A
Peace Officer's Guide to Texas Law

2021 Edition

A Peace Officer's Guide to Texas Law 2021 Edition

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This is the Nineteenth Edition of, **"A Peace Officer's Guide to Texas Law."** The guide is provided to members of the Texas Police Association as a benefit of membership. The **Peace Officer's Guide** and the *Police Legal Digest* contained in each issue of the *Texas Police Journal* serve as vital sources of up-to-date information for our Texas Peace Officers.

TPA is thankful to, appreciates, and acknowledges Joe C. Tooley, TPA General Counsel, for his perseverance, hard work, dedication, and tireless effort in preparing the bi-monthly *Police Legal Digest*, along with the monumental task of writing and assembling this edition of the **Peace Officer's Guide** as he has done after each legislative session. Mr. Tooley is truly an advocate and supporter of our Texas Law Enforcement officers!

As a result, some departments provide their officers with membership in TPA so that each officer will receive a copy of the **Peace Officer's Guide**, a bi-monthly edition of the *Police Legal Digest*, and other relative articles. This is a wise expenditure of training funds. Any department interested in signing up their officers should contact the Texas Police Association office for additional information. For individual membership, an application can be found on our website at www.TexasPoliceAssociation.com, in the *Texas Police Journal*, or in the **Peace Officer's Guide**.

Erwin Ballarta
Executive Director

PREFACE

This 2021 Peace Officer Guide is a continuation of a semi-annual series published by the Texas Police Association for many years as a service to its members.

The Guide is a compendium of reports from the Legal Digests of the Texas Police Association from September, 2019, to August, 2021. The editor has attempted to select those court decisions which are of significance to the working law enforcement officer and, within those selections, has attempted to identify and present the information pertinent to the daily work of police officers in Texas.

This Guide is dedicated to the men and women of Texas law enforcement and especially to those officers wounded or killed in the line of duty and to their families.

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1. SEARCH & SEIZURE

SEARCH & SEIZURE. Standing. Warrant for cell phone data.

This is a case about GPS searches, Fourth Amendment standing, and the Stored Communications Act. Matthew Beaudion and his girlfriend, Jessica Davis, were drug dealers. Narcotics officers obtained a warrant for the GPS coordinates of Davis's cell phone and used the coordinates to intercept the car in which she and Beaudion were traveling. After losing a motion to suppress, Beaudion pleaded guilty to drug charges. He appealed. We affirm.

During a narcotics investigation by the Monroe Police Department ("MPD"), multiple drug dealers and cooperating witnesses identified\ Beaudion and Davis as their suppliers. One witness informed MPD Officer\ Heckard that Beaudion and Davis were planning to drive from Houston to Monroe with four pounds of meth. The witness then called Davis on her cell phone, [XXX]-[XXX]-0889, to arrange a meth deal. Heckard listened in. Heckard used that information and Davis's cell phone number to request a search warrant. In the warrant application, Heckard asked for the GPS coordinates of Davis's cell phone over the next sixteen hours. Louisiana District Judge Larry Jefferson found probable cause to support the request and issued the warrant. Heckard promptly faxed the warrant to Verizon's law-enforcement division. Verizon agreed to provide the longitude and latitude coordinates of Davis's phone as many times as Heckard called to request them within the sixteen-hour window. Heckard called six times. Each time he received a verbal recitation of the most recent GPS data and an estimated margin of error. The coordinates confirmed that Davis (or at least her phone) was headed east toward Monroe. Heckard's final call to Verizon indicated that Davis was passing through Shreveport and on her way to Monroe. So Heckard and other MPD officers spread out along the interstate and waited for Davis to arrive. The officers stopped the car, searched it, and discovered the meth. Then they arrested Davis and Beaudion and recovered Davis's phone from her purse. The United States charged Beaudion with conspiracy to possess with the intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Beaudion moved to suppress the drugs and other evidence on the theory that the warrant authorizing the GPS tracking was defective. A magistrate judge recommended denying the motion for lack of Fourth Amendment standing, and the district court adopted that recommendation. The district court held in the alternative that Beaudion's warrant-related arguments did not entitle him to relief. Beaudion entered a conditional guilty plea. The district court gave him a Guidelines sentence. Beaudion timely appealed his conviction and sentence by challenging the denial of his motion to suppress.

Beaudion argues that Heckard violated the Fourth Amendment by obtaining Davis's GPS coordinates via a defective warrant. We therefore begin with the original public meaning of the Amendment.

