

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2019-0057

State of New Hampshire

v.

Ernest Jones

Appeal Pursuant to Rule 7

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

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QUESTION PRESENTED

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

IDENTITY OF AMICUS CURIE

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

STATEMENT OF THE CASE AND THE FACTS

On April 28, 2017, at 7:57 p.m., Concord Police Officers Benjamin Mitchell and Kristopher Begin were dispatched to Allison Street in Concord to respond to a report of a “suspicious vehicle” parked in the private shared driveway of a multi-tenant residence. *See* Defendant’s Appendix (“App.”) at 71-72 (N.H. Trial Tr. 5:9-25, 6:6-13). The report came in a 911 call from a babysitter within the residence who did not recognize the vehicle. Neither the babysitter, the dispatchers, nor the officers who arrived at the scene had any indication that the vehicle was involved in criminal activity. App. at 83-84 (17:5-16, 18:1-3).

The officers parked their marked Concord Police Department cruiser on the side of the street near the vehicle, which was occupied by defendant Ernest Jones and a passenger. App. at 79-80 (13:24-14:18). Both officers were uniformed. App. at 79 (13:13-16). The uniformed officers approached Jones's vehicle from both sides. Officer Mitchell approached the passenger's side and Officer Begin approached the driver's side, where Jones was seated. App. at 72 (6:15-17). Officer Mitchell testified that their purpose in approaching the vehicle was to investigate a "suspicious vehicle" and to "find out what their business was or what the reason was for why the vehicle was there." App. at 72 (6:20-22). Although Officer Mitchell does not recall whether he used a flashlight while approaching the vehicle, he recognized that he would have used a flashlight if it was dark and he needed to see better. App. at 80-81 (14:22-15:2). At the time of the interaction on 7:57 p.m., the sun had already set at approximately 7:45 p.m.¹ When Officer Mitchell approached the vehicle, he could see that Jones was African-American and that the passenger was "potentially Hispanic." App. at 85-86 (19:23-20:9).

The officers quickly learned that Jones's passenger was a resident in the building, that Jones was visiting her, and that they were just talking in the vehicle. App. at 72-73 (6:25-7:4). As Officer Mitchell's arrest warrant affidavit indicates, the passenger stated that "she lived at the address and the male was her friend and they were 'just talking.'" Having exhausted any initial concern that criminal activity was afoot, the officers nonetheless continued their investigation. Officer Begin continued talking with Jones while Officer Mitchell continued talking with Jones's passenger. App. at 82 (16:13-21). The officers then asked both Jones and Jones's passenger for identification in order to run warrant checks. App. at 73-74 (7:16-8:2).

¹ On April 28, 2017, the sun set at approximately 7:45 p.m., prior to when the officers approached the vehicle. See <https://www.almanac.com/astronomy/sun-rise-and-set/NH/Concord/2017-04-28>; see also App. at 79 (13:9-12).

After calling Jones's name into dispatch, the officers learned of an electronic bench warrant for Jones's arrest and began the process of arresting and searching him. App. at 76 (10:10-19). Although Officer Mitchell could not provide an approximate length of the investigation, he thought up to twenty (20) minutes may have elapsed from the initial contact to when the officers discovered the active warrant. App. at 76 (10:20-24). Neither the State nor Officer Mitchell claim that Jones or his passenger were told that they were free to leave before the discovery of the warrant.

Following a search incident to the arrest, the officers allegedly found in Jones's right shorts pocket a plastic circular container that contained 17.93 grams (or 0.63 ounces) of a fine white powder. The powder was later determined to be fentanyl. Jones was then charged with a Class B felony for possession of a controlled drug under RSA 318-b:2, along with another charge. Jones filed a motion to suppress the evidence. The trial court denied the motion on March 13, 2018. App. at 2-11. Jones was subsequently convicted by a jury of the Class B felony charge for possession of a controlled substance, and was acquitted on the other charge. This appeal follows.

SUMMARY OF ARGUMENT

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

Additionally, although this Court has found that a seizure does not occur where police simply ask a few questions or merely ask for identification, the officers in this case did something more. After questioning Jones and his passenger for possibly up to 20 minutes, the officers, in obtaining Jones's identification for the purposes of running a warrant check, escalated the nature of the encounter from what arguably may have still been a consensual encounter to one with "a measure of investigative pursuit." *See State v. Joyce*, 159 N.H. 440, 446 (2009). After the police initiated even a limited-in-scope investigation, Jones would not have reasonably felt free to leave until the officers indicated that their investigation was complete. This conclusion is reinforced when examined in the totality of the circumstances, thereby requiring exclusion.²

Second, although this Court need not consider Jones's race in order to reverse the trial court's decision, the time has come for courts to acknowledge and incorporate perspectives of people of color in determining how a "reasonable person" would experience officer conduct. Any test that measures how a reasonable person will feel when confronted by police must meaningfully account for power dynamics, which are particularly askew as between police officers and communities of color. Whether an African-American feels "free to leave" must naturally be colored by the numerous, well-documented instances where African-Americans have been shot leaving a police interaction. Indeed, courts—including the United States Supreme Court—have become increasingly receptive to considering race as a factor in analyses related to police encounters with Black people. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 554, 558 (1980). People of color, especially African-Americans, have for too long been ignored by a

² "While we do not dispute that deterrence of police misconduct is a central aim of the exclusionary rule, we disagree that it is the rule's sole purpose. The exclusionary rule serves to redress the injury to the privacy of the search victim and guard compliance with the probable cause requirement of part I, article 19." *State v. Canelo*, 139 N.H. 376, 387 (1995) (citations omitted).

standard which, whether explicit or not, identifies the “reasonable person” as White with the implicit privileges that go with that status.

ARGUMENT

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

A. The Issue and the Standard

Because of the unique and independent protections provided under the New Hampshire Constitution, this Court must first address the defendant’s claim under Part I, Article 19 of the New Hampshire Constitution. *State v. Ball*, 124 N.H. 226, 235 (1983). Article 19 gives every person in the State “a right to be secure from all unreasonable searches and seizures.” N.H. CONST. pt. I, art. 19. Article 19 is in the State Bill of Rights and was enacted in 1784—five years before the enactment of the United States Constitution. As this Court has explained, “part I, article 19 safeguards privacy and protection from government intrusion [It] thus manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization.” *State v. Canelo*, 139 N.H. 376, 386 (1995). In many contexts, “this [C]ourt has held that article 19 provides greater protection for individual rights than does the fourth amendment.” *State v. Koppel*, 127 N.H. 286, 289 (1985) (citing *Ball*, 124 N.H. at 235).³ Critically, as this Court has noted in case after case, this broader protection exists in the context of automobile searches and seizures. *Id.* at 291 (“[W]here the

³ For example, this Court has construed Part I, Article 19 as providing greater search and seizure protections than the Fourth Amendment in the context of police use of dogs to smell for contraband, *see State v. Pellicci*, 133 N.H. 523 (1990), and searching trash in a driveway, *see State v. Goss*, 150 N.H. 46 (2003). This Court has also explicitly rejected, unlike the U.S. Supreme Court’s interpretation of the Fourth Amendment, an exception to the exclusionary rule where the police acted in good faith in obtaining and executing a warrant. As this Court explained, such an exception “is incompatible with and detrimental to our citizens’ strong right of privacy inherent” in Article 19. *See Canelo*, 139 N.H. at 387. Moreover, unlike the federal courts interpreting the Fourth Amendment, this Court has interpreted Article 19 to provide defendants with automatic standing to challenge the legality of a search or seizure when charged with a crime that includes possession of any article or thing as an element of the offense. *State v. Settle*, 122 N.H. 214, 218 (1982).

search or seizure of a motor vehicle is involved, article 19 provides significantly greater protection than the fourth amendment”).⁴

An investigatory stop is a seizure under Article 19. *See State v. Brodeur*, 126 N.H. 411, 415 (1985). “In order for a police officer to undertake [a warrantless] investigatory stop, the officer must have reasonable suspicion—based on specific, articulable facts taken together with rational inferences from those facts—that the particular person stopped has been, is, or is about to be, engaged in criminal activity.” *State v. Hight*, 146 N.H. 746, 748 (2001) (quotation omitted). When a police officer seizes a person without a warrant or reasonable suspicion of criminal activity, this seizure constitutes a serious invasion of privacy that Article 19 is designed to protect against.

