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No. \_\_\_\_\_

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In the

**Supreme Court of the United States**

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**OLLISHA NICOLE EASLEY**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

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**Petition for Writ of Certiorari**

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## **Question Presented For Review**

When examining the totality of the objective circumstances, is a bus passenger's race a factor in understanding how a reasonable person in her position would not decline an official search request or turn away from interrogation, especially when she is the only one of her race on the bus and has not been informed she may refuse to interact?

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# Supreme Court of the United States

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**OLLISHA NICOLE EASLEY**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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## **Petition for Writ of Certiorari**

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Ollisha Easley petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in her case.

### **Opinions Below**

The Tenth Circuit's decision in *United States v. Ollisha Nicole Easley*, Case No. 18-2020, reversing the district court's order suppressing evidence, was published at 911 F.3d 1074 (10th Cir. 2018).<sup>1</sup> The district court's opinion

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<sup>1</sup> App. 1a-12a. "App." refers to the attached appendix. Citations to "App'x" refer to the appellant's (government's) appendix, which was filed with the Tenth Circuit and is paginated consecutively, in three volumes: pleadings in Volume I, transcripts in Volume II, and two audio recordings in Volume III. Citations to "Supp. App'x" are to the supplemental appendix filed in the Tenth Circuit by Easley. That appendix contains the transcript of Easley's post-arrest statements. "Doc." refers to the number of the document on the district court criminal docket sheet in No. 16-CR-1089-MV.

granting Easley's motion to suppress was published at 293 F.Supp.3d 1288 (D.N.M. 2018).<sup>2</sup>

## **Jurisdiction**

On December 26, 2018, the Tenth Circuit reversed the district court's order granting Easley's motion to suppress the evidence seized by government agents.<sup>3</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). According to this Court's Rule 13.1, this petition is timely if filed on or before March 26, 2019.

## **Pertinent Constitutional Provision**

### **U.S. CONSTITUTION, Amendment IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## **Statement of the Case**

### **A. The District Court proceedings.**

#### **1. Factual Introduction**

At public transportation facilities in Albuquerque, New Mexico, Drug Enforcement Agency officer Jarrell Perry employed the drug interdiction tactics he had honed over the course of 17 years. In March 2016, he believed

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<sup>2</sup> App. 13a-40a.

<sup>3</sup> App. 1a-12a.

Easley's information on a bus passenger manifest suggested signs of drug trafficking.

The officer, along with DEA officer Scott Godier, subsequently boarded the bus in which Easley was riding as passengers re-boarded following a scheduled stop in Albuquerque. Officer Perry questioned all the 35-40 passengers. He never told anyone he was looking for drugs. He claimed to be a police officer, and several times said he was checking for "security." Before reaching Easley, the officer confronted about two dozen people. None declined whatever requests he made of them. Several consented to his search of their belongings. One man even allowed the officer to stick a knife in his shoe.

Easley, who is African-American, was aware that every one had cooperated with the officer when he confronted her. She spoke with him and did as he asked. She told him her itinerary, gave him her ticket, consented to his search of her purse, pillow, blanket, carry-on bag, body and checked suitcase.

After the officer finished investigating the passengers, out of a baggage bin under the bus he took the two bags checked with Easley's reservation. The tag on one of the bags included her name and cellular telephone number. The other 'D brand' suitcase's tag had the name "Denise Moore" and Easley's telephone number. The officer searched the bag with Easley's name on it. Meanwhile the bus passengers were complaining about the delayed departure.

The officer learned from going through the boarding tickets with the bus driver that no one named Denise Moore had boarded. The officer re-boarded the bus and had Easley follow him off the bus, telling her she could bring her

purse, but that she did not have to bring her other belongings. Once outside with Officer Godier nearby, Officer Perry had her step away from the bus. He asked to see her ticket again. He kept her ticket for more than a minute. He asked her numerous questions. He had her give him her identification. He put aside her purse and re-searched it.

After noting he was recording his questioning, the officer then had Easley walk to the other side of the bus and view the 'G brand' suitcase. Easley disavowed any connection to that suitcase. Throughout his interaction with Easley, the officer never advised her of her right not to cooperate with him or to refuse a search.

Easley was directed back on the bus. The officer then searched the 'G brand' suitcase and found methamphetamine. He re-boarded the bus and arrested Easley. The bus left the bus terminal after its scheduled departure time. Later that day, Easley gave incriminatory statements in response to the officer's interrogation.

A grand jury indicted Easley for possessing with the intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Doc. 12; I App'x 10. She moved to suppress the methamphetamine contained in the 'G brand' suitcase and her post-arrest statements. She contended that when she abandoned that suitcase the agents had seized her without reasonable suspicion. The district court held an evidentiary hearing during which Perry and Easley testified.

2. **The district court found, based on the totality of the circumstances, that the officers seized Easley in violation of the Fourth Amendment when she abandoned the 'G brand' suitcase; accordingly, it suppressed the methamphetamine and Easley's post-arrest statements.**

In her motion to suppress, an argument Easley made was that she was illegally seized without reasonable suspicion when she abandoned the 'G brand' suitcase. A reasonable person would not feel free to end the encounter, she said, in light of the totality of the circumstances. Those circumstances included: the bus's confined space; the complete acquiescence of the passengers to the officer's wishes before he confronted Easley; the officer's particularized focus on Easley; the officer's persistent questioning and searching of Easley; the officer's having her step off the bus; the officers' delaying the bus from departing; and the officer's failure to advise Easley of her right not to cooperate and to refuse consent. Easley's abandonment of the 'G brand' suitcase and her post-arrest statements were the product of her unconstitutional detention, she concluded. I App'x 23-27, 87-93.

The government insisted Easley's entire encounter with the agents was consensual until the agents arrested her. I App'x 42-51, 68. Therefore, Easley's disclaimer of any relationship to the 'G brand' suitcase constituted an abandonment, which permitted the officer to search it without a warrant. I App'x 51, 68, 69, 75.

Following the evidentiary hearing during which the officer and Easley testified, the district court granted Easley's motion to suppress. App. 38a. The court found the agents had illegally seized Easley. The court applied the standards the Supreme Court established in *United States v. Drayton*, 536 U.S. 194 (2001) and *Florida v. Bostick*, 501 U.S. 429 (1991), and found, based on the totality of circumstances, that, at least by the time the officer had

Easley step off the bus, a reasonable person in Easley’s position would not have felt free to terminate the encounter. App. 28a. The court acknowledged some factors favored finding the encounter was consensual. App. 31a. However, the court determined those factors were outweighed by several coercive factors. App. 31-36a.

The district court found it significant that no passenger declined to cooperate with the officer. That fact suggested he verbally or nonverbally made a show of authority that would lead a reasonable person to believe she was not free to decline an encounter with him. App. 31a-32a. The court observed as well that Easley’s witnessing of the passengers’ total acquiescence put pressure on her to acquiesce. App. 32a.

The district court also found the officer misled passengers regarding his purpose. App. 33a. The court noted he told several passengers before he came to Easley he was checking the bus “for security.” *Id.* The court interpreted that announcement to be the officer’s “attempt to assert authority and confuse passengers into believing they could face physical danger if they did not comply with his search requests.” App. 32a. The court was unsure whether Easley overheard the agent’s “security” announcements, but it pointed out a listener can “clearly hear” his announcements on the recording of his interactions. App. 33a. The court knew for sure that, unlike the officer in *Bostick*, 501 U.S. at 431-32, here the officer did not tell any passenger he was a narcotics officer looking for narcotics. *Id.* The officer’s “vague” description of his purpose and misleading statements deprived passengers of the ability to knowingly exercise their right to decline consent and contributed to coercing Easley’s consent, the court concluded. App. 33a.

The district court further took into account Easley's race. It explained that race influences the likelihood of a person asserting constitutional rights because from everyday experience people of color are "conditioned to presume that asserting their constitutional rights in a police encounter will increase their likelihood of physical harm or arrest." App. 33a. The court relied on Professor Devon Carbado's articles showing that for people of color part of their socialization includes the precept that they should (a) "signal racial respectability and (b) . . . make the officers racially comfortable" or risk serious consequences. App. 33a, n. 5 (quoting Devon Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 1013-14 (2002)); *see also id.*, n. 6 (citing Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 141 (2017)).

The district court analogized its findings to this Court's ruling in *J.D.B. v. North Carolina*, 564 U.S. 261, 264-65 (2011), that the increased likelihood that children will submit to police questioning is a factor to consider in deciding whether a child is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). App. 33a. In *J.D.B.*, the Court believed "courts can account for that reality without doing any damage to the objective nature of the custody analysis." 564 U.S. at 272. The district court decided it could likewise consider the commonsense reality, "backed by substantial evidence, that a person of color is also less likely to decline consent." App. 34a. The court made clear race was not a determinative factor, but one of several to consider to fully comprehend the encounter between Easley, the only black person in the bus, and the white officer. App. 34a.

The district court emphasized that taking race into account did not discriminate against whites. But, a colorblind analysis perpetuates a biased perspective. App. 34a. When confronted by a police officer, African-Americans are not similarly situated to whites. Because they are especially vulnerable in that circumstance, ignoring that reality in the seizure determination systematically disadvantages them, the court explained. App. 34a. It noted it was weighing an objective, not a subjective, factor, that is, a factor “which, particularly in light of the elevated consciousness of these issues in recent years, is readily apparent to law enforcement officers.” App. 34a, n. 11.

The district court also considered that the officers never advised Easley of her right to end the encounter or her right to decline a search. The court acknowledged the officers’ failure did not *per se* render the encounter nonconsensual, but concluded it was entitled to weight in favor of finding coercion. App. 35a.

The district court found that, in light of the totality of circumstances, when the officer had Easley step off the bus a reasonable person in her situation would feel the officer was instructing, not requesting, her to follow his wish. In the court’s opinion, in the context of all the circumstances, the officer was being aggressive and not affording Easley an opportunity to decline to cooperate at that point. App. 33a.

In addition, the district court pointed to two of the officer’s comments after he took Easley off the bus as reinforcing the authoritative nature of his treatment of Easley. The court noted the officer’s statement that “[s]ome people are picky about their stuff.” App. 35a. It saw that statement as urging Easley to “be permissive and cooperative.” *Id.* The court also found

meaningful the officer's comment, "I'm recording," right before showing Easley the luggage. *Id.* The court said, regardless of the reason for that pronouncement, it signaled to Easley that the conversation was significant enough to be recorded, "making it even more unlikely she would feel free to terminate the encounter." *Id.*

Given all the circumstances, the district court found the officers seized Easley, implicating the Fourth Amendment. App. 35a. Since reasonable suspicion did not exist, Easley's detention was illegal, rendering involuntary her abandonment of the 'G brand' suitcase, the court concluded. App. 29a, 36a. The methamphetamine and post-arrest statements were a product of that illegal government conduct, warranting the granting of the motion to suppress, the court held. App. 37a-38a.

### **B. The Tenth Circuit proceedings.**

The government filed an interlocutory appeal to the Tenth Circuit. A circuit panel reversed the district court's order granting Easley's motion to suppress the physical evidence and incriminating statements seized by law enforcement officials. App. 6a.

The panel said the district court incorrectly concluded Easley was illegally seized. It held that "[n]one of the traditional indicia of a coercive environment were present" in Easley's "interaction with" the officer. App. 8a. Specifically, the panel rejected race as an objective circumstance that can be considered in a court's seizure analysis. In its view, race is a "subjective characteristic" that neither this Court nor the Tenth Circuit have "ever considered a relevant factor in the Fourth Amendment context." App. 9a. Still, it acknowledged that in *United States v. Mendenhall*, 446 U.S. 544 (1980), this Court said race is not an irrelevant factor in deciding whether a

person voluntarily consented to be searched. But *Mendenhall* did not endorse the district court’s decision to include race in its analysis, because here the issue was whether the person was seized. App. 9a.

In keeping with its belief that race is a subjective factor, the panel said that to expect officers “to determine how an individual’s race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law.” App. 10a. The panel was untroubled by the fact that the district court’s decision was not based on how Easley’s race affected *her* reaction to the officer’s requests. It therefore did not mention that “in considering race as a relevant contextual factor,” the district court stressed it was “not relying on Ms. Easley’s subjective impressions.” App. 34a, n. 11. The court considered “only the perspective of people of color more broadly, which, particularly in light of the elevated consciousness of these issues in recent years, is readily apparent to law enforcement officers.” Id.

Similarly, the panel completely ignored that the district court found as a matter of fact that “[t]hrough everyday experiences, people of color are conditioned to presume that asserting their constitutional rights in a police encounter will increase their likelihood of physical harm or arrest.” App. 33a. It also overlooked that in coming to the decision that the government had not shown a reasonable passenger in Easley’s position would have felt free to assert her constitutional rights by turning away from the officer or refusing consent, the district court “consider[ed] race as one of numerous contextual factors . . . . in combination with the other characteristics of this encounter.” App. 35a, 38a.

Rather than grapple with the specific objective circumstances girding the district court’s decision, the panel simply declared that “[t]here is no uniform

life experiences for persons of color . . . [but rather] “divergent attitudes toward law enforcement officers among members of the population.” App. 10a. Because it could not fathom a “uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures,” it concluded that race is an impermissible factor in the seizure analysis. App. 10a.

## Argument for Allowance of the Writ

### I. This Court should affirmatively state that race is an objective fact that affects both how a law enforcement encounter is perceived and the reasonableness of the response to it.

This case asks whether the race of a bus passenger subjected to police questioning, inspection, and search is relevant to the seizure analysis described in *Florida v. Bostick*, 501 U.S. 429, 432, 436 (1991). A person is seized when “an officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen.” *Id.* at 434 (emphasis added). The “crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Id.* at 435. By itself, race does not determine whether a person has been seized. But it can affect what a person thinks is happening and thus the response to it. The police methods used on a bus to interrogate and search, and the response produced, must be judged from the view of a reasonable person in the selected passenger’s position, including her race.

“[I]t is no secret that people of color are disproportionate victims” of suspicionless stops. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing M. Alexander, *The New Jim Crow*, 95-136 (2010)).<sup>4</sup> Here, Easley was traveling alone and, like everyone else on the bus, agreed to speak to the officers. Like others asked, she allowed them to search her and her belongings. App. 22a. Just like her fellow passengers, the officers found nothing incriminating on her. But then, Easley, the only African-American

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<sup>4</sup> See also Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 Miss. L.J. 1133, 1152 & n. 87 (2012).

on the bus, was asked to come outside for more questioning and another search. The officers' attention was no longer widely distributed. Easley was singled out and isolated. A reasonable person in her position now would think she was the officer's "target." A reasonable person also might think it was because of race.

Police stops are inherently intimidating. Officers press their position and omit mentioning a person's right to decline to answer or refuse a search. The more focused and intense the officer's inquiry, the more coercive the encounter risks becoming and the less likely a reasonable person would believe they could stop it. Add the abysmal race record noted in *Strieff* and a person of color is even more likely to feel helpless or afraid to change what is happening. Race, and the history of race, cannot be underestimated or excised from how police encounters unfold.

Race, like age, is an objective fact. A court should consider whether such facts can affect people's responses. Would a reasonable person of Easley's race in her position have felt free to ignore the officer or stop the encounter? Race inevitably informs one's perceptions and so, in turn, behavior. A court cannot reliably assess whether a reasonable person felt free to act contrary to police authority without considering the uncomfortable implications of race. Moreover, this Court has held other objective facts, such as failing to inform a person she may end the encounter or that she can refuse consent, loom large in a seizure analysis. *Bostick*, 501 U.S. at 432. In other words, law enforcement officials must somehow convey to the reasonable person in the passenger's position that cooperation with the officer is voluntary. This Court has never excluded any objective circumstance in a seizure analysis. *J.D.B. v. North Carolina*, 564 U.S. 262, 280 (2011). All objective circumstances

surrounding an encounter, including race, must be examined to ensure a citizen, exercising her constitutional right to interstate travel, has not been illegally seized.

**A. A court must take into account all the circumstances surrounding an officer's confrontation of a bus passenger from the perspective of a reasonable person in the passenger's position.**

The Tenth Circuit panel categorically dismissed race as an objective factor for a court to consider in its seizure analysis. Race is irrelevant, it said, because “there is no uniform life experience for persons of color . . . .” *Easley*, 911 F.3d at 1082. It went further and wrote “there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with the objective standard for Fourth Amendment seizures.” *Id.* The panel’s hubris is shocking. How is it then that the district court found people of color, based on everyday experience, are “conditioned to presume that asserting their constitutional rights in a police encounter will increase their likelihood of physical harm or arrest.” *Easley*, 293 F.Supp.3d at 1306.

Any “commonsense conclusions about behavior and perception” that make a reasonable person in the passenger’s position highly vulnerable to pressure, or less equipped to resist coercive tactics, must be part of any ‘free to ignore’ analysis. *J.D.B.*, 564 U.S. at 272. This Court already has ruled on characteristics appropriate to consider. *See e.g., Haley v. Ohio*, 332 U.S. 596, 600-01 (1948) (age); *Payne v. Arkansas*, 356 U.S. 560, 562-63 (1958) (education level); *Fikes v. Alabama*, 352 U.S. 191, 193-94 (1957) (general intelligence level). More importantly, the Court also has recognized race as relevant to seizure questions. In *United States v. Mendenhall*, 446 U.S. 544, 558 (1980), Mendenhall disputed her encounter was consensual and asserted

that as a black woman, she found the officers even more threatening. The Court agreed those “factors were not irrelevant,” although in her case, they were not dispositive. *Id.* Likewise, the Court’s discussion of tension between police and minorities in *Terry v. Ohio*, 392 U.S. 1, 14 n. 11 (1968) not only confirms the relevance of race in seizure issues, it establishes just how long race has been deemed significant in police encounters.

Other district and circuit courts agree. In *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015), the court, citing *Mendenhall*, held it is permissible to consider race. Race, the court said, is relevant “in everyday police encounters with citizens in Milwaukee and around the country” and “empirical data demonstrat[es] the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system.” 794 F.3d at 688; *see also Betts v. City of Chicago, Illinois*, 784 F.Supp.2d 1020, 1025-27 & n. 1 (N.D. Ill. 2011) (addressing admissibility of black plaintiff’s prior arrests when they could be false arrests and detailing evidence of racial profiling and its impact on people of color, including the response to police and advice to children); *United States v. Easley*, 2018 WL 1882853, at \* 6 (S.D. Oh. Apr. 19, 2018) (unpublished) (quoting Justice Sotomayor’s *Strieff* dissent); *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (citing hugely disproportionate targeting of black men in Boston to explain why the defendant fled from police); *In re J.M.*, 619 A.2d 497, 512-13 (D.C. App. 1992) (Mack, J., dissenting, but concurring in remand) (noting “race is a factor that has for many years engendered distrust between black males and law enforcement” and suggesting no reasonable black male, however innocent, would feel free to ignore a drug interdiction team).

