STATE OF VERMONT
HUMAN RIGHTS COMMISSION

Bentley Morgan	)	
	)	
v.	)	HRC Charge No.PA11-0038
	)	
	)	
Orange County Sheriff's Department	)	

FINAL DETERMINATION

Pursuant to 9 V.S.A. 4554, the Vermont Human Rights Commission enters the following Order:

1. The following vote was taken on a motion to find that there are reasonable grounds to believe that Orange County Sheriff's Department, the Respondent, illegally discriminated against Bentley Morgan, the Charging Party, in violation of Vermont's Fair Housing and Public Accommodations Act because of his Race, Color, and National Origin.

Mary Marzec-Gerrior, Chair	For ✓	Against __	Absent__	Recused __
Nathan Besio	For ✓	Against __	Absent __	Recused __
Mary Brodsky	For ✓	Against __	Absent __	Recused __
Mercedes Mack	For ✓	Against __	Absent __	Recused __
Donald Vickers	For ✓	Against __	Absent __	Recused __

Entry: ✓ Reasonable Grounds __ Motion failed

Dated at Winooski, Vermont, this 14th day of March, 2013.

BY: HUMAN RIGHTS COMMISSION

Mary Marzec-Gerrior, Chair

Nathan Besio

Mary Brodsky

Mercedes Mack

Donald Vickers

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INVESTIGATIVE REPORT
PA11-0038

CHARGING PARTY: Bentley Morgan

RESPONDING PARTY: Orange County Sheriff's Department (OCSD)

CHARGE: Public accommodations/race, color and national origin (Jamaican)

SUMMARY OF CHARGE: On June 20, 2011, Bentley Morgan filed a Charge of Discrimination alleging that the OCSD discriminated against him based on his race, color and national origin (Jamaican). Specifically, Mr. Morgan alleged that OCSD discriminated against him in three distinct events. First, he alleged that the OCSD illegitimately pulled him over due to his race and color during a "Click-it-or-Ticket" (CIOT) campaign in Hardwick, Vermont on June 3, 2011. Second, he further alleged that detaining him for almost an hour and one half on the side of the road while the OCSD tried to determine if he was the subject of a fugitive warrant was longer than necessary and represented discrimination based on race, color and national origin. Finally, he alleged in an amended complaint filed on August 13, 2012 that OCSD had treated him in a discriminatory fashion by pursuing him to his home and place of work and by enlisting the aid of the U.S. Marshall Service even after it became objectively clear he was not the fugitive named in the warrant.

SUMMARY OF RESPONSE: On July 5, 2011, in response to Mr. Morgan's complaint, the OCSD submitted two reports from Captain Welch and

Corporal Chin[1] who were at the scene June 3, 2011 in Hardwick, Vermont. The reports were sent to the HRC directly (not via counsel)[2] and did not explicitly address the allegations of discrimination by either denying or admitting to them as is requested by the VHRC in a response. Further investigation expanded upon their version of the events and the reasoning behind their actions.

PRELIMINARY RECOMMENDATION: This investigative report makes a preliminary recommendation that the Human Rights Commission find reasonable grounds to believe that the OCSD discriminated against Bentley Morgan because of his race, color and national origin, in violation of 9 V.S.A. §4502(a) of the Vermont Fair Housing and Public Accommodations Act.

SUMMARY OF INVESTIGATION

Interviews

Bentley Morgan[3] – Complainant - 7/28/11, 8/1/12, 7/30/12, 2/7/13
Martha Hamilton - Mr. Morgan's former landlady and employer - 7/30/12, 2/7/13
David Hair – Mr. Morgan's employer - 7/31/12
U.S. Marshall Joe Gaines – 7/31/12
Mary Ann Rakowsky – The mother of Mr. Morgan's 9 year-old son - 7/29/11
Lieutenant Tracy Simon OCSD 11/7/2012
Deputy Matthew Chin OCSD 11/7/2012
Captain Michael Welch OCSD 11/7/2012
Sheriff Bill Bohnyak OCSD 11/7/2012

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[1] Corporal Chin is now Deputy Chin but will be referred to as Corporal because that was his rank at the time.
[2] Counsel confirmed representation of Respondent on August 5, 2011.
[3] Mr. Morgan was born in Jamaica in 1958. He came to the United States in 1989 to Vermont first then moved to Maryland with his fiancée who worked for the USDA. The couple moved back to Vermont in the 1990's. In 2000, he became a naturalized U.S. citizen in a ceremony that took place in St. Albans. He holds both American and Jamaican passports and citizenship. Since the year 2000, he has traveled back and forth between Jamaica and the United States several times without incident. He has a 12 year-old son and is a Master Gardener and farmer. He identifies himself as a Bobo Ashanti Falasha Jew and wears traditional dreadlocks under a turban which are components of his religious expression. He has lived in the Danville area for four to five years. This investigation spoke to his landlady and employer, both of whom are white. They regarded Mr. Morgan as an excellent and trusted employee and tenant. His landlady encountered the U.S. Marshalls and OCSD at her home. His employer encountered the U.S. Marshall while Mr. Morgan was at work and while the OCSD officers sat in their car. Both his landlady and employer felt Mr. Morgan was being harassed and targeted due to his race.

