No. _____

In the Supreme Court of the United States

ERIC TERRELL SPEARS

Petitioner,

v.

STATE OF SOUTH CAROLINA

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Because of centuries of inequitable treatment at the hands of the police, must a court take into account a Black person's race when determining whether they are seized under the Fourth Amendment?

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PETITION FOR WRIT OF CERTIORARI

Eric Spears respectfully petitions the Court for a writ of certiorari to review the 3-2 opinion of the South Carolina Supreme Court affirming as constitutional the encounter initiated by state and federal law enforcement officers, including agents from ICE, where the court held the encounter was not a Fourth Amendment seizure because Petitioner, an African-American male, implicitly "consented" to the encounter when he stopped walking away and answered the officers' questions after the officers called out for him to "stop."

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at State v. Spears, 429 S.C. 422, 839 S.E.2d 450 (2020). App. 12 – 39.

JURISDICTION

The South Carolina Supreme Court issued its opinion on February 12, 2020. App. 12. Petitioner filed a timely petition for rehearing that was denied on April 1, 2020. App. 40 – 48; App. 49 – 50. This Court has jurisdiction pursuant to 28 U.S.C §1257(a), as Petitioner is asserting the deprivation of a right guaranteed by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

STATEMENT OF THE CASE

Factual Background

On March 29, 2012, Agent Dennis Tracy, who was with the Lexington County Sheriff's Office and the Immigration Customs Enforcement Task Force, later known as Homeland Security, went to the designated drop off point of one of the buses of the Chinese Bus Line. The agents surveilled the bus because it operated out of New York and they believed it to be used by criminals because of the lack of security or identification checks and because fares were cheap. R. 108, ll. 14 – R. 113, ll. 19.

Two other agents went with him: Briton Lorenzen of Homeland Security and Frank Finch, who was a narcotics agent with the Lexington County Sheriff's Office but who was assigned to the Drug Enforcement Administration (DEA) Task Force. The law enforcement agents went to the bus acting on a tip conveyed to them that two African-American drug trafficking suspects were supposed to be aboard the Chinese bus. They were Tyrone Richardson and Eric Bradley. Agent Lorenzen testified he never heard the name of Eric Spears. R. 143, ll. 9 – R. 144, ll. 25; R. 149, ll. 1 – 24.

On March 29, 2012, the three agents went to the bus drop off point and saw two people being dropped off who were not on a cell phone and did not have someone meet them. These two people were paying an "excessive" amount of attention to the agents. The agents were in plain clothes; however, two of the agents had their guns and badges visible during this encounter. R. 114, ll. 1 – R. 116, ll. 15; R. 144, ll. 20 – R. 145, ll. 13; R. 187, ll. 1 – 12.

The two people, Petitioner Spears and his wife, retrieved their baggage from the bus and proceeded to walk away from the bus stop. The agents decided to make contact with them, though the agents had no plan to arrest them or detain them at that time. The agents' purpose was to "engage them in a consensual encounter and see if there was anything suspicious about their stories or their actions." R. 116, ll. 16 – R. 117, ll. 14. Notably, the tip about the drug trafficking suspects indicated

two men were the suspects, but the agents stopped a man and a woman.

Before the agents stopped Spears and his wife, but while they followed the couple, they observed the woman remove an unknown object from her purse and hand it to the man. They could not discern what the object was. R. 117, ll.15 – R. 118, ll. 11.

When the agents caught up behind the couple, the agents called out to them to stop. The agents identified themselves as law enforcement. They asked the couple where they were coming from and for identification. Spears handed them a New York identification. Agent Dennis described Spears as very forthcoming in his conversation and answers. Spears allegedly started rearranging his clothing as though to pull it away from his body. Agent Dennis asked him not to do that for safety reasons as Spears' hands were out of view. When Agent Dennis asked the man if he had any illegal items on him, Spears allegedly hesitated before replying no. R. 118, ll. 12 – R. 119, ll. 18.

Spears did not stop pulling at his shirt, so Agent Dennis performed a pat down of his waistband to ensure he did not have a weapon. During the pat down, Agent Dennis felt a small hard object about the size of a golf ball with jagged edges. Agent Dennis believed the item was crack cocaine. The agents arrested Spears. R. 120, ll. 1 – R. 123, ll. 10.

Defense counsel moved to suppress the drugs because of the unlawful seizure. R. 11, ll. 17 – R. 12, ll. 22. The state called Agent Dennis Tracy to testify during the pretrial suppression hearing. R. 13, ll. 1 – R. 69, ll. 15. Agent Dennis stated information from the tip was simply that the suspect was an African-American male with no other description. Dennis admitted the tip was not specific enough for him to identify Spears as their target. The agents made contact with Spears and his wife "solely based on their activity" and not based on the tip. R. 55, ll. 12 – R. 56, ll. 13.

Traci Jenkins, Spears' wife, testified that she did not feel free to leave during the twenty-minute encounter as she thought they had to talk to the agents. They quit walking away because the

officers specifically used the word "stop" when they called out to her and her husband. R. 79, ll.1 – R. 84, ll. 1.

The trial judge denied the motion to suppress. He ruled the basis for the initial stop was valid because Spears was seen getting off a bus that was known by law enforcement to be used by criminals. Spears paid close attention to the agents or officers even though they were in plain clothes and their guns were out of sight. The agents began to follow Spears and his wife who were nervous. Agent Dennis saw the woman hand an object to Spears. Spears and his wife willingly stopped and talked to the agents. The law enforcement agents never told the defendant that he was not free to leave. R. 107, ll. 15 – R. 110, ll. 8. The drugs were admitted into evidence[1]. R. 231, ll. 5 – 12.

The Divided State Appellate Decisions

The South Carolina Court of Appeals reversed Spears' conviction holding that the agents lacked reasonable suspicion to stop Spears and under the totality of circumstances "a reasonable person in Spears's position would not have felt free to leave" such that he did not consent to the encounter with the agents. State v. Spears, 420 S.C. 363, 376, 802 S.E.2d 803, 810 (Ct. App. 2017).

In a 3-2 opinion, the South Carolina Supreme Court majority held the stop was constitutional as Spears gave his consent to the stop by turning back and answering questions after the police called him to "stop." The court wrote, "there [was] evidence in the record to support the trial court's finding that Spears engaged in a consensual encounter with law enforcement and that Spears' subsequent actions created a reasonable suspicion that he may have been armed and dangerous" justifying the Terry[2] stop. State v. Spears, 429 S.C. 422, 446, 839 S.E.2d 450, 462

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[1] Forensics determined that Spears had crack cocaine with a net weight of 11.43 grams. R. 207, ll. 1 – 17; R. 211, ll. 4 – 22.

[2] See Terry v. Ohio, 392 U.S. 1 (1968).

(2020), reh'g denied (Apr. 1, 2020).

Chief Justice Beatty and acting Justice Geathers dissented and found that Spears was seized under the Fourth Amendment because a reasonable person would not have felt free to terminate the encounter. Spears, at 446 – 47, 839 S.E.2d at 462 – 63; App. 31 - 39. The dissent further argued race should be included in the totality of circumstances test because

> The United States population includes 42 million Americans of African descent. Inexplicably, **these Americans are basically invisible to those of us who apply the analytical framework for reasonable behavior or beliefs**. Somehow the judiciary, intentionally or not, excludes these Americans' normal behaviors, responses, and beliefs in circumstances involving law enforcement agents. For most, the "totality of the circumstances" does not include consideration of the reasonable behavior or response of African-Americans when confronted with certain stimuli. Thus, the regrettable and unsettling conclusion is that the question of what is "reasonable" is viewed solely from the perspective of Americans who are White. **I shudder to think about the probable result had [Spears] continued to walk and ignore the police.**

Spears, 429 S.C. 422, 455–56, 839 S.E.2d 450, 467; App. 39 (emphasis added).

REASONS FOR GRANTING THE PETITION

This Court should grant the writ to resolve a split between state courts and the federal circuit courts on whether race should be considered when performing a Fourth Amendment seizure analysis.

The state courts and the federal circuit courts disagree on whether race should be included as a factor to determine whether a person stopped by law enforcement reasonably believed they were not free to terminate the encounter under the totality of circumstances test put forth in United States v. Mendenhall, 446 U.S. 544, 554 (1980). See Florida v. Bostick, 501 U.S. 429, 437 (1991). This Court should grant the writ to resolve the differing interpretations of the Fourth Amendment. The protests and riots during 2020 make this issue one of pressing national concern.

Ignoring race means that the "totality of the circumstances" test fails to live up to its name. Race must be considered in the totality of circumstances test as a practical recognition that race

inherently affects encounters with law enforcement.[3] See United States v. Brown, 925 F.3d 1150 (9th Cir. 2019) (quoting Washington v. Lambert, 98 F.3d 1181, 1187–88 (9th Cir. 1996) ("[T]he burden of aggressive and intrusive police action [that] falls disproportionally on African-American, and sometimes Latino, males...[shows] as a practical matter neither society nor our enforcement of the laws is yet color-blind.")); see also United States v. Mendenhall, 446 U.S. 544, 558 (1980) (promulgating the totality of circumstances test and holding that race is "not irrelevant" in the totality of circumstances).

Two circuits courts and the District of Columbia Court of Appeals hold that race should be considered in the totality of circumstances test for whether a reasonable person would believe he or she were not free to terminate the encounter with police. See U.S. v. Brown, 925 F.3d 1150 (9th Cir. 2019); U.S. v. Smith, 794 F.3d 681, 687 (7th Cir. 2015). One circuit and the state court of South Carolina refused to recognize race as a factor. See U.S. v. Easley, 911 F.3d 1074, 1081 – 82 (10th Cir. 2018); State v. Spears, 429 S.C. 422, 446, 839 S.E.2d 450, 462 (2020), reh'g denied (Apr. 1, 2020). Spears respectfully submits that this Court mandate the Brown and Smith line of cases because Easley was wrongfully decided.

This Court held in Mendenhall that race was "not irrelevant" in evaluating the totality of circumstances regarding whether a reasonable person would believe they were seized. U.S. v Mendenhall, 446 U.S. 544, 548 (1980). Accordingly, by differentiating the analyses of seizure and consent, the Tenth Circuit separated two legal concepts that are inextricably intertwined. Easley, at 1081 – 82. As such, the Easley decision contradicted this Court's precedent and should not be

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[3] In 2011 the U.S. Department of Justice investigated the Seattle Police Department and released a report finding "a pattern or practice of using unnecessary or excessive force" and "serious concerns" about racially discriminatory policing. U.S. Dep't of Justice, *Investigation of the Seattle Police Department* 3 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf.

followed.

In U.S. v. Brown, 925 F.3d 1150 (9th Cir. 2019), the Ninth Circuit Court of Appeals held that the stop of the defendant was unconstitutional as "the totality of circumstances here [did] not add up to enough" for the stop to be consensual. Brown, at 1157. In examining the factors used by police for the stop the Ninth Circuit held, "the Metro officers who stopped Brown took an anonymous tip that a young, black man 'had a gun'—which is presumptively lawful in Washington—and jumped to an unreasonable conclusion that Brown's later flight indicated criminal activity. At best, the officers had nothing more than an unsupported hunch of wrongdoing." Id. at 1153.

Underpinning the Ninth Circuit's opinion was the observation in Justice Stevens' concurrence in Illinois v. Wardlaw, 528 U.S. 119, 132 (2000) that, "[A]mong some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence." Brown, at 1152. Furthermore the Brown court noted that in the time since Justice Stevens' concurrence in Wardlaw an increase in the public's awareness of racial disparities in policing informs "the inferences to be drawn from an individual" on their decision to comply with police orders to stop or in the decision to run away. Id. at 1156 – 1157.

In U.S. v. Smith, 794 F.3d 681 (7th Cir. 2015), the Seventh Circuit applied the totality of circumstances test from Mendenhall and held that Smith's encounter with police was an unconstitutional seizure. Smith, at 688. While the Seventh Circuit determined that the seizure by police was unconstitutional regardless of the race of the detainee, the court could not, "deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the

country." Id. The Court of Appeals also stated, "Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system," and reiterated the sentiment in Mendenhall that while race was relevant it was not dispositive. Id.