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. English search-andseizure practices inform the original public meaning of this text.

For a long time, searches and seizures in England were relatively limited. Private parties who witnessed a felony could chase the perpetrator during the "hue and cry," but they rarely went house-to-house looking for unidentified suspects. Customs officials could search ships for counterfeit currency and smuggled goods, but they rarely ventured onto land. And guild officers could inspect merchandise for quality-control purposes, but they rarely investigated people outside their professions. Given the limited frequency and scope of these searches, they generated "little protest."

Then the Tudors assumed the throne in 1485, and "the English law of search and seizure underwent a radical transformation." The targeted investigations of prior centuries became general searches of sweeping scope. These searches were authorized by general warrants that commanded their enforcers "to search the houses, out-houses, or other places of any person . . . as upon good ground shall be suspected," to quote just one example. Thus, the

hue and cry morphed from targeted searches for identified felons into "private search[es] . . . in every Town" of "all suspected houses and places." Customs officials received authorization to search not only ships but also any "shop, warehouse, or other place or places whatsoever which they . . . shall think good within this realm." And the Crown expanded guild searches beyond guild members and their competitors to civilians outside the regulated profession. The Crown also used general warrants and searches to regulate vagrancy, recreation, apparel, hunting, weapons, and social unrest.

Some objected that such searches were unlawful and "unreasonable." Importantly, the objectors framed their arguments in terms of individual rights. Sir Edward Coke, for example, argued that general searches violated Magna Carta's individualized promise that "[n]o free man shall be taken or imprisoned or dispossessed, . . . nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."

Violations of personal rights necessitated personal remedies. And tort liability soon expanded to reach offending officers as well. Indeed, many of the canonical English search-and-seizure cases—whose "propositions were in the minds of those who framed the [F]ourth [A]mendment"—involved trespass suits against officers who authorized and executed general warrants.

Both the posture and pronouncements of those cases reflect the common-law understanding that unreasonable searches and seizures were a person-specific harm with a person-specific remedy. Not just anyone could sue in trespass. Rather, the proper plaintiff was one who "ha[d] a property . . . in the soil[] and actual possession by entry."

All this history matters. It explains the Fourth Amendment's requirement for specific warrants. It demarcates unreasonable searches and seizures. And it suggests the remedies for violations of Fourth Amendment rights. Of course, the complexities of history sometimes leave room for debate in answering these questions. But one thing is beyond debate: the Fourth Amendment is not a weapon that uninjured parties get to wield on behalf of others. As with the common law that preceded it, the Fourth Amendment protects individuals' security "in *their* persons," "*their* . . . houses," "*their* . . . papers," and "*their* . . . effects." It does not protect individuals' security in the property of someone else.

Modern doctrine incorporates this history in the requirement of Fourth Amendment "standing." This "standing" concept ensures that those invoking the Amendment can vindicate only their *personal* security against unreasonable searches and seizures. And it requires us to reject Beaudion's claim.

According to the Supreme Court, the Fourth Amendment sometimes carries a "judicially created remedy" that allows a defendant to suppress evidence obtained through an unreasonable search or seizure. But the so-called exclusionary rule does not operate vicariously. Rather, a criminal defendant seeking suppression must show that "his *own* Fourth Amendment rights [were] infringed by the search [or] seizure which he seeks to challenge."

Today we call this principle "Fourth Amendment standing." Fourth Amendment standing "is not a jurisdictional question." It is instead "more properly subsumed under substantive Fourth Amendment doctrine," Therefore, a defendant seeking to suppress evidence must show not only that the police committed an unreasonable search or seizure, but also that the search or seizure "infringed [a Fourth Amendment] interest of the defendant" himself.

A defendant can establish this personalized interest in one of two ways. First, he may object to the "physical intrusion of a constitutionally protected area" in which he has a property interest. And second, he may object to government action that violates a "reasonable expectation of privacy . . . in the place searched." Either way, the Fourth Amendment standing inquiry is both defendant- and place-specific: it requires that a *particular* defendant (the suppression movant) have a property or privacy interest in a *particular* place (the area searched). Here, the parties agree that the Government conducted a search when it used the GPS coordinates from Verizon to locate Davis's

phone. But the district court held that Beaudion lacked standing to challenge that search and denied his suppression motion accordingly. And we must "uphold the district court's ruling to deny the suppression motion if there is any reasonable view of the evidence to support it." To determine whether Beaudion has standing, we first identify the place that was searched. The warrant authorized Officer Heckard to search GPS coordinates and registered owner information of cell phone number [XXX]-[XXX]-0889. This is to include its location from current date and time of August 15, 2017 at 0813 hours to August 16, 2017 at 0000 hours. Cell phone number [XXX]-[XXX]-0889 is activated through Verizon Wireless and is currently being used by Jessica Nicole Davis.