When an officer, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen,” a seizure has occurred. *See State v. Steeves*, 158 N.H. 672, 675 (2009). The seizure analysis is an objective one where this Court must ask “whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he ... was not free to leave.” *Id.*; *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991). Put another way, the subjective beliefs of an officer or a suspect as to whether a person is (or feels) free to leave are irrelevant. *See State v. Riley*, 126 N.H. 257, 262 (1985). In the proceedings below, the State appears to have conceded—and did not argue otherwise—that the police did not have reasonable suspicion to seize Jones or his passenger before discovering the active warrant. *See*

⁴ *See also, e.g., Koppel*, 127 N.H. at 292 (“To justify the search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means are available to accomplish the State’s goal.”; addressing sobriety checkpoints); *State v. Sidebotham*, 124 N.H. 682, 687 (1984) (“a defendant ... charged ... with an offense arising out of his possession of a motor vehicle, must be afforded ‘automatic standing’ ... to challenge the legality of any search of that motor vehicle”); rejecting Fourth Amendment analysis); *Ball*, 124 N.H. at 237 (rejecting State’s argument that that trooper’s conduct in reaching into the defendant’s automobile to retrieve a suspicious-looking cigarette butt to examine it to determine that it did in fact contain marijuana was both reasonable and based upon probable cause); *State v. Cora*, 170 N.H. 186, 195-96 (2017) (though overruling this Court’s earlier view in *State v. Sterndale*, 139 N.H. 445 (1995) that there was an enhanced expectation of privacy inherent in an automobile, nonetheless holding that the Fourth Amendment’s automobile exception is too broad to be applied under Article 19).

App. at 89 (23:21-24:11). Accordingly, the only issue for this Court is determining whether the State can meet its burden of showing that Jones was not seized.

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

⁵ Both Part I, Article 19 and Part I, Article 2-b highlight the unique and independent protections that exist in the New Hampshire Constitution—protections which are broader than those that exist in the Fourth Amendment. As Jeffrey S. Sutton of the Sixth Circuit Court of Appeals explains in his recent book, “[f]or too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions.” Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (2018).

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

Whether a person has been seized varies to some extent from one context to another. For instance, officers may “seize” a person by stopping a pedestrian on a public street, *see Terry v. Ohio*, 392 U.S. 1 (1968), while walking in an airport, *see Florida v. Royer*, 460 U.S. 491 (1983), or while standing in a motel lobby, *see State v. Daoud*, 158 N.H. 779 (2009). In these contexts, “it makes sense to inquire whether a reasonable person would feel free to continue walking.” *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991). That standard, however, is not sufficient for other contexts. For example, “when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.” *Id.* at 436. Here, one of the relevant and critical facts in deciding whether Jones was seized prior to the discovery of the warrant is that Jones and his passenger were within a vehicle and effectively captive during questioning.

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

Numerous other courts and legal scholars have further recognized this distinction and the associated higher restriction on free movements in the vehicle context.⁶

The fact that motorists are subject to a “multitude of applicable traffic and equipment regulations,” *see Prouse*, 440 U.S. at 661, also makes it far more reasonable for motorists to feel that they cannot leave when approached by the police. Given the litany of motor vehicle violations that exist, a motorist will often not be aware of what violation is perceived by the police to have occurred. For instance, it is unlawful in New Hampshire to operate a vehicle without one or more working brake lights. *See RSA 266:38*. Given that many drivers are not aware of the operational status of their brake lights at all times, and given the fact that brake lights can burn out at any time,

⁶ See, e.g., *Brendlin v. California*, 551 U.S. 249, 257 (2007) (noting that a stop of persons inside a vehicle triggers a “societal expectation of ‘unquestioned police command’” (citations omitted)); *United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2012) (“Unlike those situations that may occur in the traffic stop context, pedestrian encounters are much less restrictive of an individual’s movements.”); *People v. Cosby*, 898 N.E.2d 603, 625 (Ill. 2008) (“[W]here a person’s movement is restrained by a factor independent of police conduct such as here, where a person encounters a law enforcement officer while the person is seated in a car [] the ‘free to leave’ test is inappropriate.”); *State v. Rankin*, 92 P.3d 202, 206 (Wash. 2004) (elaborating on the rationale suggested in *Prouse*, and stating that people “find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel” (quotation omitted)); *Pyon v. State*, 112 A.3d 1130, 1151 (Md. Ct. App. 2015) (quoting, in a case involving a police officer approaching the defendant in a parked car that had its engine off, a Maryland Supreme Court statement that the comparable situation faced by the defendant in that case “was markedly different from that of a person passing by or approached by law enforcement officers on the street, in a public place, or inside the terminal of a common carrier”); *People v. Spencer*, 646 N.E.2d 785, 787 (N.Y. Ct. App. 1995) (“Although the right to stop a vehicle is generally analogous to the right to stop a pedestrian, police/motorist encounters must be distinguished from police/pedestrian encounters when the police are operating on less than reasonable suspicion . . .”); *see also*, e.g., Aaron H. Mendelsohn, *The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. LAW & CRIMINOLOGY 930, 947-49 (1998) (stating that “[t]he particular status of the individual as a motorist or a pedestrian is crucial under Fourth Amendment jurisprudence”; noting that “when a person is approached by a police officer inside an airport terminal, on the street, or while sitting on a bus, the law operates on the assumption that the person remains free to leave and may ignore the officer” and as such, the “police officer-pedestrian encounter [] is a balanced meeting”; whereas the motorist-officer encounter is a situation in which “[c]ertainly few motorists would feel free . . . to leave the scene . . . without being told they might do so,” and as such, the motorist-officer encounter “is no longer balanced: the police officer dictates the pace and circumstances of the confrontation . . .” (internal citations omitted)); Patricia Haines, *Your Papers, Please: Police Authority to Request Identification From a Passenger During a Traffic Stop in Alaska*, 29 ALASKA L. REV. 261, 276-77 (2012) (stating that “[a]lthough the officer may be able to make the same request [for identification] of a person on the street without conducting a seizure, there are significant distinctions between pedestrians and automobile passengers” and noting considerations of security, privacy, and the absence of “the realistic option of simply walking away when confronted by undesired police contact”); *cf. United States v. Mendenhall*, 446 U.S. 544, 556-57 (1980) (Stewart, J., announcing judgment for a divided court) (“[S]topping or diverting an automobile in transit, *with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable*, is materially more intrusive than a question put to a passing pedestrian . . .” (emphasis added)); *Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984) (discussing the particularly restrictive nature of a traffic stop).

a motorist always risks being arrested if he or she terminates an encounter with a police officer.⁷

RSA 265:4 further requires a person “driving or in charge of a vehicle” to “give his name, address, date of birth, and the name and address of the owner of such vehicle” when requested by law enforcement. *See RSA 265:4, I(a).*

Given the unique nature of this motorist/police officer interaction, Jones had a greater sense of security and privacy that must be recognized under Article 19. And this greater sense of security and privacy was encroached upon by the officers’ presence and their ability to visually inspect areas of Jones’s passenger compartment. This dynamic would make a person in Jones’s situation far less likely to feel free to leave and would make what might be seen as requests in the pedestrian context—e.g., asking for identification, asking questions, and the implied request for Jones not to leave while the warrants check was being conducted—to be interpreted as demands. As such, the cases cited by the State in the proceedings below addressing pedestrian/officer encounters are inapposite. *See Daoud*, 158 N.H. 779 (finding no seizure where the officer asked for identification, but in a case involving the questioning of a pedestrian *in a motel lobby*); *State v. Brown*, 155 N.H. 164 (2007) (no seizure where the officer asked questions, but *in the hallway of an apartment building*).

⁷ See Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFFALO L. REV. 1483, 1501-02 (2007) (“[E]ven assuming [a motorist] understands the governing legal principals, [he] has no way of knowing how much suspicion the officer has. Walking away may be constitutionally protected, or it may be a criminal act; which it is may prove to be a roll of the dice.”); Mendelsohn, *The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. LAW & CRIMINOLOGY, at 948 (“[U]nlike a pedestrian who may refuse to answer a police officer’s questions, a motorist detained by a police officer is more like a person confronted in his home, i.e., he is not in a position to know the lawful limits of the officer’s conduct or the extent of his own right to leave or terminate the seizure.”); cf. *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967) (noting that a resident confronted with an official housing inspector demanding a warrantless entry has “no way of knowing the lawful limits of the inspector’s power to search”).