In U.S. v. Washington, 490 F.3d 765 (9th Cir. 2007), investigating officer Shaw saw Washington, an African-American male, sitting in his Ford Taurus lawfully parked in downtown Portland, Oregon. Id. at 767 – 68. The officer did not suspect Washington of committing any crime, but "decided make contact to investigate." Id. Shaw approached the Taurus from behind while uniformed and with his gun visible but holstered. Id.

Shaw asked Washington what he was doing. Washington responded that "he was waiting for a friend." Shaw asked Washington if he had anything on his person that he should not have, and Washington answered "no." Shaw then asked Washington if he would mind if Shaw checked, and Washington responded "sure." Washington did not dispute that he consented to Shaw's search of his person. Washington, at 768.

After the search of Washington's person, a second officer, Pahlke, arrived at the scene and the two officers requested to search Washington's car, to which he responded "go ahead." Id. The search of the car found the gun that was the basis of Washington's conviction for being a felon in possession of a firearm. Id.

On appeal the Ninth Circuit noted that Washington being an African-American was pertinent in its analysis as to whether the search of Washington's car was consensual. Id. 768 – 769. In the year and a half prior to Washington's arrest there were two "well-publicized" incidents where white Portland police officers shot African-American Portland citizens during traffic stops, one of whom died as a result. Id. In response to those shootings, the Portland Police Bureau

distributed pamphlets advising the public to "follow the officer's directions," when stopped, and "if ordered, comply with the procedures for a search." Id.

When applying the totality of circumstances test, the Ninth Circuit took into consideration "the publicized shootings by white Portland police officers of African-Americans," among the other commonly cited factors, to hold that Washington was unlawfully seized beyond the scope of consent he gave to the search of his person because a reasonable person in his position would not have felt free to terminate the encounter. Id. at 773 – 74; Id. at 776. The circuit court specifically stated, "Given... the tension between the African-American community and police officers in Portland in light of the prior shootings above mentioned, we have no confidence that Washington's assent to the car search was voluntary under the totality of circumstances." Id.

In Dozier v. United States, 220 A.3d 933 (D.C. 2019), Dozier was convicted for possession of cocaine with intent to distribute. Dozier, at 937. On appeal Dozier contended the trial court incorrectly determined that his encounter with police was consensual and he voluntarily agreed to a pat-down that led to the discover of incriminating evidence. Id.

The District of Columbia Court of Appeals noted that the encounter took place in a "high crime area and involved an African-American man." Id. at 942 – 43. The court reasoned that because the area was frequently and visibly patrolled by police, "it is to be expected that a person in the area would be aware that police officers in the area expected to find criminal activity there." Id. at 943. As a result, the officers' prolonged and escalated questions "would have felt even more pointed and coercive." Id. That coercion was "particularly justified for persons of color who are more likely to be subject to this type of police surveillance," and due to well-publicized examples, "an African-American man facing armed policemen would reasonably be especially apprehensive." Id. at 944.

The Dozier court took into consideration Dozier's race in the totality of circumstances test. Id. 944 – 945. This consideration was necessary because, "we cannot turn a blind eye to the reality that not all encounters with police proceed from the same footing, *but are based on experiences and expectations, including stereotypical impressions.*" Id. (emphasis added) As a result the court held Dozier, "was seized within the meaning of the Fourth Amendment by the time he complied with the officers' request to put his hands on the alley wall so they could pat him down. Because there was no reasonable, articulable suspicion that he was engaged in criminal activity prior to that time, the seizure was unlawful." Id. at 947.

The tenth circuit refused to use race as a factor in U.S. v. Easley, 911 F.3d 1074 (10th Cir. 2018). Easley was charged with possession with intent to distribute more than 500 grams of methamphetamine. She moved to suppress evidence seized from suitcase and her custodial statements. Easley, at 1077.

On March 10, 2016, Easley was on a Greyhound bus from Claremont, California, to her hometown of Louisville, Kentucky, when the bus made a scheduled stop in Albuquerque, New Mexico. Easley, at 1077. The passengers disembarked while the bus was serviced during the stopover, and when Ms. Easley reboarded, DEA Agents Perry and Godier were onboard—Agent Godier stood at the front of the bus while Agent Perry stood at the rear. Both agents were in plainclothes and no firearms were visible. Id.

Agent Perry questioned and searched approximately fifteen passengers and their belongings before he approached Ms. Easley. All of the passengers questioned before Ms. Easley consented to searches by Agent Perry. Easley, at 1078. Easley consented to the search of her personal belongings, her jacket, around her waist and legs, and her checked bag in the luggage hold. Id. Hidden in the suitcase were bags of methamphetamine. Agent Perry then reentered the

bus and arrested Ms. Easley. 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. Id.

On appeal the Tenth Circuit held that "none of the traditional indicia of a coercive environment were present in Ms. Easley's interaction with Agent Perry and overturned the lower court's ruling that Easley could not voluntarily consent to the search. Id. at 1079; Id. 1082 – 83. In reaching its decision, the Tenth Circuit Court of Appeals refused, in contravention of this Court's decision in Mendenhall, to consider Easley's race as part of their reasonable person seizure analysis. Id. at 1081.

The Tenth Circuit instead bifurcated the analysis into two parts, voluntariness of consent and seizure. Id. at 1081 – 82. The court stated that race is only considered in the voluntariness analysis, not in the seizure analysis. Id.

Another Tenth Circuit decision where the court refused to consider "subjective" characteristics in its reasonable person analysis was U.S. v. Little, 18 F.3d 1499 (10th Cir. 1994). Little traveled on a train from California to St. Louis. Id. 1501 – 02. DEA Agent Small initiated an encounter in Little's "roomette" where he asked to see her ticket and identification. Id. Small explained to Little that people travel eastward on the train from California to transport drugs and asked to search Little's bags. Id. Little "hesitated" and Small *informed her of her right to deny consent to search* by saying, "You don't have to [give consent]. It's completely voluntary on your part. You don't have to let me do it. I don't have a search warrant. You're not under arrest. It's up to you." Id. at 1502.

Little said she would prefer that he not search the bag. Id. Small found another suitcase belonging to Little in the "public baggage area." Id. After Little declined to give consent for that

bag as well, Small subjected it to a dog sniff because "he thought it contained contraband." Id. The dog indicated to one of Little's bags and when her two bags were searched fifteen kilograms of cocaine were found in each. Id.

On appeal, Little argued that the encounter with Agent Small was not consensual in part because she was a woman traveling alone and, "would be more easily intimidated than some other person." Id. at 1505. The Tenth Circuit refused to consider the "particular personal traits or subjective state of mind" of Little because they were irrelevant to the "objective reasonable person test set out in Bostick." Id.

Following the theme of Brown, Smith, Washington, and Dozier, this Court should hold that race is a consideration to be included in the determination of whether a person reasonably believed they were not free to terminate an encounter with police under the totality of the circumstances test this forth in Mendenhall 446 U.S. 544, 554 (1980).

An individual's race should be considered under the totality of circumstances test as a pragmatic recognition that race affects the daily activities of all Americans.[4] See Bostick, 501 U.S. 429, 439 (1991) ("[I]n 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.") Nowhere is that more apparent in Americans' lives than in interactions between African-Americans and the police.[5]

A reasonable person understands that the inherent impact of race in encounters with law

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[4] See Devon Carbado, "Blue-on-Black Violence: A Provisional Model of Some of the Causes," 104 Geo. L.J. 1479, 1480 (2016);

[5] See also Metropolitan Police Department, Washington, D.C., Stop Data Report at 9, 19 (Sept. 9, 2019), available at https://mpdc.dc.gov/stopdata https://perma.cc/RJ59-RD2M;

enforcement and African-Americans can feel "even more pointed and coercive" where "persons of color... are more likely to be subject to this type of police surveillance," such that "an African-American man facing armed policemen would reasonably be especially apprehensive [to terminate the encounter]." Dozier, at 944.

CONCLUSION

Based on the above argument, this Court should grant certiorari and resolve this important, timely issue dividing our courts.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

August 28, 2020

No. _____

In the Supreme Court of the United States

ERIC TERRELL SPEARS

Petitioner,

v.

STATE OF SOUTH CAROLINA

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on August 28 2020, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis with accompanying affidavit, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

Robert M. Dudek
Counsel of Record
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2020.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: September 30, 2029.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ERIC TERRELL SPEARS — PETITIONER
(Your Name)

VS.

THE STATE OF SOUTH CAROLINA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

X Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Court of Appeals ; South Carolina Supreme Court

_____

_____

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

X Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____

_____, or

a copy of the order of appointment is appended.

_____
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Eric T. Spears, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 0	$	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
N/A	$ 0	$ N/A
	$ 0	$
	$ 0	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been locked up since 2-17-15

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 2020

(Signature)

Sworn and subscribed before me on this day of August, 21 2020:

Victor Seeger

My Commission Expires 3/27/2025

Victor Seeger
NOTARY PUBLIC
State of South Carolina
My Commission Expires 3/27/2025

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ERIC TERRELL SPEARS — PETITIONER
(Your Name)

VS.

THE STATE OF SOUTH CAROLINA — RESPONDENT(S)

PROOF OF SERVICE

I, ROBERT M. DUDEK, do swear or declare that on this date, August 28, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

David Spencer, Senior Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211

Hon. Daniel E. Shearouse, Clerk of Court, Supreme Court of South Carolina, 1231 Gervais St., Columbia, SC 29201

Eric Terrell Spears, #363100, Broad River Correctional Institution, 4460 Broad River Rd., Columbia, SC 29210

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28, 2020

(Signature)

No. _____

In the Supreme Court of the United States

ERIC TERRELL SPEARS

Petitioner,

v.

STATE OF SOUTH CAROLINA

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix, together with a motion for leave to proceed *in forma pauperis* with accompanying affidavit, in this case have been served upon opposing counsel for Petitioner, the State of South Carolina, David Spencer, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 28th day of August, 2020.

Robert M. Dudek
Counsel of Record
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 28th day of August, 2020.
_____(L.S.)
Notary Public for South Carolina
My Commission Expires: September 30, 2029.

No. 13-_____

In the Supreme Court of the United States

ERIC TERRELL SPEARS

Petitioner,

v.

STATE OF SOUTH CAROLINA

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eric Terrell Spears, Appellant.

Appellate Case No. 2015-000390

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5489
Heard February 13, 2017 – Filed May 31, 2017

REVERSED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General David A. Spencer, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

KONDUROS, J.: Eric Terrell Spears appeals his conviction and sentence for trafficking crack cocaine between ten and twenty-eight grams. He argues the trial court erred by denying his motion to suppress drug evidence because he was seized within the meaning of the Fourth Amendment and law enforcement lacked a reasonable suspicion he was involved in criminal activity. We reverse.

FACTS/PROCEDURAL BACKGROUND

On March 29, 2012, agents of the Drug Enforcement Agency (DEA) working with the Lexington County Sheriff's Office received a tip that one or two black males being investigated by the DEA were traveling from New York City to South Carolina on the "Chinese bus lines." These bus lines depart from Chinatown and are owned and operated by Chinese Americans and Chinese Canadians. According to the DEA agents, the buses are often patronized by wanted subjects and people trafficking in narcotics and counterfeit goods because the bus lines are inexpensive, do not require identification, and have no security measures. On that day, two of these buses were scheduled to arrive at different locations in Richland County. Agents Dennis Tracy, Briton Lorenzen, and Frank Finch were dispatched to one of the bus stops. They were dressed in plain clothes, and Lorenzen's and Finch's badges and guns were visible. The agents arrived at the bus stop as passengers were exiting the bus.