The Ninth Circuit too has held race is a pertinent objective factor to consider when analyzing whether a person was seized. In *United States v. Washington*, 490 F.3d 765 (9th Cir.2007), it found that an African-American's consent to search, after being stopped late at night on a dark street and led away from his car, was not voluntary. Its conclusion acknowledged the "tension between the African-American community and police officers" and referenced two well known incidents in which white officers had shot African-Americans on those streets, killing one. *Id.* at 776. Indeed, police pamphlets were distributed afterward, advising people to "follow the officer's directions" and "if ordered, comply with the procedures for a search." *Id.* at 769, 776. Thus, the court stated it had "no confidence" that Washington's consent to search was voluntary. *Id.* at 776.

A 'reasonable person' evaluation is based on someone in the passenger's position. *Brendlin v. California*, 551 U.S. 249, 256-57 (2007). When, like here, the personal characteristic of race is an objective fact, it is appropriate for a court to consider if race had a material effect. The issue in *Brendlin* was "whether a reasonable passenger would have perceived that the [officer's] show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business." *Id.* at 261. Race is pertinent when it has been shown to exacerbate interactions with police that already are fraught and tense. As it is, many people naturally comply with shows of police authority. Imagine the effect when one is also a member of a targeted population. Like Mendenhall, Easley was a black woman. Like Washington, she was stopped and led away from the vehicle. Nothing or no one indicated she was free to ignore the officer and stay on the bus, or to get back on the bus without permission. Ultimately, the point of

any inquiry is to decide whether all the “objective circumstances add up” to a seizure. *J.D.B.*, 564 U.S. at 278 (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). When a passenger’s race is known or reasonably knowable to the confronting officer, it is an objective circumstance upon which a court is expected to deliberate. Even more so when the passenger is the only one of her race on the bus.

Without question, personal characteristics inform whether a reasonable person in the passenger’s position feels free to stop talking to police or knows she can assert her constitutional rights without retribution. For example, in *J.D.B.*, this Court held “a child’s age properly informs the *Miranda* custody analysis” because “children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” 564 U.S. at 264-65. The Court reasoned that age “is a fact that ‘generates commonsense conclusions about behavior and perception.’” *Id.* at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)). Being a person of color in the United States also forces commonsense conclusions that do not compromise the objective inquiry of seizure analyses, the Tenth Circuit’s glib opinion notwithstanding.

Here, the district court applied this Court’s reasoning in *J.D.B.* to include race as an objective fact relevant under the totality of the circumstances. Race, like age, is a personal characteristic that people cannot control. Yet, their effect on interactions with the police are measurable and well known.<sup>5</sup>

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<sup>5</sup> The district court relied, in part, on the work of Professor Devon Carbado, who noted substituting race for age in the analysis was not to “suggest that blacks are to whites what children are to adults.” Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*,

Race is arguably the more compelling fact. For while a child's behavior may be based on an officer's perceived authority, African-Americans' response is rooted in a centuries-long history of abuse that continues today. Abuses of power, injury, and death at the hands of law enforcement affect African-Americans disproportionately.

African-Americans are arrested at a much higher rate than whites. Police-related injury is almost five times more likely with African-Americans than with whites.<sup>6</sup> Although drug use is similar to other groups, the majority of people arrested for drug crimes are African-Americans. At about 13% of the American population, African-Americans comprise almost 60% of those incarcerated for drug crimes.<sup>7</sup> These statistics led an FBI director to confess that police officers of all races view African-Americans and Caucasians differently.<sup>8</sup>

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105 Calif. L. Rev. 125, 141-42 (2017). Rather, "mindful of the racial infantilization of black people under both slavery and Jim Crow," Carbado made the substitution "simply to suggest that even if one thinks that age is more relevant than race in determining whether a person is seized, the claim that race is irrelevant is difficult to sustain." *Id.*

<sup>6</sup> Sirry Alang, et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, Am. J. Public Health 107(5): 662-665 & n. 12 (May, 2017).

<sup>7</sup> Paul Butler, *The White Fourth Amendment*, 43 Tex. Tech. L. Rev. 245,253-54 & n. 79 (Fall, 2010).

<sup>8</sup> Michael Schmidt, *FBI Director Speaks Out on Race and Police Bias*, New York Times (Feb. 12, 2015), available at, <https://www.nytimes.com/2015/02/13/us/politics/fbi-director-comey-speaks-frankly-about-police-view-of-blacks.html>.

Such distressing facts of life in the United States are not lost on the African-American community, whether or not they have been directly involved in police-civilian encounters. The reality of the criminal justice system's racial disparity spawns feelings of anger, grief, stress, anxiety, hopelessness, and powerlessness.<sup>9</sup> What this means in a police-civilian situation is African-Americans ordinarily feel more vulnerable, expecting to be treated as second-class citizens.<sup>10</sup> As a consequence, African-Americans, and most communities of color, develop a strategy to deal with the police. The strategy typically involves deference - doing whatever the officer says and not talking back.<sup>11</sup> And every responsible parent of an African-American child will pass on that advice. *See Strieff*, 136 S.Ct. at 2070 (Sotomayor, J., dissenting) ("for generations, black and brown parents have given their children 'the talk' – instructing them never to run down the street; always

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<sup>9</sup> Alang, Am. J. Public Health 107(5): 662-665 & nn. 3, 14, 15 & 17; Jacob Bor, et al., *Police Killings and their Spillover Effects on the Mental Health of Black Americans: a Population-Based, Quasi-Experimental Study*, thelancet.com (June 21, 2018), available at, [http://dx.doi.org/10.1016/S01406737\(18\)31130-9](http://dx.doi.org/10.1016/S01406737(18)31130-9).

<sup>10</sup> Tracey Maclin, "Voluntary" Interviews and Airport Searches of Middleeastern Men: The Fourth Amendment in a Time of Terror, 73 Miss. L.J. 471,523(2003); Lenese Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 Mich. L. Rev. 149, 176-77 (Fall, 2003).

<sup>11</sup> Paul Butler, *Stop and Frisk and Torture-Lite: Police, Terror of Minority Communities*, 12 Ohio St. J. Crim. L. 57,63 (Fall, 2014); Lee, 81 Miss. L.J. at 1152; Lenese Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 Geo. J. on Poverty L. & Pol'y 135, 137-38 (Winter, 2002).

keep your hands where they can be seen; do not even think of talking back to a stranger – all out of fear of how an officer with a gun will react to them.”).<sup>12</sup>

Race, like age, is not necessarily “a determinative, or even significant factor in every case . . . . It is, however, a reality that courts cannot simply ignore.” *J.D.B.*, 564 U.S. at 277. Thus, “just as youth or age may impact a court’s understanding of the circumstances, this Court must consider race to fully apprehend the encounter between Ms. Easley, the only black passenger on the bus, and [ ] Perry, a white officer.” *Easley*, 293 F.Supp.3d at 1307. Ignoring race makes “the inquiry more artificial.” *J.D.B.*, 564 U.S. at 279. Taking it into account, as one factor among others, allows the ‘totality of the circumstances’ inquiry of a ‘free to ignore’ analysis to accurately reflect the reality facing people of color in the United States.

**B. Common sense and the shared experience of communities of color demonstrate race can be a consequential objective fact that heightens the reasonable person’s perception that she has been seized.**

Examining all the circumstances of a police confrontation can illustrate why race is a relevant objective factor in seizure cases. When Easley and her fellow passengers got back on the commercial bus in Albuquerque, officers were waiting inside it to question them and search their belongings. Obviously looking for evidence of crime, the lead officer questioned everyone on the bus. The officer’s authority was instantly manifest. A reasonable passenger would understand the officer’s presence and questions were not

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<sup>12</sup> See also Fleda Jackson, *Anticipated Negative Police-Youth Encounters and Depressive Symptoms among Pregnant African American Women: A Brief Report*, *J. Urban Health* 94(2): 259-65 & nn.10, 11 (Apr., 2017); Russell K. Robinson, *Perceptual Segregation*, 108 Colum. L. Rev. 1093, 1125 (June, 2008).

casual. They were a planned and deliberate inquiry tied to his authority to investigate criminal activity.

Reasonable people agree that police have inherent authority in our society. *Drayton*, 536 U.S. at 210 (J. Souter, dissenting). Police exert a power “free from immediate check” and when an officer focuses on a particular person the “imbalance of immediate power is unmistakable.” *Id.* It is understandable then that in a confined space filled only by those with tickets, an officer’s power “may overbear a normal person’s ability to act freely, even in the absence of explicit commands . . .” *Id.* Indeed, in *United States v. Ringold*, 335 F.3d 1168, 1174 (10th Cir. 2003), the court acknowledged the “natural tendency of any person . . . to feel cowed when a law enforcement officer approaches and begins to ask questions, particularly those probing into the possibility of illegal activity.” Reasonable people share this natural tendency.

On a commercial bus, that tendency is triggered when an officer gets on to question and search the passengers. Easley naturally felt cowed, but other facts detailed below heightened the power imbalance and created a persistent and overwhelming sense of tacit coercion. The experience of communities of color does inform the totality of circumstances and makes race relevant to whether a reasonable person in Easley’s position would have resisted the officer.

The officer boarded a departing bus unannounced and said he was checking the bus for “security.” *Easley*, 293 F.Supp.3d at 1304. A reasonable inference would be that he had a right to be there and ask questions. In other words, he was showing his authority which naturally elicited cooperation.

*See Florida v. Royer*, 460 U.S. 491, 511-12 (1983) (J. Brennan, concurring) (an

officer “engage[s] in a show of authority” when he says he is a police officer and requests the traveler’s ticket and identification).

Furthermore, the longer the officer stayed on the bus and the more thorough and invasive he became, the less likely a reasonable passenger in Easley’s position would believe refusing to comply was an option. The officer questioned and searched Easley more than the others. He searched her pillow, blanket, backpack, and purse. He studied her ticket and felt around her waist and legs. When he got off the bus, Easley was the only passenger he told to get off with him.

Outside the bus, separated from her fellow passengers, the barrage of questions continued. He took her ticket and identification and again searched her purse. He abruptly stated he was recording the interrogation. The officer’s commands and terse questions indicated his control and that Easley was the target of an investigation. The other officer stayed close by. No one ever told Easley her cooperation was voluntary. Given these circumstances, no reasonable person in Easley’s position would understand she could ignore the officer. *See Brendlin*, 551 U.S. at 257 (reasonable passenger pulled over by police will believe officer in control and no one free to leave without permission); *Drayton*, 536 U.S. at 204 (“a person may feel even more secure in his or her decision not to cooperate with the police” if officer’s conduct is under scrutiny by fellow passengers).

It is established that police encounters are inherently intimidating. Now add the fact Easley was the only African-American on the bus. A reasonable person can only use objective facts and common experience to make sense of what is happening and what to do. There is a general belief, ingrained by common experience, that it is best to answer an officer’s questions. *Miranda*,

384 U.S. at 468 n. 37 (citing Devlin, *The Criminal Prosecution in England* 32 (1958)); *see also Ringold*, 335 F.3d at 1174 (conceding a “natural tendency” to be intimidated by police questioning). The belief is particularly acute with African-Americans.

Is it reasonable to think Easley could have ignored the officer or refused to get off the bus? Unless Easley knew of her right to do both, here is what the district court said: “[T]he government did not show an individual in Ms. Easley’s position would feel free to leave . . . . [B]ecause people of color are less likely to assert their constitutional rights, Fourth Amendment protections may only become meaningful when [the people] are given the opportunity to meaningfully comprehend both the officer’s purpose and their right to refuse consent.” *Easley*, 293 F.Supp.3d at 1309. Easley was not given this opportunity. Consequently, inherent intimidation and the African-American experience that it is risky to not cooperate pressured her to comply.

Race, like age, is but one objective fact within the totality of the circumstances surrounding a law enforcement confrontation. Like age, race has a “discernible relationship to a reasonable person’s understanding of his freedom of action.” *J.D.B.*, 564 U.S. at 275. To ignore race, as the Tenth Circuit panel proposes, is “to ignore the very real differences” between white people and non-white people in America and to deny the latter “the full scope of the procedural safeguards” that the Fourth Amendment guarantees the former. *J.D.B.*, 564 U.S. at 281; *see also Easley*, 293 F.Supp.3d at 1307 (“Omitting consideration of the ways in which race influences encounters with law enforcement and insisting on a colorblind system of justice perpetuates a system in which constitutional protections are severely weakened for people of color.”)

**C. If the Tenth Circuit seeks guidance for police on race, a seizure analysis that recognizes race's influence on how one responds to police could emphasize another objective factor - 'freedom to ignore.'**

After an initial inquiry and search, the officer separated Easley and continued to display his authority. He offered no explanations. As the only African-American there, this treatment, in turn, multiplied Easley's feeling of being vulnerable and resurrected a fear of being mistreated. *Bostick*, 501 U.S. at 437, 439 (cramped confines and omitting right to refuse consent are factors affecting whether consent was voluntary). Without knowing her rights, Easley knew only that deference was safest. When the district court added the experience of African-Americans to the reasonable person in Easley's position, the government offered nothing in rebuttal. Easley did nothing but submit to what a reasonable person of color in her position would understand was an unmistakable imbalance of power.

After dismissing race's relevance to seizure analyses, the Tenth Circuit panel claims to not know how a "reasonable person test that adequately accounts for racial differences" might still let law enforcement "know *ex ante* what conduct implicates the Fourth Amendment." *Easley*, 911 F.3d at 1082. Its stupefaction stems from its firm belief the officer "was under no obligation to inform Ms. Easley that she was free not to cooperate with him or to answer his questions." *Id.* at 1082. A blanket license to withhold a constitutional right will never rectify the deleterious burden of race.

Fortunately, this Court has a suggestion aimed toward the panel's dilemma. If "police officers are competent to account for other objective circumstances . . . such as the length of questioning," they are competent to evaluate the objective fact of race on circumstances they control. *J.D.B.*, 564

U.S. at 279. They need only “common sense” to know that race affects the reasonable person’s understanding of a “freedom of action.” *Id.* at 275, 280. An objective seizure inquiry can coexist with Fourth Amendment rights. When race is known or knowable, an officer can mitigate the enhanced vulnerability and fear people of color feel by conveying the ‘freedom to act.’ *See* 3 Wayne R. LaFave, Search and Seizure § 8.2(i) at 214 (2d ed. 1987) (warnings of Fourth Amendment rights “show the individual that the police ‘are prepared to recognize’ [the] choice to assert [] constitutional rights.”) (quoting *Miranda*, 384 U.S. at 468); *see also J.D.B.*, 564 U.S. at 278, 280 (officers need only “common sense” to know a juvenile is not an adult and so “internalize and perceive” attendant circumstances differently). In other words, when race matters, rights can tip the balance of power toward neutral.

The panel’s protest is already noted but obliging officers to directly inform Easley of her rights is not the only way it can be done. Like the FBI director earlier, acknowledging that race affects how one is treated is the first step. The second might be to modulate approach and tone accordingly. Such measures may remain fluid, responsive to events and behavior taking place in real-time. But the effect of trying them may mirror what *Drayton* found: “passengers know that their participation enhances their own safety and the safety of those around them.” 536 U.S. at 205. Ironically, compliance rates not only may remain the same, they may rise.

In contrast to the panel, the district court already grasped a way to reconcile the competing interests of the Fourth Amendment and crime interdiction. It wrote that when an investigation targets the only African-American on the bus and she, like others, has been compliant, somehow letting her know cooperation is voluntary gives her “the opportunity to

meaningfully comprehend both the officer's purpose and [the] right to refuse consent." *Easley*, 293 F.Supp.3d at 1309. Conveying one is 'free to act' can be as simple as using a pleasant tone in a respectful manner. Not only can these measures compensate for the disparate treatment of people of color, but as *Drayton* suggests, they will not impede law enforcement operations since passengers want to participate in their own safety. 536 U.S. at 205. In this way, the unfortunate effects of race are addressed, Fourth Amendment rights are preserved, and the task of drug interdiction yet proceeds.

Finally, allowing the 'freedom to ignore' makes it more difficult for an officer to exploit race, directly or indirectly. Again, there is a natural presumption that an officer's authority demands compliance. *See Bostick*, 501 U.S. at 432, 437 (emphasizing police did not convey compliance was required when they advised of right to refuse consent); *see also id.* at 446-47 (Marshall, J., dissent) (the majority opinion 'repeatedly stresses' police told Bostick he could refuse search). The presumption is especially pronounced among African-Americans. What lawyers and judges know cannot reasonably be expected of the public, let alone a community with a shared experience of discrimination. *Cf. Bostick*, 501 U.S. at 437 (pointing to cases that hold refusal to cooperate, without more, does not justify detention); *see id.* at 447 (J. Marshall, dissenting) (a reasonable person unaware of rights would not know police cannot use a refusal to cooperate against them). When the officer conveys that a person has rights - whether directly or otherwise, it reduces the taint of implicit coercion. Conversely, deliberately withholding information or taking advantage of a lack of knowledge allows intimidation and fear to replace truly voluntary consent.

## Conclusion

In conclusion, the Tenth Circuit panel's finding was tragically flawed. To deny persons of color the reality of their experiences could only be done by someone who has not had them. The panel's refusal to recognize the legitimate burden borne by people of color is then compounded by its zero-sum approach to drug interdiction and constitutional rights. Its limited analysis is unable to conceive of anything but the status quo, which is known to be broken. It is up to another court then to recognize the role race plays in police interactions and to offer guidance on how best to support law enforcement while respecting people's rights.

Easley asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision.

Respectfully submitted,

STEPHEN P. MCCUE  
Federal Public Defender

DATED: March 26, 2019

By: *s/Margaret A. Katze*  
Margaret A. Katze  
Assistant Federal Public Defender  
Attorneys for the Petitioner

# Appendix

911 F.3d 1074  
United States Court of Appeals, Tenth Circuit.

Reversed and remanded.

UNITED STATES of America,  
Plaintiff-Appellant,  
v.  
Ollisha Nicole **EASLEY**, Defendant-Appellee.  
National Association for Public Defense,  
Amicus Curiae.

No. 18-2020

|  
FILED December 26, 2018

Synopsis

Background: Defendant, who was charged with possession with intent to distribute more than 500 grams of methamphetamine, moved to suppress evidence seized from suitcase and her custodial statements. The United States District Court for the District of New Mexico, D.C. No. 1:16-CR-01089-MV-1, Martha Vázquez, J., [293 F.Supp.3d 1288](#), granted the motion. The government appealed.

