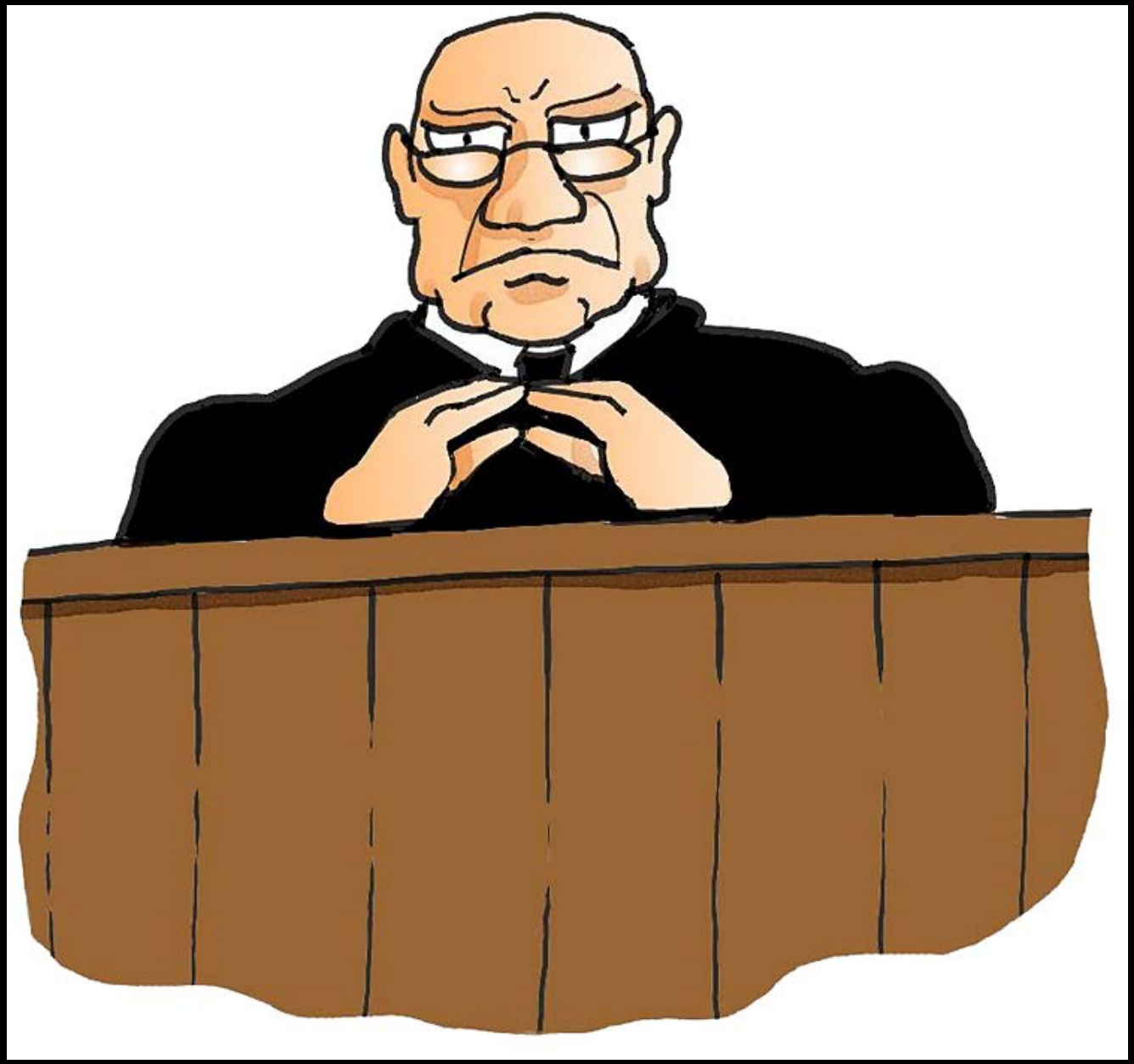
Speaking truth to Power!

Callie Glanton Steele, Senior Litigator
FPD Los Angeles, California
Tara Allen, Associate Professor of Law
Roger Williams School of Law



18 USC 3142(f)

- (2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—
- (A) a serious risk that such person will flee; or
- (B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

OUR ANCESTORS HAVE BEEN HERE LONGER THAN THIS BORDER!

Words Matter – Bail

UNITED STATES DISTRICT COURT

FEDEREAL DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA.

Plaintiff.

v.

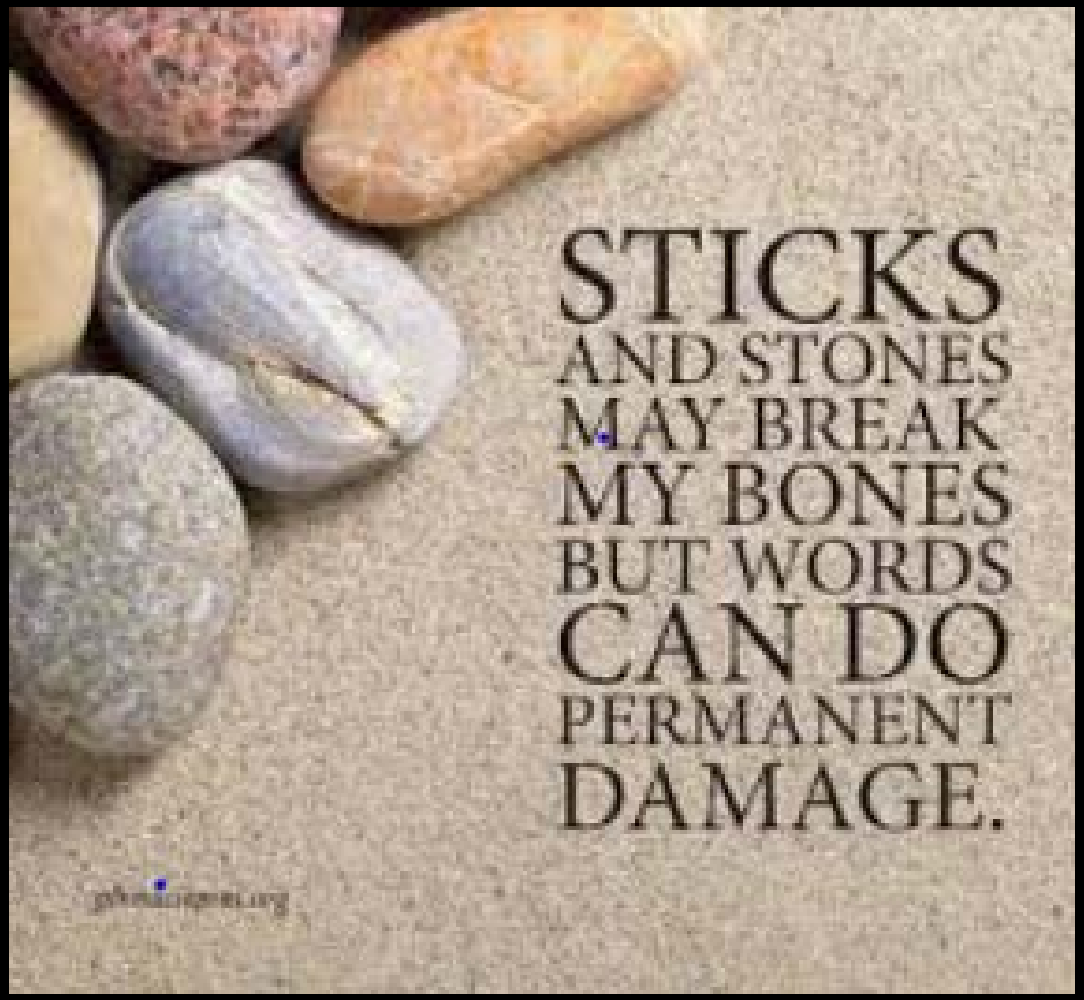
JOSE MARTINEZ.

Defendant.

Case No. CR 17-509-ZVT

JOSE MARTINEZ'S MOTION FOR AN ORDER DIRECTING THAT HE NOT BE CALLED AN "ALIEN" DURING COURT PROCEEDINGS

Words Matter – Pretrial



Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN JONES,

Defendant.

No. CR 19-00444-JFW

JOHN JONES' MOTION IN LIMINE #3 TO PRECLUDE THE GOVERNMENT FROM USING THE TERM "FELON" OR "FELONY"

Hearing Date: February 3, 2020
Courtroom of
the Honorable John F. Walter

Offensive Words/Titles

“A n***a got some chips fool on Crip, I got like, look, I got like two toys that a n***a trying to sell fool and shit. Shit, I ain’t gonna lie, fool, I got like, probably 12-13 hundred bro. I need another rack. A n***a got, I can sell, I know I can sell one of them toys. That’s like five- to six-hundred boom then, ya feel me.”

Pictures Matter

Opening Pandora's Box

Voir Dire Matters

MEMORANDUM IN SUPPORT OF JACOREY SANDERS'S MOTION FOR ATTORNEY CONDUCTED VOIR DIRE ON IMPLICIT RACE BIAS

I. INTRODUCTION

JACOREY SANDERS is a young Black man charged with possessing a firearm in violation of 18 U.S.C. § 922(g). Shortly, he will appear for trial in the Federal District of Rhode Island where a group of predominantly White jurors will decide his guilt or innocence. He has moved for an order that would allow the lawyers to voir dire the jury panel on matters of implicit race bias. The Court should grant the motion.

Plaintiff,

v. Case No. ___

___,

Defendant.

MOTION FOR THE COURT TO PLAY "UNCONSCIOUS BIAS" VIDEO DURING *VOIR DIRE*

___ ("___"), appearing by his attorneys, NELSON DEFENSE GROUP, LLC, respectfully requests that this Court play the "Unconscious Bias" video to all potential jurors prior to or during *voir dire* pursuant to Wis. Stat. § 805.08(1), ***Pena-Rodriquez v. Colorado***, 137 S. Ct. 855 (2017),

Jury Instructions Matter

PRELIMINARY INSTRUCTIONS TO BE GIVEN BEFORE OPENING STATEMENTS

DUTY OF JURY

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]

In addition, please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;
(2) the witness's memory;
(3) the witness's manner while testifying;
(4) the witness's interest in the outcome of the case, if any;
(5) the witness's bias or prejudice, if any;
(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.

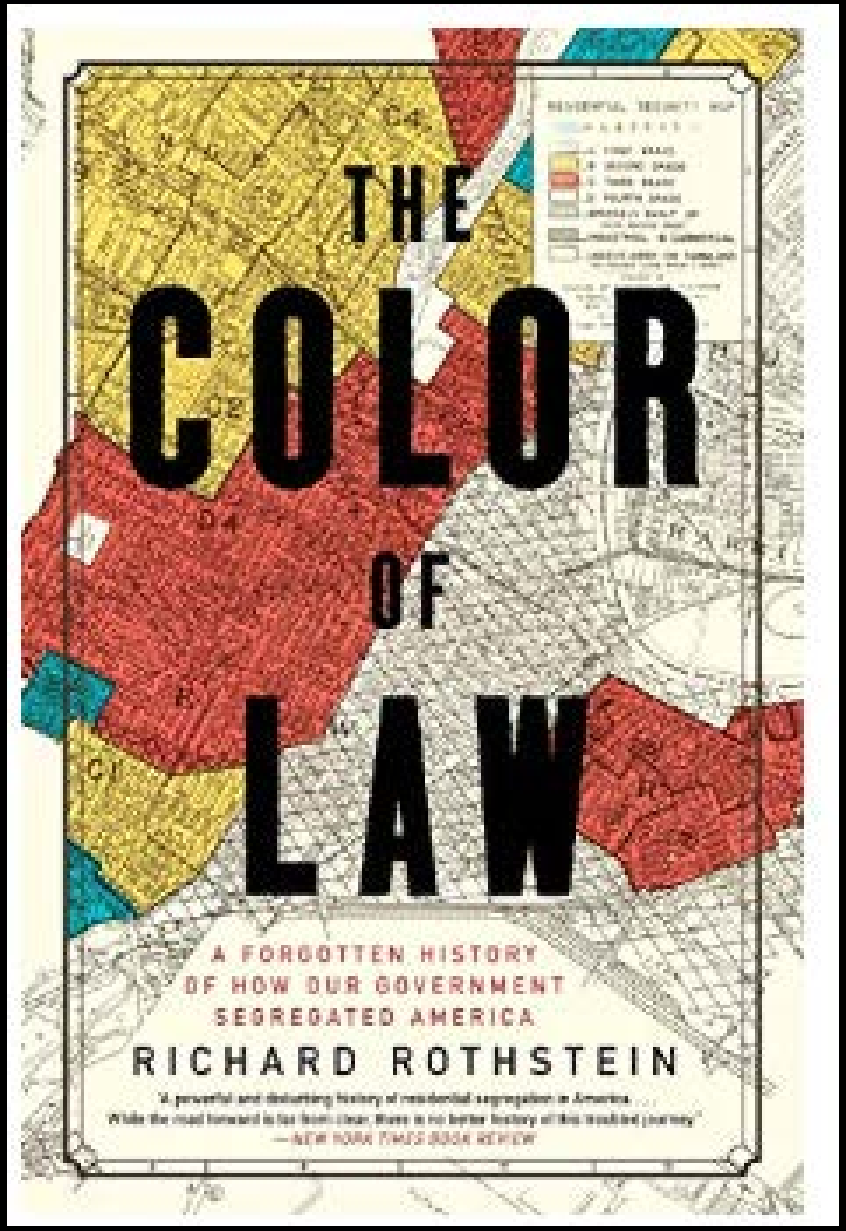
You must avoid bias, conscious or unconscious, based on the witness's race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender in your determination of credibility.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

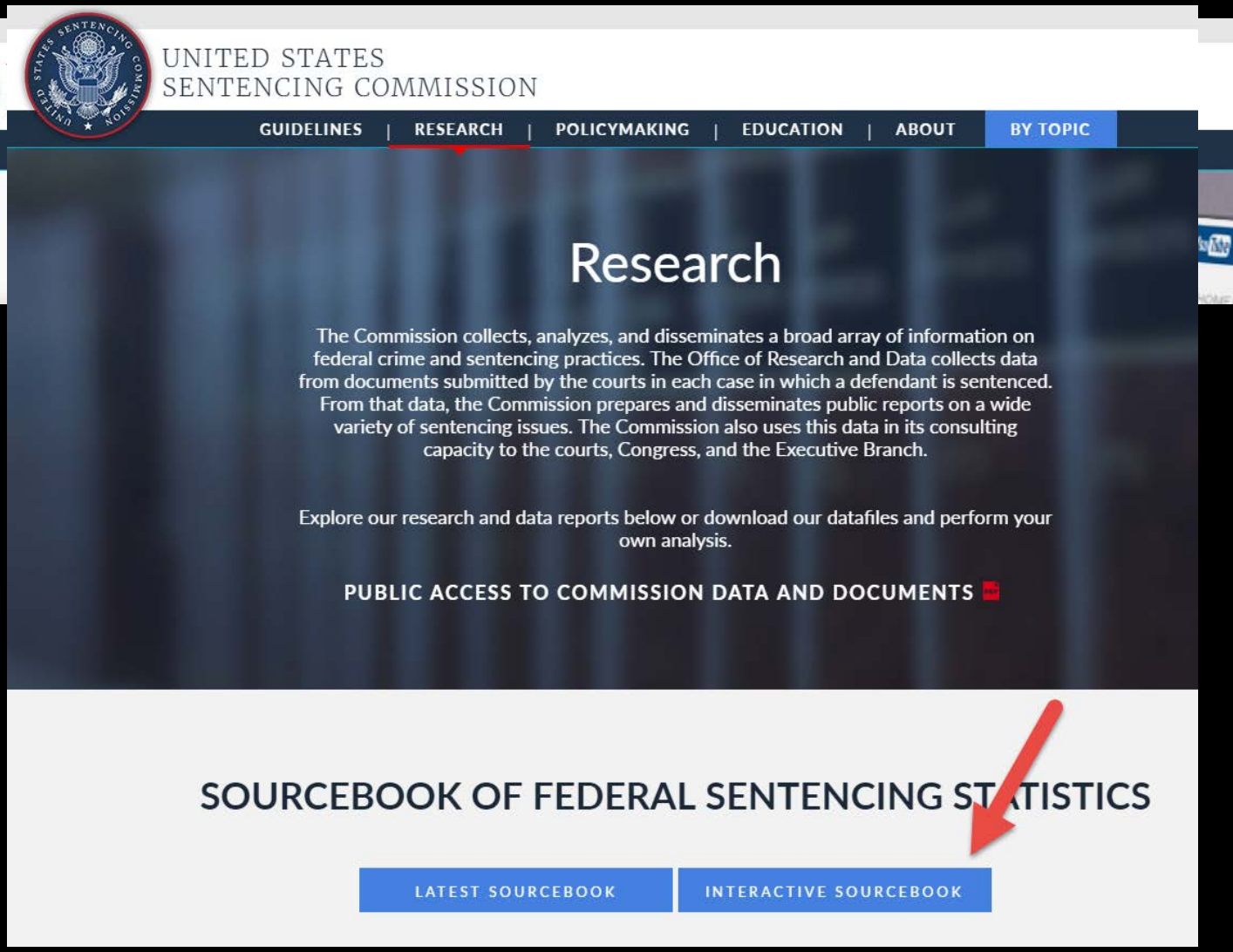
INSTRUCTION TO BE GIVEN
DURING CLOSING INSTRUCTIONS
(perhaps before 7.5 – Verdict Form)

DUTY OF JURY

I want to remind you about your duties as jurors. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[1] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[2]


THE
COLOR
OF
LAW
A FORGOTTEN HISTORY
OF HOW OUR GOVERNMENT
SEGREGATED AMERICA
RICHARD ROTHSTEIN

Sentencing Arguments Matter


UNITED STATES
SENTENCING COMMISSION
GUIDELINES | RESEARCH | POLICYMAKING | EDUCATION | ABOUT | BY TOPIC
Research
The Commission collects, analyzes, and disseminates a broad array of information on federal crime and sentencing practices. The Office of Research and Data collects data from documents submitted by the courts in each case in which a defendant is sentenced. From that data, the Commission prepares and disseminates public reports on a wide variety of sentencing issues. The Commission also uses this data in its consulting capacity to the courts, Congress, and the Executive Branch.
Explore our research and data reports below or download our datafiles and perform your own analysis.
PUBLIC ACCESS TO COMMISSION DATA AND DOCUMENTS
SOURCEBOOK OF FEDERAL SENTENCING STATISTICS
LATEST SOURCEBOOK
INTERACTIVE SOURCEBOOK


United States Sentencing Commission
Interactive Sourcebook of Federal Sentencing Statistics
Home
Basic Sentencing Data
About the Interactive Sourcebook
Features Guide
FAQs
Guidelines Manual
About the Commission
All Tables and Figures
Click here to view all available tables and figures organized into major subject categories.
Trend Analyses
Click here to view tables and figures that report individual offender federal crime data across multiple years.
Demographic Data
Click here to view tables a about offender demographic information such gender, race, age, and citizenship information.
Sentencing Information
Click here to view tables and figures related to sentence type and length.
Drug Data
Click here to view tables and figures related to drug offenses and offenders who
Immigration Data
Click here to view tables and figures related to immigration offenses and

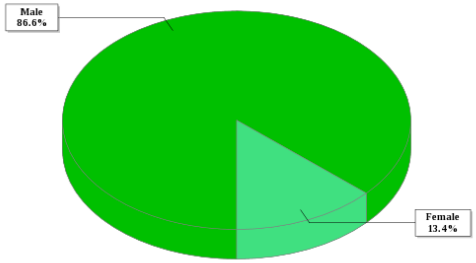
Demographic Data

Topic (Click on a [+] sign to expand a section)	*Table/Figure Number**
− **Primary Offense and Offender Characteristics**	
Demographic Information (Sourcebook Option)	
Demographic Information (Age Option 1)	
Demographic Information (Age Option 2)	
Race of Offenders in Each Primary Offense Category	Table 4
Race of Offenders in Selected Primary Sentencing Guidelines	
Gender of Offenders in Each Primary Offense Category	Table 5
Gender of Offenders in Selected Primary Sentencing Guidelines	
Age of Offenders in Each Primary Offense Category (Sourcebook Age Option)	Table 6
Age of Offenders in Each Primary Offense Category (Age Option 1)	
Age of Offenders in Each Primary Offense Category (Age Option 2)	
Age of Offenders in Selected Primary Sentencing Guidelines (Sourcebook Age Option)	
Age of Offenders in Selected Primary Sentencing Guidelines (Age Option 1)	
Age of Offenders in Selected Primary Sentencing Guidelines (Age Option 2)	
Age, Race, and Gender of Offenders (Sourcebook Age Option)	Table 7
Age, Race, and Gender of Offenders (Age Option 1)	
Age, Race, and Gender of Offenders (Age Option 2)	
Education of Offenders in Each Primary Offense Category	Table 8
Education of Offenders in Selected Primary Sentencing Guidelines	
Citizenship of Offenders in Each Primary Offense Category	Table 9
Citizenship of Offenders in Selected Primary Sentencing Guidelines	
+ **Drug Cases**	
+ **Immigration Cases**	

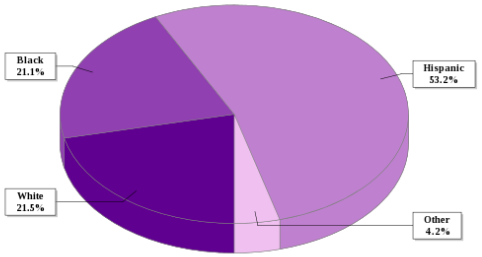
DEMOGRAPHIC INFORMATION (SOURCEBOOK OPTION)[1]

Circuits: **none selected** Fiscal Years: **2017**

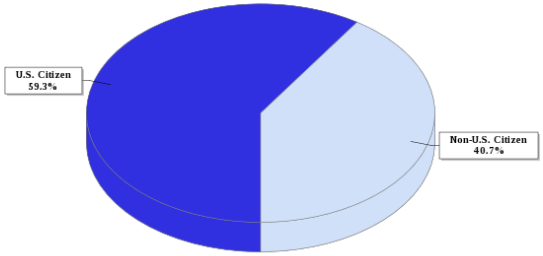
Gender



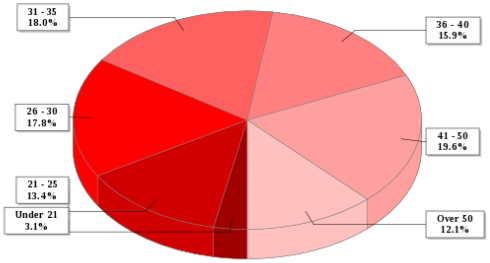
Race



Citizenship



Age



DRUG TYPE	TOTAL	WHITE		BLACK		HISPANIC		OTHER(+)	
		N	%	N	%	N	%	N	%
TOTAL	**19,712**	**4,419**	**22.4**	**4,858**	**24.6**	**9,809**	**49.8**	**626**	**3.2**
Powder Cocaine	**3,985**	249	6.2	1,117	28.0	2,591	65.0	28	0.7
Crack Cocaine	**1,610**	78	4.8	1,283	79.7	238	14.8	11	0.7
Heroin	**2,708**	425	15.7	1,154	42.6	1,088	40.2	41	1.5
Marijuana	**2,819**	309	11.0	295	10.5	2,096	74.4	119	4.2
Methamphetamine	**7,247**	2,705	37.3	583	8.0	3,621	50.0	338	4.7
Other (+)	**1,343**	653	48.6	426	31.7	175	13.0	89	6.6

---

[1] Of the 66,873 cases, 19,843 were sentenced under USSG Chapter Two, Part D (Drugs). Of these, 19,750 cases were sentenced under §§2D1.1 (Drug Trafficking), 2D1.2 (Protected Locations), 2D1.5 (Continuing Criminal Enterprise), 2D1.6 (Use of a Communication Facility), 2D1.8 (Rent/Manage Drug Establishment), or 2D2.1 (Simple Possession). Of these 19,750 cases, 38 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Sourcebook (https://isb.ussc.gov) using the Commission's fiscal year 2017 Datafile, USSCFY2017.

	TOTAL		Immigration Guideline		Non-Immigration Guideline	
	N	%	N	%	N	%
TOTAL (primary guideline specified)	**62,757**	**100.0**	**19,504**	**31.1**	**43,253**	**68.9**
GENDER						
Male	54,468	86.8	18,182	93.3	36,286	83.9
Female	8,266	13.2	1,313	6.7	6,953	16.1
Missing	23	--		--		--
RACE						
White	13,558	21.7	346	1.8	13,212	30.7
Black	13,296	21.3	285	1.5	13,011	30.2
Hispanic	33,014	52.8	18,592	96.0	14,422	33.5
Other	2,607	4.2	150	0.8	2,457	5.7
Missing	282	--		--		--
EDUCATION						
Less than High School	28,126	46.3	14,130	79.7	13,996	32.5
High School	18,589	30.6	2,535	14.3	16,054	37.3
Some College	10,308	17.0	827	4.7	9,481	22.0
College Graduate	3,727	6.1	226	1.3	3,501	8.1
Missing	2,007	--		--		--
MODE OF CONVICTION						
Plea	60,882	97.0	19,396	99.4	41,486	95.9
Trial	1,875	3.0	108	0.6	1,767	4.1
Missing	0	--		--		--

DRUG TYPE	TOTAL	Under 20		20 - 29		30 - 39		40 - 49		50 - 59		60 - 69		Over 69	
		N	%	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	**19,750**	**287**	**1.5**	**6,012**	**30.4**	**7,177**	**36.3**	**4,178**	**21.2**	**1,614**	**8.2**	**420**	**2.1**	**62**	**0.3**
Powder Cocaine	**3,990**	19	0.5	1,010	25.3	1,461	36.6	1,054	26.4	334	8.4	101	2.5	11	0.3
Crack Cocaine	**1,613**	6	0.4	512	31.7	688	42.7	286	17.7	92	5.7	27	1.7	2	0.1
Heroin	**2,709**	27	1.0	898	33.1	980	36.2	539	19.9	202	7.5	54	2.0	9	0.3
Marijuana	**2,834**	147	5.2	1,163	41.0	857	30.2	434	15.3	183	6.5	41	1.4	9	0.3
Methamphetamine	**7,256**	86	1.2	2,102	29.0	2,734	37.7	1,570	21.6	643	8.9	111	1.5	10	0.1
Other (+)	**1,348**	2	0.1	327	24.3	457	33.9	295	21.9	160	11.9	86	6.4	21	1.6


HOME GROWN

A Fair Cross Section Matters

____ The jury has reached a unanimous verdict.

X The jury advises the Court of the following:

____ The jury requests the following:

there is a juror who has stated

We have come to the consensus that through no means of reasonable argument will we reach a conclusion on all of these counts.

____ The jury has reached a unanimous verdict.

X The jury advises the Court of the following:

____ The jury requests the following:

A juror would like to inform the court that she is missing her daughter's birthday today, and that another juror still under no circumstance will be swaded to change his/her opinion and we will not reach a unanimous verdict. (Juror 10)

X The jury advises the Court of the following:

____ The jury requests the following:

We feel we will not be able to reach a unanimous verdict due to Juror #12's disregard of the court's instructions, particularly Court's instruction #1, lines 9-12. We ask that an alternate replace Juror 12, as we feel compliance of the instructions is necessary

We will be unable to come to a unanimous verdict due to his lack of compliance.

* 10 of the 12 of us were here when this note was written

X The jury advises the Court of the following:

____ The jury requests the following:

We feel we will not be able to reach a unanimous verdict due to Juror #12's disregard of the court's instructions, particularly Court's instruction #1, lines 9-12. We ask that an alternate replace Juror 12, as we feel compliance of the instructions is necessary

We will be unable to come to a unanimous verdict due to his lack of compliance.

* 10 of the 12 of us were here when this note was written

Defense Motion

MOTION FOR 1) RECONSIDERATION OF RULE 29 MOTION; 2) RULING ON PRETRIAL MOTION TO DISMISS; AND 3) RULING ON MOTIONS FOR MISTRIAL AFTER JURY NOTES 2, 3 AND 4; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF COUNSEL; EXHIBITS

Prosecution's Arguments

The Court granted a mistrial!

“Each of us is more than the worst thing we’ve ever done.”

Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption*

Questions

Callie Glanton Steele
Callie_Steele@fd.org

Tara Allen
Tallen@rwu.edu

Materials

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CR. NO. 1:16-cr-00059-S-PAS-1
	)	
JACOREY SANDERS	)	

JACOREY SANDERS'S MOTION IN LIMINE TO PRECLUDE PREJUDICIAL REFERENCE TO DEFENDANT AS A "FELON"

Jacorey Sanders moves in limine to preclude the government and its witnesses from characterizing Mr. Sanders as a felon. Mr. Sanders is charged in Count 1 of the Indictment with possessing a firearm after having been previously convicted of a crime punishable by a term exceeding one year, in violation of 18 U.S.C. § 922(g). He respectfully requests that, during his trial, this Court, the government's lawyers, and the government's witnesses not be permitted to use the informal shorthand "felon in possession" to refer to 18 U.S.C. §922(g)(1), the statute under which he is charged but the violation of which he is presumed innocence. He further asks that he not be described or characterized as a "felon" during his trial.

As grounds for this motion, Mr. Sanders submits that the word "felon" has pejorative connotations that will needlessly and unfairly prejudice the jury because rather than referring to Mr. Sanders as a person, the term dehumanizes and relegates him to a convicted criminal. *See e.g.,* Middlemass, Keisha, *Convicted and Condemned; The Politics and Policies of Prisoner Reentry,* p. 187 (NYU Press 2017) ("The pejorative nature of the word "felon" marks individual for life, and so many fail to reenter before they even get started."). Just last year, the U.S. Justice Department's Office of Justice Programs acknowledged that terms such as "felon" and "convict" are disparaging labels that carry a stigma. *See* Noble, Andrea, "Justice Department

Program To No Longer Use 'Disparaging' Terms 'Felons' And 'Convicts,'" *The Washington Times* (May 4, 2016) (attached).[1]

Especially here, in the context of a criminal trial, where the Court puts a premium on fairness and the presumption of innocence, the pejorative term should be avoided. While proof of a prior conviction is an element of the offense charged in Count 1 of the indictment, and Mr. Sanders has stipulated that he has a qualifying conviction, he has not stipulated to being called a "felon." Further, the charging statute does not refer to the accused person as a felon, but rather places the burden on the government to show the "*person* has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1) (emphasis). Accordingly, Mr. Sanders asks that he not be referred to as "felon" during his trial.

Respectfully submitted
JACOREY SANDERS
By his attorney,
/s/ Tara I. Allen
Tara I. Allen, MA Bar #641687
Assistant Federal Defender
10 Weybosset St., Ste. 300
Providence, RI 02903
(401) 528-4281; FAX 528-4285
tara_allen@fd.org

CERTIFICATION

I hereby certify that a copy of this MOTION was delivered by electronic notification to all parties registered on ECF this June 7, 2017.

/s/ Tara I. Allen

[1] Available at http://www.washingtontimes.com/news/2016/may/4/justice-dept-no-longer-use-terms-felon-convict/ (last visited June 7, 2017).

Justice Department program to no longer use 'disparaging' terms 'felons' and 'convicts'

President Barack Obama listens as U.S. Attorney Loretta Lynch speaks, in the Roosevelt Room of the White House in Washington,

The Office of Justice Programs plans to substitute terminology such as “person who committed a crime” and “individual who was incarcerated” in speeches and other communications as part of an effort to remove barriers that officials say hinder progress of those who re-enter society after completing their prison sentences.

“I have come to believe that we have a responsibility to reduce not only the physical but also the psychological barriers to reintegration,” Ms. Mason wrote Wednesday in a guest post for The Washington Post. “The labels we affix to those who have served time can drain their sense of self-worth and perpetuate a cycle of crime, the very thing reentry programs are designed to prevent.”

TOP STORIES
Twitter locks press secretary Kayleigh McEnany's account
Founders gambled on virtue prevailing over passions
House Republican introduces resolution to remove Pelosi as speaker

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The announcement follows a series of initiatives introduced as part of the Justice Department’s first National Reentry Week, through which law enforcement officials hope to reduce recidivism by changing features of the criminal justice system.

“These often-crippling barriers can contribute to a cycle of incarceration that makes it difficult for even the most well-intentioned individuals to stay on the right path and stay out of the criminal justice system,” states the department’s Roadmap to Reentry Plan, which lays out steps the department plans to take to reduce recidivism.

The re-entry plan does not contain the words “convict” or “felon.”

Ms. Mason said she issued a recent memo to staff within the Office of Justice Programs “directing our employees to consider how the language we use affects re-entry success.”

In 2013 Philadelphia Mayor Michael Nutter signed an executive order that required city employees to use the term “returning citizen” when referring to a person who has been released from jail or prison.

Over the course of National Reentry Week, the Obama administration announced a series of initiatives meant to support ex-offenders in the transition from prison. Attorney General Loretta E. Lynch last week reached out to state governors to encourage them to allow prisoners to exchange prison identification cards for state-issued IDs once their sentences are completed. President Obama announced plans to prohibit federal agencies from asking applicants for government jobs about any criminal history until the final phase in the hiring process.

Refining the language used to refer to ex-offenders “in no way means condoning criminal or delinquent behavior,” Ms. Mason wrote.

“Those who commit crimes must be held accountable,” she wrote. “But accountability requires making amends, an objective that is much harder to achieve when a person is denied the chance to move forward.”

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CR No.16-87-M-PAS
	)	
DEVON BROWN	)	

DEVON BROWN'S MOTION IN LIMINE TO EXCLUDE PHOTOGRAPH OF MR. BROWN WITH ANGELIA ARD AND OTHERS

I. ISSUE

The government has indicated that it will introduce a photograph of the defendant and Angelia Ard extracted from Mr. Brown's cellphone. Mr. Brown moves to exclude the photograph. See Exhibit A attached.

II. RELEVANT BACKGROUND

DEVON BROWN is a young man accused of transporting a woman named Angelia Ard for the purpose of engaging in prostitution in violation of 18 U.S.C. §2421(a) (transportation) and 18 U.S.C. § 2 (aiding and abetting). On March 7, 2016, he was a passenger in a car driven by his girlfriend Tamara Davis. According to the government, Davis drove Angelia Ard, from Massachusetts to a residence in Cranston, Rhode Island so that Ard could have commercial sex with a client who turned out to be an undercover police officer.

III. ARGUMENT

Devon Brown is African American. Angelia Ard is White. According to the government, the photograph that it seeks to introduce is from January 26, 2016. The photograph shows a dark skinned Devon brown with his arms around the waists of two Caucasian women. The identities of the women and their relationship to Mr. Brown at the time of the photograph are unknown. The government's exhibit list, however, claims that Ard is depicted in the photograph. See ECF Doc. 72-2 at 2. There is no indication of where, when or why the photograph was taken. It is entirely unrelated to this case.

While there will be no testimony about the circumstances of the photograph or the story behind it, the jury will be left to speculate about its relevance, filling in the blanks with implicit biases and speculation. The photograph has the potential to evoke emotional and long standing negative assumptions about gender and race that could seriously unfairly prejudice Mr. Brown. Regardless of any marginal relevance it might have, the photograph should be excluded under Rule 403 of the Federal Rules of Evidence.

Much has been written about "implicit bias." "Implicit bias" is a term of art referring to the formation of opinions based on the "relatively unconscious and relatively automatic features of prejudiced judgment and social behavior." *See* Brownstein, Michael, "Implicit Bias", The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.), available at https://plato.stanford.edu/entries/implicit-bias/. In other words, implicit bias draws conclusions based on pre-formed opinions rather than the evidence presented.

The research group Perception Institute[1] offers the following definition of "implicit bias" --

> Thoughts and feelings are "implicit" if we are unaware of them or mistaken about their nature. We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people. Thus, we use the term "implicit bias" to describe when we have attitudes towards people or associate stereotypes with them without our conscious knowledge. A fairly commonplace example of this is seen in studies that show that white people will frequently associate criminality with black people without even realizing they're doing it.

"Implicit Bias," Perception Institute, available at https://perception.org/research/implicit-bias/.

Numerous scholarly articles support that implicit social bias poses a challenge to legal theory and practice, because when a juror fills in the blanks based on implicit assumptions instead of actual evidence, it can lead to erroneous assumptions that contravene the accused's Sixth Amendment right to a trial by an impartial jury. *See e.g., Ray*, 803 F.3d at 260–61 (citing Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge–Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'Y Rev. 149, 152 (2010); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007)). *See also* Anna Roberts, (*Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*,

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[1] According to its website, the Perception Institute is a national consortium of social scientists, law professors, and advocates focusing on the role of the mind sciences in law, policy, and institutional practices. Its cofounders are Alexis McGill Johnson, of Princeton and Yale Universities, and Seton Hall University School of Law Professor Rachel Godsil renowned author and lecturer on issues of implicit bias and racial anxiety. *See* https://perception.org/about-us/team/

44 Conn. L. Rev. 827, 833 (2012); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC Irvine L. Rev. 843, 844 (2015) ("'Implicit biases' are discriminatory biases based on either implicit attitudes-feelings that one has about a particular group-or implicit stereotypes-traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do. . . African-Americans, for example, are stereotypically linked to crime and violence; their behavior is more likely to be viewed as violent, hostile, and aggressive than is the behavior of whites; and they are more readily associated with weapons than are whites."); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DePaul J. for Soc. Just. 139, 154 (2010) ("Implicit bias against socially underprivileged groups and outgroups is prevalent in our culture. As a result, there is a chance that implicit bias is present anytime a member of such a group is the defendant in a criminal trial. "); Siegfried C. Coleman, *Reliance on Legal Fiction: The Race-Neutral Juror*, 41 S.U. L. Rev. 317 (2014) ("This article highlights the notion that these unchecked biases are alive and well in all jurors as an innocent and necessary human characteristic and advocates the position that these biases should be acknowledged and formally addressed."); Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, Boston B.J., Summer 2016, at 3 ("Throughout the past several decades, State and Federal appellate courts have candidly acknowledged the implicit biases of litigants and jurors.").

Sadly, the image of guilty Black men as sexual exploiters of innocent white women is a dominant stereotype that is part of the racial ideology of the United States. *See e.g.* Calvin John Smitley, et al., "From 'brute' to 'thug:' the demonization and criminalization of unarmed Black male victims in America, J.Hum.Behav.Soc. Environ. 2016; 26(3-4); 350-366 ("explaining that "the brute image of Black men became significant moving into the early 20th century, when fear was reinforced with depictions of Black men as harmful," referencing the film Birth of a Nation, made in 1915, listed social science resources.); Jessie Daniels, "White Women and the Defense of Lynching," (Feb. 11, 2014) ("[white womanhood]… is that phantom that is

resurrected over and over again as a symbol of white racial purity defining the limits of the white lynch mob. …the figure of a threatened or raped white woman, evoked as the innocent victim of a 'terrible crime,' was conjured in attempts to justify lynching as the 'understandable' retribution of white fathers, brothers, and lovers." (quoting Shawn Michelle Smith in Photography on the Color Line).

Here, the government seeks to introduce sexualized images of a black man flanked by two scantily clad white women. The photograph begs the question whether the woman are the prostitute victims of Mr. Brown. Though the question will hang in the air unanswered, the photograph is highly provocative, especially when introduced in trial in which the government has made the unsupported assertion that Mr. Brown is a pimp who "has had a long-term pimping relationship with" Ard. ECF Doc. No. 40 at 1. At the same time the government has decided not to call Ard (Mr. Brown's alleged victim) as a witness to explain the relationship between herself and Mr. Brown. Given both the irrelevance of the photograph and the dominant racial ideology and history in the U.S. that evokes negative assumptions about black men accused of victimizing white women, the photograph should be excluded.[2]

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[2] *See e.g.* Washington Post, August 9, 2016, "People say they approve of interracial couples but studies show otherwise" (available at washingtonpost.com/news/post-nation/wp/2016/08/19/people-say-they-approve-of-interracial-couples-but-studies-uncover-bias/)(Photos of interracial couples triggered activity in part of the brain that registers disgust in sample of young adult students from the University of Nebraska); L. Rizer III, The Race Effect on Wrongful Conviction, 29 Will. Mitch. Law Review 846, 848 (2004) ("A study conducted found a statistically significant disparity in the treatment of defendants whose victims were white rather than African American…" quoting Thomas P. Sullivan, Repair or Repeal – Report of the Governor's Commission of Capital Punishment, 90 ILL. B.J. 304, 307 (2002)); Id. at 850 (The Justice Department was also able to establish that between 1930 and 1972, 89% of the people who were executed for the crime of rape in America were black men convicted of raping white women.); Samuel R. Gross, Race and Wrongful Convictions in the United States, National Registry of Exonerations,

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of this Motion was delivered by electronic notification to all counsel of record on March 5, 2018.

/s/ Tara I. Allen

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p.13 (2017) (Assaults on white women by African-American men are a small minority of all sexual assaults in the United States, but they constitute half of sexual assaults with eyewitness misidentifications that led to exoneration.).

this case." No. 13–1526, Docket No. 150. The court in Spanish Broadcasting System took exception to LAMCO's conflicting representations to the bankruptcy court. Id. at p. 5. Despite assertions that LAMCO owned the disputed composition, "LAMCO's bankruptcy filings in the United States Bankruptcy Court for the District of Puerto Rico, which Mr. Bernard also signed and authenticated during cross-examination, indicates that LAMCO owns no intellectual property beyond its logo." Id. at p. 4. The court ordered counsel for LAMCO and ACEMLA to identify the basis for their assertions that LAMCO and ACEMLA owned the relevant compositions.

