State of New Hampshire
Supreme Court

NO. 99-576

2000 TERM

AUGUST SESSION

STATE OF NEW HAMPSHIRE

v.

DORIAN HIGHT

RULE 7 APPEAL FROM FINAL DECISION OF KEENE DISTRICT COURT

BRIEF OF DEFENDANT, DORIAN HIGHT

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QUESTIONS PRESENTED

1. Consent is not willingly given in circumstances designed to force a person to give it. Due to the time of day, the race of the defendant, that the defendant was unable to leave because the officer had his license and registration, the lack of any indication that he was free to leave, and the lack of any basis to believe that the officer had reasonable suspicion of any crime, it is likely that the consent here was not willingly given and that the officer was merely fishing for evidence which he had no reasonable basis to believe actually existed. Should the court have suppressed the evidence gathered after the time necessary to write a ticket for Mr. Hight's traffic violations?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Dorian Hight was charged with possession of a small quantity of marijuana. The Keene District Court (*Edward Tenney*, J.) held a suppression hearing and trial together, at which Officer Graves was the only witness, and after which the defendant was found guilty.

According to Officer Graves, at 8:40 in the evening on May 9, 1999, *Trn.* at 6, he noticed a car with its taillight out going 47 in a 35 mph zone. *Trn.* at 7, 23. Officer Graves had the car pull over just east of the Brattleboro bridge, *Trn.* at 8, which is a rural stretch of road. The officer noticed no furtive gestures, *Trn.* at 24, and upon approaching the car Officer Graves found three males, *Trn.* at 8, one of whom was seated in the back. *Trn.* at 24.

Dorian Hight, the driver, provided his license and registration immediately when asked. *Trn.* at 8, 25-26. He did not appear impaired, *Trn.* at 25, his demeanor was fine and not overly nervous or suspicion. *Trn.* at 13. Officer Graves testified that at this point there was nothing to indicate Mr. Hight had violated any laws except the traffic violations. *Trn.* at 27.

Officer Graves then questioned Mr. Hight about his destination. Mr. Hight told the officer he was on his way to Landmark College in Putney, Vermont. *Trn.* at 9. Though he did not inquire, Officer Graves assumed the passengers were Landmark College students as well. *Trn.* at 34. Officer Graves asked Mr. Hight where he was coming from, *Trn.* at 10, and Mr. Hight replied that the three had been "hanging out" in Boston. *Trn.* at 10.

Officer Graves then returned to his police car and ran checks on Mr. Hight's license and registration, which betrayed no problems. *Trn.* at 11, 26-27. Officer Graves went back to Mr. Hight, however, and rather than allowing him to be on his way, ordered Mr. Hight out of the car, *Trn.* at 11, near the guardrail. *Trn.* at 14. Officer Graves did this based on his purported

information that "Boston is a source city for controlled substances." *Trn.* at 11. Officer Graves then engaged Mr. Hight in a further conversation about his activities in Boston, and expressed his belief that "it was a long ways to drive just to simply hang out." *Trn.* at 12. Mr. Hight told the officer that he had also been to a fraternity party while they were there. *Trn.* at 12.

Without anything further, Officer Graves asked for Mr. Hight's consent to search the car, *Trn.* at 14, which was given. Officer Graves also asked for Mr. Hight's consents to search his person, *Trn.* at 15, his wallet, *Trn.* at 17-20, and his pocket, *Trn.* at 32, which were also given. Officer Graves then radioed for additional police support to carry out the searches. When the additional police arrived, the passengers were ordered out of the car, and Mr. Hight, his wallet and pockets, and the car were searched. *Trn.* at 20, 32. Officer Graves found $^{4}/_{100}$ of a gram of marijuana in a film container in Mr. Hight's pocket. *Trn.* at 17.

The officer arrested Mr. Hight, and brought him to the Chesterfield police station. *Trn.* at 22. One of the passengers was allowed to drive the car. *Trn.* at 22. Mr. Hight's license and registration were not returned until later in the night. *Trn.* at 34-35.

After the finding of guilt, this appeal followed.

SUMMARY OF ARGUMENT

Mr. Hight first notes that during a traffic stop an officer cannot detain a motorist longer than necessary to write a traffic ticket, and argues that detention to fish for evidence or ask for consent to search is unlawful. He points out that a traveler's place of origin is not a sufficient basis for detention, and further notes that because drugs are ubiquitous in our society, the notion of Boston as a "source city" for drugs is also not reason for detention.

Mr. Hight then argues that his consent to search was not given voluntarily because the officer did not return his licence and registration and he was therefore not free to go, he was given no oral or contextual indication that he was free to go, he was stopped at night on a rural road, he merely submitted to the officer's authority in granting consent, and he acquiesced to the officer's request in part because of racial pressures.

Finally, Mr. Hight points out the problem created by traffic stops which are either intended as or often morph into drug interdiction efforts, and sets forth the possible solutions for adoption by this Court.

ARGUMENT

I. Officer Graves Had No Articulable Suspicion to Detain Mr. Hight

A. Police Need Reasonable Suspicion Based on Articulable Facts to Detain a Motorist Beyond the Short Time Necessary for a Traffic Stop

Upon stopping a car for a traffic violation,

> "A law enforcement officer is permitted to temporarily detain a suspect for investigatory purposes on grounds less than probable cause if the officer has a reasonable suspicion based on 'specific and articulable facts which, taken together with rational inferences from those facts,' leads him to believe that the person detained has committed or is about to commit a crime."

State v. Jaroma, 137 N.H. 562, 566 (1993), *quoting State v. Kennison*, 134 N.H. 243, 246-47, (1991). *See United States v. Sowers*, 136 F.3d 24 (1st Cir. 1998), *cert. denied,* 142 L.Ed. 84.

Any evidence gathered during a too-long detention is tainted by the violation of the defendant's rights against unreasonable searches and seizures, and must be suppressed. *State v. Webber*, 141 N.H. 817 (1997); *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

B. Any Delay Beyond That Necessary for the Stop is a Violation of Rights

During a traffic stop, any delay beyond that necessary for the purpose of the stop is a violation of a citizen's right to go about his business uninhibited by the police. *United States v. Ramos*, 20 F.3d 348 (8th Cir. 1994), *aff'd*, 42 F.3d 1160 (trooper's continuing motorist following warning ticket for seatbelt violation violated fourth amendment where license and registration checked out, and passenger had valid reason for not wearing seatbelt); *United States v. McSwain,* 29 F.3d 558 (10th Cir. 1994) (detention of driver beyond time necessary to verify validity of inspection sticker violated fourth amendment); United *States v. Garcia*, 23 F.3d 1331, 1334 (8th Cir. 1994) (after valid stop for swerving, officers discovered defendant had a prior arrest and

stopped him again; second detention held invalid); *United States v. Fernandez,* 18 F.3d 874 (10th Cir. 1994) (officer's un-particularized hunch did not justify detention of stopped motorist, where motorist had valid driver's license and registration, motorist and passenger gave consistent and plausible explanations for travel, and no other indication of criminal activity); *State v. Klein*, 736 So. 2d 9 (Fla. Dist. Ct. App. 1998) (officer who pulled over defendant for speeding and then administered field sobriety tests, which defendant passed, did not have reasonable suspicion to detain defendant longer than it took to issue citation); *Powell v. State,* 649 So 2d 888 (Fla. Dist. Ct. App. 1995) (initial stop of pickup for having no visible license plate was valid, but continued detention invalid after driver showed temporary tag); *People v. Koutsakis,* 649 N.E.2d 605 (Ill. App. 1995) (20-minute detention to await arrival of drug-detection dog after stop for speeding was impermissible, where officer had no valid basis for searching vehicle).

In this case, all Mr. Hight's papers were in order, and there were no articulable facts which could have lead Officer Graves to a rational conclusion that some "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1967); *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *State v. Jaroma*, 137 N.H. 562, 566 (1993). There was thus no basis for a detention beyond the time necessary to write out a ticket for speeding and a malfunctioning taillight. Despite this, Mr. Hight was detained, questioned, and ordered out of the car, all in violation of his rights.

C. Curiosity is Not an Exception

When an officer stops a car, the officer has no authority to ask the motorist any questions beyond those which are demanded by the purpose of the stop, or which are based on articulable suspicion. *See State v. Webber*, 141 N.H. 817 (1997); *State v. Dodier*, 135 N.H. 134 (1991).

For instance, in *United States v Walker*, 933 F.2d 812 (10th Cir. 1991) (subsequent history

omitted), the defendant was stopped for speeding. The officer then asked questions unrelated to the traffic stop, including whether there were any weapons, open containers of alcohol, controlled substances, or paraphernalia in the vehicle. The court said that upon conducting a routine traffic stop, an officer may request a license and registration, run a computer check, and issue a citation. A motorist is then entitled to proceed on his way without being subjected to further delay by police for additional questioning.

