NEW YORK CIVIL LIBERTIES UNION

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March 28, 2016

Mayor Kathy Sheehan
Albany City Hall
24 Eagle Street, Room 102
Albany, New York 12207

Chief Brendan Cox
Albany Police Department
165 Henry Johnson Blvd.
Albany, New York 12210

Re: The Matter of Donald 'Dontay' Ivy

Dear Chief Cox and Mayor Sheehan:

We are writing to follow-up on our February 11th meeting at City Hall where representatives from the New York Civil Liberties Union - Capital Region Chapter (NYCLU-CRC) raised concerns about the events that led to the death of Dontay Ivy. This letter is intended to provide a detailed explanation of why we believe that the initial stop, and subsequent search, of Mr. Ivy were unconstitutional. We conclude by identifying some potential policy changes to address the concerns raised herein.

Background

Since news broke of Dontay Ivy's death during an encounter with the Albany Police Department on April 2, 2015 the NYCLU-CRC has been carefully following the case. Shortly after the incident representatives from the NYCLU-CRC met with Chief Cox to discuss the Department's policies concerning the use of tasers and to inquire about the basis for Mr. Ivy's stop. We were informed that the Department was adopting changes to its taser policy and we were provided copies of the new procedures. We were told, however, that any discussion of the facts surrounding the initial stop and search of Mr. Ivy would have to wait until the conclusion of the District Attorney's investigation.

In late October District Attorney Soares announced that a grand jury had failed to indict any of the officers involved with Mr. Ivy's death and the District Attorney's office released a letter detailing the findings of their investigation. The NYCLU-CRC's Board of Directors and Legal Committee reviewed the District Attorney's letter and determined that there were serious constitutional questions about the basis for the underlying stop and search.

Subsequently the NYCLU-CRC's Chapter Director and Board President met with Chief Cox at Police Headquarters on two separate occasions in mid-December and early-January to discuss the matter and to view a detailed power-point presentation prepared by the Albany Police Department which chronicled the events of April 2nd, including audio communications and video evidence.

Having thoroughly reviewed the District Attorney's letter, the evidence provided by Chief Cox and the Albany Police Department, and having carefully researched the relevant state and federal case law, we have reached the conclusion that the initial stop of Mr. Ivy, as well as the subsequent the pat-down search, were unconstitutional.

The continued insistence from both of your offices that nothing improper occurred and the officers involved were simply following procedure is highly problematic and suggests that the Albany Police Department and the Mayor's Office condone unconstitutional police practices with ongoing implications for the civil liberties of the residents of Albany.

The Underlying Facts[1]

On April 2, 2015 at approximately 12:30am Mr. Ivy was returning to his home on Second Street in Albany after visiting a small grocery store and deli on the corner of Clinton Ave and Lark Street where he used the ATM. He had committed no crime. He was not a suspect in any crime. He was not carrying any weapons or drugs. He had no outstanding warrants. There had been no calls to the police in that area reporting a crime or suspicion of crime that evening.

Nonetheless, when Albany Police Officers Joshua Sears and Charles Skinkle drove past Mr. Ivy, they slowed down and began to follow him in their vehicle. They eventually pulled ahead, made a U-turn, and approached Mr. Ivy at the corner of Lark and Second Street.

Officer Sears instructed Mr. Ivy to "hold up a moment" and to "show his hands."[2] Officers Sears and Skinkle began to question Mr. Ivy about who he was and what he was doing. At this point a third officer, Officer Mahany, arrived on the scene. Officer Sears recalled telling Mr. Ivy "we appreciate your cooperation, I'll get you on your way in a second."[3]

When later questioned as part of the District Attorney's investigation, Officers Sears and Skinkle offered several different explanations as to why they decided to stop Mr. Ivy.

