

Dir. Ahni Malachi: Recommendations for section 3 (b): procedures related to the reporting and investigation of police misconduct, and potential reforms...development of uniform statewide system of reporting, investigation, and punishment of police misconduct.

In the testimony received for this section, it is disheartening to have heard primarily from settlement attorneys. Certainly, for those wrongly accused and currently incarcerated, there is no other voice save the attorney working in their defense which were welcomed by the Commission. I presumed much of the public testimony would have been from unrepresented individuals.

The information below on several of the cases referenced from prior testimony shed light on noteworthy facts. These details are important to review in totality of the testimony given to the Commission. To provide balance, it is essential that transparency relative to connections is shared with the Commission members and the public. In this effort to better understand suggestions made to the Commission relative to the desire for favorable recommendations for sweeping law enforcement policy changes from the Commission.

Statements of Police “Misconduct”: Cases Mentioned in Testimony

State v. Ernest Jones – this is a case that was discussed at length during the testimony of Attorney Donna Brown (Defense Attorney for Ernest Jones, Adjunct Professor at UNH Law, and Chair of the NAACP Legal Redress Committee listed on the Manchester NAACP website. President James McKim is the leadership head of the Manchester NAACP Chapter and NEAC Member), Attorney Gilles Bissonnette (ACLU NH Legal Director) and sharing in the discussion, UNH Law Professor, Albert “Buzz” Scherr. All three shared testimony with the Commission at various times on this and other topics, however never fully disclosing the shared work provided to the defendant in the State v. Jones case. Nor discussing all of the factors surrounding the arrest and conviction of Mr. Jones.

Although the defense team (Attorney Donna Brown, Attorney Gilles Bissonnette, and UNH Law Professor Albert Scherr) are steadfast in their belief and expository conversation that the arrest of Mr. Jones was reversed and remanded back to the lower court due to the defendants race, it is very clear in the judgement of the court that it reached it’s ruling without consideration of Mr. Jones’ race, but due to other factors. The reading of the case is not in line with the testimony

presented multiple times to the Commission. As such, the Prosecution will look at the evidence to determine if Mr. Jones will have another day in court to relitigate this issue. If the arresting officer is available for court, the initial outcome (that Mr. Jones was found guilty at trial of drug possession) may still stand.

As with all defendants, I hope that Mr. Jones has his day in court along with the availability of the Prosecution to be prepared to prove its case. My concern continues to be the level of undisclosed relationships that has taken place relative to actual court case outcomes along with the lack of clarity regarding verdicts and court opinions. Of course, those in the legal profession know each other and may occasionally work together on cases, etc. The issue becomes the lack of clear information about said connections relative to the testimony given to this (or any other) Commission or appointed group to avoid the appearance of calculation or manipulation. Not doing so, gives information a standing it may not deserve when taken in its entirety with the connected facts.

The testimony provided was given from no less than three members of the defense team for Mr. Jones. That in and of itself is good – to be able to hear from boots on the ground. However, it would have been wonderful to have heard from them all together, for instance, to fully discuss the case and its proposed implications, or at the very least to have disclosed each was a member of the defense strategy and team for Mr. Jones.

McCleskey v. Kemp – Discussed by Attorney Donna Brown (Defense Attorney, Chair of the NAACP Legal Redress Committee, Adjunct Professor at UNH Law School), the testimony included dissenting information. That is important because it means that the dissenting side lost the legal argument, and the verdict still stands. To share dissenting opinions as if law, however well-meaning, is misleading to the lay person. Although these opinions are interesting they are not law and should be treated as such in testimony provided.

Whren v. United States – Discussed by Attorney Donna Brown (Defense Attorney, Chair of the NAACP Legal Redress Committee, Adjunct Professor at UNH Law School), and Gilles Bissonnette (ACLU NH Legal Director), this case is used as an example to compel one to review pretextual stops, abuse of police power, racial profiling, illegal search and seizure, among other points of law. Ultimately, “the Court made clear that an officer’s motivations are immaterial so long as there

exists a valid justification for an investigatory stop”. See *State v. McBreairty*, 142 N.H. 12, 13 (1997). Whren goes on to uphold the use by police of what has been discussed as a “pretextual stop” provided it is reasonable. Justice Broderick in *State v. McBreairty* goes on to say in his opinion (concurring with the other Justices):

“Consistent with this right, a police officer may stop a vehicle for investigatory purposes provided that the stop is based on a reasonable suspicion that the person detained had committed, was committing, or was about to commit a crime and the officer is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.”