In *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 991 F. Supp. 895 (N.D. Ohio 1997), an organization of migrant workers sought an injunction to bar police from stopping foreign-looking people to request immigration documents. The court held that traffic stops must be reasonably designed to meet their objectives, and questions must be strictly tied to and justified by the circumstances that led to the stop. Any further questioning beyond the time necessary to issue a traffic ticket, the court said, must be based on particularized facts giving rise to reasonable suspicion. *See also United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994); *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988) (car stopped for seatbelt violation, driver provided license and car's rental contract, officer then asked passenger intrusive questions about their vacation and finances; court held there was no reasonable suspicion for the questioning); *United States v. Coley*, 974 F. Supp. 41 (D.D.C. 1997) (stop of unregistered car; officer's questions about guns and drugs went beyond permissible scope of stop); *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997) (police officer stopped vehicle for weaving, but satisfied himself driver not intoxicated; insufficient basis for further inquiry regarding discrepancy between vehicle identification number on vehicle and registration).

In Mr. Hight's case, without articulable facts to support a reasonable suspicion, Officer

Graves questioned Mr. Hight about his origin and destination of travel, and requested consent to search. Because these acts were in violation of Mr. Hight's rights to be free from unreasonable searches and seizures, any evidence gathered following or resulting from them must be suppressed.

D. Officer Cannot Request Consent to Search Unless There is Articulable Suspicion

As demonstrated, without reasonable suspicion, an officer conducting a traffic stop may not question a motorist about any matter not connected to the purpose of the stop. This includes a request to consent to a search.

For example, in *United States v Tapia*, 912 F.2d 1367 (11th Cir. 1990), the defendant was stopped for speeding. As a basis for further detention, the officer pointed to: the car had Texas plates, the two people in it were Mexican, they told the officer they were traveling to Atlanta to find work, but there was no luggage in the car and the trunk did not appear heavily loaded, and the driver appeared nervous about being stopped. The officer had the driver sign a consent-to-search form, and the resulting search produced some marijuana. The court found that the facts were not sufficient to justify an investigatory detention beyond that necessary to issue a traffic ticket, and suppressed the fruits of the search.

Similarly, in *United States v. Ogunbiyi,* 957 F.Supp. 89,(N.D. W.Va. 1997) the defendant was stopped for crossing over the median. The driver produced a valid learner's permit, the passenger a valid licence, and the rental agreement was in order. Upon learning the defendant had a prior criminal record, the trooper sought consent to search the car, which was given, and the search produced a quantity of drugs. The court suppressed the evidence upon finding that

"Trooper Mayle did not have reasonable suspicion of criminal activity at the time he sought consent to search the vehicle." *Id.* at 94.

In *People v Turriago*, 644 N.Y.S.2d 178 (1996) (subsequent history omitted, overturned on other grounds), the defendant was stopped for speeding. Before verifying the driver's license and registration , the officers requested consent to search the car, which was granted, whereupon a dead body was found in the trunk. The court found that "nothing transpired to justify suspicion that criminal activity was afoot so as to give rise to the common-law right to inquire and justify the request to search." *Id.* at 181 (citations omitted). Accordingly, the evidence was suppressed.

See also Karnes v Skrutski, 62 F.3d 485 (3rd Cir. 1995) (consent to search beyond scope of stop for speeding); *United States v. Ramos*, 20 F.3d 348 (8th Cir. 1994), *aff'd*, 42 F.3d 1160 (8th Cir. 1994) (request for consent did not taint the search only because defendant was apprized that he had a right to refuse); *United States v Sandoval,* 29 F.3d 537 (10th Cir. 1994) (fruits of consensual search which was beyond scope of traffic stop for speeding, suppressed).

E. Officer Cannot Conduct a Search Unless There is Probable Cause

During a traffic stop, conducting a search without probable cause is a violation of the motorist's constitutional rights. Such a search is not necessary to fulfill the purposes of the stop, and it also constitutes a further detention beyond that necessary to the stop.

In *State v. Dodier*, 135 N.H. 134 (1991), this court found that when, during a traffic stop, an officer does not have probable cause to search the car nor reasonable suspicion justifying a detention to carry out the stop, the officer is beyond his authority in conducting the search.

In *Knowles v. Iowa*, 119 S. Ct. 484 (1998), a motorist was stopped for speeding. The officer may have had probable cause for a full custodial arrest. Because the defendant was

instead issued a traffic ticket, however, the officer did not have authority to conduct a search of the car.

In *Commonwealth v. Cardoso*, 702 N.E.2d 398 (Mass. App. Ct. 1998), *review denied*, 707 N.E.2d 1079 (Mass. 1999), the defendant was stopped for a missing inspection sticker. The driver produced his license, but the officer's observation of his "fidgeting" gave him a "hunch" that he was hiding something. The defendant was ordered out of the car, and a handgun was found hidden in his waistband. The court found that there were no articulable facts on which to base the search, and suppressed the evidence. *See also United States v Lee,* 73 F.3d 1034(10th Cir. 1996) (criminal histories of driver and passenger not provide probable cause for search of vehicle after car rental papers were produced and officer determined driver not intoxicated).

F. Where You're Going is Not a Viable Basis For Suspicion

Even if questioning Mr. Hight was within his authority, Officer Graves's suspicion was subjectively aroused when Mr. Hight told him he was coming from Boston and returning to Landmark College in Putney. A generalized notion of where a motorist is going or coming from, however, is not a viable fact upon which to base suspicion that something illegal is going on. *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997) (motorist's error in identifying city where he rented car not viable factor upon which to base reasonable suspicion for search of car); *State v Retherford,* 639 N.E.2d 498, 509 (Ohio App. 1994), *appeal denied*, 635 N.E.2d 43 (traveler's route from Port Clinton, Ohio to Cincinnati not viable factor upon which to base suspicion for detention).

There are situations in which a motorist's destination can be a factor upon which suspicion can be based. In *United States v. Pino*, 855 F.2d 357 (6th Cir. 1988) (subsequent

history omitted), for example, the officer stopped a car after he saw it randomly brake and swerve. In examining the driver's papers, the officer noticed that the driver's license and rental contract contained different addresses for the driver, and that the car had been rented at the Miami airport while the defendant lived in Miami. In trying to reconcile these facts, Mr. Pino told the officer that he was going to Chicago to see the Cubs play at Wrigley Field that night. The officer knew, however, that Wrigley Field did not hold nighttime games because it did not have lights. Based on these facts, the Sixth Circuit held that the officer had sufficient facts on which to base suspicion of criminal activity. *See also United States v. Jones*, 44 F.3d 860 (10th Cir. 1995) (suspicious destination one of numerous facts upon which detention based); *United States v. Pena*, 920 F.2d 1509 (10th Cir. 1990) (subsequent history omitted) (same); *United States v. Hunnicutt*, 135 F.3d 1345 (10th Cir. 1998) (same).

In *Pino*, the traveler's report about his destination had an objective error that legitimately aroused the officer's suspicion. Many things, however, happen in Boston, many of them legal. When Mr. Hight was pressed, he told Officer Graves that he and his friends had been in Boston "hanging out" and had visited a fraternity party. It is well within reason that Mr. Hight and his passengers had been literally standing on the street watching the people walk by on a warm spring evening. Certainly more of them walk by in Boston than in Putney. There is nothing remotely suspicious about a young person "hanging out" in Boston, and there was nothing objectively erroneous about Mr. Hight's report of his whereabouts – like a night game at Wrigley Field – that could give Officer Graves an objective basis for suspicion.

Officer Graves testified that he would not have been suspicious had Mr. Hight told him he'd been to see the Red Sox or visiting Fanuiel Hall. *Trn.* at 30. This is nothing more than a

narrow notion of what constitutes a fun evening in Boston. Moreover, to the extent that Boston is a "source city" for narcotics, both Fenway Park and Fanuiel Hall are of course in Boston. Any narcotics trade that goes on in Boston, according to Officer Graves's belief, could as well go on there as in any other spot in the big city. Had Mr. Hight given Officer Graves a specific address that was a known drug transaction point, that perhaps would be sufficient to arouse reasonable suspicion. To say that the constitution has a hole in it if Mr. Hight said he was coming from Boston, but that it remains intact if he said he was coming from Fanuiel Hall or Fenway Park, is absurd.

G. Source City Not a Viable Basis for Suspicion

Even if the place one is traveling to or from is viable cause for suspicion generally, the notion of basing suspicion on a "source city" is not.

1. Drugs Are Ubiquitous in Our Society

Drugs are not marked with points of origin so that one can determine the source, and they are ubiquitous in our society. The Washington Post reported that

> "The nation's drug problem is increasingly evolving into a collection of local 'epidemics,' according to a report issued yesterday by the Clinton administration's Office of National Drug Control Policy."

David Vise & Lorraine Adams, *Study: Local Drug 'Epidemics' Plague U.S.*, WASHINGTON POST, Dec. 16, 1999, at A25.

The Federal Drug Enforcement Administration (DEA) reports that "Cocaine is readily available in all major U.S. metropolitan areas," U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, DEA BRIEFING BOOK (1999), http://www.usdoj.gov/dea/briefingbook /page16-31.htm. The agency believes that

> "Smugglers received off-loads during at-sea transfers from mother ships that arrived from source countries, and then landed with the cocaine at marinas, isolated inlets, bays, bayous, beaches, or other areas that would hinder surveillance. Landing sites typically were located near major roads that connected to interstate highway systems, thus providing smugglers with easy access to escape routes."