Officer Skinkle told investigators that Mr. Ivy:

- "[W]as walking suspicious. Um, he had…the way he was walking didn't seem right…"
- And, his "jacket sleeve was pulled way past his hand."[4]

Offer Sears told investigators:

- His attention was drawn to Mr. Ivy because he was wearing a "puffer coat"….which seemed odd because "it wasn't that cold out yet."[5]
- That Mr. Ivy was "walking heavily on his left arm."
- And, that Mr. Ivy was bunching his left hand in his sleeve rather than putting them in his pockets.[6]

After questioning Mr. Ivy and running his name, which revealed a prior arrest but no open warrants, the officers decided that they would conduct a pat-down search and instructed Mr. Ivy to place his hands on his head. However, each time the officers tried to touch Mr. Ivy he pulled his hands down to his side.

[1] As provided in the District Attorney's letter and the Albany Police Department's power-point report.
[2] *See* District Attorney Soares' letter dated October 28, 2015 page 9.
[3] District Attorney Soares' letter, page 9.
[4] Soares letter, page 8.
[5] We know from historical weather data that it was approximately 26 degrees in Albany at the time.
[6] Soares letter, page 8.

The District Attorney's report indicated that this was likely the result of his diagnosed schizophrenia and that "from interviews with members of the Ivy family, we are led to believe that, as part of his mental illness, Mr. Ivy did not like to be touched."[7]

The officers then informed Mr. Ivy that he was being detained but, as they attempted to handcuff him, he allegedly began to resist. A brief struggle ensued and Officer Sears fired his taser at Mr. Ivy. Mr. Ivy began to run away and the officers chased him approximately 100 yards down the street before tackling him. Officers struck Mr. Ivy with a baton, tased him, hand-cuffed him, and shackled his legs as he lay down face down on the street. Shortly thereafter the officers realized that Mr. Ivy was unresponsive. He had no pulse and his pupils were fixed and dilated. Officers called for an ambulance. Mr. Ivy was pronounced dead at the hospital at 1:39am approximately 50 minutes later.

Federal Constitutional Law Governing Stops

In discussing this incident with Chief Cox, he repeatedly indicated that the officers who approached Mr. Ivy were following New York State law and what are known as the *De Bour* street encounter levels. While *De Bour* is certainly good law, we believe it is important to emphasize that the officers' actions were subject not only to state law and the *De Bour* levels, but were also bound by federal constitutional law and the requirements imposed by the Fourth and Fourteenth Amendments of the United States Constitution. And while we believe there are strong reasons to think that the officers' actions did not meet the *De Bour* requirements for a Level 1 or Level 2 encounter, those questions of state law are moot if federal constitutional standards were not met. Federal constitutional law constitutes a floor below which police conduct cannot dip and is therefore the appropriate starting point for any inquiry.

Floyd v. The City of New York, a 2013 case from the U.S. District Court for the Southern District of New York, is arguably the most comprehensive judicial analysis of the constitutional issues involved in stop and frisk policing.[8] In *Floyd*, Judge Scheindlin discussed the relationship between *De Bour* and U.S. Constitution, writing that:

> "Because *De Bour* and the Fourth Amendment draw the line between permissible and impermissible police encounters in different ways, *De Bour* is in some respects more protective of liberty from governmental intrusion than the Fourth Amendment, and in other respects less. The Supreme Court has held that although states may impose greater restrictions on police conduct than those established by the Fourth Amendment, a state 'may not…authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct.' Thus, even where a police encounter would be permissible under *De Bour*, it remains unlawful if it violates the Fourth Amendment."[9]

It is necessary therefore for police encounters in New York State, like the one involving Mr. Ivy, not only to meet the *De Bour* levels but also to meet federal constitutional requirements. If an encounter does not meet federal constitutional requirements, then questions about interpretations of state case law are moot as federal constitutional law supersedes and trumps state law.

A Stop Occurred

The Supreme Court has held that under the Fourth Amendment of the U.S. Constitution it is constitutionally permissible for police to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even

[7] Soares letter page 10.
[8] *Floyd v. The City of New York*, 959 F. Supp 2d 540 (2013).
[9] *Floyd*, page 26.

if the officer lacks probable cause."[10] This form of investigative detention is known as a '*Terry* stop' or 'seizure'.