[15] This Court **ORDERS** Jelka L. Duchesne, Ibraham Latiff–Carrasquillo, Robert Penchina, and Kelly D. Talcott, as counsel for LAMCO and ACEMLA, to submit individual filings addressing (1) whether LAMCO and ACEMLA claimed to own "Llegó la Navidad," (2) on what basis counsel filed documents to the Court representing that LAMCO and ACEMLA own "Llegó la Navidad," and (3) why the Court should not impose sanctions pursuant to Rule 11. To the extent that the information requested in this Order to Show Cause implicates the attorney-client privilege, the filings may be submitted under seal and accompanied by an explanation as to why the attorney-client privileged is implicated.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** Peer International's motion for judgment on the pleadings. (Docket No. 52.) LAMCO and ACEMLA's motion to dismiss is **DENIED** as moot. Accordingly, the complaint, cross-claims, counterclaim, and third party complaint are **DISMISSED WITH PREJUDICE.** (Docket Nos. 1, 14, 16 and 21.)

Judgment shall be entered accordingly.

IT IS SO ORDERED.

UNITED STATES of America,

v.

Devon BROWN, Defendant.

Cr. No. 16–087–JJM–PAS

United States District Court,
D. Rhode Island.

Signed April 18, 2018

Background: In prosecution for knowingly transporting individual across state lines to participate in prostitution and aiding and abetting in such acts, defendant filed notice of intent to offer alleged prostitute's statement, and parties filed motions in limine.

Holdings: The District Court, John J. McConnell, Jr., J., held that:

(1) text messages authored by alleged prostitute to undercover agent and defendant were admissible as non-hearsay statements of co-conspirator;

(2) online advertisements from six to nine months before incident were not admissible;

(3) admission of photograph showing defendant with alleged prostitute and another woman would be overly prejudicial; and

(4) exclusion of government's 4,693–page report on information extracted from defendant's cellphone was warranted.

Motions granted in part and denied in part.

1. Criminal Law ⚿422(1), 423(1), 427(5)

Statements are admissible as non-hearsay statement of co-conspirator when court finds it is more likely than not that declarant and defendant were members of conspiracy when statement was made, and that statement was in furtherance of conspiracy. Fed. R. Evid. 801(d)(2)(E).

2. Criminal Law ⚿427(5)

It was more likely than not that defendant and declarant were members of prostitution conspiracy when declarant authored her text messages, and that those statements were in furtherance of conspiracy, and thus text messages authored by declarant to undercover agent and defendant were admissible as non-hearsay statements of co-conspirator in defendant's prosecution for knowingly transporting individual across state lines to participate in prostitution. Fed. R. Evid. 801(d)(2)(E).

3. Criminal Law ⚿373.10, 373.21

Online advertisements from six to nine months before incident alleged in indictment charging defendant with knowingly transporting individual across state lines to participate in prostitution were not sufficiently close in time or similar in content to advertisements involved in crime charged, and thus were not admissible in defendant's prosecution, where advertisements did not have special relevance to any issue to be decided in case. Fed. R. Evid. 401, 404(b).

4. Criminal Law ⚿438(7)

Admission of photograph showing defendant with alleged prostitute and another woman would be overly prejudicial in defendant's prosecution for knowingly transporting individual across state lines to participate in prostitution, despite government's contention that photograph showed that defendant knew alleged prostitute, where photograph would play into racial stereotyping about African American men as sexual exploiters of white women, and government had other non-prejudicial ways of proving its assertion that defendant and alleged prostitute knew each other, including police officers' testimony that they saw them in car together. Fed. R. Evid. 403.

5. Criminal Law ⚿627.5(1)

In criminal cases, government has broad disclosure obligations, which must be made in timely manner. Fed. R. Crim. P. 16.

6. Criminal Law ⚿627.8(6)

Exclusion of government's 4,693–page report on information extracted from defendant's cellphone was warranted in prosecution for knowingly transporting individual across state lines to participate in prostitution, even though report concerned evidence that was crucial to government's case, and there was no evidence that government acted intentionally or in bad faith, where phone had been in government's possession for two years, it knew it needed to extract information from phone in order to prove its case, government had history of late disclosures in case, and government provided no explanation for its lack of diligence. Fed. R. Crim. P. 16.

Terrence P. Donnelly, U.S. Attorney's Office, Providence, RI, for United States of America.

Tara I. Allen, Federal Public Defender Office, Providence, RI, for Defendant.

ORDER

John J. McConnell, Jr., United States District Judge

Before the Court are a series of pretrial motions filed by both the government and the defendant Devon Brown. The government has charged Mr. Brown in an indict-

ment with one count of knowingly transporting an individual across state lines to participate in prostitution in violation of 18 U.S.C. § 2421 and aiding and abetting in such acts in violation of 18 U.S.C. § 2. Pending before the Court are:

1. Mr. Brown's Motion in Limine to Exclude Photographs of Text Messages (ECF No. 70), to which the government objects (ECF No. 78);
2. Mr. Brown's Motion in Limine to Exclude Irrelevant Backpage.com Postings (ECF No. 73), to which the government objects (ECF No. 81);
3. Mr. Brown's Notice of Intent to Offer A.A.'s [1] Statement (ECF No. 74), and the government's objection thereto and Motion in Limine to Exclude A.A.'s Statement (ECF No. 80);
4. Mr. Brown's Motion in Limine to Exclude Photographs of Mr. Brown with A.A. and Another (ECF No. 75), to which the government objects (ECF No. 82);
5. Mr. Brown's Motion for an Order Directing the Government to be More Specific (ECF No. 76), and the government's response thereto (ECF No. 79); and
6. Mr. Brown's Motion in Limine to Exclude the Third Last–Minute Disclosure of Evidence (Cellebrite Report) (ECF No. 83), to which the government objects (ECF No. 84), and Mr. Brown replies (ECF No. 85).

The Court addresses these motions *seriatim.*

1. Photographs of Text Messages

The government seeks to introduce photographs of text messages from the phone that was in A.A.'s possession at the time of her arrest. The government alleges these photographs show the existence of a prostitution conspiracy between A.A. and Mr. Brown. The government asserts that the messages are between A.A. and Mr. Brown and between A.A. and the undercover police officer who was posing as a customer of A.A. Mr. Brown objects, claiming that the text messages contain impermissible hearsay to which there is no exception, that their introduction would violate his Sixth Amendment right to confrontation, and that they are otherwise not authenticated. The government responds by asserting that the photographs of the text messages are not hearsay because Mr. Brown's coconspirator made them during and in furtherance of the conspiracy.[2] *See* Fed. R. Evid. 801(d)(2)(E).

[1] Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay where "[t]he statement is offered against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Statements are admissible under Rule 801(d)(2)(E) when a court finds it is "more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *United States v. Ortiz*, 966 F.2d 707, 715 (1st Cir. 1992) (quoting *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977)).

[2] A review of the evidence the government intends to prove at trial shows that it is more likely than not that A.A. and Mr. Brown were members of a prostitution conspiracy when A.A. authored her text messages, and that those statements

1. A.A. is a pseudonym for the person who allegedly was the prostitute in this matter. Publishing her name would serve no purpose.

2. The government also states, without elucidating, that the statements are admissible because it does not offer them for the truth of the matter asserted and/or because they are statements of then-existing state of mind.

are in furtherance of a conspiracy. Thus, the text messages authored by A.A.—to both the undercover agent and Mr. Brown—are not hearsay.[3]

The text messages authored by the undercover agent to A.A., however, may or may not be hearsay. The undercover agent is not a coconspirator, making Rule 801(d)(2)(E) unavailable to admit his messages directly. Nevertheless, certain of the undercover agent's messages may be admissible if it is shown that a coconspirator—A. A.—adopted the undercover officer's statements.

Therefore, Defendant's Motion in Limine to Exclude Photographs of Text Messages (ECF No. 70) is DENIED as stated.

2. Previous Backpage.com Postings

Mr. Brown seeks to exclude an assortment of Backpage.com posts from June through September 2015, six to nine months before the incident alleged in the indictment. Mr. Brown asserts that these ads are irrelevant under Rule 401, unfairly prejudicial under Rule 403, and represent impermissible character evidence under Rule 404(b). The government counters that this evidence is "intrinsic to the crime" charged and therefore admissible, and that it is not impermissible under Rule 404(b). *See United States v. Epstein*, 426 F.3d 431, 439 (1st Cir. 2005).

[3] The ads from months earlier are not intrinsic to this crime. The crime charged is "knowingly transport[ing] an individual in interstate commerce . . . with intent that the individual engage in prostitution" in March 2016. ECF No. 3. These ads, which are remote in time and not similar in content to the ads involved in the crime charged, do not tend "to make a fact more or less probable than it would be without the evidence" Fed. R. Evid. 401. Moreover, it is not permissible Rule 404(b) evidence because this remote evidence does not have a "special relevance" to any issue to be decided in this case. *See United States v. Varoudakis*, 233 F.3d 113, 118 (1st Cir. 2000).

Therefore, Defendant's Motion in Limine to Exclude Irrelevant Backpage.com Postings (ECF No. 73) is GRANTED.

3. A.A.'s Statement

Mr. Brown gave notice of his intent to introduce a transcript of an interview between police officers and A.A. that took place after A.A. was arrested and charged with prostitution. ECF No. 74. Mr. Brown seeks to admit A.A.'s statement under Rule 806 in response to the admission of the text messages discussed above in section 1.[4] Mr. Brown also argues that A.A.'s statement is admissible under Rule 106's "rule of completeness." The government objects and moves in limine to exclude the transcript. ECF No. 80. It argues that the only possible ground for admitting the transcript would be as a prior inconsistent statement, and that the text messages and her statement are consistent.

The transcript, or portions of it, may be admissible under either Rule 106 or 806, but the Court cannot make that determination pretrial. If the evidence is such that the transcript "in fairness ought to be considered at the same time," then it will be admissible under Rule 106. If the tran-

3. The Court is not able to determine whether the government can properly authenticate the photographs of the text messages and leaves that proof to the government at the time it seeks to introduce the evidence.

4. Federal Rule of Evidence 806 provides that, when a hearsay statement is admitted under Rule 801(d)(2)(E) (among other rules), the "declarant's credibility may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness."

script presents evidence that tends to attack the credibility of A.A. or proves to be inconsistent with a matter presented at trial concerning A.A., then the transcript will be admissible under Rule 806.

Therefore, the government's Motion in Limine to Exclude A.A.'s Statement (ECF No. 80) is DENIED as stated.

4. Photographs of Mr. Brown with A.A. and Another

Mr. Brown objects to the government's introduction of a photograph showing Mr. Brown with A.A. and another woman. The government seeks to introduce the photograph to show that Mr. Brown knew A.A. Mr. Brown objects, asserting that the photograph would play into racial stereotyping about African American men as "sexual exploiters" of white women, and thus, would be unfairly prejudicial.

[4] Federal Rule of Evidence 403 allows the Court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury ... or needlessly presenting cumulative evidence." The photograph here is unfairly prejudicial to Mr. Brown because of its sexualized and potentially racial nature. The government has charged him with a crime that involves sex and the photograph could inappropriately prejudice him on this topic. Moreover, the government has other non-prejudicial ways of proving its assertion that Mr. Brown and A.A. knew each other, including testimony from police officers that the officers saw them in the car together.

Therefore, Defendant's Motion in Limine to Exclude Photographs of A.A. with Another (ECF No. 75) is GRANTED.

5. More Specific Response From the Government

Mr. Brown asks the government to be more specific in its identification of certain items of evidence. ECF No. 76. The government responded with specificity. ECF No. 79. Therefore, Mr. Brown's Motion for More Specific Responses (ECF No. 76) is DENIED AS MOOT.

6. Government's "Third Last–Minute Disclosure of Evidence"

The last motion before the Court (ECF No. 83) is the most involved and requires a more detailed recitation of facts and procedure.

Facts

A grand jury indicted Mr. Brown on October 11, 2016–over a year and a half ago-with one count of knowingly transporting an individual across state lines to participate in prostitution in violation of 18 U.S.C. § 2421 and aiding and abetting such acts in violation of 18 U.S.C. § 2.[5] ECF No. 3. The Court arraigned him the following day. Five days later, on October 17, 2016, Mr. Brown's attorney sent a letter to the government, requesting discovery.[6] ECF No. 85–1. The Court's Arraignment Order required the government to respond to Mr. Brown's discovery requests "[w]ithin 5 days of" the request. ECF No. 5 at 1. The government did not respond.

On November 2, 2016, Mr. Brown's attorney sent a second request for discovery.[7] ECF No. 85–2. The government again did not respond within the time ordered by the Court. On December 8, 2016,

5. The State of Rhode Island had originally charged Mr. Brown in February 2016 with essentially the same crime.

6. The letter requested, *inter alia*, "Reports of Examinations and Tests—Any results or reports of physical or mental examinations, and of scientific tests or experiments material to the case including but not limited to any DNA or fingerprint analysis, which are known to, or by the exercise of due diligence may become known to, the government." ECF No. 85–1 at 2.

7. The second letter requesting discovery mimicked the first one. It mistakenly had the old

fifty-two days after Mr. Brown's first request for discovery, "the government made the first of many discovery disclosures to the defendant through DOJ's cloud-based platform." ECF No. 84 at 1.

After the Court sent out its first trial notice (ECF No. 12), Mr. Brown requested a continuance (ECF No. 13), in part to allow "additional time ... to confer with the government following the defense's review [of] the discovery." The Court granted this request as well as subsequent requests the following two months. ECF No. 17; ECF No. 22 ("additional time is needed as the government has indicated supplemental discovery is forthcoming").

On March 21, 2017, the government further supplemented its production of discovery. In this production, the government disclosed a "Cellebrite [8] report" of information that Detective Robert Grasso of the Cranston Police Department extracted from Mr. Brown's cellphone at the time of his arrest. ECF No. 84 at 2–3. The extraction had taken place over a year earlier on March 9, 2016. ECF No. 83 at 3. The government disclosed further discovery (and *Jencks* material) on April 7, 2017. ECF No. 84–1 at 102.

Mr. Brown requested a trial continuance on May 2, 2017 (ECF No. 25), and again on May 24, 2017 (ECF No. 28), because "additional time [was] needed to review ... the supplemental discovery that was provided by the government." ECF Nos. 25, 28.

On July 6, 2017, Mr. Brown filed a plea agreement. ECF No. 32. On July 25, 2017, during the course of the plea colloquy with the Court, Mr. Brown did not agree with the facts as stated by government and the hearing ended without a change of plea.

Two months later, on September 12, 2017, the government provided further discovery. ECF No. 84–1 at 105. The discovery included "a 41–page document that purported to be cellphone records from TracFone Wireless Inc. regarding a prepaid cell phone that was seized from A.A. at the time of her arrest." ECF No. 47 at 3. Mr. Brown alleges that the documents had been in the government's possession for months, but that it did not turn them over until the eve of trial.[9] *Id.*

On September 22, 2017, Mr. Brown filed a Motion to Compel.[10] *Id.* He alleged that the government's "[i]nitial discovery was late and incomplete." *Id.* at 3. He further alleged that the government "demonstrated a pattern of dumping discovery on the defense on the eve of trial." [11] *Id.* Mr.

date on it, but was actually sent on November 2, 2016, and was received by the government on November 7, 2016. ECF No. 85 at 2 n.1.

8. Cellebrite is a company that manufactures data extraction, transfer, and analysis devices for cellphones and mobile devices. ECF No. 83 at 3 n.1. It "makes mobile device evidence extraction available on two different platforms." ECF No. 84–1 at 7.

9. On September 13, 2017, the government advised Mr. Brown that its December 7, 2016 production of screen shots from A.A.'s phone was incomplete. ECF No. 84–1 at 108. The government then produced to Mr. Brown additional photos of outgoing text messages from A.A.'s phone's. *Id.*

10. On September 14, 2017, the government had filed a Motion to Compel (ECF No. 43) requesting that Mr. Brown provide reciprocal discovery that it had requested in December 2016 under Federal Rule of Criminal Procedure 16(b). The Court denied that motion. Text Order, Oct. 10, 2017. Mr. Brown had asserted that the government's motion was "frivolous and should be summarily denied." ECF No. 48 at 1.

11. The government provided discovery on September 12, 2017; a pretrial conference had been scheduled for two days later. ECF No. 47 at 3.

Brown asked the Court "to order the prosecutor to produce the Cellebrite cell phone extraction report forthwith [and if] the evidence is not timely produced, the Court should prohibit the government from introducing it at trial." *Id.* at 5. In response, the government re-produced all discovery, including the Cellebrite report of the information extracted from the phone. The government did not oppose the motion to compel and the Court granted it on October 10, 2017 via Text Order.[12]

In October and each of the next three months, Mr. Brown, with the assent of the government, moved for trial continuances. ECF Nos. 52, 56, 59, 62. On February 9, 2018, the Court sent out a trial notice notifying the parties that trial would begin in March 2018. ECF No. 67; *see* Text Order, Feb. 28, 2018.

At some point, the government learned that Detective Grasso was unavailable to testify at trial, and it had Cranston Detective William Palmer reimage Mr. Brown's phone and prepare a new report, which the government sent to Mr. Brown on February 23, 2018. ECF No. 84 at 9.

On March 6, 2018, the government provided Mr. Brown's attorney another new Cellebrite report on Mr. Brown's cellphone. ECF No. 83–1. This new report was different from its predecessors. As the government explains:

> About February 28, 2018, the government spoke to an experienced Warwick Police Detective, Timothy Grant. Det. Grant has performed hundreds of Cellebrite extractions and explained that the reports that had been previously generated (by Dets. Grasso and Palmer) were "Logical" reports as opposed to "Physical" reports. Neither the prosecutors nor the agents working on the case were aware of such a distinction. Det. Grant explained that the "Physical" report is more comprehensive, and would account for a bit-for-bit reproduction of the data on the phone. Det. Grant prepared such a report from the defendant's phone.

ECF No. 84 at 3 (footnote omitted).

The government points out that this new Cellebrite report captured much more than the previous report, including extensive data on Mr. Brown's location, cell tower locations, text messages, Facebook conversations, and web browsing history. *Id.* at 3–5. The government told Mr. Brown's attorney that most of the cellphone information the government had intended to use in court at the upcoming trial was "not readily discernible" from the previously disclosed report and that the previous report "omits a fair amount of detail." ECF No. 83–1. The government describes this new, 4,693–page report as "highly-probative evidence." ECF No. 84 at 1; ECF No. 85 at 1.

Mr. Brown now moves to exclude this newly disclosed Cellebrite report. ECF No. 83. Mr. Brown claims the Court should exclude this report because of its late disclosure after a long period of late and incomplete disclosures by the government. *Id.* The government responds by claiming that this information was only recently discovered, that they would not object to a

12. The government explains: "Around this time, defense counsel filed a Motion to Compel discovery, and complained that discovery that the government believed had long ago been given to her was never provided. It was at this time that the government learned that, at administrative offices in Washington, the automated email notification system (i.e., that which notified counsel that new material had been uploaded) had been disabled.... On September 28, 2017, in response to this problem, as well as defense counsel's allegations that she did not get all of the discovery she was entitled to, the government re-produced the entirety of the discovery it had, in order to make doubly sure that counsel had all of the materials." ECF No. 84 at 8.

continuance of the trial to allow Mr. Brown time to review the report, and that they were not slow in providing discovery. ECF No. 84.

Analysis

[5] Under Federal Rule of Criminal Procedure 16(d)(2), if a party fails to comply with its discovery obligations, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

"In criminal cases, the government has broad disclosure obligations." *United States v. Kifwa*, 868 F.3d 55, 60 (1st Cir. 2017). "[T]he government's disclosures must be made in a timely manner." *Id.* The Court must ultimately consider what is just under the circumstances. *See* Fed. R. Crim. P. 16(d)(2).

The central issue here is whether the late produced "physical" Cellebrite report should be excluded. However, the late disclosure of this report must be taken in the context of a history of discovery from the government that was at best slow, sporadic, and untimely. For example, five days after the Court arraigned Mr. Brown, he sent a letter to the government requesting discovery. ECF No. 85–1. Instead of responding within the five days ordered by the Court (ECF No. 5), the government responded fifty-two days later. ECF No. 84 at 1. Additionally, this response does not appear to have included the first cellphone report conducted by the Warwick Police in March 2016. *See* ECF No. 84–1 at 138–39. This response was neither timely nor complete. Moreover, it violated this Court's order on timeliness. The government does not explain the incomplete or late disclosure, or why it ignored this Court's order concerning when its disclosures were due.

The late disclosures continued. About three months later—and a year after the alleged incident occurred—the government disclosed another round of information to Mr. Brown, now including the report extracted from Mr. Brown's phone over a year earlier. Then, six months later, and two days before the Court's pretrial conference, on September 12, 2017, the government turned over a further batch of discovery, this time including another forty-one-page analysis of Mr. Brown's cellphone. Understandably, Mr. Brown's frustration led him to file a motion to compel, including for the phone report, which Mr. Brown argues he never received. The government subsequently re-produced all of the discovery to Mr. Brown.

[6] Now, in March of this year, the government—for the first time—disclosed an in-depth "physical" report of the phone which contained extremely detailed information not previously disclosed. Although the government argues that it did not have this report in its possession any earlier, it most certainly had Mr. Brown's phone, and had every opportunity over the preceding two years to conduct this analysis. Although there is no evidence the government acted intentionally or in bad faith in producing this report, this late production comes at the end of a long series of late disclosures, concerns evidence that the government admits is crucial to its case, and runs contrary to the purpose of Rule 16 of the Federal Rules of Criminal Procedure.

The timely disclosure requirement of Rule 16 is only effective if the government timely analyzes and tests the evidence it has in its possession. This is the only way to ensure that the discovery process pro-

ceeds fairly, justly, and effectively. Due diligence on the part of the government is an implicit requirement of Rule 16. If the government were allowed to sit on evidence, and wait until the last minute to analyze the evidence, and then claim the results just came into their possession, it would blow a huge hole in the government's disclosure obligation under the rules.

Mr. Brown's phone had been in the possession of the government for two years. The government knew it needed to extract information from the phone in order to prove its case; it describes the information contained in the phone as central to its case. However, the government failed to run the proper test on the phone in a timely fashion. While the government argues that the original two police officers simply failed to do a full analysis of the phone, that does not relieve the government of its responsibility to act with due diligence in obtaining the evidence necessary to prove its case in a timely fashion and turning it over to the defendant.

Considering the government's lack of diligence in timely analyzing the evidence in its possession, the history of late disclosures in this case, the defendant's right to discovery under Rule 16, as well as the defendant's right to have his charges expeditiously adjudicated, the Court concludes that the "physical" Cellebrite report recently disclosed to the defendant should be excluded under Rule 16(d)(2).

* * *

For the foregoing reasons, the Court:

1. DENIES as stated above Mr. Brown's Motion in Limine to Exclude Photographs of Text Messages (ECF No. 70);
2. GRANTS Mr. Brown's Motion in Limine to Exclude Irrelevant Backpage.com Postings (ECF No. 73);
3. OVERRULES the government's objection to Mr. Brown's Notice of Intent to Offer A.A.'s Statement (ECF No. 74) and DENIES its Motion in Limine to Exclude A.A.'s Statement (ECF No. 80) as stated;
4. GRANTS Mr. Brown's Motion in Limine to Exclude Photographs of Mr. Brown with A.A. and Another (ECF No. 75);
5. DENIES AS MOOT Mr. Brown's Motion for an Order Directing the Government to be More Specific (ECF No. 76); and
6. GRANTS Mr. Brown's Motion in Limine to Exclude the Third Last–Minute Disclosure of Evidence (Cellebrite Report) (ECF No. 83).

IT IS SO ORDERED:

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff,

v.

Iftikar AHMED, Defendant,

and

Iftikar Ali Ahmed Sole Prop; I–Cubed Domains, LLC; Shalini Ahmed; Shalini Ahmed 2014 Grantor Retained Annunity Trust; Diya Holdings LLC; Diya Real Holdings, LLC; I.I. 1, a minor child, by and through his next friends Iftikar and Shalini Ahmed, his

2020

UNITED STATES V. JONES, 438 F. Supp. 3d 1039, 1055 (N.D. Cal. 2020), appeal dismissed sub nom. United States v. Walker, No. 20-10099, 2020 WL 3067525 (9th Cir. Mar. 18, 2020) (Defendants argue that court must consider the issue of race in addressing whether defendant's movements should be characterized evasive to support a finding of reasonable suspicion)

JAMISON V. MCCLENDON, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020) (encouraging the Supreme Court to revisit qualified immunity standards where armed police officers stopped African American man's car without reasonable suspicion and searched the car without probable cause or voluntary consent, during a stop that lasted over one hundred and ten minutes).

2019

UNITED STATES V. BROWN, 925 F.3d 1150 (9th Cir. 2019) ("In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race.").

2016

COMMONWEALTH V. WARREN, 475 Mass. 530, 58 N.E.3d 333 (2016) (black flight is not always indicative of consciousness of guilt).

2015

RODRIGUEZ V. UNITED STATES, 575 U.S. 348, 354 (2015) (authority for a seizure ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed" because the purpose of a traffic stop is to address the traffic violation).

438 F.Supp.3d 1039
United States District Court, N.D. California.

UNITED STATES of America, Plaintiff,
v.
Darryl JONES and Gregory Airvurtis Walker, Defendants.

Case No. 19-cr-00013-SI-1
|
Signed 02/10/2020

Synopsis

Background: Defendants filed motion to suppress evidence discovered during an allegedly unlawful traffic stop and vehicle search.

Holdings: The District Court, Susan Illston, Senior District Judge, held that:

[1] municipal police officers could effect a traffic stop of motorist for allegedly making an unsafe lane change;

[2] officers prolonged stop in manner requiring an independent reasonable suspicion of criminal activity;

[3] mere smell of unburned marijuana emanating from car, following the legalization of cannabis and cannabis products in the State, did not provide officers with probable cause to believe that vehicle contained contraband;

[4] black motorist's allegedly evasive conduct, after noticing squad car pull up on his right, did not provide officers with reasonable suspicion of criminal activity; and

[5] motorists had "standing" to challenge warrantless search of vehicle.

Motions granted.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (24)

[1] Searches and Seizures Necessity of and preference for warrant, and exceptions in general

Basic rule is that warrantless searches conducted outside the judicial process, without prior approval of judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. U.S. Const. Amend. 4.

[2] Searches and Seizures Probable or reasonable cause

Under the "automobile" exception to the warrant requirement, a warrantless search of motor vehicle may be conducted if there is probable cause to believe the vehicle contains contraband. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[3] Searches and Seizures Presumptions and Burden of Proof

Government bears burden of establishing that a warrantless search was reasonable and did not violate the Fourth Amendment. U.S. Const. Amend. 4.

[4] Automobiles Grounds

Police officers may conduct a traffic stop, if they have a reasonable suspicion that motorist has committed a traffic violation. U.S. Const. Amend. 4.

[5] Automobiles Grounds

Reasonable suspicion that motorist has committed a traffic violation, such as a police officer must have in order to effect a traffic stop, is formed by specific, articulable facts which, together with objective and reasonable

inferences, form the basis for suspecting that motorist is engaged in such a traffic violation. U.S. Const. Amend. 4.

[6] **Automobiles** Grounds

Municipal police officers could effect a traffic stop of motorist for allegedly making an unsafe lane change based on motorist's actions, after noticing squad car pull up on his right in the outer left-hand turn lane, in braking after he executed the turn in order to allow squad car to pass, in abruptly cutting across three lanes of traffic in manner that narrowly missed squad car and allegedly caused the vehicle behind it to honk and brake, and in then entering a hotel parking lot on right-hand side of road. U.S. Const. Amend. 4; Cal. Veh. Code § 22107.

[7] **Automobiles** Detention, and length and character thereof

Traffic stops are presumptively temporary and brief.

[8] **Automobiles** Inquiry; license, registration, or warrant checks

Lawful traffic stop remains lawful only for so long as unrelated inquiries do not measurably extend the duration of the stop. U.S. Const. Amend. 4.

[9] **Automobiles** Detention, and length and character thereof

Automobiles Inquiry; license, registration, or warrant checks

Law enforcement officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. U.S. Const. Amend. 4.

[10] **Automobiles** Inquiry; license, registration, or warrant checks

Beyond determining whether to issue a traffic ticket, law enforcement officer, without unlawfully prolonging an otherwise valid traffic stop, may make ordinary inquiries incident to the stop, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. U.S. Const. Amend. 4.

[11] **Automobiles** Conduct of Arrest, Stop, or Inquiry

During routine traffic stop, police officer may conduct tasks connected to an unrelated criminal investigation only if officer has an independent, individualized, reasonable suspicion to support the unrelated criminal investigation activities. U.S. Const. Amend. 4.

[12] **Automobiles** Presumptions and Burden of Proof

Government, as party asserting that warrantless vehicular stop was justified as lawful traffic stop, has burden of production of coming forward with specific and articulable facts to support reasonable suspicion that motorist committed a traffic violation. U.S. Const. Amend. 4.

[13] **Automobiles** Detention, and length and character thereof

Automobiles Inquiry; license, registration, or warrant checks

While motorist's conduct, after noticing squad car pull up on his right in the outer left-hand turn lane, in braking after he executed the turn in order to allow squad car to pass, and in then cutting abruptly across three lanes of traffic in order to enter hotel parking lot on right-hand side of road, may have provided municipal police officers with reasonable grounds to believe that motorist had committed a traffic infraction by making unsafe lane change, as

required to conduct traffic stop of vehicle in parking lot, officers prolonged stop, in manner requiring an independent reasonable suspicion of criminal activity, by questioning motorist and his passenger about why they were at the hotel and about whether they had contraband in the car, inquiries unrelated to mission of the traffic stop, by ordering motorist out of the car, and by calling for and waiting for backup to arrive. U.S. Const. Amend. 4.

[14] **Automobiles** Detention, and length and character thereof

Officer may prolong a traffic stop if the prolongation itself is supported by independent reasonable suspicion, which exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion. U.S. Const. Amend. 4.

[15] **Arrest** Reasonableness; reason or founded suspicion, etc

"Reasonable suspicion" analysis for propriety of investigatory stop looks at whether the detaining officer had a particularized and objective basis for suspecting legal wrongdoing. U.S. Const. Amend. 4.

[16] **Arrest** Reasonableness; reason or founded suspicion, etc

"Reasonable suspicion" of criminal activity, of kind required for an investigatory stop, must be based on more than an officer's inchoate and unparticularized suspicion or hunch. U.S. Const. Amend. 4.

[17] **Automobiles** Drugs and narcotics

Even accepting officers' statements that they could detect the smell of unburned marijuana emanating from car which they had stopped, allegedly for making an unsafe lane change, mere smell of unburned marijuana emanating from car, following the legalization of cannabis and cannabis products in the State, did not provide officers with probable cause to believe that vehicle contained contraband, as required for officers to conduct a warrantless search of vehicle under "automobile" exception to the warrant requirement, nor did it provide even a reasonable basis for such a suspicion, as required for officers to prolong the stop. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[18] **Automobiles** Detention, and length and character thereof

Black motorist's allegedly evasive conduct, after noticing squad car pull up on his right in the outer left-hand turn lane, in braking after he executed the turn in order to allow squad car to pass, and in then cutting abruptly across three lanes of traffic in order to enter hotel parking lot on right-hand side of road, did not itself provide officers with a reasonable suspicion of criminal activity, of kind required to prolong traffic stop, especially given the motorist's race and alternate explanation that it suggested for his allegedly evasive conduct. U.S. Const. Amend. 4.

[19] **Criminal Law** Presumptions and burden of proof

Proponent of motion to suppress evidence discovered during an allegedly unconstitutional search or seizure bears the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. U.S. Const. Amend. 4.

[20] **Searches and Seizures** Standing to Object

Concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for unconstitutional search, but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits. U.S. Const. art. 3, § 1 et seq.; U.S. Const. Amend. 4.

[21] **Searches and Seizures** Automobile searches

Defendant who was not listed as authorized driver of a car rented by his aunt and initially driven with aunt's permission by her son, the defendant's cousin, before he asked the defendant to take over driving because he was tired, had a reasonable expectation of privacy in vehicle, of kind sufficient to give him "standing" to challenge police officers' warrantless search thereof after vehicle was stopped, allegedly because the defendant had executed an unsafe lane change; it did not matter that, at the time that defendant took over driving duties, he did not have a valid driver's license. U.S. Const. Amend. 4.

[22] **Searches and Seizures** Automobile searches

As general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy therein, of kind protected by the Fourth Amendment, even if the rental agreement does not list him or her as an authorized driver. U.S. Const. Amend. 4.

[23] **Searches and Seizures** Automobile searches

Even if defendant, as the unauthorized driver of car rented by his aunt and used by her son, the defendant's cousin, with the aunt's permission, did not have a reasonable expectation of privacy in vehicle while accompanying his cousin on trip, he could nonetheless challenge officers' warrantless search of vehicle as the fruit of their unlawfully prolonged stop of vehicle for executing an allegedly unsafe lane change. U.S. Const. Amend. 4.

[24] **Searches and Seizures** Automobile searches

Defendant who, at time of stop of vehicle in which he was riding as passenger, was still serving the custodial portion of prior sentence in halfway house, had "standing" to challenge police officers' warrantless search of vehicle, which he was using with his aunt's permission to travel from halfway house to place where he worked, notwithstanding the government's contention that defendant, being required to live in halfway house, had no legal right to be in vehicle; at time of vehicle stop, defendant was not an escapee, but was lawfully traveling to place where he was employed, and returned to halfway house at his scheduled return time, though much of the time that he was supposed to be at work, he was actually being detained by police following traffic stop. U.S. Const. Amend. 4.

Attorneys and Law Firms

***1042** Kevin James Barry, United States Attorney's Office, San Francisco, CA, for Plaintiff.

Candis Lea Mitchell, Office of the Federal Public Defender, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO SUPPRESS

Re: Dkt. Nos. 54, 55

SUSAN ILLSTON, United States District Judge

***1043** On January 14, 2020, the Court held a hearing on defendants' motions to suppress. At the hearing, the government requested leave to file supplemental briefing regarding whether defendant Darryl Jones had a reasonable expectation of privacy in the rental car. The government filed a supplemental brief on January 19, and defendant Jones filed a response on January 28, 2019. After careful consideration of the parties' arguments and the record before the Court, the Court GRANTS defendants' motions to suppress.

BACKGROUND [1]

I. Alleged traffic violation

On Tuesday, January 9, 2018, at approximately 12:40 a.m., defendants Darryl Jones and Gregory Walker were driving a white Ford Fusion in the Marina District of San Francisco. [2] Jones and Walker are cousins, and they are black. Jones was driving, and Walker was in the front passenger seat. The Ford Fusion was a rental car that had been rented by Walker's mother, Gina Huddleston, in her name. Huddleston Decl. ¶¶ 1-2 (Dkt. No. 67-1). Ms. Huddleston gave her son, Walker, permission to drive the car, and Walker gave Jones permission to drive the car. *Id.* ¶ 3; Supp. Jones Decl. ¶ 3 (Dkt. No. 74). [3]

Jones states in his declaration,

> 2. As I was driving on Franklin Street, I drove past a SFPD patrol car, which was stopped at a red light on a side street of Franklin.
>
> 3. In my rear view mirror, I saw the patrol car run a red light to turn onto Franklin Street behind my car.
>
> 4. In my rear view mirror, I saw the patrol car follow me for several blocks. [4] Finally, we stopped at a red light at the Lombard Street intersection. The patrol ***1044** car pulled up to the lane on my right side.

Jones Decl. ¶¶ 2-4 (Dkt. No. 54-2).

San Francisco Police Department Officers Robert Glenn and Trevor Roberts were on uniformed patrol, and they were in the patrol car that pulled up next to defendants' vehicle. Officer Glenn, who was driving, wrote in his Incident Report that when their patrol car was parallel to the Ford Fusion, "I looked over and made eye contact with the occupants ... driver Darryl Jones and ... passenger Gregory Walker whom immediately looked away from me." Incident Report at USA-000029 (Dkt. No. 63-1).

The intersection of Franklin Street and Lombard Street has two left-turn lanes; defendants' vehicle was in the inner left-turn lane, and the officers' car was in the outer left-turn lane. Both vehicles turned left onto Lombard Street. After turning left onto Lombard, Jones braked to allow the SFPD patrol car to pass him on the right, and then he merged three lanes over and pulled into the parking lot of the Redwood Inn at 1530 Lombard Street. Jones describes what happened as follows:

> 6. Shortly after turning onto Lombard Street, I saw a hotel called the Redwood Inn on the right side of the street. I looked in my rear view mirror to see if any cars were behind me. There were not; only the SFPD patrol car to my right.
>
> 7. I braked to allow the SFPD car to pass me on the right side, and then I turned on my blinker, merged three lanes over, and pulled into the Redwood Inn parking lot at 1530 Lombard Street.
>
> 8. After I pulled into the parking lot, I turned my vehicle around and began to back into a parking space.
>
> 9. After I backed in, I saw the same SFPD patrol car pull up across the entrance way of the hotel parking lot with its lights on. Because the car was parked in front of the entrance, blocking the only exit, I could not drive away from the lot.

Jones Decl. ¶¶ 6-9.

Officer Glenn's Incident Report states:

> As we got on to Lombard Street, the Ford came to a stop in the number one lane and began to turn right narrowly missing my vehicle. This turning movement made the vehicle behind us slam on their brakes and honk their horn (in violation of 22107(a) CVC). [5] The Ford crossed three lanes of traffic and pulled into the parking lot of 1530 Lombard Street. I was unable to safely maneuver my vehicle to effect a traffic stop on the vehicle. I made a lap around the block and waited facing south on Franklin Street at the intersection of Lombard Street to see if the vehicle was going to pull out of 1530 Lombard Street. As I was waiting I saw the vehicle start to pull onto Lombard Street from the parking lot. I pulled my vehicle to westbound Lombard Street so that I could effect a traffic stop on the Ford. As I turned onto Lombard Street I saw the driver Jones look in my direction. The Ford reversed back into the parking lot into a disabled parking spot.
>
> I saw that the Hotel employee Victor was looking at the car and then at Officer Roberts and me. I approached Victor and he stated that he saw the vehicle pull into the parking lot and then he saw ***1045** that the vehicle was going to leave but when the vehicle saw our police car they reversed into a parking spot. Victor stated that he was unsure if they were hotel guests. [6]

Incident Report at USA-000029.

II. Officer Glenn's interactions with Walker

While Officer Glenn was talking to the hotel employee Victor, Walker exited the vehicle.[7] Jones Decl. ¶ 10; Glenn's Incident Report at USA-000029. According to Officer Glenn's Incident Report, Glenn asked Walker what he and Jones were doing, and Walker stated that they were looking for a friend who was staying at the hotel. Glenn's Incident Report at USA-000029. Approximately 30 seconds into Officer Glenn's body cam footage, Officer Glenn asked for Walker's identification and subjected him to a pat-down search, which did not reveal any weapons or contraband. Mitchell Decl., Ex. B at 00:36. Walker then said, "... they didn't text me the address, but they right here," presumably referring to the friend(s) he had said he and Jones were visiting at the hotel. *Id.* at 00:44-00:48. Officer Glenn asked Walker if he knew the address of the hotel (Walker did not), and then Glenn told Walker to sit down on some stairs located to the right of the hotel lobby "so we can figure out what's going on." *Id.* at 00:49-00:58. Officer Glenn then asked Officer Roberts whether he had obtained Jones' identification yet, and he told Roberts to have Jones turn the car off. *Id.* at 01:05-01:10.

Officer Glenn then contacted dispatch and provided the address of the hotel, the license plate number of the Ford Fusion, and Walker's information for a records check. *Id.* at 01:28-02:27.[8] Approximately two and a half minutes into Officer Glenn's body cam footage, Officer Glenn told Walker, "So, being straight up with you man, it looks a little weird when we're stopped next to you guys, you guys cut across three lanes then pull into here. And then we come around the corner, and you guys were trying to pull out." *Id.* at 02:28-02:37. Walker responded (what he said is indecipherable on the body cam footage), and Glenn continued, "You know what I mean? Like, from my position, right, that seems like, a little weird for me. And then we come and the manager's standing out here and he's staring at us and then staring at you and staring at us and staring at you, [laughing] so, that's why we pulled in, and he's like 'these people, they pulled in, they pulled out,' so that's why we're talking to you guys, we're trying to figure out what's going on, make sure everything's on the up and up. If it ain't nothing, it ain't nothing. We'll get out of your guys' hair." *Id.* at 02:37-02:58. Officer Glenn then spoke to Officer Roberts and Jones, who are both off camera, and said that Jones ***1046** could step out of the car "if he wants, if he's nervous about something." *Id.* at 03:03. During this entire colloquy, Officer Glenn did not mention a traffic violation as the reason for the stop, nor did he mention anything about smelling marijuana.

Approximately four minutes into Officer Glenn's body cam footage, Officer Glenn asked Walker, "How much weed do you guys have in the car?" *Id.* 04:06. At the time Officer Glenn asked this question, he was standing close to Walker, who was still sitting on the steps.[9] Walker stated that there was none. Officer Glenn responded, "Nothing? Nothing? That's good. I like that." *Id.* at 04:14. Glenn then asked, "What have you been arrested for in the past?" *Id.* at 04:15-17. Walker answered, stating he had been arrested for possession of a firearm, and then Glenn continued to question Walker, asking if there were any other arrests and whether the possession charge had been discharged (Walker said it had). *Id.* at 04:18-04:44. Throughout this questioning, Walker continued to sit on the hotel stairs. Officer Glenn then informed Walker that Jones was on probation and that he did not have a valid driver's license, and that Walker's driver's license was valid. *Id.* at 04:50-05:54.