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

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

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

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

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

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

In *Joyce*, officers approached the defendant’s car to investigate whether his passenger was using marijuana. *Joyce*, 159 N.H. at 442. This Court found that, while the initial encounter may not have been a seizure, when the defendant heard the officers call for a narcotics-sniffing dog, the encounter became a seizure. *Id.* at 445. This Court reasoned that “when the defendant heard the officers call for the narcotics-sniffing dog, he reasonably could have concluded that he would not be allowed to leave the scene until [the canine officer] and the dog arrived and completed their investigation.” *Id.* Because “a reasonable person in his position would not have felt free to leave” given, in part, the police’s “measure of investigatory pursuit,” the defendant was seized. *Id.* at 446 (quotation omitted). This Court’s decision in *State v. McKeown*, 151 N.H. 95 (2004) is similarly instructive. There, the officer directly approached the defendant in a kayak, asked if he had a personal flotation device, and “wait[ed] to determine whether” he had such a device. The

Court concluded that a seizure occurred because “a reasonable person would not feel free to decline the officer’s request or otherwise terminate the encounter.” *McKeown*, 151 N.H. at 97-98 (quotation and brackets omitted).

This Court’s decisions in *Joyce* and *McKeown* support the proposition that when an officer (and especially when multiple officers) approaches a person, engages in some sort of inquiry process, and then indicates the initiation of even a limited investigation, the person has been seized. This is precisely what happened to Jones in this case. Officers Mitchell and Begin approached Jones’s vehicle and began asking questions of both Jones and his passenger for a period of time that could have lasted up to 20 minutes. The officers then obtained the identification of both Jones and his passenger and called their names into dispatch. Thus, at this point—after potentially 20 minutes of questioning—the officers obtained Jones’s identification for the “investigative pursuit” of determining whether he had an active warrant. Just like in *Joyce* and *McKeown*, this indicated to Jones that he was not free to leave until the officers completed their investigation. Indeed, as one court has noted: “Although not determinative, [the fact that the officer immediately asked for the defendant’s identification] only reinforces that this was an investigative detention. It defies typical human experience to believe that one who is ordered to produce identification in such circumstances would feel free to leave. That conduct is not a garden-variety, non-intrusive, conversational interaction between an officer and an individual.” *State v. Rosario*, 162 A.3d 249, 266, 273 (N.J. 2017).⁸

⁸ See also Wayne R. LaFave, 4 *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.4(a) (5th ed.) (Supp. 2018) (stating that an encounter will likely be “convert[ed] . . . into a Fourth Amendment seizure . . . when the officer reveals to the suspect that he has set in motion certain investigative procedures that contemplate the suspect’s continued presence.” (citing *Joyce*, 159 N.H. 440)); Edwin J. Butterfoss, *Bright Line Seizures: The Need For Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 456 n.109 (Summer 1988) (citing to a case in which “a seizure occurred . . . when an officer approached a car parked in an airport parking lot, requested the driver’s identification, and asked a question while retaining the license” (citing *United States v. Thompson*, 33 Crim. L. Rep. (BNA) 2479 (11th Cir. Aug. 22, 1983))).

The fact that this request for identification constitutes a seizure is further supported by New Hampshire law. In fact, as opposed to this being a mere request for identification that Jones could have readily rejected, New Hampshire law likely required Jones to comply and disclose his personal information. Under RSA 265:4, I(a) entitled “disobeying an officer,” a person “driving or in charge of a vehicle” commits a class A misdemeanor if he refuses to “give his name, address, date of birth, and the name and address of the owner of such vehicle” when requested by law enforcement. (emphasis added). It is probable that, had Jones—who likely was “in charge of a vehicle” at the time—exercised his right to refuse to comply with this instruction, he would have been arrested for disobeying a police officer under RSA 265:4, I(a). Given the prospect of criminal punishment, it cannot be said that Jones reasonably “would feel free to disregard the police and go about his business.” *See Beauchesne*, 151 N.H. at 809 (quoting *Bostick*, 501 U.S. at 434).

The conclusion that Jones was seized when the officers obtained his identification for the purpose of running a warrants check is buttressed by the presence of other relevant circumstances. For instance, Jones was subjected to the “threatening presence of several officers,” as two uniformed officers approached his vehicle from both sides. *See Joyce*, 159 N.H. at 444. Further, there is no indication that either officer ever advised Jones that he was free to leave. *See id.* And the fact that Jones never asked whether he was free to leave—which the trial court seemed to suggest was indicative of Jones’s freedom to leave—actually supports the inference that he felt he was not free to leave, just as a reasonable person would feel in that situation. Jones remained seated in his vehicle, did not place his vehicle into drive, and was compliant. These are all indications that a reasonable person in Jones’s situation would feel restricted, would not “retain[] freedom of movement,” and would reasonably feel unable to terminate the encounter. *See Sullivan*, 157 N.H. at 131. Other relevant factors noted in this Court’s case law were present as well. The officers, not Jones, initiated the encounter, *see id.*; the officers were uniformed and were

driving a marked cruiser, *see Beauchesne*, 151 N.H. at 815; and the officers approached Jones at night while Jones was parked in a private driveway with no other people around, *see Quezada*, 141 N.H. at 260. Once again, this was a *private* driveway. There is an added inherent privacy interest which is invaded when an officer approaches a person in a *private* place. This diminishes much of the trial court's reasoning and cited case law, which primarily addresses public areas.

Considering all these factors together, any reasonable person sitting in a vehicle would not feel free to decline the officers' demands for identification, leave after the officers obtained the identification, or otherwise terminate the encounter. This conclusion is reinforced when considering the unique pressures of a motorist/police encounter. Here, to exit the encounter, Jones would have had to turn his vehicle's engine on, place the vehicle into reverse from a private driveway, pull out while two uniformed police officers are right next to the vehicle, and leave either without replying to a potential demand for identification and with no way of knowing whether the officers had reasonable suspicion of any wrongdoing (including, for instance, that his brake lights were out), or leave his identification (one of a person's most valuable personal possessions in modern society) as he drove off potentially in violation of RSA 263:2.⁹ This is not reasonable. A significant number of courts have determined that obtaining a motorist's identification under circumstances similar to those in this case would lead a reasonable person to believe that he or she is not free to leave.¹⁰

⁹ RSA 263:2 requires that a person possess his or her license while driving.

¹⁰ See *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) ("Precedent clearly establishes that when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual as a general rule, will not feel free to terminate the encounter."); *United States v. Tavolacci*, 895 F.2d 1423, 1425-1426 (D.C. Cir. 1990) ("[T]he retention of papers under some circumstances may transform an interview into a seizure, where it is prolonged or is accompanied by some other act compounding an impression of restraint.") (citing cases); *State v. Hall*, 115 P.3d 908, 917 (Or. 2005), abrogated on other grounds by *State v. Unger*, 333 P.3d 1009 (Or. 2014) ("When [the officer] took defendant's identification card and radioed the police dispatch for a warrant check, however, the consensual nature of that encounter dissipated, and the encounter evolved from a 'mere conversation' encounter into a restraint upon the defendant's liberty of movement."); *People v. Linn*, 241 Cal. App. 4th 46, 67-68 (2015) ("We have in our own research found numerous well-reasoned cases in other jurisdictions that . . . conclude that an officer's taking of a person's identification card and retention of it while running a record check or engaging in further

To be clear: *amicus* does not seek a rule that would prohibit police from investigating, by means of a field inquiry, when they are unable to articulate the necessary quantum of suspicion. Police here could have, without a warrant or reasonable suspicion, inquired of Jones and his passenger in an unobtrusive and non-prolonged way.¹¹ But when police officers instead exert their

