THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0253; No. 2022-0589

State of New Hampshire

v.

Julie Hellinger

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
10th CIRCUIT – DISTRICT DIVISION – SALEM

APPEAL PURSUANT TO RULE 8 FROM A JUDGMENT OF THE
ROCKINGHAM COUNTY SUPRIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute oral argument requested)

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I. Did the circuit court err in denying the defendant's motion to suppress?

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STATEMENT OF THE CASE

On July 15, 2020, the defendant, Julie Hellinger, was arrested for and charged with a class A misdemeanor disobeying an officer, contrary to RSA 265:4, and a class A misdemeanor driving after a revoked or suspended license, contrary to RSA 263:64, IV. SA 3[1].

On February 16, 2021, the defendant filed a motion to suppress. DA 3-9. The State filed an objection. DA 10-13. On April 19, 2022, the circuit court (*Lowe*, J.) held a suppression hearing followed by a trial. SA 5. Prior to the suppression hearing, the State *nolle prossed* the class A misdemeanor driving after a revoked or suspended license charge and filed a violation-level driving after a revoked or suspended license charge, contrary to RSA 263:64, VII. T 4-5.

The circuit court denied the defendant's motion to suppress by oral order. T 80-88. The case proceeded to a trial, after which the circuit court convicted the defendant of both charges. T 116-18. Following the verdicts, the defendant was sentenced on the driving after a suspended license to a $1,000 fine and a $240 penalty assessment. T 128. On the disobeying an officer conviction, the defendant was sentenced, in part, to 12 months in the house of corrections, all of which was suspended for three years and a $1,000 fine and a $240 penalty assessment. T 128-29.

Both sentences were stayed for 30 days pending the defendant's decision to appeal her convictions. T 132. On April 25, 2022, the defendant

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[1] Citations to the record are as follows:
"DIAA_" refers to the defendant's interlocutory appeal appendix and page number;
"SA_" refers to the State's appendix to this brief and page number;
"T_" refers to the suppression and trial transcript and page number.

appealed the disobeying an officer conviction to the Rockingham County Superior Court for a *de novo* jury trial. SA 6. On May 6, 2022, the defendant appealed the trial court's April 19, 2022 denial of her suppression motion and her driving after a suspended license conviction to this Court. On October 25, 2022, undersigned counsel received a copy of the defendant's interlocutory appeal statement appealing the superior court's (*Ruoff*, J.) denial of the defendant's second motion to suppress. This Court accepted the interlocutory appeal and both appeals were subsequently consolidated.

STATEMENT OF FACTS

A. The Suppression Hearing.

Salem Police Detective Jeffrey Czarnec was the State's only witness at the suppression hearing. T 11. At the time of the hearing, Detective Czarnec had been a police officer for over nine years. T 12. He explained that during the five years he had been a police officer in Salem, New Hampshire, the police involvement in the area around Red Roof Inn in Salem is "slightly more active than other places in town." T 21. He further explained that generally, crimes related to drug use and weapon possession occurred in the area of the Red Roof Inn. T 22.

On July 15, 2020, Detective Czarnec was working as a patrol officer driving in a Salem Police Department police cruiser on South Policy Street in Salem, New Hampshire. T 29, 38. At approximately 6:30 p.m., he observed a vehicle parked on the side of Red Roof Lane and observed a woman, later identified as the defendant, walk from the driver's side of that vehicle to the rear passenger side tire. T 30-31. When he saw this, Detective Czarnec turned his police cruiser around with the intention to pull behind the vehicle. T 33. The detective explained that he pulled in behind the vehicle to "community caretake," or to offer the defendant assistance with her disabled vehicle. T 39.

As Detective Czarnec turned around, the detective saw the defendant "very quickly" move away "from where she was back into the vehicle." T 34. In the detective's estimation, the defendant was only at her rear tire for less than one minute. T 35.

