2.5 Consensual Encounters

A. Overview

The protections of the Fourth Amendment do not come into play during consensual encounters in which no seizure has taken place. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also Florida v. Bostick*, 501 U.S. 429 (1991) (when a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's requests or terminate the encounter). For a further discussion on how to distinguish between a consensual encounter and a seizure, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 15.2A (Did the Officer Seize the Defendant?) (2d ed. 2013).

B. Relevance of Race to "Free to Leave" Test

Courts consider the totality of the circumstances in evaluating whether a reasonable person would have felt free to leave an allegedly consensual encounter. *See INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Analla*, 975 F.2d 119, 124 (4th Cir. 1992). In some cases, a defendant's race may be a factor in the totality of relevant circumstances. The U.S. Supreme Court has held that the individual's responses to police actions are not relevant to whether a reasonable person would have felt free to leave, which is an objective determination. *See Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (holding that the reasonable person standard "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached"). Nevertheless, some courts have indicated that a defendant's characteristics—such as race or immigration status—may play a role in determining whether a reasonable person in the defendant's position would have felt free to leave.

For example, the Ninth Circuit Court of Appeals held that an encounter between two White police officers and an African American defendant was not consensual, as a reasonable person in the defendant's circumstances would not have felt free to leave. *U.S. v. Washington*, 490 F.3d 765 (9th Cir. 2007). In that case, the court relied on, among other things, the strained relations between police and the African American community and the reputation of police among African Americans. *Id. See also* DONALD HAIDER-MARKEL ET AL., CONSTRUCTING DISTRUST: THE CONSEQUENCES OF AFRICAN AMERICAN ENCOUNTERS WITH POLICE (2012) (finding, for example that Black people are far more likely than White people to agree with the statement "the police are out to get me"); NATIONAL INSTITUTE OF JUSTICE, MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETINGS 135 (Robert H. Langworthy ed., 1999) (reporting that only 32% of African Americans hold a great deal or quite a lot of confidence in the police, as opposed to 66% of whites).

In the context of police encounters in airports, the Fourth Circuit Court of Appeals included "the characteristics of the particular defendant" as one of three main factors to

consider when determining whether an encounter was consensual. *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989) (citing *United States v. Black*, 675 F.2d 129, 134–35 (7th Cir. 1982), in which the Seventh Circuit noted in "free to leave" analysis, that defendant was an articulate, intelligent college graduate and therefore "not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment"). *But see Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009) ("[t]o agree that [the defendant's] subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures. Such a rule should be rejected."). One federal district court within the Fourth Circuit discussed without deciding whether a defendant's particular attributes—including limited English proficiency, limited formal education, and unfamiliarity with American police procedure—may be relevant to determining whether the defendant's encounter with a police officer constituted a seizure. *Santos v. Frederick County Bd. of Comm'rs*, 884 F. Supp. 2d 420, 427 n.5 (D. Md. 2012) (unpublished), *aff'd in part, vacated in part by* 725 F.3d 451 (2013) (recognizing that defendant's limited English proficiency "may have added to the coerciveness of the situation" but finding that "the language barrier, on its own, [was] insufficient to turn the otherwise consensual encounter into a seizure"). The U.S. Supreme Court has held analogously that a child's age is a relevant factor to consider in determining whether the child was in custody for *Miranda* purposes, even though whether a suspect is in custody is an objective inquiry. *See J.D.B. v. North Carolina*, __ U.S. __, 131 S. Ct. 2394, 2399 (2011).

C. Consensual Encounters Between Officers and Pedestrians

Race-based "consensual" encounters. Even if an encounter is consensual and therefore not subject to Fourth Amendment protections, an officer may violate the Equal Protection Clause of the Fourteenth Amendment and article I, section 19 of the N.C. Constitution if the defendant is selected for such an encounter because of the defendant's race. *See Whren v. U.S.*, 517 U.S. 806, 813 (1996) ("the Constitution prohibits selective enforcement of the law based on considerations such as race[;] [b]ut the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment"); *U.S. v. Avery*, 137 F.3d 343 (6th Cir. 1997); *U.S. v. Travis*, 62 F.3d 170 (6th Cir. 1995); *U.S. v. Taylor*, 956 F.2d 572 (6th Cir. 1992); *see also supra* § 2.3, Equal Protection Challenges to Police Action.