Approximately four minutes into Officer Glenn's body cam footage, Officer Glenn said, "If there ain't nothing in the car to worry about, there ain't nothing in the car to worry about, right? So if you guys are being on the up and up with us, it's gonna be all good. But if you're not, it's better to tell me now than later. You know what I mean?" *Id.* at 06:00-06:12. Walker responded with, "Yeah." *Id.*

III. Officer Roberts' interactions with Jones

While Officer Glenn was questioning Walker, Officer Roberts exited the patrol car to question Jones, who was sitting in the driver's seat of the Ford Fusion. Mitchell Decl. Ex. C (Officer Robert's body cam footage).[10] Officer Roberts stood by the driver's side and requested Jones' license and registration. *Id.* at 00:00-01:00. Roberts contacted dispatch and provided Jones' information for a records check. *Id.* at 01:26. Jones, apparently responding to hearing Officer Glenn say to Walker that "it looks a little weird when we're stopped next to you ..." said, "We was trying to pull into the hotel, and y'all was just, y'all ... we put on our blinkers and everything." *Id.* at 01:27. Officer Roberts responded, "Okay, well, then it was the manager that was a little off-put by it all too." *Id.* at 01:28-01:33. Jones then placed his hands outside the driver's side window, and after Officer Glenn said that Jones could step out of the car if he was nervous, Jones said, "No, I'm not nervous. I just don't want y'all to be nervous. I'm Gucci." *Id.* at 01:50-01:56.[11]

Jones continued to sit in the car while Officer Roberts stood next to the car, and ***1047** after another minute, Jones asked,

"We didn't break the law though or nothing, did we?" *Id.* at 02:56. Roberts responded, "We're just trying to make sure everything's good. If everything's good, you'll be on your way and we'll be on our way.... If there's nothing going on, you don't got to be nervous." *Id.* at 03:01-03:07. Officer Roberts said, "Like I said, the manager was just a little off-put, I don't know if he got a little spooked or whatever, but he asked us to check it out, and we're just here checking it out." *Id.* at 03:21-03:28. [12] At no point did Officer Roberts mention anything about an alleged traffic violation, nor did he ask Jones about marijuana: he did not ask him if there was any marijuana in the vehicle; did not ask him if he had been smoking marijuana; and he did not conduct a field sobriety test.

Officer Roberts then asked Jones why he was on probation, and Jones denied being on probation. [13] *Id.* at 03:55. Roberts then told Jones to get out of the car and to join Walker on the stairs. *Id.* at 04:18. After Jones exited the vehicle, Roberts told Jones to put his hands on his head and to turn around, and Jones asked if he was going to jail. *Id.* at 04:23. Roberts said "No, no, not right now, not if nothing's going on.... Like I said man, if nothing's going on, you don't need to be nervous." Officer Roberts proceeded to pat Jones down, and said "I'm just checking you to make sure you don't got any weapons right now, okay" *Id.* at 04:35. [14] Roberts searched Jones and did not find any weapons.

IV. Search of the vehicle

After Jones joined Walker on the steps, Officer Glenn questioned Jones about whether he was on probation, while Officer Roberts stood nearby. Mitchell Decl., Ex. B at 06:38. Jones stated that he had already completed his probation, and Officer Glenn said that he would double check. Glenn then said that Jones had a suspended driver's license "that he needs to take care of," that Walker had a valid driver's license, and asked "is there anything in the car we need to know about before we go – nothing in the car?" Walker said "no." *Id.* at 06:40-06:51. Officers Glenn and Roberts do not have any discussion about either of them smelling marijuana emanating from the vehicle. The officers did not request defendants' consent to search the vehicle.

Officer Glenn then walked to the car, while Officer Roberts stayed with Walker and Jones. Officer Glenn proceeded to search the car. *Id.* at 07:01. Officer Glenn shined his flashlight throughout the interior of the car, looked on the sides of the seats, rifled through papers and other items inside the car (including Jones' backpack), and opened up and looked through compartments, including the glove compartment and center console. *Id.*

After additional officers showed up, [15] and after Officer Glenn had been searching ***1048** the vehicle for almost four minutes, Officer Roberts joined Glenn to search the vehicle. *Id.* at 10:53. Officer Glenn told Roberts that he already checked the glove compartment, but to "double check everything." *Id.* at 10:56-11:01. Officer Roberts began to search the vehicle, and he commented that he can "smell marijuana." Mitchell Decl. Ex. C at 9:54. Glenn responded, "that reeks, right?" *Id.* at 9:57; Mitchell Decl. Ex. B at 11:06. Officer Roberts then found the firearm charged in this case underneath a food container on the passenger side floor. Mitchell Decl. Ex. C at 10:13-10:20; Krishnamurthy Decl., Ex. 5 (picture of firearm under food container). According to the government, the officers also found a closed, empty mason jar marijuana residue and a container with a partially burned marijuana cigarette. Krishnamurthy Decl., Ex. 4 (pictures of items); *see also* Glenn Decl. Ex. 1 at USA-000029 (Incident Report stating that Glenn "found several empty containers that smelled of marijuana.").

Officer Glenn then walked over to where Jones and Walker were being detained and said, "You know what happened, bro. Same thing I just asked you about, come on." Mitchell Decl. Ex. B at 11:44-11:46. Jones asked, "What happened?", and then Officer Glenn arrested him. *Id.* at 11:47-11:53. Jones continued to ask why he was being arrested and "what happened?" and Glenn told him that they would discuss it at the police station. *Id.* at 12:34-12:43.

Several minutes after the arrest, Officer Glenn called his sergeant. *Id.* at 19:07. Officer Glenn reported that they had arrested two individuals and that the car was parked on private property and would need to be towed. Glenn also told the sergeant, "So, they pulled into this parking lot for this hotel, and as we were driving by, the manager like, they were about to pull out, then they saw us, that we had made the block around, and so they were back-backing into the spot, so we kinda pulled in because the manager was looking at us, and he's like 'what's going on, why is this car here?' and we asked the manager if they were guests, and he said 'I don't think so,' so then we stared, the guy jumps out of the car, so we start talking to him, and then we run the other guy, and he's fourteen six with a suspended driver's license, so all in all, a bunch of suspicious behavior was afoot, and they parked in a handicapped spot." *Id.* at 19:10-20:31.

Officers Glenn and Roberts transported Jones and Walker to San Francisco Police Department, Central Station. At the station, Jones was questioned and he told Sergeants Manning and DeJesus that he found the gun in a brown paper bag in the Tenderloin neighborhood when he was on his way to work. Krishnamurthy Decl. Ex. 3. Walker denied that the gun was his and denied knowing that the gun was in the vehicle. *Id.*

Sergeant Manning prepared a "Chronological of Investigation." Mitchell Decl. Ex. D (Dkt. No. 54-1). That report states, *inter alia*, that at 5:45 a.m. on January 9, 2018, he arrived at the station and that he and Sergeant DeJesus were briefed by Officers Glenn and Roberts. The Chronological states,

- Officers inform us that they conducted a traffic stop on a white Ford Fusion.
- During the traffic stop the officers discovered that the drivers of the vehicle Jones had a suspended driver's license and was arrested on the scene. [16]

***1049** • During an inventory search of the vehicle officers discovered a loaded semi-automatic firearm under the front passenger seat of the Fusion.

...

Id. at USA-000015.

On January 10, 2019, the grand jury returned an indictment with forfeiture allegations charging defendants with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

V. Walker's status with the Bureau of Prisons at the time of the stop/search

At the time of the stop and search, Walker was still serving the custodial portion of the sentence imposed in *United States v. Walker*, CR 10-772-SI. [17] Walker was living at RRC Taylor Street Facility, a halfway house. The government has submitted Walker's furlough application, in which he agreed,

> I am authorized to be only in the area of the destination shown above [address of RRC Taylor Street Facility] and ... I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General, punishable as provided in Section 751 of Title 18, United States Code....

Krishnamurthy Decl., Ex. 7.

LEGAL STANDARD

[1] **[2]** **[3]** The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." U.S. Const. amend. IV. When a search is conducted without a warrant, the analysis begins "with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). For example, because there is a lesser expectation in the privacy of one's vehicle than of one's person, a warrantless search of a vehicle may be conducted if there is probable cause to believe the vehicle contains contraband. *United States v. Ross*, 456 U.S. 798, 799, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The government bears the burden of establishing that a warrantless search was reasonable and did not violate the Fourth Amendment. *United States v. Carbajal,* 956 F.2d 924, 930 (9th Cir. 1992), *cert. denied,* 510 U.S. 900, 114 S.Ct. 272, 126 L.Ed.2d 223 (1993) (citations omitted).

DISCUSSION

Defendant Jones moves to suppress all fruits of the warrantless seizure of his person and the search of the Ford Fusion, ***1050** including but not limited to, the firearm found in the car and any statements that he made after his arrest. Defendant Walker also moves to suppress "evidence from his

detention, arrest and search of his person and automobile." Def. Walker's Mtn. at 8 (Dkt. No. 55). Defendants contend that there was no reasonable suspicion to support the initial seizure during the traffic stop. Defendants also argue that even if there was reasonable suspicion to support the initial seizure, the officers unconstitutionally prolonged the stop by conducting tasks unrelated to the traffic stop. Defendants also contend that there was no probable cause to support the search of the vehicle pursuant to the automobile exception. [18]

I. Reasonable suspicion for initial seizure [19]

Defendants contend, and the government does not dispute, that defendants were seized within the meaning of the Fourth Amendment at the time that the officers blocked the exit to the parking lot of the Redwood Inn and approached defendants. *See* *Brendlin v. California*, 551 U.S. 249, 254, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) ("A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, " 'by means of physical force or show of authority,' " terminates or restrains his freedom of movement," "through means intentionally applied.") (internal citations omitted).

[4] **[5]** The government defends the seizure as a valid traffic stop. Police officers may conduct a traffic stop when they have reasonable suspicion to believe that a motorist has committed a traffic violation. *See* *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000); *see also* *United States v. Willis*, 431 F.3d 709, 717 (9th Cir. 2005) ("*Whren* and *Lopez–Soto* require that the officers have reasonable suspicion to stop a driver for traffic infractions, not that the officers issue citations."). [20] "Reasonable suspicion is formed by 'specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.' " *Lopez-Soto*, 205 F.3d at 1105.

[6] The government contends that the officers had reasonable suspicion to believe that Jones had committed a violation of California Vehicle Code § 22107 for making an unsafe lane change. The government asserts that when Jones merged over three lanes to pull into the Redwood Inn parking lot, the Ford Fusion narrowly missed hitting the patrol car and that a ***1051** vehicle behind the patrol car had to brake and honked. Jones argues that he did not commit a traffic violation and he asserts that there is a factual dispute requiring an evidentiary hearing. Jones cites his declaration, in which he states that prior to merging he "looked in my rear view mirror to see if any cars were behind me. There were not; only the SFPD patrol car to my right." Jones Decl. ¶ 6.

The Court is not persuaded that there is a factual dispute requiring an evidentiary hearing. Officer Glenn stated in both his Incident Report and the declaration submitted to this Court that when the Ford Fusion merged three lanes, the vehicle narrowly missed the patrol car and caused the vehicle behind the patrol car to slam on its brakes and honk its horn. *See* Mitchell Decl. Ex. A at USA-000029 (Incident Report); Glenn Decl. ¶¶ 5-6 (Dkt. No. 63). Although Jones states in his declaration that "I braked to allow the SFPD car to pass me on the right side, and then I turned on my blinker, merged three lanes over, and pulled into the Redwood Inn parking lot," Jones does not state that the Ford Fusion did not narrowly miss the patrol car when merging. In addition, although Jones states that there were no cars "behind me," he does not state that there were no cars behind the patrol car.

The Court concludes that the government has met its burden to show that the initial seizure of defendants was permissible insofar as the officers had reasonable suspicion to believe that Jones had committed a traffic violation. Defendants do not dispute that Jones crossed over three lanes to pull into the parking lot, and Officer Glenn's Incident Report and declaration state that defendants' car narrowly missed hitting the patrol car and that another vehicle was forced to slam on its brakes and honk as a result of the Ford Fusion's movements.

II. The traffic stop was unduly prolonged

[7] **[8]** **[9]** **[10]** **[11]** **[12]** "Traffic stops are 'presumptively temporary and brief.' " *United States v. Gorman*, 859 F.3d 706, 714 (9th Cir. 2017) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). "The vast majority of roadside detentions last only a few minutes." *Berkemer*, 468 U.S. at 437, 104 S.Ct. 3138. The Supreme Court held that a traffic stop "seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' " *Rodriguez v. United States*, 575 U.S. 348, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015). "An officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop. But ... he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily

demanded to justify detaining an individual." *Id.* The Court held that "[b]eyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop[,]' " such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* To conduct tasks connected to an unrelated criminal investigation, an officer must have independent individualized reasonable suspicion to support the unrelated criminal investigation activities. *Id.* at 1615-16; *Gorman*, 859 F.3d at 715 ("Police simply may not perform unrelated investigations that prolong a stop unless they have 'independent reasonable suspicion justifying [the] prolongation.' "). The government has the burden of production of coming forward with "specific and articulable facts" to support reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Willis*, 431 F.3d at 715 n.5 (on motion to suppress evidence based on traffic stop, stating that the government has ***1052** the burden of production to come forward with specific and articulable facts to support reasonable suspicion, and defendant has the ultimate burden of proof).

Defendants contend that even if the officers had reasonable suspicion for the traffic stop, the officers impermissibly prolonged the traffic stop by calling and waiting for backup, asking for Walker's identification, running ex-felon records checks on Jones and Walker,[21] removing Jones from the car, and searching the vehicle. Defendants argue that all of these tasks are unrelated to the mission of the traffic stop, and that they unlawfully prolonged the traffic stop.

[13] The Court concludes that although the officers may have had reasonable suspicion to justify the traffic stop, once the officers detained defendants in the parking lot, they conducted numerous tasks unrelated to the traffic stop that prolonged the traffic stop, such as calling for backup, questioning Walker and Jones about why they were in the Redwood Inn parking lot and whether there was any contraband in the vehicle. The Court finds it significant that although the record supports a finding of reasonable suspicion to justify the traffic stop, the officers never mentioned the alleged traffic violation to defendants (even when the defendants asked what they had done wrong), and instead the officers immediately began to question Walker and Jones about matters unrelated to the alleged traffic violation. These activities, as well as calling for backup and directing Jones to get out of the car and sit next to Walker, significantly prolonged the "traffic stop," and they were unrelated to the mission of the traffic stop. *See* *Gorman*, 859 F.3d at 715 (questioning motorist about matters unrelated to traffic infraction was beyond the scope of stop's mission and instead was "impermissibly aimed at detecting evidence of ordinary criminal wrongdoing") (internal quotation marks and citation omitted); *Evans*, 786 F.3d at 786 (law enforcement impermissibly extended a traffic stop by asking questions unrelated to traffic safety and unsupported by separate reasonable suspicion).

Indeed, at the hearing the government conceded that the officers conducted some tasks – such as questioning defendants about why they were at the hotel and Officer Glenn asking Walker about whether there was contraband in the car – that were unrelated to the mission of the traffic stop, and that those tasks prolonged the traffic stop. However, the government asserts that there was independent reasonable suspicion to justify those activities, namely the "the smell of marijuana emanating from the car and the Ford's evasive movements." Opp'n at 8 (Dkt. No. 62). Thus, unless the officers had reasonable independent suspicion to justify the unrelated ***1053** tasks, the seizure was unconstitutional.

III. The officers lacked independent reasonable suspicion to prolong traffic stop or probable cause to support search of vehicle pursuant to automobile exception

The government contends that the same facts support reasonable suspicion to conduct investigative activities unrelated to the mission of the traffic stop and probable cause to search the vehicle. Specifically, the government argues that the Ford's "evasive movements" and the smell of unburned marijuana emanating from the car provided reasonable suspicion for the officers to question Walker and Jones and prolong the traffic stop, and that the Ford's evasive movements and the smell of unburned marijuana provided probable cause to believe that the Ford contained contraband, thus justifying the search of the vehicle pursuant to the automobile exception.

[14] **[15]** **[16]** "[A]n officer may prolong a traffic stop if the prolongation itself is supported by independent reasonable suspicion," which "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion." *Evans*, 786 F.3d at 788 (emphasis in original).

The reasonable suspicion analysis looks "at whether the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). "Reasonable suspicion must be based on more than an officer's 'inchoate and unparticularized suspicion or hunch.' " *United States v. Thomas*, 211 F.3d 1186, 1192 (9th Cir. 2000) (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868).

The Supreme Court has held that police may conduct a warrantless search of a vehicle if they have probable cause to believe that the vehicle contains contraband. *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *see also United States v. Brooks*, 610 F.3d 1186, 1193 (9th Cir. 2010) ("[Police may conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime].... 'Probable cause to search is evaluated in light of the totality of the circumstances.' ") (citations omitted).

A. Odor of unburned marijuana

[17] The government argues that the officers had reasonable suspicion to prolong the traffic stop and probable cause to search the vehicle because the officers could smell the odor of unburned marijuana emanating from the car. The government contends that although California has decriminalized the possession of small amounts of marijuana, possession of marijuana is still illegal under federal law, and thus the officers could rely on the smell of marijuana to believe that the vehicle contained contraband.

Defendants dispute as a factual matter whether either officer smelled marijuana emanating from the car prior to the search, and they argue that the body cam footage and other evidence is inconsistent with two officers who smelled marijuana during a traffic search. *See generally* Jones' Reply at 8-10. Defendants also contend that even if the officers did smell unburned marijuana from the car, that fact does not provide reasonable suspicion or probable cause to believe that the car contained contraband after the passage of Proposition 64.

Proposition 64, passed in November 2016, decriminalized the possession of less than 28.5 grams of marijuana by persons 21 years or older. *See* Cal. Health & Safety Code § 11357(b)(2). Proposition 64 changed ***1054** California law to provide that "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct lawful by this section shall constitute the basis for detention, search or arrest." Cal. Health & Safety Code § 11362.1(c).

District courts in this District have split on the question of whether, after the enactment of Proposition 64, the odor of marijuana alone supports probable cause to search a vehicle. *Compare* *United States v. Martinez*, Case No. 17-CR-00257-LHK, 2018 WL 3861831, at *5 (N.D. Cal. Aug. 14, 2018) (marijuana odor alone provides probable cause after Proposition 64), *with* *United States v. Maffei*, 417 F.Supp.3d 1212, 1223-29 (N.D. Cal. 2019) (after Proposition 64, marijuana smell alone does not provide probable cause to believe contraband is in vehicle). *Martinez* and *Maffei* are both on appeal before the Ninth Circuit Court of Appeals, and argument is scheduled in *Martinez* for March 3, 2020.[22] Thus, the Ninth Circuit will soon address the precise question presented here, namely whether the odor of marijuana may justify a warrantless search of a vehicle under the automobile exception.

The Court agrees with the reasoning and analysis of Judge Gonzalez Rogers in *Maffei*, and for the same reasons set forth in her order, the Court concludes that even if the officers smelled unburned marijuana emanating from the Ford Fusion, that smell did not provide either reasonable suspicion or probable cause to believe that there was contraband in the Ford Fusion. After Proposition 64, California law now explicitly provides that "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section *are not contraband* nor subject to seizure, *and no conduct lawful by this section shall constitute the basis for detention, search or arrest.*" Cal. Health & Safety Code § 11362.1(c) (emphasis added). Officers Glenn and Roberts are San Francisco Police Department officers charged with enforcing California law, not federal law, and the Court is not persuaded by the government's arguments that notwithstanding the passage of Proposition 64, the officers could rely on the smell of marijuana alone to search the car because marijuana is illegal under federal law.

Further, the government does not assert – and there is no evidence – that there are any other objective, specific facts that the officers relied upon to believe that the defendants had contraband in the car. For example, the officers did not see any drugs or drug paraphernalia in plain view (California

Health & Safety Code § 11362.3(a)(4) prohibits transporting open containers of cannabis or cannabis products while driving).[23] Similarly, the government does not assert that the officers believed that Jones was driving under the influence of marijuana (which would be a crime, *see* Cal. Health & Safety Code § 11362.3(a)(7)), and indeed the officers did not ask Jones any questions about whether he had used marijuana nor did they conduct a field sobriety test.

***1055 B. "Evasive" movements of the Ford Fusion**

[18] The government also argues that the "evasive" movements of the Ford Fusion provided reasonable suspicion. The government relies on *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), for the proposition that "nervous behavior is a pertinent factor in determining reasonable suspicion." The government argues, "[t]he officers saw the car cut through three lanes to drive into a parking lot that the defendants had no business stopping in, and then drive back into that same parking lot as soon as they saw the officers. The officers' observations were confirmed by the hotel manager at the time, and Walker's own admissions." Gov't Opp'n at 10. The government asserts that "[t]his 'obvious attempt[ ] to evade officers' " supports reasonable suspicion. *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)).

Defendants respond that the car's movements were not evasive and in any event could not provide a particularized basis for suspecting wrongdoing. Defendants argue that the car's movements – turning into a hotel parking lot and reversing into a parking space – are far from an "obvious attempt to evade officers," and defendants note that *Brignoni-Ponce* involved the factually distinct circumstances of a traffic stop in a border area. *See id.* at 885, 95 S.Ct. 2574 ("Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area."). Defendants also assert that the government has not shown that defendants "had no business" at the hotel, and they note that Victor, the hotel employee, told officers that he did not know whether defendants were hotel guests or not.

Defendants also argue that even if the government could show that Jones' car movements were "evasive," the Court must consider the surrounding context of the encounter before determining that the movements support a finding of reasonable suspicion (or probable cause), and that specifically the Court must consider the issue of race. Defendants cite *United States v. Brown*, 925 F.3d 1150, 1156 (9th Cir. 2019), in which the Ninth Circuit stated, "In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race." "Flight can be a problematic factor in the reasonable suspicion analysis because some citizens may flee from police for their safety," particularly black male citizens who bear the disproportionate "burden of aggressive and intrusive police action." *Id.* In *Brown*, the Ninth Circuit held that the police did not have reasonable suspicion to stop the defendant based on an anonymous tip provided through a 911 call. The anonymous tipster had reported that a young black male of medium build with dreadlocks, a camouflage jacket, and red shoes, was carrying a gun. *Brown*, 925 F.3d at 1151. Officers on patrol heard and responded to the 911 call, and they saw Brown on foot and determined that he matched the 911 description. The officers followed Brown for several blocks, called for backup, and after the officers turned on their patrol lights, Brown ran. The officers chased Brown, ordered him to the ground at gunpoint, handcuffed him, and found drugs and a weapon on him.

The district court denied Brown's motion to suppress and the Ninth Circuit reversed. The Ninth Circuit noted that "the Supreme Court has never endorsed a per se rule that flight establishes reasonable suspicion. Instead, the Court has treated flight as just one factor in the reasonable suspicion analysis, if an admittedly significant one." *Id.* at 1154. The Ninth Circuit held,

> ***1056** [I]n the face of a weak tip, this case presents little more than a black man walking down the street in Belltown, which the government does not argue is a "high crime" area. There is no evidence that Brown was in an area known for unlawful gun possession, unlike the "heavy narcotics trafficking area" in *Wardlow*, nor did the officers observe Brown holding something or walking in a particular way that would corroborate the information that he might be carrying a gun. Brown did not refuse to speak with

> the officers after a verbal request. Although Brown's flight might be suggestive of wrongdoing, it did not corroborate any reliable suspicion of criminal behavior.

Id. at 1156. The Ninth Circuit continued,

> In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race. In explaining his understanding of the limits of the Court's opinion in *Wardlow*, Justice Stevens recognized that flight can be a problematic factor in the reasonable suspicion analysis because some citizens may flee from police for their safety. *See* *Wardlow*, 528 U.S. at 126–140, 120 S.Ct. 673 (Stevens, J., concurring in part and dissenting in part). Several years before Justice Stevens' concurrence, our court addressed at length "the burden of aggressive and intrusive police action [that] falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter neither society nor our enforcement of the laws is yet color-blind." *Washington v. Lambert*, 98 F.3d 1181, 1187–88 (9th Cir. 1996). There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.
>
> In the almost twenty years since Justice Stevens wrote his concurrence in *Wardlow,* the coverage of racial disparities in policing has increased, amplifying awareness of these issues. This uptick in reporting is partly attributable to the availability of information and data on police practices. Although such data cannot replace the "commonsense judgments and inferences about human behavior" underlying the reasonable suspicion analysis, *Wardlow*, 528 U.S. at 125, 120 S.Ct. 673, it can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise. *See* *id.* at 133, 120 S.Ct. 673 ("Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices." (footnote omitted)). Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop.

Id. at 1156-57 (internal footnote omitted);

Jones argues,

> Mr. Jones and Walker—two black men—were driving in the very-white Marina District of San Francisco, past midnight, on a weeknight, after a police car tailed them for several blocks. Perhaps Mr. Jones and Walker, uncomfortable by the police following them, and motivated by "a simple desire not to interact with police," decided to turn off the road. *Brown*, 925 F.3d at 1156. Essentially validating defendants' worry that they looked out of place because of their skin color, the government assumes —without citation or justification—that Mr. Jones's car "dr[o]ve into a parking lot that the defendants ha[d] no business stopping in." Gov't reply at 10. The government has presented no ***1057** evidence whatsoever that the men "had no business" in the hotel parking lot. Moreover, it was their right to do so—whether they were hotel guests or merely wanted to avoid a police encounter.

Jones' Reply at 7 (Dkt. No. 67).

The Court agrees with defendants and finds that the government has not met its burden to show that the officers had a "particularized and objective basis for suspecting legal wrongdoing," as opposed to an "inchoate and unparticularized suspicion or hunch." Even if the movements of the Ford Fusion could be characterized as "evasive," that does not provide a particularized basis for believing that the defendants had engaged in any criminal conduct. Further, the Court "cannot totally discount the issue of race," *Brown*, 925 F.3d at 1156. Without anything more specific to indicate that defendants had engaged in criminal conduct, the Court finds that "evasive" driving does not provide a particularized and objective basis to permit the officers to prolong a traffic stop by investigating criminal conduct unrelated to the traffic stop.

The Court notes that Officer Glenn's declaration does not provide any information about what specific criminal conduct [24] the officers suspected defendants were engaged in, nor do the officers' Incident Reports contain such information. The Court is troubled by the fact that from the very inception of the stop, the officers (and Officer Glenn in particular)

questioned defendants about what they were doing, their criminal history, why they were at the parking lot, and whether there was anything illegal in the car. Indeed, it would be fair to characterize the entire "traffic stop" as a seizure during which the officers investigated matters unrelated to the alleged traffic violation. The statements made by the officers are compelling evidence that the officers were acting on an unparticularized suspicion or hunch that there was something "a little weird" going on, as opposed to having a particularized and objective basis to believe that the defendants had engaged in criminal conduct. *See* Mitchell Decl. Ex. B at 02:37-58. The officers repeatedly stated that they were trying to "figure out what's going on" and "make sure everything's good" and "make sure everything's on the up and up." *Id.* at 00:49-58, 02:37-02:58; Mitchell Decl. Ex. C at 03:01-03:07.

In sum, the Court concludes that under the totality of the circumstances, the officers did not have reasonable suspicion to prolong the traffic stop, nor did they have probable cause to search the vehicle, even if the movements of the Ford Fusion could be characterized as "evasive" and even if the officers smelled unburned marijuana emanating from the car. The "evasive" movements of the car did not provide a particularized basis for believing that the defendants had engaged in any criminal conduct. Following passage of Proposition 64, the smell of unburned marijuana – without any other facts such as seeing marijuana in plain view or suspecting the driver of having smoked marijuana prior to driving – does not provide a basis to believe that the defendants possessed contraband in their car. [25]

***1058 IV. Defendants' expectation of privacy in the car**

[19] **[20]** The government contends that neither defendant had a reasonable expectation of privacy in the Ford Fusion and thus that they cannot challenge the search of the vehicle. The government frames this question as one of standing. "[T]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 131 n.1, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Caymen*, 404 F.3d 1196, 1199 (9th Cir. 2005). The Supreme Court has recently instructed that "[t]he concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." *Byrd v. United States*, —— U.S. ——, 138 S. Ct. 1518, 1530, 200 L.Ed.2d 805 (2018).

1. Jones

[21] The government contends that Jones did not have a legitimate expectation of privacy in the Ford Fusion because the car was rented by Walker's mother, Walker's mother did not give him permission to drive, Jones did not have a valid driver's license, and Jones was driving the car for a short period of time with Walker in the car the entire time. The government argues that these facts show that Jones did not lawfully possess or control the Ford Fusion, and thus that he did not have a legitimate expectation of privacy in the car. In support of these arguments, the government largely relies on cases outside the Ninth Circuit. *See, e.g.*, *United States v. Lyle*, 919 F.3d 716, 729 (2d Cir. 2019) (holding the defendant did not have a reasonable expectation of privacy when he was driving a rental car because he was both an unauthorized driver and because he had a suspended license: "Lyle should not have been driving any car because his license was suspended, and a rental company with knowledge of the relevant facts certainly would not have given him permission to drive its car nor allowed a renter to let him do so. Under these circumstances, Lyle did not have a reasonable expectation of privacy in the rental car."); *United States v. Almeida*, 748 F.3d 41, 45, 47-48 (1st Cir. 2014) (holding the non-owner defendant, who had driven the car previously but who was a passenger during the stop and search, did not have a reasonable expectation of privacy in the car).

[22] In *Byrd v. United States*, the Supreme Court held that "as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver." 138 S. Ct. at 1524. The government asserts, "Significantly, however, the Supreme Court did not hold that an unauthorized driver of a rental car necessarily has standing," and it cites Justice Alito's concurrence in which he wrote,

> Relevant questions bearing on the driver's ability to raise a Fourth Amendment claim may include: the terms of the particular rental agreement; the circumstances

> surrounding the rental; the reason why the driver took the wheel; any property right that the driver might have had; and the legality of his conduct under the law of the State where the conduct occurred.

Id. at 1531-32 (Alito, J., concurring). The Supreme Court held that an unauthorized driver of a rental car could have a legitimate expectation of privacy if the driver had "lawful possession and control and the ***1059** attendant right to exclude," and where the Supreme Court noted that "there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it – perhaps the renter is drowsy or inebriated." *Byrd*, 138 S. Ct. at 1528-29.

Jones argues that under *Byrd* he has a legitimate expectation of privacy in the vehicle. Jones also argues that *Lyle* is not binding on this court, and he notes that the Second Circuit in *Lyle* expressly stated that its holding differed from the approach of the Ninth Circuit in *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006). *See* *Lyle*, 919 F.3d at 729-30 ("[U]nlike the Eighth and Ninth Circuits, which have held that a defendant may have standing to challenge the search of a rental car despite lacking a valid license and authorization under the rental agreement if he received an authorized driver's permission, *United States v. Best*, 135 F.3d 1223 (8th Cir. 1998); *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006), we conclude that an authorized renter's permission is not determinative of whether a defendant has a reasonable expectation of privacy.").

In *Thomas*, the Ninth Circuit held that "an unauthorized driver who received permission to use a rental car and has joint authority over the car may challenge the search to the same extent as the authorized renter." 447 F.3d at 1199. The driver in *Thomas* had tried to rent the car from the rental agency but the agency refused to rent to him because he had unpaid fees, and then another individual rented the car and gave Thomas permission to drive the car. *Id.* at 1194-95. When police officers stopped Thomas, he provided a driver's license bearing the name of an another individual. *Id.* at 1195. The officer searched the car and found, among other items, cocaine and heroin. In the district court, Thomas moved to suppress the evidence seized in the search of the rental car. The district court denied the motion on the ground that "an unauthorized driver of a rental car has no expectation of privacy, so Thomas lacked standing to challenge the search." *Id.* at 1196.

The Ninth Circuit reversed, holding that "an authorized driver may have standing to challenge a search if he or she has received permission to use the car." *Id.* at 1199.[26] The court framed the relevant inquiry as "whether an unauthorized driver has a possessory or ownership interest in the car," and stated that "[a] 'possessory or ownership interest' need not be defined narrowly: A reasonable expectation of privacy may be shown 'either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " *Id.* at 1197-98 (quoting *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998)). "[A] defendant who lacks an ownership interest may still have standing to challenge a search, upon a showing of 'joint control' or 'common authority' over the property searched." *Id.* at 1198 (citing *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980) (holding non-owner has standing to challenge a search where he has "permission to use his friend's automobile and the keys to the ignition and the trunk, with which he could exclude all others, save his friend, the owner")). The Ninth Circuit found that on the facts of that case, Thomas had not shown that he, ***1060** in fact, had the permission of the renter to drive the car, and thus he could not challenge the search.

The Court concludes that under the totality of the circumstances, Jones had a reasonable expectation of privacy in the Ford Fusion. Jones and Walker are cousins, and the car was rented by Walker's mother/Jones' aunt. *See* *Thomas*, 447 F.3d at 1197 (indicating that relationship between driver and owner/renter is relevant to determining expectation of privacy). Walker's mother gave Walker permission to drive the car, and Walker asked Jones to drive because he was tired. *See* *Byrd*, 138 S. Ct. at 1528-29 ("there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car and drive it – perhaps the renter is drowsy or inebriated."). At the time of

the stop and seizure, Jones was driving with the permission of Walker, and Jones had possessions in the vehicle (such as his backpack, which was searched). Before the police approached the vehicle, Walker exited the car, leaving Jones with sole possession of the car and its keys. *See* *Portillo*, 633 F.2d at 1317. Jones had "complete dominion and control over" the car at the time of the stop and seizure. The Court acknowledges that Jones did not have a valid driver's license, and this fact does somewhat diminish the reasonableness of Jones' expectation of privacy. However, as Jones notes, the driver in *Thomas* also did not have a valid driver's license. The Court concludes that notwithstanding his suspended license, under all of the circumstances, Jones had a reasonable expectation of privacy in the car that he was driving when the officers conducted the stop and search.

[23] Further, even if Jones did not have a reasonable expectation of privacy in the car, he can still challenge the search of the vehicle as the fruit of the unlawfully prolonged seizure. In *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000), the Ninth Circuit held that a passenger "who has no expectation of privacy in a car that would permit [his] Fourth Amendment challenge to a search of the car ... may challenge a stop of a vehicle on Fourth Amendment grounds even if she has no possessory or ownership interest in the vehicle." *Id.* at 1095 (internal citations and quotation marks omitted). The Ninth Circuit held that "while Twilley does not have standing to challenge the search directly, if the defendant could establish that the initial stop of the car violated the Fourth Amendment, then the evidence that was seized as a result of that stop would be subject to suppression as 'fruit of the poisonous tree.' " *Id.* (internal citation and quotation marks omitted); *see also* *United States v. Rodriguez-Escalera*, 884 F.3d 661, 667, 672 (7th Cir. 2018) (where traffic stop was lawful at its inception but unlawfully prolonged and passenger lacked standing to directly challenge search of vehicle, holding passenger could nevertheless could challenge search of vehicle as fruit of the unlawful seizure and affirming district court's suppression order).

2. Walker

[24] The government raises a different challenge to Walker's expectation of privacy in the rental car. The government contends that "Walker lacks standing to contest the search of the car because someone who is 'wrongfully on a premises [can] not move to suppress evidence obtained as a result of searching them.' " Opp'n at 5 (quoting *Rakas v. Illinois*, 439 U.S. 128, 141, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). The government notes that at the time of the stop and search, Walker was still serving the custodial portion of the sentence imposed in *United States v. Walker*, CR 10-772-SI, and the government asserts that Walker had failed to "remain within the extended limits of [ ]his confinement." ***1061** Krishnamurthy Decl., Ex. 7. The government has submitted Walker's furlough application to RRC Taylor Street Facility, in which he agreed,

> I am authorized to be only in the area of the destination shown above [address of RRC Taylor Street Facility] and ... I understand that my furlough only extends the limits of my confinement and that I remain in the custody of the Attorney General of the United States. If I fail to remain within the extended limits of this confinement, it shall be deemed as escape from the custody of the Attorney General, punishable as provided in Section 751 of Title 18, United States Code....

Id. The government has also submitted a copy of a "Center Discipline Committee Report," from the Federal Bureau of Prisons, which states that Walker was found to have been in an "unauthorized vehicle" (among other charges, including "possession of weapon") based upon the events of January 8-9, 2018, and that he was disciplined as a result. Krishnamurthy Decl., Ex. 8. As noted *supra*, at the hearing the government appeared to back away from its assertion that because Walker was serving the custodial portion of his sentence at a halfway-house, he was akin to an inmate who does not have any Fourth Amendment protections. [27] However, the government continued to argue that because Walker was not authorized to be in the car, he did not have a reasonable expectation of privacy in the car such that he can challenge the search of the vehicle.

Walker contends that he had a reasonable expectation of privacy in the Ford Fusion. Walker notes that he was authorized to work at On-Trac located in South San Francisco, and that at the time of the stop he was on his way to work. Walker notes that while he was disciplined, he was never

determined to be on escape status or determined to have absconded from custody. Walker also notes that he returned to the halfway-house at the appointed hour (by 10:30 a.m.), albeit after having been in police custody for much of the time allotted for work. Walker argues that all of the cases cited by the government are factually distinguishable in that they involved escapees and fugitives.

***1062** The Court concludes that Walker had a reasonable expectation of privacy in the vehicle and thus he can challenge the search of the car. Walker's mother rented the vehicle and gave him permission to drive it. At the time of the seizure and search, Walker had authorization to leave the halfway house to go to work, and he was in fact on his way to work when defendants were stopped. Further, for the same reasons stated above with regard to Jones, even if Walker did not have a reasonable expectation of privacy in the vehicle because he was not authorized to be in it, he nevertheless can challenge the search of the vehicle as a result of the unlawfully prolonged traffic stop. *See* *Twilley*, 222 F.3d at 1095; *Rodriguez-Escalera*, 884 F.3d 661 at 672.

CONCLUSION

For the reasons set forth above, the Court GRANTS defendants' motions to suppress.

IT IS SO ORDERED.

All Citations

438 F.Supp.3d 1039

Footnotes

1 The following facts are taken from the parties' exhibits and declarations, including but not limited to the declarations of defendant Darryl Jones, the declaration of Gina Huddleston, the declaration of San Francisco Police Department Officer Robert Glenn, incident reports prepared by Officers Glenn and Roberts, and the officers' "body cam" video footage.

2 Defendants cite a report by the San Francisco Planning Department for the proposition that the Marina is the least ethnically diverse neighborhood in San Francisco. The government does not address (or dispute) that assertion. According to the report, the ethnic breakdown of the Marina neighborhood is as follows: Asian 11%, Black/African-American 1%, White 83%, Native American Indian 0.1%, Native Hawaiian/ Pacific Islander 0.1%, Other/Two or More Races 4%, Latino (of Any Race) 6%. *See* San Francisco Neighborhoods, Socio-Economic Profiles: American Community Survey 2010-2014, San Francisco Planning Department (March 2017), at 40; available at https://default.sfplanning.org/publications_reports/ SF_NGBD_SocioEconomic_Profiles/2010-2014_ACS_Profile_Neighborhoods_v3AH.pdf.

3 Jones states in his supplemental declaration that on January 9, 2018, Walker picked him up in the Ford Fusion and that they drove to a gas station. Supp. Jones Decl. ¶¶ 1-2. According to Jones, while they were at the gas station, Walker said he was tired and he asked Jones to drive. *Id.* at ¶ 3. Jones states that Walker gave him permission to drive. *Id.*; *see also* Krishnamurthy Decl., Ex. C at 18:00-23:25 (audio recording of police station interview with Walker in which Walker told police officers that he had given Jones the car and that they were driving to get some pizza when they were stopped by the police. Walker told the police that Jones was supposed to drive Walker to work for a shift that started at 2:30 a.m.).

4 Defendants assert that the patrol car tailed them for several blocks. The government does not dispute that assertion.

5 California Vehicle Code section 22107 provides, "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement." Cal. Veh. Code § 22107.

6 Defendants assert that the hotel employee Victor did not ask the officers to investigate defendants, noting that the Incident Reports do not state that Victor asked for help. The government does not contend that Victor asked the officers to investigate.

7 Officer Glenn turned on his body cam at some point prior to Walker exiting the vehicle. Officer Glenn's body cam footage, which was filed by both parties, begins with Officer Glenn facing Walker while he is standing some distance in front of the Ford Fusion in the hotel parking lot. The first 30 seconds of the footage does not contain audio. Officer Glenn's body cam footage does not include his initial interaction with Victor, the hotel employee. Officer Glenn's body cam footage is found at Mitchell Decl., Ex. B and Krishnamurthy Decl., Ex. 2.

8 At the hearing, the Court asked the government what kind of check was run on Walker, and the government's counsel stated that criminal history records checks were run on both defendants. The government's counsel also stated that the records check on Walker did not reveal his federal custodial status, discussed *infra.*

9 Defendants assert that at the time Officer Glenn asked this question, he was standing nearly 20 feet from the vehicle. Def. Jones' Mtn. at 4 (Dkt. No. 54). The government does not dispute this assertion. Based upon the Court's review of the officers' body cam footage, it is difficult to measure the precise distance between where Officer Glenn is standing and the vehicle, although it is clear that Officer Glenn is standing some distance in front of the vehicle and is not right next to the vehicle.