After the detective turned around, he pulled his police cruiser behind the vehicle. T 36. He did not have his emergency lights or sirens activated. *Id*. When the detective pulled off of the road, the defendant was already in the driver's seat of the vehicle. *Id*. As soon as the detective pulled in behind the defendant, the defendant drove forward. T 38. The detective acknowledged during cross-examination that the defendant was "free to pull away" when he pulled in behind her. T 60.

When this happened, the detective activated his emergency lights with the intention of pulling the defendant over and conducting a motor vehicle stop. T 40. The detective explained that he conducted this stop because he "knew the vehicle wasn't disabled, so it was stopped in the roadway, and also, the evasive behavior that [he] observed." T 45. The detective clarified that the evasive behavior he observed was the defendant's flight from him as he pulled his cruiser in behind her. *Id*.

When the detective turned on his emergency lights, the defendant did not pull over. T 47. The detective "chirped" his siren once and the defendant pulled over. *Id*. The detective testified that the defendant's delay in pulling over was "concerning" because it was "reasonably safe to pull over[,] the vehicle was already pulled over[,] [a]nd now, for no reason that [he could] figure, continued to drive even after [the] sirens were on." *Id*.

Once the defendant pulled over, the detective approached the driver's side window and asked the defendant for her license and registration. T 49. As he asked her this, the detective saw that the defendant's eyes were bloodshot and her pupils were constricted. T 48. After the defendant spent some time searching in the glove box for the registration, the detective told her "not to worry about the registration" and

to just produce her license. T 49. The defendant told the detective that she did not have her license "on her." *Id*.

At that point, the detective asked the defendant to speak with him outside of the vehicle. *Id*. He explained that he asked her this based on the observations he had made of her eyes, "her furtive movements in the vehicle, rummaging through the glove box," and her "evasive behaviors" when the detective tried to pull her over. *Id*. The defendant agreed to speak with the detective outside the vehicle. T 49-50. Once outside, the detective asked the defendant for her address and she provided him with an address in Goffstown, New Hampshire. T 50. The detective next asked the defendant for her first name and the defendant told him that her full name was Kristin Larochelle. *Id*.

B. The Trial Court's Order.

Following the detective's testimony, the trial court heard oral argument from both parties regarding the defendant's motion to suppress. T 74-80. The defendant argued that she was free to leave when the detective pulled his police cruiser behind her vehicle. T 74. The defendant also argued that the detective did not have any reason to believe that she had committed a crime when he activated his emergency lights and sirens to pull her over. T 76-77.

The State agreed that the defendant "had an absolute right to pull away" once the detective pulled his police cruiser behind her. T 77. The State argued that when the detective pulled the defendant over, he was doing so to see "if she still need[ed] help." T 78. While pulling her over to assist her, however, the detective observed that she did not immediately

pull over and that she had "fled" from him once he pulled in behind her. *Id*. During the motor vehicle stop, he also watched her make furtive movements. *Id*. The State also argued that the detective had reasonable, articulable suspicion that she had violated the law by "blocking part of the road" when she pulled over to check her rear passenger tire. T 79.

After hearing arguments, the trial court denied the defendant's motion to suppress. T 83. The trial court found that the detective initially pulled over behind the defendant to permissibly exercise his community caretaking function. T 81. The trial court also found that it was reasonable for the detective to "suspect something" after the defendant pulled away from the detective knowing that he had pulled over behind her and after she did not stop for an "unknown period of time" once the detective activated his emergency lights. T 82. The trial court, citing *State v. Brunelle*, 154 N.H. 656 (2000), also found that the detective was permitted to pull the defendant over to ask her for her identification because she had initially pulled her vehicle over to inspect her tire. T 83.

After this ruling, the defendant objected, arguing that there was no evidence that the detective had any "reasonable suspicion that there was any criminal activity." T 85. In response, the trial court said, "I don't think the witness has to identify criminal activity. The fact that [the defendant] pulled away – and I guess the question is was it reasonable for this police officer to assume that the defendant had seen him and pulled away, okay?" T 86.