U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES (1996), http://www.usdoj.gov/dea/pubs/intel/nnicc97.htm.

Thus, one can thus guess that Portsmouth, Newington, and Hampton Beach, are as likely as Boston to be "source cities."

Not surprisingly, therefore, the Fosters Daily Democrat (Dover, N.H.) recently reported major arrests for heroin trafficking in Seabrook. Terry Date, *Police Have Arrest Warrants for 40 in Sweeping Drug Case*, FOSTERS DAILY DEMOCRAT, March 2, 2000, at 1, *appendix* at 51.

A report by the Office of National Drug Control Policy acknowledges that marijuana has become the number one cash crop in areas of Kentucky, Tennessee and West Virginia; there has been a dramatic increase in the production and use of methamphetamines, in parts of Missouri, Kansas and Iowa; identified 31 other "high intensity drug trafficking areas"; noted that drug use in suburban high schools is higher than in many urban areas and that marijuana is cultivated on public lands in many national forests; reported that there is a burgeoning methamphetamine epidemic in the Midwest with authorities having shut down 242 secret drug labs in Iowa and 238 in Kansas in the first half of 1999 alone; and that large quantities of drugs move through the New York-New Jersey region, California and Texas. David Vise & Lorraine Adams, *Study: Local Drug 'Epidemics' Plague U.S.*, WASHINGTON POST, Dec. 16, 1999, at A25.

The Seattle times reported that marijuana is one of Washington state's biggest cash crops,

that 80 percent of the marijuana seized in the Seattle area is grown indoors according to the DEA, and that domestic marijuana growers supply about one half of the nation's demand. Chris Solomon, *Smell of Money Makes Pot a Big Indoor Crop*, SEATTLE TIMES, Nov. 25, 1998, at A1.

The Denver Post reported that marijuana growers across the United States harvested 8.7 million marijuana plants in 1998, putting it fourth in cash value for all crops in the United States and Colorado, just behind hay, corn grain, and wheat. Michael Booth, *Skepticism Greets Report on Pot Crop*, DENVER POST, Dec. 28, 1998, at B-01.

The Los Angeles Times reported there are 3,000 marijuana growers in Vancouver alone. Patt Morrison, *The Pot World's New Buzz Is from British Columbia*, LOS ANGELES TIMES, Nov. 24, 1995, at A3.

The DEA says that marijuana is grown virtually everywhere.

> "Cannabis was cultivated illicitly in the United States in remote locations, occasionally on public lands. Major domestic outdoor cannabis cultivation took place in Alabama, Hawaii, Kentucky, Tennessee, and California.

U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES (1996), http://www.usdoj.gov/dea/pubs/intel/nnicc97.htm.

Because drugs are ubiquitous in our society, it is not possible to isolate a single place or particular places as a "source."

2. The Entire United States Can Be Called "Source City"

A sampling of drug cases reveals that numerous places are called "source cities" by

police: Albuquerque, New Mexico[1]; Anchorage, Alaska[2]; Birmingham, Alabama[3]; Brownsville, Texas[4]; Chicago, Illinois[5]; Dallas, Texas[6]; Detroit, Michigan[7]; El Paso, Texas[8]; Flagstaff, Arizona[9]; Fort Lauderdale, Florida[10]; Houston, Texas[11]; Los Angeles, California[12]; Las Vegas,

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[1] *United States v. White*, 42 F.3d 457 (8th Cir. 1994).

[2] *Brooker v. State*, 298 S.E.2d 48 (1982).

[3] *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979).

[4] *Neuhoff v. State*, 708 N.E.2d 889 (Ind.App. 1999).

[5] *United States v. Vasquez*, 612 F.2d 1338 (2nd Cir. 1979); *United States v. Teslim*, 869 F.2d 316 (7th Cir. 1989) (Chicago considered "source city" because many flights from the South and the West pass through there).

[6] *State v. Maynard*, 800 S.W.2d 773 (Mo. 1990).

[7] *United States v. Flowers*, 912 F.2d 707 (4th Cir. 1990); *State v. Williams*, 525 N.W.2d 538 (Minn. 1995).

[8] *State v. Bright*, 963 S.W.2d 423 (Mo.App. 1998).

[9] *People v. Boyd*, 576 N.E.2d 116 (Ill. App. 1991).

[10] *Bothwell v. State*, 300 S.E.2d 126 (Ga. 1983); *People v. Jones*, 545 N.E.2d 1332 (Ill. App. 1989); *Grant v. Maryland*, 461 A.2d 524 (Md.Sp.App.1983).

[11] *People v. Anaya*, 665 N.E.2d 525 (Ill. App. 1996); *State v. Espinoza*, 442 S.E.2d 911 (Ga. App. 1994); *State v. Hayes*, 726 So.2d 39 (La.App. 1998).

[12] *People v. Breeding*, 579 N.E.2d 1128 (Ill. App. 1991); *State v. Jones*, 624 So. 2d 1249 (La. Ct. App. 1993); *State v. Davis*, 547 So. 2d 1367 (La. Ct. App. 1989).

Nevada[13]; Miami, Florida[14]; Newark, New Jersey[15]; New Orleans, Louisiana[16]; New York City, New York[17]; Oakland, California[18]; Ontario, California[19]; Orlando, Florida[20]; Philadelphia, Pennsylvania[21]; Phoenix, Arizona[22]; ,Portland, Oregon[23]; San Antonio, Texas[24]; San Diego,

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[13] *State v. Martinson*, 581 N.W.2d 846 (Minn. 1998).

[14] *Jamison v. State*, 414 S.E.2d 466 (Ga. 1992); *Snow v. Maryland*, 578 A.2d 816 (Md.Sp.App. 1990); *Grant v. Maryland*, 461 A.2d 524 (Md.Sp.App. 1983); *United States v. Viegas*, 639 F.2d 42 (1st Cir. 1981).

[15] *United States v. Jennings*, 985 F.2d 562 (6th Cir. 1993); *Commonwealth v. Lidge*, 582 A.2d 383 (Pa. Super. 1990).

[16] *North Carolina v. Christie*, 385 S.E.2d 181 (N.C.App. 1989).

[17] *Maryland v. Darden*, 612 A.2d 339 (Md.Sp.App.1992).; *Quarles v. State*, 696 A.2d 1334 (Del. 1997); *Guadalupe v. United States,* 585 A.2d 1348 (D.C. Ct. App. 1991).

[18] *United States v. Hooper*, 935 F.2d 484 (2nd Cir. 1991).

[19] *United States v. Respress*, 9 F.3d 483 (6th Cir. 1993).

[20] *People v. Hicks*, 539 N.E.2d 756 (Ill. App. 1989); *Rasnake v. State*, 298 S.E.2d 42 (Ga.App. 1983); *People v. Forrest*, 526 N.E.2d 616 (Ill. App. 1998).

[21] *Lawrence v. Commonwealth*, 435 S.E.2d 591 (Va.App. 1993); *Commonwealth v. Holloway*, 384 S.E.2d 99 (Va.App. 1989).

[22] *People v. Rice*, 482 N.W.2d 192 (Mich. App. 1992); *State v. Lee*, 959 P.2d 799 (Ariz. 1998); *State v. Chapman*, 939 P.2d 950 (Kan. App. Ct. 1997).

[23] *United States v. McMurray*, 34 F.3d 1405 (8th Cir. 1994).

[24] *People v. Lynch*, 609 N.E.2d 889 (Ill. App. 1993).

California[25]; San Jose, California[26]; Santa Ana, California[27]; Tucson, Arizona[28]; West Palm Beach, Florida.[29]

Law enforcement officials have been often quoted as suggesting that vast regions of the country are sources for narcotics. In *United States v. Dennis*, 115 F.3d 524 (7th Cir. 1997), the dissent noted that "Inspector Moreno informs us that California has acquired the devilish distinction of being labeled a "source" state. The criteria employed to bestow that title . . . on a municipality or a region are vague. Indeed, at trial, Inspector Moreno testified that the entire West Coast qualifies, as well as many of the country's largest and most populous states: he volunteered as examples Texas, Florida, Arizona, and parts of the State of Washington. When specifically questioned about New York, the inspector admitted that state's inclusion into the club as well. *See also, United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998) ("Officer Taylor testified that he considered not only California to be a drug source state, but also Arizona, Texas, New Mexico, Florida, and Louisiana"); *United States v. Dennis*, 115 F.3d 524, 538 n. 4 (7th Cir. 1997) (postal inspector identified as drug source states "the entire West Coast" as well as Texas, Florida, Arizona, and parts of Washington); *United States v. Adebanjo*, 54 F.3d 774 (4th Cir.

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[25] *State v. Jackson*, 457 So. 2d 660 (La. 1994); *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992).

[26] *State v. Quino*, 840 P.2d 358, 74 Haw. 161 (Haw. 1992).

[27] *United States v. Bennett*, 78 F.3d 598 (10th Cir. 1996).

[28] *State v. Magner*, 956 P.2d 519 (Ariz.App.Div. 1998); *State v. Millan*, 916 P.2d 1114 (Ariz. App. Div. 1995).