State v. Hight – Discussed by Attorney Gilles Bissonnette (ACLU NH Legal Director), the charges in this case were reversed and remanded back to the lower court. The primary reason for this upon reading takes place at the onset of the police stop. According to the Court, there is no dispute as to the cause of the stop (speeding and a broken taillight), however, the scope of the stop was deemed unnecessarily expanded by the officer with no articulable suspicion of any criminal activity providing proper justification for further detaining the defendant. Anything after this point becomes tainted, which led the Court to reverse and remand. The race of the driver is mentioned, however long after the initial concerns with the merits of the case are stated upon appeal.

Jamison v. McClendon – Unfortunately, Mr. Jamison failed to provide relevant testimony that Officer McClendon’s actions were intrusive and/or coercive. Although Judge Reeves is troubled by qualified immunity extended to the officer in the case, the Judge went on to conclude that the officer should be extended the right to not be personally sued in the case. Judge Reeves goes on to quote the Supreme Court on this issue as an:

“ ‘attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of

*official authority.’ “ See Jamison v. McClendon No. 3:
16-CV-595-CWR-LRA (S.D. Miss. August 4, 2020).*

Judge Reeves goes on to say in his opinion that “overturning qualified immunity will undoubtedly impact our society.” The subject of qualified immunity will most likely continue to be discussed on a state (official immunity) and federal level. Losing the opportunity for personal protection in the rightful pursuit of one’s job is not a decision filled with wisdom. Should said person break the law, there is already a system in place to handle such things and to provide effective relief for the defense attorney and their client.

Additional information relative to the chart provided by Defense Attorney Donna Brown:

<u>Case/Evidence</u>	<u>Year</u>	<u>Outcome</u>
U.S. v. Garcia	2014	Not an impermissible stop. Defendant’s race was not an issue for police. The stop itself was not the problem, at issue was the length of time the stop lasted. Due to a lack of ‘reasonable suspicion’ to extend the stop the evidence was therefore suppressed.
State v. Brian Perez	2018	Not an impermissible stop. The points made by Attorney Brown are not relevant to the suppression of evidence. Again, the stop itself was not the problem. The issue of an expanded search is the actual concern. Which should be trained upon and corrected. Judge Schulman’s comments are informative and authoritative because he is a judge, however, they are not the holding of the case and should not be presented as such no matter how meritorious.
State v. John Hernandez	2018	Not an impermissible stop. Defendant’s race was not an issue for the Trooper. At issue is the length of time the stop lasted, and the Trooper could not point to ‘specific and articulable facts’ to have continued the stop.
State v. Ernest Jones	2017	Defendant’s race was not a consideration in the Supreme Court’s ruling to reverse the lower court. The arresting Officer did not testify; said testimony was important in the determination of the Defendant’s ability to leave. As such, all persons have a right under the N.H. Constitution to not have their freedom of movement restricted. The elements at the core of the case: freedom of movement and the lack of corroborating testimony by the arresting officer to determine if there was an articulable suspicion to detain the Defendant. Since this case has been remanded back to the lower court, there is another opportunity to show just cause should the Prosecution decide to try again.

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The reporter's commentary in the video lends more clarity to the understanding that the law must be followed. It is illegal to infringe upon a person's civil rights in the attempts to secure an arrest for drugs, weapons, explosives, etc.

Suggested Potential Reforms by Several Providing Testimony:

1. The ending of "pretextual stops" by police.

We have not fully discussed what defense attorneys are characterizing as "police misconduct" relative to a pretextual stop. Is there an assumption that race is the only reason for the stop? If so, that is already illegal. Is there an assumption that the location where the car is coming from or going to, is the only reason for the stop? If so, that is also illegal - unless there is a reasonable and articulable suspicion to stop a vehicle or to continue to keep a vehicle stopped while more information is gathered. The mere fact that data is scarce, in and of itself is not a beacon for change – nor is it stating there is nothing to investigate. Sweeping changes based on extraordinarily little data run the risk of creating a sea of unintended consequences that hurt the vulnerable communities law enforcement is intended to protect. Further, to assume that increased training, changing or updating policies will not have a measurable effect on minority communities when there is no data relative to the impact, could hamper law enforcement in its efforts to protect all communities.

When done correctly, a pretextual stop can be an effective tool of law enforcement without trampling on personal freedoms. If not performed properly, commanding officers are recommending training, along with other appropriate consequences. The court cases mentioned did not have the evidence suppressed because the stop was impermissible or that race was a factor. There were other reasons that were not brought to light during any part of the testimony (verbal or further detailed in writing). The stories of the stops that were deemed invalid and no charges were filled are the stories we do not hear about to the positive. A permissible stop was made, identification checked, person was cleared, drove off to continue their day.