questioning weighs in favor of a finding of an unlawful detention.”) (citing cases); *State v. Affsprung*, 87 P.3d 1088, 1094-95 (N.M. Ct. App. 2004) (deciding, in a case in which the officer “requested and obtained identifying information from both driver and passenger for the purpose of running wants and warrants checks,” that “[w]ith no suspicion, much less reasonable suspicion, regarding criminal activity on the part of Defendant, and no particularized concern about his safety, the officer had no legitimate basis on which to obtain the identifying information for the purpose of checking it out through a wants and warrants check” and to decide otherwise would “open[] a door to the type of indiscriminate, oppressive, fearsome authoritarian practices and tactics of those in power that the Fourth Amendment was designed to prohibit”); *State v. Dennis*, 2000 WL 1528698, at *2 (Minn. Ct. App. Oct. 17, 2000) (“Minnesota courts have held that retaining a person’s identification may constitute a seizure.”) (citing cases); *State v. Garland*, 482 A.2d 139, 142 (Me. 1984) (“Officer Langella by asking Garland for identification, by reason of his authority as an officer of the law, effectively restrained the defendant’s resumption of his journey and his driving away; this police action brought into play the protections of the Fourth Amendment against unreasonable seizures . . .”); *State v. Chatton*, 463 N.E.2d 1237, 1240 (Ohio 1984) (holding that detaining a driver and requesting his license and registration after the officer had exhausted any suspicion was “akin to the random detentions struck down by the Supreme Court in *Deleware v. Prouse*”); *see also United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002) (“In the context of a traffic stop, if an officer retains one’s driver’s license, the citizen would have to choose between the Scylla of consent to the encounter or the Charybdis of driving away and risk being cited for driving without a license. That is, of course, no choice at all, and that is why, in those cases, the retention of one’s license is a highly persuasive factor in determining whether a seizure occurred.”); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1325-26 (9th Cir. 1997) (concluding, in a case that involved a truck that “didn’t appear to belong in the area,” that the defendant was “seized within the meaning of the Fourth Amendment when Officer Price obtained and failed to return his driver’s license and registration, and proceeded with an investigation”); *United States v. Jordan*, 958 F.2d 1085, 1087-1089 (D.C. Cir. 1992) (“[W]hat began as a consensual encounter... graduated into a seizure when the officer asked Jordan’s consent to a search of his bag, after he had taken and still retained Jordan’s driver’s license.”); *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983) (holding a seizure occurred when the officer retained the occupant’s driver’s license while requesting that the occupant give him a vial containing a white powdery substance); *United States v. Pena-Cantu*, 639 F.2d 1228, 1229 (5th Cir. 1981) (“[A] reasonable driver would not feel free to ignore a situation in which several agents pull up directly behind his stationary car, position themselves on both the driver and passenger sides of the vehicle, and proceed to question him while he and his passengers remain within the confines of the car.”); *Rosario*, 162 A.3d at 273 (“A person sitting in a lawfully parked car outside her home who suddenly finds herself blocked in by a patrol car that shines a flood light into the vehicle, only to have the officer exit his marked car and approach the driver’s side of the vehicle, would not reasonably feel free to leave . . . It defies typical human experience to believe that one who is ordered to produce identification in such circumstances would feel free to leave.”); *Borowicz v. North Dakota Dept. of Transp.*, 529 N.W.2d 186, 188 (N.D. 1995) (“In this case, a stop arguably occurred when Officer Erickson requested Borowicz to open the door of the pickup and asked Borowicz to produce his driver’s license. The requests could be interpreted as an order ‘to do something’ depending on how it was made.”); *cf. State v. Rankin*, 92 P.3d 202, 206 (Wash. 2004) (en banc) (“Washington is not alone in holding that a mere request for identification from a passenger [in a vehicle] for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry.”) (citing cases).

¹¹ The reliance by the State and even the trial court on the fact that obtaining identification is “Concord Police Department policy” is irrelevant to the seizure inquiry. The Concord Police Department could have had a policy that mandated the seizure of every person with whom officers come in contact—such a policy would be, as is the policy requiring the obtainment of identification, unconstitutional without the necessary quantum of suspicion. *See also Prouse*, 440 U.S. 648 (finding unconstitutional a policy pursuant to which officers pulled over individuals for random identification checks).

power such that a reasonable person would not feel free to leave—as is the case here—they have performed a seizure for which the New Hampshire and federal constitutions mandate reasonable suspicion to protect people’s privacy. Because the officers lacked that precise quantum of suspicion at the time of seizure and because Jones was unlawfully seized prior to the discovery of the active warrant, the evidence subsequently obtained was inadmissible.

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

I told [my Black daughter] that there were rules for dealing with the police. That she was to say yes, sir and no, sir instead of arguing, even if she was in the right. She was to give over her ID even if it wasn’t warranted. She was to stay in her car during a traffic stop, with her hands on the steering wheel. I warned her not to go digging around in her pockets, her purse, the rest of the car. She was to tell the officer what she was planning to do before she did it—I’m reaching for my license; I’m going to lean over for my registration.

She asked me, “What if I didn’t do anything wrong?” and my heart grew almost too heavy to bear.

My answer: “It doesn’t matter what you did. Just do what the police officer tells you. It could mean your life.”¹²

In deciding that Jones had not been seized before the discovery of the arrest warrant, the trial court hewed closely to an “objectively reasonable person” test that assumes a fundamental and objective similarity of perceptions shared by everyone interacting with police officers. However, whether a reasonable person in a particular circumstance feels free to leave involves consideration of numerous factors. One factor that must be acknowledged and accounted for is the racial dynamic and the lived experiences of people of color, most notably Black people, when

¹² Tess Martin, “The Talk” is Different for Parents of Black Kids, *Medium* (Apr. 3, 2018), <https://medium.com/@tessintrovert/the-talk-is-different-for-parents-of-black-kids-77d5e8238c64> (last visited Apr. 15, 2019).

subjected to police interactions. The myth of a generalized objective reasonable person, which often fails to take this reality into account, has long been challenged by legal scholars and, increasingly, by courts.¹³

While the trial court erred in determining that Jones was not seized under the more cramped “free to leave” standard, the facts and circumstances of this case present this Court with an opportunity to clarify that the “free to leave” analysis should acknowledge and take into account the perspectives of communities of color. Differing perceptions of police encounters result from lived experience as well as from data, studies, and well-publicized media reports. Indeed, whether an African-American person feels “free to leave” must naturally be colored by the numerous, well-documented instances where African-Americans have been shot attempting to leave a police interaction.¹⁴

¹³ As one former judge has written:

The problem with this test is that judges, in applying an objective reasonable person test, may be applying a test reflective of the reasonable white male law-abiding citizen, rather than a test truly reflective of the reasonable African-American, Hispanic, or Asian-American citizen. The perceptions of this mythical reasonable person may not be the same as the perceptions of a reasonable minority citizen. Thus, this very test may incorporate a racial and national origin bias against minority citizens in our society.

Arthur L. Burnett, Sr., *Permeation of Race, National Origin, and Gender Issues from Initial Law Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism and Vigilance in the Criminal Justice System*, 31 Am. Crim. L. Rev. 1153, 1155 n.5 (1994).

¹⁴ These recent shootings include

- On June 19, 2018, Antwon Rose, a 17-year-old Black boy, was shot three times on June 19, 2018 and killed after he and another passenger fled from a traffic stop in East Pittsburgh, Pennsylvania. Police officer Michael Rosfeld was charged with criminal homicide as a result of the shooting, and he was later acquitted. See Amanda Sakuma, “East Pittsburgh Police Officer Acquitted in Shooting Death of 17-year-old Antwon Rose,” *Vox* (Mar. 23, 2019), <https://www.vox.com/policy-and-politics/2019/3/23/18278470/police-officer-acquitted-antwon-rose-unarmed-shooting>.
- On March 18, 2018, Stephon Clark, a 22-year-old Black man, was shot and killed in the backyard of his grandmother’s house in Sacramento, California. He was unarmed and was holding a cellphone. The Sacramento Police Department alleged that, when Clark was confronted and ordered to stop and show his hands, Clark fled to the back of the property. See Eric Levenson, “Sacramento Police Shot Stephon Clark Holding Cell Phone in his Grandmother’s Yard,” *Philadelphia Tribune* (Mar. 22, 2018), https://www.phillytrib.com/news/sacramento-police-shot-stephon-clark-holding-cell-phone-in-his/article_49538086-2dcc-11e8-b436-e77b273709cb.html.
- On December 26, 2018, Michael Jerome Taylor, a 17-year-old Black boy, was shot in a vehicle on Lakeland, Georgia attempting to leave in what police believed was a stolen car. See Gary White, “Lakeland Police Release Video of Shooting that Killed Winter Haven Teen,” *Sarasota Herald-Tribune* (Dec. 27, 2018),

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

The law asks that Jones be a reasonable person in assessing whether he would have felt free to leave. Absent actual physical restraint, whether a person reasonably feels free to walk away from the police is very different from whether a person feels free to walk away from an inquiring stranger. Police hold inherent power and authority, especially when they have a gun at their hip. How a person responds to any show of that authority, however mild-tempered, will depend on his or her experiences of policing previously. *Amicus* submits that, based on a legacy of disproportionate police contact, Black people¹⁵ reasonably feel particularly disempowered in their interactions with police. The perspective of Black people stemming from this power imbalance can be taken into account by this Court.

Black people are the subject of police encounters at disproportionate rates compared to White people.¹⁶ In 2015, although Black people comprised only 13 percent of the United States

<https://www.heraldtribune.com/news/20181227/lakeland-police-release-video-of-shooting-that-killed-winter-haven-teen>.