10 As with Officer Glenn's body cam footage, there is no audio until approximately 30 seconds in. It appears to the Court based upon comparison of the same events (e.g., Officer Glenn calling dispatch to provide Walker's information, which can also be heard on Roberts' body cam footage), that Officer Glenn's body camera footage started approximately one minute and ten seconds before Roberts' footage began.

11 The Court is informed that, when used as slang, “Gucci” is defined as “A versatile slang term based on the luxury fashion brand meaning okay/good/great/awesome/fresh/etc.” www.urbandictionary.com/define.php?term=Gucci.

12 As noted *supra*, defendants assert that Victor did not ask the officers to investigate.

13 Jones asserts – and the government does not dispute – that on January 9, 2018, Jones was no longer on probation and that the information the officers received about Jones still being on probation was incorrect. Jones cites Mitchell Decl., Ex. F (San Francisco Police Department Criminal History Check for Jones) as evidence that Jones was no longer on probation at the time of the stop and search.

14 Defendants note that on the video, Officer Roberts states that he is checking Jones for weapons, and he does not mention marijuana. However, Officer Glenn's Incident Report states that “Officer Roberts had Jones exit the vehicle and conducted a search of his person for marijuana with negative results.” Glenn Decl., Ex. 1 at USA-000029.

15 At some point earlier in the stop, the officers called for backup.

16 As the officers' body cam footage shows, while Jones was ultimately arrested on the scene, he was not immediately arrested upon the discovery of the suspended license (and indeed even after that was discovered, officers said he could go if all okay). Instead, the officers arrested Jones arrested after they discovered the firearm during the search of the Ford.

17 In Case CR 10-722, a jury convicted Walker of one count of being a felon in possession of ammunition in violation of 18 U.S.C. § 922(g)(1). Judge Conti sentenced Walker to 108 months imprisonment to be followed by three years of supervised release. Dkt. No. 85 in CR 10-722. On December 5, 2019, Walker was charged with violating the terms of his supervised release by committing a commercial burglary on November 5, 2019. Dkt. No. 108. Case CR 10-722 SI was reassigned to the undersigned on December 31, 2019.

18 Because the search of the vehicle was described as an “inventory search” on Sergeant Manning's Chronological, defendants' motion papers argued that the search was not a permissible inventory search. The government's opposition does not attempt to justify the search as an inventory search, and instead asserts it was permissible under the automobile exception. Thus, defendants' reply briefs are the first time defendants have addressed that argument.

19 In its papers, the government contended that Walker lacked standing to challenge the initial seizure/traffic stop “because prisoners in full custody have no Fourth Amendment protections, [and thus] neither do residents of

half-way houses who are still serving their custodial terms." Gov't Opp'n at 5 (Dkt. No. 62). At the hearing, however, the government appeared to back away from that broad assertion and stated it was no longer contending that Walker was not protected by the Fourth Amendment and that he did in fact have standing to challenge the seizure, but that the initial seizure/traffic stop was justified as a traffic stop.

20 In *Lopez-Soto*, the Ninth Circuit held that the Supreme Court's decision in *Whren* did not change the settled rule that reasonable suspicion is sufficient to support an investigative traffic stop. *See* *Lopez-Soto*, 205 F.3d at 1104.

21 It is unclear precisely what type of records check the officers ran on defendants. At the hearing, the government stated that the officers ran a "criminal history" check on defendants. Defendants' supplemental briefing characterizes these checks as "ex felon" checks. The cases have seemingly drawn a distinction between a criminal history check and a non-routine "ex felon" check, and have also distinguished between the types of checks that can be run on drivers versus passengers. *Compare* *Gorman*, 859 F.3d at 712 ("routine" criminal history check) *with* *United States v. Evans*, 786 F.3d 779, 788 (9th Cir. 2015) (ex-felon registration check is not routine); *see also* *United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019) (officers impermissibly extended traffic stop by demanding passenger's identification as "[t]he identity of a passenger ... will ordinarily have no relation to a driver's safe operation of a vehicle."). In any event, the Court need not determine whether the particular records checks conducted here were routine or necessary to officer safety because the government does not dispute that the officers conducted at least some activities unrelated to the mission of the traffic stop, and those activities unquestionably extended the duration of the traffic stop.

22 *See U.S. v. Martinez*, No. 18-10498, https://www.ca9.uscourts.gov/calendar/view.php?caseno=18-10498.

23 The government relies upon this Court's decision in *United States v. Collins*, Case No. 16-CR-00244 SI, 2018 WL 306696 (N.D. Cal. Jan. 5, 2018), to argue that the smell of marijuana provides probable cause to search a vehicle. *Collins* is distinguishable in several respects. Importantly, the traffic stop and vehicle search occurred on February 25, 2016, prior to the passage of Proposition 64. *Id.* at *1. Further, when the officers stopped Collins, they saw "a digital scale on the front passenger seat next to [Collins'] child, and 'a significant quantity of marijuana ... in plain view in a clear plastic bag near the front center console.... The marijuana was within arms-reach of the child." *Id.*

24 Officer Glenn does not say in his declaration that he and Roberts believed defendants possessed a criminal amount of marijuana in the vehicle. The government's opposition brief argues that the officers could smell the odor of unburned marijuana emanating from the car, and that this provided reasonable suspicion and probable cause. The Court addresses that argument *infra.*

25 In the event that the Ninth Circuit holds that the smell of unburned marijuana alone can provide probable cause to search a vehicle, the Court will hold an evidentiary hearing regarding whether officers detected the odor of unburned marijuana emanating from the vehicle prior to the search of the car.

26 The *Thomas* court stated that it was adopting the approach of the Eighth Circuit, which had held that an unauthorized driver "would have standing after a showing of 'consensual possession' of the rental car," which could be satisfied by "a showing of 'a more intimate relationship with the car's owner or a history of regular use of the car.' " *Thomas*, 447 F.3d at 1197, 1199 (quoting *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995) (per curiam)).

27 To the extent the government does make such an assertion, the Court rejects it. In *Samson v. California*, the Supreme Court stated that "parolees have fewer expectations of privacy than probationers." 547 U.S. 843, 850, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006); *see also* *United States v. Johnson*, 875 F.3d 1265, 1275 (9th Cir. 2017) ("on the continuum of state-imposed punishments, parolees appear to hold the most limited privacy interests among people convicted of a crime but are not actually imprisoned") (internal quotation

marks omitted). Here, Walker was completing his custodial sentence in a halfway-house, and his status is similar to a parolee. Although the Supreme Court in *Samson* held that parolees have limited privacy interests and could be subjected to suspicionless searches, the Court noted that "an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee." *Samson*, 547 U.S. at 856 n.5, 126 S.Ct. 2193. The Court also rejected the dissent's criticism that the majority was equating parolees with prisoners. *See* *id.* at 850 n.2, 126 S.Ct. 2193 ("Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights. That view misperceives our holding. If that were the basis of our holding, then this case would have been resolved solely under *Hudson v. Palmer* [468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984)], [holding traditional Fourth Amendment analysis of the totality of the circumstances inapplicable to the question of whether a prisoner had a reasonable expectation of privacy in his prison cell], and there would have been no cause to resort to Fourth Amendment analysis."). Thus, *Samson* recognized that a parolee does not lose all Fourth Amendment protection, and that context matters.

End of Document

2020 WL 4497723
Only the Westlaw citation is currently available.
United States District Court, S.D. Mississippi.

Clarence JAMISON, Plaintiff,
v.
Nick MCCLENDON, in his individual capacity, Defendant.

No. 3:16-CV-595-CWR-LRA
|
Signed 08/04/2020

Synopsis

Background: Motorist brought § 1983 action against police officer after he was stopped and detained for two hours, alleging prolonged stop and lack of consent to search. Officer filed motion for summary judgment.

Holdings: The District Court, Carlton Reeves, J., held that:

[1] officer's insertion of arm into motorist's car during traffic stop was an unreasonable search;

[2] motorist's alleged consent to search was a product of an unconstitutional search and thus not voluntary;

[3] even absent initial constitutional violation, genuine issue of material fact as to whether motorist's consent to search was voluntary precluded summary judgment; and

[4] it was not clearly established that officer's actions violated the Fourth Amendment, and thus officer had qualified immunity.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (37)

[1] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity doctrine protects all officers from § 1983 liability, no matter how egregious their conduct, if the law they broke was not clearly established. 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

[2] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For the law to be clearly established, as required for a § 1983 claim, it must have been beyond debate that the officer broke the law. 42 U.S.C.A. § 1983.

[3] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

An officer cannot be held liable under § 1983 unless every reasonable officer would understand that what he is doing violates the law; it does not matter that people are morally outraged, or the fact that the collective conscience is shocked by the alleged conduct, because it does not mean necessarily that the officials should have realized that the conduct violated a constitutional right. 42 U.S.C.A. § 1983.

[4] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Even evidence that the officer acted in bad faith is considered irrelevant when considering whether a right is "clearly established" for purposes of qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

[5] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

When considering whether a right is "clearly established" for purposes of qualified immunity

in a § 1983 action, a district court opinion does not clearly establish the law in a jurisdiction, nor does a circuit court opinion, if the judges designate it as "unpublished"; only published circuit court decisions count. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[6] **Civil Rights** Government Agencies and Officers

Civil Rights Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

There are generally two steps in a qualified immunity analysis; first, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right, and second the court must decide whether the right at issue was clearly established at time of the defendant's alleged misconduct. 42 U.S.C.A. § 1983.

[7] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In Fourth Amendment cases, determining whether an official violated clearly established law, for qualified immunity purposes, necessarily involves a reasonableness inquiry. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[8] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In general, the doctrine of qualified immunity protects government officials from § 1983 liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question beyond debate. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[9] **Automobiles** Inquiry; license, registration, or warrant checks

In a valid traffic stop, an officer may request a driver's license and vehicle registration and run a computer check. U.S. Const. Amend. 4.

[10] **Automobiles** Inquiry; license, registration, or warrant checks

In a valid traffic stop, officers are permitted to require passengers to identify themselves. U.S. Const. Amend. 4.

[11] **Automobiles** Inquiry; license, registration, or warrant checks

While waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop. U.S. Const. Amend. 4.

[12] **Automobiles** Conduct of Arrest, Stop, or Inquiry

Officers are not allowed to unreasonably intrude into a person's vehicle during a traffic stop. U.S. Const. Amend. 4.

[13] **Searches and Seizures** Expectation of privacy

While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. U.S. Const. Amend. 4.

[14] **Searches and Seizures** Vehicles

An officer's intrusion into the interior of a car constitutes a search. U.S. Const. Amend. 4.

[15] **Searches and Seizures** Circumstances Affecting Validity of Warrantless Search, in General

Searches and Seizures Scope, Conduct, and Duration of Warrantless Search

The intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as reasonable. U.S. Const. Amend. 4.

[16] **Searches and Seizures** Motor Vehicles

The key inquiry in automobile search cases is whether the officer acted reasonably when he intruded; the question is highly dependent on the facts of each case. U.S. Const. Amend. 4.

[17] **Automobiles** Object, Product, Scope, and Conduct of Search, Seizure, or Inspection

Officer's insertion of arm into motorist's car during traffic stop was an unreasonable search in violation of the Fourth Amendment, where physical features of the car did not make it difficult for officer to question motorist, officer admitted that his objective was to get motorist's consent to search the car, and officer could see motorist and lacked any reason to put his arm in the car. U.S. Const. Amend. 4.

[18] **Searches and Seizures** Voluntary nature in general

Consent to a search is valid only if it is voluntary. U.S. Const. Amend. 4.

[19] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

If an individual gives consent to a search after being subject to an initial unconstitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation. U.S. Const. Amend. 4.

[20] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

Factors that inform whether the consent to search, after an initial unconstitutional search, was an independent act of free will include the temporal proximity of the illegal conduct and the consent, whether there were any intervening circumstances, and the purpose and flagrancy of the misconduct. U.S. Const. Amend. 4.

[21] **Searches and Seizures** Prior official misconduct; misrepresentation, trick, or deceit

Motorist's alleged consent to search of car was contemporaneous with officer's unconstitutional intrusion into motorist's car, and thus was not an independent act of free will, but rather a product of an unconstitutional search and thus not voluntary; motorist relented and agreed to the search only after officer escalated his efforts and placed his arm inside the car, and officer's intrusion into car was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. U.S. Const. Amend. 4.

[22] **Searches and Seizures** Questions of law or fact

The voluntariness of consent to a search is a question of fact to be determined from the totality of all the circumstances. U.S. Const. Amend. 4.

[23] **Searches and Seizures** Voluntary nature in general

To determine whether a person's consent to a search was voluntary, the Court considers the voluntariness of the suspect's custodial status, the presence of coercive police procedures, the nature and extent of the suspect's cooperation, the suspect's awareness of his right to refuse consent, the suspect's education and intelligence, and the suspect's belief that no incriminating evidence will be found; in this analysis, no single factor is determinative, and courts may consider other factors relevant to the inquiry. U.S. Const. Amend. 4.

[24] **Federal Civil Procedure** Civil rights cases in general

Even absent initial constitutional violation, genuine issue of material fact as to whether motorist's consent to search of vehicle was voluntary precluded summary judgment for officer on motorist's § 1983 claim alleging violation of his Fourth Amendment rights. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[25] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

A "clearly established right," for purposes of qualified immunity from a § 1983 claim, is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. 42 U.S.C.A. § 1983.

[26] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For purposes of qualified immunity from a § 1983 claim, clearly established law must be particularized to the facts of a case; thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate. 42 U.S.C.A. § 1983.

[27] **Civil Rights** Defenses; immunity and good faith

When seeking to show a clearly established right defeating qualified immunity from a § 1983 claim, it is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality. 42 U.S.C.A. § 1983.

[28] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

When seeking to show a clearly established right defeating qualified immunity from a § 1983 claim, the plaintiff must point to controlling authority, or a robust consensus of persuasive authority, that defines the contours of the right in question with a high degree of particularity. 42 U.S.C.A. § 1983.

[29] **Civil Rights** Sheriffs, police, and other peace officers

It was not clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment, and thus officer had qualified immunity from motorist's § 1983 claim that officer violated his Fourth Amendment rights by falsely stopping him, searching his car, and detaining him. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

[30] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For purposes of qualified immunity in a § 1983 action, an officer's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff. 42 U.S.C.A. § 1983.

[31] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Federal district court's opinions cannot serve as "clearly established" precedent defeating qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[32] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Clearly established law must be particularized to the facts of the case in order to defeat qualified immunity in a § 1983 action. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[33] **Federal Civil Procedure** Matters considered

Police officer forfeited challenge to motorist's separate § 1983 claim for damage to his car which he alleged came during officer's search, even if officer had qualified immunity from § 1983 claim for prolonged search, where, while officer sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to the damage to property claim. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[34] **Courts** Previous Decisions as Controlling or as Precedents

Stare decisis is not supposed to be the art of methodically ignoring what everyone knows to be true.

[35] **Jury** Rights of Action and Procedure in Civil Cases

Judges err when they impermissibly substitute a jury determination with their own. U.S. Const. Amend. 7.

[36] **Courts** Nature of judicial determination

Judges err when they invent legal requirements that are untethered to the complexity of the real world.

[37] **Jury** Bias and Prejudice

Like any actor in the legal system, juries may succumb to unintentional, institutional, or unconscious biases.

Attorneys and Law Firms

Victor I. Fleitas, Victor I. Fleitas, P.A., Tupelo, MS, for Plaintiff.

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ORDER GRANTING QUALIFIED IMMUNITY

Carlton W. Reeves, United States District Judge

***1** Clarence Jamison wasn't jaywalking. [1]

He wasn't outside playing with a toy gun. [2]

He didn't look like a "suspicious person." [3]

He wasn't suspected of "selling loose, untaxed cigarettes." [4]

He wasn't suspected of passing a counterfeit $20 bill. [5]

He didn't look like anyone suspected of a crime. [6]

He wasn't mentally ill and in need of help. [7]

He wasn't assisting an autistic patient who had wandered away from a group home. [8]

He wasn't walking home from an after-school job. [9]

He wasn't walking back from a restaurant. [10]

He wasn't hanging out on a college campus. [11]

He wasn't standing outside of his apartment. [12]

He wasn't inside his apartment eating ice cream. [13]

***2** He wasn't sleeping in his bed. [14]

He wasn't sleeping in his car. [15]

He didn't make an "improper lane change." [16]

He didn't have a broken tail light. [17]

He wasn't driving over the speed limit. [18]

He wasn't driving under the speed limit. [19]

No, Clarence Jamison was a Black man driving a Mercedes convertible.

As he made his way home to South Carolina from a vacation in Arizona, Jamison was pulled over and subjected to one hundred and ten minutes of an armed police officer badgering him, pressuring him, lying to him, and then searching his car top-to-bottom for drugs.

Nothing was found. Jamison isn't a drug courier. He's a welder.

Unsatisfied, the officer then brought out a canine to sniff the car. The dog found nothing. So nearly two hours after it started, the officer left Jamison by the side of the road to put his car back together.

Thankfully, Jamison left the stop with his life. Too many others have not. [20]

The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called "qualified immunity." In real life it operates like absolute immunity.

In a recent qualified immunity case, the Fourth Circuit wrote:

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. [21]

This Court agrees. Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. [22] Countless more have suffered from other forms of abuse and misconduct by police. [23] Qualified immunity has served as a shield for these officers, protecting them from accountability.

***3** This Court is required to apply the law as stated by the Supreme Court. Under that law, the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity. The officer's motion seeking as much is therefore granted.

But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.

As the Fourth Circuit concluded, "This has to stop." [24]

I. Factual and Procedural Background [25]

On July 29, 2013, Clarence Jamison was on his way home to Neeses, South Carolina after vacationing in Phoenix, Arizona. Jamison was driving on Interstate 20 in a 2001 Mercedes-Benz CLK-Class convertible. He had purchased the vehicle 13 days before from a car dealer in Pennsylvania.

As Jamison drove through Pelahatchie, Mississippi, he passed Officer Nick McClendon, a white officer with the Richland Police Department, who was parked in a patrol car on the right shoulder. [26] Officer McClendon says he decided to stop Jamison because the temporary tag on his car was "folded over to where [he] couldn't see it." Officer McClendon pulled behind Jamison and flashed his blue lights. Jamison immediately pulled over to the right shoulder. [27]

As Officer McClendon approached the passenger side of Jamison's car, Jamison rolled down the passenger side window. Officer McClendon began to speak with Jamison when he reached the window. According to McClendon, he noticed that Jamison had recently purchased his car in Pennsylvania, and Jamison told him that he was traveling from "Vegas or Arizona."

Officer McClendon asked Jamison for "his license, insurance, [and] the paperwork on the vehicle because it didn't have a tag." Jamison provided his bill of sale, insurance, and South Carolina driver's license. Officer McClendon returned to his car to conduct a background check using the El Paso Intelligence Center ("EPIC"). The EPIC check came back clear immediately. Officer McLendon then contacted the National Criminal Information Center ("NCIC") and asked the dispatcher to run a criminal history on Jamison as well as the VIN on his car.

According to Officer McClendon, he walked back to the passenger side of Jamison's car before hearing from NCIC. [28] He later admitted in his deposition that his goal when he returned to Jamison's car was to obtain consent to search the car. Once he reached the passenger side window, Officer McClendon returned Jamison's documents and struck up a conversation without mentioning that the EPIC background check came back clear. Thinking he was free to go after receiving his documents, Jamison says he prepared to leave.

This is where the two men's recounting of the facts diverges. According to Officer McClendon, he asked Jamison if he could search his car. Jamison asked him, "For what?" Officer McClendon says he responded, "to search for illegal narcotics, weapons, large amounts of money, anything illegal," and that Jamison simply gave his consent for the search.

***4** According to Jamison, however, as he prepared to leave, Officer McClendon put his hand over the passenger door threshold of Jamison's car and told him to, "Hold on a minute." Officer McClendon then asked Jamison – for the first time – if he could search Jamison's car. "For what?" Jamison replied. Officer McClendon changed the conversation, asking him what he did for a living. They discussed Jamison's work as a welder.

Officer McClendon asked Jamison – for the second time – if he could search the car. Jamison again asked, "For what?" Officer McClendon said he had received a phone call reporting that there were 10 kilos of cocaine in Jamison's car. [29] That was a lie. Jamison did not consent to the search.

Officer McClendon then made a third request to search the car. Jamison responded, "there is nothing in my car." They started talking about officers "planting stuff" in people's cars.

At this point, Officer McClendon "scrunched down," placed his hand into the car, and patted the inside of the passenger door. As he did this, Officer McClendon made his fourth request saying, "Come on, man. Let me search your car." Officer McClendon moved his arm further into the car at this point, while patting it with his hand.

As if four asks were not enough, Officer McClendon then made his fifth and final request. He lied again, "I need to search your car ... because I got the phone call [about] 10 kilos of cocaine."

Jamison would later explain that he was "tired of talking to [Officer McClendon]." Jamison kept telling the officer that there was nothing in the car, and the officer refused to listen.

Officer McClendon kept at it. He told Jamison that even if he found a "roach," [30] he would ignore it and let Jamison go. The conversation became "heated." Jamison became frustrated and gave up. He told Officer McClendon, "As long as I can see what you're doing you can search the vehicle."

Officer McClendon remembers patting Jamison down after he exited the car. Both agree that Officer McClendon directed Jamison to stand in front of the patrol car, which allowed Jamison to see the search. As Jamison walked from his vehicle to the patrol car parked behind, he remembers asking Officer McClendon why he was stopped. Officer McClendon said it was because his license plate – a cardboard temporary tag from the car dealership – was "folded up." In his deposition, the Officer would later explain, "When you got these two bolts in and you're driving 65 miles an hour down the highway, it's going to flap up where you can't see it." Jamison testified, however, that it was not curled up and "had four screws in it." [31]

Officer McClendon later testified that he searched Jamison's car "from the engine compartment to the trunk to the under-carriage to underneath the engine to the back seats to anywhere to account for all the voids inside the vehicle."

As he started the search, NCIC dispatch called and flagged a discrepancy about whether Jamison's license was suspended. Officer McClendon told the dispatcher to search Jamison's driving history, which should have told them the status of Jamison's license. NCIC eventually discovered that Jamison's license was clear, although it is not apparent from the record when Officer McClendon heard back from the dispatcher.

***5** According to Jamison, Officer McClendon continued speaking to Jamison during the search. He brought up "the 10 kilos of cocaine," asserted that the car was stolen, asked Jamison how many vehicles he owned, and claimed that Jamison did not have insurance on the car. Jamison kept saying that there was nothing in his car. At one point, Jamison heard a "pow" that "sounded like a rock" coming from inside the car, so he walked up to the car to see what had caused the noise. Officer McClendon told him to "Get back in front of my car." During the search, Jamison also requested to go to the bathroom several times, which Officer McClendon allowed.

Officer McClendon admitted in his deposition that he did not find "anything suspicious whatsoever." However, he asked Jamison if he could "deploy [his] canine." Jamison says he initially refused. Officer McClendon asked again, though, and Jamison relented, saying "Yes, go ahead." Officer McClendon "deployed [his] dog around the vehicle." The dog gave no indication, "so it confirmed that there was nothing inside the vehicle."

Before leaving, Officer McClendon asked Jamison to check his car to see if there was any damage. He gave Jamison a flashlight and told Jamison that he would pay for anything that was damaged. Jamison – who says he was tired – looked on the driver's side of the car and on the backseat, told Officer McClendon that he did not see anything, and returned the flashlight within a minute.

In total, the stop lasted one hour and 50 minutes. [32]

Jamison subsequently filed this lawsuit against Officer McClendon and the City of Pelahatchie, Mississippi. He raised three claims.

In "Claim 1," Jamison alleged that the defendants violated his Fourth Amendment rights by "falsely stopping him, searching his car, and detaining him." Jamison's second claim, brought under the Fourteenth Amendment, stated that the defendants should be held liable for using "race [as] a motivating factor in the decision to stop him, search his car, and detain him." Jamison's third claim alleged a violation of the Fourth Amendment by Officer McClendon for "recklessly and deliberately causing significant damage to Mr. Jamison's car by conducting an unlawful search of the car in an objectively unreasonable manner amounting to an unlawful seizure of his property."

Jamison sought actual, compensatory, and punitive damages against Officer McClendon. He testified that he received an estimate for almost $4,000 of physical damage to his car. He described the damage as requiring the replacement of the "whole top" of the car and re-stitching or replacement of his car seats. In his deposition, Jamison said he provided pictures and the estimates to Officer McClendon's counsel.

Jamison also sought damages for the psychological harm he sustained. During his deposition, he described the emotional toll of the traffic stop and search in this way:

> When I first got home, I couldn't sleep. So I was up for like – I didn't even sleep when I got home. I think I got some rest the next day because I was still mad just thinking about it and then when all this killing and stuff come on TV, that's like a flashback. I said, man, this could have went this way. It had me thinking all kind of stuff because it was not even called for....
>
> ***6** Then I seen a story about the guy in South Carolina, in Charleston, a busted taillight. They stopped him for that and shot him in the back, [33] and all that just went through my mind ....
>
> I don't even watch the news no more. I stopped watching the news because every time you turn it on something's bad.

On December 1, 2017, the defendants filed a motion for summary judgment. The motion said it would explain "why all claims against all defendants should be dismissed as a matter of law." The motion, however, failed to provide an argument as to Jamison's third claim.

Prior to the completion of briefing on the motion, the parties agreed to dismiss the City of Pelahatchie from the case.

On September 26, 2018, the Court entered an order granting in part and deferring in part the motion for summary judgment. [34] The Court found that Officer McClendon had shown he was entitled to summary judgment as to Jamison's Fourteenth Amendment claim for a racially-motivated stop. [35] The Court also found that Officer McClendon was

protected by qualified immunity as to Jamison's claims that Officer McClendon did not have reasonable suspicion to stop him. However, after a hearing, the Court requested supplemental briefing to "help ... determine if McLendon is entitled to qualified immunity on Jamison's lack of consent and prolonged stop claims." The present motion followed.

II. Legal Standard

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[36] A dispute is genuine "if the evidence supporting" the non-movant, "together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party."[37] A fact is material if it is one that might affect the outcome of the suit under the governing law.[38]

***7** A party seeking to avoid summary judgment must identify admissible evidence in the record showing a fact dispute.[39] That evidence may include "depositions, ... affidavits or declarations, ... or other materials."[40]

When evaluating a motion for summary judgment, courts are required to view all evidence in the light most favorable to the non-moving party and must refrain from making credibility determinations.[41]

III. Historical Context

In accordance with Supreme Court precedent, we begin with a look at the "origins" of the relevant law.[42]

A. Section 1983: A New Hope

Jamison brings his claims under 42 U.S.C. § 1983, a statute that has its origins in the Civil War and "Reconstruction," the brief era that followed the bloodshed. If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too. "Reconstruction was the essential sequel to the Civil War, completing its mission."[43] During Reconstruction, the abolitionists and soldiers who fought for emancipation sought no less than "the reinvention of the republic and the liberation of blacks to citizenship and Constitutional equality."[44]

The Reconstruction-era Congress passed "legislation to protect the freedoms granted to those who were recently enslaved."[45] One such piece of legislation created the Freedman's Bureau, a War Department agency that educated the formerly enslaved, provided them with legal protection, and "relocate[ed] them on more than 850,000 acres of land the federal government came to control during the war."[46] Another successful legislative effort was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, also known as the "Reconstruction Amendments."[47]

The Thirteenth Amendment "represented the Union's deep seated commitment to end the 'badges and incidents of servitude,' [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain."[48] The Fourteenth Amendment reversed *Dred Scott v. Sanford*.[49] While the amendment was "unpassable as a specific protection for black rights,"[50] it made all persons born in the United States citizens of this country and guaranteed due process and equal protection of the law. "The main object of the amendment was to enforce absolute equality of the races."[51] President Grant called the Fifteenth Amendment "the most important event that has occurred[ ] since the nation came into life ... the realization of the Declaration of Independence."[52] "Each Amendment authorized Congress to pass appropriate legislation to enforce it."[53] Taken together, "Reconstruction would mark a revolutionary change in the federal system, with the national government passing laws forcing the states to fulfill their constitutional responsibilities."[54]

***8** For the first time in its history, the United States saw a Black man selected to serve in the United States Senate (two from Mississippi, in fact – Hiram Revels and Blanche K. Bruce),[55] the establishment of public school systems across the South,[56] and increased efforts to pass local anti-discrimination laws.[57] It was a glimpse of a different America.

These "emancipationist" efforts existed alongside white supremacist backlash, terror, and violence.[58] "In Mississippi, it became a criminal offense for blacks to hunt or fish,"[59] and a U.S. Army General reported that "white militias, with telltale names such as the Jeff Davis Guards, were springing up across" the state.[60] In Shreveport, Louisiana, more than 2,000 black people were killed in 1865 alone.[61] "In 1866, there were riots in Memphis and New Orleans; more than 30 African-Americans were murdered in each melee."[62]

"The Ku Klux Klan, formed in 1866 by six white men in a Pulaski, Tennessee law office, 'engaged in extreme violence against freed slaves and Republicans,' assaulting and murdering its victims and destroying their property."[63] The Klan "spread rapidly across the South" in 1868,[64] orchestrating a "huge wave of murder and arson" to discourage Blacks from voting.[65] "[B]lack schools and churches were burned with impunity in North Carolina, Mississippi, and Alabama."[66]

The terrorism in Mississippi was unparalleled. During the first three months of 1870, 63 Black Mississippians "were murdered ... and nobody served a day for these crimes."[67] In 1872, the U.S. Attorney for Mississippi wrote that Klan violence was ubiquitous and that "only the presence of the army kept the Klan from overrunning north Mississippi completely."[68]

***9** Many of the perpetrators of racial terror were members of law enforcement.[69] It was a twisted law enforcement, though, as it prevented the laws of the era from being enforced.[70] When the Klan murdered five witnesses in a pending case, one of Mississippi's District Attorneys complained, "I cannot get witnesses as all feel it is sure death to testify."[71] White supremacists and the Klan "threatened to unravel everything ... Union soldiers had accomplished at great cost in blood and treasure."[72]

Professor Leon Litwack described the state of affairs in stark words:

> How many black men and women were beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known.[73] Nor could any accurate body count or statistical breakdown reveal the barbaric savagery and depravity that so frequently characterized the assaults made on freedmen in the name of restraining their savagery and depravity – the severed ears and entrails, the mutilated sex organs, the burnings at the stake, the forced drownings, the open display of skulls and severed limbs as trophies.[74]

"Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.' "[75] It passed The Ku Klux Act of 1871, which "targeted the racial violence in the South undertaken by the Klan, and the failure of the states to cope with that violence."[76]

The Act's mandate was expansive. Section 2 of the Act provided for civil and criminal sanctions against those who conspired to deprive people of the "equal protection of the laws."[77] "Sections 3 and 4 authorized the use of federal force to redress a state's inability or unwillingness to deal with Klan or other violence."[78] "The Act was strong medicine."[79]

***10** Section 1 of the Ku Klux Act, now codified as 42 U.S.C. § 1983, uniquely targeted state officials who "deprived persons of their constitutional rights."[80] While the Act as a whole "had the Klan 'particularly in mind,' " Section 1 recognized the local officials who created "the lawless conditions" that plagued "the South in 1871."[81] Thus, the doors to the courthouse were opened to "any person who ha[d] been deprived of her federally protected rights by a defendant acting under color of state law."[82] The Act reflected Congress's recognition that – to borrow the words of today's abolitionists – "the whole damn system [was] guilty as hell."[83]

Some parts of the Act were fairly successful. Led by federal prosecutors at the Department of Justice, "federal grand juries, many interracial, brought 3,384 indictments against the KKK, resulting in 1,143 convictions."[84] One of Mississippi's U.S. Senators reported that the Klan largely "suspended

their operations" in most of the State.[85] Frederick Douglass proclaimed that "peace has come to many places," and the "slaughter of our people have so far ceased."[86]

Douglass had spoken too soon. "By 1873, many white Southerners were calling for 'Redemption' – the return of white supremacy and the removal of rights for blacks – instead of Reconstruction."[87] The federal system largely abandoned the emancipationist efforts of the Reconstruction Era.[88] And the violence returned. "In 1874, 29 African-Americans were massacred in Vicksburg, according to Congressional investigators. The next year, amidst rumors of an African-American plot to storm the town, the Mayor of Clinton, Mississippi gathered a white paramilitary unit which hunted and killed an estimated 30 to 50 African-Americans."[89] And in 1876, U.S. Marshal James Pierce said, "Almost the entire white population of Mississippi is one vast mob."[90]

Federal courts joined the retreat and decided to place their hand on the scale for white supremacy.[91] As Katherine A. Macfarlane writes:

> In several decisions, beginning with 1873's *Slaughter-House Cases*, the Supreme Court limited the reach of the Fourteenth Amendment and the statutes passed pursuant to the power it granted Congress. By 1882, the Court had voided the Ku Klux Act's criminal conspiracy section, a provision "aimed at lynchings and other mob actions of an individual or private nature."
>
> As a result of the Court's narrowed construction of both the Fourteenth Amendment and the civil rights statutes enacted pursuant to it, the Ku Klux Act's "scope and effectiveness" shrunk. The Court never directly addressed Section 1 of the Act, but those sections of the Act [were] left "largely forgotten."[92]

For almost a century, Redemption prevailed. "Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede."[93] Jim Crow ruled, and Jim Crow meant that "[a]ny breach of the system could mean one's life."[94] While Reconstruction "saw the basic rights of blacks to citizenship established in law," our country failed "to ensure their political and economic rights."[95] Our courts' "involvement in that downfall and its consequences could not have been greater."[96]

***11** Though civil rights protection was largely abandoned at the federal level, activists continued to fight to realize the broken promise of Reconstruction. The Afro-American League, the Niagara Movement, the National Negro Conference (later renamed the NAACP) and other civil rights groups formed to challenge lynching and the many oppressive laws and practices of discrimination.[97] One group's efforts – the Citizens' Committee – led to a lawsuit designed to create an Equal Protection Clause challenge to Louisiana's segregationist laws on railroad cars. Unfortunately, the ensuing case, *Plessy v. Ferguson*, resulted in the Supreme Court's decision to affirm the racist system of "separate but equal" accommodations.[98] Despite this setback, civil rights activism continued, intensifying after the Supreme Court's *Brown v. Board* decision and resulting in many of the civil rights laws we have today.[99]

It was against this backdrop that the Supreme Court attempted to resuscitate Section 1983.[100] In 1961, the Court decided *Monroe v. Pape*, a case where "13 Chicago police officers broke into [a Black family's] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[101] The Justices held that Section 1983 provides a remedy for people deprived of their constitutional rights by state officials.[102] Accordingly, the Court found that the Monroe family could pursue their lawsuit against the officers.[103]

Section 1983's purpose was finally realized, namely " 'to interpose the federal courts between the States and the people, as guardians of the people's federal rights.' "[104] The statute has since become a powerful "vehicle used by private parties to vindicate their constitutional rights against state and local government officials."[105]

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress .... [106]

Invoking this statute, Jamison contends that Officer McClendon violated his Fourth Amendment right to be free from unreasonable searches and seizures.

B. Qualified Immunity: The Empire Strikes Back

Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape.* [107]

The doctrine of qualified immunity is perhaps the most important limitation.

Although Section 1983 made no "mention of defenses or immunities, '[the Supreme Court] read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " [108] It reasoned that "[c]ertain immunities were so well established in 1871 [109] ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them." [110]

***12** On that presumption the doctrine of qualified immunity was born, with roots right here in Mississippi. In *Pierson v. Ray*, "15 white and Negro Episcopal clergymen ... attempted to use segregated facilities at an interstate bus terminal in Jackson, Mississippi, in 1961." [111]

The clergymen were arrested and charged with violation of a Mississippi statute – later held unconstitutional – that made it a misdemeanor "to congregate[ ] with others in a public place under circumstances such that a breach of the peace" may occur and to "refuse[ ] to move on when ordered to do so by a police officer." [112] The clergymen sued under Section 1983. In their defense, the officers argued that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." [113]

The Supreme Court agreed. It held that officers should be shielded from liability when acting in good faith – at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment. [114]

Subsequent decisions "expanded the policy goals animating qualified immunity." [115] The Supreme Court eventually characterized the doctrine as an "attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority." [116]

A review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values. Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; [117] prison guards who forced a prisoner to sleep in cells "covered in feces" for days; [118] police officers who stole over $225,000 worth of property; [119] a deputy who body-slammed a woman after she simply "ignored [the deputy's] command and walked away"; [120] an officer who seriously burned a woman after detonating a "flashbang" device in the bedroom where she was sleeping; [121] an officer who deployed a dog against a suspect who "claim[ed] that he surrendered by raising his hands in the air"; [122] and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother. [123]

If Section 1983 was created to make the courts " 'guardians of the people's federal rights,' " what kind of guardians have the courts become? [124] One only has to look at the evolution of the doctrine to answer that question.

***13** **[1]** Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not "clearly established."

[2] **[3]** **[4]** **[5]** This "clearly established" requirement is not in the Constitution or a federal statute. The Supreme Court came up with it in 1982. [125] In 1986, the Court then "evolved" the qualified immunity defense to spread its blessings "to all but the plainly incompetent or those who knowingly violate the law." [126] It further ratcheted up the standard in 2011, when it added the words "*beyond debate.*" [127] In other words, "for the law to be clearly established, it must have been 'beyond debate' that [the officer] broke the law." [128] An officer cannot be held liable unless *every* reasonable officer would understand that what he is doing violates the law. [129] It does not matter, as the Fifth Circuit has explained, "that we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct ... [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a constitutional right." [130] Even evidence that the officer acted in bad faith is now considered irrelevant. [131]

***14** The Supreme Court has also given qualified immunity sweeping procedural advantages. "Because the defense of qualified immunity is, in part, a question of law, it naturally creates a 'super-summary judgment' right on behalf of government officials. Even when an official is not entitled to summary judgment on the merits – because the plaintiff has stated a proper claim and genuine issues of fact exist – summary judgment can still be granted when the law is not reasonably clear." [132]

And there is more. The Supreme Court says defendants should be dismissed at the "earliest possible stage" in the proceedings to not be burdened with the matter. [133] The earliest possible stage may include a stage in the case before any discovery has been taken and necessarily before a plaintiff has obtained all the relevant facts and all (or any) documents. [134] If a court denies a defendant's motion seeking dismissal or summary judgment based on qualified immunity, that decision is also immediately appealable. [135] Those appeals can lead all the way to the United States Supreme Court even before any trial judge or jury hears the merits of the case. Qualified immunity's premier advantage thus lies in the fact that it affords government officials review by (at least) four federal judges before trial. [136]

Each step the Court has taken toward absolute immunity heralded a retreat from its earlier pronouncements. Although the Court held in 2002 that qualified immunity could be denied "in novel factual circumstances," [137] the Court's track record in the intervening two decades renders naïve any judges who believe that pronouncement. [138]

Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established "beyond debate" at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable.

Consider *McCoy v. Alamu*, a 2020 case in which a correctional officer violated a prisoner's Constitutional rights when he sprayed a chemical agent in the prisoner's face, without provocation. [139]

The Fifth Circuit then asked if the illegality of the use of force was clearly established beyond debate. The *prison* didn't think the use of force was debatable: it found the spraying unnecessary and against its rules. It put the officer on three months' probation. [140] Yet the appellate court disregarded the warden's judgment and held for the officer. The case involved only a "single use of pepper spray," after all, and the officer hadn't used "the full can." [141] Based on these factual distinctions, the court concluded that "the spraying crossed that line. But it was not *beyond debate* that it did, so the law wasn't clearly established." [142]

***15** These kinds of decisions are increasingly common. Consider another Fifth Circuit case, this time from 2019, in which Texas prisoner Trent Taylor claimed that the conditions of his prison cells violated the Constitutional minimum:

> Taylor stayed in the first cell starting September 6, 2013. He alleged that almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with "massive amounts" of feces that emitted a "strong fecal odor." Taylor had to stay in the cell naked. He said that he couldn't eat in the cell, because he feared contamination. And he couldn't drink water, because feces were "packed inside the water faucet." Taylor stated that the prison officials were aware that the cell was covered in feces,

> but instead of cleaning it, [Officers] Cortez, Davison, and Hunter laughed at Taylor and remarked that he was "going to have a long weekend." [Officer] Swaney criticized Taylor for complaining, stating "dude, this is Montford, there is shit in all these cells from years of psych patients." On September 10, Taylor left the cell.
>
> A day later, September 11, Taylor was moved to a "seclusion cell," but its conditions were no better. It didn't have a toilet, water fountain, or bunk. There was a drain in the floor where Taylor was ordered to urinate. The cell was extremely cold because the air conditioning was always on. And the cell was anything but clean.
>
> Taylor alleged that the floor drain was clogged, leaving raw sewage on the floor. The drain smelled strongly of ammonia, which made it hard for Taylor to breathe. Yet, he alleged, the defendants repeatedly told him that if he needed to urinate, he had to do so in the clogged drain instead of being escorted to the restroom. Taylor refused. He worried that, because the drain was clogged, his urine would spill onto the already-soiled floor, where he had to sleep because he lacked a bed. So, he held his urine for twenty-four hours before involuntarily urinating on himself. He stayed in the seclusion cell until September 13. Prison officials then tried to return him to his first, feces-covered cell, but he objected and was permitted to stay in a different cell. [143]

Taylor spent a total of six days in feces-covered cells. [144] To make matters worse, the trial court found that Taylor "was not allowed clothing and forced to endure the cold temperatures with nothing but a suicide blanket." [145]

The correctional officers didn't submit much to contradict Taylor's evidence of filth. [146] Yet they were granted qualified immunity because it "wasn't clearly established" that "only six days" of living in a cesspool of human waste was unconstitutional. [147] The Fifth Circuit reasoned, "[t]hough the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, we hadn't previously held that a time period so short violated the Constitution.... It was therefore not 'beyond debate' that the defendants broke the law." [148]

***16** Never mind the 50 years of caselaw holding that "[c]ausing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." [149] Never mind the numerous [150] Fifth [151] Circuit [152] decisions [153] concluding that prisoners who live in "filthy, sometimes feces-smeared, cells" can bring a Constitutional claim. [154] Never mind that in other states, it is clearly established that only *three* days of living in feces-covered cells is unconstitutional. [155] And never mind that the Supreme Court had acknowledged warmth as an "identifiable human need" and that "a low cell temperature at night combined with a failure to issue [a] blanket[ ]" may deprive an inmate of such. [156] None of that mattered after 2011, the year the Supreme Court ratchetted up the standard to require that the unlawfulness be "beyond debate." [157]

Fifth Circuit Judge Don Willett has succinctly explained the problem with the clearly established analysis:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. [158]

To be clear, it is unnecessary to ascribe malice to the appellate judges deciding these terrible cases. No one wants to be reversed by the Supreme Court, and the Supreme Court's summary reversals of qualified immunity cases are ever-more biting. [159] If you've been a Circuit Judge since 1979—sitting on the bench longer than any current Justice—you might expect a more forgiving reversal. [160] Other appellate judges see these decisions, read the tea leaves, and realize it is safer to find debatable whether it was a clearly established Constitutional violation to force a prisoner to eat, sleep, and live in prison cells swarming in feces for six days.