Also please see above notes in *Whren v. United States*, and below notes in *State v. McBreaity*.

2. The ending of “qualified immunity” for government employees to include law enforcement officers.

Qualified immunity is a federal concept (supported by legal principle and precedent) that cannot be limited by state law. That being said, the assumptive claim has been made repeatedly that in order to have the public’s trust, there must be accountability by way of removing the defense of qualified immunity/official immunity if a police officer is taken to court. Qualified immunity extends to all government employees to also include law enforcement. There is no measurable data to support such claims.

It was mentioned in testimony, the state of Colorado has done so legislatively earlier this year (January of 2020). We have no way of knowing what appeals courts, state employee and police unions in the state have to say – and if the law will stand on its face if taken to court for further scrutiny. To have New Hampshire government follow in the footsteps of other states with no true test of the actual legality of the law is not prudent for us, or anyone. Again, sweeping, and seismic changes are not always the best course of action if what is intended is more than change written on the books. There are other instances where the sovereign is immune such as imminent domain and civil forfeiture where the government is protected from suit from the public.

One outcome that cannot be ignored is that attorneys have an opportunity to make a great deal more money if qualified immunity is removed from use for government employees to include law enforcement officers. A few statements given by Attorney Charles Douglas during his verbal testimony unequivocally sums up the discussion on the removal of qualified immunity/official immunity as a defense for government workers to include law enforcement officers with the understanding that the cap is not the actual cap and there are ways around the \$325,000 cap. This would apply if an individual is now personally sued after the removal of qualified/official immunity.

Attorney Douglas:

“...it’s a difficult thing because I’m gambling my time if I take the case. They’re not paying me. They’re not paying Larry (Attorney Lawrence Vogelmann, Shaheen & Gordon, P.A.). We are gambling our time on the hope that we can get a recovery and get paid...”

Further, Attorney Douglas affirmed there are ways around the cap in the following statement:

“...now that you’re into it, you’re absolutely right. It’s three and a quarter [three-hundred twenty-five thousand dollars] for the locals, however, ...if it’s under the federal Civil Rights Act, there is no cap. So that if a case is brought and resolved under the section 1983, there is no state law that can cap that. So that’s where the indemnity, or the insurance would kick in if it’s an amount above that.”

It has been consistently stated that police officers have more protection than a regular citizen driving a car. I would submit to you that an average citizen is not required in their daily course of work, to make split-second decisions with limited information in dealing with people who may not want to be apprehended in the commission of a crime. There is a distinct difference between an average citizen and an average police officer – one is responsible for daily making unpopular decisions and interfering with individuals that commit crime. The other does not.

The case below, *State v. McBrearty*, was provided as an example of privacy, however, the use of pretextual stops is discussed in this case and I believe germane to the overall conversation.

State v. McBrearty – The Court affirmed the lower courts finding at trial that the stop was not pretextual, and that the grounds provided by the officer for stopping Mr. McBrearty were “consistent with this right, a police officer may stop a vehicle for investigatory purposes.” See *State v. McBrearty* 142 N.H. 12, 13 (1997). In other words, there was no miscarriage of justice in the case for the defendant Mr. McBrearty and the stop was proper and contextually valid under the New Hampshire State Constitution.

In closing, simply repeating over and over that the public cannot trust law enforcement as a whole, does not make it so. The public is significantly smarter than that, even if the mantra is repeated daily to assist in a feeling of undermining the authority and the good works of New Hampshire law enforcement. Those that do not belong in uniform, should be unequivocally ushered out of the profession. No one disagrees with this idea and it is taking place on a regular basis.

My recommendations to the Commission are listed as follows:

Recommendations:

1. I support by recommendation all the submitted written and verbal testimony presented by Deputy Attorney General Jane Young of the NH DOJ relative to Law Enforcement transparency and accountability.
2. Although Attorney Gregory Sullivan (Malloy & Sullivan), Attorney Charles Douglas (Douglas, Leonard & Garvey, P.C.), and Attorney Gilles Bissonnette (ACLU NH) all representing the plaintiff – Union Leader Corporation, in *Union Leader v. Town of Salem (2020)*, have argued for the publication of the “EES or Laurie List” to be made public I recommend that the list not be made public. However, the names currently on the list must be appropriately processed with actionable outcomes. Once those on the list are processed, the list itself is dissolved with any future accusations being handled properly through local measures, Police Standards and Training Council (PSTC), and the Public Integrity Unit of the DOJ to provide needed oversight, transparency, and accountability.