[29] *People v. Furlong*, 578 N.E.2d 77 (Ill. App. 1991); *Booker v. State*, 298 S.E.2d 48 (Ga. App. 1983); *North Carolina v. Sugg*, 300 S.E.2d 248 (N.C.App. 1983).

1995) (state admitted that virtually every major city on the train route between New York and Baltimore, except for Dover, Delaware, would be considered a "source city"); *State v. Trainor*, 925 P.2d 818 (Haw. 1996) (state acknowledged that it regarded "any of the major cities' in the United States and all of the west coast cities from which airline flights arrived in Hawai'i as drug source cities); *State v. Chapman*, 939 P.2d 950, 958 (Kan. Ct. App. 1997) ("[a]t oral argument, the State admitted that very large areas of our country can be considered 'source areas' for illegal drugs"); *State v. Odum*, 459 S.E.2d 826 (N.C.App. 1995) ("Agent Weis testified that any major city in the United States would be considered a source city for narcotics"); *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980) (suggesting every place in United States is either source or use location for purposes of drug courier profile); *United States v. Andrews*, 600 F.2d 563, 566-67 (6th Cir.) *cert. denied*, 444 U.S. 878 (1979) (same). Underscoring the problem of identifying what is a "source city,"

> "no comprehensive definition of either source or use cities is available for analysis. Government descriptions of "source" and "use" cities have been facially inconsistent."

Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. Rev. 843, 899 (1985).

3. Courts Have Cast Doubt on the "Source City" Concept

Because of the ubiquity of drugs, courts have cast serious doubt on the usefulness the "source city" concept.

> "[O]ur experience with DEA agent testimony . . . makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center."

United States v. Andrews, 600 F.2d 563, 566-67 (6th Cir. 1979), *cert denied*, 444 U.S. 878 (1979);

> "That Sokolow embarked from Miami, 'a source city for illicit drugs,' . . . is no[t] suggestive of illegality; thousands of innocent persons travel from 'source cities' every day and, judging from the DEA's testimony in past cases, nearly every major city in the country may be characterized as a source or distribution city.

United States v. Sokolow, 490 U.S. 1, 16 (1989) (Marshall dissenting).

The "source city" idea is part of the drug courier profile developed by the drug warriors. Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye*," 65 N.C.L. REV. 417 (1987); *United States v. Ehlebracht*, 693 F.2d 333, 335 n.3 (5th Cir. 1982) (identifying DEA agent who created it). But it is apparent that such profiling means anything an arresting officer wants it to mean. Judge Pratt of the Second Circuit humourously demonstrated this in *United States v. Hooper*, 935 F.2d 484 (2nd Cir. 1991), quoted at length:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone,"it means just what I choose it to mean -- neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."
>
> L. CARROLL, ALICE THROUGH THE LOOKING-GLASS (1872).
>
> This case presents another example of the erosion of our constitutional protections resulting from this country's wasteful, ineffective, self-destructive efforts to stop drug trafficking. Because I believe that the majority's holding now allows government agents to seize virtually any air traveler's luggage while they make an investigation, I dissent.
>
> To justify their seizure of Hooper's bag the agents testified he had come from a "source city" and fit the DEA's "drug courier profile." Yet the government

conceded at oral argument that a "source city" for drug traffic was virtually any city with a major airport, a concession that was met with deserved laughter in the courtroom. The "drug courier profile" is similarly laughable, because it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose. "The [DEA] has not committed the profile to writing" and "the combination of factors looked for varies among agents." *United States v. Taylor*, 917 F.2d 1402, 1407 n. 8 (6th Cir. 1990), *vacated*, 925 F.2d 990 (6th Cir. 1991). Moreover, a canvass of numerous cases reveals the drug courier profile's "chameleon-like way of adapting to any particular set of observations." *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989):

Arrived late at night. *United States v. Nurse*, 916 F.2d 20, 24 (D.C. Cir. 1990).

Arrived early in the morning. *United States v. Reid*, 448 U.S. 438, 441 (1980); *United States v. Millan*, 912 F.2d 1014, 1017 (8th Cir. 1990).

One of first to deplane. *United States v. Millan*, 912 F.2d at 1015; *United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983).

One of last to deplane. *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980); *United States v. Sterling*, 909 F.2d 1078, 1079 (7th Cir. 1990); *United States v. White*, 890 F.2d 1413, 1414 (8th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990).

Deplaned in the middle. *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2nd Cir. 1980).

Used a one-way ticket. *United States v. Johnson*, 910 F.2d 1506 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 764 (1991); *United States v. Colyer*, 878 F.2d 469, 471 (D.C. Cir. 1989); *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980).

Used a round-trip ticket. *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977).

Carried brand-new luggage. *United States v. Taylor*, 917 F.2d at 1403; *United States v. Sullivan*, 625 F.2d at 12.

Carried a small gym bag. *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982).

Traveled alone. *United States v. White*, 890 F.2d at 1415; *United States v. Smith*, 574 F.2d 882, 883 (6th Cir. 1978).

Traveled with a companion. *United States v. Garcia*, 905 F.2d 557, 559 (1st Cir.), *cert. denied*, 498 U.S. 986 (1990); *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir. 1980).

Acted too nervous. *United States v. Montilla*, 928 F.2d 583, 585 (2nd Cir. 1991); *United States v. Cooke*, 915 F.2d 250, 251 (6th Cir. 1990).

Acted too calm. *United States v. McKines*, 933 F.2d 1412 (8th Cir. 1991); *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977).

Wore expensive clothing and gold jewelry. *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990).

Dressed in black corduroys, white pull-over shirt, loafers without socks. United *States v. McKines*, 933 F.2d at 1412.

Dressed in dark slacks, work shirt, and hat. *United States v. Taylor*, 917 F.2d at 1403.

Dressed in brown leather aviator jacket, gold chain, hair down to shoulders. *United States v. Millan*, 912 F.2d at 1015.

Dressed in loose-fitting sweatshirt and denim jacket. *United States v. Flowers*, 909 F.2d 145, 146 (6th Cir. 1990).

Walked rapidly through airport. *United States v. Millan*, 912 F.2d at 1017; *United States v. Rose*, 889 F.2d 1490, 1491 (6th Cir. 1989).

Walked aimlessly through airport. *United States v. Gomez-Norena*, 908 F.2d 497, 497 (9th Cir. 1990), *cert. denied*, 498 U.S. 947 (1991).

Flew in to Washington National Airport on the LaGuardia Shuttle. *United States v. Powell*, 886 F.2d 81, 82 (4th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990).

Had a white handkerchief in his hand. *United States v. Garcia*, 848 F.2d 58, 59 (4th Cir.), *cert. denied*, 488 U.S. 957 (1988).

In our "Looking-Glass" world of drug enforcement, the DEA apparently seeks "to be master" by having "drug courier profile" mean, like a word means to Humpty Dumpty, "just what I choose it to mean -- neither more nor less."

United States v. Hooper, 935 F.2d 484, 499-500 (2nd Cir. 1991) (*Pratt, J.*, dissenting) (internal

citation format altered from original).

4. Cannot Use "Source City" to Draw Conclusions About Travelers

Even if Boston were a source city, does that mean all traffic originating there is suspect? Courts have concluded that the source city concept is far too amorphous to support the particularized suspicion necessary for detention. Stopping cars for coming from places with drugs is like stopping cars for coming from places with people. *See Brown v. Texas*, 443 U.S. 47 (1979) (being in high-drug areas not sufficient for reasonable suspicion); *Florida v. Royer*, 460 U.S. 491 (1983); *Florida v. Bostick*, 501 U.S. 429 (1991).

In *Commonwealth v Torres*, 674 N.E.2d 638 (Mass. 1996), the defendant was stopped for speeding. The Massachusetts court held that detention was not justified by the passenger's delay in acknowledging the officer, his unexpected attempt to get out of the vehicle, the driver's residence in an area known for drug activity, the passenger's birthplace in a principal cocaine source city, or the driver's implausible explanation of where they had been. In *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2nd Cir. 1980), the court wrote

> "That appellants here arrived from a source city and seemed nervous to Agent Whitmore strikes us as wholly insufficient to constitute 'specific and articulable' facts supporting a reasonable suspicion that they were involved in drug trafficking."