***17** It is also unnecessary to blame the doctrine of qualified immunity on ideology. "Although the Court is not always

unanimous on these issues, it is fair to say that qualified immunity has been as much a liberal as a conservative project on the Supreme Court." [161] Judges disagree in these cases no matter which President appointed them. [162] Qualified immunity is one area proving the truth of Chief Justice Roberts' statement, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges." [163]

There are numerous critiques of qualified immunity by lawyers, [164] judges, [165] and academics. [166] Yet qualified immunity is the law of the land and the undersigned is bound to follow its terms absent a change in practice by the Supreme Court.

[6] **[7]** **[8]** Here is the exact legal standard applicable in this circuit:

> There are generally two steps in a qualified immunity analysis. "First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second ... the court must decide whether the right at issue was clearly established at time of the defendant's alleged misconduct." However, we are not required to address these steps in sequential order.
>
> In Fourth Amendment cases, determining whether an official violated clearly established law necessarily involves a reasonableness inquiry. In *Pearson*, the Supreme Court explained that [an] officer is "entitled to qualified immunity where clearly established law does not show that the conduct violated the Fourth Amendment," a determination which "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." However, "a reasonably competent public official should know the law governing his conduct." In general, "the doctrine of qualified immunity protects government officials from ... liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate.*" [167]

***18** The Court will now consider Jamison's claims under these two steps.

IV. Qualified Immunity Analysis

A. Violation of a Statutory or Constitutional Right

The Court has already determined that Officer McClendon is entitled to qualified immunity for his decision to pull over Jamison. [168] The Court now turns to the stop itself.

1. Physical Intrusion

[9] **[10]** **[11]** "In a valid traffic stop, an officer may request a driver's license and vehicle registration and run a computer check." [169] Officers are also permitted "to require passengers to identify themselves," and "[w]hile waiting for the results of computer checks, the police can question the subjects of a traffic stop even on subjects unrelated to the purpose of the stop." [170]

[12] **[13]** **[14]** Officers are not allowed to unreasonably intrude into a person's vehicle. "While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." [171] It follows that an "officer's intrusion into the interior of [a] car constitute[s] a search." [172]

[15] **[16]** "[T]he intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as 'reasonable.' " [173] Accordingly, "the key inquiry" in these cases is whether the officer "acted reasonably" when he intruded. [174] The question is highly dependent on the facts of each case. [175]

[17] Here, Jamison argues that Officer McClendon "physically prevent[ed] Mr. Jamison from resuming his travel by placing his arm inside Mr. Jamison's automobile." [176] Viewing the evidence in the light most favorable to the non-movant, the Court must conclude for present purposes that the stop happened in this way. Officer McClendon's insertion of his arm into Jamison's vehicle is an "intru[sion] inside a space that, under most circumstances, is protected by a legitimate expectation of privacy." [177] The Court must therefore consider whether Officer McClendon acted reasonably when he intruded.

In *United States v. Pierre*, Border Patrol Agent Lonny Hillin stopped a GMC Jimmy at a fixed checkpoint in Texas. [178] The Jimmy was a "two-door vehicle ... equipped with tinted fixed rear windows." [179] The defendant, Pierre, "was lying down in the back seat." [180] During the stop, Agent Hillin "ducked his head in the window to get a clear view of the back seat and to talk to Pierre about his citizenship." [181] The Fifth Circuit considered the following to determine if the agent's intrusion was reasonable: (1) whether the officer intruded upon an area for which there is a reasonable expectation of privacy; (2) whether the officer's "actions were no more intrusive than necessary to accomplish his objective"; and (3) whether the intrusion was reasonable to ensure the safety of the officer. [182]

***19** As to the first consideration, the Fifth Circuit found that "passengers of vehicles at fixed checkpoints near the border of the United States do not have a reasonable expectation of privacy in not being stopped and questioned about their citizenship." [183] The court reasoned that "occupants of a vehicle stopped at a checkpoint have no expectancy that they will not be required to look an agent in the eye and answer questions about their citizenship." [184] In *Pierre*, the "physical features of the Jimmy made it difficult for Agent Hillin to speak with Pierre and verify his citizenship." [185] These considerations weighed toward finding that the agent's intrusion – in this case, sticking his head into the car – was reasonable. [186]

The Fifth Circuit also found that the sole purpose of Agent Hillin's intrusion was to ask about the passenger's citizenship. Again, the Court noted that vehicle's physical features did not allow Agent Hillin "to see and communicate with Pierre." [187] The court observed that "Agent Hillin's action in sticking his head in the driver's window was certainly less intrusive than requiring Pierre to get out of the vehicle." [188]

Finally, "in evaluating the reasonableness of the search," the Fifth Circuit "considered the safety of the officer." [189] It held that "[a]n agent at a checkpoint, for his own safety, would have good reason to position himself so he could see the person with whom he is speaking." [190]

Here, Jamison had no reasonable expectation of privacy as to being questioned during a lawful stop. [191] However, there is no evidence that the physical features of Jamison's car or any other circumstance made it difficult for Officer McClendon to question Jamison. Accordingly, this first consideration weighs against finding that Officer McClendon acted reasonably when he put his arm into Jamison's car.

Turning to the second consideration, Officer McClendon admitted that his objective was to get Jamison's consent to search the car. He had no reason to physically put his arm into the car to accomplish that objective. This situation is inapposite to *Pierre*, where the agent had to intrude in to the car to "see and communicate with Pierre." [192]

As to the third consideration, the same principle discussed in *Pierre* obviously applies here: officers have good reason to see the person they have pulled over. Officer McClendon, however, could already see Jamison. There was no reason to put his arm into Jamison's car to request that he consent to a search, and nothing in this record or the parties' briefs attempts to support that view.

In *Pierre*, the Fifth Circuit emphasized that officers do not have "carte blanche authority" to intrude into vehicles. [193] All of the considerations discussed in *Pierre* point toward a finding that Officer McClendon acted unreasonably.

For these reasons, Officer McClendon's physical intrusion into Jamison's car was an unreasonable search in violation of the Fourth Amendment.

2. Subsequent Vehicle Search

Officer McClendon then argues that Jamison consented to the search of his car. Jamison concedes that he "consented" but argues that his consent was involuntary.

[18] **[19]** **[20]** "Consent is valid only if it is voluntary." [194] "Furthermore, if an individual gives consent after being subject to an initial unconstitutional search, the consent is valid only if it was an independent act of free will, breaking the causal chain between the consent and the constitutional violation." [195] Factors that inform whether the consent was an independent act of free will include the

"temporal proximity of the illegal conduct and the consent," whether there were any intervening circumstances, and "the purpose and flagrancy" of the misconduct. [196]

***20** **[21]** The Court has found a constitutional violation in Officer McClendon's intrusion into Jamison's vehicle. Jamison's "consent to search ... was contemporaneous with the constitutional violation, and there was no intervening circumstance." [197] Viewing the evidence in the light most favorable to Jamison, as the legal standard requires, he relented and agreed to the search only after Officer McClendon escalated his efforts and placed his arm inside the car. Officer McClendon's intrusion into Jamison's car was a purposeful and unreasonable entry into an area subject to Fourth Amendment protection. "Thus, under the circumstances of this case, the consent to search was not an independent act of free will, but rather a product of" an unconstitutional search. [198]

[22] **[23]** Even absent the initial constitutional violation, there is a factual dispute as to whether Jamison's consent was voluntary. "The voluntariness of consent is a question of fact to be determined from the totality of all the circumstances." [199] To determine whether a person's consent was voluntary, the Court considers six factors: "(1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found." [200] "In this analysis, no single factor is determinative" [201] and courts consider other factors relevant to the inquiry. [202]

[24] Viewing the evidence in the light most favorable to Jamison, three factors weigh toward finding voluntary consent. Jamison was aware of his right to refuse consent; he refused to give consent after being asked four times by Officer McClendon. Jamison graduated from high school and there is nothing in the record showing that he "lack[ed] the requisite education or intelligence to give valid consent to the search." [203] Finally, Jamison believed – rightly so – that no incriminating evidence would be found.

The remaining factors weigh against finding voluntary consent. Jamison's custodial status was not voluntary: he was not free to leave. Jamison was also polite but unwilling to let Officer McClendon search his car the first four times the Officer asked. It is difficult to accept that Jamison truly wanted to give consent, since the exchange became "heated." Moreover, when Officer McClendon brought out his canine, Jamison says that he initially refused to consent to the dog sniff.

The parties disagree about whether Officer McClendon's actions were coercive. Jamison mainly points to Officer McClendon's intrusion into the car and repeated requests for consent. Officer McClendon, on the other hand, points to a number of cases where (he claims) other courts cleared officers who used greater restraints on a person's freedom. [204]

Jamison also points to "promises" and other "more subtle forms of coercion" that might have affected his judgment. [205] The existence of a promise indeed constitutes a relevant factor in the Court's determination. [206]

***21** There is a genuine factual dispute about whether Officer McClendon's actions amount to coercive procedures. There is evidence of omissions, outright lies, and promises by the officer: he did not inform Jamison that the EPIC check had come back clear, he lied about a call saying Jamison was transporting drugs, and he promised Jamison that he would allow him to leave if he found a roach in the car. A jury could reasonably conclude that Officer McClendon's lies reasonably caused Jamison to fear that the officer would plant drugs in his car, or worse. McClendon's statement to "Hold on a minute" and his physical intrusion into the interior of Jamison's car, while separately a constitutional violation, had the effect of physically expressing to Jamison that he was not free to leave – even though Jamison reasonably believed he could go after Officer McClendon returned his documents.

For these reasons, the Court finds a genuine factual dispute about whether Jamison voluntarily consented to the search.

A reader would be forgiven for pausing here and wondering whether we forgot to mention something. [207] When in this analysis will the Court look at the elephant in the room—how race may have played a role in whether Officer McClendon's actions were coercive? [208]

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of

traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman.[209] Pelahatchie is also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man.[210] Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities.

For Black people, this isn't mere history. It's the present.

By the time Jamison was pulled over, more than 600 people had been killed by police officers in 2013 alone.[211] Jamison was stopped just 16 days after the man who killed Trayvon Martin was acquitted.[212] On that day, Alicia Garza wrote a Facebook post that said, "Black people. I love you. I love us. We matter. Our lives matter, Black lives matter."[213] And that week, "thousands of demonstrators gathered in dozens of cities" to commemorate Martin "and to add their voices to a debate on race that his death ... set off."[214] A movement was in its early stages that would shine a light on killings by police and police brutality writ large – a problem Black people have endured since "states replaced slave patrols with police officers who enforced 'Black codes.' "[215]

***22** Jamison's traffic stop cannot be separated from this context. Black people in this country are acutely aware of the danger traffic stops pose to Black lives.[216] Police encounters happen regardless of station in life or standing in the community; to Black doctors, judges, and legislators alike.[217] United States Senator Tim Scott was pulled over seven times in one year—and has even been stopped while a member of what many refer to as "the world's greatest deliberative body."[218] The "vast majority" of the stops were the result of "nothing more than driving a new car in the wrong neighborhood or some other reason just as trivial."[219]

The situation is not getting better. The number of people killed by police each year has stayed relatively constant,[220] and Black people remain at disproportionate risk of dying in an encounter with police.[221] It was all the way back in 1968 when Nina Simone famously said that freedom meant "no fear! I mean really, no fear!"[222] Yet decades later, Black male teens still report a "fear of police and a serious concern for their personal safety and mortality in the presence of police officers."[223]

***23** In an America where Black people "are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,"[224] who can say that Jamison felt free that night on the side of Interstate 20? Who can say that he felt free to say no to an armed Officer McClendon?

It was in this context that Officer McClendon repeatedly lied to Jamison. It was in this moment that Officer McClendon intruded into Jamison's car. It was upon this history that Jamison said he was tired. These circumstances point to Jamison's consent being involuntary, a situation where he felt he had "no alternative to compliance" and merely mouthed "pro forma words of consent."[225]

Accordingly, Officer McClendon's search of Jamison's vehicle violated the Fourth Amendment.

B. Violation of Clearly Established Law

The Court must now determine whether Officer McClendon "violated clearly established constitutional rights of which a reasonable person would have known."[226]

[25] **[26]** "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' "[227] "Clearly established law must be particularized to the facts of a case. Thus, while a case need not be directly on point, precedent must still put the underlying question beyond debate."[228] District courts in this Circuit have been told that "clearly established law comes from holdings, not dicta."[229] We "are to pay close attention to the specific context of the case" and not "define clearly established law at a high level of generality."[230]

[27] **[28]** "It is the plaintiff's burden to find a case in his favor that does not define the law at a high level of generality."[231] To meet this high burden, the plaintiff must "point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."[232]

[29] It is here that the qualified immunity analysis ends in Officer McClendon's favor.

Viewing the facts in the light most favorable to Jamison, the question in this case is whether it was clearly established that an officer who has made five sequential requests for consent to search a car, lied, promised leniency, and placed his arm inside of a person's car during a traffic stop while awaiting background check results has violated the Fourth Amendment. It is not.

Jamison identifies a Tenth Circuit case finding that an officer unlawfully prolonged a detention "after verifying the temporary tag was valid and properly displayed."[233] That court wrote that "[e]very temporary tag is more difficult to read in the dark when a car is traveling 70 mph on the interstate. But that does not make every vehicle displaying such a tag fair game for an extended Fourth Amendment seizure."[234] Aside from the fact that a Tenth Circuit case is not "controlling authority" nor representative of "a robust consensus of persuasive authority,"[235] the case is unavailing here since Officer McClendon was awaiting NCIC results when he began to question Jamison. As discussed above, questioning while awaiting results from an NCIC check is "not inappropriate."[236] Officer McClendon's initial questioning was not in and of itself a Fourth Amendment violation.

***24** As to Officer McClendon's "particular conduct" of intruding into Jamison's vehicle, making promises of leniency, and repeatedly questioning him, Jamison primarily argues that "a genuine issue of material fact exists regarding the voluntariness of Mr. Jamison's alleged consent to allow the Defendant McLendon to search his car."[237] He contends that a grant of "qualified immunity [is] inappropriate based on those factual conflicts."[238]

To prevail with this argument, Jamison must show that the factual dispute is such that the Court cannot "settl[e] on a coherent view of what happened in the first place."[239] Further, "[Jamison's] version of the violations [should] implicate clearly established law."[240] That is not the case here.

[30] While Jamison and Officer McClendon's recounting of the facts differs, the Court is able to settle on a coherent view of what occurred based on Jamison's version of the facts.[241] Considering the evidence in a light "most favorable" to Jamison,"[242] Jamison has failed to show that Officer McClendon acted in an objectively unreasonable manner. An officer's "acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff."[243]

[31] While Jamison contends that Officer McClendon's intrusion was coercive, Jamison fails to support the claim with relevant precedent. He cites to this Court's opinion in *United States v. Alvarado*, which found it unreasonable to detain a person on the side of the highway for an hour "for reasons not tied to reasonable suspicion that he had committed a crime or was engaged in the commission of a crime."[244] However, this Court's opinions cannot serve as "clearly established" precedent.[245] Moreover, the facts of that case are distinguishable since the defendant in *Alvarado* was unlawfully held after background checks came back clear.[246]

[32] The cases the Court cited above regarding physical intrusions – *United States v. Pierre* and *New York v. Class* – are also insufficient. While it has been clearly established since at least 1986 that an officer may be held liable for an unreasonable "intrusion into the interior of [a] car,"[247] this is merely a "general statement[ ] of the law."[248] "[C]learly established law must be particularized to the facts of the case."[249]

In *Pierre*, the officer could not see into the suspect's back seat and had to put his head inside to speak to the suspect. In *Class*, the suspect had been removed from his car and the officer put his hand inside to move papers so that he could see the car's VIN. Neither case considered a police officer putting his arm inside a car while trying to get the driver to consent to a search. Both cases also found the officer's conduct to be reasonable, thus not providing "fair and clear warning" of what constitutes an unreasonable intrusion into a car.

***25** Given the lack of precedent that places the Constitutional question "beyond debate," Jamison's claim cannot proceed.[250] Officer McClendon is entitled to qualified immunity as to Jamison's prolonged detention and unlawful search claims.

V. Jamison's Seizure of Property & Damage Claim

[33] Jamison's complaint pleads a separate claim for the "reckless[ ] and deliberate[ ]" damage to his car he alleges occurred during Officer McClendon's search. Jamison points out, however, that although Officer McClendon sought summary judgment as to all claims and an entry of final judgment, neither his original nor his renewed motion for summary judgment provided an argument as to this third claim.

Jamison is correct. Officer McClendon's failure to raise the argument in his motions for summary judgment means he has forfeited its resolution at this juncture. [251] And his attempt to shoehorn it into his reply in support of his renewed motion for summary judgment was too late, since "[a]rguments raised for the first time in a reply brief are waived." [252] The question of whether to grant or deny summary judgment as to Jamison's "Seizure of Property & Damage Claim" is simply not before the court. Accordingly, the claim will be set for trial.

VI. The Return of Section 1983

Our nation has always struggled to realize the Founders' vision of "a more perfect Union." [253] From the beginning, "the Blessings of Liberty" were not equally bestowed upon all Americans. [254] Yet, as people marching in the streets remind us today, some have always stood up to face our nation's failings and remind us that "we cannot be patient." [255] Through their efforts we become ever more perfect.

The U.S. Congress of the Reconstruction era stood up to the white supremacists of its time when it passed Section 1983. The late Congressman John Lewis stared down the racists of his era when he marched over the Edmund Pettus Bridge. The Supreme Court has answered the call of history as well, most famously when it issued its unanimous decision in *Brown v. Board of Education* and resigned the "separate but equal" doctrine to the dustbin of history.

***26** The question of today is whether the Supreme Court will rise to the occasion and do the same with qualified immunity.

A. The Supreme Court

That the Justices haven't acted so far is perhaps understandable. Not only would they likely prefer that Congress fixes the problem, they also value *stare decisis*, the legal principle that means "fidelity to precedent." [256]

[34] *Stare decisis*, however, "isn't supposed to be the art of methodically ignoring what everyone knows to be true." [257] From TikTok [258] to the chambers of the Supreme Court, there is increasing consensus that qualified immunity poses a major problem to our system of justice.

Justice Kennedy "complained" [259] as early as 1992 that in qualified immunity cases, "we have diverged to a substantial degree from the historical standards." [260] Justice Scalia admitted that the Court hasn't even "purported to be faithful to the common-law immunities that existed when § 1983 was enacted." [261] Justice Thomas wrote there is "no basis" for the "clearly established law" analysis [262] and has expressed his "growing concern with our qualified immunity jurisprudence." [263] Justice Sotomayor has noted that her colleagues were making the "clearly established" analysis ever more "onerous." [264] In her view, the Court's doctrine "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." [265] It remains to be seen how the newer additions to the Court will vote. [266]

***27** Even without a personnel change, recent decisions make it questionable whether qualified immunity can withstand the *stare decisis* standard. [267] In 2018, *Janus v. AFSCME* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); in 2019, *Knick v. Township of Scott* overruled *Williamson County v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and in 2020, *Ramos v. Louisiana* overruled *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). Perhaps this Court is more open to a course-correction than its predecessors.

So what is there to do?

I do not envy the Supreme Court's duty in these situations. Nor do I have any perfect solutions to offer. But a Fifth Circuit case about another Reconstruction-era statute, 42 U.S.C. § 1981, suggests vectors of change. The case has been lost to the public by a fluke of how it was revised. I share its original version here to give a tangible example of how easily legal doctrine can change.

B. Section 1981 and Mr. Dulin

Section 1981 "prohibits racial discrimination in making and enforcing contracts."[268] It reads,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[269]

You don't need a lawyer to understand this statute. The language is simple and direct. It calls for "full and equal benefit of all laws and proceedings" regardless of race.

A few years ago, George Dulin invoked this law in a suit he brought against his former employer. Dulin was a white attorney in the Mississippi Delta. He had represented the local hospital board for 24 years. When he was replaced by a Black woman, Dulin claimed that the Board had discriminated against him on the basis of race. He said that no Board member had complained about his job performance, some of the Board members had made racist remarks, and he was better qualified than his replacement.[270]

Despite being simply stated, Section 1981 is not simply enforced. In Section 1981, as with its cousin Section 1983, federal judges have invented extra requirements for plaintiffs to overcome before they may try their case before a jury.

In Dulin's case, the trial judge and two appellate judges thought he couldn't overcome those extra hurdles. Specifically, the Fifth Circuit majority explained that although some evidence showed that no one *complained* about Dulin's job performance, other evidence revealed that the Board was *silently* dissatisfied with his work.[271] They held that Dulin's evidence of racist remarks was from too long ago—it failed the "temporal proximity" requirement.[272] Then they found that his evidence of superior qualifications could not overcome a legal standard which says that "differences in qualifications are generally not probative evidence of discrimination unless those disparities are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."[273] For the moment, Dulin had lost.

***28** To be clear, these judges in the majority hadn't "gone rogue." They were simply attempting to follow precedent that had long since narrowed the scope of Section 1981.

Judge Rhesa Barksdale filed a 22-page dissent. He argued that the many factual disputes should be resolved by a jury, given the Seventh Amendment right to jury trials.[274] He wrote that the temporal proximity test was too stringent since a savvy Board could have "*purposely* waited a year to terminate Dulin in order for that decision not to appear to be motivated by race."[275] He noted the evidence suggesting that the Board was lying about its motives, since "the Board never discussed Dulin's claimed poor performance."[276] Judge Barksdale then flatly disagreed that the court "must apply the superior-qualifications test," given evidence that the Board never cared to even discuss the qualifications of Dulin's replacement.[277] He "urged" the full court to rehear the case en banc.[278]

[35] **[36]** Judges err when we "impermissibly substitute[ ]" a jury determination with our own—the Seventh Amendment tells us so.[279] We err again when we invent legal requirements that are untethered to the complexity of the real world.[280] The truth is, Section 1981 doesn't have a "temporal proximity" requirement. It says everyone in this country has "the same right ... to the full and equal benefit

of all laws and proceedings for the security of persons and property." We should honor it.

[37] Judge Barksdale's powerful defense of the Seventh Amendment eventually persuaded his colleagues. They withdrew their opinion and issued in its place a two-paragraph, per curiam order directing the district court to hold a full trial on Dulin's claims.[281] Dulin subsequently presented his case to a jury of his peers, and the judiciary didn't collapse under a flood of followon litigation.[282] That he won his trial hardly matters: the case affirmed Judge Browning's point that "jury trials are the most democratic expression" of which official acts are reasonable and which are excessive.[283] , [284]

***29** I have told this story today because of its obvious parallels with § 1983. In both situations, judges took a Reconstructionera statute designed to protect people *from the government*, added in some "legalistic argle-bargle,"[285] and turned the statute on its head to protect the government *from the people.* We read § 1983 against a background of robust immunity instead of the background of a robust Seventh Amendment.[286] Then we added one judge-made barrier after another. Every hour we spend in a § 1981 case trying to parse "temporal proximity" is a distraction from the point of the statute: to determine if there was unlawful discrimination. Just as every hour we spend in a § 1983 case asking if the law was "clearly established" or "beyond debate" is one where we lose sight of why Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights.

There is another, more difficult reason I have told this story, though. When the Fifth Circuit withdrew its first opinion, Westlaw deleted it and the accompanying dissent. Other attorneys and judges have thus never had the benefit of Judge Barksdale's analysis and defense of the Seventh Amendment —one forceful enough to persuade his colleagues to reverse themselves.[287] That is a loss to us all.

And, although the panel in *Dulin* ultimately permitted the case to proceed to a jury trial, this fell short of equal justice under the law. Instead of seeking en banc review to eliminate the judge-created rules that prohibited Mr. Dulin's case from moving forward, the panel simply decided his case would be an exception to the rules. They provided no explanation as to why an exception, rather than a complete overhaul, was appropriate. The "temporal proximity" requirement still applies to § 1981 claims in the Fifth Circuit today. *Dulin* shows us an example of judges recognizing the inconsistencies and impracticalities of an invented doctrine, but not going far enough to correct the wrong.

In *Dulin*, federal judges decided that a Reconstruction-era law could accommodate the claims of an older, white, male attorney. They had the imagination to see how their constricting view of § 1981 harmed someone who shared the background of most federal judges. That same imagination must be used to resuscitate § 1983 and remove the impenetrable shield of protection handed to wrongdoers.

Instead of slamming shut the courthouse doors, our courts should use their power to ensure Section 1983 serves all of its citizens as the Reconstruction Congress intended. Those who violate the constitutional rights of our citizens must be held accountable. When that day comes we will be one step closer to that more perfect Union.

VII. Conclusion

Again, I do not envy the task before the Supreme Court. Overturning qualified immunity will undoubtedly impact our society. Yet, the status quo is extraordinary and unsustainable. Just as the Supreme Court swept away the mistaken doctrine of "separate but equal," so too should it eliminate the doctrine of qualified immunity.

Earlier this year, the Court explained something true about wearing the robe:

> Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.[288]

Let us waste no time in righting this wrong.

***30** Officer McClendon's motion is **GRANTED**, and the remaining claim in this matter will be set for trial in due course.

SO ORDERED, this the 4th day of August, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 4497723

Footnotes

1 That was Michael Brown. *See* Max Ehrenfreund, *The risks of walking while black in Ferguson*, WASH. POST (Mar. 4, 2015).

2 That was 12-year-old Tamir Rice. *See* Zola Ray, *This Is The Toy Gun That Got Tamir Rice Killed 3 Years Ago Today*, NEWSWEEK (Nov. 22, 2017).

3 That was Elijah McClain. *See* Claire Lampen, *What We Know About the Killing of Elijah McClain*, THE CUT (July 5, 2020).

4 That was Eric Garner. *See* Assoc. Press, *From Eric Garner's death to firing of NYPD officer: A timeline of key events*, USA TODAY (Aug. 20, 2019).

5 That was George Floyd. *See* Jemima McEvoy, *New Transcripts Reveal How Suspicion Over Counterfeit Money Escalated Into The Death Of George Floyd*, FORBES (July 8, 2020).

6 That was Philando Castile and Tony McDade. *See* Andy Mannix, *Police audio: Officer stopped Philando Castile on robbery suspicion*, STAR TRIB. (July 12, 2016); Meredith Deliso, *LGBTQ community calls for justice after Tony McDade, a black trans man, shot and killed by police*, ABC NEWS (June 2, 2020).

7 That was Jason Harrison. *See* Byron Pitts et al., *The Deadly Consequences When Police Lack Proper Training to Handle Mental Illness Calls*, ABC NEWS (Sept. 30, 2015).

8 That was Charles Kinsey. *See Florida policeman shoots autistic man's unarmed black therapist*, BBC (July 21, 2016).

9 That was 17-year-old James Earl Green. *See* Robert Luckett, *In 50 Years from Gibbs-Green Deaths to Ahmaud Arbery Killing, White Supremacy Still Lives*, JACKSON FREE PRESS (May 8, 2020); *see also* Robert Luckett, *50 Years Ago, Police Fired on Students at a Historically Black College*, N.Y. TIMES (May 14, 2020); Rachel James-Terry & L.A. Warren, *'All hell broke loose': Memories still vivid of Jackson State shooting 50 years ago*, CLARION LEDGER (May 15, 2020).

10 That was Ben Brown. *See* Notice to Close File, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (Mar. 24, 2017), *available at* https://www.justice.gov/crt/case-document/benjamin-brown-notice-close-file; *see also* Jackson State Univ., Center for University-Based Development, *The Life of Benjamin Brown, 50 Years Later*, W. JACKSON (May 11, 2017).

11 That was Phillip Gibbs. *See* James-Terry & Warren, *supra.*

12 That was Amadou Diallo. *See Police fired 41 shots when they killed Amadou Diallo. His mom hopes today's protests will bring change.*, CBS NEWS (June 9, 2020).

13 That was Botham Jean. *See* Bill Hutchinson, *Death of an innocent man: Timeline of wrong-apartment murder trial of Amber Guyger*, ABC NEWS (Oct. 2, 2019).

14 That was Breonna Taylor. *See* Amina Elahi, *'Sleeping While Black': Louisville Police Kill Unarmed Black Woman*, NPR (May 13, 2020).

15 That was Rayshard Brooks. *See* Jacob Sullum, *Was the Shooting of Rayshard Brooks 'Lawful but Awful'?*, REASON (June 15, 2020).

16 That was Sandra Bland. *See* Ben Mathis-Lilley & Elliott Hannon, *A Black Woman Named Sandra Bland Got Pulled Over in Texas and Died in Jail Three Days Later. Why?*, SLATE (July 16, 2015).

17 That was Walter Scott. *See* Michael E. Miller et al., *How a cellphone video led to murder charges against a cop in North Charleston, S.C.*, WASH. POST (Apr. 8, 2015).

18 That was Hannah Fizer. *See* Luke Nozicka, *'Where's the gun?': Family of Sedalia woman killed by deputy skeptical of narrative*, KANSAS CITY STAR (June 15, 2020).

19 That was Ace Perry. *See* Jodi Leese Glusco, *Run-in with Sampson deputy leaves driver feeling unsafe*, WRAL (Feb. 14, 2020).

20 *See, e.g.*, Mike Baker et al., *Three Words. 70 cases. The tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020) (discussing the deaths of Eric Garner, George Floyd, and 68 other people killed while in law enforcement custody whose last words included the statement, "I can't breathe.").

21 *Estate of Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 673 (4th Cir. 2020), *as amended* (June 10, 2020).

22 Mark Berman et al., *Protests spread over police shootings. Police promised reforms. Every year, they still shoot and kill nearly 1,000 people.*, WASH. POST (June 8, 2020) ("Since 2015, police have shot and killed 5,400 people."); *see also* Alicia Victoria Lozano, *Fatal Encounters: One man is tracking every officer-involved killing in the U.S.*, NBC NEWS (July 11, 2020), ("As of July 10, Fatal Encounters lists more than 28,400 deaths dating to Jan. 1, 2000. The entries include both headline-making cases and thousands of lesser-known deaths.").

23 *See, e.g.*, Jamie Kalven, *Invisible Institute Relaunches The Citizens Police Data Project*, THE INTERCEPT (Aug. 16, 2018) (discussing "a public database containing the disciplinary histories of Chicago police officers .... It includes more than 240,000 allegations of misconduct involving more than 22,000 Chicago police officers over a 50-year period."); Andrea J. Ritchie, *How some cops use the badge to commit sex crimes*, WASH. POST (Jan. 12., 2018) ("According to a 2010 Cato Institute review, sexual misconduct is the second-most-frequently reported form of police misconduct, after excessive force.").

24 *Estate of Jones*, 961 F.3d at 673.

25 The facts are drawn from the parties' depositions.

26 That night, Officer McClendon was working in Pelahatchie pursuant to an interlocal agreement between the Richland and Pelahatchie Police Departments.

27 Jamison testified that there were two other officers on the scene. The record does not contain any evidence from these individuals.

28 This part of Officer McClendon's testimony is undisputed. Jamison testified that he did not know if Officer McClendon heard back from NCIC prior to returning to Jamison's car.

29 Officer McClendon denies saying such a thing.

30 "A 'roach' is what remains after a joint, blunt, or marijuana cigarette has been smoked. It is akin to a cigarette butt." *United States v. Abernathy*, 843 F.3d 243, 247 n.1 (6th Cir. 2016) (citation omitted).

31 When Officer McClendon was shown the cardboard tag during his deposition, it showed no signs of being creased. The officer claimed that it either could have folded without creasing or that someone had ironed out the crease.

32 This explains why he was tired. Here he was, standing on the side of a busy interstate at night for almost two hours against his will so Officer McClendon could satisfy his goal of searching Jamison's vehicle. In that amount of time, Dorothy and Toto could have made it up and down the yellow brick road and back to Kansas. *See* Lee Pfeiffer, *The Wizard of Oz*, ENCYCLOPEDIA BRITANNICA (Mar. 19, 2010) (noting the 101-minute run time of the 1939 film). If Jamison was driving at 70 MPH before being stopped, in the 110 minutes he was held on the side of the road he would have gotten another 128 miles closer to home, through Rankin, Scott, Newton, and Lauderdale counties and more than 40 miles into Alabama.

33 Given the timeline – Jamison filed this suit in 2016 – he may be referring to the 2015 killing of Walter Scott by former South Carolina policeman Michael Slager. A bystander captured video of Slager shooting Scott in the back as he ran away, leading to "protests across the U.S. as demonstrators said it was another example of police officers mistreating Blacks." Meg Kinnard, *South Carolina officer loses appeal over shooting conviction*,

ASSOC. PRESS (Jan. 8, 2019). Another news source noted that Scott was shot in the back five times. Meredith Edward & Dakin Andone, *Ex-South Carolina Cop Michael Slager gets 20 years for Walter Scott Killing*, CNN (Dec. 7, 2017). "At the time of the shooting, Scott was only the latest black man to be killed in a series of controversial officer-involved shootings that prompted 'Black Lives Matter' protests and vigils." *Id.* Slager pleaded guilty to federal criminal charges that he deprived of Scott of his civil rights and was sentenced to serve 20 years in prison. State murder charges were dropped. The fact that Slager was convicted is an anomaly; law enforcement officers are rarely charged for on-duty killings, let alone convicted. *See generally* Janell Ross, *Police officers convicted for fatal shootings are the exception, not the rule*, NBC NEWS (Mar. 13, 2019); Jamiles Lartey et al., *Former officer Michael Slager sentenced to 20 years for murder of Walter Scott*, THE GUARDIAN (Dec. 7, 2017).

34 Docket No. 62.

35 Jamison provided no evidence of comparative discriminatory treatment of those among similarly-situated individuals of different classes. *See id.* at 7–8.

36 Fed. R. Civ. P. 56(a).

37 *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (citation omitted).

38 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

39 Fed. R. Civ. P. 56(c)(1).

40 *Id.* at 56(c)(1)(A).

41 *Strong v. Dep't of Army*, 414 F. Supp. 2d 625, 628 (S.D. Miss. 2005).

42 *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1394, 206 L.Ed.2d 583 (2020).

43 RON CHERNOW, GRANT 706 (2017); *see also* Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi 1870-1890*, 53 J. S. HIST. 421, 421 (Aug. 1987), http://www.jstor.org/stable/2209362 (describing the era as Mississippi's first civil rights struggle and noting that the federal government sought to "secure black civil and political equality in the years after the Civil War.").

44 DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 2 (2001).

45 Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 660 (2018) (citation omitted); *see* BLIGHT, *supra* at 47.

46 CHERNOW, *supra* at 562.

47 *United States v. Cannon*, 750 F.3d 492, 509 (5th Cir. 2014) (Elrod, J., concurring).

48 Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 542 (2002) (quotations and citation omitted).

49 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1857).

50 DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 47 (6th ed. 2008).

51 Margaret Bush Wilson and Diane Ridley, *The New Birth of Liberty: The Role of Thurgood Marshall's Civil Rights Contribution*, 6 NAT'L BLACK L.J. 67, 75 n.26 (1978)

52 CHERNOW, *supra* at 685–86.

53 THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES 442 (Kermit L. Hall et al. eds., 2d ed. 2005).

54 *Id.*

55 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 353–57 (1988). Black Mississippians were also elected to local, state, and federal posts. John R. Lynch, a former slave, would serve as Speaker of the House in the Mississippi Legislature and would later represent Mississippi in Congress. *See* JOHN R. LYNCH, REMINISCENCES OF AN ACTIVE LIFE: THE AUTOBIOGRAPHY OF JOHN ROY LYNCH xii–xv (1970). James Hill, also formerly enslaved, would too serve as Speaker of the House and was later elected as Mississippi's Secretary of State. *See* GEORGE A. SEWELL & MARGARET L. DWIGHT, MISSISSIPPI BLACK HISTORY MAKERS 48 (2d ed. 1984).

56 FONER, *supra* at 365–67. During this period, Mississippi's Superintendent of Education was Thomas Cardozo, a Black man. *See History*, THOMAS CARDOZO MIDDLE SCHOOL, https://www.jackson.k12.ms.us/domain/616 (last visited July 10, 2020).

57 FONER, *supra* at 368–71.

58 The chasm between these two visions of America was embodied by President Johnson, who in his official capacity led a nation founded in the belief "that all men are created equal," yet in his individual capacity "side[d] with white supremacists," "privately referred to blacks as 'niggers,' " and had "a morbid fascination with miscegenation." CHERNOW, *supra* at 550; *see generally* FONER, *supra* at 412–59; NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

59 CHERNOW, *supra* at 563.

60 *Id.*

61 *Id.* at 568.

62 *See, well, Moore v. Bryant*, 205 F. Supp. 3d 834, 840 (S.D. Miss. 2016) (citation omitted).

63 Macfarlane, *supra* at 660.

64 CHERNOW, *supra* at 588.

65 *Id.* at 621.

66 *Id.* at 571, 703.

67 *Id.* at 703.

68 Cresswell, *supra* at 426.

69 *See* Robin D. Barnes, *Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1099 (1996); Randolph M. Scott-McLaughlin, *Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1371 (1992); Alfred L. Brophy, *Norms, Law, and Reparations: The Case of the Ku Klux Klan in 1920s Oklahoma*, 20 HARV. BLACKLETTER L.J. 17, 24–25 (2004); *see also* SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE 21ST CENTURY 77–84 (2007); FONER, *supra* at 434 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.").

70 *See* Barnes, *supra* at 1094.

71 CHERNOW, *supra* at 702; *see also* Cresswell, *supra* at 432 ("Attorneys, marshals, witnesses and jurors suffered abuse and assault, were ostracized by the white community, and some were even murdered.").

72 CHERNOW, *supra* at 707.

73 At least 2,000 Black women, men, and children were killed by white mobs in racial terror lynchings during Reconstruction. *See Reconstruction in America*, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america/ (last visited July 16, 2020). "Thousands more were assaulted, raped, or injured in racial terror attacks between 1865 and 1877." *Id.*

74 LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 276–77 (1979).

75 *Baxter v. Bracey*, —— U.S. ——, 140 S. Ct. 1862, —— L.Ed.2d —— (2020) (Thomas, J., dissenting from the denial of certiorari) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983)).

76 Macfarlane, *supra* at 661 (quotations and citations omitted); *see also* *Monroe v. Pape*, 365 U.S. 167, 172–83, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

77 Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982) (citations omitted).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Monroe*, 365 U.S. at 174, 81 S.Ct. 473.

82 Zach Lass, *Lowe v. Raemisch: Lowering the Bar of the Qualified Immunity Defense*, 96 DENV. L. REV. 177, 180 (2018) (citation omitted).

83 @ignitekindred, TWITTER (Apr. 25, 2016, 6:39 PM) https://twitter.com/ig-nitekindred/status/724744680878039040.

84 CHERNOW, *supra* at 708.

85 *Id.* at 710.

86 *Id.* at 709.

87 *Reconstruction vs. Redemption*, NAT'L ENDOWMENT HUMAN. (Feb. 11, 2014); *see also* BLIGHT, *supra* at 101–02.

88 BLIGHT, *supra* at 137–39.

89 *Moore*, 205 F. Supp. 3d at 840 (quotations, citations, and brackets omitted).

90 Cresswell, *supra* at 429.

91 That is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both. *See Barnes, supra* at 1099 ("judges, politicians, and law enforcement officers were fellow Klansmen"); PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 193 (2016) ("a near majority" of Article III judges appointed in the wake of Reconstruction were former Confederates). L.Q.C. Lamar, the only Mississippian to ever serve on the Supreme Court, was on the side of these renegades. *See generally* DENNIS J. MITCHELL, A NEW HISTORY OF MISSISSIPPI 199–200 (2014). As an attorney, Lamar was noted for "wielding a chair" in open court and attacking a U.S. Marshal, "breaking a small bone at the cap of the [Marshal's] eye." Cresswell, *supra* at 434.