Holdings: The Court of Appeals [Kelly](#), Circuit Judge, held that:

[1] defendant was not illegally seized under Fourth Amendment when agent questioned her aboard intercity bus;

[2] it was inappropriate to consider the prior cooperation of other bus passengers with the agent, when determining whether defendant was illegally seized;

[3] it was inappropriate to consider subjective characteristics like race as part of the court's reasonable person analysis for determining whether an individual has been seized; and

[4] defendant abandoned any interest in suitcase that agent suspected belonged to a so-called phantom passenger.

West Headnotes (17)

[1] [Criminal Law](#)  
    **key** [Review De Novo](#)  
    [Criminal Law](#)  
    **key** [Evidence wrongfully obtained](#)

[110Criminal Law](#)

[110XXIV](#)Review  
[110XXIV\(L\)](#)Scope of Review in General  
[110XXIV\(L\)13](#)Review De Novo  
[110k1139](#)In general

[110Criminal Law](#)  
[110XXIV](#)Review  
[110XXIV\(O\)](#)Questions of Fact and Findings  
[110k1158.8](#)Evidence  
[110k1158.12](#)Evidence wrongfully obtained

When reviewing a district court's decision to grant a motion to suppress, the Court of Appeals reviews factual findings for clear error and legal determinations de novo.

[Cases that cite this headnote](#)

[2] [Criminal Law](#)  
    **key** [Reception of evidence](#)

[110Criminal Law](#)

[110XXIV](#)Review  
[110XXIV\(M\)](#)Presumptions  
[110k1144](#)Facts or Proceedings Not Shown by Record  
[110k1144.12](#)Reception of evidence

For factual findings made by district court in granting a motion to suppress, the Court of Appeals views the evidence in the light most favorable to the district court's decision.

[Cases that cite this headnote](#)

[3]

[Arrest](#)

🔑 [What Constitutes a Seizure or Detention](#)  
[Arrest](#)  
🔑 [Grounds for warrantless arrest in general](#)

[35Arrest](#)

[35IIOn Criminal Charges](#)  
[35k60.4](#) What Constitutes a Seizure or Detention  
[35k60.4\(1\)](#) In general

[35Arrest](#)  
[35IIOn Criminal Charges](#)  
[35k63](#) Officers and Assistants, Arrest Without Warrant  
[35k63.4](#) Probable or Reasonable Cause  
[35k63.4\(1\)](#) Grounds for warrantless arrest in general

An individual has been "seized" for Fourth Amendment purposes when a reasonable person in the individual's position would not feel free to terminate her encounter with the police and leave; such a seizure must be supported by probable cause. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[4]

[Arrest](#)

🔑 [Casual, routine, or random encounters](#)

[35Arrest](#)

[35IIOn Criminal Charges](#)  
[35k60.1](#) Pre-Arrest Issues; Police-Citizen Encounters  
[35k60.1\(2\)](#) Casual, routine, or random encounters

If an individual chooses voluntarily to remain and cooperate with the police, the Fourth Amendment's seizure analysis is not implicated. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[5]

[Arrest](#)

🔑 [Casual, routine, or random encounters](#)

[35Arrest](#)

[35IIOn Criminal Charges](#)  
[35k60.1](#) Pre-Arrest Issues; Police-Citizen Encounters  
[35k60.1\(2\)](#) Casual, routine, or random encounters

Police officers are permitted to pose questions, ask for identification, and request consent to search even when they have no particular reason to suspect an individual has violated the law; such an encounter must be assessed under the totality of the circumstances and from the perspective of the objective, reasonable person. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[6]

[Arrest](#)

🔑 [Particular cases](#)

[35Arrest](#)

[35IIOn Criminal Charges](#)  
[35k60.4](#) What Constitutes a Seizure or Detention  
[35k60.4\(2\)](#) Particular cases

A reasonable person in the position of defendant, who was a passenger on an intercity bus, would have felt free to terminate her encounter with Drug Enforcement Administration (DEA) agent during a stopover and refuse to cooperate, and thus, defendant was not illegally seized under Fourth Amendment; there were no indicia of a coercive environment, as only one agent approached defendant, near the back of the bus, while a second agent remained at the front, neither agent brandished a weapon, agent specifically asked defendant whether he could search her bags for contraband and never said that he was searching the bus for security purposes, agent did not retain defendant's personal effects for a prolonged period of time, as he searched each item briefly and immediately returned it to her, and agent had no obligation to inform defendant that she was free not to cooperate with him or to answer his questions. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[7]

[Arrest](#)

 [What Constitutes a Seizure or Detention](#)

[35 Arrest](#)

[35II On Criminal Charges](#)

[35k60.4 What Constitutes a Seizure or Detention](#)

[35k60.4\(1\) In general](#)

A “coercive environment,” for purposes of determining whether an individual has been seized under the Fourth Amendment, means an environment that is the creation of law enforcement conduct. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[8]

[Arrest](#)

 [What Constitutes a Seizure or Detention](#)

[35 Arrest](#)

[35II On Criminal Charges](#)

[35k60.4 What Constitutes a Seizure or Detention](#)

[35k60.4\(1\) In general](#)

A person is only seized under the Fourth Amendment when she submits to an officer's display of authority. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[9]

[Arrest](#)

 [What Constitutes a Seizure or Detention](#)

[35 Arrest](#)

[35II On Criminal Charges](#)

[35k60.4 What Constitutes a Seizure or Detention](#)

[35k60.4\(1\) In general](#)

The key inquiry in determining whether an individual has been seized under the Fourth Amendment is whether a reasonable person in the individual's position would have felt coerced to cooperate given law enforcement agent's conduct. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[10]

[Arrest](#)

 [Particular cases](#)

[35 Arrest](#)

[35II On Criminal Charges](#)

[35k60.4 What Constitutes a Seizure or Detention](#)

[35k60.4\(2\) Particular cases](#)

When determining whether defendant, who was a passenger on an intercity bus, was illegally seized by Drug Enforcement Administration (DEA) agent while the bus was being serviced during a stopover, it was inappropriate to consider the prior cooperation of other bus passengers with the agent, who had all consented to searches, because doing so weakened the administrability of seizure law, undermining the rule's ability to steer law enforcement conduct, and accepting an argument that consent or cooperation by third parties could create a coercive environment raised difficult line-drawing questions as to at what point the consent or cooperation offered by previous individuals had sufficiently compounded to produce a coercive environment. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[11] [Arrest](#)  
    key [Particular cases](#)

[35](#)[Arrest](#)

[35II](#)[On Criminal Charges](#)  
[35k60.4](#)[What Constitutes a Seizure or Detention](#)  
[35k60.4\(2\)](#)[Particular cases](#)

It was inappropriate to consider subjective characteristics like race as part of the court's reasonable person analysis for determining whether an individual has been seized under the Fourth Amendment, which asks whether a reasonable person in the individual's position would not feel free to terminate her encounter with the police and leave, since there was no uniform way to apply a reasonable person test that adequately accounted for racial differences consistent with an objective standard for Fourth Amendment seizures. [U.S. Const. Amend. 4.](#)

[2 Cases that cite this headnote](#)

[12] [Arrest](#)  
    key [What Constitutes a Seizure or Detention](#)  
[Searches and Seizures](#)  
    key [Voluntary nature in general](#)

[35](#)[Arrest](#)

[35II](#)[On Criminal Charges](#)  
[35k60.4](#)[What Constitutes a Seizure or Detention](#)  
[35k60.4\(1\)](#)[In general](#)

[349](#)[Searches and Seizures](#)  
[349V](#)[Waiver and Consent](#)  
[349k179](#)[Validity of Consent](#)  
[349k180](#)[Voluntary nature in general](#)

While the test for voluntariness of consent to search accounts for some subjective characteristics of the accused, the Fourth Amendment's seizure analysis has always been an objective one. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[\[13\]](#) [Searches and Seizures](#)

🔑 [Knowledge of rights; warnings and advice](#)

[349](#) [Searches and Seizures](#)

[349V](#) [Waiver and Consent](#)

[349k179](#) [Validity of Consent](#)

[349k183](#) [Knowledge of rights; warnings and advice](#)

It is not a requirement of the Fourth Amendment that law enforcement officers inform an individual of her constitutional right to refuse to consent to a search or her freedom to leave before they ask her to cooperate. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[\[14\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#) [Searches and Seizures](#)

[349I](#) [In General](#)

[349k25](#) [Persons, Places and Things Protected](#)

[349k28](#) [Abandoned, surrendered, or disclaimed items](#)

The Fourth Amendment is not implicated when police search property that has been abandoned. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[\[15\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#) [Searches and Seizures](#)

[349I](#) [In General](#)

[349k25](#) [Persons, Places and Things Protected](#)

[349k28](#) [Abandoned, surrendered, or disclaimed items](#)

Abandonment of property occurs, and the police search of that property does not implicate the Fourth Amendment, if either: (1) the owner subjectively intended to relinquish ownership of the property, or (2) the owner lacks an objectively reasonable expectation of privacy in the property. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[\[16\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#) [Searches and Seizures](#)

[349II](#) [In General](#)

[349k25](#) [Persons, Places and Things Protected](#)

[349k28](#) [Abandoned, surrendered, or disclaimed items](#)

The owner's abandonment of property must be voluntary in order for the search of that property by police not to implicate the Fourth Amendment, and abandonment cannot be voluntary when it results from a violation of the Fourth Amendment. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[\[17\]](#) [Controlled Substances](#)

🔑 [Objects thrown or abandoned](#)

[96H](#) [Controlled Substances](#)

[96HIV](#) [Searches and Seizures](#)

[96HIV\(B\)](#) [Search Without Warrant](#)

[96Hk138](#) [Objects thrown or abandoned](#)

Defendant, who was a passenger on an intercity bus, voluntarily relinquished any expectation of privacy in suitcase in the bus's luggage hold that Drug Enforcement Administration (DEA) agent suspected belonged to a so-called phantom passenger who was not aboard the bus but whose ticket was under same reservation as defendant, and thus, the suitcase was abandoned property, and agent's search of it did not implicate Fourth Amendment, even though defendant may have felt pressure while under police questioning to relinquish the bag; defendant told the agent that she did not own the bag, did not know who the bag belonged to, did not have any interest in what happened to the bag, and even claimed that she had never seen the bag before, these statements were voluntary given and were not the product of an illegal arrest. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

\*1077 Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:16-CR-01089-MV-1)

Attorneys and Law Firms

C. Paige Messec, Assistant United States Attorney (and [John C. Anderson](#), United States Attorney, on the briefs), Albuquerque, New Mexico, for Plaintiff-Appellant.

[Brian A. Pori](#), Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellee.

Afton Paris, ([Tillman J. Breckenridge](#) of Bailey & Glasser, L.L.P., Washington, D.C. and Patricia E. Roberts of William & Mary Appellate and Supreme Court Clinic, Of Counsel, Williamsburg, Virginia, on the brief), for Amicus Curiae.

Before [BRISCOE](#), [KELLY](#), and [MORITZ](#), Circuit Judges.

Opinion

[KELLY](#), Circuit Judge.

The government appeals from the district court's decision granting Defendant-Appellee Ollisha Easley's motion to suppress physical evidence and incriminating statements. The district court held that Ms. Easley was seized in violation of the Fourth Amendment and that the evidence obtained was tainted by her preceding illegal arrest. Our jurisdiction arises under [18 U.S.C. § 3731](#) and we reverse.

Background

On March 10, 2016, Defendant-Appellee Ollisha Easley was onboard a Greyhound bus from Claremont, California, to her hometown of Louisville, Kentucky, when the bus made a scheduled stop in Albuquerque, New Mexico. [United States v. Easley](#), 293 F.Supp.3d 1288, 1292 (D.N.M. 2018). The Greyhound passenger list showed that Ms. Easley's reservation included a second woman identified as "Denise Moore"—both Ms. Easley and Denise Moore had one checked bag and both tickets were purchased with cash. *Id.* at 1293. No one named Denise Moore boarded the bus in California, but her suitcase was stowed in the luggage hold of the Greyhound and was identified with the same reservation number and telephone number as Ms. Easley's luggage. *Id.* at 1293–94.

While the bus was stopped in Albuquerque, Special Agent Jarrell Perry of the Drug Enforcement Agency (DEA) and his partner that day, Special Agent Scott Godier, observed the luggage in the bus's cargo hold. *Id.* at 1293. Agent Perry had reviewed the bus's passenger list before arriving at the Greyhound station in Albuquerque and noted that Ms. Easley and Denise Moore were traveling on the same reservation, purchased with cash. *Id.* Agent Perry later testified that the use of a so-called "phantom passenger" is a common method of narcotics trafficking—the drugs are transported in the suitcase of the fictitious passenger who never boards the bus, presumably in an attempt to give plausible deniability to the actual drug trafficker. 2 Aplt. App. 143–44. Among the checked luggage, Agent Perry observed a gray "Rome Essentials" brand suitcase with Ms. Easley's name and a black and tan "G" brand suitcase with Denise Moore's name. [Easley](#),

293 F.Supp.3d at 1293. He observed that both bags had identical travel information and listed identical phone numbers. Id. Agent Perry later testified that their origin in California (in his opinion, a common source for narcotics) and terminus in Louisville (a destination \*1078 city for illegal drugs) piqued his interest in their reservation. 2 Aplt. App. 144.

The passengers disembarked while the bus was serviced during the stopover, and when Ms. Easley reboarded, Agent Perry and Agent Godier were onboard—Agent Godier stood at the front of the bus while Agent Perry stood at the rear. Easley, 293 F.Supp.3d at 1292–93. Both agents were in plainclothes and no firearms were visible. Id. at 1293. Agent Perry questioned and searched approximately 15 passengers and their belongings before he approached Ms. Easley. Id. All of the passengers questioned before Ms. Easley consented to searches by Agent Perry. Id. at 1294.

When Agent Perry spoke with Ms. Easley he asked her the origin and destination of her travel, whether she was traveling with anyone, if she had checked any luggage, whether he could search any checked luggage she had, whether she had any personal items with her on the bus, and whether he could search those personal items. Id. Ms. Easley responded that she was traveling alone and that she had only checked one bag and identified her backpack and pillows as her only personal belongings. Id. She consented to the search of her personal belongings, her jacket, and around her waist and legs, and she gave Agent Perry permission to search her checked bag in the luggage hold. Id.

After Agent Perry was finished speaking with the other passengers, he exited the bus and retrieved Ms. Easley's gray suitcase from the luggage compartment and searched it, finding no contraband. 2 Aplt. App. 162. Agent Perry then spoke with the bus driver, who confirmed that Denise Moore had not boarded the bus with Ms. Easley. Easley, 293 F.Supp.3d at 1294. Agent Perry then approached Ms. Easley for a second time and asked if she would speak with him outside the bus. Id. Ms. Easley agreed. 2 Aplt. App. 326–27. Agent Perry questioned Ms. Easley again about her travel plans, asked to see her identification, and asked for permission to search her purse, which she granted. Id. at 326–29. Finally, Agent Perry asked Ms. Easley if she was the owner of the black and tan suitcase checked under Denise Moore's name. Id. at 329. Ms. Easley

responded that she was not; in response to Agent Perry's questioning she said that she did not know who the bag belonged to, did not have any interest in it, did not care what happened to it, that no one had given her the bag, and that she had never seen the bag before. Id. at 329–30. Ms. Easley then returned to her seat on the bus and Agent Perry proceeded to search Denise Moore's bag. Easley, 293 F.Supp.3d at 1294. Hidden in the suitcase were bags of methamphetamine. 2 Aplt. App. 165. Agent Perry then reentered the bus and arrested Ms. Easley. Easley, 293 F.Supp.3d at 1294. Following her arrest, Ms. Easley was taken to the DEA office in Albuquerque where she confessed to her agreement to transport the luggage containing methamphetamine from California, described the other individuals with whom she had worked, and explained what had occurred before she boarded the bus in California. Id. at 1296.

On March 23, 2016, Ms. Easley was indicted for possession with intent to distribute 500 grams or more of a substance containing methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Id.; see also 1 Aplt. App. 10.

On May 23, 2016, Ms. Easley moved to suppress the evidence seized from the Denise Moore suitcase and to exclude the confession she made to Agent Perry. Easley, 293 F.Supp.3d at 1296; see also 1 Aplt. App. 11. Ms. Easley argued that Agent Perry had violated her rights under the Fourth, Fifth, and Sixth Amendments. See id.

\*1079 On January 10, 2018, the district court granted Ms. Easley's motion to suppress. See generally Easley, 293 F.Supp.3d 1288. The district court first held that Ms. Easley had not established that Agent Perry illegally searched her bags while the bus was in the wash bay; nor had she established that the bus was subject to an unreasonable investigatory detention. See id. at 1297–98. The court also held, however, that under the totality of the circumstances Ms. Easley had been illegally seized. See id. at 1298. The district court found that Ms. Easley's abandonment of the Denise Moore suitcase was the product of the preceding Fourth Amendment violation, and so it suppressed the evidence seized from the suitcase. Id. at 1298. The district court also determined that the earlier Fourth Amendment violation tainted Ms. Easley's subsequent confession and suppressed her inculpatory statements. Id.

## Discussion

[1] [2]When reviewing a district court’s decision to grant a motion to suppress, this court reviews factual findings for clear error and legal determinations de novo. See United States v. Thompson, 524 F.3d 1126, 1132 (10th Cir.2008). For factual findings, this court views the evidence in the light most favorable to the district court’s decision. See United States v. Augustine, 742 F.3d 1258, 1264–65 (10th Cir.2014).

There are three distinct but interrelated questions in Ms. Easley’s case. First, whether she was illegally seized in violation of the Fourth Amendment. Second, whether she voluntarily abandoned the Denise Moore suitcase containing methamphetamine. Third, whether her confession was tainted by a preceding Fourth Amendment violation.

The resolution of each of these questions depends on the threshold determination whether Ms. Easley was illegally seized. If Ms. Easley was seized in violation of the Fourth Amendment, as the district court found, then her abandonment of the suitcase under the second test was *per se* involuntary and the evidence from the suitcase was properly suppressed. If, however, there was no illegal seizure and her abandonment was voluntary, the suppression of the physical evidence was error. The confession analysis, too, turns on a threshold determination whether Ms. Easley was illegally seized—without a preceding Fourth Amendment violation there could be no taint. We address each question in turn.