In response, the defendant again argued that the detective had to provide reasonable, articulable suspicion to believe the defendant had engaged in criminal activity and had not provided that during his testimony.

T 87. The trial court responded that the appropriate standard to justify the defendant's motor vehicle stop was whether "it was reasonable for this officer under these circumstances to believe that she might be evasive." *Id*.

C. The Trial.

Following the trial court's suppression order, the parties proceeded to trial. After the defendant told the detective her name was Kristin Larochelle, she told the detective her date of birth and said she was 49 years old. T 88-89. When asked for the last four numbers of her social security number, she said that she did not know it. T 89. The detective said this was a sign of "deceit" because it was unlikely that someone who was 49 years old would not know her social security number. *Id*.

The detective ran the information the defendant provided through dispatch to receive "descriptors" back from dispatch, such as height, weight, and hair and eye color, to confirm that the defendant had provided him the correct information because she did not have a physical identification with her. T 90. When the detective received the descriptors, the defendant "vaguely fit the description," but the detective was not convinced, so he asked for and received a Facebook photograph of Kristen Larochelle from dispatch. T 91.

After receiving this photograph, the detective returned to the vehicle and administered the horizontal gaze nystagmus test to the defendant. T 92. During the test, the defendant said, "not in her 56 years had she ever been treated this way by law enforcement." *Id*. Based on this comment and the Facebook photograph, the detective did not believe that the victim was actually Kristin Larochelle. *Id*. To try to identify the defendant, the

detective asked her if she had anything with her name on it. T 93. The detective did not remember the defendant's response. *Id*. When refreshed with his report, he said that he had asked the defendant to show him her Facebook account and in response, the defendant said that her phone was old and her Facebook account did not work on her phone. T 93-94.

The detective next asked the defendant if she could get her purse. T 94. When she did, the defendant took out a credit or debit card and handed it to the detective. *Id*. The defendant said that her license was suspended. *Id*. The detective asked the defendant for her name and date of birth. T 95-96. The detective could not remember if he learned the defendant's name from the card or from the defendant, but the defendant did provide him with her actual date of birth after he asked for it this time. *Id*. At this point, the detective arrested the defendant for driving after revocation or suspension of her driver's license and disobeying an officer. T 96.

During cross-examination, the detective testified that he did not suspect the defendant of committing a crime when he initiated the motor vehicle stop. T 106.

Following the detective's testimony, both parties rested. T 114-15. Before the circuit court issued its verdict, the defendant moved to reconsider the circuit court's denial of her suppression motion "based on the officer's testimony that he didn't believe any crime was being committed when he activated his blue lights." T 116.

The circuit court denied the motion to reconsider, ruling that the detective did not have to "specifically identify a particular crime that he believes has been committed or is about to be committed. It was enough that she pulled away after he was behind her and that he had a reasonable,

articulable suspicion that something, some crime was committed or had been committed, or was about to be committed." *Id*.

The circuit court then found the defendant guilty of both charged offenses. T 116-18.

D. Appeal to Superior Court.

On May 12, 2022, the defendant appealed her disobeying an officer conviction to superior court for a *de novo* jury trial. SA 8. On July 26, 2022, the defendant filed a motion to suppress in superior court, arguing that the detective did not have reasonable, articulable suspicion to initiate a motor vehicle stop. DIAA 7-8. The defendant contended that because the motor vehicle stop was illegal, all the evidence collected by the detective after the illegal stop had to be suppressed. *Id*. The State did not file an objection.

On August 5, 2022, the superior court (*Ruoff*, J.) denied the defendant's suppression motion without a hearing. DIAA 10. The superior court ruled that, "[a]ssuming without deciding that the 'stop' in this case was 'illegal,' evidence of a new crime that is committed after the alleged illegal 'stop' is not subject to the Exclusionary Rule." *Id*. The superior court found that "[t]he defendant's alleged lie to the police about her identity came after the 'stop' and is, thus, not subject to exclusion." *Id*.