Documents

1) Bentley Morgan's Charge of Discrimination - June 20, 2011.
2) Captain Welch's and (then) Corporal Chin's Responses to the charge of discrimination dated July 5, 2011.
3) Copy of NCIC (National Crime Information Center)[4] fugitive warrant for "Fidel Peter Maragh" provided by OCSD July 5, 2011.
4) Information sent from Broward County Florida Sheriff's Office to OCSD on June 3, 2011 including:
    - The fingerprints of Fidel Peter Maragh;
    - A copy of original court warrant for Fidel Peter Maragh issued in Florida in May 1995;
    - A booking photo and accompanying information on Fidel Peter Maragh.
5) Correspondence and documents from the Broward County Florida Sheriff's Department provided June 15, 2011 to OCSD containing a 1995 photo of Fidel Peter Maragh and cover letter.
6) OCSD Traffic Citation Report containing all information available for each ticket issued on June 3, 2011, including ticket number, location, reason for stop, name, and seatbelt violation (if any).
7) Department of Motor Vehicle Records.
8) Bentley Morgan's driver's license photo, U.S. Passport photo, Jamaican Passport photo, Jamaican birth certificate and naturalization certificate.
9) Amended Charge of Discrimination from Bentley Morgan received August 13, 2012.
10) OCSD Anti-Bias Policy and Procedures effective May 2011.
11) Bentley Morgan's Social Security card.
12) Aris Solutions[5] background check results for Bentley Morgan.

Attachments

Attachment 1 – Captain Welch's response to the charge of discrimination.

Attachment 2 – Corporal Chin's Response to the charge of discrimination.

Attachment 3 – The NCIC fugitive warrant for Fidel Peter Maragh.

Attachment 4 – Photos of the scene.

Attachment 5 - Photocopy of Mr. Morgan's license and the passport he was issued after he was naturalized in 2000.

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[4] "[A]n electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year." http://www.fbi.gov/about-us/cjis/ncic

[5] Provides background checks (and other fiscal services) for employers. http://www.aris-solutions.net/aris-home.php

Attachment 6 – The photo, fingerprints and booking information for Mr. Maragh sent from Florida to Vermont.
Attachment 7 – Results of a recent employment background check of Mr. Morgan.
Attachment 8 – OCSD Anti-Bias policing policy.

I. **Organization of Investigative Report**

Captain Welch and Corporal Chin wrote reports of their encounter with Mr. Morgan because of Mr. Morgan's complaint. They did not write any report prior to his complaint, so without the complaint there might have been no written record of the event. These reports were written without assistance from counsel. During the investigation, both men were asked to read their reports before interviews to confirm they were true and accurate accounts of the all the events in question. In light of this, both reports are attached as **Attachment 1** and **Attachment 2**. **Attachment 3** is a copy of the fugitive warrant that appeared when Captain Welch ran Mr. Morgan's license. It makes more sense to read them and then refer to them as needed throughout the report than for this investigation to attempt to paraphrase or describe them.

Part II is a compressed timeline of events that can also be used for reference. Part III sets forth the elements of a prima facie case of discrimination and discusses the legal burdens that each party must meet. Part IV discusses the theories of implicit/unconscious and explicit bias. Finally, Part V reviews the facts that support the reasonable grounds recommendation of discrimination.

Basic Timeline

June 3, 2011

- At approximately 4:30 p.m. Bentley Morgan, a black male who identifies as "Jamaican-American" was pulled over by Captain

Michael Welch and then Corporal Matthew Chin of the OCSD as the OCSD was conducting a CIOT campaign in Hardwick. Mr. Morgan stated that Captain Welch of the OCSD told him he had watched him get gas and that he had failed to use his turn signal to turn **into** the gas station. Captain Welch stated he pulled Mr. Morgan over for allegedly not using his turn signal to merge into traffic as he **left** the gas station to head back towards town. He was directed to pull over into the parking lot of the Hardwick fire station. See **Attachment 4** for photographs of scene. Deputy Bohnyak[6] and Sergeant Lambert were also present at the scene conducting the CIOT program.

- While running Mr. Morgan's license (See **Attachment 5** for copy of his license) there was a Soundex[7] hit for a fugitive warrant. The fugitive was identified as a black Jamaican male named "Fidel Peter Maragh." (Refer back to **Attachment 3**). One of Mr. Maragh's many aliases was "Morgan." He was described as being the same height and the same age as Mr. Morgan. The warrant was dated 1995. The OCSD could not get a photograph of the fugitive on site in Hardwick due to an equipment malfunction.

- During the investigation of the warrant Mr. Morgan gave his Social Security card to Captain Welch. There was a notation on the card that it was not to be used for work without other authorization so Captain Welch also contacted the Vermont State Police (VSP) to get information on Mr. Morgan's immigration status. The VSP confirmed he was a naturalized citizen.

- OCSD officers released Mr. Morgan from their custody approximately one hour and twenty minutes (approximately 5:50 p.m.) after the stop and initial detention. The details of what happened while Mr. Morgan was in custody are further reviewed within this report.

- At 6:59 p.m., (the same day as noted) the OCSD received information from Broward County (Florida) Sherriff's Department, including a booking photo and information about Mr. Maragh. They also received Peter Maragh's fingerprints, and

[6] Sheriff Bohnyak's son.