### A. Seizure

[3] [4] [5]An individual has been “seized” for Fourth Amendment purposes when a reasonable person in the individual’s position would not feel free to terminate her encounter with the police and leave. See Halley v. Huckabee, 902 F.3d 1136, 1145 (10th Cir.2018). Such a seizure must be supported by probable cause. Id. If, however, an individual chooses voluntarily to remain and cooperate with the police, the Fourth Amendment’s

seizure analysis is not implicated. See United States v. Drayton, 536 U.S. 194, 200–01, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). Police officers are permitted to pose questions, ask for identification, and request consent to search even when they have no particular reason to suspect an individual has violated the law. Id. Such an encounter must be assessed under the totality of the circumstances and from the perspective of the objective, reasonable person. See Jones v. Hunt, 410 F.3d 1221, 1225–26 (10th Cir.2005).

[6]Here, none of the traditional indicia of a coercive environment were present in Ms. Easley’s interaction with Agent Perry. As the district court summarized:

First, there was no “threatening presence of several officers.” To the contrary \*1080 only SA Perry approached Ms. Easley, near the back of the bus, while Agent Godier remained at the front of the bus. Second, neither SA Perry nor Agent Godier “brandished” a weapon. SA Perry kept his gun and handcuffs concealed beneath his shirt. Third, in reading the transcript of the audio recording, it would appear that SA Perry did not use “aggressive language.” Fourth, SA Perry did not retain Ms. Easley’s personal effects for a prolonged period of time, as he searched each item briefly and immediately returned it to her. Fifth the recording and testimony do not indicate that SA Perry blocked Ms. Easley’s access to the aisle during the encounter. Finally, the encounter occurred in the presence of other members of the public, namely, the other bus passengers.

293 F.Supp.3d at 1303 (citations omitted).

Nonetheless, the district court found that a reasonable person in Ms. Easley’s position would not have felt free to terminate her encounter with Agent Perry because: (1) no passenger before Ms. Easley refused to consent to a search by Agent Perry, thus creating a coercive environment; (2) Agent Perry told some passengers (but not Ms. Easley) that he was checking the bus for “security purposes,” and this

mischaracterization of purpose contributed to a finding that Ms. Easley's cooperation was coerced; (3) Ms. Easley's race contributed to a finding that a reasonable person of color would not have interpreted Agent Perry's request as open to refusal, and that his request took on authoritative and coercive force in the context of a white law enforcement officer speaking to the only black passenger onboard;<sup>1</sup> and (4) Agent Perry did not inform Ms. Easley of her right to refuse to cooperate or consent to a search of her belongings. We do not find these justifications legally adequate.

it is not at all clear that such a statement rises to the level of a misrepresentation that would create a coercive environment. In finding for Ms. Easley, the district court relied on United States v. Harrison, 639 F.3d 1273 (10th Cir.2011), which involved agents misleading an occupant of an apartment to believe that he was in physical danger from a possible bomb threat. Easley, 293 F.Supp.3d at 1304–05. But deception about a bomb threat is a difference in kind, not merely degree, from Agent Perry stating that he was searching the bus for "security purposes," and clarifying to multiple passengers that he was specifically looking for contraband. See 2 Aplt. App. 291, 293, 297.

[7] [8] [9] [10]First, when we speak of a coercive environment, we mean an environment that is the creation of law enforcement conduct. The pressure to cooperate here, if any, was the product of *peer pressure*, not Agent Perry's behavior. A person has not been seized merely because she feels social pressure to conform her behavior to match that of other passengers on the bus; she is only seized when she submits to an officer's display of authority. See United States v. Salazar, 609 F.3d 1059, 1064 (10th Cir.2010). Here, it is legally irrelevant that every other passenger on the bus cooperated with Agent Perry.<sup>2</sup> Rather, the key inquiry is whether a reasonable person in Ms. Easley's position \*1081 would have felt coerced to cooperate given Agent Perry's conduct.

Second, we reject Ms. Easley's contention that a reasonable person would not have felt free to refuse to cooperate because of Agent Perry's characterization of his motives for being onboard the bus. Even if Agent Perry misrepresented his purposes to *other* passengers on the bus, he did not misrepresent his purpose to Ms. Easley. He specifically asked her whether he could search her bags "for contraband" and never told her that he was searching the bus "for security purposes." See 2 Aplt. App. 313–16. Even drawing inferences from the evidence in a way most favorable to Ms. Easley and assuming she overheard Agent Perry say he was searching the bus for security purposes,

[11] [12]Third, we reject Ms. Easley's argument that we should consider subjective characteristics like race as part of our reasonable person analysis. Neither this court nor the Supreme Court has ever considered race a relevant factor in the Fourth Amendment context. Indeed, the Tenth Circuit has specifically disclaimed considerations that could inject the objective reasonable person analysis with subjective considerations: "[W]e reject any rule that would classify groups of travelers according to gender, race, religion, national origin, or other comparable status." United States v. Little, 18 F.3d 1499, 1505 (10th Cir.1994) (en banc).<sup>3</sup> Ms. Easley relies on the Supreme Court's decision in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), to support her contention that race is a permissible consideration in the seizure analysis. Mendenhall's discussion of race, however, was in the context of assessing voluntariness, not seizure. See id. at 557–58, 100 S.Ct. 1870. While the test for voluntariness of consent accounts for some subjective characteristics of the accused, see Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (noting that the court takes into account the "characteristics of the accused" when assessing voluntariness), the Fourth Amendment's seizure analysis has always been an objective one. See California v. Hodari D., 499 U.S. 621, 628, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) ("Mendenhall"

establishes that the test for existence of a ‘show of authority’ [for seizure purposes] is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but \*1082 whether the officer’s words and actions would have conveyed that to a reasonable person.”).

Requiring officers to determine how an individual’s race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law. As the government notes, there is no easily discernable principle to guide consideration of race in the reasonable person analysis. Aplt. Br. at 16–17. There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population. Thus, there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures. This distinguishes race from the Supreme Court’s consideration of age in the reasonable person analysis in J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). In J.D.B., the Court noted that age is distinct from subjective considerations because it is readily discernible by police and any considerations apply broadly to children as a class. Id. at 272, 131 S.Ct. 2394. In addition, the considerations applicable to children are “self-evident to anyone who was a child once himself, including any police officer or judge,” eliminating the necessity of conjecture about the effect age has on one’s perception of freedom to leave. Id. In contrast, consideration of race undermines one of the chief benefits of an objective test for search and seizure law, namely, the ability it gives law enforcement to know *ex ante* what conduct implicates the Fourth Amendment. See, e.g., id. at 271, 131 S.Ct. 2394 (“The benefit of the objective custody analysis is that it is ‘designed to give clear guidance to the police.’ ” (quoting Yarborough v. Alvarado, 541 U.S. 652, 668, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ). Furthermore, as the government correctly notes, a seizure analysis that differentiates on the basis of race raises serious equal

protection concerns if it could result in different treatment for those who are otherwise similarly situated. Aplt. Br. at 30–31. In short, the categorical consideration of race in the reasonable person analysis is error, and we reject Ms. Easley’s argument to the contrary.

[13]Finally, Ms. Easley contends that Agent Perry’s failure to inform her of her right to refuse to cooperate, when considered with the other circumstances of their encounter, contributed to the creation of a coercive environment. But it has never been a requirement of the Fourth Amendment that law enforcement officers inform an individual of her constitutional right to refuse to consent to a search or her freedom to leave before they ask her to cooperate. See, e.g., United States v. Ledesma, 447 F.3d 1307, 1315 (10th Cir.2006) (“The Supreme Court has admonished … that an officer’s failure to inform the defendant that she is free to leave, standing alone, does not make an encounter nonconsensual.”). The same is true here: Agent Perry was under no obligation to inform Ms. Easley that she was free not to cooperate with him or to answer his questions. And in the absence of any other factor that would lead this court to conclude that the reasonable person would not have felt free to rebuff him, the fact that Agent Perry did not inform Ms. Easley that she was free to terminate their encounter cannot convert their interaction into an illegal seizure.

We conclude, then, that the district court erred when it determined that Ms. Easley was illegally seized in violation of the Fourth Amendment. A reasonable person in her position would have felt free to terminate her encounter with the police and refuse to cooperate. We turn next to \*1083 Ms. Easley’s abandonment of the Denise Moore suitcase and its contents.

## B. Abandonment

[14] [15] [16]The Fourth Amendment is not

implicated when police search property that has been abandoned. See United States v. Juszczyk, 844 F.3d 1213, 1213 (10th Cir.2017). Abandonment occurs if either (1) the owner subjectively intended to relinquish ownership of the property or (2) the owner lacks an objectively reasonable expectation of privacy in the property. See id. at 1214; United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir.1997). The owner's abandonment must be voluntary, and abandonment cannot be voluntary when it results from a violation of the Fourth Amendment. United States v. Ojeda-Ramos, 455 F.3d 1178, 1187 (10th Cir.2006).

[17] Here, the district court found that Ms. Easley's abandonment of the Denise Moore suitcase was involuntary because she had already been illegally seized by Agent Perry. Given our conclusion that Ms. Easley was not seized, her abandonment of the Denise Moore suitcase could not have been the product of an illegal seizure.

The question, then, is whether a reasonable officer in Agent Perry's position would have believed that Ms. Easley had relinquished any property interests she possessed in the Denise Moore suitcase based on her voluntary words and actions. See, e.g., United States v. Pitts, 322 F.3d 449, 456 (7th Cir.2003). We hold that he would.

Here, it is clear from Ms. Easley's words and actions that she relinquished any expectation of privacy in the Denise Moore suitcase. In response to Agent Perry's questions she responded that she did not own the bag, did not know who the bag belonged to, did not have any interest in what happened to the bag, and even claimed that she had never seen the bag before. 2 Aplt. App. 329–30. It is also clear from the record that these statements were voluntary given the surrounding circumstances; as we have already said, her statements were not the product of an illegal arrest on Agent Perry's part. Additionally, Agent Perry used deferential language throughout his interaction with Ms. Easley,

including when he requested that Ms. Easley step off the bus. See, e.g., id. at 326 ("Excuse me, ma'am. Can I speak to you outside for one second, please?"). And he used similarly deferential and courteous language while asking her about her luggage, and his tone of voice was cordial and nonthreatening throughout. See id. at 327–28; see also 3 Aplt. App. 19:00–20:35 (first audio recording), 0:08–2:48 (second audio recording). Furthermore, the mere fact that Ms. Easley was the subject of police questioning and investigation at the time of abandonment—and may have felt pressure while under police questioning to relinquish the bag—does not of itself render that abandonment involuntary. See United States v. Flynn, 309 F.3d 736, 738 (10th Cir.2002). Ms. Easley's responses to Agent Perry's questions were the product of her own free will and would have led a reasonable law enforcement officer to believe she had relinquished any expectation of privacy in the suitcase. We conclude the agents' search of the Denise Moore suitcase was a valid search of abandoned property; suppression of the evidence the suitcase contained was error.

### C. Confession

Because we have found there was no preceding constitutional violation to taint Ms. Easley's confession, suppression of her inculpatory statements was error. The parties did not brief or argue any other ground to support the district court's decision on appeal, so we remand to the distr \*1084 ict court to resolve the admissibility of Ms. Easley's confession in the first instance.

### Conclusion

REVERSED and REMANDED for further proceedings consistent with this opinion.

All Citations

911 F.3d 1074

Footnotes

- 1 The government argues that it could find no support in the record for the district court's statements that Ms. Easley was the only black passenger on the bus. Aplt. Br. at 9 n.6; see Easley, 293 F.Supp.3d at 1307. There is no need for us to address any contention that the district court's finding was clearly erroneous because, for the reasons explained below, the racial composition of the bus's passengers is not relevant to the Fourth Amendment seizure analysis.
- 2 It is inappropriate to consider the prior cooperation of other bus passengers because doing so weakens the administrability of seizure law, undermining the rule's ability to steer law enforcement conduct. Accepting an argument that consent or cooperation by third parties can create a coercive environment raises difficult line-drawing questions: At what point would the consent or cooperation offered by previous individuals have sufficiently compounded to produce a coercive environment? There is no clear principle to guide officers in determining when a sufficient number of people have cooperated to render an environment coercive. And if that is the case, then what guidance would such a rule give to law enforcement, whose behavior the exclusionary rule is meant to police? See Davis v. United States, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). We reject any such domino theory of the Fourth Amendment.
- 3 In Little, we noted that the particular personal traits or characteristics of the defendant are irrelevant to the Fourth Amendment's reasonable person test "other than to the extent that they may have been known to the officer and influenced *his conduct*." Little, 18 F.3d at 1505 (emphasis added) (quoting United States v. Bloom, 975 F.2d 1447, 1455 n.9 (10th Cir.1992)). As Little suggests, the Tenth Circuit has only found personal characteristics to be relevant when those personal characteristics affected the conduct of *law enforcement officers*—for example, making apparent an officer's racial bias. When determining whether an individual has been seized, the court has never discussed the effect of an individual's own race on her reaction to law enforcement behavior.



KeyCite Red Flag - Severe Negative Treatment

Reversed and Remanded by [United States v. Easley](#), 10th Cir.(N.M.), December 26, 2018

293 F.Supp.3d 1288

United States District Court, D. New Mexico.

UNITED STATES of America, Plaintiff,  
v.

Ollisha Nicole EASLEY, Defendant.  
Crim. No. 16-1089-MV

|  
Signed 01/10/2018

Synopsis

Background: Defendant, who was charged with possession with intent to distribute more than 500 grams of methamphetamine, moved to suppress evidence seized from suitcase and her custodial statements.

Holdings: The District Court, Martha Vázquez, J., held that:

[1] actions agents took to observe luggage in cargo hold of bus did not constitute unreasonable search in violation of Fourth Amendment;

[2] agents' detention of defendant and other bus passengers was not unreasonable investigative stop;

[3] defendant's abandonment of suitcase was involuntary, and thus search of suitcase was unreasonable; and

[4] defendant's recorded statement was product of her illegal arrest.

Motion granted.

West Headnotes (31)

[1] [Searches and Seizures](#)  
    key [Expectation of privacy](#)

[349](#) [Searches and Seizures](#)

[349I](#) [In General](#)

[349k25](#) [Persons, Places and Things Protected](#)

[349k26](#) [Expectation of privacy](#)

A search implicating the Fourth Amendment occurs when the government invades a person's legitimate expectation of privacy. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[2] [Searches and Seizures](#)  
    key [Necessity of and preference for warrant, and exceptions in general](#)

[349](#) [Searches and Seizures](#)

[349I](#) [In General](#)

[349k24](#) [Necessity of and preference for warrant, and exceptions in general](#)

A search undertaken without a warrant, subject only to a few, well-established exceptions, is per se unreasonable under the Fourth Amendment. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[3] [Searches and Seizures](#)  
    key [What Constitutes Search or Seizure](#)

[349](#) [Searches and Seizures](#)

[349I](#) [In General](#)

[349k13](#) [What Constitutes Search or Seizure](#)

[349k13.1](#) [In general](#)

A seizure implicating the Fourth Amendment occurs when the government meaningfully interferes with an individual's possessory interests in their property. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[4] [Criminal Law](#)  
    🔑 [Persons entitled to object](#)  
    [Criminal Law](#)  
    🔑 [Presumptions and burden of proof](#)

[110Criminal Law](#)

[110XVIIEvidence](#)  
[110XVII\(I\)Competency in General](#)  
[110k392.1Wrongfully Obtained Evidence](#)  
[110k392.41Persons entitled to object](#)

[110Criminal Law](#)  
[110XVIIEvidence](#)  
[110XVII\(I\)Competency in General](#)  
[110k392.1Wrongfully Obtained Evidence](#)  
[110k392.49Evidence on Motions](#)  
[110k392.49\(2\)Presumptions and burden of proof](#)

When a defendant moves to suppress evidence obtained as a result of an allegedly unconstitutional search, she has the burden of demonstrating a subjective expectation of privacy that society is prepared to recognize as reasonable. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[5] [Criminal Law](#)  
    🔑 [Custodial interrogation in general](#)

[110Criminal Law](#)

[110XVIIEvidence](#)  
[110XVII\(M\)Statements, Confessions, and Admissions by or on Behalf of Accused](#)  
[110XVII\(M\)10Warnings](#)  
[110k411.4Custodial interrogation in general](#)

The Fifth Amendment specifically prohibits admitting statements given by a person during a custodial interrogation without *Miranda* warnings. [U.S. Const. Amend. 5.](#)

[Cases that cite this headnote](#)

[6] [Criminal Law](#)  
    🔑 [Counsel](#)

[110Criminal Law](#)

[110XVIIEvidence](#)  
[110XVII\(M\)Statements, Confessions, and Admissions by or on Behalf of Accused](#)  
[110XVII\(M\)17Waiver of Rights](#)  
[110k411.94Counsel](#)

When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [U.S. Const. Amend. 5.](#)

[Cases that cite this headnote](#)

[7] [Controlled Substances](#)  
    🔑 [Purses, bags, or suitcases](#)

[96HControlled Substances](#)

[96HIVSearches and Seizures](#)  
[96HIV\(B\)Search Without Warrant](#)  
[96Hk120Persons and Personal Effects, Search of](#)  
[96Hk125Purses, bags, or suitcases](#)

Actions agents took to observe luggage in cargo hold while bus was in wash bay did not constitute unreasonable search in violation of Fourth Amendment; agent did not touch, squeeze, or otherwise manipulate luggage when it was in cargo hold beneath bus, agent opened up luggage bins and looked at luggage and tags, and agents did not manipulate suitcase in way that went beyond type of contact which passenger could reasonably expect when checking bag with commercial bus line. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[8] [Searches and Seizures](#)  
    🔑 [Expectation of privacy](#)

[349 Searches and Seizures](#)

[349I](#)In General

[349k25](#)Persons, Places and Things Protected

[349k26](#)Expectation of privacy

People have a legitimate expectation of privacy in their personal luggage, one which the Fourth Amendment protects. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[9] [Searches and Seizures](#)  
    🔑 [Closed containers; luggage](#)

[349 Searches and Seizures](#)

[349I](#)In General

[349k47](#)Plain View from Lawful Vantage Point

[349k50](#)Closed containers; luggage

A traveler's expectation of privacy in her luggage has limits; merely conducting a visual inspection of what is in plain view does not constitute a search under the Fourth Amendment. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[10] [Searches and Seizures](#)  
    🔑 [What Constitutes Search or Seizure](#)

[349 Searches and Seizures](#)

[349I](#)In General

[349k13](#)What Constitutes Search or Seizure

[349k13.1](#)In general

Although every search necessarily involves the use of sensory perception, the use of sensory perception does not necessarily constitute a search. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[11] [Searches and Seizures](#)  
    🔑 [What Constitutes Search or Seizure](#)

[349 Searches and Seizures](#)