On August 5, 2022, the defendant filed a motion to reconsider, arguing that the "new crime" exception to the exclusionary rule only allowed the State to charge defendants with crimes of violence or threatened violence against law enforcement or crimes that are "separate and distinct" from an illegal seizure. DIAA 12-13. On August 12, 2022, the

State objected to the defendant's motion to reconsider, arguing that disobeying an officer is a separate and distinct crime from the illegal motor vehicle stop. DIAA 19-22.

On August 24, 2022, the superior court (*Ruoff*, J.) denied the defendant's motion to reconsider, holding that the case was "controlled by *McGurk* and there is no factual dispute that warrants a hearing." DIAA 11. The defendant sought an interlocutory appeal of this ruling, which this Court accepted on November 22, 2022.

SUMMARY OF THE ARGUMENT

I. Defendant's Mandatory Appeal.

The circuit court erred in denying the defendant's suppression motion relative to the detective's motor vehicle stop. During the hearing, the circuit court used an incorrect legal standard to determine whether the detective had reasonable, articulable suspicion to initiate a motor vehicle stop of the defendant. Instead of using the well-settled rule that an officer needs reasonable, articulable suspicion that criminal activity is afoot, *State v. Perez*, 173 N.H. 251, 257 (2020), the circuit court only analyzed whether the detective's decision was reasonable. As such, the circuit court's order denying the defendant's suppression motion is erroneous as a matter of law.

Additionally, under the reasonable, articulable suspicion standard, the circuit court erred in denying the defendant's motion to suppress because the detective did not articulate at trial or during the suppression hearing what criminal activity he was investigating when he initiated a motor vehicle stop of the defendant. He testified instead that he did not believe that the defendant had committed a crime that warranted a motor vehicle stop and acknowledged that the defendant was free to leave when he initially pulled in behind her. The State concedes here that the record is insufficient to meet the reasonable articulable suspicion standard. Accordingly, this Court should reverse the circuit court's denial of the defendant's suppression motion, vacate the defendant's violation-level driving with a suspended license conviction, and remand this charge to the circuit court.

II. Defendant's Interlocutory Appeal.

The superior court sustainably denied the defendant's suppression motion because disobeying an officer is a crime separate and distinct from police illegality. To be a separate and distinct crime, the crime must be an act of free will that is not motivated solely by an officer's illegality.

In this case, the defendant chose to provide a false name and date of birth to avoid arrest and any other penalties for driving with a suspended license. The defendant chose to provide this false information of her own free will, not because the detective compelled her to provide false information. *State v. McGurk*, 157 N.H. 765, 771-72 (2008). Case law from other jurisdictions supports extending the "new crime" exception to offenses involving the concealment of one's identity to avoid arrest. *See e.g. State v. Tapia*, 414 P.3d 332 (N.M. 2018); *State v. Suppah*, 369 P.3d 1108 (Or. 2016); *State v. Earl*, 92 P.3d 167 (Utah Ct. App. 2004); *Clark v. United States*, 755 A.2d 1026 (D.C. 2000); *United States v. Sprinkle*. 106 F.3d 613 (4th Cir. 1997); *United States v. King*, 724 F.2d 253 (1st Cir. 1984). This Court should do the same and affirm the superior court's denial of the defendant's suppression motion.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

The circuit court erred in denying the defendant's motion to suppress when it used the wrong legal standard to determine whether Detective Czarnec legally conducted a motor vehicle stop of the defendant after she drove away.

"When reviewing a trial court's ruling on a motion to suppress, [this Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous, and [this Court] review[s] its legal conclusions *de novo*." *State v. Gates*, 173 N.H. 765, 770 (2020) (quotations and citation omitted). This Court will limit its "review to the suppression record upon which the trial court based its decision." *Id*. (quotations and citation omitted).

