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No. _____

S.C. SUPREME COURT

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

Victor R. Seeger
Appellate Defender

Robert M. Dudek
Counsel of Record
Chief Appellate Defender
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
DIVISION OF APPELLATE DEFENSE
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330
rdudek@sccid.sc.gov

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 evidence¹. 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 Terry² stop. State v. Spears, 429 S.C. 422, 446, 839 S.E.2d 450, 462

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 disproportionately 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

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

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

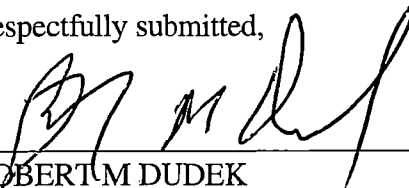
⁵ See also Metropolitan Police Department, Washington, D.C., Stop Data Report at 9, 19 (Sept. 9, 2019), available at <https://mpdc.dc.gov/stopdata> <https://perma.cc/RJ59-RD2M>;

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,



ROBERT M DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

August 28, 2020

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S.C. SUPREME COURT

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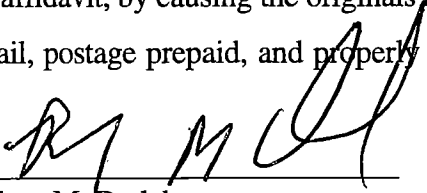
STATE OF SOUTH CAROLINA

Petitioner.

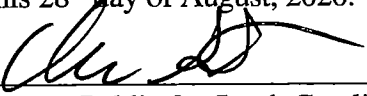
**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

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.