[349I](#)In General

[349k13](#)What Constitutes Search or Seizure

[349k13.1](#)In general

In determining whether search of luggage occurred, the thrust of the analysis is whether the government officer's manner of handling the bag was the sort that a traveler leaving the bag in such a position might reasonably expect. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[12] [Arrest](#)

🔑 [Duration of detention and extent or conduct of investigation or frisk](#)

[35](#)[Arrest](#)

[35II](#)[On Criminal Charges](#)

[35k60.2](#)[Investigatory Stop or Stop and Frisk](#)

[35k60.2\(20\)](#)[Duration of detention and extent or conduct of investigation or frisk](#)

Agents' detention of defendant and other bus passengers was not unreasonable investigative stop, although bus may have been delayed in departing station due to agents' activities; agents were attempting to conduct consensual searches and not conducting investigatory stop of bus, everyone agreed to speak to agent, and no one declined consent to be searched. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[13] [Arrest](#)

🔑 [Reasonableness; reason or founded suspicion, etc](#)

[Arrest](#)

🔑 [Duration of detention and extent or conduct of investigation or frisk](#)

[35](#)[Arrest](#)

[35II](#)[On Criminal Charges](#)

[35k60.2](#)[Investigatory Stop or Stop and Frisk](#)

[35k60.2\(6\)](#)[Grounds for Stop or Investigation](#)

[35k60.2\(10\)](#)[Reasonableness; reason or founded suspicion, etc](#)

[35](#)[Arrest](#)

[35II](#)[On Criminal Charges](#)

[35k60.2](#)[Investigatory Stop or Stop and Frisk](#)

[35k60.2\(20\)](#)[Duration of detention and extent or conduct of investigation or frisk](#)

An investigative detention is reasonable under the Fourth Amendment if the officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity, and if the detention is reasonably related in scope to the circumstances justifying the stop; in other words, the Fourth Amendment imposes limitations on both the length of the detention and the manner in which it is carried out. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[14] [Controlled Substances](#)

🔑 [Objects thrown or abandoned](#)

[96H](#)[Controlled Substances](#)

[96HIV](#)[Searches and Seizures](#)

[96HIV\(B\)](#)[Search Without Warrant](#)

[96Hk138](#)[Objects thrown or abandoned](#)

Defendant's abandonment of suitcase was involuntary, and thus search of suitcase was unreasonable, although there was no threatening presence of several officers, neither agent brandished weapon, agent did not use aggressive language, agent did not retain defendant's personal effects for prolonged period of time, agent did not block defendant's access to aisle during encounter, and encounter occurred in presence of other members of public; abandonment of suitcase resulted from earlier Fourth Amendment violation, reasonable person would not have felt free to terminate encounter with agent, no other passengers refused to speak with agent, agent initiated conversation with several passengers by saying that he was checking bus for security purposes, and defendant was only black person on bus. [U.S. Const. Amend. 4.](#)

[3 Cases that cite this headnote](#)

[\[15\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#)[Searches and Seizures](#)

[349I](#)[In General](#)

[349k25](#)[Persons, Places and Things Protected](#)

[349k28](#)[Abandoned, surrendered, or disclaimed items](#)

A warrantless search and seizure of abandoned property is not unreasonable under the Fourth Amendment; however, an abandonment must be voluntary. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[\[16\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#)[Searches and Seizures](#)

[349I](#)[In General](#)

[349k25](#)[Persons, Places and Things Protected](#)

[349k28](#)[Abandoned, surrendered, or disclaimed items](#)

Mere police pursuit or investigation at the time of abandonment of property does not of itself render the abandonment involuntary, but property is considered involuntarily abandoned if the abandonment was a consequence of illegal police conduct. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[\[17\]](#) [Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#)[Searches and Seizures](#)

[349I](#)[In General](#)

[349k25](#)[Persons, Places and Things Protected](#)

[349k28](#)[Abandoned, surrendered, or disclaimed items](#)

An abandonment of property is not voluntary when it results from a Fourth Amendment violation. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[\[18\]](#)

[Searches and Seizures](#)

🔑 [Abandoned, surrendered, or disclaimed items](#)

[349](#)[Searches and Seizures](#)

[349I](#)[In General](#)

[349k25](#)[Persons, Places and Things Protected](#)

[349k28](#)[Abandoned, surrendered, or disclaimed items](#)

When a person expressly denies having ownership of property, unless that denial of ownership is the result of a Fourth Amendment violation, it constitutes an abandonment of property; that a law enforcement agent might have known that a defendant previously exercised dominion over the property is irrelevant. [U.S. Const. Amend. 4.](#)

[1 Cases that cite this headnote](#)

[\[19\]](#)

[Searches and Seizures](#)

🔑 [Voluntary nature in general](#)

[349](#)[Searches and Seizures](#)

[349V](#)[Waiver and Consent](#)

[349k179](#)[Validity of Consent](#)

[349k180](#)[Voluntary nature in general](#)

Voluntary consent to search is an exception to the rule that a warrantless search violates the Fourth Amendment; voluntary consent consists of two parts: (1) the law enforcement officers must receive either express or implied consent, and (2) that consent must be freely and voluntarily given. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[20] [Searches and Seizures](#)

🔑 [Voluntary nature in general](#)

[349 Searches and Seizures](#)

[349V Waiver and Consent](#)

[349k179 Validity of Consent](#)

[349k180 Voluntary nature in general](#)

In determining the voluntariness of consent to search, the Fourth Amendment requires that consent not be coerced, by explicit or implicit means, by implied threat or covert force; for, no matter how subtly the coercion is applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[21] [Searches and Seizures](#)

🔑 [Consent, and validity thereof](#)

[349 Searches and Seizures](#)

[349V Judicial Review or Determination](#)

[349k192 Presumptions and Burden of Proof](#)

[349k194 Consent, and validity thereof](#)

The government bears the burden of proving that consent to search is given freely and voluntarily. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[22]

[Searches and Seizures](#)

🔑 [Questions of law or fact](#)

[349 Searches and Seizures](#)

[349V Judicial Review or Determination](#)

[349k201 Questions of law or fact](#)

The question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[23]

[Searches and Seizures](#)

🔑 [Voluntary nature in general](#)

[349 Searches and Seizures](#)

[349V Waiver and Consent](#)

[349k179 Validity of Consent](#)

[349k180 Voluntary nature in general](#)

Courts must consider all the circumstances surrounding the encounter to determine whether consent to search was voluntary. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[24]

[Searches and Seizures](#)

🔑 [Voluntary nature in general](#)

[349](#) Searches and Seizures

[349V](#) Waiver and Consent

[349k179](#) Validity of Consent

[349k180](#) Voluntary nature in general

A defendant's subjective state of mind may be relevant to some degree on the issue of the voluntariness of his or her consent to search, but it is not determinative if it does not overcome other indicia that the defendant's consent was freely and voluntarily given. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[\[25\]](#) [Searches and Seizures](#)

 [Effect of Illegal Conduct; Trespass](#)

[349](#) Searches and Seizures

[349I](#) In General

[349k80](#) Effect of Illegal Conduct; Trespass

[349k80.1](#) In general

Not all deception or trickery will render a search invalid. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[\[26\]](#) [Searches and Seizures](#)

 [Fourth Amendment and reasonableness in general](#)

[Searches and Seizures](#)

 [Waiver and Consent](#)

[349](#) Searches and Seizures

[349I](#) In General

[349k23](#) Fourth Amendment and reasonableness in general

[349](#) Searches and Seizures

[349V](#) Waiver and Consent

[349k171](#) In general

The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. [U.S. Const. Amend. 4](#).

[Cases that cite this headnote](#)

[\[27\]](#) [Arrest](#)

 [What Constitutes a Seizure or Detention](#)

[35](#) Arrest

[35II](#) On Criminal Charges

[35k60.4](#) What Constitutes a Seizure or Detention

[35k60.4\(1\)](#) In general

In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. [U.S. Const. Amend. 4](#).

[1 Cases that cite this headnote](#)

[\[28\]](#) [Searches and Seizures](#)

 [Knowledge of rights; warnings and advice](#)

[349](#) Searches and Seizures

[349V](#) Waiver and Consent

[349k179](#) Validity of Consent

[349k183](#) Knowledge of rights; warnings and advice

Although government agents are not required to advise a defendant that he or she has a right to refuse consent to search, this is one factor considered in the totality of circumstances analysis of whether search was voluntary. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[29] [Criminal Law](#)  
    🔑 [Particular cases](#)

[110Criminal Law](#)

[110XVIIEvidence](#)

[110XVII\(M\)Statements, Confessions, and Admissions by or on Behalf of Accused](#)  
[110XVII\(M\)18Effect of Prior Illegality](#)  
[110k413.7Illegal Arrest or Detention](#)  
[110k413.12Particular cases](#)

Defendant's recorded statement was product of her illegal arrest, although she received *Miranda* warnings; upon arrival at Drug Enforcement Administration (DEA) office, defendant was strip searched, processed, and waited in holding cell for around an hour in total before agent initiated recorded interview, there were no intervening circumstances, and agent and defendant discussed her situation between her arrest and recorded interview. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[30] [Criminal Law](#)  
    🔑 [Warnings](#)

[110Criminal Law](#)

[110XVIIEvidence](#)

[110XVII\(M\)Statements, Confessions, and Admissions by or on Behalf of Accused](#)  
[110XVII\(M\)18Effect of Prior Illegality](#)  
[110k413.7Illegal Arrest or Detention](#)  
[110k413.10Warnings](#)

When a person's arrest violates the Constitution, a *Miranda* warning alone is not enough to purge a confession of the taint of the illegal arrest, that is, the Fourth Amendment violation. [U.S. Const. Amend. 4.](#)

[Cases that cite this headnote](#)

[31] [Criminal Law](#)  
    🔑 [Weight and Sufficiency of Evidence in General](#)

[110Criminal Law](#)

[110XXTrial](#)

[110XX\(F\)Province of Court and Jury in General](#)  
[110k733Questions of Law or of Fact](#)  
[110k741Weight and Sufficiency of Evidence in General](#)  
[110k741\(1\)In general](#)

Evaluations of witness credibility, the weight to be given to evidence, and any inferences to be drawn from the evidence are determinations within the sound discretion of the district court.

[Cases that cite this headnote](#)

Attorneys and Law Firms

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[Brian A. Pori](#), Federal Public Defender, Albuquerque, NM, for Defendant.

MEMORANDUM OPINION AND ORDER

MARTHA VÁZQUEZ, UNITED STATES DISTRICT JUDGE

\*1292 THIS MATTER is before the Court on Ollisha Nicole Easley's Motion to Suppress. [Doc. 20]. Having reviewed the Motion, briefs, testimony, and relevant law, for the reasons below, the Court grants the Motion.

## BACKGROUND

This Motion concerns a warrantless bus sweep and its fallout—one of many warrantless sweeps that have come before this Court and courts across the country. On March 10, 2016, Ollisha Easley, the defendant, was a passenger on a Greyhound bus traveling east from Claremont, California. The bus made many scheduled stops at stations along its route. Some stops were for a few minutes. The bus stopped for a longer layover at the bus station in Albuquerque, New Mexico. When it is on schedule, the bus arrives in Albuquerque at 9:55 a.m. and departs at 11:15 a.m.<sup>1</sup>

During the one-hour-and-twenty-minute layover in Albuquerque, passengers disembarked. Those who were continuing on to eastward destinations waited in the terminal while the bus was serviced, refueled, and cleaned in the maintenance shop—what is called the wash bay, south of the terminal. When the bus was ready to depart from Albuquerque, it left the wash bay and returned to the terminal. The passengers re-boarded to continue their journeys.

Ms. Easley is a 34-year-old African-American mother from Louisville, Kentucky. It appears that she is the sole economic provider and caregiver for her family. In early March, 2016, she was in a desperate financial situation when she got an offer for a job that would pay \$1,000. The Court does not know how much Ms. Easley was earning in Kentucky, where she worked at a chain restaurant. But the weekly take-home pay—that is, pay after deductions for Social Security and Medicare taxes—for a minimum wage job in the United States during this time period was around \$267.80.<sup>2</sup> It

would take a person earning the minimum wage more than 149 hours of remunerated work to earn what Ms. Easley was offered for this job.<sup>3</sup>

William Schultz—a friend in Kentucky whom she had known for about a year and a half—knew that Ms. Easley needed money. He gave Ms. Easley's number to a woman who called to offer her the job. The woman said that Ms. Easley would earn \$1,000 for flying out to California and returning to Louisville on a Greyhound bus. Beyond those details, Ms. Easley did not know what the job would involve and she did not ask the woman for more information. Mr. Schultz gave Ms. Easley money for her airline ticket, which she purchased with her own debit or credit card. She flew to Ontario, California, where Mr. Schultz \*1293 (who had traveled from Kentucky to California on an earlier plane) and the woman met Ms. Easley at the airport and took her to the woman's apartment.

Drug Enforcement Agency (DEA) Special Agent (SA) Jarrell Perry works to detect and intercept both illegal drugs and proceeds from the sales of illegal drugs at hubs of public transportation in Albuquerque: the bus station, the Amtrak train station (which is connected to the bus station), at packaging services, and sometimes at the international airport. SA Perry has more than nineteen years of experience with the DEA. He has interdicted illegal drugs and proceeds from sales of illegal drugs for almost eighteen of those nineteen years—at the Greyhound station in Albuquerque for six or seven of those nineteen years.

On March 10, 2016, SA Perry was at the Greyhound station in Albuquerque. Before SA Perry arrived at the bus station, he had received a passenger list from Greyhound. In reviewing the list, SA Perry observed that two passengers—Ms. Easley and a woman called “Denise Moore”—were traveling under the same reservation number. Their tickets had been paid for in cash and, according to the passenger list, both women had one piece of checked luggage, that is, luggage traveling in the cargo area of the bus. [Doc. 21 at 2].

That day, the other agent with whom SA Perry typically works was on vacation. Another DEA agent, Scott Godier, was SA Perry's backup. Agent Godier does not typically work in interdiction. The two agents were in street clothes, their shirts were untucked. SA Perry was carrying a weapon, but his shirt was covering it. SA

Perry believes that Agent Godier was also carrying a weapon, but he (SA Perry) did not see it.

The two agents watched the bus from Claremont pulling into the Greyhound station in Albuquerque. They watched the passengers disembark from the bus. The bus went to the wash bay. While the bus was in the wash bay, SA Perry and Agent Godier “observed” the luggage that was stored underneath the bus. Ms. Easley’s counsel notes that the extent of the agents’ observations in the luggage hold is unknown. [Doc. 20 at 2]. In the Preliminary Examination/Detention Hearing on March 14, 2016, SA Perry testified that he “opened up the luggage bins[,] … looked at the luggage[, and] looked at the tags.” [Doc. 23 at 10:11–13]. According to the government, SA Perry observed two pieces of luggage—a grey-colored Rome Essentials-brand suitcase with a luggage tag displaying Ms. Easley’s name and a black-tan-colored G-brand suitcase with a luggage tag displaying the name of Denise Moore. Both luggage check-in tags listed Claremont, California, as the city of origin, and a Louisville, Kentucky, as the final destination. The two luggage tags also listed an identical contact phone number. [Doc. 21 at 2–3].

After the bus was washed and refueled, Ms. Easley and the other passengers re-boarded. As she was returning to her seat, Ms. Easley saw Agent Godier at the front of the bus and SA Perry at the rear of the bus. SA Perry was questioning other passengers.

According to Ms. Easley, after SA Perry had questioned about 15 passengers and searched numerous passengers’ belongings, he approached Ms. Easley. In the Preliminary Examination/Detention Hearing on March 14, 2016, SA Perry testified that he “spoke with each passenger” and estimated that there were “maybe 35, 40” passengers aboard the Greyhound bus that day. [Doc. 23 at 14:17–18, 24]. The recording of SA Perry’s conversations with passengers clearly demonstrates that different passengers were subjected to different levels of inquiry. For example, some passengers \*1294 were only asked where they boarded, where their final destination was, and whether they would consent to a search of their belongings, although SA Perry did not actually search these passengers. [Doc. 34 at 4]. Defense counsel points out that “[i]t is not at all clear how Agent Perry decided which passengers would be subject to which level of inquiry. Every passenger on the bus began their travel in a source city for narcotics.

Every passenger (except the two traveling to Fort Worth, TX) were traveling to a destination city for narcotics.” [Doc. 34 at 5]. However, “what is clear is that most of the people who were asked to produce their ticket and identification and who were ordered to submit to a search of their person were Hispanic surname individuals and Ms. Easley, who is an African-American.” *Id.* According to the government, SA Perry had his recording device activated during his questioning of the passengers, including Ms. Easley. [Doc. 21 at 3]. The recording of these interactions reveals that not a single passenger on Ms. Easley’s bus declined to speak with SA Perry, and that everyone who was asked to do so gave consent for SA Perry to search their person and belongings. A Latino passenger apparently even consented to SA Perry’s cutting into his stiff shoe with a knife that SA Perry borrowed from another passenger.

According to Ms. Easley, when SA Perry spoke to her, he asked her:

- (1) where she was traveling from; (2) where she was traveling to; (3) if she was traveling alone; (4) if she had checked luggage stored underneath in the cargo hold of the bus; (5) if he could search her checked luggage stored underneath in the cargo hold of the bus; (6) if she had any personal belongings stored in the overhead bin of the bus; and, (7) if he could search her personal belongings.

[Doc. 20 at 3]. According to the government, Ms. Easley told SA Perry that she was not traveling with anyone. Ms. Easley also identified a backpack, pillows, and a checked-in suitcase as the items belonging to her. [Doc. 21 at 3]. The government and Ms. Easley agree that Ms. Easley “consented to a search of all of her belongings.” [Doc. 20 at 3]. While on the bus, SA Perry saw her ticket, searched her backpack and pillow, asked Ms. Easley to open her jacket and if he could search her waist and around her legs. Ms. Easley complied with these requests. [Doc. 34 at 6]. After SA Perry finished speaking with each passenger, he exited the bus, pulled luggage out of the cargo hold, removed Ms. Easley’s suitcase and the G-brand suitcase, then reboarded and asked Ms. Easley to step off the bus. Once she had exited the bus, SA

Perry asked to see her ticket and again asked her about her travel plans. [Gov. Ex. 1(A) at 38:9–15]. He then asked to see her identification and to search her purse. *Id.* at 39:23, 40:17. Next, SA Perry asked Ms. Easley to identify her suitcase. Then SA Perry asked Ms. Easley if she also owned the G-brand suitcase, to which Ms. Easley responded that it was not hers and that she did not know who it belonged to. *Id.* at 41:7–42:4. She then reboarded the bus. After confirming with the bus driver that the other passenger on Ms. Easley's reservation had not boarded the bus, SA Perry concluded that the G-brand suitcase had been abandoned and proceeded to search it. He cut into the suitcase and discovered methamphetamine. SA Perry then reboarded the bus and arrested Ms. Easley. The bus then departed, sometime later than its scheduled departure.