Buenaventura-Ariza, 615 F.2d at 36; *see also, Reid v. Georgia*, 448 U.S. 438, 441 (1980) (fact that defendant "had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country" not sufficient to "reasonably suspect[] the petitioner of criminal activity"); *United States v. Mendenhall*, 446 U.S. 544, 572 (*White*, J., dissenting) ("the fact that her flight originated from a 'major source city,'" is not "sufficient to

provide reasonable suspicion that she was engaged in criminal activity," "for the mere proximity of a person to areas with a high incidence of drug activity or to persons known to be drug addicts, does not provide the necessary reasonable suspicion for an investigatory stop."); *United States v. Viegas*, 639 F.2d 42, 48 (1st Cir. 1981) (*Bownes*, J. dissenting) ("Viegas arrived from Miami, a city known to be a drug source, is a . . . tenuous a reason to suspect him of criminal activity"); *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980) (source city not given "much weight" because "of tragic fact that every major population center in this country has become a home for drug traffickers"); *United States v. Andrews*, 600 F.2d 563, 566-67 (6th Cir. 1979) (travel from Los Angeles cannot be regarded as suspicious because "the probability that any given airplane passenger from that city is a drug courier is infinitesimally small"), *cert. denied*, 444 U.S. 878 (1979); *United States v. Scott*, 545 F.2d 38, 40 n.2 (8th Cir. 1976) (traveling from Los Angeles has "little or no probative value"), *cert. denied*, 429 U.S. 1066 (1977); *State v. Chapman*, 939 P.2d 950, 958 (Kan. Ct. App. 1997) ("The fact that [the defendant] was driving from Phoenix to some other point in the United State is not a fact that would provide probable cause or even reasonable suspicion."); *Daniels v. State*, 718 S.W.2d 702, 705 (Tex. Crim. App. 1986) (appellant's arrival from a source city does not distinguish him from the other passengers on the flight).

At least one court in New Hampshire has recognized that where a person is coming from is not a reason for detention. Michael Grondin was stopped and given a ticket for "following too closely" near the Hampton toll booth. He was wearing a T-shirt with a marijuana plant on it, and lived in Lawrence, MA, a city the officer associated with drugs. Based on this the officer asked Mr. Grondin whether he had any drugs in the car, and also asked for and obtained his consent to

search the car. The court found that the defendant was not given any indication that he was free to leave, and that a reasonable person in his circumstances would not believe they were free to leave. The court held that the "defendant's wearing apparel and residence are not sufficient predicates to justify further detention," and therefore suppressed evidence obtained in the search. *State v. Michael Grondin*, No. 98-JT-00874, ORDER, (Portsmouth Dist. Ct. Jury Trial Div. *Robert Cullinane*, J., Jan. 19, 1999), *appx. to brief* at 54.

Although this Court has never ruled on the persuasiveness of the drug courier profile, *c.f.*, *State v. Winn*, 141 N.H. 812 (1997), it has made clear that it is suspicious of the "sexual offender" profile because like drug couriers, sex offenders "are a heterogeneous group." *State v. Cavaliere*, 140 N.H. 108, 114 (1995); *see also State v. MacRae*, 141 N.H. 106 (1996); *State v. Silk*, 138 N.H. 290 (1994); *State v. Cressey*, 137 N.H. 402 (1993).

In cases where the defendant traveled from a "source city" and courts found the detention was legal, many other articulable facts were present. *United States v. White,* 42 F.3d 457 (8th Cir. 1994) (reasonable suspicion based on: driver consented to search of truck but not to boxes covered by blankets, driver was extremely nervous and could not state destination address of blankets, which were being transported from city that was known drug source, driver had no bill of lading or permit for blankets, and truck cab contained laser detector, radar detector, and ham radio); *United States v. Banks*, 971 F. Supp. 992 (E.D. Va. 1997) (reasonable suspicion based on: driver told officer that despite having worked full shift on previous day he had rented vehicle to make nighttime 800-mile round-trip drive to drug-source city merely to spend two or three hours with friends); *United States v. Gonzalez*, 952 F.Supp. 813 (M.D. Ga. 1997) (reasonable suspicion based on: defendant traveling from drug- source city to drug-destination city, stated he had rented

car even though was merely named as additional renter, and was nervous throughout discussion with officer and remained nervous even after officer told him he was only getting warning); *State v. Melchor*, 683 N.E.2d 442 (Ohio App. 1996), *appeal denied*, 77 674 N.E.2d 1184 (1997) (reasonable suspicion based on: driver gave unsolicited consent to search before trooper had concluded scope of initial stop, drove for one mile before heeded siren, door jambs appeared altered, there was strong odor of air freshener emanating from vehicle, owner was not present, driver was from town known as a "high source drug area," occupants gave conflicting stories, and driver contradicted himself). In *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997) the court found that the trooper lacked reasonable suspicion for a search of the defendant's rental car after a speeding stop even though the defendant took his vacation by airline and rental car while he was unemployed. The court found there was nothing criminal about traveling by car to view the scenery, his schedule permitted time to make the trip, possession of open maps and vestiges of fast-food meals described a large category of presumably innocent travelers, the defendant identified the city where he rented car and did not attempt to conceal the fact that he had rented it in a city known to be source of narcotics, and the defendant promptly and truthfully responded to inquiries regarding his prior narcotics record.

H. Boston: Ballet, Baked Beans, Baseball, Baccalaureates

While obviously drugs are available in Boston, it is equally a source city for ballet, baked beans, baseball, and baccalaureates. Because there was no more evidence that Mr. Hight and his friends were transporting drugs than enjoying these things, merely being in Boston cannot possibly give rise to reasonable suspicion.

II. Mr. Hight's Consent Was Not Voluntary

For a search to be valid, consent to it must be granted voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Hastings*, 137 N.H. 601, 607 (1993). If the consent is not made voluntarily, it is coercive, and not valid. *Id.* If consent is coerced, fruits of the resulting search must be suppressed. *State v. McGann*, 124 N.H. 101 (1983). The State bears the burden of proving lack of coercion by a preponderance of the evidence, based on the totality of the circumstances. *McGann*, 124 N.H. at 106. To be voluntary, consent must be "the result of an independent act of free will." *Florida v. Royer*, 460 U.S. 491, 501 (1983).

A. Factors Showing Consent Was Not Voluntary

There are a number of factors to determine whether consent was not granted voluntarily.

1. Defendant is in Custody

While "custody alone . . . is not enough in itself to demonstrate a coerced consent to search," *State v. Patch*, 142 N.H. 453, 459 (1997), consent given while in custody must be carefully scrutinized. *United States v. Watson*, 423 U.S. 411 (1976).

A person is in custody when "in view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State v. Green*, 133 N.H. 249, 257(1990) (citation omitted); *Michigan v. Chesternut*, 486 U.S. 567 (1988).

Indicative of custody are the failure of police to return a person's license, registration, or keys. *State v. Oxley*, 127 N.H. 407 (1985) (license and keys); *United States v. Gregory*, 79 F.3d 973 (10th Cir. 1996) (license and car rental agreement); *United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996) (license); *United States v. McSwain*, 29 F.3d 558, 563 (10th Cir. 1994) (returning driver's documents necessary but not sufficient to show encounter was consensual); *United*

States v. Soto, 988 F.2d 1548, 1557 n.5 (10th Cir. 1993) (same); *United States v. Battista*, 876 F.2d 201 (D.C. Cir. 1989) (identification); *People v. Zazzetta*, 189 N.E.2d 260 (Ill. 1963) (keys).

2. Arrest is at Night on a Deserted Road

Where and when an encounter takes place is one factor in determining whether a person understands whether they are to leave. *Florida v. Bostick*, 501 U.S. 429 (1991). Consent may not be voluntary when it is granted at night on a deserted road. *United States v. Mapp*, 476 F.2d 67 (2nd Cir. 1973) (arrest late at night); *United States v. Hale,* 934 F.Supp. 427 (N.D. Ga. 1996) (search of driver and passenger in car stopped late at night on isolated road for minor traffic violation was unreasonable); *Ferris v. State*, 735 A.2d 491 (Md. 1999) (stop in early morning hours on rural interstate). *C.f. Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973) ("since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite"); *United States v. Watson*, 423 U.S. 411 (1976) ("He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station."); *State v. Jacobus*, 864 P.2d 861 (Ore. 1993) (voluntary consent, after arrest but "during daylight hours on a public street").

3. Submission to Authority or Imbalance of Power

A consent to search is not voluntary when granted in submission to authority. *Johnson v. United States*, 333 U.S. 10, 13 (1948). In *State v. McGann*, 124 N.H. 101, 106 (1983), the defendant gave police his keys, which the police understood as consent to search the car. This Court found, however, that because the police had made clear they were going to bust open the trunk, the defendant gave the officers the keys only to avoid damage to his car, and therefore the

"consent" was merely in submission to authority and not voluntary.

In the sphere of sex relations, an imbalance of power undermines consent. *See e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE (1989); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); ANDREA DWORKIN, INTERCOURSE (1987); ANDREA DWORKIN, RIGHT-WING WOMEN (1983). New Hampshire has accepted this notion by allowing the battered woman defense to crime. *State v. Briand*, 130 N.H. 650 (1988).

4. Timing and Intervening Circumstances

In *State v. Prevost*, 141 N.H. 647 (1997), the defendant alleged her consent was not voluntary. But because she signed a consent form after initially refusing consent, this court found that the defendant had had time to give her consent some thought. But where consent is immediate with no intervening circumstances, consent is probably not voluntary. *United States v. Richardson*, 949 F.2d 851, 858 (6th Cir. 1991); *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995) (subsequent history omitted) ("The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of vehicle that they are not legally obligated to allow.").

5. Race as an Element of Coerciveness – Driving While Black

Race is a possible element of coerciveness. Tracey Maclin, "*Black and Blue Encounters" – Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter*, 26 VAL. U.L.REV. 243, 249-50 (1991). Commentators have cataloged so much racism in how traffic

stops are handled, that it has earned the moniker "driving while black," or "DWB."