The test for determining whether an encounter constitutes a *Terry* stop requiring reasonable suspicion is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[11] Stated another way, the Supreme Court has held that a *Terry* stop has occurred if, taking into account all the circumstances surrounding the encounter, "the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[12]

In Mr. Ivy's case, Officers Sears and Skinkle approached Mr. Ivy on a dark street, late at night, and instructed him to "hold up a moment" and show them his hands. Mr. Ivy complied.

It is extraordinarily difficult to imagine an ordinary person being approached by multiple police officers, late at night, being told to "hold up" and "show your hands", and reasonably believing that they were free to ignore those demands and simply walk-away. Indeed after the officers commenced questioning Mr. Ivy, Officer Sears informed him that "I appreciate your cooperation. I'll get you on your way in a second."[13] The clear implication being that at that moment Mr. Ivy was not free to go, but if he continued to cooperate he may be allowed to leave at a later time.

The facts here are quite similar to *United States v. Simmons*.[14] In *Simmons* police officers approached a Mr. Simmons in the lobby of a building. They instructed him to "hold on a sec" and "remove his hands from his pockets."[15] Upon reviewing the facts, the 2nd Circuit Court held that the officers' actions constituted a *Terry* stop and Fourth Amendment protections applied.

Moreover, it is important to note that the fact that Mr. Ivy cooperated and complied with the officers' requests does not mean that a *Terry* stop did not occur. As courts have repeatedly held, a *Terry* stop is considered to have occurred if either: (i) a person obeys a police officer's order to stop; or (ii) they do not submit to an officer's show of authority and are physically restrained.[16] As the *Simmons* court put it: "A police officer's order to stop constitutes a seizure if a reasonable person would have believed that he was not free to leave and the person complies with the officer's order to stop."[17]

It seems clear, therefore, that Officers Skinkle and Sears actions in stopping Mr. Ivy constituted a *Terry* stop for purposes of the Fourth Amendment.

Standard for a Constitutional Terry Stop

In order for a *Terry* stop to comply with the Fourth Amendment it must be based on a reasonable and articulable suspicion that criminal activity is afoot.[18] This suspicion has to be more than "an inchoate and unparticularized suspicion or hunch."[19] Rather, officers must have an individualized suspicion of wrong doing. Importantly there is no exception to these requirements for the general purpose of controlling

[10] *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (referencing *Terry v. Ohio*, 392 U.S. 1 (1968)).
[11] *Florida v. Bostick*, 501 U.S. 429, 436 (1991).
[12] *Florida*, at 437.
[13] Soares letter page 9.
[14] 560 F.3d 98 (2d Cir. 2009).
[15] *Simmons*, 560 F.3d at 101.
[16] *Ibid* page 105.
[17] *Ibid.*
[18] *Terry v. Ohio*, 292 U.S. 1 (1968)
[19] *Alabama v. White*, 496 U.S. 325, 329 (1990).

crime. Simply being in a high-crime area, late at night, is not constitutionally sufficient to constitute a reasonable suspicion.

The Supreme Court has held that in reviewing the reasonableness of a suspicion one "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing."[20] As described above, Officers Sears and Skinkle articulated three justifications for stopping Mr. Ivy: (i) his walk was 'suspicious' and/or 'heavy', (ii) he was wearing a puffer coat, and (iii) his hand was bunched in his sleeve. Chief Cox has indicated that it was the totality of these circumstances that justified the initial stop of Mr. Ivy.