Agent Godier transported Ms. Easley to the DEA District Office in Albuquerque. According to Ms. Easley, while he was transporting her, Agent Godier asked her questions about the offense and warned \*1295 her that she was facing a prison sentence of ten years to life. [Doc. 34 at 8].

At the DEA District Office, SA Perry interrogated Ms. Easley. The government provided a video of the interrogation and a transcript of the video. [Gov. Ex. 2(A) ]. The parties dispute what happened before the recorded interrogation—specifically, what SA Perry told Ms. Easley about the potential charges against her, her right to be represented by an attorney, and her potential exposure to incarceration. According to Ms. Easley, after she was placed in a holding cell, SA Perry removed her from the holding cell, showed her the methamphetamine that had been seized, told her that she was facing a sentence of ten years to life imprisonment, “and then he told he[r] that she needed to be selfish, that she needed to think about her kids, that the people who supplied her with the drugs would not care about her and, most important, that she needed to ‘help herself.’ ” [Doc. 34 at 8]. Ms. Easley says that she was then returned to the holding cell and,

sometime later, removed again by SA Perry to take her photograph, fingerprints, and obtain personal information. During this processing, according to Ms. Easley, SA Perry told her that she was “not getting out,” that he wanted to interview her, and that, again, she needed to be “selfish” and “help” herself. *Id.* at 9. Ms. Easley recalls that SA Perry told her “she could help herself by consenting to an interview because if she cooperated he would tell the judge that she was a good person but if she failed to cooperate he would be forced to tell the judge that she was not worthy of leniency.” *Id.* at 9. At the hearing, SA Perry testified to telling Ms. Easley that “if she decided to cooperate to help herself, that her consideration, anything that she did, would be relayed to the U.S. Attorneys who would relate it to the Judge, who would make the final decision of what happened to her.” [Hearing Tr. at 100:11–15].

SA Perry returned Ms. Easley to the holding cell and then, sometime later, removed her again and took her to an interview room where he conducted a tape-recorded conversation. The following is an excerpt of the interrogation near the beginning of the recording, after SA Perry read Ms. Easley her Miranda warning.

SA Perry: You kind of had a puzzled look on your face. Do you—do you want me to read that again? Do you understand it?

Ms. Easley: I understand it, but I'm just like I want to help but I'm like—

SA Perry: Well, let me finish. Let me finish reading your rights. You understand that one, though, right? Let me read it to you again. You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during questioning. Do you understand that?

Ms. Easley: Yes.

SA Perry: Okay. If you cannot afford a Lawyer one will be appointed to you before any questioning if you wish. Do you understand that?

Ms. Easley: Yes.

SA Perry: Do you understand everything I just read to you?

Ms. Easley: Yes.

SA Perry: Okay. Are you willing to answer some questions?

Ms. Easley: If I answer the questions now and then I answer questions with a lawyer here, how long would it that be?

SA Perry: Okay. Repeat that again because I didn't understand.

Ms. Easley: I said—I said how long would it be for me to answer questions with a lawyer here?

SA Perry: Okay. Here's the deal, you have a right to a lawyer, okay, before you answer any questions. If you tell \*1296 me that you want a lawyer right now—

Ms. Easley: Uh-huh

SA Perry:—we're just not going to ask you the questions today. Okay. So that's your right. We're not going to call a lawyer and bring one in here and have you question—answer questions. Okay. We're not going to do that today. If you decide you want a lawyer today we just won't ask you questions but you can—if you talk to your lawyer later and after you go to court and then you decide you want to answer questions then we'll talk to you then. Does

that make sense? If it doesn't make sense let me know.

Ms. Easley: It makes sense. I'm just like which one is going to help me better because I told you I don't—I can't afford to be here like this. I know what is going on but I can't afford to be here like this.

SA Perry: Okay. That's your right. I—you know, all I can do is read you your rights and I can't try to talk you into talking to us. You know, I mean, as I explained to you when we was processing you, you know, I want to talk to you. The advantages of you talking to us is it'll, in the long run help you. Obviously it will help us. It will help you when it comes down to your sentencing. That's a choice you make. You can get—make a choice to talk to us and, you know, I can't make that decision for you.

Ms. Easley: All right. [...] I'll answer the questions.

[Gov. Ex. 2(A) at 2:24–5:13]. During the ensuing interview, Ms. Easley described how she agreed to transport luggage from Claremont, California, to Louisville, Kentucky, who she was working with and what transpired prior to her boarding the bus in Claremont. Over the course of the interview, both SA Perry and Ms. Easley made references to their earlier, unrecorded conversation while Ms. Easley was being processed, including SA Perry saying “I told you before, we can't go back and change anything we did,” *id.* at 24:4–5, and Ms. Easley saying “like you already said, I'm not going to get out anyways,” *id.* at 21:23–24. After the recorded interview, Ms. Easley was eventually transported to the Sandoval County Detention Center in Bernalillo, New Mexico.

## PROCEDURAL BACKGROUND

On March 23, 2016, Ms. Easley was charged in a one-count Indictment [Doc. 12] with possession with intent to distribute more than 500 grams of methamphetamine, in violation of [21 U.S.C. §§ 841\(A\)\(1\) and 841\(B\)\(1\)\(a\)](#). On May 23, 2016, she filed the instant Motion to Suppress [Doc. 20], arguing that SA Perry had violated her rights under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, and sought to suppress the evidence that SA Perry seized from the G-brand suitcase, as well as her subsequent custodial statements. On June 2, 2016, the United States filed a Response in opposition to Ms. Easley's Motion to Suppress. [Doc. 21]. On July 19, 2016, Ms. Easley filed a Reply to the United States' Response. [Doc. 30]. On August 24, 2016, the Court held a suppression hearing. SA Perry and Ms. Easley testified at the hearing. At the conclusion of the hearing, the Court ordered the parties to file written closing statements. The United States filed its written closing on August 31, 2016, and Ms. Easley filed her written closing on September 6, 2016. [Docs. 33, 34].

## STANDARD

When ruling on a motion to suppress, the Court must state its essential findings on the record. *See Fed. R. Crim. P. 12(d)* (“When factual issues are involved in deciding a motion, the court must state its \*1297 essential findings on the record.”). This Memorandum Opinion and Order's findings of fact shall serve as the Court's essential findings for [Rule 12\(d\)](#)'s purposes. The Court makes these findings under the authority of [Rule 104\(a\) of the Federal Rules of Evidence](#), which requires a judge to decide preliminary questions relating to the admissibility of evidence, including the legality of a search or seizure, and the voluntariness of an individual's confession or consent to search. *See United States v. Merritt*, 695 F.2d 1263, 1269–70 (10th Cir. 1982) (“[U]nder Rule[ ] 104(a) ..., the district court ‘is not bound by

the Rules of Evidence except those with respect to privilege.’ ”) (quoting *United States v. Matlock*, 415 U.S. 164, 174, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) ). In deciding such preliminary questions, the other rules of evidence, except those with respect to privileges, do not bind the Court. *See Fed. R. Evid. 104(a)* (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”).

[\[1\]](#) [\[2\]](#) [\[3\]](#) [\[4\]](#)The Fourth Amendment protects “the right of the people to be secure in their ... effects, against unreasonable searches and seizures.” [U.S. Const. amend. IV](#). A search implicating the Fourth Amendment occurs when the government invades a person's “legitimate expectation of privacy.” *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). A search undertaken without a warrant, subject only to a few, well-established exceptions, is *per se* unreasonable under the Fourth Amendment. A seizure implicating the Fourth Amendment occurs when the government meaningfully interferes with an individual's possessory interests in their property. *See, e.g., U.S. v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). When a defendant moves to suppress evidence obtained as a result of an allegedly unconstitutional search, she has the burden of demonstrating a subjective expectation of privacy that society is prepared to recognize as reasonable. *See United States v. Conway*, 73 F.3d 975, 979 (10th Cir. 1995).

[\[5\]](#) [\[6\]](#)The Fifth Amendment protects a person from being compelled to incriminate herself. [U.S. Const. amend. V](#). The Fifth Amendment specifically prohibits admitting statements given by a person during a custodial interrogation without *Miranda* warnings. Moreover, “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further

police-initiated custodial interrogation even if he has been advised of his rights[.]” *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Supreme Court later explained that a person “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. U.S.*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). Without this “level of clarity, *Edwards* does not require that the officers stop questioning the suspect.” *Id.* at 458, 114 S.Ct. 2350.

## DISCUSSION

Ms. Easley seeks to suppress evidence seized from the G-brand suitcase as well as the recorded statement she made to SA Perry at the DEA office. [Doc. 20 at 1]. As described herein, Ms. Easley has not established by a preponderance of the evidence that, while in the wash bay, SA Perry searched her bags in violation of the Fourth Amendment. Nor has Ms. Easley established that she and the bus were subject to an unreasonable investigatory detention. \*1298 However, the government has not established by a preponderance of the evidence that, under the totality of the circumstances, Ms. Easley's consent to search and abandonment of the G-brand suitcase were voluntary. Accordingly, the evidence seized from the suitcase will be suppressed. Furthermore, because Ms. Easley's confession is tainted by the earlier Fourth Amendment violation, the confession also will be suppressed.

### I. Evidence Seized From the G-Brand Suitcase

The pre-search that SA Perry conducted in the wash bay does not run afoul of the Fourth Amendment because the testimony indicates that SA Perry and Agent Godier were only making visual observations of the luggage and their tags, and not otherwise manipulating the bags. However, in considering the totality

of the circumstances in the encounter between SA Perry and Ms. Easley, the Court finds that Ms. Easley's consent to the search of her suitcase and her abandonment of the G-brand suitcase were not voluntary.

#### A. Pre-Search of Checked Bags After Bus Arrived in Wash Bay

[7] Ms. Easley argues that when the bus was in the wash bay and SA Perry and Agent Godier were making observations about the luggage in the cargo hold of the bus, the agents' “actions went far beyond the sort of occasional touching that a person expects as a passenger on the bus.” [Doc. 20 at 12]. Instead, the agents undertook their observations of the luggage “with the improper aim of ‘discovering the nature of the contents of the bag.’ ” *Id.* (citing *U.S. v. Nicholson*, 144 F.3d 632, 638 (10th Cir. 1998)).

[8] People have a legitimate expectation of privacy in their personal luggage—one which the Fourth Amendment protects. *See U.S. v. Nicholson*, 144 F.3d 632, 636 (10th Cir. 1998) (citing *United States v. Chadwick*, 433 U.S. 1, 13, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (“individual has expectation of privacy in luggage as repository of ‘personal effects’ ”), *overruled in part on other grounds*, *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) ).

[9] [10] [11] However, a traveler's expectation of privacy in her luggage has limits. Merely conducting a visual inspection of what is in “plain view” does not constitute a search under the Fourth Amendment. *See Nicholson*, 144 F.3d at 636 (citing *Arizona v. Hicks*, 480 U.S. 321, 328, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) ). Moreover, although “[e]very search necessarily involves the use of sensory perception,” “the use of sensory perception does not necessarily constitute a search.” *Id.*

at 636. The Tenth Circuit has held, for example, that “an officer’s kicking and lifting of a gym bag located on the floor in front of a train seat, and protruding into the aisle, did not constitute a search.” *Id.* at 636–37 (citing *U.S. v. Gault*, 92 F.3d 990 (10th Cir. 1996)). The thrust of the analysis is whether the government officer’s “manner of handling the bag was the sort that a traveler leaving the bag in such a position might reasonably expect.” *Id.* at 637.

In *Nicholson*, the detective testified that he removed Mr. Nicholson’s carry-on bag from the overhead rack and “manipulated” it. *Id.* at 635. In manipulating the bag, he detected “tightly wrapped bundles[,]” which he believed to be illegal drugs. The Tenth Circuit found that because the manner of the detective’s manipulation of the bag was one that “Defendant did not reasonably expect from other passengers,” the detective conducted a search within the meaning of the Fourth Amendment. *Id.* at 639. Specifically, the Court noted:

Detective Leach was not prepping the bag for a sniff. He never testified that he smelled Defendant’s bag. Instead, \*1299 Detective Leach worked Defendant’s bag to determine whether it contained something of independent evidentiary value. Unlike a sniff, manipulating a bag with the hands may reveal much more than simply the likely presence of illegal drugs. To an extent, it reveals the contents of a bag, for example clothes, shoes, or toiletries, in which the owner has a legitimate expectation of privacy.

*Id.* The Court concluded:

We believe that by handling Defendant’s carry-on bag in this manner, Detective Leach departed from the type of handling a commercial bus passenger would reasonably expect his baggage to be subjected, and entered the domain protected by the Fourth Amendment. When Detective Leach removed Defendant’s carry-on bag from the overhead rack and conducted a

tactile examination aimed at discovering the nature of the contents of the bag, he violated Defendant’s reasonable expectation of privacy in the bag. Thus, Detective Leach’s manner of handling Defendant’s carry-on bag constituted a search within the meaning of the Fourth Amendment.

*Id.* The Court similarly found that another detective’s manner of handling the defendant’s checked suitcase in the cargo hold of the bus constituted a search, where the detective testified that he pressed on the sides of the bag “with his hands perpendicular to the ground and flat.” *Id.* at 640. By pressing on the sides, he detected “several large bundles” inside it. The Court found that “Detective Wenthold’s pressing on the sides of the suitcase with the palms of his hands in order to inspect its contents violated Defendant’s reasonable expectation of privacy in the suitcase because it went beyond that type of contact which a passenger may reasonably expect when checking a bag with a commercial bus line.” *Id.* at 640.

According to his testimony, it does not appear that SA Perry touched, squeezed, or otherwise manipulated the G-brand luggage when it was in the cargo hold underneath the bus—that is, it does not appear that SA Perry’s actions amounted to an unconstitutional search. SA Perry claimed that while he was in the wash bay, he “opened up the luggage bins, [and] looked at the luggage.” [Doc. 23 at 10:11–13]. SA Perry also testified that he “[h]ad to move some of the luggage to get to all of the luggage” and he “looked at the tags[.]” *Id.* at 10:12–13. He did not recall removing luggage from the bus. *Id.* at 10:21. He also testified that he did not notice anything suspicious about the luggage at the time he inspected it in the wash bay. *Id.* at 13:18.

Because the record does not indicate, nor has Ms. Easley identified, any evidence that SA Perry or Agent Godier “manipulated” the G-brand suitcase in a way that “went beyond that type of contact which a passenger may

reasonably expect when checking a bag with a commercial bus line,” *Nicholson*, 144 F.3d at 640, the Court finds that the actions the agents took to observe the luggage in the cargo hold while the bus was in the wash bay did not constitute an unreasonable search in violation of the Fourth Amendment.

#### B. Investigatory Detention

[12] Ms. Easley argues that even if the agents' observations of the luggage in the cargo hold did not constitute an unreasonable search, the detention of the Greyhound bus was unlawful because SA Perry and Agent Godier lacked “individualized suspicion of wrongdoing” and engaged in a “suspicionless drug interdiction operation which prevented every passenger on the bus from continuing on their journey.” *Id.* at 13–14 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) for the holding that \*1300 officers may not establish suspicion-less checkpoints for the primary purpose of interdicting narcotics). Ms. Easley argues that the prolonged detention of the bus was unreasonable and “unquestionably exceeded the permissible duration of an investigative detention[.]” *Id.* at 18. She argues that SA Perry “transformed a routine stop in Albuquerque for washing and [refueling] into a drug interdiction checkpoint, in violation of the Fourth Amendment.” *Id.* at 19 (citing *U.S. v. Nicholson*, 144 F.3d at 639).

[13] The Court rejects Ms. Easley's argument that the bus and its passengers experienced an unreasonable investigative stop. Although the bus may have been delayed in departing the Albuquerque station due to the agents' activities, the agents' detention of Ms. Easley and the other bus passengers was not unreasonable. An investigative detention is reasonable under the Fourth Amendment if the officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity,” *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000), and

if the detention is “reasonably related in scope to the circumstances” justifying the stop. *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In other words, the Fourth Amendment imposes “limitations on both the length of the detention and the manner in which it is carried out.” *United States v. Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc), overruling on other grounds recognized in *United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007).

In considering the agents' activities on the Greyhound bus in this case, the evidence suggests that the agents were attempting to conduct consensual searches and not conducting an investigatory stop of the bus. Neither counsel nor the Court has identified a case where law enforcement questioning passengers on a bus or train, during one of its scheduled stops, was considered an investigatory stop. Rather than stopping the bus outside of its schedule, SA Perry and Agent Godier boarded the bus during one of its regularly scheduled stops and spoke to passengers in an effort to conduct consensual searches. Everyone agreed to speak to SA Perry and no one declined consent to be searched. Because all of the agents' actions on the bus were based on consent, the factual setting of this case does not raise the issue of whether SA Perry and Agent Godier had reasonable suspicion to conduct a stop and frisk type search of Ms. Easley or others on the bus. *See also Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (“no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required.”).

#### C. Consent to Search G-brand Suitcase

[14] The Court considers the totality of the circumstances in the encounter between SA Perry and Ms. Easley and finds that a person in Ms. Easley's position would not have felt free to terminate the encounter and that,

accordingly, Ms. Easley's abandonment of the G-brand suitcase was involuntary and the methamphetamine obtained from the suitcase must be suppressed.

[15] [16] [17] [18] In general, a warrantless search and seizure of abandoned property is not unreasonable under the Fourth Amendment. *U.S. v. Trimble*, 986 F.2d 394, 399 (10th Cir.), cert. denied, 508 U.S. 965, 113 S.Ct. 2943, 124 L.Ed.2d 691 (1993). However, an abandonment must be voluntary. *U.S. v. Ward*, 961 F.2d 1526, 1535 (10th Cir. 1992), overruled on other grounds in \*1301 *U.S. v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994). Mere “police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary,” *U.S. v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983), but property is considered involuntarily abandoned if the abandonment was a consequence of illegal police conduct. See, e.g., *U.S. v. Garzon*, 119 F.3d 1446, 1450–51 (10th Cir. 1997) (finding property not abandoned when left on bus after police issued unlawful order to remove all belongings from bus and “parade them past a drug-sniffing dog”). In sum, “[a]n abandonment is not voluntary when it results from a Fourth Amendment violation.” *U.S. v. Hernandez*, 7 F.3d 944, 947 (10th Cir. 1993). When a person expressly denies having ownership of property, unless that denial of ownership is the result of a Fourth Amendment violation, it constitutes an abandonment of property. “That [a law enforcement agent] might have known [that a Defendant] previously exercised dominion over the bag is irrelevant.” See *U.S. v. Denny*, 441 F.3d 1220, 1228 (10th Cir. 2006).