"A traffic stop is a seizure for purposes of the State Constitution." *Perez*, 173 N.H. at 257. "The scope of such an investigative stop must be carefully tailored to its underlying justification, must be temporary, and last no longer than is necessary to effectuate the purpose of the stop." *Id*. "The scope of a stop may be expanded to investigate other suspected illegal activity only if the officer has a reasonable and articulable suspicion that other criminal activity is afoot." *Id*. (quotations and citation omitted). "An investigatory stop may metamorphose into an overly prolonged or intrusive detention and, thus, become unlawful." *Id*. "Whether the detention is a lawful investigatory stop, or goes beyond the limits of such a stop, depends upon the facts and circumstances of the particular case." *Id*.

The detective testified that his underlying justification for initiating a motor vehicle stop was that the vehicle was "stopped in the roadway, and also, the evasive behavior that [he] observed." T 45. The detective clarified that the evasive behavior he observed was the defendant's flight from him as he pulled his cruiser in behind her. T 45. The detective also testified that the defendant was "free to pull away" when he pulled in behind her. T 60.

Here, instead of using the reasonable articulable suspicion standard cited above, the circuit court analyzed whether the detective's decision to conduct a motor vehicle stop for "evasive" behavior was reasonable. T 82, 83. Indeed, the circuit court, in issuing its order, said, "I don't think the witness has to identify a criminal activity. The fact that she pulled away – and I guess the question is was it reasonable for this police officer to assume that the defendant had seem [sic] him pull away, okay?" T 86. The circuit court also said that the standard under which it analyzed the detective's decision was, "is it reasonable for the police officer to believe that she was being evasive? Not is it – not was she being evasive or not whether she had committed a crime, but was it reasonable for this officer under these circumstances to believe that she might be evasive." T 87.

The circuit court further clarified that it was "finding that it was reasonable for Officer Czarnec to think that it was evasive. And it's a low bar on a motion to suppress and on a stop or a seizure. The question is was it reasonable, that's all. Was it reasonable." T 88.

Here, the State concedes that, under a *de novo* review, the circuit court's legal conclusion denying the defendant's motion to suppress is unsustainable. The circuit court erroneously reviewed the detective's motor vehicle stop using simply a "reasonable" standard, not the well-settled

reasonable, articulable suspicion of criminal activity standard. Moreover, the circuit court erroneously said multiple times in issuing its ruling that the detective did not have to suspect any criminal activity. As such, the circuit court applied an incorrect legal standard and in this regard, its decision constitutes legal error.

The circuit court's decision constitutes error under the correct legal standard as well. The correct legal standard required the detective to have reasonable, articulable suspicion to believe that the defendant was engaged in, about to engage in, or had recently engaged in criminal activity. *Perez*, 173 N.H. at 257. The detective testified that the defendant was free to pull away when he initially pulled in behind her. He did not testify to any crime or criminal activity that he believed she had committed prior to pulling in behind her. Indeed, he testified that the only reason he initially pulled in behind her was to "render assistance" to her, or to "community care take in case she needed help with whatever she was checking out." T 39.

Despite his testimony during the suppression hearing that he initiated a motor vehicle stop on the defendant because she was "stopped in the roadway," T 45, the detective did not testify at the hearing about where on the roadway the defendant had stopped or whether she had left an unobstructed roadway for other vehicles to pass her one at a time. Moreover, the detective testified later that he was "concerned" when the defendant did not immediately pull over when he initiated the motor vehicle stop because the defendant was "on the side of the roadway already where it's reasonably safe to pull over. The vehicle was already pulled over," T 47, meaning that it would have been safe for her to pull over on the side of the road as she had done prior to the motor vehicle stop.

Likewise, the detective did not testify as to the reason he provided to the defendant for the motor vehicle stop. During the defendant's trial, the detective testified on cross-examination that he did not believe that the defendant had committed a crime prior to him activating his emergency lights and initiating the motor vehicle stop. T 106. As such, it cannot be determined what crime the detective told the defendant he was investigating during the motor vehicle stop. The detective also testified that when he initially pulled behind the defendant's vehicle, his only reason for doing so was to render assistance, not to investigate the alleged crime of being stopped in the roadway. T 39. Indeed, when defense counsel asked the detective, "[w]hat crime did you believe the Defendant had committed, was committing, or was about to commit when you activated your blue lights," the detective answered, "[n]o crime." T 106. Additionally, following the motor vehicle stop, the detective did not cite the defendant for any motor vehicle violations. T 58-59.