[7] Soundex assigns numerical values to vowels and consonants comprising the subject's name and assigns additional values based on a match of the subject's sex, race, and date of birth. If the sum total of those values reaches a certain threshold, a hit response is produced. (Illinois State Police Information & Technology Command Bureau of Identification). http://www.isp.state.il.us/docs/chriguide.pdf

the original warrant from the Broward County Circuit Court. See **Attachment 6** for the photo of Mr. Maragh and the booking information, warrant and fingerprints.

June 15, 2011

- At 12:46 p.m. Corporal Chin requested a better photo of Mr. Maragh from Broward County. He forwarded what he received to Captain Welch at 1:03 p.m.

June 20, 2011

- Mr. Morgan filed a complaint with the VHRC alleging discrimination by the OCSD on June 3, 2011 on the grounds of race, color and national origin. The OCSD was not aware that he had filed the complaint, so it should be clear that the events of June 21-22, 2011 were not retaliation for having filed a complaint.

June 21, 2011

- Captain Welch and Lieutenant Tracy Simon drove from Chelsea in Orange County, to Danville in Caledonia County to look for Mr. Morgan's address. They saw him but did not make him aware of their presence. They contacted the U.S. Marshall's office and gave them Mr. Morgan's address.

June 22, 2011

- Captain Welch and Corporal Chin met with two U.S. Marshalls in Danville. They first went to Mr. Morgan's home, but were directed by Martha Hamilton, his landlady, to Mr. Morgan's work site.

- Corporal Chin and Captain Welch stayed in their vehicle while one of the U.S. Marshalls approached Mr. Morgan. The Marshall stated to Mr. Morgan and to this investigation that he was able to tell that Mr. Morgan was not Mr. Maragh by a visual inspection of his hands (in addition to knowing they were not the same person from their photos). He then retrieved a copy of Mr. Maragh's fingerprint sheet for comparison to further explain the difference to Mr. Morgan (even though Mr. Morgan of course knew he was not Mr. Maragh). Mr. Morgan said the Marshall

made a statement to the effect that Mr. Morgan was a "good Jamaican."[8] All parties departed.

August 9, 2012

- Mr. Morgan amended his complaint with the VHRC to include the events of June 22, 2011.

I. Elements of a Prima Facie Case

The Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §4502(a) provides:

> (a) An owner or operator of a place of public accommodations or an agent or employee of such owner or operator shall not, because of . . . . race [or] national origin . . . . of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.

In order to make out a *prima facie* case of discrimination in public accommodations, Mr. Morgan must show all of the following:

1. He is a member of a protected class (race, color and national origin); Mr. Morgan is a black male born in Jamaica and a naturalized U.S. Citizen. He identifies as Jamaican-American. **Mr. Morgan meets this element.**

2. He made himself available to receive services ordinarily provided by the Responding Parties to all members of the public in the manner in which they are ordinarily provided; **Mr. Morgan meets this element.**[9]

3. He did not enjoy the privileges and benefits of the place of public accommodation under factual circumstances which rationally support an inference of unlawful discrimination in that (a) he was deprived of the services while similarly situated persons outside the

[8] The HRC does not have jurisdiction over federal entities.

[9] Vermont Department of Public Safety v. Vermont Human Rights Commission Docket No.: 394-6-10 Wncv (Judge Geoffrey Crawford recognizing that public roads fall under the statutory rubric of "places of public accommodation." In that case, the Department of Public Safety were "owners" in that regard. Here, the OCSD are the "owners" and their role in the "Click-it-or-Ticket" program subjected all passing citizens to its authority and scrutiny.

protected class were not deprived of those services, and/or (b) he received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.[10] **Mr. Morgan meets this element.**

Direct evidence of discrimination is rarely available. However, a charging party may use circumstantial evidence to prove discrimination. Under the three-stage inquiry set forth by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), when circumstantial evidence is involved, the charging party must first establish a *prima facie* case by a preponderance of the evidence. Generally, in order to establish a *prima facie* case of disparate treatment discrimination, a charging party must show that he/she was treated differently than other similarly situated persons outside of his/her protected class.

Once a charging party has established a *prima facie* case of discrimination, the burden shifts to the responding party to provide a legitimate, non-discriminatory reason for its actions. If the responding party succeeds in doing so, the charging party must then show by a preponderance of the evidence that the reason given by the responding party was merely a pretext for a discriminatory motive.

II. **Implicit and Explicit Bias**

All OCSD officers stated, without exception, that they harbored no bias towards Mr. Morgan due to his race, color or national origin. Sherriff Bohnyak and Corporal Chin stated that their own familial make-up and histories reflected some diversity and that as a result they were not able to be biased. All OCSD officers who had had direct contact with Mr. Morgan (Bohnyak, Welch and Chin) stated he had been treated courteously by the OCSD and that they were just doing their jobs.

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[10] Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 872 (6th Cir. 2001) (citing Callwood v. Dave & Buster's, Inc., 98 F.Supp.2d 694, 706 (D. Md. 2000).

