…and the Fourth Amendment." SA 52. For these reasons, this Court must affirm.

CONCLUSION

WHEREFORE, the amicus curae requests that this Court affirm the trial court's order granting the defendant's motion to suppress.

Undersigned counsel waives oral argument during any portion of the arguments this Court may grant.

The appealed decision is in writing and are filed in the Appendix to the State's Brief.

This brief complies with the applicable word limitation and contains 6339 words.

Respectfully submitted,

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DATED: October 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this brief through the New Hampshire Supreme Court's e-filing system is accordance with Supplemental Rule 18(b).

DATED: October 14, 2021 /s/ Matthew McNicoll
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