92 Macfarlane, *supra* at 661–62 (citations omitted).

93 *Id.* at 662.

94 *Id.*

95 BELL, *supra* at 48.

96 *Id.* at 49.

97 Macfarlane, *supra* at 663.

98 163 U.S. 537, 552, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting), *overruled on other grounds by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

99 *See generally* Macfarlane, *supra* at 665.

100 Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1722 (1989).

101 365 U.S. at 169, 81 S.Ct. 473.

102 *Id.* at 187, 81 S.Ct. 473.

103 *Id.*

104 *Haywood v. Drown*, 556 U.S. 729, 735, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972)).

105 Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1002 (2002).

106 42 U.S.C. § 1983.

107 *See* John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 803 (2003) (noting that we "have witnessed the restriction of rights developed during" the Civil Rights Movement, including Section 1983).

108 *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1870, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

109 Several scholars have shown that history does not support the Court's claims about qualified immunity's common law foundations. *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) [hereinafter *The Case Against Qualified Immunity*].

110 *Ziglar*, 137 S. Ct. at 1870 (citations omitted).

111 386 U.S. 547, 549, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

112 *Id.*

113 *Id.* at 555, 87 S.Ct. 1213.

114 *Id.* ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

115 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 14 (2017) (citations omitted).

116 *Harlow v. Fitzgerald*, 457 U.S. 800, 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

117 *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, No. 19-679, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3146693 (U.S. June 15, 2020).

118 *Taylor v. Stevens*, 946 F.3d 211, 220 (5th Cir. 2019).

119 *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied* No. 19-1021, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2515813 (U.S. May 18, 2020).

120 *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019), *cert. denied*, No. 19-682, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2515455 (U.S. May 18, 2020).

121 *Dukes v. Deaton*, 852 F.3d 1035, 1039 (11th Cir. 2017).

122 *Baxter v. Bracey*, 751 F. App'x 869, 872 (6th Cir. 2018), *cert. denied*, —— U.S. ——, 140 S. Ct. 1862, —— L.Ed.2d —— (2020).

123 *Willingham v. Loughnan*, 261 F.3d 1178, 1181 (11th Cir. 2001), *cert. granted, judgment vacated*, 537 U.S. 801, 123 S.Ct. 68, 154 L.Ed.2d 2 (2002).

124 *Haywood*, 556 U.S. at 735, 129 S.Ct. 2108 (citation omitted).

125 *See* *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 81 (2018). Previously, the Court had used "clearly established" as an explanatory phrase to better understand good faith. *See, e.g.,* *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (finding compensatory damages "appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.").

126 *Malley*, 475 U.S. at 341, 106 S.Ct. 1092; *see also* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 61 (2012). *Malley* was also the first time "objectively unreasonable" appeared in a Supreme Court qualified immunity decision.

127 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (citations omitted) (emphasis added).

128 *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020) (citation omitted). That leads us to another rabbit hole. A district court opinion doesn't clearly establish the law in a jurisdiction. *Id.* at 233 n.6 (citation omitted). Nor does a circuit court opinion, if the judges designate it as "unpublished." *Id.* Only *published* circuit court decisions count. *See* *id.* Even then, the Supreme Court has "expressed uncertainty" about whether courts

of appeals may ever deem constitutional law clearly established. *Cole v. Carson*, 935 F.3d 444, 460 n.4 (5th Cir. 2019) (Jones, J., dissenting) (collecting cases).

129 *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074. As Professor John Jeffries explains, "[t]he narrower the category of cases that count, the harder it is to find a clearly established right." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 859 (2010) [hereinafter *What's Wrong with Qualified Immunity?*]. This restrictive approach bulks up qualified immunity and makes its protections difficult to penetrate. When combining the narrow view of relevant precedent to the demand for "extreme factual specificity in the guidance those precedents must provide, the search for 'clearly established' law becomes increasingly unlikely to succeed, and 'qualified' immunity becomes nearly absolute." *Id.*

130 *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (quotations and citation omitted).

131 *See* *Mullenix v. Luna*, —— U.S. ——, 136 S. Ct. 305, 316, 193 L.Ed.2d 255 (2015) (Sotomayor, J., dissenting) ("an officer's actual intentions are irrelevant to the Fourth Amendment's 'objectively reasonable' inquiry") (citing *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

132 Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 NEV. L.J. 185, 195 (2008).

133 *Saucier v. Katz*, 533 U.S. 194, 200–01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

134 *See* *Bosarge v. Mississippi Bureau of Narcotics*, 796 F.3d 435, 443 (5th Cir. 2015) (citation omitted) ("[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming and intrusive."); *see also* Lass, *supra*, at 188.

135 *See* *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994).

136 Brown, *supra* at 196.

137 *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

138 *See generally Baude, supra* at 83 ("[A]ll but two of the [Supreme] Court's awards of qualified immunity reversed the lower court's denial of immunity below. In other words, lower courts that follow Supreme Court doctrine should get the message: think twice before allowing a government official to be sued for unconstitutional conduct."); *see also* *Mullenix*, 136 S. Ct. at 310 (reversing and reminding lower courts that the Supreme Court "has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity"); *White v. Pauly*, —— U.S. ——, 137 S. Ct. 548, 552, 196 L.Ed.2d 463 (2017) (per curiam) (reversing and chastising the appellate court for "misunderst[anding] the 'clearly established' analysis").

139 950 F.3d at 231.

140 *Id.*

141 *Id.* at 233.

142 *Id.* A dissent argued that the majority was stretching qualified immunity to rule for the officer, since it was already clearly established that correctional officers couldn't use their fists, a baton, or a taser to assault an inmate without provocation. *Id.* at 234–35 (Costa, J., dissenting).

143 *Taylor*, 946 F.3d at 218–19 (brackets and footnotes omitted).

144 *Id.* at 218 & n.6.

145 *Taylor v. Williams*, No. 5:14-CV-149-BG, 2016 WL 8674566, at *3 (N.D. Tex. Jan. 22, 2016), *report and recommendation adopted*, No. 5:14-CV-149-C, 2016 WL 1271054 (N.D. Tex. Mar. 29, 2016), *aff'd in part, vacated in part, remanded*, 715 F. App'x 332 (5th Cir. 2017).

146 *Taylor*, 946 F.3d at 219.

147 *Id.* at 222.

148 *Id.* (citations omitted). It would appear that correctional officers in this Circuit can now just put inmates in feces-covered cells for *five* days or less and escape liability.

149 *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972).

150 *Bienvenu v. Beauregard Par. Police Jury*, 705 F.2d 1457, 1460 (5th Cir. 1983) ("Bienvenu's statements that the defendant ... intentionally subjected him to a cold, rainy, roach-infested facility and furnished him with inoperative, scum-encrusted washing and toilet facilities sufficiently alleges a cause of action cognizable under 42 U.S.C. § 1983.")

151 *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999) (concluding that plaintiff stated a Constitutional claim when "his only option was to urinate and defecate in the confined area that he shared with forty-eight other inmates").

152 *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004) (affirming injunction where "cells were 'extremely filthy' with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles").

153 *Cowan v. Scott*, 31 F. App'x 832, at *2 (5th Cir. 2002) (finding that prisoner stated a Constitutional claim when he alleged that "he was forced to lie in feces for days without access to a shower").

154 *Harper v. Showers*, 174 F.3d 716, 717 (5th Cir. 1999).

155 *See, e.g.*, *McBride v. Deer*, 240 F.3d 1287, 1291 (10th Cir. 2001); *Sperow v. Melvin*, 182 F.3d 922 (7th Cir. 1999); *see also* *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) (holding that "forcing inmates to work in a shower of human excrement without protective clothing and equipment" for as little as 10 minutes stated a claim). Judge Wilson of the Eleventh Circuit once wrote that "there is remarkably little consensus among the United States circuit courts concerning how to interpret the term 'clearly established.' " Charles R. Wilson, "*Location, Location, Location*": *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). "One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) (collecting cases).

156 *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

157 *al-Kidd*, 563 U.S. at 741, 131 S.Ct. 2074.

158 *Zadeh v. Robinson*, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

159 *See, e.g.*, *White*, 137 S. Ct. at 552 (per curiam) (chastising the appellate court for "misunderst[anding] the 'clearly established' analysis"). Professor Baude says the Court has been on a "crusade." Baude, *supra* at 61.

160 *See* *White*, 137 S. Ct. at 552.

161 Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 909 (2016).

162 *See, e.g.*, *Pratt v. Harris Cty., Tex.*, 822 F.3d 174, 186 (5th Cir. 2016).

163 Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018).

164 *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (No. 18-1287) 2019 WL 2370285.

165 *See, e.g., Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part); *Zadeh*, 928 F.3d at 474 (Willett, J., concurring in part and dissenting in part); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *10 (E.D.N.Y. June 26, 2018); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 283 (Iowa 2018) (Appel, J., dissenting); James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake*, WASH. POST (June 12, 2020).

166 *See, e.g., The Case Against Qualified Immunity, supra*; Baude, *supra*; Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2305 (2018); *What's Wrong with Qualified Immunity?, supra*; Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 678 (1997).

167 *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017) (citations and brackets omitted).

168 *See* Docket No. 62.

169 *United States v. Estrada*, 459 F.3d 627, 631 (5th Cir. 2006) (citation omitted).

170 *United States v. Spence*, 667 F. App'x 446, 447 (5th Cir. 2016) (citations omitted).

171 *New York v. Class*, 475 U.S. 106, 114–15, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

172 *United States v. Pierre*, 958 F.2d 1304, 1309 (5th Cir. 1992); *see also United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993).

173 *Pierre*, 958 F.2d at 1309 (citation omitted).

174 *Id.*

175 *See id.*

176 Docket No. 68 at 21.

177 *Ryles*, 988 F.2d at 15 (citations omitted).

178 *Pierre*, 958 F.2d at 1307.

179 *Id.*

180 *Id.*

181 *Id.* (quotations and brackets omitted).

182 *Id.* at 1309–10.

183 *Id.* at 1309.

184 *Id.* at 1310.

185 *Id.* at 1309.

186 *Id.* at 1310.

187 *Id.*

188 *Id.*

189 *Id.* (citation omitted).

190 *Id.*

191 *See Spence*, 667 F. App'x at 447.

192 *Pierre*, 958 F.2d at 1310.

193 *Id.*

194 *United States v. Gomez-Moreno*, 479 F.3d 350, 357 (5th Cir. 2007) (citation omitted), *overruled on other grounds by* *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

195 *Id.* (quotations and citation omitted).

196 *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002) (citation omitted).

197 *United States v. Santiago*, 310 F.3d 336, 343 (5th Cir. 2002) (citations omitted).

198 *Id.*

199 *United States v. Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993) (quotations and citation omitted).

200 *United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017) (citation omitted).

201 *United States v. Macias*, 658 F.3d 509, 523 (5th Cir. 2011) (citation omitted).

202 *United States v. Tompkins*, 130 F.3d 117, 122 (5th Cir. 1997) (citation omitted).

203 *United States v. Cooper*, 43 F.3d 140, 148 (5th Cir. 1995).

204 *See, e.g.,* *Tompkins*, 130 F.3d at 122; *United States v. Olivarria*, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011).

205 *United States v. Hall*, 565 F.2d 917, 921 (5th Cir. 1978).

206 *See United States v. Fernandes*, 285 F. App'x 119, 124 (5th Cir. 2008).

207 *Cf.* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1151 n.81 (2012) (identifying cases in which the Supreme Court failed to recognize the potential impact of race and racism).

208 *Cf.* *United States v. Mendenhall*, 446 U.S. 544, 558, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (noting that the race, gender, age, and education of a young Black woman who "may have felt unusually threatened by the officers, who were white males" were all relevant factors in determining whether the woman voluntarily consented to a seizure).

209 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE 1964 MURDERS OF MICHAEL SCHWERNER, JAMES CHANEY, AND ANDREW GOODMAN 7–8 (2018), *available at* https://www.justice.gov/crt/case-document/file/1041791/download.

210 Albert Samaha, *"This Is What They Did For Fun": The Story Of A Modern-Day Lynching*, BUZZFEED NEWS (Nov. 18, 2015); *see also* Press Release, U.S. Dep't of Justice, Three Brandon, Miss., Men Plead Guilty for Their Roles in the Racially Motivated Assault and Murder of an African-American Man (Mar. 22, 2012) *available at* https://www.justice.gov/opa/pr/three-brandon-miss-men-plead-guilty-their-roles-racially-motivated-assault-and-murder-african.

211 *See* MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ (last accessed June 15, 2020).

212 Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013).

213 Elazar Sontag, *To this Black Lives Matter co-founder, activism begins in the kitchen*, WASH. POST (Mar. 26, 2018); *see also* Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1095 (2018).

214 Channing Joseph & Ravi Somaiya, *Demonstrations Across the Country Commemorate Trayvon Martin*, N.Y. TIMES (July 21, 2013).

215 Hannah L.F. Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1189 (2015); *see also* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 1 ANN. REV. CRIMINOLOGY 2.1, 2.3 (forthcoming 2021); Katheryn Russell-Brown, *Making Implicit Bias Explicit: Black Men and the Police*, in POLICING THE BLACK MAN 139–40 (Angela J. Davis ed., 2018); Brandon Hasbrouck, *The 13th Amendment Could End Racist Policing*, SLATE (June 5, 2020).

216 *See, e.g.*, Ron Stodghill, *Black Behind the Wheel*, N.Y. TIMES (July 14, 2020); Helen Sullivan et al., *Thousands continue protesting across US as Minneapolis vows to dismantle police department – as it happened*, THE GUARDIAN (June 12, 2020). "There's a long history of black and brown communities feeling unsafe in police presence." *United States v. Curry*, 965 F.3d 313, ——, 2020 WL 3980362, at *13 (4th Cir. 2020) (Gregory, C.J., concurring).

217 *See* Crystal Bonvillian, *Video: Black Miami doctor who tests homeless for COVID-19 handcuffed, detained outside own home*, KIRO 7 (Apr. 14, 2020); David A. Harris, *Racial Profiling: Past, Present, and Future?*, ABA CRIM. JUSTICE MAG. (Winter 2020) (recounting the suit and settlement achieved by Robert Wilkins, U.S. Circuit Judge for the D.C. Circuit); Louis Nelson, *Sen. Tim Scott reveals incidents of being targeted by Capitol Police*, POLITICO (July 13, 2016).

In a moving speech delivered from the Senate floor just last month, Senator Scott said,

> As a black guy, I know how it feels to walk into a store and have the little clerk follow me around, even as a United States Senator. I get that. I've experienced that. I understand the traffic stops. I understand that when I'm walking down the street and some young lady clutches on to her purse and my instinct is to get a little further away because I don't want any issues with anybody, I understand that.

See U.S. Senator Tim Scott, Senator Tim Scott Delivers Fiery Speech on Senate Floor After Senate Democrats Stonewall Legislation on Police Reform Across America (June 24, 2020), *available at* https://www.scott.senate.gov/media-center/press-releases/senator-tim-scott-delivers-fiery-speech-on-senate-floor-after-senate-democrats-stonewall-legislation-on-police-reform-across-america.

218 Tim Scott, *GOP Sen. Tim Scott: I've choked on fear when stopped by police. We need the JUSTICE Act.*, USA TODAY (June 18, 2020).

219 Nelson, *supra* ("Scott also shared the story of a former staffer of his who drove a Chrysler 300, 'a nice car without any question, but not a Ferrari.' The staffer wound up selling that car out of frustration after being pulled over too often in Washington, D.C., 'for absolutely no reason other than for driving a nice car.' He told a similar story of his brother, a command sergeant major in the U.S. Army, who was pulled over by an officer suspicious that the car Scott's brother was driving was stolen because it was a Volvo.... Scott pleaded in his remarks that the issues African-Americans face in dealing with law enforcement not be ignored.").

220 *See, e.g.*, John Sullivan et al., *Four years in a row, police nationwide fatally shoot nearly 1,000 people*, WASH. POST (Feb. 12, 2019).

221 Niall McCarthy, *Police Shootings: Black Americans Disproportionately Affected [Infographic]*, FORBES (May 28, 2020) ("Black Americans ... are shot and killed by police [at] more than twice ... the rate for white Americans.").

222 Adam Shatz, *The Fierce Courage of Nina Simone*, N.Y. REV. OF BOOKS (Mar. 10, 2016).

223 Smith Lee & Robinson, *That's My Number One Fear in Life. It's the Police*": *Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. BLACK PSYCH. 143, 146 (2019) (citation omitted).

224 *Curry*, 965 F.3d at ——, 2020 WL 3980362, at *14 (Gregory, C.J., concurring).

225 *United States v. Ruigomez*, 702 F.2d 61, 65 (5th Cir. 1983).

226 *Samples v. Vadzemnieks*, 900 F.3d 655, 662 (5th Cir. 2018) (quotations, citations, and ellipses omitted).

227 *Mullenix*, 136 S. Ct. at 308 (citation omitted).

228 *Id.* (quotations and citation omitted).

229 *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (citations omitted).

230 *Anderson v. Valdez*, 913 F.3d 472, 476 (5th Cir. 2019) (quotations and citations omitted).

231 *Rich v. Palko*, 920 F.3d 288, 294 (5th Cir. 2019) (quotations and citation omitted).

232 *McLin v. Ard*, 866 F.3d 682, 696 (5th Cir. 2017) (quotations and citation omitted).

233 Docket No. 68 at 20 (citing *United States v. Edgerton*, 438 F.3d 1043, 1051 (10th Cir. 2006)).

234 *Edgerton*, 438 F.3d at 1051.

235 *Palko*, 920 F.3d at 294.

236 *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995).

237 Docket No. 68 at 23.

238 *Id.* at 24 (citing *Jordan v. Wayne Cty., Miss.*, No. 2:16-CV-70-KS-MTP, 2017 WL 2174963, at *5 (S.D. Miss. May 17, 2017)).

239 *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993); *see also* *Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994).

240 *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1061 (5th Cir. 1994).

241 *Contra* *Lampkin*, 7 F.3d at 435 ("The facts leading up to these mistakes are not consistent among various officers' testimony and affidavits.").

242 *Id.*

243 *Thompson v. Upshur Cty., TX*, 245 F.3d 447, 457 (5th Cir. 2001).

244 *United States v. Alvarado*, 989 F. Supp. 2d 505, 522 n.21 (S.D. Miss. 2013).

245 *See* *McCoy*, 950 F.3d at 233 n.6.

246 *Alvarado*, 989 F. Supp. 2d at 522.

247 *Pierre*, 958 F.2d at 1309; *see also* *Class*, 475 U.S. at 114–15, 106 S.Ct. 960.

248 *White*, 137 S. Ct. at 552 (quotations and citation omitted).

249 *Id.* (quotations and citation omitted).

250 *Id.* at 551 (quotations and citation omitted).

251 *See Bank of Am. Nat'l Ass'n v. Stauffer*, 728 F. App'x 412, 413 (5th Cir. 2018). The situation is inapposite to the cases in Officer McClendon's reply brief. Both *Vela v. City of Houston*, 276 F.3d 659 (5th Cir. 2001), and *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1156 (5th Cir. 1983), concerned cases in which a party argued for summary judgment on claims and the opposing party failed to address at least one of the theories of recovery in its response. In such cases, the Fifth Circuit held that the nonmoving party "abandoned its alternative theories of recovery [or defenses] by failing to present them to the trial court." *Vela*, 276 F.3d at 678–79. Here, however, Officer McClendon failed to raise an argument in his original brief as to Jamison's third claim.

252 *Dixon v. Toyota Motor Credit Corp.*, 794 F.3d 507, 508 (5th Cir. 2015); *see also Dugger v. Stephen F. Austin State Univ.*, 232 F. Supp. 3d 938, 957 (E.D. Tex. 2017) (collecting cases demonstrating that "courts disregard new evidence or argument offered for the first time in the reply brief").

253 U.S. CONST. pmbl.

254 *Id.*

255 John Lewis, Speech at the March on Washington (Aug. 28, 1963), *available at* https://voicesofdemocracy.umd.edu/lewis-speech-at-the-marchon-washington-speech-text/.

256 *See June Med. Servs. L.L.C. v. Russo*, —— U.S. ——, 140 S.Ct. 2103, 2134, —— L.Ed.2d —— (2020) (Roberts, C.J., concurring).

257 *Ramos*, 140 S. Ct. at 1405 (citation omitted).

258 *See, e.g.*, @thekaranmenon, TIKTOK (June 7, 2020), https://vm.tiktok.com/JLVfBkn/.

259 That's Professor Baude's word, not mine. Baude, *supra* at 61.

260 *Wyatt v. Cole*, 504 U.S. 158, 170, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (Kennedy, J., concurring).

261 *Crawford-El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., joined by Thomas, J., dissenting) (citation omitted).

262 *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from the denial of certiorari).

263 *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part).

264 *Kisela v. Hughes*, —— U.S. ——, 138 S. Ct. 1148, 1158, 200 L.Ed.2d 449 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *see also* *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting).

265 *Id.* at 1162.

266 According to one analysis, Justice Gorsuch's record on the Tenth Circuit signaled that he "harbors a robust—though not boundless—vision of qualified immunity" and "is sensitive to the practical concerns qualified immunity is meant to mollify—namely, the realities of law enforcement." Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (2017). On the Court of Appeals, however, those were the concerns then-Judge Gorsuch was supposed to honor. The genius of the law is that, as now-Justice Gorsuch observed in 2019, "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Gamble v. United States*, —— U.S. ——, 139 S. Ct. 1960, 2006, 204 L.Ed.2d 322 (2019) (Gorsuch, J., dissenting) (quoting Justice Brandeis). Sometimes our understanding of words changes, too, as we glean new insight into the meaning of an authoritative text. *See, e.g.,* *Bostock v. Clayton Cty., Georgia*, —— U.S. ——, 140 S. Ct. 1731, —— L.Ed.2d —— (2020). Justice Gorsuch's majority opinion in *Bostock* emphasized that "no court should ever" dispense with a statutory text "to do as we think best," adding, "the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them." *Id.* at 1753. Yet that is exactly what the Court has done with § 1983.

267 *See* *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2481, 201 L.Ed.2d 924 (2018); *June Med. Servs.*, 140 S.Ct. at 2134-35 (Roberts, C.J., concurring).

268 *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas*, 947 F.3d 301, 308 (5th Cir. 2020) (citation omitted).

269 42 U.S.C. § 1981(a). "[W]hile the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976).

270 *Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 586 F. App'x 643, 645-46 (5th Cir. 2014).

271 *See* *George Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 657 F.3d 251, 252 (5th Cir.2011).

272 *Id.* at 255.

273 *Id.* at 258 (quotations and citation omitted). This standard is awfully subjective.

274 *Id.* at 258-59 (Barksdale, J., dissenting).

275 *Id.* at 272.

276 *Id.* at 274.

277 *Id.* at 281-82.

278 *Id.* at 283.

279 *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *see also* *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000).

280 The most confounding made-up standard might have been from the Eleventh Circuit. For years, that court held that a plaintiff could prove discrimination based on her superior qualifications "only when the disparity in qualifications is so apparent as virtually to jump off the page and *slap you in the face.*" *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57, 126 S.Ct. 1195, 163 L.Ed.2d 1053 (2006) (emphasis added) (quotations and

citation omitted). The Supreme Court eventually rejected the standard as "unhelpful and imprecise." *Id.* at 457, 126 S.Ct. 1195.

281 *See Dulin v. Bd. of Comm'rs of Greenwood Leflore Hosp.*, 657 F.3d 251, 251 (5th Cir. 2011).

282 We have many tools at our disposal to stop frivolous suits at any stage of litigation. *See, e.g.*, 28 U.S.C. § 1915; Fed. R. Civ. P. 11, 12, 37, and 56; *Link v. Wabash R. Co.*, 370 U.S. 626, 629, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Even after a jury has reached a verdict, a judge may set aside the decision or take other corrective actions if the judge believes a reasonable jury could not have reached the decision. *See, e.g.*, Fed. R. Civ. P. 50, 59 and 60. And where the trial court errs, the appellate court is given the opportunity to correct.

283 *Manzanares*, 331 F. Supp. 3d at 1294 n.10.

284 The Court recognizes that juries have not always done the right thing. As the Supreme Court noted in *Ramos*, some states created rules regarding jury verdicts that can be "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities' " on their juries. 140 S. Ct. at 1394. As other courts have noted, "racial discrimination remains rampant in jury selection." *State v. Saintcalle*, 178 Wash. 2d 34, 35, 309 P.3d 326 (2013), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 (2017). Like any actor in our legal system, juries may succumb to "unintentional, institutional, or unconscious" biases. *Id.* at 36, 309 P.3d 326. However, the federal courts' adoption and expansion of qualified immunity evinces an obvious institutional bias in favor of state actors. With its more diverse makeup relative to those of us who wear the robe, a jury is best positioned to "decide justice." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701-02 (1995) (citation omitted); *see also* Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019) ("Today, more than 73 percent of sitting federal judges are men and 80 percent are white. Only 27 percent of sitting judges are women .... while Hispanic judges comprise just 6 percent of sitting judges on the courts. Judges who self-identify as LGBTQ make up fewer than 1 percent of sitting judges.") (citations omitted).

285 *United States v. Windsor*, 570 U.S. 744, 799, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (Scalia, J., dissenting).

286 Afterall, "[q]uite simply, jurors are the life's blood of our third branch of government." *Marchan v. John Miller Farms, Inc.*, 352 F. Supp. 3d 938, 947 (D. N.D. 2018) (citation omitted).

287 Fortunately, the dissent is readily found on Google searches and an official copy was preserved on the District Court's docket.

288 *Ramos*, 140 S. Ct. at 1408.

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Vandergroen, 9th Cir.(Cal.), July 7, 2020

925 F.3d 1150
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Daniel Derek BROWN, Defendant-Appellant.

No. 17-30191
|
Argued and Submitted November 6, 2018 Seattle, Washington
|
Filed June 5, 2019

Synopsis

Background: Defendant was charged with drug and firearm offenses. The United States District Court for the Western District of Washington, Carolyn R. Dimmick, J., 2017 WL 1233043, No. 2:16-cr-00056-JCC-1, denied defendant's motion to suppress. Defendant appealed.

[Holding:] The Court of Appeals, McKeown, Circuit Judge, held that police did not have reasonable suspicion to stop defendant based on anonymous tip.

Reversed.

Friedland, Circuit Judge, filed a concurring opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (7)

[1] **Arrest** Reasonableness; reason or founded suspicion, etc

An officer may only conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. U.S. Const. Amend. 4.

3 Cases that cite this headnote

[2] **Arrest** Reasonableness; reason or founded suspicion, etc

In undertaking the fact-driven analysis of reasonable suspicion, appellate courts consider de novo the totality of the circumstances surrounding a stop, including both the content of information possessed by police and its degree of reliability. U.S. Const. Amend. 4.

4 Cases that cite this headnote

[3] **Arrest** Particular cases

Police did not have reasonable suspicion to stop defendant based on anonymous tip that a young, black man had a gun, where source of tip was anonymous, tip did not provide predictive information, defendant was not in a high crime area, defendant was not suspected of committing any crime, it was presumptively lawful to carry a gun in state where defendant was arrested, and defendant fled when police activated patrol car lights, but officers had not tried to communicate with defendant or tell him to stop. U.S. Const. Amend. 4.

7 Cases that cite this headnote

[4] **Arrest** Reasonableness; reason or founded suspicion, etc

An anonymous tip that identifies an individual but lacks moderate indicia of reliability provides little support for a finding of reasonable suspicion. U.S. Const. Amend. 4.

[5] **Arrest** Reasonableness; reason or founded suspicion, etc

Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity to establish reasonable suspicion. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[6] **Arrest** Reasonableness; reason or founded suspicion, etc

An anonymous tip, to provide reasonable suspicion, must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. U.S. Const. Amend. 4.

2 Cases that cite this headnote

[7] **Arrest** Pursuit

Flight is just one factor in the reasonable suspicion analysis. U.S. Const. Amend. 4.

4 Cases that cite this headnote

Attorneys and Law Firms

***1151** Jason B. Saunders (argued), Law Offices of Gordon & Saunders PLLC, Seattle, Washington, for Defendant-Appellant.

Charlene Koski (argued), Assistant United States Attorney; Annette L. Hayes, United States Attorney; United States Attorney's Office, Seattle, Washington; for Plaintiff-Appellee.

Appeal from the United States District Court for the Western District of Washington, Carolyn R. Dimmick, District Judge, Presiding, D.C. No. 2Presiding, D.C. No. 2:16-cr-00056-JCC-1

Before: M. Margaret McKeown and Michelle T. Friedland, Circuit Judges, and Fernando J. Gaitan, Jr.,* District Judge.

Concurrence by Judge Friedland

OPINION

McKEOWN, Circuit Judge:

Daniel Derek Brown, who is a black man, had the misfortune of deciding to avoid contact with the police. Following an anonymous tip that a black man was carrying a gun—which is not a criminal offense in Washington State—police spotted Brown, who was on foot, activated their lights, and pursued him by car, going the wrong direction down a one-way street. Before flashing their lights, the officers did not order or otherwise signal Brown to stop. Brown reacted by running for about a block before the officers stopped him at gunpoint.

With no reliable tip, no reported criminal activity, no threat of harm, no suggestion that the area was known for high crime or narcotics, no command to stop, and no requirement to even speak with the ***1152** police, we are left with little more than Brown's flight from the officers, which is not enough under the circumstances. In today's world, Justice Stevens' observations some twenty years ago are particularly prescient:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.

Illinois v. Wardlow, 528 U.S. 119, 132, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (Stevens, J., concurring in part and dissenting in part). Without more specific, articulable facts supporting their actions, we conclude that the officers lacked the requisite reasonable suspicion that criminal activity was afoot before stopping Brown. Accordingly, we reverse the district court's order denying Brown's motion to suppress.

BACKGROUND

This case began with a 911 call reporting that an unidentified resident at the YWCA claimed "they saw someone with a gun." On January 11, 2016, around 7:20 p.m., Sandra Katowitz—an employee at the YWCA in the Belltown neighborhood of Seattle—called 911, which dispatched the information to the Seattle Police Department ("Seattle Police"). Katowitz stated that "[o]ne of [her] residents just came in and said they saw someone with a gun." Katowitz never saw the gun herself. Through Katowitz, the resident described the man as a young, black man of medium build with dreadlocks, a camouflage jacket, and red shoes. The

911 dispatcher asked Katowitz specific questions about what Brown was doing with the gun. Katowitz answered that all her resident said was that "he has a gun."

Katowitz did not indicate that the resident yelled or shouted, was visibly upset by seeing the gun, or was otherwise alarmed by the gun's presence. Also, there was no indication that the man was loitering at the residence, was known at the YWCA, was harassing or threatening any residents there, or had done anything other than be seen by the resident. The resident remained in the lobby while Katowitz called 911, but on the call the resident can only be heard stating that she did not want to provide a firsthand report because she "[does not] like the police." The resident did not speak to the 911 dispatcher or the officers who responded to the call, nor did she provide her name.

While Seattle Police officers were speaking to Katowitz, two King County Sheriff's Office Metro Transit Unit ("Metro") officers heard and responded to the 911 call. [1] From his patrol car, Metro officer Ryan Mikulcik spotted Brown, who was on foot and matched the 911 description. Mikulcik called his partner, Curt Litsjo. Then Mikulcik began the pursuit, driving behind Brown slowly for several blocks before turning on his patrol lights and driving the wrong direction down a one-way street to follow Brown. Seeing the lights and patrol car coming from behind him, Brown ran. Mikulcik and Litsjo pursued Brown for one block before stopping him and ordering him to the ground at gunpoint. The officers placed Brown in handcuffs and ***1153** found a firearm in his waistband. A further search revealed drugs, cash, and other items.

Brown moved to suppress the evidence from the searches, arguing that the officers lacked reasonable suspicion to stop him under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The district court disagreed and denied the motion. We reverse.

ANALYSIS

[1] **[2]** Recognizing that an officer may only "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot," *Wardlow*, 528 U.S. at 123, 120 S.Ct. 673, we must consider whether the officers' stop of Brown met this standard. In undertaking this fact-driven analysis, we consider de novo "the totality of the circumstances surrounding the stop, including 'both the content of information possessed by police and its degree of reliability.' " *United States v. Williams*, 846 F.3d 303, 308 (9th Cir. 2016) (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)); *see also* *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014).

[3] Here, the lack of facts indicating criminal activity or a known high crime area drives our conclusion. The Metro officers who stopped Brown took an anonymous tip that a young, black man "had a gun"—which is presumptively lawful in Washington—and jumped to an unreasonable conclusion that Brown's later flight indicated criminal activity. At best, the officers had nothing more than an unsupported hunch of wrongdoing. The government's effort to rest reasonable suspicion on the tip and Brown's flight fails to satisfy the standard established by *Terry* and *Wardlow*. The combination of almost no suspicion from the tip and Brown's flight does not equal reasonable suspicion.

The tip suffers from two key infirmities—an unknown, anonymous tipster and the absence of any presumptively unlawful activity.

[4] **[5]** It is well established that an anonymous tip that identifies an individual but lacks "moderate indicia of reliability" provides little support for a finding of reasonable suspicion. *See* *Florida v. J.L.*, 529 U.S. 266, 270–71, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). As the Supreme Court has observed: "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Id.* at 270, 120 S.Ct. 1375 (internal citations and quotation marks omitted).

Even though Katowitz identified herself, the actual source of the tip—the resident—remained anonymous. Nor did the tip provide any predictive information that might have served as indicia of reliability. *Compare* *White*, 496 U.S. at 332, 110 S.Ct. 2412 ("Because only a small number of people are generally privy to an individual's itinerary [and future behaviors], it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's

illegal activities."). The Supreme Court has found a virtually identical anonymous tip insufficiently reliable to create reasonable suspicion. *J.L.*, 529 U.S. at 268, 270–72, 120 S.Ct. 1375 (holding an anonymous tip that a young black man in a plaid shirt was carrying a gun insufficient to create reasonable suspicion).

[6] The Court was clear in *J.L.* that "a tip [must] be reliable in its assertion of ***1154** illegality, not just in its tendency to identify a determinate person." *Id.* at 272, 120 S.Ct. 1375. None of the officers who responded to the 911 call articulated what crime they suspected Brown of committing. They stated only that they knew he had a firearm, testifying at the suppression hearing: "I heard them dispatch a call to a subject with a gun ...," and "I heard a call of a subject with a gun at—in the Belltown area." These statements are illustrative for what is not said. Although an officer is not required to identify the exact crime he suspects, he must articulate suspicion as to some criminality, not simply "an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Wardlow*, 528 U.S. at 123–24, 120 S.Ct. 673 (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868).

In Washington State, it is presumptively lawful to carry a gun. It is true that carrying a concealed pistol without a license is a misdemeanor offense in Washington. *See* RCW §§ 9.41.050(1)(a) ("[A] person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol ...."), 9.41.810 (explaining that any violation of the subchapter is a misdemeanor "except as otherwise provided"). However, the failure to carry the license is simply a civil infraction. *Id.* § 9.41.050(1)(b) ("Every licensee shall have his or her concealed pistol license in his or her immediate possession at all times .... Any violation of this subsection ... shall be a class 1 civil infraction ...."). Notably, Washington is a "shall issue state," meaning that local law enforcement *must* issue a concealed weapons license if the applicant meets certain qualifications. *Id.* § 9.41.070(1).

The anonymous tip that Brown had a gun thus created at most a very weak inference that he was unlawfully carrying the gun without a license, and certainly not enough to alone support a *Terry* stop. *Cf.* *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (holding that unless there is a particularized suspicion that the driver is unlicensed, officers are prohibited from stopping drivers solely to ensure compliance with licensing and registration laws).

Faced with this reality, the government now argues that the officers suspected that the *manner* in which Brown was carrying his gun was unlawful: it is "unlawful for any person to carry, exhibit, display, or draw any firearm ... in a manner, under circumstances, ... that warrants alarm for the safety of other persons." RCW § 9.41.270. Never mind that nothing in the record could support such a finding. No evidence shows that the resident was alarmed at the time she reported seeing the gun. There is no report that she yelled, screamed, ran, was upset, or otherwise acted as though she was distressed. Instead, the 911 call reported only that the resident "walked in" and stated "that guy has a gun." The 911 dispatcher followed up trying to learn more about how Brown was displaying the gun, other than simply possessing it. But Katowitz simply reiterated, "[u]h, she just came in and said he has a gun." Both of the officers that stopped Brown testified they were responding to a call about a "subject with a gun." Considering the tipster's anonymity and the presumptive legality of carrying a concealed firearm in Washington, the "tip" alone did not create reasonable suspicion that Brown was engaged in any criminal activity.

The government also offers a post hoc rationale, namely that the call coming from the YWCA—a women's shelter—was part of the whole picture considered by the officers. Nothing in the record suggests that Brown was in the shelter, loitering in front of the shelter, or harassing or threatening anyone around the shelter. To the ***1155** contrary, Brown was walking away from the shelter at the time of the stop. While we do not take lightly the possibility of violence at a women's shelter, such a threat was not part of the totality of circumstances confronting the officers who ultimately stopped Brown. In the end, the 911 call revealed nothing more than an unreliable anonymous tip reporting presumptively lawful behavior. That is not to say that the tip has no weight, but under the totality of circumstances, it is worth little. *See* *United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 n.3 (9th Cir. 2003).

[7] We next consider Brown's flight from the Metro officers. No one disputes that once the Metro officer activated his patrol car lights, Brown fled. But the Supreme Court has never endorsed a per se rule that flight establishes reasonable suspicion. Instead, the Court has treated flight as just one factor in the reasonable suspicion analysis, if an admittedly

significant one. *Wardlow*, 528 U.S. at 124, 120 S.Ct. 673 ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). Nonetheless, the Court has a long history of recognizing that innocent people may reasonably flee from the police:

> [I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.

Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 40 L.Ed. 1051 (1896).

Notably, the officers did not communicate with Brown, use their speaker to talk with him, or tell him to stop before they flashed their lights and then detained him. Under these circumstances, Brown had no obligation to stop and speak to an officer. *See* *Florida v. Royer*, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (holding that an individual has no obligation to respond when police approach and ask questions).

The situation was far different in *United States v. Smith*, where the officer activated his siren twice, pulled over, and exited his vehicle before commanding Smith to stop. 633 F.3d 889, 891 (9th Cir. 2011). Smith, who was in a high crime area, turned around and questioned whether the officer was talking to him. *Id.* The officer clarified he was and again commanded Smith to stop. *Id.* After a very pointed back and forth with the officer, who made it clear that Smith should stop, Smith suddenly broke out into a headlong run, which the court found to be for "no other reason than to evade." *Id.* at 891, 894. As the officer approached, Smith said that he had a handgun in his pocket. *Id.* at 891.

The circumstances here are also very distinguishable from what law enforcement faced in *Wardlow*. There, the officers specifically "converg[ed] on an area known for heavy narcotics trafficking in order to investigate drug transactions" and discovered the suspect holding an opaque bag, who immediately ran after looking in the direction of the officers. 528 U.S. at 121–22, 124, 120 S.Ct. 673. Assessing the situation from the officers' reasonable perspective, ***1156** the totality of the circumstances—the baggie, the high crime area, and the known heavy narcotics trafficking in that area—put Wardlow's flight from the officers in an extremely suspicious light. *See* *id.* at 124, 120 S.Ct. 673 ("It was in this context [of the officers anticipating encountering various people involved in drug crimes and seeing Wardlow holding an item consistent with drug trafficking] that [the officer] decided to investigate Wardlow after observing him flee."). By contrast, in the face of a weak tip, this case presents little more than a black man walking down the street in Belltown, which the government does not argue is a "high crime" area. There is no evidence that Brown was in an area known for unlawful gun possession, unlike the "heavy narcotics trafficking area" in *Wardlow*, nor did the officers observe Brown holding something or walking in a particular way that would corroborate the information that he might be carrying a gun. Brown did not refuse to speak with the officers after a verbal request. Although Brown's flight might be suggestive of wrongdoing, it did not corroborate any reliable suspicion of criminal behavior.

In evaluating flight as a basis for reasonable suspicion, we cannot totally discount the issue of race. In explaining his understanding of the limits of the Court's opinion in *Wardlow*, Justice Stevens recognized that flight can be a problematic factor in the reasonable suspicion analysis because some citizens may flee from police for their safety. *See* *Wardlow*, 528 U.S. at 126–140, 120 S.Ct. 673 (Stevens, J., concurring in part and dissenting in part). Several years before Justice Stevens' concurrence, our court addressed at length "the burden of aggressive and intrusive police action [that] falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter neither society nor our enforcement of the laws is yet color-blind." *Washington v. Lambert*, 98 F.3d 1181, 1187–88 (9th Cir. 1996). There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.

In the almost twenty years since Justice Stevens wrote his concurrence in *Wardlow*, the coverage of racial disparities in policing has increased, amplifying awareness of these issues. This uptick in reporting is partly attributable to the availability of information and data on police practices.[2] Although such data cannot replace the "commonsense judgments and inferences about human behavior" underlying the reasonable suspicion analysis, *Wardlow*, 528 U.S. at 125, 120 S.Ct. 673, it can inform the inferences to be drawn from an individual who decides to step away, run, or flee from police without a clear reason to do otherwise. *See* *id.* at 133, 120 S.Ct. 673 ("Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their ***1157** own practices." (footnote omitted)). Given that racial dynamics in our society—along with a simple desire not to interact with police—offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop.