Their assertions of lack of bias, countered by Mr. Morgan's assertion of disparate treatment, requires an exploration of implicit/unconscious bias and the role it plays within a law enforcement setting. Open bias towards minorities is rarely acknowledged. Indeed, some people may genuinely believe they do not harbor bias towards others who are different from themselves. However numerous studies have shown that people may have a level of implicit bias towards minorities or those who are perceived as being "different" from them.[11]

Law enforcement in particular has come under closer scrutiny because of the type of contacts it has with the public, the power differential that exists between citizens and law enforcement, and the vast discretion vested in police officers. The term "racial profiling"[12] describes one aspect of bias that exists within the law enforcement community. While racial profiling can be explicit and open, it can also be implicit and driven by unconscious bias. Since all responding parties have denied any explicit bias or discriminatory treatment of Mr. Morgan, this investigation must identify the evidence of implicit bias that contributed to the reasonable grounds recommendation.

Implicit bias can be as harmful as explicit bias because of the resulting negative outcomes for minority populations.[13] Unconscious or implicit bias has been defined as the result of "social judgments [that] operate without conscious awareness or conscious control. These implicit thoughts and feelings leak into everyday behaviors such as whom we befriend, whose work we value, and whom we favor—notwithstanding our obliviousness to

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[11] *See infra* footnotes 13-17.

[12] Racial profiling - The law-enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity. Originally, the term referred to the practice of stopping a disproportionate number of male African–American drivers on the assumption that they had a heightened likelihood of being involved in criminal activity. After the terrorist attacks of September 11, 2001, the term was frequently used in reference to searching and interrogating Middle Eastern men at airports. Also termed ethnic profiling; profiling. Cf. linguistic profiling. Black's Law Dictionary (9th ed. 2009).

[13] *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 382 (1987). Professor Lawrence points out that "...a race-based process defect is no less injurious or reprehensible when it originates in the unconscious."

any such influence."[14] Studies have shown (and common sense would suggest) that when people are asked about the nature and existence of their own biases, most persons "engage in impression management and provide what they feel are politically correct answers."[15] While there may be a collective acknowledgement of implicit bias, it is atypical for individuals to openly admit to or explore their own implicit/ unconscious biases. The fact that people use polite and courteous language or offer apologies for their actions does not erase or negate the possibility that implicit bias lies at the foundation of an interaction.

Federal District Court Judge Mark Bennett gives a jury instruction that recognizes the existence of collective implicit bias and instructs jurors to keep that awareness individually in mind as they form their impressions and make their decisions throughout a trial and during deliberations:

> As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on stereotypes, generalizations, gut feelings, or implicit biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[16]

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[14] Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and The Law*, 58 UCLA L. Rev. 465, 467-68. In another article by Professor Kang, he notes: "Implicit biases pop[] into mind quickly and automatically without conscious volition. Unlike explicit biases, implicit biases are difficult to identify because of introspective limitations and our own self-monitoring. In fact, we are usually unaware of, or mistaken about, the sources of our implicit biases and the influence they have on our judgment and behavior. Implicit biases may actually include 'thought[s] or feeling[s] that we would reject as inaccurate or inappropriate upon self-reflection." Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 888 (2010).

[15] Kang & Lane at 470.

[16] *Id.*

In addition to the general cautionary tone of this jury instruction, it should be clear that implicit and unconscious bias can still exist even when a person may have a relative or friend who is a minority, or even when they self-identify with a minority group.

One recent and well known example of this assertion is the shooting of Trayvon Martin, a young African-American man, by George Zimmerman, who was identified as "half-white and half-Latino."[17] Mr. Zimmerman's father, who is white, described his son as a "Spanish speaking minority."[18] During the course of the initial investigation, *Time* magazine reported George Zimmerman "reportedly" had a "long history of making 911 calls about 'suspicious' black persons."[19] In response, Zimmerman's father (and his attorney) denied those allegations and stated that Zimmerman had "...many black family members and friends."[20] The failure of the police to immediately arrest Zimmerman for the shooting resulted in "a national outcry, with many observers suspecting that Zimmerman, who is half-white and half Latino, was given a break because of his race, and the race of the young man he fatally shot."[21] Whatever the underlying circumstances, this is an example of a situation which contains very complex elements of implicit/unconscious bias.[22] Mr. Zimmerman was not immune to the charge

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[17] *See* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210, 215 (2012) (citations omitted).

[18] Rene Stutzman, *George Zimmerman's Father: My Son Is Not Racist, Did Not Confront Trayvon Martin*, ORLANDO SENTINEL, Mar. 15, 2012, http://articles.orlandosentinel.com/2012-03-15/news/os-trayvon-martin-shooting-zimmerman-letter-20120315_1_robert-zimmerman-letter-unarmed-black-teenager/2. Zimmerman's father went on to say: "One black neighbor recently interviewed said she knew everything in the media was untrue and that she would trust George with her life. Another black neighbor said that George was the only one, black or white, who came and welcomed her to the community, offering any assistance he could provide. Recently, I met two black children George invited to a social event. I asked where they met George. They responded that he was their mentor. They said George visited them routinely, took them places, helped them, and taught them things and that they really loved George. The media portrayal of George as a racist could not be further from the truth."

[19] Tim Padgett, *The Controversial Florida Law at the Heart of the Trayvon Martin Case*, TIME, Mar. 20, 2012, http://www.time.com/time/nation/article/0,8599,2109511,00.html.

[20] *Id.*

[21] Richard Fausset, *Trayvon Martin Case: George Zimmerman Waives Right to Speedy Trial*, L.A. TIMES, May 8, 2012, http://www.latimes.com/news/nation/nationnow/la-na-nn-zimmerman-waives-speedytrial-20120508,0,4573513.story.