Similar rationales for making stops have been considered and rejected as constitutionally inadequate by multiple courts. The case of *United States v. Jones* is highly instructive because of the similarity of the fact pattern.[21]

United States v. Jones

In *United States v. Jones* police officers in a marked police cruiser observed a Mr. Fonta Jones walking across a church parking lot. They followed and then stopped him. In explaining their rationale, Officer Hasiak testified that Mr. Fonta caught the officers' attention because he was "walking with his right hand clutching his front hoodie pocket."[22] Hasiak explained that he "was trained to look for clues that an individual is carrying a firearm such as walking with his hand held against his midriff, as if holding something against his body."[23]

Officer Hasiak cited additional factors, the totality of which he believed constituted reasonable suspicion to stop Mr. Fonta. Specifically, Hasiak noted that his suspicion was supported by three additional factors:

> "(1) that Jones was walking in a high crime precinct in a neighborhood considered to be a violent 'hot spot' in that precinct, (2) that it was sunny and 68 degrees, so Jones by wearing a long-sleeved sweatshirt 'was obviously hiding something he did not want the world, and the cruiser officers, to see,' and (3) that Jones continually watched the officers [as the cruiser drove by] as if concerned that they would stop him."[24]

The Eighth Circuit Court of Appeals considered and rejected Officer Hasiak's rationale for stopping Mr. Fonta. In a unanimous decision the court concluded that of the suspicious circumstances cited by Hasiak:

> "…all were shared by countless, wholly innocent persons -- walking in a high-crime area, wearing a sweatshirt on a September day that began at a cool 50 degrees in the morning but warmed to 68 degrees by late afternoon, and intently watching a police cruiser drive by. In other words, the totality of these circumstances, on which our inquiry must be based, adds nothing to Jones's protective clutching of *something* in his hoodie pocket…
>
> …We suspect that nearly every person has, at one time or another, walked in public using one hand to "clutch" a perishable or valuable or fragile item being lawfully carried in a jacket or sweatshirt pocket in order to protect it from falling to the ground or suffering other damage. With only this circumstance to support Officer Hasiak's suspicion, though we are mindful of the need to credit law enforcement officers who draw on their experience and specialized training, we

[20] *United States v. Arvizu*, 534 U.S. 266, 273 (2002).
[21] *United States v. Jones*, 606 F.3d 964 (8th Cir. 2010).
[22] *Jones*, 606 F.3d at 966.
[23] *Ibid.*
[24] *Ibid.*

> conclude that '[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity.'"[25]

The parallels to Mr. Ivy's case are unmistakable. Countless, wholly innocent, residents of Albany were out walking on the evening of April 2nd, wearing coats, possibly with their hands in their sleeve and a somewhat irregular walking gait - be it due to a limp, carrying an innocuous object or any other perfectly legal reason. The fact that any one of them could be subject to a police stop and questioning based on the policies of the Albany Police Department is troubling and constitutionally problematic.

Floyd v. The City of New York

In *Floyd v. The City of New York* Judge Scheindlin spent considerable time discussing the inadequacy and danger of the NYPD's policies and trainings, which cast suspicion on all manner of innocent activities including the manner of one's walk. In part, she wrote:

> "The danger of this inadequate training is illustrated by the testimony of Officer Christopher Moran, who stopped David Ourlicht for walking in a suspicious way with an ostensible bulge under his winter clothing. Officer Moran testified that "people acting nervous" could "[o]f course" provide reasonable suspicion for a stop. Officer Moran also explained that "furtive movement is a very broad concept," and could include "changing direction," "walking a certain way," "acting a little suspicious," "making a movement that is not regular," being "very fidgety," "going in and out of his pocket," "going in and out of a location," "looking back and forth constantly," "looking over their shoulder," "adjusting their hip or their belt," "moving in and out of a car too quickly," "[t]urning a part of their body away from you," "[g]rabbing at a certain pocket or something at their waist," "[g]etting a little nervous, maybe shaking," and "stutter[ing]." To the extent that Officer Moran views nervousness or fidgeting, standing alone, as an adequate basis for seizing, questioning, and potentially frisking a person under the Fourth Amendment, he is incorrect. But his view is also a natural response to the vague and overly broad description of furtive movement in the Police Student's Guide. Misconceptions like Officer Moran's are a predictable consequence of the training reflected in the Guide, and likely lead to unconstitutional stops."[26]

Based on the statements of Albany Police Officers Sears and Skinkle, as well as repeated conversations with Chief Cox, we are concerned that similar problems may exist with the training and policies of the Albany Police Department.