Ms. Easley consented to a search of her other belongings and expressly denied ownership of the G-brand luggage. The issue therefore is whether her denial of ownership over the G-brand suitcase resulted from an earlier Fourth Amendment violation. Ms. Easley argues that the abandonment of the G-brand suitcase was involuntary because she “merely acquiesced to Agent Perry's increasing show of authority,” [Doc. 20 at 14], and that she

was “left with the firm belief that she had no choice but to comply with each of Agent Perry's requests.” *Id.* at 16. The government argues that Ms. Easley consented to speaking with SA Perry and to his search of “her backpack, her pillow and her suitcase” that was checked in the cargo hold below the bus. *Id.* at 13. In support of the argument that Ms. Easley's consent was voluntary, the government notes that she “was on a public bus, within view of persons other than law enforcement.” *Id.* at 14 (citing to *U.S. v. Thompson*, 546 F.3d 1223, 1227 (10th Cir. 2008) (“[t]he presence of other citizens during a police encounter is one factor suggesting its consensual nature”)). The government also notes that SA Perry did not obstruct Ms. Easley's movement on the bus or restrain her until he arrested her, he did not display his weapon, and he spoke with Ms. Easley “in a consistently polite tone of voice.” *Id.* The government argues that under the Supreme Court's holding in *United States v. Drayton*, 536 U.S. 194, 204, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002), police officers do not have to always inform people of their right to refuse a request to search. *Id.* at 15.

Furthermore, the government argues that in addition to consenting to the search of her suitcase and other belongings, Ms. Easley also “effectively consented” to the search of the so-called phantom passenger Denise Moore's suitcase, in which the methamphetamine was found. *Id.* The government argues that Ms. Easley “initially denied any relationship to the suitcase, denied knowing about it[,] and told SA Perry that she didn't care about it,” *id.*, demonstrating that the G-brand suitcase had been abandoned and was legitimately subject to search. *Id.* at 16 (citing *Abel v. U.S.*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), *inter alia*).

[19] [20] [21] [22] Voluntary consent to search is an exception to the rule that a warrantless search violates the Fourth Amendment. *United States v. Jones*, 701 F.3d 1300, 1317 (10th Cir. 2012). “Voluntary consent” consists of two parts: (1) the law enforcement officers must receive either

express or implied consent, and (2) that consent must be freely and voluntarily given.” *Id.* In determining the voluntariness of consent, the Fourth Amendment requires that “consent not be coerced, by explicit or \*1302 implicit means, by implied threat or covert force. For, no matter how subtly the coercion is applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The government bears “the burden of proving that consent is given freely and voluntarily.” *Jones*, 701 F.3d at 1318 (citation omitted). “Further, the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” *Id.* (citation omitted).

In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), the Supreme Court specifically addressed drug interdiction efforts on buses. In *Bostick*, two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine, adopting a *per se* rule that due to the cramped confines onboard a bus, the act of questioning would deprive a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment. The Supreme Court reversed, “ma[king] it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context.” *Drayton*, 536 U.S. at 201, 122 S.Ct. 2105 (citing *Bostick*). Rather, “[t]he proper inquiry necessitates a consideration of ‘all the circumstances surrounding the encounter.’” *Id.* (quoting *Bostick*, 501 U.S. at 429, 111 S.Ct. 2382).

The Court next noted that a passenger may not want to get off a bus if there is a risk it will depart before the opportunity to re-board. *Bostick*, 501 U.S. at 434–36, 111 S.Ct. 2382. Although a bus rider's movements are confined in this sense, the circumstance of

simply riding a bus says nothing about whether the police conduct is coercive. *Id.* at 436, 111 S.Ct. 2382. Accordingly, the Court held that the proper inquiry “is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.” *Bostick*, 501 U.S. at 436, 111 S.Ct. 2382.

The *Bostick* Court deemed the following factors relevant to the Fourth Amendment reasonableness determination: (1) whether the agent advised the defendant he had the right to refuse consent, (2) whether the agent in any way threatened the defendant (*i.e.*, the display of a weapon and/or the nature of the questioning), and (3) the particular location of the encounter. *Bostick*, 501 U.S. at 437, 111 S.Ct. 2382. Following *Bostick*, the Tenth Circuit similarly identified various factors relevant to whether a reasonable person would not feel free to terminate an encounter with police:

The threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed place; and absence of other members of the public.

*United States v. Hill*, 199 F.3d 1143, 1147–48 (10th Cir. 1999).

In *Drayton*, the Supreme Court applied the *Bostick* framework to the facts of the case before it and determined that the respondents' consent to the search of their luggage and their persons was voluntary, explaining:

Nothing Officer Lang said indicated a command to consent to the search. Rather, \*1303 when Lang requested to

search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.

Drayton, 536 U.S. at 206, 122 S.Ct. 2105. The Court specifically noted that although the officer "did not inform the respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable." Id. at 207, 122 S.Ct. 2105. The Court rejected not only the notion that "police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search," but also the suggestion that "a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate." Id. Rather, the Court stated that "the totality of the circumstances must control, without giving extra weight to the absence of this type of warning." Id.

Several of the factors listed in Hill, considered in isolation, would weigh in favor of finding that Ms. Easley's consent was voluntary. First, there was no "threatening presence of several officers." To the contrary, only SA Perry approached Ms. Easley, near the back of the bus, while Agent Godier remained at the front of the bus. See United States v. Benard, 680 F.3d 1206, 1211 (10th Cir. 2012) (finding first factor did not weigh against a finding of voluntary consent where only two police officers were present at the scene and only one of those officers approached defendant). Second, neither SA Perry nor Agent Godier "brandished" a weapon. SA Perry kept his gun and his handcuffs concealed beneath his shirt. Third, in reading the transcript of the audio recording, it would appear that SA Perry did not use "aggressive language." Fourth, SA Perry did not retain Ms. Easley's personal effects for a prolonged period of time, as he searched each item briefly and immediately returned it to her. Fifth, the recording and testimony do not indicate that SA Perry blocked Ms. Easley's access to the aisle during the encounter. Finally, the encounter occurred in the presence of other members of the public, namely, the other bus passengers.

[23] [24] In assessing the totality of the circumstances in the instant case, the Court notes first that the factors listed in Hill are not exhaustive. See United States v. Hernandez, 847 F.3d 1257, 1264 (10th Cir. 2017); Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005). Courts " 'must consider all the circumstances surrounding the encounter' to determine whether consent was voluntary." U.S. v. Ledesma, 447 F.3d 1307, 1314 (10th Cir. 2006) (quoting Bostick, 501 U.S. at 439, 111 S.Ct. 2382). "A defendant's subjective state of mind may be relevant to some degree on the issue of the voluntariness of his or her consent, but it is not determinative if it does not overcome other indicia that the defendant's consent was freely and voluntarily given." U.S. v. Huerta-Rodriguez, 2010 WL 4929044, at \*10 (D.N.M. Oct. 20, 2010) (Browning, J.) (citing Hill ).

However, in considering the totality of the circumstances, beyond the factors specifically mentioned in Hill, the Court finds that a reasonable person in Ms. Easley's position would not have felt free to terminate the encounter with SA Perry. First, the recording of SA Perry's interactions with passengers on the bus reflects that none of the passengers refused to speak with SA Perry, and those who were asked \*1304 did consent to searches. One passenger even consented to SA Perry cutting into his shoe. [Gov. Ex. 1(A) at 13:19–14:6]. That no one declined consent suggests that SA Perry, either verbally or nonverbally, made a show of authority that would lead a reasonable person in Ms. Easley's position to believe she was not free to decline or terminate the encounter.

In United States v. Levetan, 729 F.Supp. 891,

901 (D.D.C. 1990), the district court held that, where the defendant train passenger was told that police were searching others on the train and defendant understood that the train would be stopped until the officers finished their questioning and searches, a reasonable person would not believe they were free to leave. The court recognized that “[a] reasonable person is unlikely to believe that he alone can walk away from police when he is one of a group of persons being questioned.” *Id.* The court further reasoned that “[t]he knowledge that police are searching a group of other persons must have at least subtly coerced Levetan into believing that the police could lawfully search his bags whether he consented or not.” *Id.* at 902, 99 S.Ct. 2577. Similarly, Ms. Easley witnessed SA Perry’s interrogation and search of several other passengers on the bus before she was questioned, and she did not see anyone decline consent. The Court therefore gives some weight to this factor, as part of the totality of circumstances, in favor of its finding that Ms. Easley’s consent was involuntary.

[25] Second, SA Perry initiated his conversation with several passengers by saying that he was checking the bus “for security” purposes, rather than stating he was looking for contraband. [Gov. Ex. 1(A) at 4:2–3, 7:6–7, 8:9–10, 22:1–2, 25:6–7]. Although “not all deception or trickery will render a search invalid,” *United States v. Harrison*, 639 F.3d 1273, 1278 (10th Cir. 2011), the Court interprets SA Perry’s approach of introducing himself as a police officer who is checking the bus “for security” as an attempt to assert authority and confuse passengers into believing they could face physical danger if they did not comply with his search requests. In *Bostick*, the officers identified themselves as “narcotics agents on the lookout for illegal drugs.” *Bostick*, 501 U.S. at 431–32, 111 S.Ct. 2382. In contrast, SA Perry’s pattern of introducing himself as a police officer who is checking the bus “for security” may mislead so called reasonable passengers into believing they are not free to decline or terminate the encounter. See *United States v. Grobstein*, 1:13-cr-0063-MV, Doc. 129, 2016 WL

10587954, at \*24 (D.N.M. Mar. 7, 2016) (Vázquez, J.) (finding that “by identifying himself as a police officer, rather than as a DEA officer, and by representing that he is there for security purposes, without clarifying that his purpose is drug interdiction, SA Perry misled and misinformed Defendant. The Court is troubled by SA Perry’s obfuscation of his position and his role.”); *United States v. Ruedas*, 270 F.Supp.2d 1316, 1317 (D.N.M. 2003) (Vázquez, J.) (finding defendant voluntarily consented to the encounter with SA Perry, noting in part that SA Perry approached the defendant and “identified himself as law enforcement who investigated drug trafficking activity”).

In *U.S. v. Harrison*, 639 F.3d 1273, 1278–79 (10th Cir. 2011), the Tenth Circuit held that “when government agents seek an individual’s cooperation with a government investigation by misrepresenting the nature of that investigation, this deception is appropriately considered as part of the totality of circumstances in determining whether consent was gained by coercion or duress.” The Court affirmed the district court’s finding that consent was not voluntary where officers were investigating the defendant for selling drugs out of his apartment but told the defendant they had received an anonymous tip that there were \*1305 drugs and bombs in the defendant’s apartment. *Id.* at 1275–76. The Court counseled to be “especially cautious when this deception creates the impression that the defendant will be in physical danger if he or she refuses to consent to the search.” *Id.* at 1279.

Similarly, in *United States v. Vaughn*, 1:11-cr-01235-MCA-1, 2013 WL 12333588 (D.N.M. Jan. 7, 2013), Doc. 98, the Court granted the defendant’s motion to suppress on the basis that SA Perry coerced the defendant’s consent to search, in part by misleading the defendant as to the purpose of his search. *Id.* at 20. The Court found that SA Perry failed to inform the defendant that he was searching for illegal narcotics, and instead informed her “that he was searching for weapons and/or explosives,” to which either the defendant or her co-defendant

“indicated that she felt reassured that law enforcement was being vigilant to protect their safety.” *Id.* at 23. The Court also found that SA Perry failed to inform the defendant of her right to refuse consent, and that this failure “weigh[ed] in favor of the conclusion that Defendant’s consent was obtained through coercion.” *Id.* at 22. The Court weighed these factors and concluded that “because Perry did not clarify that Defendant did not have to consent ... and because Perry misrepresented the reason why he wanted to search Defendant,” and in light of some observations about the tone and demeanor of SA Perry, the defendant’s consent to be searched was obtained through coercion. *Id.* at 24.

Here, the Court finds that SA Perry misled passengers as to the purpose of his search. The Court weighs this factor in support of its conclusion that Ms. Easley’s consent to be searched and subsequent abandonment of the G brand suitcase was involuntary. On one hand, in talking to Ms. Easley specifically, SA Perry did not repeat his earlier statement to several other passengers that he was checking the bus for “security.” In fact, when he asked Ms. Easley for permission to search her checked bag, SA Perry asked “Would you consent for [sic] a search of your bag for contraband, ma’am?” [Gov. Ex. 1(A) at 27:11–12]. The Court does not know whether Ms. Easley specifically overheard SA Perry’s prior interactions with passengers, in which he stated five times that he was checking the bus for security purposes. On the other hand, on the audio recording you can clearly hear him telling other passengers that he is a police officer checking the bus for security purposes. What is clear is that SA Perry did not tell Ms. Easley he was a DEA officer looking for narcotics. By being vague as to his purpose, SA Perry deprives passengers of an opportunity to understand the situation, let alone exercise their right to decline consent. Therefore, in light of the fact that all of the other passengers consented to be searched and that Ms. Easley was not informed of her right to refuse consent, the Court weighs SA Perry’s misleading statement in favor of finding that Ms. Easley’s consent was coerced.<sup>4</sup>

\*1306 Third, when SA Perry reboarded and asked Ms. Easley to step off the bus for more questioning, his instructions could be interpreted as either a request or a demand, depending on contextual factors such as race, gender, and economic or social status. When SA Perry asked Ms. Easley to step off the bus, the recording indicates that he said “Excuse me, ma’am. Can I speak to you outside for one second, please? You don’t have to bring any of your stuff. You can bring your purse if you’d like. Can I see your ticket one more time, ma’am? Can we step over here just to get away from this noise? Where did you say you were headed to?” [Gov. Ex. 1(A) at 38:9–15]. The government’s position is that these instructions were non-aggressive and gave Ms. Easley the opportunity to decline.

The Court disagrees and, in weighing the audio recording, considers race as a relevant contextual factor. Race influences the likelihood of a person asserting their constitutional rights. Through everyday experiences, people of color are conditioned to presume that asserting their constitutional rights in a police encounter will increase their likelihood of physical harm or arrest.<sup>5</sup> Given the backdrop of fear between people of color and law enforcement, the Court must consider race as a factor, rather than simply asking whether a reasonable person would feel free to leave.<sup>6</sup>

\*1307 The Court is persuaded that it is both permissible and necessary to consider race as part of the totality of the circumstances because the Supreme Court has regarded age as a relevant factor. In *J.D.B. v. North Carolina*, 564 U.S. 261, 264–65, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), the Supreme Court held that “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.” The Court explained that “courts can account for

that reality without doing any damage to the objective nature of the custody analysis.” *Id.* at 272, 131 S.Ct. 2394. In particular, “[p]recisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are ‘most susceptible to influence’ ... and ‘outside pressures,’ ...—considering age in the custody analysis in no way involves a determination of how youth ‘subjectively affect[s] the mindset’ of any particular child.” *Id.* at 275, 131 S.Ct. 2394 (quoted authority omitted). In the same way, if courts may consider that a younger person is less likely to decline consent than an adult, without determining the child’s subjective mindset, this Court may consider the “commonsense reality,” backed by substantial evidence, that a person of color is also less likely to decline consent.<sup>7</sup> As Justice Sotomayor explains in *J.D.B.*, “[t]his is not to say that a child’s age will be a determinative, or even a significant, factor in every case.... It is, however, a reality that courts cannot simply ignore.” *Id.* at 277, 131 S.Ct. 2394. This Court similarly considers Ms. Easley’s race as one of several factors in assessing the totality of the circumstances surrounding her encounter with SA Perry. The fact that Ms. Easley was the only black person on the Greyhound bus bolsters the Court’s conclusion that, in light of the previously discussed circumstances surrounding the encounter, Ms. Easley’s consent was not voluntary.

The Court acknowledges that the Supreme Court’s consideration of age is based in part on the observation that “[o]ur history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults,” *id.* at 274, 131 S.Ct. 2394, and that our history has not similarly acknowledged race. However, just as youth or age may impact a court’s understanding of the totality of the circumstances, this Court must consider race in order to fully apprehend the encounter between Ms. Easley, the only black passenger on the bus, and SA Perry, a white officer. Omitting consideration of the ways in which race influences encounters with law enforcement and insisting on a colorblind system of justice perpetuates a system in which constitutional protections are severely

weakened for people of color. As Professor Devon W. Carbado explains:

\*1308 Because, for example, whites and African Americans are not similarly situated with respect to how their racial identity might affect this sense of constraint, the Court’s failure to consider race is not race-neutral. It creates a racial preference in the seizure doctrine for people who are not racially vulnerable to, or who do not experience a sense of racial constraint in the context of, interactions with the police. Black people, across intraracial differences, are likely to feel seized earlier in a police interaction than whites, likely to feel “more” seized in any given moment, and less likely to know or feel empowered to exercise their rights.<sup>8</sup>

In other words, if race is ignored in the “free to leave” test, “people who are especially vulnerable to police encounters because of their race are systematically disadvantaged in comparison to people who are not.”<sup>9</sup> At least one appellate judge has stated in dissent that racial context must be considered in the totality of the circumstances analysis:

Whether the courts speak of it or not, race is a factor that has for many years engendered distrust between black males and law enforcement personnel.... I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team.

*In re J.M.*, 619 A.2d 497, 512–13 (D.C. 1992) (Mack, J., dissenting).<sup>10</sup> This Court similarly finds that it must consider race in weighing the totality of the circumstances as to whether someone in Ms. Easley’s position would have felt free to leave, in order to ensure that Fourth Amendment protections apply equally to people of color.<sup>11</sup>

Accordingly, because the Court is tasked with assessing “all the circumstances surrounding the encounter,” *Bostick*, 501 U.S. at 429, 111 S.Ct. 2382,” the Court views SA Perry’s request to speak with Ms. Easley outside the bus as an assertion of law enforcement authority that would make a reasonable person of color feel that they are not free to decline or terminate the interaction. The government argues that SA Perry’s words, on paper and in isolation, are not coercive. However, this Court must consider the context in which these statements were made, in order to properly weigh the totality of the circumstances. In the context of an interaction between a white officer and the only black person on the bus, taking place after a stream of passengers have already agreed to answer questions or be searched, and after SA Perry has repeatedly misrepresented his purpose, the Court considers \*1309 SA Perry’s words and instructions to Ms. Easley to have authoritative and coercive force.