Thus, even when analyzing the detective's motor vehicle stop under the reasonable, articulable suspicion standard, the facts elicited during the suppression hearing or the trial do not establish that the detective had reasonable, articulable suspicion of any criminal activity when he initiated the stop. Accordingly, this Court should reverse the circuit court's denial of the defendant's motion to suppress.

II. THE SUPERIOR COURT SUSTAINABLY EXERCISED ITS DISCRETION IN RULING THAT THE DEFENDANT'S DISOBEYING AN OFFICER CHARGE WAS SEPARATE AND DISTINCT FROM HER ILLEGAL SEIZURE.

"When reviewing a trial court's ruling on a motion to suppress, [this Court] accept[s] the trial court's factual findings unless they lack support in the record or are clearly erroneous, and [this Court] review[s] its legal conclusions *de novo*." *State v. Gates*, 173 N.H. 765, 770 (2020) (quotations and citation omitted). This Court will limit its "review to the suppression record upon which the trial court based its decision." *Id*. (quotations and citation omitted).

"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." *State v. Panarello*, 157 N.H. 204, 207 (2008) (quotations and citation omitted). "The purpose of the exclusionary rule is three-fold." *Id*. (citation omitted). "It 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." *Id*. This Court has recognized exceptions to this rule. *Id*. One such exception, recognized by this Court in *Panarello*, is the "new crime" exception. *Id*. at 209.

"Under this exception, where the response to an unlawful entry, search or seizure has been a physical attack (or threat of same) upon the officer . . . , courts have . . . held that the evidence of the new crime is admissible." *Id*. at 208 (quotations and citations omitted). The rationale for this exception varies among jurisdictions who have adopted this rule, but

this Court, in adopting this rule, was most persuaded by the rationale that "the deterrent purpose of the exclusionary rule would not be served in applying it in cases where the accused has committed a crime against police officers in response to police misconduct." *Id* (quotations and citation omitted).

In addition to the new crime exception to the exclusionary rule allowing for the prosecution of crimes of violence or threats of violence against police officers, this Court has also held that a new crime that is separate and distinct from the illegal seizure is an exception to the exclusionary rule. *McGurk*, 157 N.H. at 771-72.

In determining whether a new crime is separate and distinct from police illegality, this Court relied on the Idaho Court of Appeals' reasoning in *State v. Schrecengost*, 6 P.3d 403 (Idaho Ct. App. 2000). In that case, the Idaho Court of Appeals held that the "intervening circumstance factor strongly militates against suppression" where the defendant's action in destroying suspected contraband did not occur during an active and illegal police search or while the evidence was in her possession. *Id*. The Idaho Court of Appeals further held that the defendant's actions "were therefore her own and were independent of any police coercion caused by the illegal arrest and search for evidence." *Id*.

Similarly, in *McGurk*, this Court held that the defendant's conduct was an intervening circumstance "sufficient to purge the taint" of an illegal search. *McGurk*, 157 N.H. at 767-78, 771. In *McGurk*, a trooper approached a vehicle and asked its two occupants if they had seen a suspicious pick-up truck that had previously been reported to him. *Id*. at 767. They responded that they had not. *Id*. While speaking with them, the

trooper noted two partially full bottles of juice on the floor of the vehicle. *Id*. Because the driver appeared to be under 21, he asked her to get out of the vehicle and provide him with identification, believing that the bottles contained alcohol. *Id*. The trooper confirmed that the driver was only 18 and asked if the bottles contained alcohol. *Id*. She said no, but allowed the trooper to smell the liquid. *Id*. The trooper smelled alcohol in the bottle and arrested the driver. *Id*. During the arrest, the trooper told the passenger, who was the defendant, that he could leave, and the defendant left on foot. *Id*.