Even under *Wardlow*, flight itself—the "consummate act of evasion"—is not tantamount to guilt. Although flight *may* be suggestive of wrongdoing, the absence of other factors here, when considered alongside a tip that is entitled to little weight, underscores the lack of reasonable suspicion.

CONCLUSION

In the end, the totality of the circumstances here does not add up to enough: no reliable tip, no reasonable inference of criminal behavior, no police initiative to investigate a particular crime in an identified high crime area, and flight without any previous attempt to talk to the suspect. We conclude that the Metro officers did not have reasonable suspicion of criminal activity when they stopped and frisked Brown. Accordingly, we **REVERSE** the district court's denial of the motion to suppress.

FRIEDLAND, Circuit Judge, concurring:

I agree that Metro officers Mikulcik and Litsjo did not have a reasonable suspicion that Brown was engaged in a crime when they stopped him, so I concur in the majority opinion. I write separately to elaborate on a few points.

First, the presumptive legality of carrying a concealed firearm in Washington makes this case distinguishable from our recent decision in *Foster v. City of Indio*, 908 F.3d 1204, 1215–16 (9th Cir. 2018), in which we held that an officer could have reasonably believed that an anonymous tip alleging that an individual had a gun created reasonable suspicion. There, even though the tip did not state that the person was carrying the gun illegally or was about to commit a crime, we held that a reasonable officer "could have concluded that the tip ... provided information on potential illegal activity" because it is presumptively unlawful to carry a concealed weapon without a permit in California, which issues concealed carry permits to only 0.2 percent of its adult population. *Id.* at 1215. In comparison, Washington is not only a "shall issue state," as the majority opinion emphasizes; it is also a state in which almost ten percent of citizens have concealed carry permits. *See* John R. Lott, Jr., *Concealed Carry Permit Holders Across the United States: 2016*, Crime Prevention Research Center, July 26, 2016, at 20. Especially following our holding in *Foster*, I believe that statistic weighs in favor of concluding that there was no reasonable suspicion to stop Brown.

Second, to help explain why the result here is different from that in *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), I believe it is helpful to think of justification for a *Terry* stop as a calculus in which the factors raising suspicion must, after aggregating their relative weights, add up to reasonable suspicion. Under this framing, the Supreme Court in *Wardlow* may be interpreted as suggesting that flight affords officers most of the reasonable suspicion needed to conduct a *Terry* stop. In *Wardlow*, the suspect's presence in the narcotics trafficking area while holding an object consistent with drug trafficking activity provided enough additional suspicion that, taken together with the suspect's flight, there was reasonable suspicion to support a *Terry* stop. By contrast, the tip here was so ***1158** unreliable that it added less suspicion to Brown's flight than Wardlow's presence and actions in a drug trafficking area did to his. Without more than this tip, even if Brown's flight created a significant amount of suspicion, the Metro officers lacked sufficient suspicion overall to stop and frisk him.

In my view, however, the Metro officers may have been able to stop Brown in a constitutional manner if they had

approached the situation differently. Because Washington law requires an individual to "have his or her concealed pistol license in his or her immediate possession at all times" and punishes the failure to produce the license on request as a civil infraction, Wash. Rev. Code § 9.41.050(1)(b), I believe the Metro officers could have approached Brown to ask him to show his concealed carry license. The officers would not have "seized" Brown, and therefore would not have required reasonable suspicion for the interaction, as long as a reasonable person in Brown's position would "feel free 'to disregard the police and go about his business.' " *See* *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). And if Brown had failed to produce the license, he would have committed a civil infraction at minimum. *See* Wash. Rev. Code § 9.41.050(1)(b). Washington law would then have permitted the officers to ask Brown for his name and, if he refused, to detain him "for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing" the infraction. *Id.* § 7.80.060; *see id.* § 7.80.050, *see also* *State v. Duncan*, 146 Wash.2d 166, 43 P.3d 513, 519–20 (2002). Depending on Brown's responses and reactions, the officers might even have obtained reasonable suspicion that Brown did not have a license at all, which would have made his gun possession a misdemeanor offense under § 9.41.050(1)(a). Once they had such suspicion, the officers could have conducted a full *Terry* stop and frisk.

We are not reviewing the constitutionality of such a hypothetical stop here, however, because the Metro officers did far more than approach Brown and ask him for his concealed carry license. As soon as Brown ran, the officers cornered him with guns drawn, handcuffed him, and frisked him, transforming the stop immediately into a detention that could have only been supported by reasonable suspicion existing prior to the detention.

Third, to the extent the majority opinion, particularly its reference to the Seattle Police Department's current consent decree with the U.S. Department of Justice, *see* majority opinion, at 13 n.2, could be read as suggesting that race explains why the Metro officers initiated the encounter in the first place, I want to emphasize that this is not my understanding.

Nothing in the record supports the conclusion that the officers were stopping Brown simply because he was black. In other words, I see no reason to believe the officers were using the tip as some pretext to stop Brown and that this stop therefore fits into a longer history of Seattle law enforcement engaging in racially discriminatory policing. [1] The concern that Brown ***1159** had a gun, regardless of race, was something worth investigating, even if the circumstances ultimately fell shy of giving the officers reasonable suspicion.

Given the serious public safety threat that firearms present, we should not discourage law enforcement from investigating whether an individual carrying a gun in public is legally allowed to do so. But law enforcement must do so in accordance with the protections of the Fourth Amendment. Because the Metro officers here did not have reasonable suspicion when they conducted a *Terry* stop of Brown, the stop cannot stand under the Fourth Amendment.

With these points of elaboration, I join the majority opinion.

All Citations

925 F.3d 1150, 19 Cal. Daily Op. Serv. 5130, 2019 Daily Journal D.A.R. 4863

Footnotes

* The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

1 After speaking to Katowitz, the Seattle Police officers who responded to the call at the YWCA updated the dispatcher, saying that "we have no victim of any crime." The record is at best ambiguous as to whether the Seattle Police officers updated dispatch that there was "no victim of any crime" before Metro officers Mikulcik and Litsjo stopped Brown at gunpoint.

2 For example, relevant to this case, in 2011 the U.S. Department of Justice investigated the Seattle Police Department and released a report finding "a pattern or practice of using unnecessary or excessive force" and "serious concerns" about racially discriminatory policing. U.S. Dep't of Justice, *Investigation of the Seattle Police Department* 3 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf. Since this report, the Department has been subject to a Consent Decree focused on eliminating the identified constitutional violations. *See United States v. City of Seattle*, No. C12-1282JLR, 2018 WL 6304761, at *1 (W.D. Wash. Dec. 3, 2018). Two years after Brown's arrest, in January 2018, a federal judge determined the Seattle Police Department was fully compliant with phase one of the Consent Decree, although review under the decree continues. *See id.* at *1–2.

1 Race might help explain why Brown ran. As the majority opinion notes, potentially "innocent" explanations of flight include fears based on racial disparities in policing. But race is not the only innocent explanation that can explain flight—fear of the police for any reason can. And our consideration of these innocent explanations does not mean that the level of suspicion caused by flight is necessarily reduced when the individual fleeing is black. Here, it is the lack of additional facts suggesting Brown's flight was borne out of an effort to hide criminal behavior, such as a reliable tip or police observations suggesting illicit activity, and not Brown's race, that drives our analysis.

475 Mass. 530
Supreme Judicial Court of Massachusetts,
Suffolk.

COMMONWEALTH
v.
Jimmy WARREN.

SJC 11956.
|
Argued Feb. 9, 2016.
|
Decided Sept. 20, 2016.

Synopsis

Background: Defendant was charged with unlawful possession of a firearm. The Boston Municipal Court Department, Central Division, Suffolk County, Tracy–Lee Lyons, J., denied motion to suppress. Following bench trial, defendant was convicted in the Municipal Court Department, Annette Forde, J., and defendant appealed. The Appeals Court, 87 Mass.App.Ct. 476, 31 N.E.3d 1171, affirmed. Defendant sought further appellate review.

[Holding:] The Supreme Judicial Court, Hines, J., held that investigatory stop was not justified by reasonable suspicion that defendant had committed breaking and entering.

Vacated and remanded.

West Headnotes (14)

[1] **Criminal Law** Geographical facts in general

Supreme Judicial Court would take judicial notice of location of seizure of defendant when reviewing whether police had reasonable suspicion for seizure; record contained map of area in question. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[2] **Arrest** Casual, routine, or random encounters

A "field interrogation observation" (FIO), which is an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area, is deemed a consensual encounter because the individual approached remains free to terminate the conversation at will. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[3] **Criminal Law** Evidence wrongfully obtained

The appellate court accepts a suppression judge's subsidiary findings of fact absent clear error and leaves to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing.

1 Cases that cite this headnote

[4] **Criminal Law** Illegally obtained evidence

In reviewing a ruling on a motion to suppress evidence, the appellate court reviews independently the application of constitutional principles to the facts found.

3 Cases that cite this headnote

[5] **Arrest** Reasonableness; reason or founded suspicion, etc

If a seizure occurs, the court asks whether the stop was based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime; that suspicion must be grounded in specific, articulable facts and reasonable inferences drawn therefrom rather than on a hunch. U.S.C.A. Const.Amend. 4.

12 Cases that cite this headnote

[6] **Arrest** Reasonableness; reason or founded suspicion, etc

When a court reviews the validity of an investigatory stop, the essence of the reasonable suspicion inquiry is whether the police have an individualized suspicion that the person seized is the perpetrator of the suspected crime. U.S.C.A. Const.Amend. 4.

19 Cases that cite this headnote

[7] **Arrest** Particular cases

Investigatory stop was not supported by reasonable suspicion that defendant had committed breaking and entering, even though defendant fled from officer; description stated only that suspects were two black males wearing dark clothing and one black male wearing red hoodie, defendant was one of only two men, defendant was not wearing hoodie, stop occurred in area that was in opposite direction from where either of two reported paths of flight might have led, lapse of time between victim's report and canvassing suggested that perpetrators could have fled immediate area before officer began his search, and black males in city were disproportionately and repeatedly targeted for field interrogation observation (FIO) encounters, which may have been a motivating factor in defendant's flight. U.S.C.A. Const.Amend. 4.

14 Cases that cite this headnote

[8] **Criminal Law** Search and arrest

In reviewing the validity of an investigatory stop, the appellate court reviews the judge's findings as a whole, bearing in mind that a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief that a person has, is, or will commit a particular crime. U.S.C.A. Const.Amend. 4.

[9] **Arrest** Reasonableness; reason or founded suspicion, etc

The proximity of the stop to the time and location of the crime is a relevant factor in determining whether there was reasonable suspicion to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

7 Cases that cite this headnote

[10] **Arrest** Reasonableness; reason or founded suspicion, etc

An individual's evasive conduct during his successive encounters with police is a factor properly considered in determining whether there was reasonable suspicion to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

[11] **Arrest** Reasonableness; reason or founded suspicion, etc

Evasive conduct in the absence of any other information tending toward an individualized suspicion that an individual was involved in the crime is insufficient to support a finding that there was reasonable suspicion to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

6 Cases that cite this headnote

[12] **Arrest** Casual, routine, or random encounters

Arrest Reasonableness; reason or founded suspicion, etc

Unless reasonable suspicion for a threshold inquiry already exists, the law guards a person's freedom to speak or not to speak to a police officer; a person also may choose to walk away, avoiding altogether any contact with police. U.S.C.A. Const.Amend. 4.

5 Cases that cite this headnote

[13] **Arrest** Reasonableness; reason or founded suspicion, etc

Where a suspect is under no obligation to respond to a police officer's inquiry, flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion to justify an investigatory stop. U.S.C.A. Const.Amend. 4.

5 Cases that cite this headnote

[14] **Arrest** Reasonableness; reason or founded suspicion, etc

In determining whether there was reasonable suspicion to justify an investigatory stop, a judge should, in appropriate cases, consider the findings of a report from the Boston police department documenting a pattern of racial profiling of black males in the city of Boston. U.S.C.A. Const.Amend. 4.

12 Cases that cite this headnote

Attorneys and Law Firms

****335** Nelson P. Lovins, Woburn, for the defendant.

Michael Glennon, Assistant District Attorney, for the Commonwealth.

Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ. [1]

Opinion

HINES, J.

After a jury-waived trial in the Boston Municipal Court, the defendant, Jimmy Warren, was convicted of unlawful possession of a firearm, G.L. c. 269, § 10 (*a*). [2] The complaint ***531** arose from the discovery of a firearm after an investigatory stop of the defendant in connection with a breaking and entering that had occurred in a nearby home approximately thirty minutes earlier. Prior to trial, the defendant filed a motion to suppress the firearm and ****336** statements made after his arrest, arguing that police lacked reasonable suspicion for the stop. The judge who heard the motion denied it, ruling that, at the time of the stop, the police had reasonable suspicion that the defendant was one of the perpetrators of the breaking and entering. The defendant appealed, claiming error in the denial of the motion to suppress. [3] The Appeals Court affirmed, *Commonwealth v. Warren,* 87 Mass.App.Ct. 476, 477, 31 N.E.3d 1171 (2015). We allowed the defendant's application for further appellate review and conclude that because the police lacked reasonable suspicion for the investigatory stop, the denial of the motion to suppress was error. Therefore, we vacate the conviction.

[1] *Background.* We summarize the facts as found by the judge at the hearing on the motion to suppress, supplemented by evidence in the record that is uncontroverted and that was implicitly credited by the judge. *Commonwealth v. Melo,* 472 Mass. 278, 286, 34 N.E.3d 289 (2015). On December 18, 2011, Boston police Officer Luis Anjos was patrolling the Roxbury section of Boston in a marked police cruiser when, at 9:20 P.M., he received a radio call alerting him to a breaking and entering in progress on Hutchings Street, where the suspects were fleeing the scene. The dispatcher gave several possible paths of flight from Hutchings Street, one toward Seaver Street and the other toward Jackson Square, locations that are in the opposite direction from one another. [4]

Anjos went to the scene and spoke to the victims, a teenage male and his foster mother. The male reported that as he was leaving the bathroom in the residence, his foster mother said that she heard people in his bedroom. The victim opened his bedroom door and saw a black male wearing a "red hoodie" (hooded sweatshirt) jump out of the window. When the victim looked out ***532** the window he saw two other black males, one wearing a "black hoodie," and the other wearing "dark clothing." When the victim checked his belongings, he noticed that his backpack, a computer, and five baseball hats were missing. The victim saw the three males run down Hutchings Street, but he could only guess which direction they took thereafter. Anjos peered out the window but could only see twelve to fifteen yards up the street to the intersection of Hutchings and Harold Streets. After speaking to the victims for approximately eight to twelve minutes, Anjos left the scene and broadcast the descriptions of the suspects.

For the next fifteen minutes or so, Anjos drove a four to five block radius around the house, searching for persons fitting the suspects' descriptions. Because of the cold temperature that night, Anjos did not come across any pedestrians as he searched the area. At around 9:40 P.M., Anjos headed back toward the police station. While on Martin Luther King Boulevard, he saw two black males, both wearing dark clothing, walking by some basketball courts near a park. One male wore a dark-colored "hoodie." Neither of the two carried a backpack. Anjos did not ****337** recognize either of the males, one of whom was the defendant, as a person he had encountered previously in the course of his duties as a police officer.

[2] When Anjos spotted the defendant and his companion, he had a hunch that they might have been involved in the

breaking and entering. He based his hunch on the time of night, the proximity to the breaking and entering, and the fit of the males to the "general description" provided by the victim. He decided "to figure out who they were and where they were coming from and possibly do [a field interrogation observation (FIO)]." [5] He rolled down the passenger's side window of the cruiser and "yelled out," "Hey guys, wait a minute." The two men made eye contact with Anjos, turned around, and jogged down a path into the park.

After the two men jogged away, Anjos remained in the police cruiser and radioed dispatch that three men [6] fitting the descriptions provided by the victim were traveling through the park ***533** toward Dale Street. Boston police Officers Christopher R. Carr and David Santosuosso, who had heard the original broadcast of the breaking and entering, were very near Dale Street and headed in that direction. Arriving quickly, Carr and Santosuosso observed two males matching Anjos's description walking out of the park toward Dale Street. Carr parked the cruiser on Dale Street and both officers approached the defendant and his companion as they left the park. The defendant and his companion walked with their hands out of their pockets. Carr saw no bulges in their clothing suggesting the presence of weapons or contraband.

Carr was closer to the two males, approximately fifteen yards away. When he uttered the words, "Hey fellas," the defendant turned and ran up a hill back into the park. His companion stood still. Carr ordered the defendant to stop running. After the command to stop, Carr observed the defendant clutching the right side of his pants, a motion Carr described as consistent with carrying a gun without a holster. [7]

Ignoring the command to stop, the defendant continued to run and eventually turned onto Wakullah Street. Carr lost sight of the defendant for a few seconds before catching up with him in the rear yard of a house on Wakullah Street. Carr drew his firearm, pointed it at the defendant, and yelled several verbal commands for the defendant to show his hands and to "get down, get down, get down." The defendant moved slowly, conduct that Carr interpreted as an intention not to comply with his commands. After a brief struggle, Carr arrested and searched the defendant but found no contraband on his person. Minutes after the arrest, police recovered a Walther .22 caliber firearm inside the front yard fence of the Wakullah ****338** Street house. When asked if he had a license to carry a firearm, the defendant replied that he did not.

Discussion. The defendant challenges the judge's denial of the motion to suppress, claiming error in the judge's ruling that at the time of the stop on Dale Street, the police had a sufficient factual basis for reasonable suspicion that the defendant had committed the breaking and entering. [8] In sum, he argues that the police ***534** pursued him with the intent of questioning him, while lacking any basis for doing so. Accordingly, he claims that any behavior observed during the pursuit and any contraband found thereafter must be suppressed.

[3] **[4]** 1. *Standard of review.* "In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing" (citation omitted). *Commonwealth v. Wilson,* 441 Mass. 390, 393, 805 N.E.2d 968 (2004). However, "[w]e review independently the application of constitutional principles to the facts found." *Id.* We apply these principles in deciding whether the seizure was justified by reasonable suspicion that the defendant had committed the breaking and entering on Hutchings Street. *Commonwealth v. Scott,* 440 Mass. 642, 646, 801 N.E.2d 233 (2004).

[5] **[6]** 2. *Reasonable suspicion.* The judge ruled, and the Commonwealth concedes, that the seizure occurred when Officer Carr ordered the defendant to stop running and pursued him onto Wakullah Street. If a seizure occurs, "we ask whether the stop was based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime." *Commonwealth v. Martin,* 467 Mass. 291, 303, 4 N.E.3d 1236 (2014). "That suspicion must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a hunch." *Commonwealth v. DePeiza,* 449 Mass. 367, 371, 868 N.E.2d 90 (2007), quoting *Scott,* 440 Mass. at 646, 801 N.E.2d 233. The essence of the reasonable suspicion inquiry is whether the police have an individualized suspicion that the person seized is the perpetrator of the suspected crime. *Commonwealth v. Depina,* 456 Mass. 238, 243, 922 N.E.2d 778 (2010) (stop is lawful only if "information on which the dispatch was based had sufficient indicia of reliability, and ... the description of the suspect conveyed by the dispatch had sufficient particularity that it was reasonable for the police to suspect a person matching that description").

[7] According to the judge's ruling, the following information established reasonable suspicion for the investigatory stop: the defendant and his companion "matched" the description of two of ***535** the three individuals being sought by the police; they were stopped in close proximity in location (one mile) and time (approximately twenty-five minutes) to the crime; they were the only persons observed on the street on a cold winter night as police canvassed the area; and they evaded contact with the police, first when both men ****339** jogged away into the park, and later when the defendant fled from Carr after being approached on the other side of the park. [9]

[8] We review the judge's findings as a whole, bearing in mind that "a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief" that a person has, is, or will commit a particular crime. *Commonwealth v. Feyenord,* 445 Mass. 72, 77, 833 N.E.2d 590 (2005), cert. denied, 546 U.S. 1187, 126 S.Ct. 1369, 164 L.Ed.2d 77 (2006), quoting *Commonwealth v. Fraser,* 410 Mass. 541, 545, 573 N.E.2d 979 (1991). We are not persuaded that the information available to the police at the time of the seizure was sufficiently specific to establish reasonable suspicion that the defendant was connected to the breaking and entering under investigation.

a. *The description of the suspects.* First, and perhaps most important, because the victim had given a very general description of the perpetrator and his accomplices, the police did not know whom they were looking for that evening, except that the suspects were three black males: two black males wearing the ubiquitous and nondescriptive "dark clothing," and one black male wearing a "red hoodie." Lacking any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics, the victim's description "contribute[d] nothing to the officers' ability to distinguish the defendant from any other black male" wearing dark clothes and a "hoodie" in Roxbury. *Commonwealth v. Cheek,* 413 Mass. 492, 496, 597 N.E.2d 1029 (1992) (insufficient detail in generalized description of suspect to justify stop where defendant was observed walking on street approximately one-half mile from scene of reported stabbing, without indication he was fleeing crime scene or had engaged in criminal activity).

With only this vague description, it was simply not possible for the police reasonably and rationally to target the defendant or any ***536** other black male wearing dark clothing as a suspect in the crime. If anything, the victim's description tended to exclude the defendant as a suspect: he was one of two men, not three; he was not wearing a red "hoodie"; and, neither he nor his companion was carrying a backpack. [10] Based solely on this description, Anjos had nothing more than a hunch that the defendant might have been involved in the crime. He acknowledged as much when he explained that the purpose of the stop was "to figure out who they were and where they were coming from and possibly do an FIO." As noted, an FIO is a consensual encounter between an individual and a police officer. Therefore, the defendant was not a "suspect" subject to the intrusion of a threshold inquiry. Unless the police were able to fortify the bare-bones description of the perpetrators with other facts probative of reasonable suspicion, the defendant was entitled to proceed uninhibited as he walked through the streets of Roxbury that evening.

[9] b. *Proximity.* We agree with the motion judge that proximity of the stop to the time and location of the crime is a relevant factor in the reasonable suspicion analysis. ****340** *Commonwealth v. Foster,* 48 Mass.App.Ct. 671, 672–673, 676, 724 N.E.2d 357 (2000) (reasonable suspicion established where police observed persons matching physical description on same street and headed in same direction as indicated by informant). Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close. See *Commonwealth v. Doocey,* 56 Mass.App.Ct. 550, 555 n. 8, 778 N.E.2d 1023 (2002), and cases cited. Here, the defendant was stopped one mile from the scene of the crime approximately twenty-five minutes after the victim's telephone call to the police. Several considerations, however, weigh against proximity as a factor supporting an individualized suspicion of the defendant as a suspect in the breaking and entering.

The location and timing of the stop were no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere conjecture. Although the police appropriately began their investigation with the information available to them, this lack of detail made it less likely that a sighting of potential suspects could be elevated beyond the level of a hunch or speculation. As noted by the dissenting Justices in the Appeals Court opinion, given the nearly ***537** thirty-minute time period between the breaking and entering and

the stop on Dale Street, the suspects could have traveled on foot within a two mile radius of the crime scene, a substantial geographic area comprising 12.57 square miles. [11] *Warren,* 87 Mass.App.Ct. at 499 n. 1, 31 N.E.3d 1171 (Rubin, J., dissenting). See *id.* at 488–489, 31 N.E.3d 1171 (Agnes, J., dissenting). Other than the victim's report that the perpetrators fled toward Harold Street, the responding officers had nothing more than the information in the dispatch suggesting that the perpetrators could have fled toward Seaver Street or Walnut Avenue. Depending on the direction taken, these paths of flight would lead to different Boston neighborhoods, Dorchester or Jamaica Plain, in different areas of the city.

In addition, Anjos testified to two important geographical facts that undermine the proximity factor. He acknowledged that Dale Street is in the opposite direction from where either of the reported paths of flight might lead. And, most important, Anjos also stated that if the perpetrators had headed in the direction of Dale Street, they likely would have reached that location well before his first encounter with the defendant and his companion. Thus, where the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus.

c. *Lack of other pedestrians.* The judge considered in her analysis that the defendant and his companion were the only people observed on the street as Anjos canvassed the four to five block radius of the Hutchings Street address, traveling "up and down Harold Street, Walnut Avenue and Holworthy Street" before turning onto Martin Luther King Boulevard to return to the station. [12] This factor also is ****341** of questionable value in the analysis given the lapse of time and the narrow geographical scope of the ***538** search for suspicious persons. Anjos spoke to the victim for approximately fifteen minutes and thereafter canvassed only four to five blocks surrounding the location of the breaking and entering. The lapse of time between the victim's report and the canvassing suggests that the perpetrators could have fled the immediate area before Anjos began his search. Thus, the defendant's presence on the street, some distance away from the crime, within a time frame inconsistent with having recently fled the scene, is hardly revelatory of an individualized suspicion of the defendant as the perpetrator of the crime.

[10] **[11]** d. *Flight.* We recognize that the defendant's evasive conduct during his successive encounters with police is a factor properly considered in the reasonable suspicion analysis. *Commonwealth v. Stoute,* 422 Mass. 782, 791, 665 N.E.2d 93 (1996) (failure to stop combined with accelerated pace contributed to officer's reasonable suspicion). But evasive conduct in the absence of any other information tending toward an individualized suspicion that the defendant was involved in the crime is insufficient to support reasonable suspicion. *Commonwealth v. Mercado,* 422 Mass. 367, 371, 663 N.E.2d 243 (1996) ("Neither evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support ... reasonable suspicion"); *Commonwealth v. Thibeau,* 384 Mass. 762, 764, 429 N.E.2d 1009 (1981) (quick maneuver to avoid contact with police insufficient to establish reasonable suspicion). "Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the [flight] justifying the suspicion." *Stoute, supra* at 789, 665 N.E.2d 93, quoting *Thibeau, supra.* Although flight is relevant to the reasonable suspicion analysis in appropriate circumstances, we add two cautionary notes regarding the weight to be given this factor.

[12] **[13]** First, we perceive a factual irony in the consideration of flight as a factor in the reasonable suspicion calculus. Unless reasonable suspicion for a threshold inquiry already exists, our law guards a person's freedom to speak or not to speak to a police officer. A person also may choose to walk away, avoiding altogether any contact with police. *Commonwealth v. Barros,* 435 Mass. 171, 178, 755 N.E.2d 740 (2001) (breaking eye contact and refusing to answer officer's initial questions did not provide reasonable suspicion for detention or seizure as "[i]t was the defendant's right to ignore the officer"). Yet, because flight is viewed as inculpatory, we have endorsed it as a factor in the reasonable suspicion analysis. See *Commonwealth v. Sykes,* 449 Mass. 308, 315, 867 N.E.2d 733 (2007) (defendant's ***539** abandonment of bicycle in "effort to dodge further contact with the police was significant" in determining reasonable suspicion); *Commonwealth v. Grandison,* 433 Mass. 135, 139–140, 741 N.E.2d 25 (2001) (attempt to avoid contact with police may be considered with other factors in establishing reasonable suspicion). Where a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight

as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters ****342** will be seriously undermined. Thus, in the circumstances of this case, the flight from Anjos during the initial encounter added nothing to the reasonable suspicion calculus.

[14] Second, as set out by one of the dissenting Justices in the Appeals court opinion, where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston. *Warren,* 87 Mass.App.Ct. at 495 n. 18, 31 N.E.3d 1171 (Agnes, J., dissenting), citing Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results [https://perma.cc/H9RJ–RHNB]. [13] According to the study, based on FIO data collected by the department, [14] black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. [15] Black men were also disproportionally targeted for ***540** repeat police encounters. [16] We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus.

Here, we conclude that the police had far too little information to support an individualized suspicion that the defendant had committed the breaking and entering. As noted, the police were handicapped ****343** from the start with only a vague description of the perpetrators. Until the point when Carr seized the defendant, the investigation failed to transform the defendant from a random black male in dark clothing traveling the streets of Roxbury on a cold December night into a suspect in the crime of breaking and entering. Viewing the relevant factors in totality, we cannot say that the whole is greater than the sum of its parts.

Conclusion. For the reasons stated above, the police lacked reasonable suspicion for the investigatory stop of the defendant. Therefore, we vacate the judgment of conviction and remand the matter to the Boston Municipal Court for further proceedings consistent with this opinion.

So ordered.

All Citations

475 Mass. 530, 58 N.E.3d 333

Footnotes

1 Justices Spina, Cordy, and Duffly participated in the deliberation on this case prior to their retirements.

2 The trial judge allowed the defendant's motion for a required finding of not guilty on a trespass charge, G.L. c. 266, § 120.

3 Given our conclusion, we need not address the defendant's argument about the sufficiency of the evidence supporting his conviction.

4 The record contains a map of the area in question, providing geographical context for our review of the judge's ruling that the police had reasonable suspicion for the seizure of the defendant. We may take judicial notice of the location. See *Commonwealth v. Augustine,* 472 Mass. 448, 457 n. 14, 35 N.E.3d 688 (2015), citing

Federal Nat'l Mtge. Ass'n v. Therrien, 42 Mass.App.Ct. 523, 525, 678 N.E.2d 193 (1997) ("facts that are verifiably true, such as geographic locations, are susceptible to judicial notice").

5 "A 'field interrogation observation' (FIO) has been described as an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area." *Commonwealth v. Lyles,* 453 Mass. 811, 813 n. 6, 905 N.E.2d 1106 (2009). FIOs are deemed consensual encounters because the individual approached remains free to terminate the conversation at will. See *id.* at 815, 905 N.E.2d 1106, and cases cited.

6 During cross-examination, Officer Anjos admitted that he observed only two males.

7 The Commonwealth persists in claiming that the police observed the defendant clutching the right side of his pants *before* the command to stop. As did the Appeals Court, see *Commonwealth v. Warren,* 87 Mass.App.Ct. 476, 479 n. 7, 31 N.E.3d 1171 (2015), we reject this view of the facts where the judge explicitly found that "[t]his observation was after a verbal command to stop."

8 Although the defendant argues in his brief that a stop occurred "when Officer[s] Anjos and Carr approached the defendant ... with the intent of questioning the defendant," we assume that this was a typographical error because it is undisputed that Anjos never left his vehicle. Rather, it was Officers Santosuosso and Carr who approached the defendant and his companion as they exited the park. Therefore, we do not address whether the first encounter, when Anjos called out to the defendant from his cruiser, was an investigatory stop.

9 The judge also cited her finding that the police observed the defendant engaging in behavior suggestive of the presence of a firearm. That finding must be discounted in the reasonable suspicion analysis, however, as the judge explicitly found that this conduct occurred *after* the police commanded the defendant to stop.

10 There is no suggestion in the judge's findings that the defendant and his companion changed clothing or jettisoned the backpack before being stopped by the police.

11 Because the map of the area is part of the record, we are persuaded by the observation of a dissenting Justice in the Appeals Court opinion that the suspects could have been anywhere within twelve square miles of the crime scene by the time of the encounter with Anjos. See *Warren,* 87 Mass.App.Ct. at 499 n. 1, 31 N.E.3d 1171 (Rubin, J., dissenting).

12 One of the police officers testified during the motion to suppress hearing that another officer reported seeing a different young black male with a backpack in a nearby neighborhood. Thus, we agree with one of the dissenting Justices in the Appeals Court opinion that if the judge credited this testimony, the fact that Anjos saw no other pedestrians on the street that night was not a factor supporting reasonable suspicion that the defendant was involved in the breaking and entering. See *Warren,* 87 Mass.App.Ct. at 489–490, 31 N.E.3d 1171 (Agnes, J., dissenting).

13 See also *Warren,* 87 Mass.App.Ct. at 495 n. 18, 31 N.E.3d 1171 (Agnes, J., dissenting), citing American Civil Liberties Union, Stop and Frisk Report Summary, https://www.aclum.org/sites/all/files/images/education/stopandfrisk/stop_and_frisk_summary.pdf [https://perma.cc/7APK–8MG9] ("[sixty-three per cent] of Boston police-civilian encounters from 2007–2010 targeted blacks, even though blacks made up less than [twenty-five per cent] of the city's population").

14 The study by the Boston Police Department (department) reviewed all field interrogation and observation (FIO) reports, approximately 205,000 in total, submitted by Boston police officers from 2007 through 2010. *Warren,* 87 Mass.App.Ct. at 495 n. 18, 31 N.E.3d 1171 (Agnes, J., dissenting).

15 "[T]he targets of FIO reports were disproportionately male, young, and Black. For those 204,739 FIO reports, the subjects were 89.0 percent male, 54.7 percent ages 24 or younger, and 63.3 percent Black." Final Report, An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports, at 2 (June 15, 2015).

16 The department's study revealed that five per cent of the individuals repeatedly stopped or observed accounted for more than forty per cent of the total interrogations and observations conducted

by the police department. *Warren,* 87 Mass.App.Ct. at 495 n. 18, 31 N.E.3d 1171 (Agnes, J., dissenting), quoting Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results [https://perma.cc/H9RJ–RHNB].

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by United States v. Villavicencio, 4th Cir.(N.C.), August 17, 2020

135 S.Ct. 1609
Supreme Court of the United States

Dennys RODRIGUEZ, Petitioner
v.
UNITED STATES.

No. 13–9972.
|
Argued Jan. 21, 2015.
|
Decided April 21, 2015.

Synopsis
Background: Defendant was convicted in the United States District Court for the District of Nebraska, Joseph F. Bataillon, J., 2012 WL 5458427, upon his conditional guilty plea to one count of possession with intent to distribute 50 grams or more of methamphetamine. Defendant appealed the denial of his motion to suppress. The United States Court of Appeals for the Eighth Circuit, Wollman, Circuit Judge, 741 F.3d 905, affirmed. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Ginsburg, held that:

[1] police may not extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct dog sniff, abrogating *U.S. v. Morgan,* 270 F.3d 625, *U.S. v. $404,905.00 in U.S. Currency,* 182 F.3d 643, and *U.S. v. Alexander,* 448 F.3d 1014, and

[2] question of whether reasonable suspicion of criminal activity justified detaining motorist beyond completion of traffic stop to conduct dog sniff was to be resolved by Court of Appeals on remand.

Vacated and remanded.

Justice Kennedy filed dissenting opinion.

Justice Thomas filed dissenting opinion, in which Justice Alito joined and Justice Kennedy joined in part.

Justice Alito filed dissenting opinion.

West Headnotes (13)

[1] Arrest Duration of detention and extent or conduct of investigation or frisk

A police stop exceeding the time needed to handle the matter for which a stop is made violates the Fourth Amendment's proscription of unreasonable seizures. U.S.C.A. Const.Amend. 4.

182 Cases that cite this headnote

[2] Automobiles Detention, and length and character thereof

A seizure justified only by a police-observed traffic violation becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. U.S.C.A. Const.Amend. 4.

339 Cases that cite this headnote

[3] Automobiles Detention, and length and character thereof

Police may not extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff; abrogating *U.S. v. Morgan,* 270 F.3d 625; *U.S. v. $404,905.00 in U.S. Currency,* 182 F.3d 643; *U.S. v. Alexander,* 448 F.3d 1014. U.S.C.A. Const.Amend. 4.

159 Cases that cite this headnote

[4] Automobiles Conduct of Arrest, Stop, or Inquiry

A seizure for a traffic violation justifies a police investigation of that violation. U.S.C.A. Const.Amend. 4.

165 Cases that cite this headnote

[5] **Automobiles** Arrest, Stop, or Inquiry; Bail or Deposit

A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest. U.S.C.A. Const.Amend. 4.

68 Cases that cite this headnote

[6] **Automobiles** Detention, and length and character thereof

Automobiles Inquiry; license, registration, or warrant checks

Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission, to address the traffic violation that warranted the stop, and attend to related safety concerns. U.S.C.A. Const.Amend. 4.

698 Cases that cite this headnote

[7] **Automobiles** Detention, and length and character thereof

Because addressing the traffic infraction is the purpose of a traffic stop, it may last no longer than is necessary to effectuate that purpose. U.S.C.A. Const.Amend. 4.

318 Cases that cite this headnote

[8] **Automobiles** Detention, and length and character thereof

During a traffic stop, authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. U.S.C.A. Const.Amend. 4.

407 Cases that cite this headnote

[9] **Automobiles** Detention, and length and character thereof

Automobiles Inquiry; license, registration, or warrant checks

An officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. U.S.C.A. Const.Amend. 4.

436 Cases that cite this headnote

[10] **Automobiles** Inquiry; license, registration, or warrant checks

Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to the traffic stop to ensure that vehicles on the road are operated safely and responsibly; typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. U.S.C.A. Const.Amend. 4.

436 Cases that cite this headnote

[11] **Automobiles** Conduct of Arrest, Stop, or Inquiry

A dog sniff is not an ordinary incident of a traffic stop; lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission. U.S.C.A. Const.Amend. 4.

175 Cases that cite this headnote

[12] **Automobiles** Detention, and length and character thereof

When reviewing the legality of a dog sniff conducted in relation to a traffic stop, the critical question is not whether the dog sniff occurred before or after the officer issued a ticket, but whether conducting the sniff prolonged, or added time to, the stop. U.S.C.A. Const.Amend. 4.

361 Cases that cite this headnote

[13] **Federal Courts** Particular cases

Question of whether reasonable suspicion of criminal activity justified detaining motorist beyond completion of traffic stop to conduct dog sniff of vehicle was to be resolved by Court of Appeals on remand, where Court of Appeals did not review District Court's determination that dog sniff of vehicle was not independently supported by individualized suspicion. U.S.C.A. Const.Amend. 4.

180 Cases that cite this headnote

****1610** *Syllabus* [*]

***348** Officer Struble, a K–9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, *inter alia,* checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge recommended denial of the motion. He found no reasonable suspicion supporting detention ****1611** once Struble issued the written warning. Under Eighth Circuit precedent, however, he concluded that prolonging the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was for that reason permissible. The District Court then denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed. Noting that the seven or eight minute delay was an acceptable "*de minimis* intrusion on Rodriguez's personal liberty," the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

Held:

1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, than an arrest, see, *e.g., Arizona v. Johnson,* 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694. Its tolerable duration is determined by the seizure's "mission," which is to address the traffic violation that warranted the stop, *Illinois v. Caballes,* 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 and attend to related safety concerns. ***349** Authority for the seizure ends when tasks tied to the traffic infraction are —or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, *Johnson,* 555 U.S., at 327–328, 129 S.Ct. 781 (questioning); *Caballes,* 543 U.S., at 406, 408, 125 S.Ct. 834 (dog sniff), but a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket, *id.,* at 407, 125 S.Ct. 834.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Delaware v. Prouse,* 440 U.S. 648, 658–659, 99 S.Ct. 1391, 59 L.Ed.2d 660. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In concluding that the *de minimis* intrusion here could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. The Court reasoned in *Mimms* that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis* " additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, *id.,* at 110–111, 98 S.Ct. 330.

The officer-safety interest recognized in *Mimms,* however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore gains no support from *Mimms*.

The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop "prolonged beyond" the time in fact needed for the officer to complete his traffic-based inquiries is "unlawful," **1612 *Caballes,* 543 U.S., at 407, 125 S.Ct. 834. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 1619 – 1621.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. P. 1621.

741 F.3d 905, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined, and in which KENNEDY, J., joined as to all but Part III. ALITO, J., filed a dissenting opinion.

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Opinion

Justice GINSBURG delivered the opinion of the Court.

[1] [2] *350 In *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete *351 th[e] mission" of issuing a ticket for the violation. *Id.*, at 407, 125 S.Ct. 834. The Court so recognized in *Caballes,* and we adhere to the line drawn in that decision.

I

Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road. Nebraska law prohibits driving on highway shoulders, see Neb.Rev.Stat. § 60–6,142 (2010), and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

**1613 Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance, and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

***352** Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] ... took care of all the business." App. 70.

Nevertheless, Struble did not consider Rodriguez "free to leave." *Id.,* at 69–70. Although justification for the traffic stop was "out of the way," *id.,* at 70, Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1). He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. App. 100 (apart from "information given by the dog," "Officer Struble had [no]thing other than a rather ***353** large hunch"). He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible.

The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, "dog sniffs that occur within a short time following the completion of ****1614** a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." App. 114 (quoting *United States v. Alexander,* 448 F.3d 1014, 1016 (C.A.8 2006)). The court thus agreed with the Magistrate Judge that the "7 to 10 minutes" added to the stop by the dog sniff "was not of constitutional significance." App. 114. Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison.

The Eighth Circuit affirmed. The "seven- or eight-minute delay" in this case, the opinion noted, resembled delays that the court had previously ranked as permissible. 741 F.3d 905, 907 (2014). The Court of Appeals thus ruled that the delay here constituted an acceptable "*de minimis* intrusion on Rodriguez's personal liberty." *Id.,* at 908. Given that ruling, the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

[3] We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. 573 U.S. ——, 135 S.Ct. 43, 189 L.Ed.2d 896 (2014). Compare, *e.g., United States v. Morgan,* 270 F.3d 625, 632 (C.A.8 2001) (postcompletion delay of "well under ten minutes" permissible), with, *e.g., State v. Baker,* 2010 UT 18, ¶ 13, 229 P.3d 650, 658 (2010) ("[W]ithout additional reasonable ***354** suspicion, the officer must allow the seized person to depart once the purpose of the stop has concluded.").

