

Testimony from Donna J. Brown on behalf of N.H. Association of Criminal Defense Lawyers – June 26, 2020.

About three months ago I got a call from a client who was on the side of the road after being stopped by the police. He said he had done nothing wrong and he thought he was being racially profiled. He was screaming and the police officer was yelling back at him, and things were spiraling out of control. I said, “Breathe, it’s going to be ok. Try to stay calm. See if the officer will take the phone.” He handed the phone to the officer. The officer screamed at me, “He just called me a F\*\*\*ing racist – I’m not a racist.” I said, “This isn’t about you...I’m sure you aren’t racist. Jim has experienced a lot of trauma because of mistreatment by the police and his childhood so even contact by a good officer can trigger him.” I asked the officer, “Have you ever had a friend or family member who was in combat and got PTSD and they got triggered in an irrational way?” He said, “Yes.” I said, “It’s the same thing. If you talk quiet, he will be ok.” Five minutes later they were joking with each other. Later I learned the officer stopped my client because of a non-specific “suspicious vehicle call.”

Criminal defense lawyers having been trying to educate law enforcement about racial bias since the 1980’s because we’ve had a front row seat to it. Every time we tried to combat racial bias, the police, and the prosecutors that enable them, have fought us every step of the way. In the 1987 U.S. Supreme Court case of *McCleskey v. Kemp*, defense lawyers presented volumes of irrefutable evidence about racism in the criminal justice system, but the court ignored the research.<sup>i</sup>

*McCleskey v. Kemp* held that accepting the argument that race played a significant role in the administration of the death penalty would call into “**serious question the principles that underlie our entire criminal justice system.**”<sup>ii</sup> In the famous words of Justice William Brennan’s dissent, law enforcement and the courts were afraid of “too much justice.”

As Justice Brennan observed in the *McCleskey* dissent:

**“[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.”**<sup>iii</sup>

That’s Justice Brennan using research from criminal defense attorneys in **1987** trying to shine a light on implicit bias and institutional racism, but society and the police ignored this information. The police and prosecutors ignored racial bias in the criminal justice system for over 30 more years. It is only when people are marching in the streets saying “Defund the Police” that you are now willing to listen.

Criminal defense attorneys tried again in 1996 in *Whren v. United States*.<sup>iv</sup> We warned the court that the police were abusing the use of minor motor vehicle stops to stop persons of color with the resulting risk of racial profiling.<sup>v</sup> Again, the police and the prosecutors who enabled them, fought against criminal defense attorneys’ attempts to limit the use of pretextual stops and we lost the *Whren* case. The CATO Institute found that the decision in *Whren* basically legalized racial profiling for the last 20 years.<sup>vi</sup>

The New Hampshire State Police even have a specialized unit trained to use these types of pretextual stops – it’s called the N.H. State Police Mobile Enforcement Unit (MET). As one of the troopers from that unit described it, the unit is a “proactive policing unit [where they] basically try to stop crimes before they actually occur.” This is the motor vehicle equivalent of “stop and frisk” that was outlawed in New York City due to its misuse as a tool for racial profiling.<sup>vii</sup> It is this type of policing that killed Sandra Bland.<sup>viii</sup>

Numerous recent N.H. cases show how this type police training facilitates racial profiling:<sup>ix</sup>

**Brian Perez** was stopped by the NH State Police for having his hands on the 10 and 2 position on the steering wheel.<sup>x</sup>

**Miquel Perez** was stopped by the NH State Police for allegedly following to close and changing lanes while simultaneously turning on his turn signal.<sup>xi</sup>

**John Hernandez** was stopped by the NH State Police for both having his hands in the 10 and 2 position and following too close.<sup>xii</sup>

**Ernest Jones**, who is black, was detained by the Concord Police because a 911 caller said that he was suspicious for sitting in a car.<sup>xiii</sup>

The list goes on.

These cases are just the tip of iceberg of persons who have been racially profiled. These are people who got arrested. This list does not include all the people who were stopped on a claimed violation of a motor vehicle offense, but they knew in their heart they were stopped because of the color of their skin. The police are supposed to be the good guys, but they are causing pain.

I know there will be resistance to ending pretextual motor vehicle stops and the MET. The police will say “we need this tool to fight the opioid epidemic.” Our response to that argument is that there are two ways to fight the drug crisis: go after the supply or the demand. Those fighting the supply have failed to solve the problem after 30 years and instead caused the disproportionate incarceration of persons of color.<sup>xiv</sup> Let’s try working on the demand by training the police not to racially profile and instead getting more treatment facilities and other social supports for persons struggling with addiction, trauma and other mental health issues related to addiction.

Instead of training officers so expand the scope of roadside stops and search cars without probable cause, the police need to be trained not to ask for consent to search when there is no evidence of wrongdoing. You might think, “What’s the harm of asking for consent to search...if they’ve got nothing to hide it shouldn’t be a problem, right.” In some of the materials I’ve referenced, including the briefs in the *State v. Ernest Jones* case,<sup>xv</sup> research shows that, because of history of negative contact with the police, persons of color don’t feel free to say no to the police and these requests to search are coercive.<sup>xvi</sup> The police need to be trained and on this history and change their mindset.

Let’s get back to that phone call. I could have said to that officer, “He has trauma from his childhood and systemic racism,” but I didn’t say that. Why? I didn’t think the officer had the training and knowledge to know about how systemic racism contributed to my client’s fear of the

police. I didn't trust that this officer listened to the dissents in *McCleskey* and *Whren* that explained implicit bias and racial profiling. If that officer he had training about black history and information about the history of police misconduct against person of color, like the post-reconstruction Black Codes<sup>xvii</sup> discussed in the *McCleskey* case, he might have been able to de-escalate the situation without my help. I helped humanize my client to this officer in a way that he should have been able to do without my help.