[22] *See* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210 (2012).

of preferential treatment or racism, despite the fact of his own racial identity.

A more recent example was re-visited in the recent of death of eighty-seven year old Essie Mae Washington-Williams, the bi-racial daughter of the deceased white South Carolina senator and segregationist Strom Thurmond. While Thurmond provided some financial support and [secretly] acknowledged her as his daughter, his entrenched identity as a committed segregationist reflected a truly complete rejection of his own flesh and blood:

> In ways that run contrary to any parental creed, he worked to make the world a worse place for his child and her children. He was unable to extrapolate the humanity he saw in the teen-age Essie Washington to a whole population who looked like her and shared her experiences.[23]

Both examples contain complex elements of explicit and implicit bias. In Mr. Morgan's case, the respondent has used the following "racism defense" which rests on the following syllogism:

> (1) The perpetrator is not a racist and does not endorse racial discrimination; (2) Because the perpetrator is not a racist and does not endorse racial discrimination, the perpetrator would never intend to discriminate on the basis of race; and (3) Because the perpetrator did not intend to discriminate on the basis of race, the perpetrator could not have acted because of race.[24]

Since there is no direct evidence of explicitly racist behavior by the respondent (and the respondent has denied any bias or wrongdoing), this investigation considered the totality of the circumstances and all known factors in assessing whether or not reasonable grounds exist in this matter. Before exploring the merits of the respondent's proffered defenses, it is critical to recognize that unlawful discriminatory conduct need not be intentional. It is the impact of the challenged behavior which must be

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[23] See http://www.newyorker.com/online/blogs/newsdesk/2013/02/the-segregationists-daughter.html?printable=true&currentPage=all

[24] Feingold & Lorang, at 219.

assessed to determine whether disparate treatment has occurred and whether the charging party has shown that the defenses set forth by the charging party are actually pretexts for discrimination.

V. **Evidence Supporting a Reasonable Grounds Recommendation**

A review of all known evidence reveals several factors which support a reasonable grounds recommendation. This investigation believes that it was reasonable for the OCSD to investigate the warrant given the information that appeared in the Soundex hit. However the contradictions to Captain Welch's statement about the initial stop from other officer and from Mr. Morgan (highlighted below) raise the specter of racial profiling. Furthermore, this investigation considered the fact that the OCSD failed to expeditiously and thoroughly complete the investigation at the expense of embarrassment and inconvenience to Mr. Morgan.

The OCSD appeared to be so completely focused on the idea that Mr. Morgan was Mr. Maragh that they lost sight of, and failed to pursue or use information which would have been exculpatory in nature. They could have made an effort to try to get Mr. Morgan's fingerprints since he was fingerprinted when he was naturalized and instantly ruled him out, but did not. They could have done a comprehensive background check, which would have come up negative, (see **Attachment 7**) but did not. They could have spoken to the Vermont State Police, who patrol Danville to see if there had ever had trouble with him or to the Hardwick police where his son lived but they did not. They could have tried to find out how many times Mr. Morgan had passed between Jamaica and the United States since he had become a naturalized citizen (during which a fugitive warrant would have turned up) but they did not. Furthermore they seemed to ignore the fact that he had

been naturalized five years after the warrant was issued.[25]

Instead, the evidence shows that they operated from the assumption he was "guilty" – that he *was* Peter Maragh. The warrant mentioned that Mr. Maragh had a scar above his left eye. Captain Welch then reported he saw a "mark" above Mr. Morgan's left eye even though there were no parameters available about the nature and size of the scar. Captain Welch admitted during interviews that he could have been looking at a "wrinkle." Instead of treating the absence of scars or tattoos or the lack of precise information about the details of the scars or tattoos as possible evidence that Mr. Morgan was not Mr. Maragh, Captain Welch opined that Mr. Morgan might have had surgery to remove any scars or tattoos on his arms, even though he saw no evidence of removal, stating he was not an "expert" in such things.

Although the two men did not look at all alike, Captain Welch stated in his report and in interviews that the two men had "similarities in facial features around the eyes and nose as well as the of the head" that continued to convince him that it was possible that Mr. Morgan might well be Mr. Maragh. He again stated he was not enough of an "expert" to make a determination even though he admitted he had dealt with cases such as robbery or missing persons where the ability to make a positive identification was a critical issue. Captain Welch and Corporal Chin ignored the obvious differences in skin tone and failed to notice that Mr. Maragh was even described as "white" in his booking information whereas Mr. Morgan has very dark skin. Captain Welch attributed the difference in skin tone to possible over-exposure of the film in Mr. Maragh's photo, the age of it, and the transmission of it via facsimile. While Sherriff Bohnyak and Joe Gaines,

[25] A complicated area of immigration law practice. Suffice to say that it is an understatement to say that having a conviction for cocaine possession and a failure to appear with resulting warrant would severely hurt someone's chances of becoming a U.S. citizen.

the U.S. Marshall,[26] said the two men were obviously not the same person (Joe Gaines cited skin tone and stated Mr. Maragh almost looked "Cuban"), Captain Welch and Corporal Chin were unable to make this determination and adopted a stance that again seemed oriented towards the assumption that Mr. Morgan was being untruthful about aliases, his address, and former places he had lived.