Black men, especially, are likely to respond to a white officer by accommodating whatever they perceive will result in the least acrimonious end to the traffic stop.

> And when police stop Christopher Darden, one of the prosecutors in the O.J. Simpson case, he doesn't move, keeps his hands on the wheel, and makes no sudden gestures; he calls these "African American survival techniques."

David Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 571 (1997) (documenting numerous instances of racism in traffic stops)

In *Washington v. Lambert*, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996), the Ninth Circuit noted that Los Angeles police unlawfully detained Hall of Fame baseball player Joe Morgan at the Los Angeles airport on the basis of a tip that "made all black men suspect"; erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him; stopped 1984 Olympic medalist Al Joyner twice in the space of twenty minutes, forcing him out of his car, handcuffing him, and making him lie spread-eagled on the ground at gunpoint; took actor Wesley Snipes from his car at gunpoint, handcuffed, and forced him to lie on the ground while a policeman kneeled on his neck and held a gun to his head; and stopped actor Blair Underwood in his car and detained him at gunpoint. *See also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (justice system more likely to believe a black person did a crime); Christo Lassiter, *Eliminating Consent From the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 114-124. (1998) (chronicling numerous instances of racism in traffic stops); Katheryn K. Russell, '*Driving While Black': Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); David

Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Note, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683, 1711 (1999) ("dark skinned" motorists are 5 percent of drivers on portion of Florida interstate, convicted for 15 percent of traffic convictions, but were 70 percent of motorists stopped).

As a result of this case being appealed, the Chesterfield police department, of which Officer Graves is a member, did an internal review of its arrests. It found that 3 percent of arrests during the last three years were of black people, while blacks accounted for only 0.6 percent of the population. Jane Mills, *Chesterfield Police: Race Not a Factor in Traffic Stops*, KEENE SENTINEL, Nov. 2, 1999 at 1, *appx. to brief* at 56. Even if the Chesterfield police are correct in saying that they do not practice racial profiling, the numbers are statistically significant, and justify a black man feeling like he might need to be extra polite and compliant to avoid unwarranted suspicion.

B. Mr. Hight's Consent Was Not Voluntary

In Mr. Hight's case, he was in custody. Officer Graves had taken his license and registration, and at the time he was asked for consent to search, had not been given them back. One cannot legally drive without the documents, and thus Mr. Hight was not free to go.

The stop was at night, on a rural road, exactly the sorts of circumstances that make it difficult for a person to feel confident enough to exercise their right to refuse consent.

Mr. Hight, at the time he was stopped, was a college student in Vermont. He was on no great crime spree, and except for possessing an exceedingly small quantity of marijuana in a film container, was apparently a law-abiding citizen. He naturally acquiesced to Officer Graves's

display of authority – blue lights, police uniform, demand for documents, order to get out of the car, request for consent to search.

The switch from the lawful stop to the request for consent was absolutely seamless in Mr. Hight's case. When Officer Graves returned from the police car to Mr. Hight, rather than allowing Mr. Hight to be on his way as one would expect, Mr. Hight was ordered out of his car, and asked further questions about what he had been doing in Boston. On the side of a dark road, near the guardrail, now separated from his companions, without any contextual or oral indication that he was free to leave nor pause to give him time to consider his rights, Mr. Hight was asked to consent to a search. *See State v. Chapman*, 939 P.2d 950 (Kan. Ct. App. 1997).

Faced with these circumstances, most people would feel coerced into consenting. Mr. Hight's encounter was additionally layered with race. He was stopped by a white officer in an area where few blacks live. He predictably responded to Officer Graves by being exceedingly polite and submissive.

At least one court in New Hampshire excluded evidence when consent is granted in coercive circumstances during a traffic stop. Brett Buteau was stopped for speeding in Newport. The officer determined he had not been drinking and there was no evidence of wrongdoing. Nonetheless, because his eyes were glassy and he had out-of-state plates, the officer requested permission to search. In suppressing the resulting evidence, the court held that "Any other ruling invites the unscrupulous to abuse the consent exception to the warrant requirment by taking advantage of obedient, law-abiding citizens." *State v. Brett Buteau*, No. 95-S-183, ORDER ON DEFENDANT'S MOTION TO SUPPRESS, (Sullivan Cnty. Super. Ct. *Robert Morrill,* J., April 8, 1996), *appx. to brief* at 58.

Mr. Hight's "consent," in the totality of these circumstances, was not voluntary. Accordingly, the fruits of the search should have been suppressed.

III. Crafting a Rule for Signaling the End of a Traffic Stop – The Problem and Possible Solutions

A. The Problem – When Does a Valid Traffic Stop End?

The question this cases raises is when does a valid traffic stop end. *State v. Robinette*, 653 N.E.2d 695, 697 (Ohio 1995) (subsequent history omitted). The question, from a motorist's point of view, comes frequently and as a product of intentional police training and practice, but is not simple and may have serious repercussions.

1. People Feel Compelled to Consent

Beyond coercion, there is no rational reason a person stopped for a motor vehicle violation would consent to a search. No driver wants talk to the police unless they're in trouble, nor have themselves or their car searched.

> "What is baffling about consent to search is why it is ever given. Why should anyone surrender to the police, perhaps without a whimper, an interest recognized both practically and legally to be of the first order and often resulting in the discovery of evidence that incriminates the consenter?

Daniel Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175, 187 (1991). Yet, virtually everybody says "yes" to a request to search. *Ohio v. Robinette*, 117 S.Ct. 417, 425 (1996) (*Stevens*, J., dissenting).

If a driver allows a search before the end of the valid portion of the stop – before the ticket is written – then the reason to consent is in the hopes that they will only receive a warning. This is patently coercive. Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?"* 48 CASE W. RES. L. REV. 201-202 (1997).

But "if a suspect refuses consent to a search, this may reinforce the prior police suspicions

and prompt them to focus their subsequent investigative efforts upon the suspect." 3 W. LAFAVE, SEARCH AND SEIZURE § 8.1, p. 597 (3rd ed. 1996). Drivers, of course, know this viscerally, and probably figure that if they consent, it will prove their inocence and allow them to be on their way. *Id.*

In *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), for example, a couple was stopped for not wearing a seatbelt. The driver provided his license and rental contract for the car, explained that the contract was in his wife's brother's name because the couple did not have a credit card, and that he was an authorized driver. The officer concluded that all papers were in order, decided to not write a ticket, but approached the car to check its mileage. The officer then asked the wife a series of questions about her husband's prior statement that they were *en route* from their home in Florida for a vacation in Las Vegas, and she stated they had saved $5,000 for the trip. When the police noticed that the wife was pregnant, perspiring and breathing heavily, seemed nervous, and avoided making eye contact, he requested they sign a consent-to-search form, which resulted in discovery of some drugs. The court found that there were no objective circumstances to suggest that the couple had committed any crime more serious than not wearing a seat belt, and there was no articulable suspicion to check the odometer or conduct the intrusive questioning. Nonetheless, the defendants did consent to the search.

People simply do not have the moxie to leave. They think they must stay, answer questions, and believe they have little choice but to consent to a search. Most people believe they have a duty to do so. *Ohio v. Robinette*, 117 S.Ct. 417, 425 n. 4 (1996) (*Stevens*, J., dissenting), *citing* 4 W. LAFAVE, SEARCH AND SEIZURE § 9.3(a), p. 112 (3rd ed. 1996). Drawing on the work of noted psychologists, one commentator wrote that "powerful psychological forces

are at work even in the noncustodial police-citizen encounter." Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215. Obedience to authority is "a deeply ingrained behavior tendency" in all people. *Id.* at 234. "[T]he degree to which a person obeys authority largely depends upon the uniform worn by the authority figure." *Id.* at 238. The trappings of authority – badge, weapon, uniform – transform the officer's request to search into a "courteous expression of demand backed by force of law." *Id.* at 241-42.

The Supreme Court noted that there is "substantial anxiety" caused by the police stopping one's car. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). Most people feel they have no choice but to submit to the officer's will, based on the objective actions of the officer. *Orozco v. Texas*, 394 U.S. 324 (1969).

The State, and this Court, have acknowledged the pressure. In *State v. Webber*, 141 N.H. 817 (1997), the State argued that refusing consent is "unreasonable," apparently believing that once the police stop drivers, they *must* consent to a search. This Court rebuffed the argument and said that despite the pressure, "consent cannot be imposed upon an individual who chooses to exercise his constitutional right to be free from unreasonable searches." *Webber,* 141 N.H. at 821.

Many people consent to a search, of course, because they don't know their rights. LAFAVE, § 8.1. Even if they do know, however, many probably don't realize a transition has been made from the valid portion of the traffic stop to the post-valid period.

> "Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue

> to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him. . . . A 'consensual encounter' immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all."

State v. Robinette, 653 N.E.2d 695, 698-99 (Ohio 1995) (subsequent history omitted).

Whatever the reason for not exercising one's right to refuse consent, many searches are very intrusive, and frequently result in arrest for an unrelated offense. *Ohio v. Robinette*, 117 S.Ct. 417, 425 n. 5 (1996) (*Stevens*, J., dissenting).