- On June 29, 2017, Aaron Bailey, a 45-year-old Black man, was shot in his vehicle in Indianapolis, Indiana following a late-night traffic stop and brief vehicle pursuit. See Ryan Martin and James Briggs, “No Charges in Federal Investigation into Aaron Bailey Shooting,” *Indianapolis Star* (Apr. 12, 2019), <https://www.indystar.com/story/news/crime/2019/04/12/no-charges-federal-investigation-into-aaron-bailey-shooting/3451113002/>.
- On November 18, 2017, Lawrence Hawkins, a 56-year-old unarmed Black man, was shot after exiting his vehicle in his driveway in Prichard, Alabama during a traffic stop. See Olivia Stump, “Details on Prichard Officer Involved Shooting,” *WKRG* (Nov. 18, 2017), <https://www.wkrg.com/news/local-news/large-police-presence-on-first-ave-and-hanes-st/906187299>.

The list goes on.

¹⁵ In light of the facts of this case, *amicus* focusses primarily on the disparities affecting, and experiences and perceptions of, Black people. However, other minority groups, particularly Latinos, are also subject to disparate treatment by the police, with similar consequences. See Tomás Rivera Policy Institute, *Disparities in the Criminal Justice System: Racial and Ethnic Disparities in Pretrial Detainment, Sentencing, and Incarceration*, USC, <http://safeandjust.uscmediacurator.com/racial-and-ethnic-disparities-in-pretrial-detainment-sentencing-and-incarceration/> (last visited Apr. 9, 2019).

¹⁶ Police encounters range from stops to arrests. For example, Black drivers are likelier to be stopped more often than White drivers. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, Working Paper 2017, The Stanford Open Policing Project, <https://5harad.com/papers/traffic-stops.pdf>.

population, they accounted for 26.6 percent of all arrests.¹⁷ These arrests translate into even greater disparities in incarceration, suggesting further disparities in decisions around prosecution, conviction, sentencing, and/or parole.¹⁸ According to 2010 data, approximately 40 percent of those incarcerated in America are Black. *See Prison Policy Initiative, Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, <https://www.prisonpolicy.org/reports/rates.html>.¹⁹

New Hampshire is not immune from this racial disparity trend, especially as portions of the State rapidly diversify.²⁰ The most recent available data from 2014 compiled by The Sentencing Project shows that, in New Hampshire, the rate of Black people incarcerated is 1,040 per 100,000 Black people. *See The Sentencing Project, New Hampshire Profile*, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR>. This compares to only 202 out of 100,000 White people. *Id.* The rate for Hispanic people is 398 out of 100,000. *Id.* Moreover, New Hampshire has Black/White imprisonment disparity ratio of 5.2 to 1 and a Hispanic/White ratio of 2 to 1. *See id.* A recent *New Hampshire Public Radio* study has further exposed racial disparities in arrests and jailing. *See* Emily Corwin, “Data Shows Racial Disparities

¹⁷ Uniform Crime Report, *Overview of Table 43 – Arrests, by Race and Ethnicity, 2015, Crime in the United States, 2015*, <https://ucr.fbi.gov/crime-in-the-u-s/2015/crime-in-the-u-s-2015/tables/table-43>.

¹⁸ It is a common misconception that these racial disparities can be explained by different rates of drug involvement among different races or ethnicities. They cannot. As explained in Michelle Alexander’s book, “The New Jim Crow,” studies show that at a national level people of all colors use and sell illegal drugs at remarkably similar rates. And “[i]f there are significant differences in the surveys to be found, they frequently suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color.” *See* Michelle Alexander, THE NEW JIM CROW 7, 264 n. 10-11 (2012) (collecting studies).

¹⁹ In 2015, over 9 percent of young Black men were incarcerated, compared to 1.6 percent of young White men. Becky Pettit & Bryan Sykes, Stanford Center on Poverty and Inequality, *State of the Union 2017: Incarceration* 24, https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017.pdf. Ten percent of Black children have an incarcerated parent. *Id.* at 26.

²⁰ For example, in Manchester and Nashua — New Hampshire’s two largest cities — the White population in each has gone from around 98 percent in 1980 to 86.5 percent and 82.9 percent, respectively, today. *See* Census Data for 1980, available at <https://www.census.gov/population/www/documentation/twps0076/NHtab.pdf>; Manchester 2018 Census Estimate, available at <https://www.census.gov/quickfacts/fact/table/manchestercitynewhampshire,US/PST045218>; Nashua 2018 Census Estimate, available at <https://www.census.gov/quickfacts/fact/table/nashuacitynewhampshire,US/PST045218>.

Increase at Each Step of N.H.’s Criminal Justice System,” *NHPR* (Aug. 10, 2016)

<https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0>.

Data from this study shows that Black people have a 5 times greater chance of being jailed compared to White people—a statistic that is well above the United States average where Black people are 3.5 times more likely to be in jail than White people. *Id.* Equally disturbing is that Black people in New Hampshire have a 2.8 times greater chance of being arrested compared to White people. And in Hillsborough County—the most populous and diverse county in the state—African-Americans are nearly 6 times more likely to be in jail than White people.

Id.

This state and national data correlates with disproportionately negative perceptions about police in Black communities and their relative power in police encounters. A 2014 national survey found that 70 percent of Black people felt that police departments do a poor job of treating racial and ethnic groups equally, whereas only 25 percent of White people reported the same. Carroll Doherty et al., Pew Research Center, *Few Say Police Forces Nationally Do Well in Treating Races Equally* 2 (Aug. 25, 2014), <https://www.people-press.org/2014/08/25/few-say-police-forces-nationally-do-well-in-treating-races-equally/>.²¹ In another study, researchers identified three recurrent themes in Black participants’ descriptions of their experience and perception of the police. Participants believed that Black people have a right to be angry about their treatment by law enforcement, that law enforcement has a persistent fear of Black men,

²¹ See also Rich Morin & Renee Stepler, Pew Research Center, *The Racial Confidence Gap in Police Performance* 2 (Sept. 29, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf (finding widely different views of police in Black and White communities); Ashley Gold, *The Unique Fear of Driving While Black*, BBC (July 12, 2016), <http://www.bbc.com/news/world-us-canada-33868658> (examining “driving while Black” as an inevitable part of the Black experience); Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black, Federal Statistics Show*, WASH. POST (Sept. 9, 2014) (finding 32.5 percent of Black motorists who had been stopped and ticketed believed that they had been unfairly stopped compared to just 16.4 percent of White motorists).

and that there is a need to restructure law enforcement training and education to address systemic bias.²² Participants described their overall sentiment as hopelessness and a certainty that law enforcement will never view Black men as more than “symbolic assailants.” *Id.* at 350.²³

These negative perceptions of police treatment may stem in part from real experience with police misconduct. In a study of young Black men, 83 percent reported personal experience with police harassment, and over 90 percent reported knowing someone who had been harassed by the police.²⁴ People often shared accounts of these experiences with family and friends, “creat[ing] a domino effect of anguish and anger rippling across an extended group.” *Id.* at 73. High-profile media reports of police misconduct further exacerbated the negative perception of police bias against people of color. *Id.* at 74; see also Wesley Lowery, *Aren’t More White People than Black People Killed by Police? Yes, But No*, WASH. POST, July 11, 2016 (finding a Black person is 2.5 times more likely to be killed by police than a White person).²⁵

Social scientists have noted that, to minimize the potential for harm from police encounters, Black people “self-police” their behavior whenever there is an officer in sight.²⁶ When engagement does occur, “Black people … are likely to feel seized earlier in a police interaction than whites, likely to feel ‘more’ seized in any given moment, and less likely to know or feel empowered to exercise their rights.” Devon Carbado, *From Stopping Black People to Killing Black People*:

²² Michael Brooks et al., *Is There a Problem Officer? Exploring the Lived Experience of Black Men and Their Relationship with Law Enforcement*, 20 J. AFRICAN AM. STUD. 346, 352-53 (2016).

²³ The reality of how police view Black people as more dangerous than White people is reflected in numerous legal and social science studies. See *infra* note 36.

²⁴ Rod K. Brunson, “People Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 CRIMINOLOGY & PUB. POL’Y 71, 81 (2007).

²⁵ Disproportionate experience of police encounters begins at an early age. One study found 40 percent of Black eighth graders reported having had a police contact, compared to twenty-one percent of White youth, and that these differences could not be explained simply by criminal involvement. Robert D. Crutchfield et al., *Racial Disparity in Police Contacts*, 2 RACE & JUST. 179, 192, 196 (2012).

²⁶ Kevin L. Nadal, *Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study*, 73 J. SOC. ISSUES 808, 825 (2017).