Amongst the passengers disembarking, the agents observed Spears and Traci Williams, a female, exit the bus and retrieve four large bags. Unlike the other passengers, Spears and Williams appeared nervous and kept looking at the agents and talking amongst themselves. Spears and Williams left the bus stop on foot, and the agents followed them. As they walked, Spears and Williams continued to look back at the agents, and Williams appeared to hand something to Spears. After following Spears and Williams for several hundred feet, the agents walked at a fast pace to catch up with them. The agents identified themselves and asked to speak with Spears and Williams. Solely based on Williams and Spears's activity, not the tip, the agents made contact with Spears and Williams to identify them and ascertain whether they were involved in criminal activity. The agents asked to speak with Spears and Williams and asked them questions such as where they had traveled from and where they were going. Agent Tracy then told Spears and Williams there had been problems in the past with wanted subjects, drugs, and counterfeit merchandise on the bus line and asked them for their identification. After Spears gave Agent Tracy his identification, Agent Tracy asked Spears if he had any illegal weapons or items on him or in his property. Spears hesitated before saying "no," making Agent Tracy suspicious because until that point, Spears had been very forthcoming.

Around the time Agent Tracy asked Spears about illegal items, Spears began to put his hands underneath his shirt and make what Agent Tracy described as a "puffing" motion, pushing the shirt away from his waistband and body. Agent Tracy asked Spears not to do this because he needed to see Spears's hands for safety purposes. Spears stopped momentarily but then repeated the motion. After asking Spears not

to do this three times, Agent Tracy told Spears he was going to search him for weapons. While patting Spears down, Agent Tracy felt a rocky, ball-like object that felt consistent with crack cocaine. After completing the search, Agent Tracy removed the object from Spears's waistband. The object was wrapped in a napkin and inside a plastic bag. Agent Tracy removed the object from the plastic bag and the napkin, saw it was consistent with crack cocaine, and arrested Spears.

Prior to trial, Spears moved to suppress the drug evidence, arguing he was seized by the agents because a reasonable person would not have felt free to leave and the agents did not have reasonable suspicion to stop Spears and Williams.[1] The State contended the encounter between Spears, Williams, and the agents was consensual and therefore, the agents did not need reasonable suspicion.

The trial court denied Spears's motion to suppress the drugs. The trial court concluded the agents engaged Spears in a consensual encounter, finding Spears and Williams willingly stopped and talked with the agents, the agents told Spears and Williams they were law enforcement, and the agents did not tell Spears he was not free to leave.[2] At trial, Spears was convicted of trafficking cocaine between ten and twenty-eight grams and received a thirty-year sentence.

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[1] Spears also argued the agents did not have reasonable suspicion he was armed, the plain-feel doctrine did not apply, and Agent Tracy exceeded the scope of the frisk. On appeal, Spears only challenges the search.

[2] During the hearing on Spears's motion to suppress, the trial court heard arguments on whether Spears was seized or engaged by the agents in a consensual encounter. The trial court asked, "[W]hat's the evidence that criminal activity is afoot? [F]or a Terry stop one issue is [an] officer's safety, but the other issue is the officer has to believe that criminal activity is afoot." When denying Spears's motion to suppress, the trial court did not explicitly rule the agents engaged Spears in a consensual encounter, finding only that the agents "pointed to specific and articulable facts [that] warranted a search of [Spears]'s person." However, when listing the facts it found warranted the search, the trial court stated the agents "initiated a conversation with [Spears] and [he] and [Williams] willingly stopped and spoke with law enforcement. The agents notified [Spears] that they were law enforcement. [The agents] never told [Spears] he was not free to leave." Thus, based on the record, we conclude the trial court implicitly ruled this was a consensual encounter. *See State v. McLaughlin*, 307 S.C. 19, 23, 413 S.E.2d 819, 821 (1992) (finding the record supported the trial court's implicit ruling that appellant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), were voluntarily waived).

STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). "Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling." *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016), *cert. denied*, 136 S. Ct. 2473 (2016).

LAW/ANALYSIS

I. Seizure

Spears argues the trial court erred by denying his motion to suppress because he was seized under the Fourth Amendment. We agree.

"The Fourth Amendment prohibits unreasonable searches and seizures." *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (citing U.S. Const. amend. IV). "The security and protection of persons and property provided by the Fourth Amendment are fundamental values." *State v. Gamble*, 405 S.C. 409, 420, 747 S.E.2d 784, 789 (2013). "A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); *see also United States v. Sullivan*, 138 F.3d 126, 132 (4th Cir. 1998) ("The test . . . [to] determin[e] whether a person has been seized for purposes of the Fourth Amendment is whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position 'would have felt free to decline the officers' requests or otherwise terminate the encounter.'" (quoting *Florida v. Bostick*, 501 U.S. 429, 438 (1991))).

"[T]he nature of the reasonableness inquiry is highly fact-specific." *State v. Brannon*, 379 S.C. 487, 499, 666 S.E.2d 272, 278 (Ct. App. 2008).

> Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact.

State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002). "Not all personal encounters between police officers and citizens implicate the Fourth Amendment." *State v. Blassingame*, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999). "So long as the person approached and questioned remains free to disregard the officer's questions and walk away, no intrusion upon the person's liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary." *State v. Rodriquez*, 323 S.C. 484, 491, 476 S.E.2d 161, 165 (Ct. App. 1996).

"Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when [the agents] 'seized'" Spears. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Here, the trial court identified the following factors as evidence Spears and the agents were engaged in a consensual encounter: Spears and Williams willingly stopped and talked with the agents, the agents told Spears and Williams they were law enforcement, and the agents did not tell Spears he was not free to leave. But, this is not the totality of the circumstances. Several of the factors identified in *Williams* as probative of whether a seizure has occurred are present in this case: Spears and Williams were approached by three agents, two of whom had their guns visible; the agents waited to engage Spears and Williams until they were alone; the agents did not inform Spears and Williams they were free to leave; Agent Tracy indicated Spears was suspected of a crime by following Spears, telling him the bus lines were known for illegal activity, and asking him if he had any illegal weapons or items on his person or in his property; and the agents exhibited threatening behavior by following Spears and Williams for several hundred feet before the agents increased their pace to catch up with Spears and Williams.

All but one of the *Williams* factors present in this case were manifest at the time the agents increased their speed to make contact with Spears and request to question him. However, the final *Williams* factor occurred when Agent Tracy asked Spears if he possessed any illegal weapons or items on him or in his property. Although Spears was arguably seized the moment the agents made contact with him, at the latest, Spears was seized when Agent Tracy asked Spears if he had any illegal weapons or items on him or in his property. *See Blassingame*, 338 S.C. at 249, 525 S.E.2d at 540 (finding a stop occurred for *Terry* purposes when the officer questioned appellant about a carjacking in the area and the place from which appellant was walking).

The fact the agents increased their speed to catch up with Spears and Williams after following them for several hundred feet is particularly significant. A consensual encounter between a law enforcement officer and a person is predicated on the person being able to "disregard the officer's questions and *walk away*." *Rodriguez*, 323 S.C. at 491, 476 S.E.2d at 165 (emphasis added). Before the agents made contact with Spears, he had walked several hundred feet without the agents engaging him, indicating he was free to continue walking. By increasing their speed to catch up with Spears, the agents indicated to Spears he was no longer free to continue walking away. This is especially true considering that when the agents stopped Spears, they asked for his identification and whether he was engaged in illegal activity. Thus, in light of all the circumstances surrounding this incident, we conclude a reasonable person in Spears's position would not have felt free to walk away, and Spears was seized within the meaning of the Fourth Amendment.

II. Reasonable Suspicion

Spears argues the agents lacked reasonable suspicion to stop him. We agree.[3]

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[3] The trial court did not determine whether the agents had reasonable suspicion to stop Spears because it concluded Spears and the agents were involved in a consensual encounter. "Given our standard of review, the normal procedural course would be to remand this case to the [trial] court" to determine whether the agents had reasonable suspicion to stop Spears. *State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) (citing *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this [c]ourt from conducting its own review of the record to determine whether the trial

Because Spears was seized within the meaning of the Fourth Amendment, we must determine whether the agents had reasonable suspicion, or "an objective, specific basis for suspecting [Spears] of criminal activity." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868-69 (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

"Pursuant to *Terry*, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity may stop, briefly detain, and question that person for investigative purposes, without treading upon his Fourth Amendment rights." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54. "[L]ooking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868.

"Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Provet*, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); *see also Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). It is "a particularized and objective basis for suspecting legal wrongdoing." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). "Reasonableness is measured in objective terms by examining the

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[court]'s decision is supported by the evidence." (citation omitted)). However, like in *Hewins*, in the interest of judicial economy, we have decided to address the merits of this issue as the parties fully argued it during the suppression hearing, in their briefs, and at oral argument. *See Hewins*, 409 S.C. at 113, 760 S.E.2d at 824 (addressing the merits of Hewins's motion to suppress in the interest of judicial economy instead of remanding to the circuit court for a hearing); *see also State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("Given our finding that the show-up used in this case was unduly suggestive, we must determine whether a remand is necessary or whether, under the unique facts of this case, the matter of reliability may be determined by this Court. We find a remand unnecessary. . . . [U]nder the facts of this case, the identification is unreliable as a matter of law and therefore a remand would serve no useful purpose.").

totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." *State v. Pichardo*, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (Ct. App. 2005).

"Although never dispositive . . . being in a high crime area can be a consideration in our analysis of the totality of the circumstances." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 55. Moreover, "[w]hile nervous behavior is a pertinent factor in determining reasonable suspicion . . . the single element of nervousness [should not be parlayed by law enforcement] into a myriad of factors supporting reasonable suspicion." *Moore*, 415 S.C. at 254-55, 781 S.E.2d at 902 (footnote omitted). "The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, 'reasonably warrant' the intrusion." *Robinson*, 401 S.C. at 182, 754 S.E.2d at 869 (quoting *Terry*, 392 U.S. at 21, 27).

Our supreme court's recent consideration of reasonable suspicion during a street encounter in *Anderson* is instructive. In *Anderson*, officers were executing a search warrant at a home where they had observed drug activity. 415 S.C. at 444, 783 S.E.2d at 53. During previous surveillance of the home, the police department learned the footpath outside the home was also used to transport drugs. *Id.* However, the footpath was not included in the warrant. *Id.* While executing the warrant, officers were stationed at both ends of the footpath with instructions to "secure and detain any person found on the footpath." *Id.* During the execution of the warrant, Donald Anderson and a woman were on the footpath but stepped off the path "in a quick manner" after observing the officers. *Id.* at 444-45, 783 S.E.2d at 53. One of the officers ran towards Anderson with his gun drawn, telling Anderson to stop and get on the ground. *Id.* Anderson cooperated and was handcuffed and searched. *Id.* The officer found crack cocaine in one of Anderson's front pockets. *Id.* The supreme court held the drugs should have been suppressed "because the officer did not have reasonable suspicion that Anderson was involved in criminal activity to justify an investigative stop." *Id.* at 446-47, 449, 783 S.E.2d at 54. The court found Anderson's presence in a high crime area carried little weight because the police were in the area for the express purpose of executing a search warrant that did not include the footpath. *Id.* at 448, 783 S.E.2d at 55. The court also noted Anderson did not flee the property involved nor did the police recognize Anderson as a suspect related to the drug crimes the police were investigating. *Id.* The court stated,

> Certainly being in a high crime area does not provide police officers carte blanche to stop any person they meet

> on the street. We acknowledge we are dealing with the totality of the circumstances. Nevertheless, even considering the situs with the fact that Anderson stepped off the footpath after seeing the police, we find the circumstances here fail to support the finding of reasonable suspicion.

Id.

At the time Spears was seized, the agents had observed Spears and Williams, get off a bus known by the agents to be patronized by criminals, retrieve four large bags, and appear nervous while paying close attention to the agents.[4] This evidence is insufficient to support a conclusion the agents had a "particularized and objective basis for suspecting legal wrongdoing." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54 (quoting *Arvizu*, 534 U.S. at 273).