While the trooper was inventorying the vehicle, the defendant returned and interfered with the trooper's inventory search by demanding that he release the driver. *Id*. at 767-78. The trooper warned the defendant that if he did not leave the scene, he would be arrested. *Id*. at 78. The defendant did not leave. *Id*. When the trooper found marijuana in a plastic Ziploc baggie in the vehicle, he asked the defendant if he wanted to take responsibility for the marijuana. *Id*. The defendant yelled and swore at the trooper, but did not take ownership of the marijuana. *Id*. As the trooper attempted to finish the inventory search, the defendant approached the trooper from behind. *Id*. The trooper arrested the defendant for obstructing government administration. *Id*.

Before placing the defendant in the police cruiser, the trooper realized that he could not find the plastic bag of marijuana. *Id*. While booking the defendant at the police department, the defendant told the trooper he "made a mistake" and "opened his mouth, stuck out his tongue, and exhaled into [the trooper's] face." *Id*. The trooper smelled an odor of marijuana on the defendant's breath, returned to his cruiser, and found a Ziploc baggie with "remnants of marijuana still inside and pieces of

marijuana on the back seat." *Id*. The defendant was charged with falsifying physical evidence for ingesting the marijuana. *Id*.

This Court held in *McGurk* that "the taint of any police illegality was purged when the defendant independently and of his own volition ingested the marijuana." *Id*. at 772 (internal quotations and citation omitted).

Other jurisdictions have also adopted the "separate and distinct" crime exception to the exclusionary rule. In *United States v. Sprinkle*, the Fourth Circuit held that, "[i]f a suspect's response to an illegal stop is itself a new crime, then the police may constitutionally arrest [the suspect] for that crime." 106 F.3d 613, 619 (4th Cir. 1997). Similarly, in *United States v. Waupekenay*, the Tenth Circuit held that evidence of a separate crime initiated against a police officer in his or her presence after an illegal act will not be suppressed under the Fourth Amendment to the Federal Constitution. 973 F.2d 1533, 1538 (10th Cir. 1992). In *United States v. King*, the First Circuit held that a new crime could constitute an "independent intervening act which purge[s] the taint of the prior [police] illegality." 724 F.2d 253, 256 (1st Cir. 1984). The Washington D.C. Court of Appeals also held that "the critical issue is not the gravity of the defendant's response to unlawful police action, but the legality of it. We hold today that, at least absent unforeseen exceptional circumstances, the commission of a separate and distinct crime while in unlawful police custody is the type of intervening act which purges the primary taint [of police illegality]." *Clark v. United States*, 755 A.2d 1026, 1030 (D.C. 2000).

State courts have also held that "identity crimes committed after a Fourth Amendment violation fall under the new crime exception to the

exclusionary rule." *State v. Tapia*, 414 P.3d 332, 338 (N.M. 2018). In *Tapia*, the New Mexico Supreme Court held that the officer's illegal traffic stop did not require suppression of evidence of the defendant's use of a false name because "it was free of the taint of the unlawful seizure." *Id*. at 335, 341. In holding this, the New Mexico Supreme Court applied the "three general attenuation factors;" (1) the time elapsed between the illegality and the acquisition of evidence; (2) any intervening circumstances that "attenuate the illegal detention from the discovery of the evidence;" and (3) the flagrancy and purpose of the police illegality in analyzing whether to suppress evidence of the defendant's false identity crime. *Id*. at 341. The New Mexico Supreme Court held that the evidence need not be suppressed because the "defendant's misrepresentation of his identity was [] an intervening circumstance," finding that the defendant's "response to [the officer] was not a natural or predictable progression from the unlawful seizure but rather an unprompted act of his own free will." *Id*.