People v. Cooper

New York State courts have also examined this issue. *People v. Cooper*, a 1st Department, Appellate Division case, is illustrative.[27] In that case the court considered whether an individual's suspicious walk and the appearance of an unexplained bulge provided an officer with reasonable suspicion to make a *Terry* stop. The court held that they did not, writing that:

> "…the officer's tentative belief that the bulge might be a weapon was 'absolute speculation, since [he] never observed any part of or the shape of a [gun] and had no independent information that men with guns were in the vicinity'…
>
> Nor did the idiosyncratic limp displayed by defendant during the 20-second period that Officer Baumeister estimated it took defendant to walk from the apartment building to the livery cab trigger a founded or reasonable suspicion that he was armed. Given the officer's lack of prior knowledge of, or prior dealings with, defendant that might provide a basis for ascribing criminality to his gait, the defendant's unusual way of walking was clearly susceptible of an innocent

[25] *Ibid*, at 967.
[26] *Floyd,* at 100-101.
[27] *People v. Cooper,* 17 Misc. 3d 44 (1st Dept. 2007).

> explanation and was too equivocal to provide reasonable suspicion that he was carrying a gun...."[28]

Conclusions on the Stop

We, therefore, believe that Officers Sears and Skinkle's stop of Mr. Ivy constituted a *Terry* stop or seizure requiring reasonable suspicion. We believe that the justifications offered by those officers do not constitute reasonable suspicion. As a result, we believe that the stop of Mr. Ivy was unconstitutional and violated his Fourth Amendment rights to be free from unreasonable seizure. Moreover, given that the Albany Police Department continues to insist that the stop was appropriate, we believe there are broader systemic problems with the Department's policies and practices concerning stops.

Federal Constitutional Law Governing Searches

As explained above, there are strong grounds for believing that the initial stop of Mr. Ivy was unconstitutional. Whether the subsequent pat-down search was constitutional is a separate but related legal question.

The Supreme Court has recognized that police officers making an investigatory stop should not be denied the opportunity to protect themselves if they reasonably believe the person they are stopping is armed and poses a risk to their safety. The Court explained in *Arizona v. Johnson* that in order for a pat-down search or 'frisk' to be constitutionally permissible, two conditions must be met:

> "First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, Terry determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous."[29]

Thus, if the initial stop of Mr. Ivy was unconstitutional then any subsequent pat-down search or frisk could not have been constitutional. As explained above we believe the initial stop indeed was unconstitutional and therefore any subsequent search would also have been unconstitutional. Assuming for the sake of argument, however, that the initial stop was permissible, the key question to determining the constitutionality of the search is whether the officers reasonably suspected that Mr. Ivy was armed and dangerous.

As explained in *Floyd v. The City of New York*, the purpose of a pat-down search*:*

> "…is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. Thus, the frisk must be limited in scope to this protective purpose, and strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby."[30]

District Attorney Soares' report states that following the initial stop and questioning of Mr. Ivy, but before Officer Sears conducted the pat-down search, Officer Sears told investigators that: "[b]ased on everything he had observed….he now began to suspect that Mr. Ivy was not hiding a weapon, but was instead hiding drugs."[31] Officer Sears, therefore, unequivocally did not meet the constitutional requirements for conducting a pat-down search. By his own admission, Officer Sears did not believe at that the time the

[28] *Cooper*, at 46.
[29] 555 U.S. 323, 326-327 (2009).
[30] *Floyd* (quoting from *Adams,* 407 U.S. at 146).
[31] Soares Letter page 10.

search was conducted that Mr. Ivy had a weapon. He therefore, by law, was not warranted in patting down Mr. Ivy.

Importantly, this is the case regardless of whether Mr. Ivy did or did not initially assent to the search. Officers cannot bootstrap an unconstitutional stop into a constitutional pat-down search via an individual's consent when there is no reasonable belief that they are armed. This is especially the case where, as here, it is not at all clear that consent was validly obtained or freely given. Indeed the officers testified that they attempted to handcuff and detain Mr. Ivy specifically because he did not cooperate with the search.