II

[4] **[5]** **[6]** **[7]** **[8]** A seizure for a traffic violation justifies a police investigation of that violation. "[A] relatively brief encounter," a routine traffic stop is "more analogous to a so-called '*Terry* stop' ... than to a formal arrest." *Knowles v. Iowa,* 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (quoting *Berkemer v. McCarty,* 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), in turn citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). See also *Arizona v. Johnson,* 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, *Caballes,* 543 U.S., at 407, 125 S.Ct. 834 and attend to related safety concerns, *infra,* at 1619 – 1620. See also *United States v. Sharpe,* 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification."). Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose." *Ibid.* See also *Caballes,* 543 U.S., at 407, 125 S.Ct. 834. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe,* 470 U.S., at 686, 105 S.Ct. 1568 (in determining the reasonable duration of a stop, "it [is] appropriate to examine whether the police diligently pursued [the] investigation").

[9] Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. *Johnson,* 555 U.S., at 327–328, 129 S.Ct. 781 (questioning); *Caballes,* 543 U.S., at 406, 408, 125 S.Ct. 834 (dog sniff). In *Caballes,* however, we cautioned that a traffic stop "can become unlawful ****1615** if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ***355** warning ticket. 543 U.S., at 407, 125 S.Ct. 834. And we repeated that admonition in *Johnson* : The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." 555 U.S., at 333, 129 S.Ct. 781. See also *Muehler v. Mena,* 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) (because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] ... no additional Fourth Amendment justification ... was required"). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to Justice ALITO's suggestion, *post,* at 1625, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see *post,* at 1623 – 1624 (ALITO, J., dissenting) (premising opinion on the dissent's own finding of "reasonable suspicion," although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).

[10] Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Caballes,* 543 U.S., at 408, 125 S.Ct. 834. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. See *Delaware v. Prouse,* 440 U.S. 648, 658–660, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). See also 4 W. LaFave, Search and Seizure § 9.3(c), pp. 507–517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse,* 440 U.S., at 658–659, 99 S.Ct. 1391; LaFave, Search and Seizure § 9.3(c), at 516 (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

[11] A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond,* 531 U.S. 32, 40–41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). See also *Florida v. Jardines,* 569 U.S. 1, —— – ——, 133 S.Ct. 1409, 1416–1417, 185 L.Ed.2d 495 (2013). Candidly, the Government ***356** acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. See Tr. of Oral Arg. 33. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In advancing its *de minimis* rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*

). See *United States v. $404,905.00 in U.S. Currency,* 182 F.3d 643, 649 (C.A.8 1999). In *Mimms,* we reasoned that the government's "legitimate and weighty" interest in officer safety outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. 434 U.S., at 110–111, 98 S.Ct. 330. See also *Maryland v. Wilson,* 519 U.S. 408, 413–415, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (passengers may be required to exit vehicle stopped for traffic violation). The Eighth Circuit, echoed in Justice THOMAS's dissent, believed that the imposition here similarly could be offset by the Government's "strong interest in interdicting the flow of illegal drugs along the nation's highways." *$404,905.00 in U.S. Currency,* 182 F.3d, at 649; see *post,* at 1621.

****1616** Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," *Johnson,* 555 U.S., at 330, 129 S.Ct. 781 (internal quotation marks omitted), so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. Cf. *United States v. Holt,* 264 F.3d 1215, 1221–1222 (C.A.10 2001) (en banc) (recognizing officer safety justification for criminal record and outstanding warrant checks), abrogated on other grounds as recognized in *United States v. Stewart,* 473 F.3d 1265, 1269 (C.A.10 2007). On-scene investigation into other crimes, however, detours from that mission. See *supra,* at 1615. So too do safety precautions taken in order to facilitate such detours. But cf. *post,* at 1624 – 1625 (ALITO, J., dissenting). ***357** Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms,* the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

[12] The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. Brief for United States 36–39. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. See also *post,* at 1617 – 1619 (THOMAS, J., dissenting) (embracing the Government's argument). The reasonableness of a seizure, however, depends on what the police in fact do. See *Knowles,* 525 U.S., at 115–117, 119 S.Ct. 484. In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." Tr. of Oral Arg. 49. How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." *Caballes,* 543 U.S., at 407, 125 S.Ct. 834. As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." *Ibid.* The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice ALITO supposes, *post,* at 1624 – 1625, but whether conducting the sniff "prolongs"—*i.e.,* adds time to—"the stop," *supra,* at 1615.

III

[13] The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, see App. 100, and the District Court ***358** adopted the Magistrate Judge's findings, see *id.*, at 112–113. The Court of Appeals, however, did not review that determination. But see *post,* at 1617, 1622 – 1623 (THOMAS, J., dissenting) (resolving the issue, nevermind that the Court of Appeals left it unaddressed); *post,* at 1623 – 1624 (ALITO, J., dissenting) (upbraiding the Court for addressing the sole issue decided by the Court of Appeals and characterizing the Court's answer as "unnecessary" because the Court, instead, should have decided an issue the Court of Appeals did not decide). The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction ****1617** investigation, therefore, remains open for Eighth Circuit consideration on remand.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, dissenting.

My join in Justice THOMAS' dissenting opinion does not extend to Part III. Although the issue discussed in that Part was argued here, the Court of Appeals has not addressed that aspect of the case in any detail. In my view the better course would be to allow that court to do so in the first instance.

Justice THOMAS, with whom Justice ALITO joins, and with whom Justice KENNEDY joins as to all but Part III, dissenting.

Ten years ago, we explained that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Illinois v. Caballes,* 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). The ***359** only question here is whether an officer executed a stop in a reasonable manner when he waited to conduct a dog sniff until after he had given the driver a written warning and a backup unit had arrived, bringing the overall duration of the stop to 29 minutes. Because the stop was reasonably executed, no Fourth Amendment violation occurred. The Court's holding to the contrary cannot be reconciled with our decision in *Caballes* or a number of common police practices. It was also unnecessary, as the officer possessed reasonable suspicion to continue to hold the driver to conduct the dog sniff. I respectfully dissent.

I

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amdt. 4. As the text indicates, and as we have repeatedly confirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). We have defined reasonableness "in objective terms by examining the totality of the circumstances," *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), and by considering "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing," *Atwater v. Lago Vista,* 532 U.S. 318, 326, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (internal quotation marks omitted). When traditional protections have not provided a definitive answer, our precedents have "analyzed a search or seizure in light of traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore,* 553 U.S. 164, 171, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (internal quotation marks omitted).

Although a traffic stop "constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]," such a seizure ***360** is constitutionally "reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States,* 517 U.S. 806, 809–810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). But "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests ****1618** protected by the Constitution." *Caballes, supra,* at 407, 125 S.Ct. 834.

Because Rodriguez does not dispute that Officer Struble had probable cause to stop him, the only question is whether the stop was otherwise executed in a reasonable manner. See Brief for Appellant in No. 13–1176 (CA8), p. 4, n. 2. I easily conclude that it was. Approximately 29 minutes passed from the time Officer Struble stopped Rodriguez until his narcotics-detection dog alerted to the presence of drugs. That amount of time is hardly out of the ordinary for a traffic stop by a single officer of a vehicle containing multiple occupants even when no dog sniff is involved. See, *e.g., United States v. Ellis,* 497 F.3d 606 (C.A.6 2007) (22 minutes); *United States v. Barragan,* 379 F.3d 524 (C.A.8 2004) (approximately 30 minutes). During that time, Officer Struble conducted the ordinary activities of a traffic stop—he approached the vehicle, questioned Rodriguez about the observed violation, asked Pollman about their travel plans, ran serial warrant checks on Rodriguez and Pollman, and issued a written warning to Rodriguez. And when he decided to conduct a dog sniff, he took the precaution of calling for backup out of concern for his safety. See 741 F.3d 905, 907 (C.A.8 2014); see also *Pennsylvania v. Mimms,* 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*) (officer safety is a "legitimate and weighty" concern relevant to reasonableness).

As *Caballes* makes clear, the fact that Officer Struble waited until after he gave Rodriguez the warning to conduct the

dog sniff does not alter this analysis. Because "the use of a well-trained narcotics-detection dog ... generally does not implicate legitimate privacy interests," 543 U.S., at 409, 125 S.Ct. 834 "conducting a dog sniff would not change the character of a ***361** traffic stop that is lawful at its inception and otherwise executed in a reasonable manner," *id.,* at 408, 125 S.Ct. 834. The stop here was " lawful at its inception and otherwise executed in a reasonable manner." *Ibid*. As in *Caballes,* "conducting a dog sniff [did] not change the character of [the] traffic stop," *ibid.,* and thus no Fourth Amendment violation occurred.

II

Rather than adhere to the reasonableness requirement that we have repeatedly characterized as the "touchstone of the Fourth Amendment," *Brigham City, supra,* at 403, 126 S.Ct. 1943 the majority constructed a test of its own that is inconsistent with our precedents.

A

The majority's rule requires a traffic stop to "en[d] when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Ante,* at 1614. "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission" and he may hold the individual no longer. *Ante,* at 1616 (internal quotation marks and alterations omitted). The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop: If a driver is stopped by a particularly efficient officer, then he will be entitled to be released from the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. Similarly, if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology.

I "cannot accept that the search and seizure protections of the Fourth Amendment ****1619** are so variable and can be made to turn upon such trivialities." *Whren,* 517 U.S., at 815, 116 S.Ct. 1769 (citations omitted). We have repeatedly explained that the reasonableness ***362** inquiry must not hinge on the characteristics of the individual officer conducting the seizure. We have held, for example, that an officer's state of mind "does not invalidate [an] action taken as long as the circumstances, viewed objectively, justify that action." *Id.,* at 813, 116 S.Ct. 1769 (internal quotation marks omitted). We have spurned theories that would make the Fourth Amendment "change with local law enforcement practices." *Moore, supra,* at 172, 128 S.Ct. 1598. And we have rejected a rule that would require the offense establishing probable cause to be "closely related to" the offense identified by the arresting officer, as such a rule would make "the constitutionality of an arrest ... vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists." *Devenpeck v. Alford,* 543 U.S. 146, 154, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (internal quotation marks and citation omitted). In *Devenpeck,* a unanimous Court explained: "An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection." *Ibid.*

The majority's logic would produce similarly arbitrary results. Under its reasoning, a traffic stop made by a rookie could be executed in a reasonable manner, whereas the same traffic stop made by a knowledgeable, veteran officer *in precisely the same circumstances* might not, if in fact his knowledge and experience made him capable of completing the stop faster. We have long rejected interpretations of the Fourth Amendment that would produce such haphazard results, and I see no reason to depart from our consistent practice today.

B

As if that were not enough, the majority also limits the duration of the stop to the time it takes the officer to complete ***363** a narrow category of "traffic-based inquiries." *Ante,* at 1616. According to the majority, these inquiries include those that "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Ante,* at 1615. Inquiries directed to "detecting evidence of ordinary criminal wrongdoing" are not traffic-related inquiries and thus cannot count toward the overall duration of the stop. *Ibid*. (internal quotation marks and alteration omitted).

The combination of that definition of traffic-related inquiries with the majority's officer-specific durational limit produces a result demonstrably at odds with our decision in *Caballes*. *Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff. We explained that no Fourth Amendment violation had occurred in *Caballes,* where the "duration of the stop ... was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop," but suggested a different result might attend a case "involving a dog sniff that occurred during an *unreasonably* prolonged traffic stop." 543 U.S., at 407–408, 125 S.Ct. 834 (emphasis added). The dividing line was whether the overall duration of the stop exceeded "the time reasonably required to complete th[e] mission," *id.,* at 407, 125 S.Ct. 834 not, as the majority suggests, whether the duration of the stop "in fact" exceeded the time necessary ****1620** to complete the traffic-related inquiries, *ante,* at 1616.

The majority's approach draws an artificial line between dog sniffs and other common police practices. The lower courts have routinely confirmed that warrant checks are a constitutionally permissible part of a traffic stop, see, *e.g., United States v. Simmons,* 172 F.3d 775, 778 (C.A.11 1999); *United States v. Mendez,* 118 F.3d 1426, 1429 (C.A.10 1997); *United States v. Shabazz,* 993 F.2d 431, 437 (C.A.5 1993), and the majority confirms that it finds no fault in these measures, *ante,* at 1615. Yet its reasoning suggests the opposite. Such warrant checks look more like they are directed to "detecting ***364** evidence of ordinary criminal wrongdoing" than to "ensuring that vehicles on the road are operated safely and responsibly." *Ante,* at 1615 (internal quotation marks and alteration omitted). Perhaps one could argue that the existence of an outstanding warrant might make a driver less likely to operate his vehicle safely and responsibly on the road, but the same could be said about a driver in possession of contraband. A driver confronted by the police in either case might try to flee or become violent toward the officer. But under the majority's analysis, a dog sniff, which is directed at uncovering that problem, is not treated as a traffic-based inquiry. Warrant checks, arguably, should fare no better. The majority suggests that a warrant check is an ordinary inquiry incident to a traffic stop because it can be used " 'to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.' " *Ante,* at 1615 (quoting 4 W. LaFave, Search and Seizure § 9.3(c), p. 516 (5th ed. 2012)). But as the very treatise on which the majority relies notes, such checks are a "manifest[ation of] the 'war on drugs' motivation so often underlying [routine traffic] stops," and thus are very much like the dog sniff in this case. *Id.,* § 9.3(c), at 507–508.

Investigative questioning rests on the same basis as the dog sniff. "Asking questions is an essential part of police investigations." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,* 542 U.S. 177, 185, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). And the lower courts have routinely upheld such questioning during routine traffic stops. See, *e.g., United States v. Rivera,* 570 F.3d 1009, 1013 (C.A.8 2009); *United States v. Childs,* 277 F.3d 947, 953–954 (C.A.7 2002). The majority's reasoning appears to allow officers to engage in *some* questioning aimed at detecting evidence of ordinary criminal wrongdoing. *Ante,* at 1614. But it is hard to see how such inquiries fall within the "seizure's 'mission' [of] address[ing] the traffic violation that warranted the stop," or "attend[ing] to related safety concerns." *Ibid.* Its reasoning appears to come down to the principle that dogs are different.

***365** C

On a more fundamental level, the majority's inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion. Probable cause is *the* "traditional justification" for the seizure of a person. *Whren,* 517 U.S., at 817, 116 S.Ct. 1769 (emphasis deleted); see also *Dunaway v. New York,* 442 U.S. 200, 207–208, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). This Court created an exception to that rule in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), permitting "police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause," *Michigan v. Summers,* 452 U.S. 692, 698, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Reasonable suspicion is the justification for such seizures. *Prado Navarette v.* ****1621** *California,* 572 U.S. ——, ——, 134 S.Ct. 1683, 1687–1688, 188 L.Ed.2d 680 (2014).

Traffic stops can be initiated based on probable cause or reasonable suspicion. Although the Court has commented that a routine traffic stop is "more analogous to a so-called '*Terry* stop' than to a formal arrest," it has rejected the notion "that a

traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." *Berkemer v. McCarty,* 468 U.S. 420, 439, and n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (citation omitted).

Although all traffic stops must be executed reasonably, our precedents make clear that traffic stops justified by reasonable suspicion are subject to additional limitations that those justified by probable cause are not. A traffic stop based on reasonable suspicion, like all *Terry* stops, must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Hiibel,* 542 U.S., at 185, 124 S.Ct. 2451 (internal quotation marks omitted). It also "cannot continue for an excessive period of time or resemble a traditional arrest." *Id.,* at 185–186, 124 S.Ct. 2451 (citation omitted). By contrast, a stop based on probable cause affords an officer considerably more leeway. In such seizures, an officer may engage in a warrantless arrest of the driver, *Atwater,* 532 U.S., at 354, 121 S.Ct. 1536 a warrantless search incident to arrest of the driver, ***366** *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014), and a warrantless search incident to arrest of the vehicle if it is reasonable to believe evidence relevant to the crime of arrest might be found there, *Arizona v. Gant,* 556 U.S. 332, 335, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

The majority casually tosses this distinction aside. It asserts that the traffic stop in this case, which was undisputedly initiated on the basis of probable cause, can last no longer than is in fact necessary to effectuate the mission of the stop. *Ante,* at 1616. And, it assumes that the mission of the stop was merely to write a traffic ticket, rather than to consider making a custodial arrest. *Ante,* at 1614. In support of that durational requirement, it relies primarily on cases involving *Terry* stops. See *ante,* at 1614 – 1615 (citing *Arizona v. Johnson,* 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) (analyzing "stop and frisk" of *passenger* in a vehicle temporarily seized for a traffic violation); *United States v. Sharpe,* 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985) (analyzing seizure of individuals based on suspicion of marijuana trafficking); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) (analyzing seizure of man walking through airport on suspicion of narcotics activity)).

The *only* case involving a traffic stop based on probable cause that the majority cites for its rule is *Caballes*. But, that decision provides no support for today's restructuring of our Fourth Amendment jurisprudence. In *Caballes,* the Court made clear that, in the context of a traffic stop supported by probable cause, "a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." 543 U.S., at 408, 125 S.Ct. 834. To be sure, *the dissent* in *Caballes* would have "appl[ied] *Terry* 's reasonable-relation test ... to determine whether the canine sniff impermissibly expanded the scope of the initially valid seizure of Caballes." *Id.,* at 420, 125 S.Ct. 834 (GINSBURG, J., dissenting). But even it conceded that the *Caballes* majority had "implicitly [rejected] the application of *Terry* to a traffic stop converted, by calling ****1622** in a dog, to a drug search." *Id.,* at 421, 125 S.Ct. 834.

***367** By strictly limiting the tasks that define the durational scope of the traffic stop, the majority accomplishes today what the *Caballes* dissent could not: strictly limiting the scope of an officer's activities during a traffic stop justified by probable cause. In doing so, it renders the difference between probable cause and reasonable suspicion virtually meaningless in this context. That shift is supported neither by the Fourth Amendment nor by our precedents interpreting it. And, it results in a constitutional framework that lacks predictability. Had Officer Struble arrested, handcuffed, and taken Rodriguez to the police station for his traffic violation, he would have complied with the Fourth Amendment. See *Atwater, supra,* at 354–355, 121 S.Ct. 1536. But because he made Rodriguez wait for seven or eight extra minutes until a dog arrived, he evidently committed a constitutional violation. Such a view of the Fourth Amendment makes little sense.

III

Today's revision of our Fourth Amendment jurisprudence was also entirely unnecessary. Rodriguez suffered no Fourth Amendment violation here for an entirely independent reason: Officer Struble had reasonable suspicion to continue to hold him for investigative purposes. Our precedents make clear that the Fourth Amendment permits an officer to conduct an investigative traffic stop when that officer has "a

particularized and objective basis for suspecting the particular person stopped of criminal activity." *Prado Navarette,* 572 U.S., at ——, 134 S.Ct., at 1687 (internal quotation marks omitted). Reasonable suspicion is determined by looking at "the whole picture," *ibid.,* taking into account "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Ornelas v. United States,* 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (internal quotation marks omitted).

Officer Struble testified that he first became suspicious that Rodriguez was engaged in criminal activity for a number ***368** of reasons. When he approached the vehicle, he smelled an "overwhelming odor of air freshener coming from the vehicle," which is, in his experience, "a common attempt to conceal an odor that [people] don't want ... to be smelled by the police." App. 20–21. He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was "more nervous than your typical passenger" who "do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation." *Id.,* at 34.

Officer Struble's interactions with the vehicle's occupants only increased his suspicions. When he asked Rodriguez why he had driven onto the shoulder, Rodriguez claimed that he swerved to avoid a pothole. But that story could not be squared with Officer Struble's observation of the vehicle slowly driving off the road before being jerked back onto it. And when Officer Struble asked Pollman where they were coming from and where they were going, Pollman told him they were traveling from Omaha, Nebraska, back to Norfolk, Nebraska, after looking at a vehicle they were considering purchasing. Pollman told the officer that he had neither seen pictures of the vehicle nor confirmed title before the trip. As Officer Struble explained, it "seemed suspicious" to him "to drive ... approximately two hours ... late at night to see a vehicle ****1623** sight unseen to possibly buy it," *id.,* at 26, and to go from Norfolk to Omaha to look at it because "[u]sually people leave Omaha to go get vehicles, not the other way around" due to higher Omaha taxes, *id.,* at 65.

These facts, taken together, easily meet our standard for reasonable suspicion. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion," *Illinois v. Wardlow,* 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), and both vehicle occupants were engaged in such conduct. The officer also recognized ***369** heavy use of air freshener, which, in his experience, indicated the presence of contraband in the vehicle. "[C]ommonsense judgments and inferences about human behavior" further support the officer's conclusion that Pollman's story about their trip was likely a cover story for illegal activity. *Id.,* at 125, 120 S.Ct. 673. Taking into account all the relevant facts, Officer Struble possessed reasonable suspicion of criminal activity to conduct the dog sniff.

Rodriguez contends that reasonable suspicion cannot exist because each of the actions giving rise to the officer's suspicions could be entirely innocent, but our cases easily dispose of that argument. Acts that, by themselves, might be innocent can, when taken together, give rise to reasonable suspicion. *United States v. Arvizu,* 534 U.S. 266, 274–275, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). *Terry* is a classic example, as it involved two individuals repeatedly walking back and forth, looking into a store window, and conferring with one another as well as with a third man. 392 U.S., at 6, 88 S.Ct. 1868. The Court reasoned that this "series of acts, each of them perhaps innocent in itself, ... together warranted further investigation," *id.,* at 22, 88 S.Ct. 1868 and it has reiterated that analysis in a number of cases, see, *e.g., Arvizu, supra,* at 277, 122 S.Ct. 744; *United States v. Sokolow,* 490 U.S. 1, 9–10, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). This one is no different.

* * *

I would conclude that the police did not violate the Fourth Amendment here. Officer Struble possessed probable cause to stop Rodriguez for driving on the shoulder, and he executed the subsequent stop in a reasonable manner. Our decision in *Caballes* requires no more. The majority's holding to the contrary is irreconcilable with *Caballes* and a number of other routine police practices, distorts the distinction between traffic stops justified by probable cause and those justified by reasonable suspicion, and abandons reasonableness as the touchstone of the Fourth Amendment. I respectfully dissent.

Justice ALITO, dissenting.

***370** This is an unnecessary,[1] impractical, and arbitrary decision. It addresses a purely hypothetical question: whether

the traffic stop in this case *would be* unreasonable if the police officer, prior to leading a drug-sniffing dog around the exterior of petitioner's car, did not already have reasonable suspicion that the car contained drugs. In fact, however, the police officer *did have* reasonable suspicion, and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue.

The relevant facts are not in dispute. Officer Struble, who made the stop, was the only witness at the suppression hearing, and his testimony about what happened was not challenged. Defense counsel argued that the facts recounted by Officer Struble were insufficient to establish ****1624** reasonable suspicion, but defense counsel did not dispute those facts or attack the officer's credibility. Similarly, the Magistrate Judge who conducted the hearing did not question the officer's credibility. And as Justice THOMAS's opinion shows, the facts recounted by Officer Struble "easily meet our standard for reasonable suspicion." *Ante,* at 1623 (dissenting opinion); see also, e.g., United *States v. Carpenter,* 462 F.3d 981, 986–987 (C.A.8 2006) (finding reasonable suspicion for a dog sniff based on implausible travel plans and nervous conduct); *United States v. Ludwig,* 641 F.3d 1243, 1248–1250 (C.A.10 2011) (finding reasonable suspicion for a dog sniff where, among other things, the officer smelled "strong masking odors," the defendant's "account of his travel was suspect," and the defendant "was exceptionally nervous throughout his encounter").

Not only does the Court reach out to decide a question not really presented by the facts in this case, but the Court's answer to that question is arbitrary. The Court refuses to address the real Fourth Amendment question: whether the ***371** stop was unreasonably prolonged. Instead, the Court latches onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks.

This holding is not only arbitrary; it is perverse since Officer Struble chose that sequence for the purpose of protecting his own safety and possibly the safety of others. See App. 71–72. Without prolonging the stop, Officer Struble could have conducted the dog sniff while one of the tasks that the Court regards as properly part of the traffic stop was still in progress, but that sequence would have entailed unnecessary risk. At approximately 12:19 a.m., after collecting Pollman's driver's license, Officer Struble did two things. He called in the information needed to do a records check on Pollman (a step that the Court recognizes was properly part of the traffic stop), and he requested that another officer report to the scene. Officer Struble had decided to perform a dog sniff but did not want to do that without another officer present. When occupants of a vehicle who know that their vehicle contains a large amount of illegal drugs see that a drug-sniffing dog has alerted for the presence of drugs, they will almost certainly realize that the police will then proceed to search the vehicle, discover the drugs, and make arrests. Thus, it is reasonable for an officer to believe that an alert will increase the risk that the occupants of the vehicle will attempt to flee or perhaps even attack the officer. See, *e.g.,* *United States v. Dawdy,* 46 F.3d 1427, 1429 (C.A.8 1995) (recounting scuffle between officer and defendant after drugs were discovered).

In this case, Officer Struble was concerned that he was outnumbered at the scene, and he therefore called for backup and waited for the arrival of another officer before conducting the sniff. As a result, the sniff was not completed until ***372** seven or eight minutes after he delivered the warning. But Officer Struble could have proceeded with the dog sniff while he was waiting for the results of the records check on Pollman and before the arrival of the second officer. The drug-sniffing dog was present in Officer Struble's car. If he had chosen that riskier sequence of events, the dog sniff would have been completed before the point in time when, according to the Court's analysis, the authority to detain for the traffic stop ended. Thus, an action that would have been lawful had the ****1625** officer made the *unreasonable* decision to risk his life became unlawful when the officer made the *reasonable* decision to wait a few minutes for backup. Officer Struble's error—apparently—was following prudent procedures motivated by legitimate safety concerns. The Court's holding therefore makes no practical sense. And nothing in the Fourth Amendment, which speaks of *reasonableness,* compels this arbitrary line.

The rule that the Court adopts will do little good going forward.[2] It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement. (I would love to be the proverbial fly on the wall when police instructors teach this rule to officers who make traffic stops.)

For these reasons and those set out in Justice THOMAS's opinion, I respectfully dissent.

All Citations

575 U.S. 348, 135 S.Ct. 1609, 191 L.Ed.2d 492, 83 USLW 4241, 15 Cal. Daily Op. Serv. 3776, 2015 Daily Journal D.A.R. 4311, 25 Fla. L. Weekly Fed. S 191

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 See Brief in Opposition 11–14.

2 It is important to note that the Court's decision does not affect procedures routinely carried out during traffic stops, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Ante,* at 1615. And the Court reaffirms that police "may conduct certain unrelated checks during an otherwise lawful traffic stop." *Ibid.* Thus, it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants out of their car during a valid stop. See *Arizona v. Johnson,* 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009); *Maryland v. Wilson,* 519 U.S. 408, 414–415, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997); *Pennsylvania v. Mimms,* 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*).

99 Mass. L. Rev. 101

Massachusetts Law Review
August, 2018

Case Comment
Peter T. Elikann

CRIMINAL LAW: FLIGHT IS NOT CONSCIOUSNESS OF GUILT

Commonwealth v. Warren, 475 Mass. 530 (2016)

If an individual on the street breaks into a run and flees after a police officer gives an order to stop, many people might intuitively presume that the person running must be guilty of some form of criminal activity. In other words, such flight from law enforcement is an obvious indication of consciousness of guilt. After all, why else would an individual run from the police? As the *Bible* states in Proverbs 28:1, "The wicked flee when no man pursueth: but the righteous are bold as a lion." [1]

In ***Commonwealth*** *v.* ***Warren***, however, the Massachusetts Supreme Judicial Court (SJC) ruled counter to this presumption. [2] Reviewing a judgment of a divided Appeals Court, [3] the SJC held instead that flight from the police, without additional supporting factors, does not rise to the level of reasonable suspicion for a threshold inquiry. [4] This is particularly so if the suspect is a minority because fear of racial profiling is a legitimate concern. [5]

In ***Warren***, police officer Luis Anjos, on patrol in a marked cruiser, responded to the scene of a breaking and entering of a home by three individuals in Roxbury. [6] Upon interviewing the victims, he learned that one of the suspects was a black male wearing a red hoodie, another was a black male wearing a black hoodie, and a third black male wore "dark clothing." [7] The victim reported that they stole a backpack, a computer and five baseball hats. [8]

Officer Anjos searched for approximately 15 minutes within a four- or five-block radius of the crime and, perhaps because the temperature was particularly cold on that December night, saw no pedestrians at all out on those streets. [9] He drove back toward the station and, on his way, at approximately a mile from the scene of the crime, he saw two black males walking past some basketball courts near a park wearing dark clothing, one a dark-colored hoodie. [10] Neither carried a backpack and Officer Anjos did not recognize them from any previous encounters. [11]

The officer had a hunch that these two individuals might be involved since they fit a "general description" and they were at some proximity to the crime, so he decided to "figure out who they were and where they were coming from and possibly do [a field interrogation observation (FIO)]." [12] He rolled down the passenger's side window of his cruiser and yelled, "Hey guys, wait a minute." [13] They made eye contact with the officer and jogged away into the park in the opposite direction. [14] Officer Anjos radioed dispatch noting the location of the suspects. [15]

Two other officers saw the described suspects leaving the other side of the park. [16] The individuals' hands were out of their pockets and there were no evident bulges in their clothes to indicate the possibility of contraband or a concealed firearm. [17] They were only 15 feet away from the officers on Dale Street. [18] One of the officers said, "Hey, fellas." [19] The first suspect stood still while the second suspect, the defendant Jimmy **Warren**, ran up the hill and back into the park. [20] He was ordered

to stop, but did not.[21] The officers saw him clutching the right side of his pants, which indicated to the police officers that he might be armed.[22]

Warren ran out of the park, up the street and was in the back yard of a nearby home on Wakullah Street when one of the police officers drew his firearm, pointed it at **Warren**, shouted at him several times to show his hands and "get down, get down, get down."[23] **Warren** moved slowly, which the police interpreted as a sign of lack of cooperation and, after a brief struggle, arrested him.[24] The officers searched **Warren** but did not find any firearms or contraband.[25] However, one of the officers recovered a Walther .22 firearm in the ***102** front yard of the Wakullah Street house.[26] **Warren** was charged and later convicted of unlawful possession of that firearm.[27]

Prior to trial, a motion to suppress was filed asserting that, at no point prior to his seizure, did there exist reasonable suspicion that **Warren** was involved in criminal activity.[28] Accordingly, there would be no legal justification for the stop or threshold inquiry.[29] The trial court denied the motion to suppress.[30] Importantly, the **commonwealth** had conceded that, at the moment when the second police officer ordered the defendant to stop running and pursued him onto Wakullah Street, a seizure occurred, thus implicating the protections of the state and federal constitutions.[31]

It is well established in Massachusetts that a police officer is warranted in making "a threshold inquiry where suspicious conduct gives the officer reason to suspect that a person has committed, is committing, or is about to commit a crime."[32] Such action must be "based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience. A mere hunch is not enough. Simple good faith on the part of the officer is not enough. The test is an objective one."[33]

The motion judge had ruled that reasonable suspicion existed for the investigatory stop of **Warren**.[34] The judge reasoned that the two suspects matched the description of those sought for the breaking and entering; they were stopped only a mile away from the crime scene; they were the only individuals seen on the street on that very cold evening; they ran from the police officers; and the officers observed **Warren** act in a way consistent with possible possession of a firearm when he clutched the side of his pants as he ran.[35]

The SJC appraised the trial judge's analysis in light of the understanding that "a combination of factors that are each innocent when contemplated individually may, when taken together, amount to the requisite reasonable belief"[36] that a person has committed, is committing, or will commit a particular crime.[37] Here it considered the following components to determine whether alone or together, they constituted a reasonable suspicion:

1. Behavior suggestive of a firearm

The SJC quickly dismissed, without analysis, the lower court's finding that **Warren's** grabbing at the side of his pants while running from the officers contributed to the existence of reasonable suspicion because the judge also found that this behavior occurred only after **Warren** was ordered to stop.[38] Therefore, that behavior could not have entered into the calculus in support of that stop.[39]

2. Description of the suspects

Since the victim gave only a very generalized description of three black suspects, the police only knew that two of the suspects wore "dark clothing" and the third wore a "red hoodie."[40] No further physical description, such as height, weight, distinguishing marks, skin tone or facial characteristics, was included. Such a generalized, non-distinctive description could fit almost any black male in Roxbury wearing a hoodie.[41] Here, **Warren** was one of two men, not three; he did not wear a red hoodie; was

not carrying a backpack; and was not initially seen by the police committing any criminal behavior. [42] Indeed, he was simply walking. [43]

The police officer was apparently acting on a hunch when he called **Warren** over. [44] The police officer essentially conceded this when he noted that the purpose of the stop was "to figure out who they were and where they were coming from and possibly do an FIO." [45]

Therefore, without any apparent objective indication that **Warren** was in the act of committing any criminal activity, and no other indication that he matched anything more than the most generalized of descriptions, his physical characteristics did nothing to assist the police in arriving at a reasonable suspicion that he had committed a crime. [46] Indeed, based on such an anodyne physical description, **Warren** had as much of a right to walk a Boston street without interference as anyone else. [47] There was simply no good reason to stop him.

3. Proximity to the crime scene

Warren was stopped a mile away from the location of the crime and approximately 25 minutes after it was reported. [48] While proximity is an important criterion, without knowing in which particular direction the perpetrators were headed, they could have easily traveled on foot more than two miles from the crime in any direction. [49] Indeed, the suspects, even on foot, could have been within ***103** a 12-mile radius area that included several Boston neighborhoods, including Roxbury, Dorchester or Jamaica Plain. [50] There was simply too little detail as to where the suspects might be. [51] Therefore, the court ruled that the location and timing of the stop were:

> no more than random occurrences and not probative of individualized suspicion where the direction of the perpetrator's path of flight was mere conjecture. Although the police appropriately began their investigation with the information available to them, this lack of detail made it less likely that a sighting of potential suspects could be elevated beyond the level of a hunch or speculation. [52]

In addition, the court reasoned that, if the perpetrators of the crime had, indeed, been headed toward Dale Street where **Warren** and his companion were stopped, they would have reached that location long before the actual stop. [53] The court concluded that "[t]hus, where the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus." [54]

4. Lack of other pedestrians

According to Officer Anjos, after he interviewed the victim for approximately 15 minutes, he drove up and down streets within a four- or five-block radius of the crime location and saw no one on the streets. [55] He then drove back in the direction of the police station. [56] The SJC held this to be of negligible worth given the passage of time and the "narrow geographical scope" of the hunt for the perpetrators. [57]

Given the period of time that had elapsed, the perpetrators could easily have traveled a considerable distance past the vicinity where **Warren** was first spotted by the time the officer even began his search. [58] The court concluded that, therefore, **Warren's** presence far from the location of the crime given the time that had passed does nothing to add to a reasonable suspicion that he had anything to do with any crime. [59]

5. Flight

The court quickly and succinctly dispatched the above four factors as inadequate grounds for reasonable suspicion of a crime that justified a stop of **Warren**. Indeed, after that, the court expended the lion's share of its analysis on an additional consideration--whether an individual's flight from the police constitutes reasonable suspicion?

The court prefaced its reasoning by establishing that evasive action may be taken into consideration during an encounter with the police in determining the existence of reasonable suspicion, but not in the absence of any other supporting information. [60] Evasive conduct alone does not rise to the level of reasonable suspicion that a crime has been, will be or is being committed. [61] The court held that, "[w]ere the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the [flight or the abandonment of potential evidence] justifying the suspicion." [62]

Indeed, "[n]either evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support the reasonable suspicion necessary to justify a stop and frisk." [63] However, again, in combination with other factors, any of these considerations may properly be used as a building block to arrive at reasonable suspicion.

Importantly, while observing that flight could be relevant in a reasonable suspicion analysis when considered in concert with other facts, the court added two "cautionary notes" concerning the weight given to a consideration of flight. [64] Each merits some discussion.

First, the court noted what it referred to as an "irony." [65] On the one hand, it reiterated that a person has the absolute right to choose either to speak or not to speak with a police officer. [66] Even if a person breaks eye contact with and refuses to answer an officer's questions, that alone cannot serve as a basis for a search. [67] It is significant that the court made no distinction between someone courteously declining to talk to the police and someone actually breaking into a run in the opposite direction. On the other hand, because flight can be considered inculpatory, there are times when an "effort to ***104** dodge further contact with the police was significant" enough to determine reasonable suspicion. [68] The court cited ***Commonwealth*** *v. Sykes* where, among other factors, the defendant's abandonment of a bicycle "in an effort to dodge further contact with police was significant." [69] The court held that:

> Where a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined. [70]

Therefore, the court concluded that **Warren's** flight after being called over by Officer Anjos, with no additional factors, contributes nothing to a calculation of appropriate factors that would add up to reasonable suspicion. [71]

The SJC could have stopped at that point. However, it went further by adding its second "cautionary note." Here, the court stated that, where evidence of racial profiling exists and the suspect is, in fact, a minority, this information must be added to the calculus in determining whether flight is justifiable, and therefore constitutes even less of a basis for reasonable suspicion of criminal activity. [72]

The court relied upon a recent Boston Police Department study authenticating a pattern of racial profiling of black males in the city of Boston. [73] The study found that, based on field interrogation and observation figures and other information assembled by the Boston Police, black males in the city of Boston were more likely to be pursued for police-civilian encounters, such

as stops, frisks, searches, observations and interrogations. [74] Black men were also disproportionally targeted for repeat police encounters. [75] The court concluded that:

> We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus. [76]

The decision in ***Warren*** may, indeed, be a landmark ruling that potentially could affect future search and seizure law beyond the issue of simply whether flight indicates a consciousness of guilt. Its apparent recognition that members of the minority community might have a legitimate rationale for fleeing from law enforcement officers due to systemic bigotry and prejudice may well resound throughout every aspect of every stage of future encounters between minorities and law enforcement. If this rationale, asserting as it does that certain groups of citizens are regularly subjected to unequal treatment at the hands of law enforcement, were to be recognized and extended in future rulings, it could have serious reverberations across the field of not only criminal justice, but society as a whole as well.

Footnotes

1 Proverbs 28:1.

2 **Commonwealth** v. **Warren**, 475 Mass. 530 (2016).

3 **Commonwealth** v. **Warren**, 87 Mass. App. Ct. 476 (2016).

4 ***Warren***, 475 Mass. at 538.

5 *Id.* at 539-40.

6 *Id.* at 531-32.

7 *Id.*

8 *Id.* at 532.

9 **Commonwealth** v. **Warren**, 475 Mass. 530, 532 (2016).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 **Commonwealth** v. **Warren**, 475 Mass. 530, 532-33 (2016).

16 *Id.* at 533.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 **Commonwealth** v. **Warren**, 475 Mass. 530, 533 (2016).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 **Commonwealth** v. **Warren**, 475 Mass. 530 (2016).

28 *Id.* at 531.

29 *Id.*

30 *Id.*

31 *Id.* at 534.

32 **Commonwealth** v. Silva, 366 Mass. 402, 405 (1974); *see also* **Commonwealth** v. Almeida, 373 Mass. 266, 270-271 (1977).

33 *Silva*, 366 Mass. at 406; *see also* **Commonwealth** v. DePeiza, 449 Mass. 367, 371 (2007); **Commonwealth** v. Carkhuff, 441 Mass. 122 (2004); **Commonwealth** v. Bacon, 381 Mass. 642, 643 (1980).

34 ***Warren***, 475 Mass. at 534.

35 *Id.* at 534-35.

36 **Commonwealth** v. Feyenord, 445 Mass. 72, 77 (2005), *cert. denied,* 546 U.S. 1187 (2006), *quoting* **Commonwealth** v. Fraser, 410 Mass. 541, 545 (1991).

37 *Id.*

38 **Commonwealth** v. **Warren**, 475 Mass. 530, 535 n. 9 (2016).

39 *Id.*

40 *Id.* at 535.

41 *Id.*

42 *Id.* at 536.

43 *Id.*

44 **Commonwealth** v. **Warren**, 475 Mass. 530, 536 (2016).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 536-537.

50 **Commonwealth** v. **Warren**, 475 Mass. 530, 536 (2016).

51 *Id.*

52 *Id.* at 536.

53 *Id.* at 537.

54 *Id.*

55 *Id.* at 537-38.

56 **Commonwealth** v. **Warren**, 475 Mass. 530, 537-38 (2016).

57 *Id.*

58 *Id.* at 537.

59 *Id.* at 538.

60 *Id.*

61 *Id.; see also* **Commonwealth** v. Mercado, 422 Mass. 367, 371 (1996); **Commonwealth** v. Thibeau, 384 Mass. 762, 764 (1981).

62 **Commonwealth** v. Stoute, 422 Mass. 782, 789 (1996), *quoting* *Thibeau,* 384 Mass. at 764.

63 *Mercado*, 422 Mass. at 371.

64 **Commonwealth** v. **Warren**, 475 Mass. 530, 538 (2016).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 538-539.

69 **Commonwealth** v. Sykes, 449 Mass. 308, 315 (2007).

70 **Commonwealth** v. **Warren**, 475 Mass. 530, 539 (2016).

71 *Id.*

72 *Id.* at 539-40. Indeed, here, the court explicitly endorsed the studies relied on by the dissenters in the Appeals Court's earlier decision affirming the denial of **Warren's** motion to suppress.

73 Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results [https://perma.cc/H9RJ-RHNB].

74 ***Warren***, 475 Mass. at 539-40.

75 *Id.* at 540.

76 *Id.*

99 MALR 101