Indisputably, Spears was a passenger on a bus sometimes patronized by criminals, which is an articulable fact. *See Anderson*, 415 S.C. at 447, 783 S.E.2d at 55 ("Although never dispositive . . . being in a high crime area can be a consideration in our analysis of the totality of the circumstances."). But, like in *Anderson*, this fact carries little weight here. First, like the appellant in *Anderson*, Spears did not flee from the bus or the agents, not even when they increased their speed to stop him. Second, Spears and Williams's possession of four large bags is unparticularized given they were travelers from New York and presumably amongst many other passengers with luggage. Furthermore, luggage size is of no consequence here when the agents were interested in all types of illegal items, which are of varying size and do not all require luggage to transport. Finally, "[w]hile nervousness is a pertinent factor in determining reasonable suspicion," *Moore*, 415 S.C. at 254, 781 S.E.2d at 902, Spears was pursued by three agents—two of whom had their guns visible—for several hundred feet before those agents increased their speed to catch up with him. In this situation, some nervousness is to be expected. *Compare with Moore*, 415 S.C. at 254, 781 S.E.2d at 902 ("General nervousness will almost invariably be present in a traffic stop."). Also,

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[4] All of the agents testified they were too far behind Spears and Williams to see what Williams handed to Spears or even if she handed something to Spears. Agent Tracy testified he did not include this in his report because he could not identify the object and stated that "for all he knew," Williams and Spears had "shaken hands," which he did not consider a fact. Therefore, neither will we consider this as an articulable fact.

unlike in *Anderson*, Spears at no point exhibited evasive conduct and was forthcoming with the agents until they questioned him about illegal items, but by that point, Spears had already been seized.

We recognize the agents were entitled to "make reasonable inferences regarding the criminality of [the] situation in light of [their] experience." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868. Still, reasonable suspicion requires more than a hunch. *Willard*, 374 S.C. at 134, 647 S.E.2d at 255 ("Reasonable suspicion is more than a general hunch but less than what is required for probable cause."); *see also Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). Here, the agents suspected Spears of criminal activity for getting off a bus used by criminals, having four large bags, and acting nervous. Based on the totality of the circumstances, we cannot conclude the agents' belief Spears was involved in criminal activity amounted to anything more than a hunch, which is insufficient under the Fourth Amendment. Thus, the agents seized Spears without reasonable suspicion in violation of the Fourth Amendment. Therefore, the trial court erred by denying Spears's motion to suppress.

CONCLUSION

The trial court erred by finding the agents engaged Spears in a consensual encounter because under the totality of the circumstances, a reasonable person in Spears's position would not have felt free to leave. The trial court further erred by denying Spears's motion to suppress the drug evidence because under the totality of the circumstances, the agents did not have a reasonable suspicion Spears was involved in criminal activity. Accordingly, Spears's conviction and sentence are

REVERSED.

SHORT, J., concurs.

WILLIAMS, J., dissenting.

WILLIAMS, J.: I respectfully dissent. One of the guiding principles shaping our state's Fourth Amendment jurisprudence is that, in a fact-based Fourth Amendment challenge, an appellate court is restricted by the "any evidence" standard of review. "A [circuit] court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error." *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013).

Importantly, "clear error" means that the appellate court may not reverse the circuit court's findings of fact merely because it would have decided the case differently than the circuit court. *See State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). In my view, a faithful adherence to the "any evidence" standard of review will prevent any misconception that we have substituted our own findings in place of those of the circuit court. Therefore, in light of the evidence presented at trial and the circuit court's findings, I believe our standard of review requires an affirmance.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Eric Terrell Spears, Respondent.

Appellate Case No. 2017-001933

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 27945
Heard January 30, 2019 – Filed February 12, 2020

REVERSED

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, and Interim Solicitor Heather Savitz Weiss, all of Columbia, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Respondent.

JUSTICE JAMES: Eric Terrell Spears was indicted for trafficking crack cocaine between ten and twenty-eight grams. Spears moved to suppress the evidence of the drugs seized from his person on the ground he was seized in violation of the

convicted as charged. The trial court sentenced Spears to thirty years in prison. A divided court of appeals reversed Spears' conviction. *State v. Spears*, 420 S.C. 363, 802 S.E.2d 803 (Ct. App. 2017). We granted the State's petition for a writ of certiorari to review the court of appeals' decision. We now reverse the court of appeals and uphold Spears' conviction. We hold there is evidence in the record to support the trial court's finding that Spears engaged in a consensual encounter with law enforcement and that Spears' subsequent actions created a reasonable suspicion that he may have been armed and dangerous—justifying law enforcement's *Terry*[1] frisk that led to the discovery of the offending crack cocaine in Spears' pants.

I. FACTUAL AND PROCEDURAL HISTORY

Law enforcement officers from Immigration Customs Enforcement (ICE), the Drug Enforcement Agency (DEA), and the Lexington and Richland County Sheriffs' Offices were investigating a tip that two black males (Tyrone Richardson and Eric Bradley) were transporting drugs into South Carolina via one of the "Chinese bus lines." These bus lines depart from the Chinatown district in New York City, dropping off passengers in major cities along the East Coast. Because of the lack of security measures and required identification, these buses are frequently exploited by wanted criminals and people trafficking in narcotics and counterfeit merchandise. There are no traditional bus stations for the "Chinese bus line"; the buses usually stop at a couple of different locations in Columbia to allow passengers to disembark.

On March 29, 2012, Agents Dennis Tracy, Briton Lorenzen, and Frank Finch were dispatched, pursuant to the tip, to conduct surveillance at one of the bus stops. As the passengers were exiting the bus, most of the passengers were being greeted by relatives or friends, being picked up by cabs, or talking on the phone (presumably making arrangements to be picked up). However, the agents observed a man and a woman with four large suitcases who "stuck out" because "they were paying an excess amount of attention" to the plain-clothed agents. A few minutes later, the man and woman began walking down the road away from the agents. The agents followed, and while walking briskly behind the man and woman to catch up with them, the agents observed the woman remove an unknown object from her purse and pass it to the man. When the agents were approximately ten feet from the couple, they asked the couple to stop and speak with them. The couple complied and engaged the agents in a conversation. The man was identified as Spears. As they spoke, Spears kept placing his hands inside his untucked shirt near his waistband.

[1] *See Terry v. Ohio*, 392 U.S. 1 (1968).

Fearing Spears might have a weapon, Agent Tracy repeatedly asked Spears to stop. Spears persisted in this movement, so Agent Tracy frisked Spears for safety reasons.

During the frisk, Agent Tracy felt a small, hard object about the size of a golf ball with jagged edges tucked into Spears' waistband. Based on his training and experience, Agent Tracy believed the object was crack cocaine, and he removed it from Spears' pants. The object field-tested positive for crack cocaine, and Spears was arrested. Spears told law enforcement he was paid to bring the crack cocaine from New York to South Carolina because of the drug's higher street value in South Carolina. Spears admitted he did so out of "stupidity" and because he needed the money.

Spears was indicted for trafficking crack cocaine more than ten grams and less than twenty-eight grams. Prior to trial, Spears moved to suppress the drug evidence. Spears argued he was seized by the agents in violation of the Fourth Amendment. Specifically, he contended a seizure occurred because a reasonable person would not have felt free to walk away from the initial encounter. Spears also contended the agents did not have a reasonable suspicion to stop him. The State argued the encounter between the couple and the agents was consensual and the agents therefore did not need a reasonable suspicion to initiate the stop. The State contended Agent Tracy properly frisked Spears for safety reasons.

Agent Tracy, a nineteen-year law enforcement veteran with ten years' experience in narcotics and certified in the field of narcotics interdiction, testified during the suppression hearing. Agent Tracy testified that on the day of the incident, he and Agents Lorenzen and Finch were dressed in plain clothes and were observing passengers disembarking a bus in a parking lot near I-20. Agent Tracy testified he was carrying a concealed handgun.[2] He testified most of the passengers did not appear suspicious; however, he noted Spears and a woman appeared nervous and "kept looking at us and talking amongst themselves." Agent Tracy testified as to why the agents wanted to make contact with the couple:

> The reason . . . was to first of all identify them, and second of all to ascertain if they were involved in any criminal activity, specifically under our ICE authority it would be trafficking counterfeit goods. They have four large bags coming out of a known source area for counterfeit goods,

[2] Agents Lorenzen's and Finch's guns were holstered but visible. This fact was disclosed during trial testimony in front of the jury, not during the suppression hearing.

> we thought that might be something we wanted to take a look at.

Agent Tracy conceded the agents wanted to make contact with the couple solely based on their activity and not based on the original narcotics tip. Agent Tracy testified Spears and the woman began walking down the street towards the post office and that the woman appeared to reach into her bag and pass an unknown item to Spears. Agent Tracy testified that because Spears never lifted his hands above his waist, the agents believed the object would be in Spears' hands, waistband, or pockets.

Agent Tracy testified Spears and the woman continued to look back at the agents as they were walking away and that when the agents got close enough to Spears and the woman, he requested to speak with the couple. Agent Tracy testified he said something "nonthreatening" such as, "Excuse us, do you mind if we have a word with you?" Agent Tracy testified the couple complied. Agent Tracy described how the agents caught up with the couple: "They're walking, we're walking behind them, we didn't run. However, [] we [did] walk a little faster than they did to make contact with them." Agent Tracy testified Spears and the woman were not handcuffed and would have been free to walk away if they had initially refused to speak to the agents. Agent Tracy testified:

> We identified ourselves, made small talk with them about their travel itinerary, asked them how the bus ride was, if they got any bad weather[.] . . . We then asked them if they had -- or we told them the bus lines, that we had problems in the past with drugs and wanted subjects and counterfeit merchandise, and we asked them for ID.

Spears handed the agents his ID. However, the record does not reflect whether the agents retained his ID or gave it back to him. Agent Tracy testified Spears' answers about the trip were "very forthcoming"; however, when he asked Spears whether he had any illegal weapons, Spears hesitated before answering "no." Agent Tracy testified that based on his training in narcotics interdiction, people traditionally hesitate when they are confronted with a question they do not want to answer truthfully.

Agent Tracy testified about Spears' subsequent behavior, which is of particular importance to the issues on appeal:

> I noted that while I was speaking with [Spears,] he continued to put his hands underneath his shirt and I guess the motion would be like puff his shirt away from his waistband. . . . I asked him to keep his hands where I could see them . . . because I didn't know what if he was reaching in his pockets. He did it a couple more times, and I kept reminding him to cease putting his hands in his pockets . . . for officer safety regards[.] . . . So he continued to get frustrated, or he continued to put his hands in his pockets or pulled his shirt out, and I told him I was going to conduct a pat down of him so I could be sure he didn't have any weapons on him or anything that was going to hurt me.

Agent Tracy testified he frisked Spears for his and the other agents' safety. He testified it was during the frisk in which he discovered the crack cocaine and a small amount of marijuana.

Traci Jenkins (referred to as Traci Williams by the court of appeals), the woman with Spears at the time of the incident, also testified at the suppression hearing. She testified Spears was her boyfriend at the time of the incident. Jenkins testified she and Spears were waiting on a ride when they first disembarked the bus but decided to walk when the ride was taking too long to arrive. Jenkins testified she and Spears were told by the agents to "stop." She testified the encounter lasted probably less than twenty minutes and that she did not believe she was free to walk away. Jenkins testified she was told by the agents to sit down; however, she recalled that particular instruction was likely given to her after Spears was searched and handcuffed. She was unsure as to whether the agents' guns were visible. Spears did not testify at the suppression hearing.

The trial court denied Spears' motion to suppress the crack cocaine. The trial court found the agents engaged Spears in a consensual encounter and that Agent Tracy "pointed to specific and articulable facts [that] warranted a search of Spears' person."

During trial, Agents Tracy, Lorenzen, and Finch testified about their encounter with Spears. Tara Kinney, a forensic chemist, identified the seized drug as crack cocaine and determined it had a net weight of 11.43 grams. When the State moved the drug into evidence, Spears renewed his pretrial objection to its admissibility. The jury convicted Spears of trafficking crack cocaine, and because

this was Spears' third offense, the trial court imposed a thirty-year sentence pursuant to section 44-53-375(C)(1)(c) of the South Carolina Code (2018).