For example, while searching Ms. Easley’s purse, SA Perry asks if he can set it down and then says “Some people are picky about their stuff.” [Gov. Ex. 1(A) at 40:23–24]. This comment communicates to someone who is less likely to assert her rights that she should be permissive and cooperative. Furthermore, when SA Perry turns to show the G-brand bag to Ms. Easley he starts by saying “Okay. I’m recording” and asks Agent Godier to hand him the G-brand bag. *Id.* at 41:10. Regardless of SA Perry’s reasons for stating that the recording device was on, this comment would put a reasonable person of color on notice that the conversation was significant enough to be recorded, making it even more unlikely that she would feel free to terminate the conversation.

[26] [27]As Justice O’Connor explains in *Bostick*, courts are charged with enforcing constitutional protections and may not take policy positions on the war on drugs. *Bostick*, 501 U.S. at 439, 111 S.Ct. 2382. Indeed, “[t]he Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.... We adhere to the rule that, in order to determine

whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” *Id.*

[28]Consistent with *Bostick*, no single factor is dispositive or receives extra weight in the Court’s reasoning. However, the Court is concerned that (1) SA Perry misrepresented his purpose, (2) SA Perry did not inform Ms. Easley of her right to refuse consent, (3) all of the passengers agreed to answer SA Perry’s questions and, among those who were asked to consent to searches, all agreed to searches of their belongings, including cutting into a shoe, and (4) as the only black person on the bus, Ms. Easley was less likely to assert her constitutional rights. This combination of circumstances leads the Court to conclude that Ms. Easley’s consent was not voluntary. Although SA Perry is not required *per se* to inform passengers of their right to refuse consent, the Court may give weight to this factor in combination with the other circumstances of the encounter. *Bostick*, 501 U.S. at 439–40, 111 S.Ct. 2382 (finding that “[t]he Florida Supreme Court erred in adopting a *per se* rule” and that courts “must consider all the circumstances surrounding the encounter”). Furthermore, in accordance with *Drayton*, the Court does not give “extra weight” to the absence of a warning regarding Ms. Easley’s right to refuse consent. The Court gives this factor weight in combination with the other circumstances of the encounter. “Although government agents are not required to advise a defendant that he or she has a right to refuse consent to search, this is one factor considered in the totality of circumstances.” *Harrison*, 639 F.3d at 1279.

Under this set of circumstances, the Court finds that the encounter was coercive and that the government has not shown by a preponderance that an individual in Ms. Easley’s position would feel free to leave. In short, because people of color are less likely to assert their constitutional rights, Fourth

Amendment protections may only become meaningful when they are given the opportunity to meaningfully comprehend both the officer's purpose and their right to refuse consent. *See J.D.B.*, 564 U.S. at 281, 131 S.Ct. 2394 (“To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore \*1310 the very real differences between children and adults—would be to deny children the full scope of procedural safeguards that *Miranda* guarantees to adults.”).

Accordingly, because Ms. Easley has established that her abandonment of the G-brand suitcase resulted from an earlier Fourth Amendment violation, the Court must find that her abandonment of the suitcase was involuntary and SA Perry's search of the suitcase was therefore unreasonable. Because the search of the suitcase was in violation of the Fourth Amendment, the methamphetamine discovered as a result of the search shall be suppressed.

## II. Ms. Easley's Statement at the DEA District Office

[29]Ms. Easley argues that when she asked SA Perry, “How long until my lawyer gets here?” she was unambiguously invoking her right to counsel and the interrogation should have ceased. [Doc. 20 at 21]. She argues further that because SA Perry proceeded with the interrogation, any statement she made after her invocation of her right to counsel must be suppressed. *Id.*

Ms. Easley also argues that her statement was not voluntary because SA Perry said that he could “help her” or tell the judge she was a “piece of shit.” *Id.* at 23–24. Ms. Easley argues these statements indicated that SA Perry was promising leniency in exchange for Ms. Easley's confession. *Id.* at 22–24 (citing to *U.S. v. McCullah*, 76 F.3d 1087, 1101 (10th Cir. 1996) (“A defendant's confession is involuntary if the government's conduct

causes the defendant's will to be overborne and his capacity for self-determination critically impaired.”)).

The government argues that Ms. Easley's statement was voluntary because Ms. Easley was a thirty-three-year-old adult, she was not handcuffed during the interrogation at the DEA office, and SA Perry “began his recorded, custodial interview” by reading Ms. Easley her *Miranda* rights. [Doc. 21 at 17]. The government underscores that after Ms. Easley asked about a lawyer, SA Perry specifically said that if she wanted a lawyer, he would stop asking her questions until a lawyer was secured for her. *Id.* at 18. The government characterizes Ms. Easley's question about a lawyer as an ambiguous statement, which does not invoke her fifth amendment rights because the Supreme Court has held that an invocation must be unambiguous and clear. *Id.* at 18 (citing *Davis v. U.S.*, 512 U.S. 452, 458–59, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) ).

[30]However, when a person's arrest violates the Constitution, a *Miranda* warning alone is not enough to purge a confession of the taint of the illegal arrest—that is, the Fourth Amendment violation. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (“It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will [to] break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.”). The Supreme Court in *Brown* “announced the following factors to consider when evaluating a confession made following an illegal arrest: [1] a valid *Miranda* advisement, [2] the time lapse between the arrest and the confession, [3] any intervening circumstances, and [4] any official misconduct.” *U.S. v. Pullin*, 17 Fed.Appx. 867, 869 (10th Cir. 2001) (affirming that the confession was sufficiently attenuated from the illegal arrest where *Miranda* warnings were given and the

defendant did not allege any official misconduct) \*1311 (citing *Brown*, 422 U.S. at 603–04, 95 S.Ct. 2254). *See also Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) (reiterating the holding in *Brown* in holding that confession following unlawful seizure was inadmissible); *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982) (same); *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (same).

In *Brown*, the Court found that the confession was not sufficiently attenuated from the illegal arrest because less than two hours had elapsed since the defendant's arrest and confession, there were no intervening events, and the arrest without probable cause had a “quality of purposefulness” in that it appeared to be an “expedition for evidence” undertaken “in the hope that something might turn up.” *Brown*, 422 U.S. at 605, 95 S.Ct. 2254. The burden is on the government to show that the confession is admissible. *Brown*, 422 U.S. at 604, 95 S.Ct. 2254.

The Court considers the factors under *Brown* and finds that although Ms. Easley received *Miranda* warnings, her confession remains tainted by the earlier Fourth Amendment violation. *Kaupp*, 538 U.S. at 633, 123 S.Ct. 1843 (“we held in *Brown* that *Miranda* warnings, *alone* and *per se*, cannot always ... break, for Fourth Amendment purposes, the causal connection between the illegality and the confession.”) (internal quotation marks omitted).

Regarding the second factor, the time lapse between the arrest and the confession, Ms. Easley testified, consistent with SA Perry's testimony, that upon arrival at the DEA office Ms. Easley was strip searched, processed, and waited in a holding cell for around an hour in total before SA Perry initiated the recorded interview. [Hearing Tr. at 120:14–16]. In a concurring opinion, Justice Stevens stated that “[t]he temporal relationship between the arrest and the confession may be ambiguous,” depending on any intervening circumstances. *Dunaway*, 442 U.S. at 220, 99 S.Ct. 2248

(Stevens, J., dissenting). The Court considers intervening circumstances separately but notes that there does not appear to be a substantial passage of time between the arrest and the confession. *See U.S. v. Cooper*, 103 F.Supp.3d 1286 (D.N.M. 2015) (Vázquez, J.) (finding that the confession was not sufficiently attenuated from the defendant's illegal arrest where less than an hour elapsed between the arrest and confession); *United States v. Maez*, 872 F.2d 1444, 1455–56 (10th Cir. 1989) (thirty minutes held insufficient to remedy illegal arrest); *Taylor*, 457 U.S. at 691, 102 S.Ct. 2664 (holding that confession was not sufficiently attenuated where six hours elapsed between illegal arrest and confession). Here, the short lapse in time between the arrest and confession weigh against finding attenuation.

Regarding the third *Brown* factor, intervening circumstances, the record does not present any intervening circumstances weighing in favor of attenuation. *See, e.g., United States v. Fox*, 600 F.3d 1253, 1260 (10th Cir. 2010) (“Some examples of intervening circumstances include carefully explain[ing] a consent form and advising an individual of the right to withhold consent,” or “release from custody, an appearance before a magistrate, or consultation with an attorney.”) (internal quotation marks and citations omitted). Before the recorded interview, Ms. Easley was informed that the G-brand suitcase contained methamphetamine. However, the Supreme Court has indicated that “merely confronting the accused with evidence of [her] guilt in an effort to elicit an incriminating response” does not break the causal chain between the illegal arrest and confession. *Barry v. New Jersey*, 454 U.S. 1017, 1020, 102 S.Ct. 553, 70 L.Ed.2d 415 (1981) (White, J., dissenting in the Court's denial of certiorari) (citing *Brown*, *inter alia* ). If anything, the earlier coercive dynamic between SA Perry and Ms. Easley may have continued after the Fourth Amendment violation. Both SA Perry and Ms. Easley testified that SA Perry made several statements to her during processing that she could be facing a life sentence, that he could make a positive or negative recommendation to the sentencing judge, and

that Ms. Easley needed to help herself. [Hearing Tr. at 99:21–100:15; 121:20–24]. The government has not identified any intervening circumstances weighing in favor of attenuation.

[31] Regarding the final factor, any official misconduct, Ms. Easley's testimony about what SA Perry said to her between her arrest and the recorded interview raises concern that Ms. Easley may have been further coerced to confess. As Justice Stevens explains in his concurrence in *Dunaway*, “[t]he flagrancy of the official misconduct is relevant ... insofar as it has a tendency to motivate the defendant.” [442 U.S. at 220, 99 S.Ct. 2248](#). Given that the Court found Ms. Easley to be credible, the Court is not predisposed to find SA Perry's testimony more credible than Ms. Easley's solely on the basis that Ms. Easley is the defendant.<sup>12</sup>

Indeed, the recorded interview supports Ms. Easley's testimony that SA Perry and Ms. Easley did discuss her situation between her arrest and the recorded interview. *See, e.g.*, Gov. Ex. 1(A) 9:7–10 (SA Perry asked Ms. Easley the purpose of her trip to Ontario, to which she replied “To meet up with the lady that I told you about”); *id.* at 21:21–22:23 (Ms. Easley said “... like you already said I'm not getting out anyways,” to which SA Perry responded “I never said you're not going to get out. I—I explained four things to you what could happen to you about the—I don't make the decision.”). In light of the conflicting credible testimony about what was said in the conversation before the recorded interview, the government has not established under *Brown* that Ms. Easley's confession was sufficiently attenuated from the earlier Fourth Amendment violation. If anything, the coercive dynamic between SA Perry and Ms. Easley may have persisted if not magnified before the recorded interview began. As the Supreme Court has explained, admitting Ms. Easley's confession after she was coerced into abandoning the G-brand suitcase “would allow law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the ‘procedural safeguards’ of the Fifth.”

*Dunaway*, 442 U.S. at 219, 99 S.Ct. 2248 (quoted authority omitted).

Because the government has not shown that the causal connection between Ms. Easley's illegal arrest and her recorded confession was broken, the Court finds that Ms. Easley's recorded statement was a product of her illegal arrest and must be suppressed.

## CONCLUSION

The Court must faithfully apply the Fourth Amendment in order to ensure equal protection for all. Ignoring the fear-infused racial dynamics in a police encounter weakens if not eviscerates Fourth Amendment protections for people of color. Because the Tenth Circuit instructs courts to consider the totality of the circumstances, so long as it does not rely on the subjective perspective of the defendant, the Court must consider race as one of numerous contextual factors in the same \*1313 way that the Supreme Court has considered age. In combination with the other characteristics of this encounter, in which SA Perry obfuscated his purpose as well as Ms. Easley's rights, the government has not shown that Ms. Easley's consent was voluntary. The Court's ruling today is a straightforward application of the prescription in *Bostick* and, like *Bostick*, declines to find a *per se* rule that all encounters with people of color are coercive.

For the foregoing reasons, the Court GRANTS Ms. Easley's Motion to Suppress [Doc. 20] in its entirety.

All Citations

293 F.Supp.3d 1288

Footnotes

1 DEA Special Agent Jarrell Perry testified at the suppression hearing that Ms. Easley was traveling on a bus that arrives in Albuquerque at 9:55 a.m. and departs at 11:15 a.m. According to the corresponding bus itinerary on the Greyhound website, the bus would have departed from Claremont at 2:50 p.m. the day before it arrived in Albuquerque and would have made stops in Riverside, San Bernardino, and Blythe, California, Phoenix and Flagstaff, Arizona, and Gallup, New Mexico, before stopping in Albuquerque.

2 Nick Wing, “17 Numbers That Will Make You Realize Just How Pathetic The Federal Minimum Wage Is,” *Huffington Post*, Sept. 24, 2014, [http://www.huffingtonpost.com/2014/09/24/minimum-wage-increase-numbers\\_n\\_5868848.html](http://www.huffingtonpost.com/2014/09/24/minimum-wage-increase-numbers_n_5868848.html).

3 *Id.*

4 The Court weighs SA Perry's misrepresentation differently in this case than it did in *Grobstein*, 1:13-cr-0063-MV, Doc. 129, 2016 WL 10587954. In *Grobstein*, this Court distinguished *Vaughn* and found that because SA Perry merely said he was there for security purposes and did not say he was searching for weapons and explosives, “there [wa]s no reason to believe that Defendant was less inclined to refuse SA Perry's questioning and his repeated requests for consent to search in light of his vague and ambiguous description of his purpose as ‘security.’” *Id.* at 52. This Court explained that although SA Perry's misrepresentation was “a relevant factor for consideration,” it did not “tip the balance in favor of finding coerced consent” when viewed within the totality of the circumstances.” *Id.* at 52–3. However, the Court weighs this factor differently in the instant case because the totality of the circumstances is distinct. First, whereas Ms. Easley was present as SA Perry questioned and searched several passengers, Grobstein was only the third passenger to speak with SA Perry. Furthermore, whereas neither Ms. Easley nor any other passenger declined consent, Grobstein initially declined consent to search. Because the totality of the circumstances in the encounter between Grobstein and SA Perry indicated voluntary consent, the Court found that SA Perry's misrepresentation that he was on the bus for security purposes to be inconsequential. In the instant case, SA Perry's misrepresentation bolsters the Court's conclusion, based on several additional factors, that Ms. Easley's consent was not voluntary.

5 See, e.g., Devon W. Carbado, *(E)rasing the Fourth Amendment*, 100 Mich. L. Rev. 946, 1013–14 (2002) (“... people of color are less likely than whites to assert their constitutional rights. Part of their racial socialization will include the idea that, in the context of encounters with the police, they should comport themselves (a) to signal racial respectability and (b) to make the officers racially comfortable. The assertion of rights can undermine that performance strategy. Specifically, it can racially aggravate or intensify the encounter, increasing the person of color's vulnerability to physical violence, arrest, or both.”).

6 As one scholar put it, “it bears reiterating that there is no race neutral position from which to conduct the ‘reasonable person under the circumstances’ inquiry.” *Id.* at 1002. Accordingly, the imaginary “reasonable person” appears in fact to be a subjective one: a wealthy white man whose lived experience of privilege means that he is rarely stopped by police, that he knows his right to terminate a police encounter, and that he does not fear police retaliation against him for terminating the encounter. The imaginary person cannot be a person of color whose life experiences with police have conditioned her to comply with police requests—one who would reasonably fear police violence were she to terminate an encounter or decline to consent to a search. *Id.* at 977 (“As a result of this racial vulnerability, a black man, over the course of his lifetime, is likely to have several encounters with the police. During these encounters, the police may ask him to produce identification, to justify his presence at a particular location, to explain where he is traveling to and from, and to answer questions about whether he uses, distributes, or manufactures drugs. They may well ask him for permission to search his personal belongings. To the extent that these inquiries reside outside of the reach of the Fourth Amendment, police officers have virtually unbridled discretion in deciding which individuals to engage in this way.”). In this sense, “[w]hen the Court asks ‘whether a reasonable person would feel free to leave or otherwise terminate the encounter,’ it is really asking whether a reasonable person *should* feel free to leave or otherwise terminate the encounter.... the legal conclusion that a reasonable person is not seized in the context of a voluntary interview is a normative position that a reasonable person *should not* feel seized.” Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 141 (2017).

7 The Eighth Circuit has considered additional personal characteristics of the person giving consent. *See, U.S. v. Sanchez*, 156 F.3d 875, 878 (8th Cir. 1998) (“When evaluating [the totality of the] circumstances, we pay particular attention to the characteristics of the person giving consent and to the encounter from which the consent arose.... Relevant characteristics of the consenting party include age, intelligence and education; chemical intoxication (if any); whether the individual was informed of the right to withhold consent; and whether the suspect generally understood the rights enjoyed by those under criminal investigation.”).

8 Carbado 2016, *supra* n.6, at 142.

9 Carbado 2002, *supra* n.5, at 1003.

10 *See also J.D.B.*, 564 U.S. at 281, 131 S.Ct. 2394 (“To hold, as the State requests, that a child’s age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of procedural safeguards that *Miranda* guarantees to adults.”).

11 In considering race as a relevant contextual factor, the Court is not relying on Ms. Easley’s subjective impressions. The Court considers only the perspective of people of color more broadly, which, particularly in light of the elevated consciousness of these issues in recent years, is readily apparent to law enforcement officers. *United States v. Rogers*, 391 F.3d 1165, 1169 (10th Cir. 2004) (“This reasonable person ‘does not have a guilty state of mind and does not have peculiar mental or emotional conditions that are not apparent to the questioning officer.’ ”) (quoted authority omitted); *United States v. Abdenbi*, 361 F.3d 1282, 1292 (10th Cir. 2004) (finding that the suspect’s subjective state of mind “is wholly irrelevant and plays no role in [the Court’s] evaluation of the circumstances surrounding the encounter.”).

12 Evaluations of witness credibility, the weight to be given to evidence, and any inferences to be drawn from the evidence are determinations within the sound discretion of the district court. *See, e.g., United States v. Elliott*, 107 F.3d 810, 813 (10th Cir. 1997); *United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996).

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No. \_\_\_\_\_

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In the

# **Supreme Court of the United States**

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**OLLISHA NICOLE EASLEY**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

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## **Certificate of Service**

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I, Margaret A. Katze, hereby certify that on March 26, 2019, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

STEPHEN P. MCCUE  
Federal Public Defender

DATED: March 26, 2019

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