In the late 1990's and early 2000s, defense attorneys again tried to fight racial profiling. We made some progress until 9/11 happened. The 9/11 attacks set back the fight against racial profiling 20 years.<sup>xviii</sup> We had been fighting racial bias against blacks and Hispanics for decades and now a new group was added to those being targeted – those of middle eastern ethnic origin and Muslims.<sup>xix</sup> Our fight against racial profiling has always been hindered by police refusal to keep data on their motor vehicle stops and to have dash cams and body cams.<sup>xx</sup> Yesterday, law enforcement said it might be expensive to do the training right. We do not want to hear about the costs of this training – if the police have money for riot gear, drug interdiction,<sup>xxi</sup> and police dogs they can find money to address racial bias. You cannot look back on 30 years of police misconduct and say we do not have enough money to do the right thing. That is unacceptable.

We are here today to focus on police training, which is just a small part of what needs to be changed in the criminal justice system. What do we recommend for training?

- Mandatory Police Academy training and yearly training in the history of police oppression of minorities, prejudice, and misconduct towards persons of color.<sup>xxii</sup>
- Mandatory yearly training on implicit bias, and to quote James McKim, training that changes your mindset on this issue.<sup>xxiii</sup>
- Mandatory yearly training on cases like State v. Ernest Jones<sup>xxiv</sup> and Commonwealth v. Warren<sup>xxv</sup> where the officers have to learn about how take the race of a subject into account in deciding whether there is reasonable cause to detain someone or whether they consent to a search.

There is one final lesson from that call, from the part where I told the officer I did not think he was racist. If I was being really candid I would have said, “You may not be racist but, if you are like the overwhelming majority of Americans,<sup>xxvi</sup> you have unconscious racial bias and you have to work hard to overcome that bias.” We all do. Training is just the start of the work to be done in repairing our history of racial injustice.<sup>xxvii</sup> Many of our members were concerned when the governor opened this commission by stating that N.H. law enforcement is the “gold standard.” Yesterday, Director Scippa said that “we do a very, very good job in NH.” This is not the time for N.H. law enforcement to pat itself on the back. This commission will have no credibility if law enforcement keeps coming in here praising themselves. It is a time for an honest, likely painful and long overdue discussion about race and the criminal justice system.

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<sup>i</sup> <https://www.aclu.org/blog/smart-justice/sentencing-reform/fighting-too-much-justice>

<sup>ii</sup> *Id.*

<sup>iii</sup> <https://www.law.cornell.edu/supremecourt/text/481/279>; citing Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan.L. Rev. 327 (1987).

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- iv <https://supreme.justia.com/cases/federal/us/517/806/>
- v <https://www.cato.org/publications/commentary/twenty-years-ago-supreme-court-effectively-legalized-racial-profiling>
- vi *Id.*
- vii <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html>
- viii <http://america.aljazeera.com/articles/2015/7/29/vehicular-stop--frisks-and-sandra-bland.html>
- ix *See* <https://www.nhpr.org/post/i-m-paranoid-drive-every-day-young-black-activists-speak-out-manchester>
- x <https://www.fosters.com/news/20200321/aclu-nh-state-policersquos-pretexual-whisper-stops-unconstitutional>
- xi <https://www.courts.state.nh.us/supreme/opinions/2020/2020028Perez.pdf>
- xii <http://www.nhd.uscourts.gov/sites/default/files/opinions/19/19NH109.pdf>
- xiii <https://www.aclu-nh.org/en/cases/new-hampshire-v-jones>
- xiv <https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0>
- xv [https://www.aclu-nh.org/sites/default/files/field\\_documents/final\\_amicus\\_brief\\_6.13.19.pdf](https://www.aclu-nh.org/sites/default/files/field_documents/final_amicus_brief_6.13.19.pdf);  
[https://www.aclu-nh.org/sites/default/files/field\\_documents/01-10-2020\\_opinion\\_issued\\_reversed\\_and\\_remanded.pdf](https://www.aclu-nh.org/sites/default/files/field_documents/01-10-2020_opinion_issued_reversed_and_remanded.pdf)
- xvi *Id.*
- xvii <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816>
- xviii <https://www.aclu.org/report/racial-profiling-911-report>
- xix *Id.*
- xx <https://www.policingproject.org/news-main/2019/9/27/its-time-to-start-collecting-stop-data-a-case-for-comprehensive-statewide-legislation>
- xxi <http://america.aljazeera.com/articles/2015/7/29/vehicular-stop--frisks-and-sandra-bland.html>
- xxii <https://www.americanprogress.org/issues/race/reports/2016/09/01/143357/the-intersection-of-policing-and-race/>
- xxiii <https://implicit.harvard.edu/implicit/education.html>
- xxiv [https://www.aclu-nh.org/sites/default/files/field\\_documents/01-10-2020\\_opinion\\_issued\\_reversed\\_and\\_remanded.pdf](https://www.aclu-nh.org/sites/default/files/field_documents/01-10-2020_opinion_issued_reversed_and_remanded.pdf)
- xxv <https://www.aclum.org/en/press-releases/sjc-stands-decision-black-men-have-cause-flee-police>
- xxvi <https://www.sciencemag.org/news/2020/03/meet-psychologist-exploring-unconscious-bias-and-its-tragic-consequences-society>
- xxvii <https://www.theatlantic.com/politics/archive/2019/06/can-practical-reforms-fix-polices-implicit-bias/592990/>