Another piece of evidence this investigation considered was the impact of the OCSD Anti-Bias policing policy which was in place one month before the events of June 2011 occurred. See **Attachment 8** for the policy. In sum, it appears that the policy played little to no role in the particulars of day-to-day policing. The policy was placed in a book in the Sheriff's office and there was no follow-up to know which employees had read it or when and who had not read it. There was no sign off sheet to show officers had read the policy and no evidence of training or testing on the policy. Sherriff Bohnyak was proud of the policy and stated that the OCSD had represented the Vermont Sherriff's Association "at the Attorney General level" at the first anti-bias policing meeting. His stance on the policy was that he "recommend[ed]" his officers go through the policy and review it. He stated that when a new deputy is hired he or she would be given the guidelines and told to review them; however he acknowledged that he did not know for sure who had actually read it. As for further online training, the officers have discretion as to what to take outside the mandatory courses but there is no requirement that they take any available anti-bias policing or related courses.[27] Captain Welch as the number two in command said all new officers got a copy of the policy when they start (presumably along with a lot of other policies and rules) but did not receive training on the policy that he was "aware" of.

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[26] This investigation asked Mr. Gaines why he had agreed to go to Danville to investigate Mr. Morgan when it was clear he and Mr. Maragh were not the same person. Mr. Gaines jokingly replied that he could not pass up a chance for a drive to the beautiful Northeast Kingdom. The HRC has no jurisdiction over federal agencies.

[27] Vermont's training academy offers rotating courses, two of which are "Power, Authority and Discretion" "Awareness of Cultural Diversity." They may not be offered at all times and none of the OCSD officers had taken them. *See* https://www.jpmaweb.com/etrain/classes.asp.

Sherriff Bohnyak stated he did not see how the OCSD had violated Mr. Morgan's "rights" and he believed Mr. Morgan had been treated respectfully and courteously. He identified what he called "three components of a violation" that had to be considered in order to make a determination as to whether a person's "rights" (in general, not just Mr. Morgan's "rights") had been violated. First he said there had to reasonable suspicion or probable cause to investigate which he stated was present because the warrant popped up when Mr. Morgan's license was run. Second he stated there had to be a sound investigation and adequate reason to go forward with it. The third question for him was how the person was treated - were they treated politely or rudely?

Sheriff Bohnyak was not intimately involved with the investigation of Mr. Morgan[28] (he stated he did not believe in "micro-managing") so he was not really able to say how thoroughly it was conducted, but he backed his staff up and believed they had done an appropriate and thorough investigation, even though no report of the whole incident was done until Mr. Morgan filed his complaint and the OCSD had to respond. Sheriff Bohnyak also believed they acted courteously towards Mr. Morgan and he said he would not tolerate rude behavior from his staff towards anyone. He stated that he felt it was a "shame" that any officer would treat someone differently because of their "race or orientation" and that those people should not be in law enforcement. He stated his focus was on community policing and being "fair and honest" with people. While he stated "it was unfortunate what happened with Mr. Morgan" and that "I understand where he is coming from, I really do" he did not think his department's handling of Mr. Morgan's case represented discrimination on their part or see this as a contradiction to his prior statement that Mr. Morgan had been treated with courtesy. The use of polite words does not mean that discriminatory actions have not occurred.

[28] Recall he had not compared pictures of Mr. Morgan and Mr. Maragh until this investigation showed them to him.

One question this investigation considered was what would have happened if Captain Welch and Corporal Chin had shared the photos and the entire case file with the Sherriff during the investigation. Since the Sheriff could see that the men were two different people, what might he have counseled them to do and what other stones might he have instructed them to turn over before calling in the Marshalls? This is a question that cannot, of course, be answered. However section IV of the OCSD anti-bias policing policy – the Compliance section - sets forth the first fundamental requirements which are accountability and oversight. The policy states that supervisors "shall" ensure that "all personnel in their command are familiar with the content of this policy." Furthermore:

> Supervisors should randomly review records ... or otherwise monitor the conduct of the deputies in their command for the purpose of ensuring compliance with this policy and to identify training issues.[29]

Future familiarity with this policy, training, oversight and accountability may prevent further complaints of discrimination against the OCSD.

In sum, this investigation recommends reasonable grounds based on the following factors:

- The **BASIS** for the stop. Captain Welch wrote in his report and reconfirmed to this investigator that all four of OCSD officers present (Welch, Chin, Bohnyak and Lambert) saw Mr. Morgan fail to use his turn signal when he pulled out of the gas station. He also said he was unable to see Mr. Morgan's race from where he was standing. However the following information challenges this version of events:
    - Sergeant Lambert stated that he did not see Mr. Morgan fail to use his turn signal because his attention was on passing traffic. This contradicts Captain Welch.[30]

[29] OCSD Policy Prohibiting Bias Policing at p. 2.