The Fourth Amendment Pathways to Police Violence, 105 CAL. L. REV. 125, 142 (2017).²⁷ The immediate perception of police intervention triggers a code of behavior that is considered necessary to survive the encounter.²⁸ This may include taking on a non-confrontational affect, a lesson taught from early instructions by family to “not question the police.”²⁹ These findings from social science researchers reflect a truth known by millions in American society—namely, that there is a different understanding of “free to leave” than what the law provides for Americans of color.

New Hampshire is not immune to this reality either. As detailed in the *New York Times*, Rogers J. Johnson—president of the Seacoast N.A.A.C.P.—recently told a conference group that New Hampshire’s problem “was ‘a lack of recognition as to the seriousness of this problem.’ He said that many people in New Hampshire view race as an issue in the South but not in the North.”³⁰ Reena Goldthree, a professor of African and African-American studies at Princeton University (and formerly of Dartmouth College), similarly addressed race as an issue in New Hampshire—specifically in the context of Black peoples’ interactions with police officers—and how it can go unrecognized:

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

²⁷ See also Erika L. Johnson, “A Menace to Society:” the Use of Criminal Profiles and Its Effects on Black Males, 38 How. L.J. 629, 663 (1995) (“Given the history of police brutality against blacks in this country, as well as the present climate of fear and distrust toward police officers,” few Black people will “feel free to ignore . . . [or] leave a police officer without considering the possible repercussions—bodily injury or death.”).

²⁸ See PBS, *Get Home Safely: 10 Rules of Survival*, http://www.pbs.org/Black-culture/connect/talk-back/10_rules_of_survival_if_stopped_by_police/ (last visited Apr. 11, 2019).

²⁹ Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL FORUM 295, 341-42 (2016) (referring to “The Talk,” information passed on from Black parents to children to inform of certain aspects of the Black experience associated with policing).

³⁰ Katharine Q. Seelye, *New Hampshire, 94 Percent White, Asks: How Do You Diversify a Whole State*, N.Y. TIMES, July 27, 2018, <https://www.nytimes.com/2018/07/27/us/new-hampshire-white-diversify.html> (last visited Mar. 20, 2019).

Peter Biello & Cordelia Zars, *Police, Black Lives Matter, and Violence: A New Hampshire Perspective*, NHPR, July 8, 2016, <https://www.nhpr.org/post/police-black-lives-matter-and-violence-new-hampshire-perspective#stream/0> (last visited Mar. 20, 2019). She added that, “I, as a black American, have had negative experiences with police officers, including here in New Hampshire. I think that most African Americans have either personally experienced it or have close friends or family members who have had the negative encounters with police.” *Id.*³¹ Similarly, a 2016 *National Public Radio* interview examined the unique experience of Lakeisha Phelps, who, at the time, was one of only two Black officers on Nashua, New Hampshire’s force of more than 170.³² Officer Phelps discussed how, after she was hired, she was racially profiled by her fellow officers: “[O]ne of the troopers would stop me, like, once every other night.” *Id.* Phelps also stated that “I absolutely know that I can get shot just because I’m black.” She talked about her struggle, in light of the publicized police shootings of unarmed Black men, to determine how she can explain to her 2-year-old son “that people that dress like me—because he knows that I’m a cop, he comes to the station all the time—… are killing people that look like you.” *Id.*

It is, in part, because of these experiences in New Hampshire and elsewhere that many Black parents are forced to give their children “The Talk.” See Ray Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*, CONCORD MONITOR, July 24, 2016, [---

³¹ A small portion of these experiences recently came to light in the form of a 177-page redacted audit report by Kroll Inc. on the Salem, New Hampshire police department. The report “described instances of discrimination-related complaints being ignored, racist comments by police on social media, as well as a department lacking in diversity.” Ryan Lessard, *Audit Report, Lawsuits Include Citations of Racial Discrimination in Salem Arrests*, UNION LEADER, Dec. 8, 2018, \[https://www.unionleader.com/news/crime/audit-report-lawsuits-include-citations-of-racial-discrimination-in-salem/article_54631e2b-546f-5280-b3ef-986ffe71c2c5.html\]\(https://www.unionleader.com/news/crime/audit-report-lawsuits-include-citations-of-racial-discrimination-in-salem/article_54631e2b-546f-5280-b3ef-986ffe71c2c5.html\) \(last visited Mar. 20, 2019\).](https://www.concordmonitor.com>If-you-re-black-in-NH-and-get-pulled-over-do-you-worry>You-bet-3518899 (last visited Mar. 20, 2019); see also <i>Utah v. Strieff</i>, 136 S. Ct. 2056, 2070</p></div><div data-bbox=)

³² See Emily Corwin, *Black Officer Navigates ‘2 Incompatible Worlds’ on N.H. Police Force*, NPR, Oct. 12, 2016, <https://www.npr.org/2016/10/12/497637765/black-officer-navigates-2-incompatible-worlds-on-n-h-police-force> (last visited Mar. 20, 2019).

(2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”). As Rev. Keith Patterson of St. Paul’s Church in Concord explained:

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

Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community.*

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

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

When they are stopped by the police, do whites contemplate the possibility that they will be physically abused for questioning why an officer has stopped them? White teenagers who walk the streets or hang-out in the local mall, do they worry about being strip-searched by the police? Does the average white person ever see himself experiencing what Rodney King or Don Jackson went through during their encounters with the police?

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

[The U.S. Supreme] Court categorized certain “stops” as non-stops and thus outside of the purview of the Fourth Amendment where there has been no show of force and where a reasonable person – even if never advised of his right to leave, which is usually the case – would still feel free to leave. *However, the fact is that minorities are disproportionately singled out for “consensual encounter” and are least likely to “feel free to leave.”*³³

Similarly, Professor Omar Saleem has observed that a “reasonable person standard for Fourth Amendment searches and seizures is particularly inappropriate for Black Americans ... due to selective race-based *Terry* stops which place Blacks in custody during most police encounters.”³⁴ Professor Saleem’s contention is laid out in more detail by Professor Maclin, who sets forth the folly of a generalized reasonable person standard:

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

Maclin, 26 VAL. U. L. REV. at 248.³⁵

In short, legal scholars have recognized the imprudence of assuming that all people will behave in the way a theoretical “reasonable person” would, without taking into account how Black people reasonably feel when interacting with police. As Professor Goldthree explained in discussing the tension between Black people and police in New Hampshire:

[I]t’s important for police officers to understand the anxiety that many African Americans feel during encounters with police. It’s important for them to be sensitive and cognizant of that anxiety. I also think that there has to be a reckoning with the legacies of fear around African Americans. Studies have shown over and over again that police judge African Americans as more hostile, and often older, than they are.

³³ Bennett I. Capers, *Re-thinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 39 (2011)(emphasis added).

³⁴ Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk”*, 50 OKLA. L. REV. 451, 453 (1997).

³⁵ See also Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976 (2002) (arguing that courts should ensure that the seizure analysis reflects “the relationship between race and vulnerability to police encounters” as well as “the ways in which race mediates how people respond to such encounters”).

Peter Biello & Cordelia Zars, *Police, Black Lives Matter, and Violence: A New Hampshire Perspective*, NHPR, July 8, 2016.³⁶ These legacies of fear naturally impact police interactions with Black people and further emphasize the need to view these interactions, and analyze seizure, in the context of race.

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

Courts have begun to recognize the folly of utilizing a cramped and monolithic basis for what constitutes an “objectively reasonable person.” For example, individual characteristics such as age and cognitive abilities profoundly affect human dynamics and, in particular, the way one perceives and processes interactions with the police. The United States Supreme Court recognized this axiom in the *Miranda* context in *J.D.B. v. North Carolina*, where it held that a child’s age is a relevant factor in determining custodial status. 564 U.S. 261 (2011). Looking to social science research, the Court acknowledged that the impact of age and immaturity on

³⁶ Legal scholars and social scientists have studied the tendency of people across racial and ethnic lines to perceive Black people, especially young Black men, as dangerous. See Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) (finding that study participants implicitly associated Blackness with guilt); B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS IN PSYCHOL. SCI. 287, 288 (2006) (finding that participants making snap judgments were more prone to believe they saw a gun when shown a Black face, as opposed to a White face); Joshua Correll et al., *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 (1) J. EXPERIMENTAL SOC. PSYCHOL., 184-89 (2012) (finding that respondents more frequently shoot armed Black people than armed White people and make “don’t shoot” responses more frequently and quickly for unarmed White people than unarmed Black people); DAVID H. BAYLEY & HAROLD MENDELSON, MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA 91 (1969) (“[T]here seems little doubt that interpersonal violence as well as violence directed against policemen is considered [by the police] more likely to take place in minority neighborhoods regardless of economic class.”); Amina Khan, *People Overestimate the Size of Black Men, Perceive Them as More Threatening Than White Men, Study Finds*, LA TIMES, Mar. 14, 2017, <https://www.latimes.com/science/sciencenow/la-sci-sn-black-men-threatening-20170313-story.html> (last visited Mar. 20, 2019) (discussing a study which found that Black people are simultaneously dehumanized and super-humanized and how that view manifests itself in police encounters); Rochaun Meadows-Fernandez, *The Little Understood Mental-Health Effects of Racial Trauma*, THE CUT, June 23, 2017, <https://www.thecut.com/2017/06/the-little-understood-mental-health-effects-of-racial-trauma.html> (last visited Mar. 20, 2019) (discussing the mental health effects—including anxiety, hypervigilance to threat, lack of hopelessness, depression, etc.—of the frequent police killings and mistreatment of Black people); see generally Mark Bennett, et al., *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745 (2018).

perceptions of custodial status is “a reality that courts cannot simply ignore.” *Id.* at 277.