2. Motor Vehicles Regulations are Comprehensive

Cars and driving them are highly regulated. Vehicles codes are

> "so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop."

Whren v. United States, 517 U.S. 806 (1996) (*Scalia*, J.).

> "There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. Reading the codes, it is hard to disagree; the question is how anyone could get as far as three blocks without violating the law."

David Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 557-58 (1997).

3. The Police Are Good at Getting Consent

The police use the comprehensive nature of the vehicle codes to their advantage.

> "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made. You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway. In the event

> that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search."

LAWRENCE P. TIFFNEY *et al.*, DETECTION OF CRIME 131 (Frank J. Remington, ed., 1967) (paragraphing omitted).

In *Thomas v. State*, 614 So.2d 468, 471 (Fla. 1993), for example, the defendant was stopped, in a known high-drug area, for riding a bicycle without a bell, and then arrested for carrying a concealed handgun.

Because the police can "stop vehicles in almost countless circumstances," *Maryland v. Wilson*, 519 U.S. 408, __ (1997) (*Kennedy* J., dissenting), vehicle stops are common and often morph into searches.

The police are in fact trained to use traffic stops to develop consent during car stops. Mark G. Ledwin, Note, *The Use of the Drug Courier Profile in Traffic Stops: Valid Police Practice or Fourth Amendment Violation*, 15 OHIO N.U.L. REV. 593, 605-607 (1988) (noting police education and experience in gaining consent to search during traffic stops through various techniques); *State v. Retherford*, 639 N.E.2d 498 (Ohio Ct. App. 1994) (police trained to develop consent); *People v Turriago*, 644 N.Y.S.2d 178 (1996) (subsequent history omitted) (officer testified standard procedure "is to stop vehicles, either through a road block or roving patrol, and ask the occupants for consent to search the vehicle, conducting a search if consent is granted").

In Mr. Hight's case, Officer Graves testified that he has had "training, seminars, dealing specifically with highway drug interdiction" and in "aggressive patrol tactics for drug enforcement." *Trn.* at 5-6. When asked to define "drug interdiction," he said

> "Drug interdiction is stopping a vehicle for a violation, developing suspicion and probable cause that there may be drugs in the vehicle, and obtaining consent to search the vehicle for any drugs."

Trn. at 6. Note that Officer Graves did not testify that he might merely *find* something suspicious, but that it was his object to "develop" suspicion and to "obtain" consent. His testimony suggests that, as part of his mission, he was looking for the opportunity to search drivers.

4. Police Get Consent Frequently

Because of people's propensity to consent, and police tactics designed to exploit that, officers frequently gain consent to search.

> "The officer starts with innocuous sounding questions: Where are you coming from? Where are you headed? Who's the person you're visiting? What's her address? Who's with you in the back seat? Then the questions often get more personal. They are designed to find contradictions that show the driver might have something to hide, and to put the driver in the frame of mind of responding to the officer's authority. Police call it 'sweet talk,' and it almost always leads to a consensual search. None of this is accidental; rather, it is a well-honed, calculated psychological technique that police departments teach their officers. And it works. In the course of 150 stops over two years, one Indiana state trooper said, 'I've never had anyone tell me I couldn't search.'"

David Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 574-75 (1997) *quoting* Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers – Police Stop Many Cars For Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6 ("'We definitely tell [our officers] to try to talk their way into a search,' said Lt. Mike Nagurny of the Pennsylvania State Police bureau of drug law enforcement."). In *Ohio v. Robinette*, 117 S.Ct. 417, 422 (1996), Justice Ginsburg (concurring), wrote that the officer in that case requested consent to search during 786 traffic

stops. *See* Peterson, *Drug Couriers Easy Targets on U.S. 40*, N.Y. TIMES, May 8, 1987, at B1.

But more than any training, it is because people almost always consent that the police ask. David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 321; *Florida v. Kerwick*, 512 So.2d 347, 349 (Fla. Dist. Ct. App. 1987) (Officer Damiano testified he had searched more than 3,000 pieces of luggage in 9-month period). *United States v. Suarez*, 694 F.Supp. 926, 930-31 (S.D. Ga. 1988) (detailing frequency and success of one Georgia state trooper in asking for and receiving consent to search).

5. The Transition From Traffic Stop to Consensual Conversation is Seamless and Subtle

There is no demarcation, but rather much subtlety, in the transition from the valid traffic stop to the request to search that immediately follows.

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of vehicle that they are not legally obligated to allow."

State v. Robinette, 653 N.E.2d 695, 698 (Ohio 1995) (subsequent history omitted); *People v Rodriguez,* 945 P.2d 1351, 1364 (Colo. 1997) (where request for consent immediate, illegality of detention taints the request).

B. Possible Solutions

Courts and commentators have suggested a number of solutions for the problems resulting from a lack of regulation of officers' request for consent.

1. No Consent Searches in Routine Traffic Stops

In *Thomas v. State*, 614 So.2d 468, 471 (Fla. 1993), the Florida Supreme Court said that a

routine traffic stop is not the sort of "arrest" from which could flow a search incident. The ruling underscores that the police cannot detain a motorist for any longer than necessary to write a ticket, and effectively disallows the "may I search" question. *State v. Saroka*, 311 A.2d 45, 48 (R.I. 1973) (same).

Professor Christo Lassiter has argued that the police should not be allowed to request consent during traffic stops. He points out that a *Miranda* type warning is not good enough.

> "A warning requirement implies that mere knowledge of the right to freely and effectively withhold consent will safeguard against coerced consent. In a routine traffic stop where a seamless transition from the lawful detention to a request for consent occurs, citizens consent involuntarily because they are environmentally intimidated into doing so just as they are in custodial interrogations. Intimidation is effective when a person is alone regardless of one's level of knowledge. The cure for intimidation is not knowledge alone, but companionship accompanied by knowledge. . . . [While] legal representation may be the only viable comfort on earth [, i]t is impractical to make defense counsel available for roadside stops. In any case, the only competent legal advice would be to not consent. Thus the final solution is to eliminate the doctrine of uncounseled consent from the lexicon of traffic stop interrogations. If no probable cause or other basis to search the car exists at the conclusion of the routine traffic stop, the car should not be searched."

Christo Lassiter, *Eliminating Consent From the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 132-133(1998); *see also* Robert H. Whorf, "*Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U.L. REV. 379, 408-09 (1997).

2. Miranda-Type Oral Warning of Right to Refuse Consent

Short of disallowing consent completely, there is the possibility of requiring a warning that the motorist has a right to not consent, similar to Miranda. The United States Supreme Court rejected this in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). New Hampshire rejected it in *State v. Feole*, 121 N.H. 164 (1981), but left open the possibility of revisiting the issue. *Id.* at 168 ("Although this court is free to require that a person be informed of his right to withhold his

consent, we are not prepared to do so at this time.")

New Jersey, however, requires a Miranda-style warning, and does not appear to have weakened law enforcement. *State v. Johnson*, 346 A.2d 66, 68 (1975).

Even this, however, is an incomplete solution. Even informed of one's right to refuse consent, without the means to leave (return of license, car keys, etc.), or without the officer stopping the "conversation" so that the motorist does not feel compelled to stay, few will take advantage of the information. Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U.L. REV. 379, 407-08 (1997).

3. Showing of Reasonable Need Coupled With Reasonable Suspicion

One commentator suggested that in order for the police to request consent, the state must show not only reasonable suspicion, but also reasonable need. *See* Daniel Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175 (1991).

4. Return of Documents and Unmistakable Behavioral Indications That Detention Has Ceased

One court has required that, before an officer can request consent to search, the officer must return to the driver the instruments necessary to operate the vehicle. In *United States v. Soto*, 988 F.2d 1548 (10th Cir. 1993), the tenth circuit said

> "The law requires a driver to be in possession of a valid license and registration when operating a motor vehicle on public roads. As long as the driver does not have those items, he or she cannot legally drive away."

Soto, 988 F.2d at 1557.

While "this rule directly addresses the issue of the legality of the consent to search . . . alone [it] is still insufficient" because the documents can be returned in a swift motion

simultaneously with the officer asking the consent questions. Robert H. Whorf, "*Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 408 (1997). The driver will be in possession of the documents, but will not feel free to drive away with a police officer talking in the window.

5. First-Tell-Then-Ask

While not a Miranda-type warning advising a motorist of their right to refuse consent, one solution is to require notification when the traffic detention portion of the stop has ceased, and when the voluntary conversation (with request to consent) begins.

This "first-tell-then-ask"[30] rule was initially adopted by the Ohio Supreme Court in *State v. Robinette*, 653 N.E. 2d 695 (Ohio 1995). It required that the officer say, "at this time you are legally free to go" or similar words. The state appealed, and the United States Supreme Court, after discussing adequate and independent state grounds, said that the federal fourth amendment did not require such notification. *Ohio v. Robinette*, 117 S.Ct. 417 (1996). On remand, the Ohio court substituted a totality of the circumstances test in which a notification would be one factor. *State v. Robinette*, 685 N.E. 2d 762 (Ohio 1997). The United States Supreme Court decision sparked a flurry of commentary on the issue.