Thus, the Government sought and Judge Jefferson granted sixteen hours of access to the GPS coordinates of Davis's phone. Nothing in the record or the parties' briefs suggests that MPD officers ever exceeded the scope of that warrant. Officer Heckard adhered to its terms by faxing the warrant to Verizon and periodically requesting the location of Davis's phone during the approved window. His requests didn't mention Beaudion or Beaudion's phone. In fact, Heckard testified that he did not learn that Beaudion even had a phone until after Beaudion's arrest. We therefore conclude that the GPS coordinates of Davis's phone constitute the relevant "place searched."

Beaudion would have us go further. In his view, the Government's search extended beyond Davis and her phone to include Beaudion and the car in which he and Davis were traveling. That's so, he argues, because "[t]he purpose of the search warrant was to track the movements of [t]he car by using the GPS location of the cell phone inside of the car." That argument fails for at least two reasons.

First, the Supreme Court long ago rejected the "target" theory of a search under which "any criminal defendant at whom a search was 'directed' would have standing to contest the legality of that search." Framing the standing inquiry that way "would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial." What matters is not the *purpose* of a search but rather its *scope*.

Second, the Supreme Court has consistently defined the relevant scope of a search with granularity. In *United States v. Rakas*, for example, two defendants moved to suppress evidence discovered during the search of a vehicle in which they were passengers. The Court confined its analysis to the specific "portions of the automobile which were searched," holding that the Defendants lacked an expectation of privacy "in the glove compartment [and the] area under the seat" where police found contraband. Similarly, in *Collins v. Virginia*, the Court reviewed "photographs in the record" to determine "whether the part of the driveway where [the defendant's] motorcycle was parked and subsequently searched" qualified as constitutionally protected "curtilage." Defining the scope of a search with such specificity makes sense: the Fourth Amendment itself authorizes warrants only when "the scope of the . . . search is set out with particularity." Applying that particularized analysis here, the scope of the search—as reflected in both the warrant and Heckard's compliance with it—included only the GPS coordinates of Davis's phone and her corresponding location.

Having concluded that the "place searched" is limited to location information about Davis, we now ask whether Beaudion has a Fourth Amendment property or privacy interest in that information. He doesn't. The Supreme Court requires us to consider "whether the person claiming the constitutional violation ha[s] a legitimate expectation of privacy in the premises searched." Indeed, the privacy inquiry "supplements . . . 'the traditional property-based understanding of the Fourth Amendment.'" Privacy and property concepts "are often linked" because "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." That's why we must remain "[e]ver mindful of the Fourth Amendment and its [property-based] history."

These principles certainly gave *Davis* a reasonable expectation of privacy in her phone and its location. She lawfully possessed and controlled the phone as its "primary user." And she owned the phone number for nearly a

decade. But Davis's suppression motion is not before us. Rather, Beaudion must show a reasonable expectation of privacy in a phone and number he did not own.

Beaudion directs us to five facts as evidence of his reasonable privacy expectations in Davis's phone: (1) he purchased the physical phone and gave it to Davis; (2) he had permission to use the phone; (3) he had password access to the phone; (4) he accessed his Facebook account from the phone; and (5) he used the phone to capture intimate videos of him and Davis. Fact (1) is irrelevant. "[A] person has no standing to challenge a search or seizure of property that was voluntarily abandoned" or conveyed to another. And the Government correctly observes that fact (3) is not supported by the record. Davis testified only that Beaudion "ha[d] to put in [his] screen name and . . . password" when logging onto Facebook, not when accessing the phone more generally.

Facts (2), (4), and (5) reduce to a claim that Beaudion sometimes used Davis's phone for personal activities. There is no indication that Beaudion ever used or possessed the phone outside of Davis's presence. And the record doesn't tell us how often he accessed Facebook or captured intimate videos. What the record does tell us is that Davis was the "primary user"; Davis had the phone number long before she met Beaudion; Davis maintained possession of the phone throughout the day of the arrest; and Davis's parents paid the bill. No matter whether Beaudion actually expected privacy in the phone, we cannot say his expectation of privacy would be reasonable.