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

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

Id. at 279 (emphasis added). *Finally*, the *J.D.B.* Court declined to embrace the prosecution’s argument that rejection of the “one-size-fits-all reasonable-person” standard would obfuscate the objective test, which was “designed to give clear guidance to the police.” *Id.* (citing *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)). The Court made clear that ignoring a factor as fundamental as age undermined the utility of the inquiry, adding that concerns about injecting some degree of individualized consideration into the process did not justify ignoring age altogether. *Id.* Other courts have reached similar conclusions.³⁷

The consideration of unique factors and perspectives in “reasonable person” analyses can be found elsewhere in the law. For instance, courts consider relevant training and education of

³⁷ See, e.g., *State v. Jason L.*, 2 P.3d 856, 862 (N.M. 2000) (a young person’s age was a relevant factor in determining whether a 15-year-old felt “free to leave” in the Fourth Amendment context); *State v. Freeman*, 298 S.E.2d 331 (N.C. 1983) (concluding that, where 50-year-old police officer picked up 17-year-old defendant at his home and drove him to police station, “reasonable person” would not have believed he was “free to leave.”); *People v. Leonard*, 157 P.3d 973, 997 (Cal. 2007) (holding defendant’s age, low intelligence, and developmental disability were relevant factors in “free to leave” test); *People v. Braggs*, 810 N.E.2d 472 (Ill. 2004) (holding that reasonable person standard was subject to modification to take into account defendant’s intellectual disability with respect to custody inquiry).

defendants in negligence cases to determine how that person should be expected to act. This is true even though every individual's ability to learn, understand, and respond to training is influenced by personal characteristics. Nonetheless, despite the possibility that some highly trained individuals will still not be skilled, the reasonable person standard explicitly considers advanced training. Similarly, in sexual harassment law, several courts have adopted a reasonable woman standard to account for women's unique experiences and perspective in determining what behavior qualifies as sexual harassment.³⁸

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

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

The United States Supreme Court has also explained in *United States v. Mendenhall* that race is among "the circumstances surrounding the incident" that factor into whether "a person has been 'seized' within the meaning of the Fourth Amendment." 446 U.S. at 554. *Mendenhall* examined whether a Black woman was forcibly seized after federal agents patrolling an airport "asked to see her identification and airline ticket." *Id.* at 548. Even though the Supreme Court

³⁸ See Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Environment Claims Under Title VII: Who is the Reasonable Person?*, 38 B.C.L. REV. 861, 869-77 (1997) (describing the adoption of the reasonable woman standard in sexual harassment case law).

ultimately ruled that the defendant was not seized in light of the other circumstances of the encounter (for example, she was “questioned only briefly, and her ticket and identification were returned to her”), it observed that she “may have felt unusually threatened by the officers” because she was “a female and a Negro.” *Id.* at 558. The Supreme Court explained that “these factors were not irrelevant” to whether she would have felt free to leave. *Id.*

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

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

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

[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department [] report documenting [that] … black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.

Id. at 342. The court ruled that a “judge should, in appropriate cases, consider the report’s findings in . . . the reasonable suspicion calculus.” *Id.* Similarly, in *State v. Ashbaugh*, 244 P.3d 360 (Or. 2010), the Oregon Supreme Court observed that “courts and academics across the country” are recognizing that Fourth Amendment analysis of “encounters between police and black males”

should “consider how the race of the person confronted by the police might have influenced his attitude toward the encounter.” *Id.* at 368, 368 n.15.³⁹

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

Amicus asks this Court to simply consider the role race might play, along with the other factors it considers, when judging the constitutionality of a person’s encounter with police. Race is hardly an obscure factor. As with the question of age, police “need no imaginative powers . . . or training in social and cultural anthropology” to recognize that race may play a role in their interactions with civilians. *J.D.B.*, 564 U.S. at 279-80. Further, since race is not in and of itself determinative but merely one factor among other considerations, police officers need not be expected to calculate precisely the effect that race may have in every case. Rather, as in other constitutional and legal contexts, an enhanced test that examines, as one factor, the race of a person in scrutinizing the behavior of so-called reasonable people is appropriate. It is appropriate because it would provide Black people, and other people of color, only what the Fourth Amendment and Part I, Article 19 already guarantee: protection against unreasonable seizures. Indeed, the *J.D.B.* court described a child’s age as “a fact that generates commonsense conclusions about . . . perception.” *J.D.B.*, 564 U.S. at 272. While there are significant differences between race and age, the social science examined in Argument II, A, *supra*, suggests that race, too, affects perception, reflecting the power imbalances between a Black suspect and an inquiring police officer. Race, like age, is “a reality that courts cannot simply ignore.” *Id.* at 277.

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

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

As to the trial court’s concern, *JDB* already rejects the idea that a factor such as race is subjective.⁴⁰ A race analysis is no more subjective than the age analysis in *JDB* and it is no more subjective than any other consideration in the “free to leave” test. After all, the test is whether the *person would feel* free to leave. For instance, courts consider the presence or display of weapons; this factor examines the suspect’s “subjective” response to display of gun in the same way that courts would consider the response of Black people to police encounters. Courts consider who initiated the encounter and the “subjective” response to police initiation; they consider whether the suspect indicated freedom of movement, which would fall under what the trial court seems to have defined as “subjective.” And while these all might have a “subjective” element to them, they are all, as race should be, examined through an objective lens.

Furthermore, considering race is entirely consistent with the “free to leave” test’s reliance on the totality of the circumstances. If this is truly a totality of the circumstances analysis, “the Court should include the consideration of race in order to gain a full view of the circumstances and dynamics surrounding the encounter.” Maclin, 26 VAL. U. L. REV. at 273-74. Otherwise, the “[c]ontinued use of a reasonable person test [absent consideration of race] runs the risk that majoritarian values and perceptions of police practices will go unchallenged.” *Id.* at 274. “[I]t

⁴⁰ See *J.D.B.*, 564 U.S. at 279 (“[I]t cannot be the case that a circumstance is subjective simply because it has an ‘internal’ or ‘psychological’ impact on perception.”).

makes no sense to devise Fourth Amendment rules as if we lived in a nation where there are no differences among us.” *Id.*

The other concern the trial court seems to have is that incorporating race as but one factor in the “free to leave” analysis will open the door to a different standard for a suspect “who’s dressed in Hell’s Angels colors, and it’s summertime, with tattoos all over him.” App. at 97 (31:1-5). Although this is not a logical extension of the argument for incorporating the perspective of Black people into the “free to leave” analysis, the concern seems to be this: considering race opens the door to other considerations based on gender, ethnic groups, and social groups. First, as Professor Maclin notes in reference to a similar objection, “You will pardon me if I label this objection a ‘fear of too much justice.’”⁴¹ Second, this concern has no bearing on the appropriateness of race as a consideration. We know that Black people are disproportionately targeted, imprisoned, and subject to violence at the hands of police; we know that Black people have a longstanding, historic, and contemporary tension with law enforcement; and we know that Black people view police encounters differently than White people and adjust their behavior accordingly. “Just because similar claims may be presented by other groups today or at some future date is no reason not to consider the case of [Black people] who have sufficient cause for complaint now.”⁴²

Finally, one concern often raised is that factoring race into the “free to leave” analysis would make the work of police and courts more difficult. Yet consideration of race as a relevant factor in the objective reasonable person analysis would, conversely, lead to more honest determinations of custodial status while maintaining a workable standard that both police and courts are competent to conduct. In *J.D.B.*, the U.S. Supreme Court reasoned that inclusion of age

⁴¹ Maclin, “*Black and Blue Encounters*” Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. at 272-73.