There are a lot of reasons this rule makes sense.

i. First-Tell-Then-Ask is a Bright line Rule

The "first-tell-then-ask" rule creates a bright line that is clear for everyone when detention ends. There has long been a bright-line rule regarding when seizure begins, *see California v.*

[30]The label appears to have been coined by Justice Ginsburg. *Ohio v. Robinette*, 117 S.Ct. 417, 425 (1996) (*Ginsburg*, J., concurring).

Hodari D., 499 U.S. 621, 627-28 (1991), and so there should be a clear demarcation of when it ends.

While Judge Rehnquist claims that the Supreme Court has "eschewed" bright-line rules in its fourth amendment jurisprudence, *Robinette*, 117 S.Ct. at 421, it's not true. *See Michigan v. Summers*, 452 U.S. 692 (1981) (*per se* reasonable to detain occupant of house during execution of search warrant); *Dunaway v. New York*, 442 U.S. 200 (1979) (custodial interrogations *per se* unreasonable in absence of probable cause); *Oliver v. United States*, 466 U.S. 170, 181 (1984) (fourth amendment not apply to open fields) (Supreme Court "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."); Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?"*, 48 CASE W. RES. L. REV. 173, 191-196 (1997).

The New Hampshire Supreme Court has expressed a preference for bright-line rules. In *State v. Sidebotham*, 124 N.H. 682 (1984), this Court rejected the "expectation of privacy test" to determine third-party standing to raise search and seizure issues. This Court wrote that the United States Supreme Court's "expectation of privacy" doctrine

> "simply introduces into the law enforcement and judicial process yet another flexible threshold determination to be made for the orderly and fair disposition of criminal cases. The protection of constitutional rights and effective law enforcement will be better aided by our adoption of 'automatic standing' – a simpler, less fact-specific test."

Sidebotham, 124 N.H. at 687 (quotations and citations omitted). This Court has thus adopted bright-line rules in several contexts. *See e.g., State v. Tapply*, 124 N.H. 318, 325 (1983) (no

"good faith" exception to exclusionary rule); *State v. Sterndale*, 139 N.H. 445 (1995) (no general car exception to warrant requirement).

ii. First-Tell-Then-Ask Rule Recognizes Fiction of "Consent" Where There is an Imbalance of Power

The rule also recognizes the fiction of "consent" where there is an imbalance of power, whether created by being in custody, arrested at night along a lonely road, stopped by an officer with all the indicia of authority, intimidated by skillful and subtle efforts to gain consent, or confronted by a racial differences.

iii. First-Tell-Then-Ask Rule Strengthens Law Enforcement's Control Over the Encounter

> "Rather than being an unfair burden upon officers [a bright-line rule] actually strengthens law enforcement's ability to control their encounters with individuals. Without a clear test, citizens may receive a signal from the *Robinette* decision that once an officer takes a breath, they can walk away. Officers might fear allowing themselves even a moment of pause, for any hesitation could be a pretext for a motorist to head for the car. Instead, compliance with lawful police orders should be encouraged. [A bright-line rule], based as it is on overt communication, clarifies the encounter for the individual, thus allowing the officer to maintain better control."

George M. Dery, III, *"When Will This Traffic Stop End?": The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern – Ohio v. Robinette*, 25 FLA. ST. U. L. REV. 519, 564-65 (1998). In cases when the officer informed the defendant that the traffic stop was over, and the defendant consents anyway, conviction is a certainty. *See e.g., United States v. Ramos*, 20 F.3d 348 (8th Cir. 1994), *aff'd*, 42 F.3d 1160 (8th Cir. 1994) (conviction upheld because defendant was apprized of his right to refuse consent, breaking chain of coercion).

In his dissent in *Robinette*, Justice Stevens noted that police organizations do not disagree with the practice of informing motorists when they are free to go. *Ohio v. Robinette*, 117 S.Ct.

417, 428 n. 12 (1996) (*Stevens*, J., dissenting).

iv. First-Tell-Then-Ask Rule Follows From Existing Law

As noted above, an officer cannot detain a person longer than necessary to fulfill the purposes of the stop. The "first-tell-then-ask" rule is a logical adjunct to this, and merely makes clear when the detention ends. Moreover, as also noted above, this court has made clear that fishing-expedition searches are not allowed. With the "first-tell-then-ask" rule, making it clear that detention is over and consent has begun, the officer can freely go fishing for evidence, and cannot then be alleged to have violated the motorists rights when he finds some.

New Hampshire law is significantly more protective than the federal fourth amendment. *See e.g., State v. Sterndale*, 139 N.H. 445 (1995); *State v. Canelo*, 139 N.H. 376 (1995); *State v. Sidebotham*, 124 N.H. 682, 686 (1984) ("This court has consistently recognized that in a given situation our State constitution often will afford greater protection against the action of the State than does the Federal constitution.") (brackets, quotations omitted); *State v. Ball*, 124 N.H. 226 (1983). Thus, the rule comports with our constitution, even if not mandated by the fourth amendment.

The "first-tell-then-ask" rule serves the purposes of the New Hampshire constitution's protection against searches and seizures. *State v. Tapply*, 124 N.H. 318, 325 (1983) (because the government has no power to violate or infringe upon rights against searches and seizures, "any such violation is a nullity" and the evidence obtained in violation of those rights cannot be used as evidence).

v. First-Tell-Then-Ask Rule Isn't *Miranda*

The "first-tell-then-ask" rule has been criticized as being *Miranda* in a different guise:

"The distinction between being informed of the right to refuse a search and being informed of the right to leave the scene is insignificant." *State v. Robinette*, 653 N.E.2d 695, 700 (Ohio 1995) (subsequent history omitted) (*Sweeney*, J. dissenting).

Justice Ruth Ginsburg likened the rule to Miranda. In her *Robinette* concurrence, she wrote that it is prophylactic, and will reduce number of violations of rights. *Ohio v. Robinette*, 117 S.Ct. 417, 422, 423 (1996) (*Ginsburg*, J., concurring). While hopefully it would reduce violations of rights, because people tend to consent when asked, it is unlikely the rule will reduce *consent searches.*

Miranda probably hasn't reduced the number of confessions; rather than coercing confessions, police now use a variety of techniques to gain a waiver of a suspect's *Miranda* rights. *See e.g., Moran v. Burbine*, 475 U.S. 412 (1986). Police frequently get consents to search in non-custodial situations, and the rule does not affect those. It only makes clear that the person is not in custody. George M. Dery, III, *"When Will This Traffic Stop End?": The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern – Ohio v. Robinette*, 25 FLA. ST. U. L. REV. 519, 565 (1998). Moreover, the criticism begs the issue – in traffic stops, there is not generally any reason to search. Thus, the "first-tell-then-ask" rule will not slow down the police because, as demonstrated above, people will continue to consent when asked. Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 406 (1997).

6. First-Tell-Then-Ask Rule as Part of Totality of Circumstances

On remand, the Ohio Supreme Court substituted a totality of the circumstances test in which a notification would be one factor. *State v. Robinette*, 685 N.E. 2d 762 (Ohio 1997);

United States v. McSwain, 29 F.3d 558 (10th Cir. 1994). While this is marginally better than no rule at all, it does not go far enough. The totality test ignores the reality that most people *don't* know their rights, does not address potential racial issues in traffic stops, and assumes incorrectly that pretextual traffic stops of those targeted by police for some other reason are actually as short as envisioned in *Terry*. Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?*", 48 CASE W. RES. L. REV. 173, 205-08 (1997).

CONCLUSION

The entire notion of using traffic stops as a way to snoop on citizens is not in the spirit of American democracy. One Florida Court found it

> "extremely troublesome the admitted policies of these . . . deputies regarding 'encounters' with the public. Despite the apparent protections . . . of the Florida Constitution, commonly referred to as a 'right of privacy', the evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers -- in short a *raison d'etre* -- is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification, tickets, ask to search luggage – all in the name of 'voluntary cooperation' with law enforcement – to the shocking extent that just one officer . . . admitted that during the previous nine months, he, himself, had searched *in excess* of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck. It certainly shocks the *Court's* conscience that the American public would be 'asked', at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions. This Court would ill-expect *any* citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. And these officers know that -- that is one reason that they display those trappings. It is much like the feeling that an ordinary citizen has on seeing a patrol car behind him, or observing blue lights flashing, or being confronted by a police officer asking questions."

State v. Kervick, 512 So.2d 347, 348-49 (Fla.App. 1987).

Based on the foregoing, Mr. Hight requests this Court to find that the police cannot request consent to search during traffic stops without clear indications of voluntariness or knowledge of rights, and to institute controls on when traffic stops end.

Because no such procedures were used here, he therefore requests a ruling that the evidence gained as a result of Officer Graves's search should have been suppressed, and requests a reversal of his conviction.

Respectfully submitted,

Dorian Hight,
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 2, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Dorian Hight requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 2, 2000, copies of the foregoing will be forwarded to Janice K. Rundles, Assistant Attorney General.

Dated: August 2, 2000

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APPENDIX