Conclusions on the Search

To be constitutionally permissible a pat-down search or frisk must: (i) follow from a lawful stop, and (ii) be based on reasonable suspicion that an individual is armed and dangerous. We have described above why we do not believe the first requirement was met. Regardless, the second requirement was indisputably not met because the officer conducting the search admitted that he did not suspect that Mr. Ivy was armed.

Our conclusion, therefore, is that the pat-down search of Mr. Ivy was unconstitutional and was conducted in violation of his Fourth Amendment rights. Based on the Albany Police Department's continued insistence that nothing improper occurred with the search, we believe that this indicates a broader systemic problem concerning the Department's policies and procedures concerning pat-down searches.

Federal Constitutional Law Governing Equal Protection

In addition to the serious Fourth Amendment concerns raised by Mr. Ivy's stop and search, there are also important Fourteenth Amendment equal protection concerns involving the role that race played in Mr. Ivy's stop and in the Albany Police Department's practices more generally.

The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall…deny to any person within its jurisdiction the equal protection of the laws."[32] The Clause is "essentially a direction that all persons similarly situated should be treated alike."[33]

In the context of police encounters, it is well-established that use of racial classifications in determining whom to stop, detain and search violates the Equal Protection Clause. The Second Circuit has emphasized that courts should "not condone racially motivated police behavior" and must "take seriously an allegation of racial profiling."[34]

Importantly, the Equal Protection Clause's prohibition against racial profiling is not limited to instances where a police officer openly admits a discriminatory intent or where a department has formally adopted a written policy explicitly directing officers to use race in determining whom to stop and search. Rather, the Second Circuit and other courts have made clear that a plaintiff presents a valid Fourteenth Amendment claim under the Equal Protection when they can: (i) identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner; or (ii) allege a facially neutral policy has an adverse effect and that it was motivated by a discriminatory purpose.[35]

[32] U.S. Constitution Amend XIV §1.
[33] *City of Cleburne v. Cleburne Living Ctr. Inc*, 473 U.S. 432, 439 (1985).
[34] *United States v. Davis*, 11 Fed App'x 16, 18 (2d Cir. 2001).
[35] *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d. Cir. 2000).

Chief Cox and Mayor Sheehan, you have repeatedly stated that the Albany Police Department's policies do not direct officers to racially profile. If this is the case, the important question becomes: do these facially neutral policies nonetheless have an adverse effect on people of color in Albany and are they motivated by a discriminatory purpose? In the alternative, are those policies applied in an intentionally discriminatory manner by the Albany Police despite their facial neutrality?

The Supreme Court held in *Washington v. Davis*, that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another."[36] Put another way, the Supreme Court noted in *Feeney* that what a police department "is 'up to' may be plain from the results its actions achieve, or the results they avoid."[37]

So what is the Albany Police Department 'up to'? Do the relevant facts show that the Albany Police Department's practices bear more heavily on one race than another?

A recent analysis by the Times Union, using data from the State Division of Criminal Justice Services, found that "nearly 80% of all people arrested by Albany Police on the charges of fourth-degree and fifth-degree marijuana possession, both misdemeanors, between Jan. 1, 2009 until Aug. 26, 2015 were black. Police charged 336 people within that time period – 265 of whom were black."[38] This, despite the fact that all available evidence shows that blacks and whites use and sell drugs at virtually identical rates.

This analysis is consistent with a 2012 study by the Center for Law and Justice entitled "The Disproportionate Impact of the Criminal Justice System on People of Color in the Capital Region" which found that minorities (defined as other than non-Hispanic whites) represented 71% of total arrests in the City of Albany in 2010 despite the fact that minorities constituted only 46% of the City's population.[39]

Unfortunately similar demographic data is not publicly available with regard to incidents of police stops and police searches in Albany. The NYCLU has sent the Albany Police Department a Freedom of Information Law request to obtain this data, and Chief Cox has assured us that the information will be forthcoming. As we await this data, however, it seems entirely reasonable to assume that if black individuals in Albany constitute nearly 80% percent of arrests for minor marijuana offenses and minorities represent 71% of total arrests, then it is extremely likely that they are also being stopped and searched at disproportionately high rates.

