

Testimony of Professor Albert (Buzz) Scherr

Thank you to the Commission for allowing me to testify. I am currently a professor at UNH Law. Prior to that I was a public defender in NH for 13 years, representing over 2,000 clients on everything from juvenile to homicide cases. As such, I worked with police, prosecutors, jailers and mental health professionals on a regular basis. I have been on the faculty at UNH Law for 27 years. Relevant to my testimony today, I teach the foundational course, Criminal Procedure that examines police investigative conduct in the context of the U.S. and N.H. Constitutions, somewhat fondly known as cops, robbers and the Constitution.

This means I have taught many of the prosecutors, defense lawyers and even some of the judges in NH and continue to maintain relationships with many of them. I have also worked closely with members of the legislature over the last five years in the area of criminal justice reform, providing testimony and helping write draft legislation. I continue to talk and consult with prosecutors and defense lawyers around the state about many aspects of the criminal justice system.

I want to take you back to a case that was referred to early in the Commission's hearings, *State v. Ernest Jones*. Briefly, one evening in April, two police officers responded to a call about a suspicious vehicle, a pickup truck to be exact, in the parking lot for an apartment building. The pickup's driver was a Black man and the passenger was a White woman. The two officers approached the pickup and allayed their suspicions, finding out that the woman was a resident of the apartment building.

Though they had no reason (no reasonable suspicion, in legal terms) to detain the two any longer, they did. They took the Black man's ID and for about 20 minutes ran a "warrant check." (Note that the NH Supreme Court found that the two officers did not have a reasonable basis to detain the two - to keep them from leaving during those 20 minutes.)

It is hard to conclude anything other than the officers illegally extended the detention due to racial profiling – "he's Black and something isn't right here." That may

have been an intuitive hunch or a conscious basis for a decision. The bad decisions did not stop there. The prosecution at the trial and appellate levels opposed the defense's argument that the court should take into consideration how Mr. Jones, the black driver, felt as a Black man, about being detained for 20 minutes for no reason.

One can only think of this circumstance as a clear example of racial profiling. And, you can see other examples of this in the cases presented to the Commission by Attorney Donna Brown. In several of those cases, the police used minimal motor vehicle violations to stop Latinx individuals in order to investigate what were, at best, hunches about other, more serious crimes, relying in part on the nervousness of the people of color in the face of out-sized police questioning for a minor motor vehicle violation.

However, my testimony is not about the officers' implicit bias and racial profiling in *Jones*. It is about the decisions by the prosecutors in that case to go forward with the case at the trial level and at the appellate level. That is just as much a failure to recognize racial profiling as is the officers' choice to continue to be suspicious of a Black man legitimately present in a apartment building parking lot with a building resident.

Any prosecutor who chooses to prosecute a case of what is transparently profiling is complicit in the profiling and sends a message to the police that it is okay. This Commission needs to rein in prosecutorial conduct like this in its efforts at improving law enforcement practices in relation to people of color. When prosecutors condone such conduct by ignoring it, they send a powerful message of approval to the police: winning is more important than the justice that comes with calling out racial profiling.

We need to change the mindset of the most powerful players in the formal criminal justice system – prosecutors. They too are effectively members of the law enforcement community They:

1. make judgements about whether to charge or not charge someone;
2. the seriousness of the crime with which to charge them;
3. the nature of the sentence to recommend as a part of a plea or after a guilty finding;

4. whether to call to account a police officer like those in the *Jones* case for transparent racial profiling;
5. whether to train police officers with whom they work about implicit bias and, in particular, racial profiling.

To be blunt, this Commission needs to say explicitly and unambiguously to prosecutors in NH that racial profiling is not okay. You must not condone it by ignoring it. Its existence must not be cast aside simply because obtaining a conviction is more important.

My belief is that prosecutors in NH don't notice racial profiling like that which occurred in the *Jones* case. Sadly, they probably don't know any better, after all virtually none of them work with people of color. They seem to implicitly choose to ignore the existence of obvious racial profiling in favor of going forward towards a conviction.

I appreciate how difficult a prosecutor's job is. They have a tremendous amount of power, and it comes with very difficult responsibilities. They deal with defendants, counsel, witnesses, police officers, victims, victims' advocates and victims' families as well as judges. The pressure to turn over cases quickly is immense and often occurs in the politically charged environment of an elected county attorney's office. Yet, their pre-eminent ethical responsibility is not only to do what they can to win the case but also, most importantly, to do justice.

Prosecutors need to better understand what implicit bias is. They need to understand what racial profiling is, which is often an outgrowth of implicit bias but also an independent issue related to conduct. This is a call for a change in mindset amidst a hard job.

Prosecutors need to be able to call out police officers for racial profiling. That is an immensely difficult thing to do. And, county attorneys and their supervising attorneys (after receiving training themselves) must set a clear example that they expected to be followed by their assistant county attorneys in that racial profiling is not okay, regardless of how its acknowledgement affects the chances of getting a conviction. And, prosecutors need some version of a support system within and outside their office so they are not making these

decisions on their own. To put it simply, the single most powerful way to stop racial profiling by police is for prosecutors to say, “no, I will not prosecute that case.”

Prosecutors also need to be able to call out other kinds of police misconduct. Police misconduct can mean many things. It can be Laurie-list related conduct. It can be the kind of roughing up that criminal defense lawyers hear about from their clients. It can be criminal conduct. It can be lying in a report or on the witness stand. Without question, the large majority of police officers do not engage in this kind of behavior. But, it happens as I learned when I practiced in the criminal justice system for 13 years and as I continue to hear from defense lawyers throughout New Hampshire. Prosecutors have a unique perspective on such conduct and need to find ways to act on what they hear and see. A requirement that they report such misconduct would make a significant difference.

Prosecutors also need to create a more racially diverse work culture in their offices. As best I can determine, there are two Asian-American prosecutors in the Hillsborough County Attorney’s office. There are no other prosecutors of color in County Attorneys’ offices in New Hampshire.

A work culture devoid of diversity makes it that much easier to never confront the realities of what it is to be a person of color in the criminal justice system. It makes it that much more likely that any remedies to racial profiling implemented by the most powerful players in the criminal justice system will fall by the wayside in the pursuit of convictions.

My recommendations are as follows. They are based on the existence of racial profiling in NH, evidenced by the decisions to proceed with the cases originating from racial profiling that others have offered to this Commission:

1. **Every prosecutor in the NH should receive annual implicit bias training.**
2. **Every prosecutor in the state should receive annual training on what constitutes racial profiling and the importance of identifying, acknowledging and accounting**

for it in their decisions. This training should be done in collaboration with trainers from outside the prosecutors' offices, be it at the municipal, county, or state level.

3. **Require prosecutors to report police misconduct to the department chief and police standards and training** by adding them to the recently passed legislation requiring police to report certain misconduct by a fellow officer.
4. **Recommend to the Supreme Court that they pass a Rule of Professional Conduct that requires a prosecutor to report police misconduct to the appropriate authorities.**
5. **Prosecutors' offices must develop specific plans for increasing the diversity amongst the prosecutors in their office.**
6. **Comprehensive data collection and release of race/ethnicity data by prosecutors' offices concerning charges; indictments; dismissals and decisions not to charge or indict.**

Finally, I will point out that, as I have been training law students who have become prosecutors in NH for 27 years, I must do a better job in the way I introduce developing prosecutors to racism in the criminal justice system; how it is directly and explicitly implicated in the quality of their decision-making. And, I must find ways to help them move forward with that awareness. Such is my *mea culpa*.