⁴² *Id.* at 273.

as a relevant factor would not undermine the objective reasonable person standard’s interest in giving “clear guidance to the police” because police—who are competent to account for other objective circumstances that are a matter of degree, such as length of questions—are also competent to consider the role a suspect’s age may play. *J.D.B.*, 564 U.S. at 279. Likewise, race is an objective circumstance which police and courts are competent to consider as part of the “reasonable person” and “free to leave” analysis; doing so does not undermine the ability to apply this standard. In fact,

[G]uidance and understanding may be promoted, and not undermined, if police officers are provided information regarding how their investigative tactics are perceived by different segments of the community . . . police officers will not be asked to “guess” whether a particular person feels free to leave depending on his or her skin color. Rather . . . police departments would be encouraged to keep abreast of minority groups’ perceptions of police behavior and investigative tactics, and to make sure that the officers on-the-beat are kept updated about these perceptions.⁴³

While adding race to the objective factors that determine an investigative detention may require police to confront their own implicit biases, this Court should recognize that such honesty serves everyone and would make the criminal justice system ultimately more just.

Amicus does not ask that this Court upend the “free to leave,” reasonable person standard. Rather, we ask that the standard be inclusive of perspectives of people of color. Accordingly, to the extent reversal is not required pursuant to Section I *supra* (which it is), this Court should still reverse the trial court’s March 13, 2018 order due to the trial court’s refusal to take into consideration the perspectives of people of color in assessing whether a person feels “free to leave.” This case should then be remanded so such perspectives can be considered.⁴⁴

⁴³ Maclin, “*Black and Blue Encounters*” Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. at 275.

⁴⁴ When the proper analysis—including consideration of Jones’s race—is conducted, it becomes clearer that Jones was seized prior to the discovery of the active warrant. At the latest, this seizure occurred when the officers obtained his identification for the purpose of conducting a warrants check. This conclusion, as articulated in Argument I, *supra*, is only reinforced when Jones’s race is considered. The trial court emphasized, both in its discussion of the identification and warrants check as well as in its discussion of race, that Jones was “cordial and cooperative

CONCLUSION

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

Respectfully Submitted,

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throughout the brief interaction with the Defendant. Therefore, no seizure occurred." Not only does this observation fail to suggest that Jones felt free to leave, but when viewed from the perspective of a Black person this behavior is entirely consistent with a reasonable belief that Jones did not feel free to leave. As the social science detailed above makes clear, Black people typically go out of their way to act courteously and cooperatively to police, a tactic taught to them by their parents as well as by their observations of police violence against Black people and the justice system's disproportionate adverse effects on the Black community.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 22nd day of May 2019 through the electronic-filing system on counsel for the Defendant/Appellant (Donna Brown, Esq.) and the State/Appellee (Stephen Fuller, Esq.).

/s/ Gilles Bissonnette
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APPENDIX

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JAVIER GUZMAN-SANTOS,

14 Defendant.

CASE NO. CR15-0308-JCC

ORDER GRANTING
DEFENDANT'S MOTION TO
SUPPRESS

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

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

22 **I. FACTUAL BACKGROUND**

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

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

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

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

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

23
 24
 25
 26 ¹ Where the Court discusses a factual detail without citation, it is referring to the record developed at the evidentiary hearing on April 5, 2016. A transcript of that hearing was not available on the date of this Order.

1 What ensued was an approximately four-hour conversation. Paradoxically, Agent Leiman
 2 testified that he wanted to speak with Mr. Guzman-Santos to “get his side of the story,” but also
 3 that he and Agent Gahan repeatedly “told [Mr. Guzman-Santos] what we believed had
 4 happened.” The agents continued to question Mr. Guzman-Santos, employing what they
 5 described as “strategies” or “themes,” to “continue probing” until they heard the version of
 6 events that they deemed to be true. Agent Leiman described some of these strategies as
 7 “rationalizing behavior,” “minimizing consequences,” and “projecting blame elsewhere.” One
 8 “strategy” or “theme” involved minimizing the allegations against Mr. Guzman-Santos by saying
 9 the accusation was “not a big deal,” and “things happen.” (Dkt. No. 31 at 2.) The agents also
 10 claimed to have DNA and video evidence proving his guilt. (*Id.*) The agents repeatedly said,
 11 “We know you touched her.”² (Dkt. No. 23 at 3–4.) Eventually, Agent Gahan told Mr. Guzman-
 12 Santos that he could either be a “hero” by “taking responsibility,” or a “coward.” (Dkt. No. 23. at
 13 4–5.)

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

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

23 **II. DISCUSSION**

26 ² As Agent Leiman testified, “we told him what we believed had happened.”

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

9 Given the undisputed fact that Mr. Guzman-Santos was interrogated³ without *Miranda*
 10 warnings, the sole question before the Court is whether he was “in custody.”

11 **A. “In Custody”**

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

17 The Ninth Circuit has identified five factors which are “among those likely to be
 18 relevant” to determining whether or not a suspected person is “in custody.” *United States v. Kim*,
 19 292 F.3d 969, 974 (9th Cir. 2002). The five factors are: (1) the language used to summon the
 20 individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the
 21 physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of
 22 pressure applied to detain the individual. *Id.*

23
 24 ³ Any tactics can be considered interrogation which “the police should know are reasonably likely to elicit
 25 an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). This can
 26 occur through actual questioning or “its functional equivalent.” *Id.* at 300–301. Even where the police
 conversationally raise a topic, it can be considered interrogation if reasonably likely to elicit incriminating
 information. *Id.*

1 **1. Language Used to Summon the Individual**

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

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

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

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

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

22 **3. The Physical Surroundings of the Interrogation**

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

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

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

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

19 **4. Duration**

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

1 The Ninth Circuit has deemed lengths of time far less than four hours long enough to
 2 render a suspect “in custody.” *See Beraun-Panez*, 812 F.2d at 579 (questioning estimated to last
 3 between thirty and ninety minutes); *United States v. Kim*, 292 F.3d at 977 (total questioning
 4 estimated to last fifty minutes); *United States v. Wauneka*, 770 F.2d 1434, 1439 (9th Cir. 1985)
 5 (interview that lasted over an hour was custodial); *United States v. Lee*, 699 F.2d 466, 467–68
 6 (9th Cir. 1982) (60–90 minute interview was custodial).

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

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

21 **5. Degree of Pressure**

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

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

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

13 The Court pauses to note that the tactics used by FBI agents in an interrogation in April
 14 2015 closely resemble those condemned by the U.S. Supreme Court in *Miranda v. Arizona*. 384
 15 U.S. 436 (1966). *Miranda* discussed law enforcement manuals that, "instruct the police to
 16 display an air of confidence in the suspect's guilt . . . [t]he interrogator should direct his
 17 comments toward the reasons why the subject committed the act, rather than court failure by
 18 asking the subject whether he did it." *Id.* at 450. Agents in this case raised suggestions about
 19 alcohol use, Mr. Guzman-Santos's family life, and his desires towards women; all are mentioned
 20 in the *Miranda* opinion. *Id.* Tactics identified as problematic by the Court in *Miranda* also

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

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

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

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

14 **B. Failure to Record Interrogation**

15 The Court briefly notes its frustration with the fact that the lengthy interrogation of Mr.
 16 Guzman-Santos was not recorded. Determining whether a criminal defendant’s constitutional
 17 rights were violated would be considerably easier with the benefit of a full recording. Other
 18 courts have criticized the FBI for failing to record in similar circumstances, thus necessitating
 19 court intervention and fact-finding. *See U.S. v. Azure*, 1999 WL 33218402 at *1 (D.S.D. Oct. 19,
 20 1999) (“There is no good reason why F.B.I. agents should not follow the same careful practices
 21 unless the interview is being conducted under circumstances where it is impossible to tape or
 22 record the interview”); *U.S. v. Perez*, 2014 WL 5460452 at *2 (D.S.D. 2014). Agent Leiman’s
 23 testimony that he was afraid recording might “chill” the conversation with Mr. Guzman-Santos is
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25
 26⁵ See *Oregon v. Mathiason*, 429 U.S. 492, 495–496 (1977); *Moran v. Burbine*, 475 U.S. 412 (1986);
Illinois v. Perkins, 496 U.S. 292, 297–98 (1990).

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

5 **II. CONCLUSION**

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

8 DATED this 6th day of April 2016.
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15 John C. Coughenour
16 UNITED STATES DISTRICT JUDGE
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