Here, the GPS coordinates told MPD officers nothing about Beaudion specifically. It was only because Officer Heckard spoke with a confidential informant and overheard her conversation with Davis that he suspected Beaudion would be nearby. Obviously, Heckard's interactions with the informant were not a search. And nothing in *Carpenter* requires us to hold that Heckard's non-search became a search simply because Beaudion decided to ride with Davis. Beaudion's claim to Fourth Amendment standing therefore fails.

Even if Beaudion has standing to challenge the GPS search, he must also show the search was unreasonable. He has not done so.

The Fourth Amendment "does not specify" what amounts to an unreasonable search. The Supreme Court has said its "ultimate touchstone" is simply "reasonableness." But the Court has also said that "reasonableness" requires a "warrant supported by probable cause" or else a "specific exception to the warrant requirement."

It is beyond dispute that Officer Heckard began tracking the GPS coordinates only after receiving a warrant. And Beaudion concedes that the warrant was "supported [by] probable cause with regard to [his] . . . illegal drug[] activities." Those two facts make this an easy case.

Beaudion nevertheless claims for the first time on appeal that the GPS search was unreasonable because the authorizing warrant failed to comply with the Stored Communications Act ("SCA").

The SCA creates various mechanisms by which a "governmental entity may require a provider of electronic communication service . . . to disclose a record or other information pertaining to a subscriber to or customer of such service." 18 U.S.C. § 2703(c)(1). One such mechanism allows the Government to "obtain[] a warrant" from a state "court of competent jurisdiction" using "[s]tate warrant procedures." *Id.* § 2703(c)(1)(A). That is exactly what happened here. The Louisiana district court that issued the warrant is unquestionably a court of competent jurisdiction within the meaning of the SCA. *See id.* § 2711(3)(B). And there is no indication that Officer Heckard or Judge Jefferson violated state warrant procedures. So the warrant clearly complies with the plain text of the SCA. Beaudion disagrees. He contends that the SCA requires the Government to produce probable cause that the *subscriber or customer* committed a crime. And because Davis's parents were the relevant Verizon subscribers, Beaudion insists that the SCA invalidates a warrant premised on illegal activities not involving Davis's parents. The argument borders on frivolous. Nowhere does § 2703 require a showing of probable cause relating to the sub-

scriber. Subsection (c) merely requires that warrants comply with, as relevant here, "[s]tate warrant procedures." And subsection (d) authorizes disclosure of otherwise-protected information upon a "showing that there are reasonable grounds to believe that the . . . information sought [is] relevant and material to *an* ongoing criminal investigation." The warrant issued by Judge Jefferson complied with these provisions.

Beaudion's SCA argument faces another problem: "[S]uppression is not a remedy for a violation of the Stored Communications Act." Congress could not have been clearer on this point. *See* 18 U.S.C. § 2708.

Beaudion also argues that the district court should have granted his motion to suppress because the officers who intercepted him committed an unconstitutional traffic stop. According to Beaudion, we must find a Fourth Amendment violation because "there is not a shred of evidence in the record of the reason the patrol officer [stopped] the car." In fact, he observes, "[t]here is not a shred of evidence about the stop" at all. Beaudion's argument is his own undoing. "The party seeking suppression has the burden of proving, by a preponderance of the evidence, that the evidence in question was obtained in violation of his Fourth Amendment rights." Beaudion never challenged the constitutionality of the traffic stop in the district court. And he offers no argument that we should overlook his forfeiture under plainerror review. AFFIRMED.

***U.S. v. Beaudion*, No. 19-30635, 5th Circuit. Nov. 11, 2020.**

SEARCH & SEIZURE, wiretap warrant in drug case.

Defendant-Appellant Troy "99" Kendrick was charged and convicted of conspiracy to distribute cocaine base ("crack cocaine") and possession of a firearm by a convicted felon. He now contests the Government's Title III wiretap that intercepted calls and text messages from his phone, the sufficiency of the evidence on his drug conspiracy conviction, the district court's sentencing enhancement for possessing a firearm, and the effectiveness of counsel. We affirm.

Wiretap and Search Warrant The wiretap events are drawn from Drug Enforcement Administration (DEA) Special Agent (SA) Scott Arseneaux's supporting warrant affidavits.

1. *The Garrick Jones Surveillance and Wiretap*.
The DEA and St. John Parish Sheriff's Office (SJPSO) initially investigated Kendrick's co-defendant Garrick "Gnu" Jones and used a reliable confidential source/informant to surveil Jones distributing crack cocaine. The narcotics transactions involving the informant and Jones occurred on January 4 and February 17 of 2016, and on March 10, the informant was involved in a physical altercation with Jones.