Spears appealed, and a divided court of appeals reversed his conviction. *State v. Spears*, 420 S.C. 363, 802 S.E.2d 803 (Ct. App. 2017). The majority held Spears was seized under the Fourth Amendment at the time of the initial encounter because a reasonable person would not have felt free to walk away from the agents at that point. *Id.* at 369-72, 802 S.E.2d at 806-08. The majority found Spears was arguably seized the moment the agents made initial contact with him, but, at the latest, he was seized when Agent Tracy asked whether Spears had any weapons or illegal items. *Id.* at 371, 802 S.E.2d at 807. The majority recognized the trial court did not rule as to whether the agents had a reasonable suspicion to stop Spears since the trial court's ruling was based on the premise that Spears and the agents engaged in a consensual encounter. *Id.* at 372 n.3, 802 S.E.2d at 808 n.3. However, in the interest of judicial economy, finding a remand unnecessary, the majority held the agents did not have a reasonable suspicion to seize Spears—thereby violating Spears' Fourth Amendment rights. *Id.* at 372-76, 802 S.E.2d at 808-10. The majority held the trial court erred in denying Spears' suppression motion. *Id.* at 376, 802 S.E.2d at 810.

The dissent at the court of appeals believed the appellate court's deferential standard of review in Fourth Amendment cases required the court of appeals to affirm. The dissent noted "a faithful adherence to the 'any evidence' standard of review will prevent any misconception that we have substituted our own findings in place of those of the [trial] court." *Id.* at 377, 802 S.E.2d at 810 (Williams, J., dissenting). This Court granted the State's petition for a writ of certiorari to review the court of appeals' decision.

II. ISSUE

Did the court of appeals err in reversing the trial court's denial of Spears' motion to suppress?

III. STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *Id.* If there is any evidence to support the trial judge's decision, this Court will affirm. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). "The 'clear error'

standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

IV. DISCUSSION

The State argues the court of appeals erred in reversing the trial court's decision to deny Spears' suppression motion. The State contends the court of appeals failed to properly apply the standard of review and substituted its own findings in place of the trial court's findings. The State argues there is evidence in the record to support the trial court's finding that law enforcement engaged Spears in a consensual street encounter that only became a seizure when law enforcement necessarily performed a *Terry* frisk. We agree.

A. Seizure

Spears unquestionably possessed Fourth Amendment rights as he walked down the street, for "the Fourth Amendment protects people, not places." *See Katz v. United States*, 389 U.S. 347, 351 (1967). "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). The Fourth Amendment guarantee "protects against unreasonable searches and seizures, including seizures that involve only a brief detention." *Pichardo*, 367 S.C. at 97, 623 S.E.2d at 847 (citing *United States v. Mendenhall*, 446 U.S. 544, 551 (1980)). "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

"A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014). In other words, when law enforcement "accosts an individual and restrains his freedom to walk away, [law enforcement] has 'seized' that person." *Terry*, 392 U.S. at 16. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16.

However, not all personal intercourse between law enforcement and citizens triggers Fourth Amendment concerns. *Id.* The United States Supreme Court has

made it clear that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* at 434 (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). "What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* at 215 (quoting *Mendenhall*, 446 U.S. at 554).

There is not "a litmus-paper test for distinguishing a consensual encounter from a seizure." *Royer*, 460 U.S. at 506. Rather, "there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable . . . seizure in violation of the Fourth Amendment." *Id.* at 506-07.

Here, in denying Spears' motion to suppress, the trial court pointed to certain facts in the record to support a finding that the encounter was consensual. The trial court found: (1) law enforcement initiated a conversation with Spears; (2) Spears willingly stopped and spoke with law enforcement; (3) law enforcement notified Spears they were law enforcement; (4) law enforcement never told Spears he was not free to leave; and (5) Spears was originally forthcoming with his answers to law enforcement's questions until he was asked about having anything illegal on his person.

The court of appeals held the trial court's characterization of the evidence ignored the totality of the circumstances. *See Spears*, 420 S.C. at 371, 802 S.E.2d at 807. The court of appeals concluded a reasonable person in Spears' position would not have felt free to terminate the encounter and go about his business. *Id.* at 372, 802 S.E.2d at 807. In so concluding, the court of appeals cited the framework it employed in *State v. Williams*, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002), to determine whether a seizure had occurred:

> Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact.

The court of appeals concluded most of the factors it enumerated in *Williams* to be probative of whether Spears had been seized:

> Spears and [Jenkins] were approached by three agents, two of whom had their guns visible; the agents waited to engage Spears and [Jenkins] until they were alone; the agents did not inform Spears and [Jenkins] they were free to leave; Agent Tracy indicated Spears was suspected of a crime by following Spears, telling him the bus lines were known for illegal activity, and asking him if he had any illegal weapons or items on his person or in his property; and the agents exhibited threatening behavior by following Spears and [Jenkins] for several hundred feet before the agents increased their pace to catch up with Spears and [Jenkins].

Spears, 420 S.C. at 371, 802 S.E.2d at 807. The court of appeals found "particularly significant" the fact that "the agents increased their speed to catch up with Spears," indicating Spears was no longer free to continue to walk away. *Id.* at 371-72, 802 S.E.2d at 807. The court of appeals held that although Spears was arguably seized when the agents made contact with him, Spears was seized, at the latest, when Agent Tracy inquired as to whether Spears had any weapons or illegal items on his person or in his property. *Id.* at 371, 802 S.E.2d at 807. Even though Traci Jenkins was unsure whether the officers' guns were visible, the court of appeals found the visibility of the guns to be a factor in the analysis. *Id.*

We disagree with the court of appeals and find the facts and circumstances as a whole support the trial court's finding that Spears engaged in a consensual encounter with law enforcement and was not seized until he was frisked by Agent

Tracy. The court of appeals erred in finding that the trial court ignored the totality of the circumstances; the trial court simply considered the facts of this case and, in its broad discretion, determined Spears' encounter with law enforcement was consensual up until the moment Agent Tracy frisked Spears. The deferential standard for reviewing the trial court's ruling compels our reversal of the court of appeals. When facts in the record support the trial court's decision, an appellate court cannot reweigh the facts to support its own conclusions.

Specifically, there is evidence in the record to support a finding that a reasonable person would have felt free to walk away from the encounter up until the point of being told an agent was going to frisk him. The evidence supports the conclusion that after Spears and Jenkins disembarked a bus known for harboring illegal activity, they paid undue attention to the three plain-clothed agents. The three agents followed Spears and Jenkins down a public street and sped up to a brisk walk to catch up with the couple to see if the couple would answer some questions. The agents did not move Spears and Jenkins to an isolated place to speak to them. The record supports the conclusion that when the agents reached Spears and Jenkins, Agent Tracy, in a "nonthreatening" manner, asked if the couple would stop and speak with the agents. Spears complied, engaged in small-talk with the agents, and gave them his ID; Agent Tracy informed Spears in general terms about prior issues involving illegal activity on the buses and did not accuse Spears of committing a crime. Agent Tracy then inquired as to whether Spears had any weapons or illegal items. Again, the trial court's ultimate finding that a reasonable person would have felt free to walk away from the encounter is supported by the evidence.

We reject Spears' contention that the only conclusion the trial court could have reached was that a reasonable person would not have felt free to walk away from the encounter. The evidence supports a finding that the agents' goal was not to impede Spears' movement and that he was free to walk away from the encounter up until the time he was frisked. As noted previously, Jenkins testified she felt she was not free to walk away from the encounter; however, she testified her impression she was not free to leave arose only *after* Spears was searched, the drugs were found, and Spears was handcuffed. Even if Jenkins believed she was not free to leave before then, the law requires us to discount her subjective belief, as our analysis must be based upon whether a "reasonable person" would have felt free to decline the agents' requests or otherwise terminate the encounter. *See Bostick*, 501 U.S. at 436.

While we acknowledge many of the *Williams* factors might apply in any given case, we decline to expressly adopt the specific factor test enumerated in *Williams*; we believe a proper determination of whether a seizure occurred involves a broader analysis of the totality of circumstances and does not lend itself to what might be

construed as a rigid test. Nevertheless, even when we apply the *Williams* factors to this case, our deferential review of the evidence supports the trial court's conclusion:

- Time and place of the encounter: Here, it was daylight, and Spears and Jenkins were walking down a public street. *See United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2002) ("Unlike those situations that may occur in the traffic stop context, pedestrian encounters are much less restrictive of an individual's movements.").

- The number of officers present and whether they were uniformed: Three plain-clothed agents spoke with Spears and Jenkins.

- The length of the detention: The record is not clear as to the exact length; Jenkins was unsure but believed the detention likely lasted less than twenty minutes; in this case, that is not an excessive length of time.

- Whether the officer moved the person to a different location or isolated him from others: Spears was not moved into an isolated location; he walked away from the bus on his own accord. Once they caught up with Spears, the agents did not move him to a more isolated location and did not separate him from Jenkins.

- Whether the officer informed the person he was free to leave: The agents did not inform Spears he was free to leave; however, the agents did not inform Spears he was not free to leave. *See Delgado*, 466 U.S. at 216 ("While most citizens will respond to a police request, the fact that people do so, *and do so without being told they are free not to respond*, hardly eliminates the consensual nature of the response." (emphasis added)); *United States v. Ringold*, 335 F.3d 1168, 1172 (10th Cir. 2003) (refusing to view any one factor as dispositive).

- Whether the officer indicated to the person that he was suspected of a crime: Agent Tracy informed Spears in general terms of the illegal activity that often occurs on the bus line. Agent Tracy asked Spears whether he had any weapons or illegal items.

- Whether the officer retained the person's documents: Agent Tracy asked for Spears' identification. The record does not indicate whether it was or was not returned to Spears. *See Weaver*, 282 F.3d at 312 (differentiating a pedestrian

encounter from an encounter involving a traffic stop because a pedestrian can refuse to cooperate when asked for identification).

- Whether the officer exhibited threatening behavior or physical contact: The agents did not physically touch Spears until he was frisked, and Spears was frisked only after he refused to comply with Agent Tracy's instruction to stop reaching under his shirt. The agents did not run after Spears but walked briskly at an accelerated rate so they could reach him. Agent Tracy politely asked if Spears would speak with him, and Spears complied. Agent Tracy testified his firearm was concealed. Jenkins testified she was unsure as to whether the agents' guns were visible.

The court of appeals found important to its reasonable person analysis the fact that the agents increased their walking speed before speaking with Spears. *Spears*, 420 S.C. at 371-72, 802 S.E.2d at 807. In *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988), the United States Supreme Court held law enforcement officers' pursuit of the defendant did not constitute a seizure implicating the protections of the Fourth Amendment. The officers observed a man get out of a car and approach the defendant at a street corner. *Id.* at 569. The defendant saw the officers in their patrol car and ran, and "[t]he cruiser quickly caught up with [the defendant] and drove alongside him for a short distance." *Id.* The officers observed the defendant discarding pills from his pockets as he ran. *Id.* At a pretrial hearing, the defendant moved to suppress the drugs, arguing he was seized during an "investigatory pursuit." *Id.* at 570-71. The Supreme Court disagreed with the lower court's suppression of the drugs, holding the officers' conduct would not have communicated to a reasonable person "an attempt to capture or otherwise intrude upon [the defendant's] freedom of movement." *Id.* at 575. The Supreme Court noted the record did not show "the police activated a siren or flashers; or that they commanded [the defendant] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block [the defendant's] course or otherwise control the direction or speed of his movement." *Id.* The Supreme Court provided, "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." *Id.*

Here, the agents briskly walking behind Spears is similar—but much less "threatening"—to the police cruiser's "investigatory pursuit" discussed in *Chesternut*. The brisk approach of the agents in the instant case did not automatically morph a street encounter into a seizure. A finding of a seizure in this context could create the absurd result of law enforcement officers only being able to

ask questions of individuals who were standing still, walking slowly, or walking toward the officers. Law enforcement does not have unlimited license to deploy interdiction efforts or engage in general policing; however, legitimate efforts in these areas would be unrealistically restricted if law enforcement was not permitted to walk fast in an effort to speak to a pedestrian on a public street. Walking briskly towards a suspect may, in any given case be interpreted differently based on the totality of the circumstances; however, in this case, the record supports the finding that the agents walked briskly to catch up with Spears and Jenkins as a matter of practicality—not as a show of authority to restrain Spears' liberty. Spears was free to continue walking and to refuse the agents' request that he speak with them. *See Mendenhall*, 446 U.S. at 554 ("[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.").