Certainly there is substantial anecdotal evidence that people of color are regularly and disproportionately stopped and searched by Albany Police. The NYCLU-CRC frequently receives complaints about such incidents from residents of Albany. Moreover, the Police Department itself has acknowledged an elevated focus on certain high-crime neighborhoods in Albany such as Arbor Hill, the South End and West Hill, which are disproportionately communities of color.

In understanding why this disproportionate police focus may be constitutionally problematic, even if it is being driven by facially neutral reasons such as crime statistics, the case of *Floyd v. The City of New York* is again instructive. In *Floyd* the court reviewed the constitutionality of the NYPD's practice of conducting stops and frisks based on local criminal suspect data, which NYPD defended as a neutral policy that was focused on stopping "the right people."[40]

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[36] *Washington v. Davis,* 426 U.S. 229, 242 (1976).
[37] *Personnel Adm'r of Mass. V. Feeney*, 442 U.S. 256, 279 (1979).
[38] See: http://www.timesunion.com/local/article/DA-Minor-pot-arrests-unnecessary-6501093.php
[39] "The Disproportionate Impact of the Criminal Justice System on People of Color in the Capital Region" from the Center For Law and Justice (2010) page 6.
[40] *Floyd*, at 181.

In finding that the NYPD's stop and frisk practices constituted 'indirect racial profiling' and violated the Equal Protection Clause of the Fourteenth Amendment, Judge Scheindlin wrote that "[i]n order to establish an equal protection violation based on an intentionally discriminatory application of a facially neutral policy, plaintiffs must prove that the defendants actions had a discriminatory effect and were motivated by a discriminatory purpose."[41]

Looking first at the question of discriminatory effect, Judge Scheindlin concluded:

> "In this case, plaintiffs' statistical evidence of racial disparities in stops is sufficient to show a discriminatory effect. In particular, plaintiffs showed that: (1) the NYPD carries out more stops where there are more black and Hispanic residents, even when other relevant variables are held constant; (2) NYPD officers are more likely to stop blacks and Hispanics than whites *within* precincts and census tracts, even after controlling for other relevant variables; (3) NYPD officers are more likely to use force against blacks and Hispanics than whites, after controlling for other relevant variables; and (4) NYPD officers stop blacks and Hispanics with less justification than whites."[42]

Looking second at the question of being motivated by a discriminatory purpose, Judge Scheindlin began by clarifying that plaintiffs "are not required to prove that race was the sole, predominant, or determinative factor in a police enforcement action. Nor must the discrimination be based on ill will, enmity, or hostility."[43] Rather a plaintiff need only show that a discriminatory purpose was a "motivating factor."[44] Moreover, Judge Scheindlin noted that discriminatory intent is rarely susceptible to direct proof. It is difficult, if not impossible, to get inside an officer's head to demonstrate their subjective intent at the time of incident. Rather, the legal inquiry is "objective" and "practical", and the consequences of government actions can serve as evidence of the government's intent.[45]

Based on these factors, Judge Scheindlin concluded there was a sufficient basis for inferring the NYPD had the requisite discriminatory intent to constitute a violation of the Fourteenth Amendment. She added that:

> "The fact that the targeted racial groups were identified based on crime victim complaints does not eliminate the discriminatory intent. …[I]t is impermissible for a police department to target its general enforcement practices against racially defined groups based on crime suspect data."[46]

Shifting back to Albany, there are clear parallels to the practices of the Albany Police Department. Important questions need to be answered about whether Dontay Ivy was racially profiled and whether his stop is indicative of a broader practice of indirect racial profiling by the Albany Police. While, at present, the statistical evidence necessary to definitively resolve these questions is not publicly available, there are strong grounds for concern.