[30] On June 3, 2011 a total of 16 motorists were stopped and ticketed for various citations. It is unknown how many motorists were stopped but not ticketed, like Mr. Morgan. This investigation went to the Department of Motor Vehicles and reviewed the license photos of all motorists who received tickets from the OCSD on June 3, 2011. Out of the 16 motorists who received tickets, there was one minority, a black male, who was ticketed by Sergeant Lambert in his own driveway for an obstructed windshield (a hanging air freshener). While Sergeant Lambert

- Deputy Bohnyak stated via Counsel was that "It was a busy Click-It or Ticket campaign, and we were watching many drivers and stopped many vehicles. I recall that Mr. Morgan was pulled over, but I cannot now recall the specific violation by Mr. Morgan. I did not write a report for Morgan's stop."
- Mr. Morgan stated that Captain Welch told him after he had pulled him over that he (Captain Welch) had seen Mr. Morgan fail to use his turn signal as he pulled *into* the gas station and that he had been "watching" him.
- Captain Welch's version was that he was standing on the bridge about 35 yards[31] from where Mr. Morgan pulled out onto Route 14 heading back to Hardwick (refer back to **Attachment 4**). If accurate, Captain Welch's view of Mr. Morgan's truck was unobstructed and he was on the same side of the road as Mr. Morgan and even closer to Mr. Morgan's truck. The evidence suggests that from that vantage point, he could have seen both whether the turn signal was used or not, and the operator's race and color.
- If Mr. Morgan's version is accurate, Captain Welch had been watching Mr. Morgan from the moment he pulled into the gas station, have his gas pumped and then pull away from the gas station towards his (Captain Welch's position). Captain Welch would have had an even longer time to see Mr. Morgan and thus his race and color. Mr. Morgan's window was rolled down because the attendant pumped his gas. It is not clear whether Captain Welch could have seen Mr. Morgan fail to use his turn signal to pull *in* to the station from that greater distance (where Mr. Morgan pulled into the gas station).
- Mr. Morgan stated he could easily see the officers and was careful to use his turn signal.

- **<u>Conclusion</u>** – Captain Welch was adamant that all four officers

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ticketed this motorist, Captain Welch spotted the motorist first and directed Sergeant Lambert to pull him over for failure to wear a seat belt and obstructed windshield. Interestingly, Mr. Morgan had items hanging from his mirror but they were not ever mentioned in any statement. Mr. Morgan and this other motorist did not know each other; however the motorist and his wife filed a complaint of discrimination against the OCSD for racial profiling but later dropped it when Sergeant Lambert failed to show up in court when the motorist contested the fine. The mention of this other motorist is the only known basis of comparison for evaluating how another non-white motorist was treated during the CIOT on the day in question. However no conclusions can be drawn from this data about whether the OCSD conducts widespread racial profiling. The data that would determine this is simply not kept. This investigation asked if the OCSD had ever received complaints of discrimination prior to Mr. Morgan and the other motorist and Counsel responded for the OCSD that the OCSD had not received any such prior complaints.

[31] This was paced off to the best of this investigator's ability.

saw Mr. Morgan fail to use his turn signal, yet Sgt. Lambert, the second in command, said he did not and Deputy Bohnyak cannot recall but cites the busy nature of the CIOT. Additionally, Captain Welch said he could not see Mr. Morgan's race from where he was and from where Mr. Morgan was. The evidence in this investigation suggests otherwise no matter which version is accepted. These factors support a reasonable grounds recommendation that Mr. Morgan was stopped on the grounds of race and color. His national origin was unknown to Captain Welch at that time.

- The **ACTIONS** of the OCSD during the stop:
    - Mr. Morgan was detained almost an hour and a half on the side of the road partially due to a malfunction of an OCSD piece of equipment on a sixteen (16) year old warrant. Captain Welch said if Mr. Morgan had left the site he would have considered him as having fled the scene, meaning that Mr. Morgan was technically in custody and arguably under arrest despite the warning on the face of warrant for Mr. Maragh which said "Do not arrest" unless information could be verified.
    - During this time, OCSD discovered no current warrants or other adverse information on a Bentley Morgan who resided in Vermont or Maryland and cited no information of concern from the C.A.D.[32] system.
    - Mr. Morgan's Vermont license, registration and insurance were all in good order after being produced upon request.
    - The OCSD found out from the Vermont State Police that Mr. Morgan had become a naturalized citizen in 2000 which would have been difficult if not impossible had there been a warrant for his arrest outstanding from 1995.
    - Captain Welch had him roll up his sleeves in public to check for tattoos or scars (the fugitive was described as having them on both) and found none.
    - Mr. Morgan was not allowed to use the restroom during his eighty (80) minute detention even with an escort although

[32] "C.A.D." stand for Computer Assisted Dispatch –"Law enforcement agencies use CAD to facilitate incident response and communication in the field. CAD systems, in many cases, are the first point of entry for information coming into the law enforcement system. Typical CAD system functions include resource management, call taking, location verification, dispatching, unit status management, and call disposition. Additionally, mapping functionality, interface with mobile data computers (MDC), and interfaces with other external local, state, and federal information systems may be included. Call takers, dispatchers, and their supervisors are primary users of CAD. Units in the field may interact via mobile data computers." Standard Functional Specifications for Law Enforcement Computer Aided Dispatch (CAD) Systems p. 1 (Law Enforcement Information Technology Standards Council 2003).

he asked repeatedly.