The asking of incriminating questions by law enforcement does not automatically trigger Fourth Amendment protections. *See Bostick*, 501 U.S. at 434-35 ("[E]ven when [police] officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." (internal citations omitted)). There is no evidence in the record that the agents asked incriminating questions in a forceful or persistent manner to compel Spears' compliance. *See Ringold*, 335 F.3d at 1173 ("[T]he mere fact that officers *ask* incriminating questions is not relevant to the totality-of-the-circumstances inquiry—what matters instead is 'the manner' in which such questions were posed."); *United States v. Little*, 60 F.3d 708, 712 (10th Cir. 1995) ("Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one." (internal quotation marks omitted)). The record supports the finding that the tone of the agents' interaction with Spears was not aggressive but conversational. The evidence supports the finding that the agents simply noted to Spears, in general terms, issues in the past with people transporting illegal items on the bus line and inquired as to whether Spears had any illegal weapons or other items in his luggage or on his person. *See United States v. Wilson*, 895 F.2d 168, 170 (4th Cir. 1990) (finding no seizure occurred when a narcotics agent stopped the defendant in an airport, informed the defendant he was investigating drug trafficking, and asked the defendant if he had anything illegal in his possession).

Spears dwells on the fact that Agents Lorenzen's and Finch's firearms were visible. The court of appeals also found this fact important to its analysis. Spears

argues, "It was not consensual because Spears did not feel free to leave with police guns facing him." First, the fact that Agents Lorenzen's and Finch's firearms were visible was never argued to the trial court during the suppression hearing. This fact did not surface until trial. Second, even if it had been argued during the suppression hearing, Spears' statement improperly characterizes and inflates the impact of the agents' firearms and ignores the fact that both agents' firearms remained holstered during the entire encounter. It is common knowledge a law enforcement officer carries a holstered weapon, concealed or visible. The record does not indicate the agents displayed their firearms in a manner that would cause a reasonable person to feel he could not walk away. This conclusion is supported by the fact that Traci Jenkins was unsure if the officers' guns were even visible. It would be unrealistically restrictive and unsafe for a law enforcement officer to have to remove his firearm and leave it elsewhere before approaching and questioning a person on the street. We hold, under the facts of this case, the court of appeals erred in concluding the "display" of handguns in Lorenzen's and Finch's holsters would have caused a reasonable person to feel he was not free to leave the encounter.

Spears is a black male. During oral argument, this Court inquired as to whether Spears' race was a factor to be considered in determining whether a reasonable person would have felt free to terminate the encounter with law enforcement and continue walking. Spears did not argue this point during the suppression hearing or to the court of appeals or in his brief to this Court; in fact, he contended *no one* would have felt free to leave this encounter. Even though the issue is not before us, we will briefly address it.

In *Mendenhall*, the defendant, a black female, was approached by DEA agents in the concourse of the Detroit Metropolitan Airport after she exhibited behavior the agents believed to be characteristic of a person carrying illegal drugs. 446 U.S. at 547. The agents approached the defendant and began asking her questions about her flight documentation. *Id.* at 548. The defendant appeared "extremely nervous" and, according to the agents, provided inconsistent accounts about her flight documentation. *Id.* An agent asked the defendant if she would accompany him to the airport DEA office for further questions. *Id.* The defendant acquiesced and, after being escorted to a private office, consented to a search of her person by a female agent. *Id.* at 548-49. Two packages of heroin were found, and the defendant was arrested. *Id.* at 549. The district court denied the defendant's motion to suppress, and the defendant was convicted of possessing heroin with the intent to distribute. *Id.*

The United States Supreme Court held the original encounter did not constitute a seizure. *Id.* at 555. When discussing whether the agent's request for the

defendant to accompany him to the airport DEA office constituted a seizure, the Court concluded, "The question whether the [defendant's] consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances." *Id.* at 557. The Court noted the defendant's age and education and stated, "It is additionally suggested that the [defendant], a [black female], may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, . . . neither were they decisive[.]" *Id.* at 558. The United States Supreme Court ultimately held the totality of the evidence was sufficient to support the trial court's finding that the defendant voluntarily consented to accompany the agents to the DEA office. *Id.*

In *United States v. Smith*, the defendant argued the Fourth Amendment reasonable person analysis should consider the defendant's race. 794 F.3d 681, 687 (7th Cir. 2015). The defendant specifically argued "no reasonable person in his 'position'—as a young black male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained—would have felt free to walk away from the encounter" with the law enforcement officers. *Id.* at 687-88. The Seventh Circuit Court of Appeals stated:

> We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while [the defendant's] race is "not irrelevant" to the question of whether a seizure occurred, it is not dispositive either.

Id. at 688.

The Tenth Circuit Court of Appeals has concluded differently, rejecting the argument that race is an appropriate consideration in the reasonable person analysis. *See United States v. Easley*, 911 F.3d 1074, 1081-82 (10th Cir. 2018), *cert. denied*, 2019 WL 1886117 (U.S. Apr. 29, 2019). The Tenth Circuit distinguished *Mendenhall*, finding its discussion of race was limited to the context of assessing voluntariness, not seizure. *Id.* at 1081. The Tenth Circuit explained:

> 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. . . . 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.

Id. at 1082.

We need not consider whether Spears' race is a factor to be considered when resolving the issue of whether the encounter was consensual. The trial record contains no evidence on this point other than the fact that Spears is a black male, and Spears advanced no argument on this point to the trial court, thus rendering the issue unpreserved.

There is evidence in the record to support the trial court's conclusion that the encounter was consensual. We reverse the court of appeals on this point and hold Spears was not seized until he was frisked by Agent Tracy. Consequently, until the frisk, the Fourth Amendment was not implicated, and there was no requirement of a showing of reasonable suspicion that Spears was engaged in criminal activity. *See Bostick*, 501 U.S. at 434 (providing as long as the encounter remains consensual, it does not trigger Fourth Amendment scrutiny, and there is no requirement of a showing of reasonable suspicion of criminal activity).

B. Legality of the Frisk

We next address the legality of the frisk. Giving due consideration to the evidence in the record, we conclude the law requires us to sustain the trial court's finding that the frisk was justified.

"[B]efore the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous." *State v. Fowler*, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996). "In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety." *Id.* "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." *State v. Blassingame*, 338 S.C. 240, 248-49, 525 S.E.2d 535, 540 (Ct. App. 1999). A protective frisk may be employed after

either an investigative stop or a consensual encounter. *United States v. Ellis*, 501 F.3d 958, 961 (8th Cir. 2007) (citing *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir. 2000)). *Terry* dictates that even in the setting of a protective frisk, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

The trial court concluded Agent Tracy had a reasonable suspicion that Spears was armed and dangerous and was therefore justified in frisking Spears. The trial court stated, "Now the only justification for patting down the defendant is a reasonable belief that his safety or the safety of others was in danger. Law enforcement has pointed to specific and articulable facts which warranted a search of the defendant's person." Evidence in the record supports the trial court's finding. First, Agent Tracy was a veteran law enforcement officer with a certification in interdiction. *See State v. Moore*, 415 S.C. 245, 255, 781 S.E.2d 897, 902 (2016) (citing a law enforcement officer's "extensive experience" in drug interdiction in support of common sense judgments); *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."). Such experience in law enforcement and interdiction lends support to the common sense judgments Agent Tracy made during the encounter. Also, Agent Tracy's testimony supports a finding that Spears kept placing his hands underneath his shirt near his waistband and "would puff his shirt away from his waistband." Agent Tracy asked Spears not to do this because he wanted to see Spears' hands to make sure Spears was not reaching for a weapon. Despite being asked several times to not make this "puffing" motion under his shirt, Spears did not comply. Only after Spears continued to disobey Agent Tracy's request did Agent Tracy fear for his safety and find it necessary to frisk Spears. We affirm the trial court's ruling that the frisk was justified.

V. CONCLUSION

There is evidence in the record to support the trial court's finding that Spears engaged in a consensual encounter with law enforcement, and there is evidence in the record to support the trial court's finding that Agent Tracy was justified in frisking Spears. Consequently, the trial court properly denied Spears' motion to suppress evidence of the crack cocaine seized during the frisk. We reverse the court of appeals and reinstate Spears' conviction and sentence.

REVERSED.

FEW, J., concurs. HEARN, J., concurring in a separate opinion. BEATTY, C.J., dissenting in a separate opinion in which Acting Justice John D. Geathers, concurs.

JUSTICE HEARN: I concur but write separately because I share many of the dissent's concerns regarding whether Eric Spears—an African-American male—*actually* felt free to walk away from the encounter with law enforcement. While I am skeptical that he did, this does not change the fact that our standard of review requires us to affirm unless there is clear error, meaning we cannot substitute our judgment for that of the trial court. *State v. Cardwell*, 425 S.C. 595, 599, 824 S.E.2d 451, 453 (2019) ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently."). Further, as pointed out by the majority, Spears never raised the argument the dissent advances to the trial court, where it would have had the opportunity to specifically address this issue when deciding whether he was seized pursuant to the totality of the circumstances. Indeed, had Spears raised this issue to the trial court and briefed it before this Court, we would be in a position to consider the reasoning of the dissent. Instead, this important discussion originated from the bench, and the record contains nothing to enable us to alter our jurisprudence as the dissent suggests. Accordingly, I concur.

CHIEF JUSTICE BEATTY: I respectfully dissent. I agree with the majority of the Court of Appeals and would find: (1) Spears was seized under the Fourth Amendment because a reasonable person would not have felt free to terminate the encounter with law enforcement; and (2) law enforcement did not have reasonable suspicion to justify the seizure. Accordingly, I would conclude the trial court erred in denying Spears's motion to suppress.

A. Seizure

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. Not every interaction between law enforcement and a citizen constitutes a seizure. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16.

"[T]o 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." *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *see Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014) ("A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980))).

The threshold question in this case is whether Spears was seized. The determination of this issue hinges on how a reasonable person would perceive the encounter with law enforcement. Our Fourth Amendment jurisprudence does not take into account personal characteristics such as race, sex, age, disability, and so forth when making this determination. The test does, however, consider the totality of the circumstances. In my view, a true consideration of the totality of the circumstances cannot ignore how an individual's personal characteristics—and accompanying experiences—impact whether he or she would feel free to terminate an encounter with law enforcement.

Spears is an African-American male. Scholars have examined ad nauseam the dynamics between marginalized groups—particularly African-Americans—and

law enforcement.[3] African-Americans generally experience police misconduct and brutality at higher levels than other demographics.[4] Consequently, it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics. "For many members of minority communities, however, the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security." Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 How. L.J. 239, 247 (1993). Moreover, "[g]iven the mistrust by certain racial, ethnic, and socioeconomic groups, an individual who has observed or experienced police brutality and disrespect will react differently to inquiries from law enforcement officers . . . ."). *Id.* at 253. Unfortunately, under our existing framework, this can result in the evisceration of Fourth Amendment protections for many people of color.

> Courts have also noted the existence of racial disparities in policing.
>
> [O]ur court addressed at length "the burden of aggressive and intrusive police action that falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter

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[3] *See, e.g.*, Charles R. Epp et al., *Beyond Profiling: The Institutional Sources of Racial Disparities in Policing*, 77 Pub. Admin. Rev. 168 (2017); Emily Ekins, The Cato Inst., *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey* (2016).

[4] *See, e.g.*, Epp, *supra*, at 174 ("Simply put, investigatory stops of vehicles especially target minority communities and people of color."); Ekins, *supra*, at 30 ("African Americans are about twice as likely as whites to report profanity or knowing someone physically mistreated by the police."); Scottie Andrew, *Police Are Three Times More Likely to Kill Black Men, Study Finds: 'Not a Problem Confined to a Single Region'*, Newsweek (July 23, 2018, 1:41 PM), https://www.newsweek.com /black-men-three-times-likely-be-killed-police-1037922 ("Across the country, black men are over three times more likely to be killed by police than white men, according to a study . . . ."); Maggie Fox, *Police Killings Hit People of Color Hardest, Study Finds*, NBC News (May 8, 2018, 8:00 AM), https://www.nbcnews.com/health/ health-news/police-killings-hit-people-color-hardest-study-finds-n872086 ("While just over half of people killed by police are white, Hispanics and African-Americans are on average younger, the researchers found. And people of black, Hispanic and Native American background are disproportionately killed by police, they reported.").