The gross disparities in arrest numbers point to a serious and systemic problem with the Albany Police Department. The fact that Albany Police openly rely on vague justifications to make stops like Mr. Ivy's, including walking suspiciously or wearing a puffy coat - which are easily susceptible to discriminatory application, is highly concerning. The fact that Albany Police appear to not follow the requirements of the Fourth Amendment when conducting pat-down searches is also a highly concerning practice that lends itself to discriminatory application. It is critical therefore for the Albany Police Department to respond in a

[41] *Floyd*, at 182.
[42] *Floyd,* at 182-183.
[43] *Floyd,* at 184.
[44] *Floyd*, at 29 (quoting *Arlington Heights*, 429 U.S. at 265).
[45] *Floyd*, at 29.
[46] *Floyd,* at 185.

timely and complete manner to the NYCLU's FOIL request to release statistical data concerning the number of stops and searches, the demographics of those stopped and searched, and the justifications offered for those stops and searches.

Overall Conclusions

Conclusion #1: The initial stop of Dontay Ivy was unconstitutional and violated his Fourth Amendment right to be free from illegal seizure. The fact that the Albany Police Department and Mayor's offices insist that it was legal points to broader systemic problems with how the Albany Police conduct stops.

Conclusion #2: The pat-down search of Dontay Ivy was unconstitutional and violated his Fourth Amendment right to be free from illegal search. The fact that the Albany Police Department and Mayor's offices insist that it was legal points to broader systemic problems with how the Albany Police conduct searches.

Conclusion #3: There is strong reason to suspect that Dontay Ivy's stop was the result of racial profiling and reflects a broader practice of indirect racial profiling by the Albany Police Department in violation of the Fourteenth Amendment's Equal Protection Clause.

Proposals

In response to Dontay Ivy's death and concerns raised by the NYCLU-CRC and community members, the Albany Police Department has instituted changes to its taser policy and is moving forward with a plan to provide officers with body worn cameras. The Mayor has also indicated support for additional trainings concerning implicit bias and mental illness.

While these are positive steps forward, they are not sufficient and do not get to the heart of the problem.

The heart of the problem is that Albany Police Department believes that it can stop and search individuals without reasonable suspicion and it appears to do so in a manner that has a disproportionate impact on communities of color.

Nothing in the policy changes or additional trainings proposed by the Police Department or the Mayor's Office addresses this central problem. Indeed, to date, neither the Albany Police Department nor the Mayor's Office has been willing to even admit that these are problems, let alone discuss appropriate solutions to them.

In light of these considerations, the NYCLU-CRC proposes:

1) That the Albany Police Department adopt policies and amend trainings to clarify that even neutral stop and search policies should not be applied in a manner, or have an impact, whereby people of color are disproportionately affected by police stops and searches.

2) That the Albany Police Department should adopt policies and amend trainings to clarify that walking 'suspicious' or 'heavy', wearing a puffy coat and/or having your hand in your sleeve are not constitutionally sufficient grounds to stop someone. This effort should be part of a broader clarification of what constitutes reasonable suspicion in light of *Terry, Floyd* and other recent jurisprudence.

3) That the Albany Police Department should adopt policies and amend trainings to clarify when members of the public are free to terminate a police encounter and walk away. That information should be conveyed to members of the public when they are approached by police officers.

4) That the Albany Police Department should adopt policies and amend trainings to make clear that pat-down searches are limited to situations where an officer reasonably suspects that an individual is armed and dangerous.

5) That the Albany Police Department immediately complies with the NYCLU's FOIL request and, moving forward, proactively collects and publishes data concerning: (i) the number of stops and searches by police in Albany, (ii) the racial demographics of those stopped and searched, and (iii) the justifications for those stops and searches.

6) That the Albany Police Department take steps to hold the officers responsible for Dontay Ivy's unconstitutional stop and search, and ultimately his death, accountable for their actions.

We look forward to working with you to address the serious concerns raised above.

Sincerely,

Colin J. Donnaruma

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CC:

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