The Utah Court of Appeals has also held that "although illegal entry by police can result in the suppression of any evidence discovered through the illegal entry, 'suppression is not justified unless the challenged evidence is in some sense the product of illegal government activity.'" *State v. Earl*, 92 P.3d 167, 175 (Utah Ct. App. 2004) (citing *Segura v. United States*, 468 U.S. 796, 815 (1984) (quotation and citation omitted)). The Utah Court of Appeals held that where a suspect commits an "intervening illegal act, the taint of the prior illegality is considered dissipated . . . ." *Id*. The Utah Court of Appeals ultimately held that the defendant's decision to provide an officer with a false name and date of birth was an intervening illegal act that purged the taint of the officer's illegal entry. *Id*. at 175-76.

The Oregon Supreme Court held that "a defendant's decision to commit a new crime in response to an unlawful seizure ordinarily will attenuate the taint of the seizure." *State v. Suppah*, 369 P.3d 1108, 1115 (Or. 2016). The Oregon Supreme Court further held that this attenuation "is true whether the new crime consists of assaulting the arresting officer, attempting to bribe the officer, or making a 'criminal misrepresentation in an effort to bring the incident to a close.'" *Id*. (citation omitted). The Oregon Supreme Court found that the defendant's decision to provide a false name and date of birth was a "criminal misrepresentation in an effort to bring the incident to a close." *Id*. at 1110, 1115. The Court also found that the officer's stop did not justify the defendant's misrepresentations, nor did the officer exploit the stop. *Id*. at 1115. "Rather, the [officer] merely sought to determine the driver's identity so that he could issue an accurate citation or warning." *Id*. As such, the Court held that the defendant's decision to provide a false name and date of birth "attenuated the taint of the unlawful stop . . . ." *Id*.

Here, the defendant's case is analogous to the *Suppah* and *McGurk* cases. The defendant purged the taint of the illegal motor vehicle stop when she "independently and of her own volition" provided a false name and date of birth to Detective Czarnec. Like the officer in *Suppah*, the detective only sought the defendant's identity to accurately identify the driver during a motor vehicle stop. And like the defendant in *Suppah*, the defendant here engaged in a "criminal misrepresentation in an effort to bring the incident to a close," and not because of any police exploitation or undue influence. *Id*.

Like the defendant in *McGurk*, who ingested the marijuana to prevent the trooper from charging him or the driver with possession of marijuana, the defendant here provided a false name and date of birth to prevent her arrest for driving with a suspended driver's license. This motivation demonstrates that her decision to lie to the detective was independent, self-preserving, and an act of free will. Likewise, this motivation demonstrates that the defendant's decision was not compelled solely by the detective's illegality. *See State v. Hight*, 146 N.H. 746, 750-51 (2001) (finding that an intervening circumstance that purges that taint of police illegality must "support a conclusion" that the defendant's conduct was "an act of free will" and was not compelled by a belief that the defendant was under the police's lawful authority).

Here, because the defendant's disobeying an officer crime was separate and distinct from the police illegality, the superior court sustainably denied the defendant's suppression motion based on this Court's holding in *McGurk*. Any other result would incentivize individuals stopped by the police to disobey the police based on a self-assessment of the legality of the stop or seizure. Such a result should not be encouraged. Accordingly, this Court should affirm the superior court's denial of the defendant's suppression motion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the circuit court's denial of the defendant's motion to suppress, vacate the defendant's violation-level driving with a suspended license conviction, and remand this charge to the circuit court. The State

also respectfully requests that this Honorable Court affirm the superior court's order denying the defendant's suppression motion below.

The State requests a fifteen-minute oral argument delivered by Audriana Mekula, Esq.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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March 7, 2023

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CERTIFICATE OF COMPLIANCE

I, Audriana Mekula, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,135 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.

March 7, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula

CERTIFICATE OF SERVICE

I, Audriana Mekula, hereby certify that a copy of the State's brief shall be served on Attorney Olivier Sakellarios, Esq., counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

March 7, 2023 *<u>/s/ Audriana Mekula</u>*
Audriana Mekula