> neither society nor our enforcement of the laws is yet colorblind." There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.

United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1187–88 (9th Cir. 1996)). United States Supreme Court Justice Sonia Sotomayor has intimated:

> But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always 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.

Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (internal citations omitted); *see Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding the City of New York liable for the New York Police Department's stop-and-frisk policy, which violated plaintiffs' constitutional rights, and noting the racial disparities in the policy's implementation).

In spite of these academic findings and judicial observations, our current framework fails to meaningfully consider the ways in which a person's race can influence their experience with law enforcement. As a result, I fear minority groups are not always afforded the full protections of the Fourth Amendment. Given the interests at stake, one would expect our criminal justice system to forcefully resist marginalizing the experiences of people of color by insisting on a "color-blind" reasonable person standard. *See* Ward, *supra*, at 241 ("Because the reasonable person test assumes that a person's interactions with the police is a generic experience, the test is biased."). In my opinion, the seizure analysis should consider whether a reasonable *Black* person felt free to end an encounter with police. At the very least, I believe courts should consider a person's race (and other personal characteristics) in examining the totality of the circumstances in a seizure analysis.[5]

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[5] For example, in analyzing the totality of the circumstances to determine whether a defendant was seized, the Ninth Circuit acknowledged, among other things, "the publicized shooting by white Portland police officers of African-Americans" and "the widely distributed pamphlet with which [the defendant] was familiar,

Notwithstanding the foregoing, Spears's status as an African-American male is not the only circumstance militating against a conclusion that this was a consensual encounter. I agree with the Court of Appeals' determination that Spears was seized at the earliest when the officers made contact with him, and at the latest when the officers asked him whether he possessed any illegal items. Prior to the stop, the police followed Spears approximately 500 feet from the bus stop and walked at a brisk pace to catch up to him. Once Spears stopped to engage with the police, an officer explained there had been "problems in the past with drugs and wanted subjects and counterfeit merchandise." The officer also inquired about Spears's trip and asked for his identification. Subsequently, the officer asked Spears whether he had any illegal items on him or his property.

Under the totality of the circumstances, a reasonable person in Spears's shoes would not feel free to terminate the encounter with law enforcement. Spears was aware that he was being followed by three police officers.[6] The agents followed him to a more isolated area and quickened their pace to catch up to him. In my view, a reasonable person in this situation would not feel free to continue walking and disregard the agent's request to talk.[7] As the Court of Appeals pointed out—correctly, in my opinion—the agents signaled to Spears that he was no longer free to continue walking when they increased their speed to catch up to him. Accordingly, Spears was arguably seized as soon as the police initiated contact.

Even assuming the initial contact between Spears and the agents did not amount to a seizure, Spears was undoubtedly seized when the agent asked Spears

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instructing the public to comply with an officer's instructions." *United States v. Washington*, 490 F.3d 765, 773 (9th Cir. 2007).

[6] Agent Tracy testified that Spears kept looking back at the agents as they were following him. Agents Finch and Lorenzen testified that their guns and badges were visible.

[7] I question what would have happened had Spears continued walking and ignored the agent's request to speak with him. Indeed, had Spears continued to walk away, the agents may have interpreted this as furtive behavior that created reasonable suspicion for a stop. *See State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013) (finding reasonable suspicion existed where the defendant attempted to avoid officers by riding away on his bicycle). The Fourth Amendment could not possibly intend to place citizens in this impossible catch-22 situation.

whether he possessed any illegal items. As mentioned, when Spears stopped to talk with the agents, he was aware the agents had been following him.[8] After asking a few general questions, the agent stated there had been "problems" on the bus lines with "drugs and wanted subjects and counterfeit merchandise." The agent then asked Spears for identification and inquired whether Spears possessed any illegal items.

In my view, under these circumstances, a reasonable person would feel like he or she was suspected of wrongdoing and thus obligated to comply with the agent's requests.[9] Indeed, this is the only logical conclusion a person in Spears's situation

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[8] In *United States v. Jones*, the Fourth Circuit examined whether a defendant was seized when the officers blocked his car from leaving the scene. 678 F.3d 293 (2012). While the facts in *Jones* obviously differ and can be distinguished from the instant case, I find the Fourth Circuit's analysis compelling. In *Jones*, the court noted "the encounter here began with a citizen knowing that the police officers were conspicuously following him, rather than a citizen, previously unaware of the police, being approached by officers seemingly at random." *Id.* at 300. The court also made much of the fact that the defendant in *Jones* was seemingly *targeted* by the officers. "[H]ere, the totality of the circumstances would suggest to a reasonable person in Jones's position that the officers suspected him of some sort of illegal activity in a 'high crime area,' which, in turn, would convey that he was a target of a criminal investigation and thus not free to leave or terminate the encounter." *Id.* at 304.

[9] In *State v. Contreras*, a New Jersey appellate court concluded an encounter between the defendants and police officers was a seizure. In making this determination, the court stated:

> The officers proceeded to explain that there are 'problems' with drugs, weapons, and other contraband being transported on the trains between New York and New Jersey. They then asked defendants if they were carrying any such contraband, a question that clearly conveyed to defendants the message that the officers suspected them of criminal activity.

742 A.2d 154, 160 (1999). Similarly, in *State v. Pitts*, the Supreme Court of Vermont detailed several cases in other jurisdictions and noted there has been "a recognition among many courts that while 'mere questioning' may not constitute a seizure per se, pointed questions about drug possession or other illegal activity in circumstances indicating that the individual is the subject of a particularized investigation may convert a consensual encounter into a *Terry* stop requiring objective and articulable suspicion under the Fourth Amendment." 978 A.2d 14, 19–21 (Vt. 2009). The court ultimately found the defendant was seized, stating: "Although the officers' first few

could draw. This was not a situation in which the officers questioned passengers at random as they disembarked—Spears was singled out, followed, and questioned. Therefore, under the totality of the circumstances, I do not believe a reasonable person in this situation would feel at liberty to terminate the encounter with law enforcement. Accordingly, I would find Spears was seized under the Fourth Amendment.

I also wish to address the State's and majority's reliance on *Michigan v. Chesternut*, 486 U.S. 567 (1988), as I believe that case is readily distinguished. In *Chesternut*, the police observed a man get out of a car and approach the defendant. 486 U.S. at 569. When the defendant saw the marked police cruiser approach the corner where he was standing, he turned and ran. *Id.* The cruiser caught up to the defendant and "drove alongside him for a short distance." *Id.* As the cruiser drove alongside the defendant, he retrieved several packets from his pocket and discarded them. *Id.* An officer got out of the car to examine the packets (which contained pills), and the defendant stopped running while the officer was examining the packets. *Id.*

The majority compares the agents' brisk walk behind Spears to the police cruiser's "investigatory pursuit" in *Chesternut* and finds the agents' behavior here "much less 'threatening.'" At the outset, I note the United States Supreme Court expressly limited its holding in *Chesternut* to the particular facts in that case. *Id.* at 572–73 ("Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure."). Additionally, there are significant factual differences between *Chesternut* and this case. In *Chesternut*, the officers never commanded or asked the defendant to stop. Here, the agents effectuated a seizure when they asked Spears if they could speak with him. Unlike the police officers in *Chesternut*, the agents in this case singled Spears out (among many disembarking passengers), followed him to a more isolated location, accelerated their pace to catch up to him, and initiated conversation.

Furthermore, the State and majority assert a finding of seizure in this case would lead to the "absurd result" of a blanket prohibition on an officer's ability to

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questions to [the defendant] were the kind that courts have uniformly held to be innocuous and nonconfrontational, they rapidly progressed to inquiries indicating a particularized suspicion of criminal activity."). *Id.* at 21.

walk briskly. I disagree. Here, the agents' pursuit of Spears is just one of many circumstances to be considered, and the case does not turn solely on the speed at which the agents walked. Because a court must always examine the totality of the circumstances in determining whether a seizure occurred, the specific manner in which an officer approaches a defendant will remain just one of many facts a court must consider.

The State also contends upholding the Court of Appeals' decision will jeopardize officer safety if police can no longer ask a person whether they possess any illegal weapons. However, the agents did not ask Spears whether he had any illegal *weapons*. Rather, the agents asked Spears whether he had any illegal *items*.

B. Reasonable Suspicion

After determining Spears was seized, the question becomes whether law enforcement had a reasonable suspicion of criminal activity to warrant the seizure. *See Florida v. Royer*, 460 U.S. 491, 512 (1983) ("To justify such a seizure an officer must have a reasonable suspicion of criminal activity based on 'specific and articulable facts . . . [and] rational inferences from those facts . . . .'" (quoting *Terry*, 392 U.S. at 21)).

Law enforcement initially grew suspicious of Spears because he appeared to pay an "excessive" amount of attention to the officers and seemed "nervous." According to one officer's testimony at trial, this was unusual because the agents were dressed in plain clothes. However, two officers testified that their guns and badges were visible, and one officer speculated that Spears noticed the police were not "just off the bus or . . . there to pick anybody up." In my opinion, this would suggest the presence of law enforcement at the bus stop was indeed "obvious." And, practically speaking, once a person recognizes the presence of police, they are likely to pay attention irrespective of the officers' dress. Nonetheless, there is nothing particularly incriminating about *looking* at law enforcement.

In addition to paying the agents an "excessive" amount of attention, the officers made only the following observations prior to stopping Spears: Spears and his companion arrived on a bus line known to be used by criminals; the pair retrieved four large pieces of luggage; Spears did not appear to be meeting anyone at the bus stop; Spears began walking down the road away from the bus stop; and, while walking away, Spears's companion handed him an unidentified item. In my view, none of these facts, standing alone or together, provide articulable and reasonable suspicion to justify a seizure.

Several of the aforementioned facts are entirely reasonable given the context of the situation. One would expect two people traveling to South Carolina from New York to have several pieces of luggage. Further, walking away from a bus stop after disembarking is not suspicious activity. Indeed, Spears's companion testified the pair decided to walk when their ride failed to show up. In addition, Spears walked at a normal pace even though he knew he was being followed. Moreover, not one agent could testify regarding the specifics of what Spears's companion handed him—or even if she actually handed Spears anything at all. Therefore, these facts cannot be relied upon to establish a reasonable suspicion that criminal activity was afoot.

Once these facts are dispensed with, law enforcement was left with only two facts: (1) Spears's arrival on the bus line; and (2) Spears kept looking at the agents. In *Illinois v. Wardlow*, the United States Supreme Court recognized that "presence in an area of expected criminal activity" and "nervous, evasive behavior" are both relevant—though not dispositive—in a reasonable suspicion analysis. 528 U.S. 119, 124 (2000). When considering the totality of the circumstances, these two factors alone are woefully inadequate to provide an officer with any reason to suspect Spears was engaged in criminal activity.

The Fourth Amendment requires a police officer to have more than a mere, unsupported hunch before subjecting a citizen to police intrusion. *See Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). Although I am sympathetic to the everyday realities police officers face, the courts must be careful to strike an equitable balance between the needs of law enforcement and the constitutional rights of citizens. In *Schneckloth v. Bustamonte*, Justice Thurgood Marshall aptly noted the following in his dissent:

> Of course it would be 'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

412 U.S. at 288 (Marshall, J., dissenting). Although *Schneckloth* addressed a different Fourth Amendment issue, I believe Justice Marshall's words are equally applicable here.

The United States population includes 42 million Americans of African descent. Inexplicably, these Americans are basically invisible to those of us who apply the analytical framework for reasonable behavior or beliefs. Somehow the judiciary, intentionally or not, excludes these Americans' normal behaviors, responses, and beliefs in circumstances involving law enforcement agents. For most, the "totality of the circumstances" does not include consideration of the reasonable behavior or response of African-Americans when confronted with certain stimuli. Thus, the regrettable and unsettling conclusion is that the question of what is "reasonable" is viewed solely from the perspective of Americans who are White. I shudder to think about the probable result had the defendant continued to walk and ignore the police.