If you suspect that "Officer Jones" singled out your client for a consensual encounter on the basis of race, you may want to review court files in which Officer Jones was the arresting officer for evidence of racially discriminatory practices. By recording data such as the race of the person charged for a relevant time period, e.g., a one-year period before your client's encounter, you may be able to discern a pattern of enforcement decisions. If the charges initiated by the officer in question appear to be racially skewed, they may be compared to (1) census data reflecting the demographics of the area patrolled by the officer, and/or (2) the enforcement patterns of other officers responsible for patrolling the same area during approximately the same hours. *See* Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police*

Decision-Making, 15 GEO. MASON U. CIV. RTS. L.J. 219, 247 (2005) ("A promising technique for assessing potential discrimination in the traffic stop practices of a particular officer is to compare the racial composition of the officer's stops to the racial composition of stops made by other officers who work the same assignment in the same general area and at approximately the same time of day."). This sort of information may be obtained by pulling court files in which other officers were the arresting officers. If you see a disparity in enforcement, you may have grounds for obtaining additional discovery about departmental practices. *See supra* "Discovery" in § 2.3D, Gathering Evidence to Support a Claim of Selective Enforcement. Ultimately, an equal protection claim of selective enforcement arising out of a consensual encounter must be supported by evidence demonstrating that the officer's consensual encounters were driven by racial motivations and resulted in racially disparate effects. *See supra* § 2.3D, Gathering Evidence to Support a Claim of Selective Enforcement.

D. Consensual Encounters at Home: The "Knock and Talk" Technique

Race-based "knock and talks." The "knock and talk" practice is one in which law enforcement officers, acting without a warrant and often without probable cause, knock on the door of a dwelling in order to question its inhabitants and often ask for consent to search their home. This practice has been criticized as one that allows targeting of minorities or other vulnerable populations. *See* Brian J. Foley, *Policing From the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 340 (2010) (observing that "when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail"). Attorneys may raise Equal Protection Clause challenges to race-based decisions to initiate "knock and talks." Such challenges might be considered, for example, if it appears that police officers are targeting predominantly minority neighborhoods for "knock and talks." These challenges should also be raised under article I, section 19 of the N.C. Constitution. *See supra* § 2.5C, Consensual Encounters Between Officers and Pedestrians and *supra* § 2.3, Equal Protection Challenges to Police Action.

Consent to search following a "knock and talk." Searches following "knock and talks" are permissible when the occupant freely, voluntarily, and unequivocally consents to the search. *U.S. v. Miller*, 933 F. Supp. 501, 505 (M.D.N.C. 1996). In *U.S. v. Johnson*, 333 U.S. 10 (1948), the Supreme Court characterized a defendant's alleged permission to search following a "knock and talk" as a "submission to authority rather than as an understanding and intentional waiver of a constitutional right" and rejected it as non-consensual. The burden is on the State to demonstrate that the defendant's consent was voluntary. *See, e.g.*, *United States v. Morrow*, 731 F.2d 233, 236 (4th Cir. 1984) (where the State argues that defendant consented to a search of his or her home, it must prove that the defendant "freely and intelligently [gave his or her] unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied" (internal quotation omitted)).

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), the Supreme Court recognized that characteristics of the accused are relevant in the determination of whether consent to

search was voluntarily given. "[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents"). *Id.* at 229. Based on this authority, defense counsel could argue that a defendant's race, ethnicity, age, limited education, or limited English proficiency should be taken into consideration in determining whether consent was freely given. Challenges to the validity of consent should be raised under the Fourth Amendment as well as article I, sections 19, 20, and 23 of the N.C. Constitution.

For a fuller discussion of the "knock and talk" technique, *see* 1 NORTH CAROLINA DEFENDER MANUAL § 14.2E (Knock and Talk) (2d ed. 2013).

E. Practice Tips: Challenges to Alleged Consensual Encounters

If your client is facing charges arising out of an allegedly consensual encounter with an officer and you believe race may have played a role in the encounter, the following questions may help you identify viable Fourth Amendment or Equal Protection challenges on which to base a motion to suppress evidence or dismiss charges:

- Is there evidence, direct or circumstantial, that your client may have been approached for a consensual encounter because of his or her race? For example, is there a pattern of police officers engaging in such encounters more often in predominantly minority neighborhoods? If so, the encounter may have violated your client's right to equal protection guaranteed by the N.C. Constitution and U.S. Constitution, even if the encounter did not constitute a seizure.
- Was there a show of force or other coercive action by the officer? If so, the court will be more likely to find that the encounter was a seizure requiring reasonable suspicion or an arrest requiring probable cause.
- Was your client in a particularly vulnerable state when approached by the officer, or was your client subjected to police pressure, making his or her consent involuntary and therefore invalid?
- Is there evidence that your client is a member of a minority community with a particularly strained relationship with the police? If so, those attributes may be relevant in determining whether, given the totality of the circumstances, a reasonable person would have perceived the encounter as consensual.
- Does your client have a history of traumatic interactions with police officers? For example, has your client ever been tasered or treated in any fashion that may have rendered him or her more likely to have his or her will overborne?