- Corporal Chin tried to entrap him by repeatedly calling him "Peter" even after Mr. Morgan asked him to stop, telling him over and over that his name was "Bentley Morgan."
- Corporal Chin aggressively questioned Mr. Morgan's son's mother about where he had lived, whether he had aliases or nicknames and tried to gain access to question his nine year old son.
- Both officers reflected a suspicious attitude towards him when he could not recall all the places he had lived.
- Negative inferences were drawn from the inability to understand Mr. Morgan's accent and his efforts to make them understand what he was saying. For instance, when he was asked about possible aliases, he made a gesture with his wrists to show he had not been handcuffed and gone to jail, was not a fugitive (and of course did not want to go to jail). Corporal Chin's report seemed to reflect the view that these gestures meant Mr. Morgan has been in jail and did not want to go back.
- Corporal Chin stated that Mary Ann Rakowsky, the mother of Mr. Morgan's son, told him that Mr. Morgan went by the name "Maragh." Ms. Rakowsky emphatically stated she did not say this and had never heard that name and characterized Corporal Chin's statement as a lie. The fact that Mr. Morgan was shown not to be Mr. Maragh lends credibility to her statement.

- **Conclusion** – While it was not unreasonable to investigate the warrant, the OCSD appeared to ignore exculpatory evidence while it made Mr. Morgan wait for nearly an hour and a half for more information. While Captain Welch and Officer Chin did not search Mr. Morgan or his vehicle or place him in actual handcuffs, they would not allow him to leave or use the bathroom, and so the evidence suggests that they presumed he was the fugitive in question. Mr. Morgan experienced humiliation, inconvenience and embarrassment in front of his 9 year old son, and his mother. These factors, in combination with all other factors, support a reasonable grounds recommendation that OCSD discriminated against Mr. Morgan on the grounds of race and color and national origin.

- The OCSD **INVESTIGATION** that followed:

  - The failure to try or even consider retrieving Mr. Morgan's

fingerprints so they could be compared to Mr. Maragh's and resulted in Mr. Morgan being ruled out.
  - The failure to see what was apparent to the U.S. Marshalls and Sheriff Bohnyak – that Mr. Morgan and Mr. Maragh looked nothing alike.
  - Assuming Mr. Morgan had given a fake address and then driving to his home only to find it was indeed the correct address.
  - Unnecessarily involving the U.S. Marshalls which resulted in disruptive, stressful and embarrassing visits to Mr. Morgan's landlady and his work-site.
  - This also resulted in the U.S. Marshall asking to see his hands, at his work-site, out in the open, in front of his employer.
  - The OCSD had the tools and training to make this same conclusion without ever having to approach, bother or make contact with Mr. Morgan again, but made no effort to do so.

- **Conclusion** – This part of the investigation involving the Marshalls and the visit to Mr. Morgan's home and place of employment were unnecessary. The OCSD could have ruled out Mr. Morgan, yet they failed to do so. Captain Welch stated he felt he did not have the ability to make the determination of whether the two men were one in the same, yet all his training, his experience in investigating identity crimes, the calls he and Corporal Chin made to determine Mr. Morgan's immigration status and to get more information on Mr. Maragh from Broward County show he clearly could have pursued the question of Mr. Morgan's true identity without further distress to Mr. Morgan yet he stated he chose not do so because he was not an expert in fugitive matters and because of similarities in the "similarities in facial features around the eyes and nose as well as the of the head" continued to persuade him that the two men might be the same person. Mr. Morgan experienced unnecessary humiliation, inconvenience and embarrassment in front of his employer and because of the visit by four law local and federal law enforcement officers to his landlady. These factors, in combination with all other factors, support a reasonable grounds recommendation that the OCSD discriminated against Mr. Morgan on the grounds of race and color and national origin.

There are no "winners" here regardless of the recommendation or outcome. The Department of Justice (DOJ) stated through its Community Oriented Policing Program (COPS) that "Biased policing and the perceptions of it threaten the relationship between police agencies and the diverse communities that they serve."[33] That observation characterizes this case. While there have been many steps in the right direction by law enforcement and within the court system[34] in terms of addressing implicit bias, nothing can be accomplished without continued, sincere and applied efforts in that direction. This involves not just adopting policies, but ensuring they are read and studied. There must be a commitment to continual training, but most importantly there must be accountability. Law enforcement must craft their anti-bias policies with care and ensure that the men and women they lead read and truly understand them. Both Captain Welch and Corporal Chin said they had not encountered any Jamaican men before in a professional context until they encountered Mr. Morgan. Unfortunately, that encounter has reflected the very problems identified by the DOJ above.

As Vermont continues to become more diverse, law enforcement must lead the way and set the example in welcoming all citizens who reside in the communities they serve and protect. Better training and education can help prevent situations like this one from occurring. This investigation finds that the defenses offered by the respondents are overcome by a showing of pretext and that Mr. Morgan experienced disparate treatment by the OCSD on the basis of his race, color and national origin.

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[33] Department of Justice "COPS" (Community Oriented Policing Services) Program http://www.cops.usdoj.gov/html/dispatch/February_2009/biased_policing.htm (February 2009).

[34] *See* the National Center for State Courts (NCSC) publication on implicit bias at : http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx. (August 2009).

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PRELIMINARY RECOMMENDATION:

This investigation recommends that the Human Rights Commission find reasonable grounds to believe that Orange County Sheriff's Department discriminated against Bentley Morgan on the basis of race, color and national origin in violation of 9 V.S.A. §4502.

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Nelson M. Campbell
Investigator

Robert Appel 2/20/13

Robert Appel, Executive Director
and Legal Counsel

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