This unassailable observation is not intended as an indictment of my colleagues who wear the robe. I do not believe their obliviousness is due to intentional disregard. I prefer to assign their selective blindness to a lifetime of being repeatedly subjected to episodes of minimizing the African-American experience. Life experiences influence the way that we all view the world and legal issues. We should be cognizant of this fact and attempt to view the issue truly with an objective eye. An objective eye would acknowledge the fact that African-Americans are being reasonable when they respond in accordance with their collective experiences gained over two hundred years.

This fact of life observation has no bearing on the actual guilt or innocence of the defendant in this case. However, it has great significance to our Constitution, due process, equal protection, and what it means to be an American.

Based on the foregoing, I would find the trial court erred in denying Spears's motion to suppress because Spears was seized pursuant to the Fourth Amendment without any articulable and reasonable suspicion. Therefore, I would affirm the decision of the Court of Appeals.

Acting Justice John D. Geathers, concurs.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

PETITIONER,

V.

ERIC TERRELL SPEARS,

RESPONDENT

APPELLATE CASE NO. 2017-001933

Certiorari to the Court of Appeals

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 27945

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Eric Terrell Spears petitions this Court for rehearing and respectfully submits that this Court misapprehended the facts in the totality of the circumstances analysis such that it should have held Respondent was improperly seized in this case. Additionally, this Court should have considered race in its analysis of the totality of the circumstances to support that holding.

In this case Respondent was improperly seized as understood by the Fourth Amendment of the United States Constitution when he was stopped and questioned by multiple officers about possessing illegal items as he walked away from a bus terminal. Furthermore, regardless of whether

Respondent's race was *specifically* argued as a factor in the totality of circumstances test by trial counsel or whether it was briefed before this Court, this Court should adopt the dissent's position that race should always be considered in the totality of circumstances test as a practical recognition that race inherently impacts encounters with law enforcement. See United States v. Brown, 925 F.3d 1150 (9th Cir. 2019) (quoting Washington v. Lambert, 98 F.3d 1181, 1187–88 (9th Cir. 1996) ("[T]he burden of aggressive and intrusive police action [that] falls disproportionally on African-American, and sometimes Latino, males…[shows] as a practical matter neither society nor our enforcement of the laws is yet color-blind.")); see United States v. Mendenhall, 446 U.S. 544, 558 (1980) (holding that race is "not irrelevant" in the totality of circumstances.)

In this case, the state conceded that the officers did not have reasonable suspicion to stop Respondent. R. 65, ll. 7 – 18. Instead, the state argued that Spears was not seized by the arresting officers because he consented to the encounter with police that led to his arrest. Id. However, Spears did not voluntarily choose to speak with police and only did so because the circumstances of the stop were such that a reasonable person would not feel free to terminate the encounter. R. 55, ll. 1 – 60, ll. 1; See U.S. v. Smith, 794 F.3d 681, 684 – 685 (7th Cir. 2015) (explaining that the presence of multiple officers makes a stop threatening in and of itself and that the officers waiting for a suspect to move to an isolated location before springing the encounter on him has the same threatening effect as the officers proactively isolating him.)

To determine when a suspect has been seized under the Fourth Amendment the Court uses the totality of the circumstances test put forth in United States v. Mendenhall. That test states that a person has been seized when, under the totality of circumstances, a reasonable person in the suspect's position would not have felt free to decline the officers' requests or to otherwise terminate the encounter. Id. at 554 – 555.

An examination of the commonly enumerated factors in the totality of circumstances test showed that they weighed in favor of Respondent in this case.[1] The most crucial factor here was that Spears and Jenkins were not informed of their right to terminate the encounter. This was especially true in this case because the state's argument was that Respondent consented to the encounter with police.

Since Respondent was never informed of his right to terminate the encounter, he could not consent to the encounter with police. As Justice Marshall explained in his dissent in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), "I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all." Schneckloth, at 284 – 285. Moreover, "If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police." Id. Since Respondent was never informed of his right to terminate the encounter, this most important factor weighed in favor of holding that Respondent was wrongfully seized.

If this Court believed that Spears implicitly consented to the stop by answering the officers' initial questions, the scope of that consent was limited to the general questions about his identity and recent bus trip. Florida v. Bostick, 501 U.S. 429, 437 (1991) ("As we have explained, no seizure occurs when police ask... to examine the individual's identification, and request consent to search his or her luggage.") The moment the officers asked Spears if he possessed "illegal items" they exceeded the limited scope of Spears' implied consent to answer non-incriminating questions. R.

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[1] The usual factors include: the time and place of the encounter; the number of officers present; the length of the detention; whether the detainee was isolated at the time of the encounter; whether the detainee was informed of his right to terminate the encounter; whether the detainee was told they were the suspect of a crime; whether the detainee's documents were retained; and whether the officer(s) exhibited threatening behavior. U.S. v. Smith, 794 F.3d 681, 684 (citing Mendenhall, 446 U.S. at 554).

71, ll. 22 – 24; R. 69, l. 14 – 70, l. 9; See Smith, 794 F.3d at 686 ("The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime… While the government posits that in order to convey such a message, police must say, 'you are a suspect,' such magic words are not required.") (internal citations omitted) Furthermore, during the stop, but before the frisk, the officers repeatedly ordered Respondent to not make movements with his hands. R. 41, ll. 1 – 20. No reasonable person would have believed they could terminate the encounter and walk away once the multiple officers who stopped him asked incriminating questions and issued orders that controlled his movements. R. 61, l. 20 – 62, l. 9.

Had Respondent continued to walk away, the agents could have used that against him as behavior that created a reasonable suspicion for stopping him. See State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013) (finding reasonable suspicion existed where the defendant attempted to avoid officers by riding away on his bicycle). Respondent was then stuck in the situation where he had to either stop and talk to the police, thereby "consenting" to the stop, or keep walking away and risk giving police enough "reasonable suspicion" to stop him. The protections of the Fourth Amendment cannot be so limited that they allow the state to put citizens in this Catch-22 position.

Respondent also disagrees with this Court's determination that the length of the encounter weighed in favor of the state. The length of the actual face to face encounter was not exactly determined but it was estimated it took about twenty minutes. R. 56, ll. 18 – 24. A twenty-minute conversation on the street with strangers was exceedingly long and would not have reached that length had the officers been anyone other than the police. Thus, the length of the conversation indicated that it was solely Respondent's reasonable belief that he was not free to terminate the encounter that kept the conversation going for twenty minutes. Accordingly, this factor weighed in favor of Respondent.

While there are the factors commonly enumerated in the "totality of the circumstances" test, they are not exhaustive. It was undeniable that race was a factor in the totality of circumstances in this case such that this Court should have considered it in its evaluation. Race is a pivotal characteristic in society today such that people are treated differently because of their race and *people expect to be treated differently because of their race.* Since there is no denying race's impact in the minds of Americans, it should always be included in the totality of circumstances test.[2]

This Court cited United States v. Mendenhall, 446 U.S. 544 (1980) in support of the decision that Respondent was not seized in this case but overlooked crucial differences between Mendenhall and the present case. Mendenhall was standing in the concourse of an airport when two DEA agents questioned her about her trip. Id. at 547 – 548. After Mendenhall gave inconsistent answers, the agents asked her if she consented to coming to the DEA airport office for further questioning, and Mendenhall agreed to go with them. Id. at 548. In the DEA office an agent asked her if she consented to having her bag searched and *informed her of her right to decline the search.* Id. Mendenhall again consented to be searched after being notified of her right to decline. Id.

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[2] There is a split among the circuits between two lines of cases on the issue of race being considered in the totality of circumstances test for whether a reasonable person would believe they were seized. The first line recognized race as a factor. See U.S. v. Brown, 925 F.3d 1150 (9th Cir. 2019); U.S. v. Smith, 794 F.3d 681, 687 (7th Cir. 2015). The second is U.S. v. Easley, 911 F.3d 1074, 1081-82 (10th Cir. 2018) that refused to recognize race as a factor. Respondent respectfully recommends that this Court follow the Brown and Smith line because Easley was wrongfully decided. The United States Supreme Court held in Mendenhall that race was "not irrelevant" in evaluating the totality of circumstances regarding whether a reasonable person would believe they were seized. Mendenhall, at 548. Accordingly, by differentiating the analyses of seizure and consent, the Tenth Circuit separated two legal concepts that are inextricably intertwined. As such, the Easley decision contradicted United States Supreme Court precedent and should not be followed.

Accordingly, the reason the Court in Mendenhall determined the stop was consensual, despite the impact Mendenhall's race had on the encounter, was because the officers informed Mendenhall of her right to terminate the encounter. Id. at 558 – 559. ("It is *especially significant* that respondent was twice expressly told that she was free to decline consent to search, and only thereafter explicitly consented to it.") (emphasis added) While race was not dispositive in the totality of circumstances test, the Supreme Court stated race was "not irrelevant," meaning it was included in the totality of circumstances. Id. at 558.

The factors in Mendenhall that outweighed the consideration of race were not present in Respondent's case. Here, the officers never asked for Spears' consent to search him nor *did they inform Spears of his right to terminate the encounter*. R. 118, l. 12 – 119, l. 18. Spears was also leaving the bus terminal and was hailed by police, such a show of force was not necessary in Mendenhall because she was stationary when her encounter started. Id.; R. 61, ll. 20 – 25. Lastly, Spears' answers to the questions about his identity and trip were not inconsistent like Mendenhall's and the agents should not have persisted in their questioning beyond those innocuous topics. R. 118, l. 12 – 119, l. 18.

Although at trial the issue of race was never expressly argued at trial, the fact that Spears was a black male was put before the trial court. R. 17, ll. 15 – 17; R. 169, ll. 15 – 17. The issue of race's impact on the totality of circumstances was apparent enough that during oral argument this Court posed the question if race played a part in whether Spears felt free to terminate the encounter with police.

Under State v. Tindal, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010), this Court can conduct its own review of the facts under the deferential standard of review for Fourth Amendment cases. If this Court felt that Respondent's race should have been considered by the lower court as

part of the totality of circumstances it was able to reach a conclusion on that issue on appeal as part of its own review of the facts.

It is not required for trial attorneys to foresee and argue every potential angle or detail of the encounter to preserve that factor for consideration on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (quoting State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001)). Such a requirement would constrain an appellate court from conducting its own review of the facts involved in the totality of circumstances to evaluating the rote arguments of trial counsel.

Here, the dissent cited the Ninth Circuit Court of Appeals decision in United States v. Brown, 925 F.3d 1150 (9th Cir. 2019) for the proposition that race is a factor included in the totality of circumstances test. There was nothing in the Brown opinion that indicated that the issue of race was ever brought up by the trial attorneys or ever argued on appeal. However, the Brown Court addressed the issue because it was a practical recognition that "neither society nor our enforcement of the laws is yet color-blind." Brown, 925 F.3d at 1156 (quoting Washington v. Lambert, 98 F.3d 1191, 1197-99 (9th Cir. 1996)).

Respondent does not argue that the consideration of race on its own necessitated holding that a reasonable person would not feel free to terminate Respondent's encounter with police. It is Respondent's position that race was a factor to be considered as part of the totality of circumstances in his case, and had this Court considered race in its decision it would have held that Respondent was seized at least at the time that the officers asked if he possessed any illegal items. See U.S. v. Smith, 794 F.3d at 686.

Accordingly, Respondent respectfully requests that this Court reconsider its decision, grant rehearing, hold that Respondent was seized at least at the time the officers questioned him on illegal activity, and affirm the Court of Appeals' decision as modified.

Respectfully Submitted,

Victor R. Seeger

VICTOR R SEEGER
Appellate Defender

This 27th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

PETITIONER,

V.

ERIC TERRELL SPEARS,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Eric T. Spears, #363100, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of February, 2020.

Victor R Seeger
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029

The Supreme Court of South Carolina

The State, Petitioner,

v.

Eric Terrell Spears, Respondent.

Appellate Case No. 2017-001933

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Kaye G. Hearn J.

John Cannon Few J.

J.

I would grant the Petition for Rehearing.

C.J.

Acting Justice John D. Geathers, not participating.

Columbia, South Carolina

April 1, 2020

cc:
LaNelle Cantey DuRant, Esquire
Alan McCrory Wilson, Esquire
David A. Spencer, Esquire
Heather Savitz Weiss, Esquire
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Victor R Seeger, Esquire
Jeanette W. McBride