• **January 4**: The DEA and SJPSO officials witnessed the informant contact Jones at his phone number, Telephone #1,1 to arrange meetings to purchase crack cocaine. The informant met with Jones at Jones's Reserve, Louisiana home and purchased 12 grams of crack cocaine. According to the informant, he witnessed Jones initially meet Kendrick in the front of Jones's home to purchase crack cocaine before subsequently selling the narcotics to the informant.

• **February 17**: The DEA and SJPSO again observed the informant contact Jones (via Telephone #1) to arrange a meeting to purchase a half-ounce of crack cocaine from Jones. Once the informant and Jones agreed to meet, the DEA and SJPSO surveillance units followed the informant as he or she traveled to Jones's home wearing a recording device. After the informant arrived at Jones's residence, the DEA and SJPSO observed Jones walk to the next-door neighbor's home to meet with an unknown individual, who was later identified as Kendrick.3 After meeting

with Kendrick, Jones returned to his residence to complete his transaction with the informant that was for approximately 12 grams of crack cocaine.

• **March 10**: The DEA and SJPSO directed the informant to contact Jones to purchase more crack cocaine, but Jones never responded. Later that day, co-defendant Travis "Tree" Carter (1) contacted the informant; (2) informed the informant that Carter would be taking over for Jones; and (3) told the informant to meet him at another Reserve location. The informant met with Carter and shortly thereafter, sent a distress signal to the DEA and SJPSO. The DEA and SJPSO officials arrived and witnessed Jones and Carter fleeing the scene after attempting to assault the informant with a piece of lumber. Jones and Carter were arrested and subsequently released because the informant did not want to press charges in fear of retaliation. In late April, SA Arseneaux attested to the foregoing investigative facts as a basis for probable cause to obtain a wiretap on Jones's Telephone #1. A district judge signed an order authorizing the Title III wire intercepts, and on May 12, the DEA officials began monitoring Telephone #1.

• **May 12**: The DEA agents intercepted an incoming 4:07 p.m. call from an unidentified woman calling Jones. The unidentified woman asked for "a dime," and Jones confirmed that he was in possession of one. A minute later (4:08 p.m.), Jones sent a text message to a number associated with Telephone #2, which the authorities determined was Kendrick's telephone number. Jones's text message asked Kendrick where he was located, and Kendrick responded: "leaving Home Depot."

• **May 17**: The DEA agents intercepted an incoming 9:32 a.m. call from another woman calling Jones. During the call, Jones described a recent situation where he "flushed everything [he] had last night" because he was supposedly concerned about law enforcement surrounding his home. The caller then inquired as to whether Jones "re-up['ed]," and Jones stated that he was "waiting on my [sic] to come through right now." Five minutes after the call ended (9:37 a.m.), the agents intercepted an outgoing call from Jones to Telephone #2, where Kendrick picked up and greeted Jones. Jones replied that he "need[ed] [Kendrick] til tomorrow man" to which Kendrick stated, "I got you." Jones subsequently sent an outgoing 3:31 p.m. text message to the number that called him at 9:32 a.m., stating "I'm back gud."

• **May 20**: Jones sent an outgoing 5:00 p.m. text message to Telephone #2, stating "Bring me 1." At 5:48 p.m., Kendrick (using Telephone #2) called Jones, asking Jones where Jones was currently located. Jones informed Kendrick that he was "in the truck with Tree [and that he was] coming to get that [in a] little bit, man." Kendrick told Jones that he was at a Valero gas station and Jones confirmed that he was "about to be coming to get that."

2. *The Kendrick Wiretap*. Based on the foregoing intel, SA Arseneaux submitted a Title III wiretap affidavit in which he attested and analyzed the investigative facts to conclude (based on his experience) that Jones relied on Kendrick as his drug supplier. He also believed that there was probable cause to monitor Kendrick's Telephone #2, and on June 13, the Title III wiretap request was granted (via court order) for a 30-day window.

• **June 13**: The DEA agents intercepted an incoming 3:59 p.m. text message from Kendrick to Jones, stating "Wya"—which is a common acronym for "where you at." One minute later (4:00 p.m.), the agents intercepted an incoming text message from Jones to Kendrick, stating "Da Crib. I need 1," and within seconds, Kendrick replied via text message, "[c]oming."

• **June 22**: The DEA agents intercepted an incoming 9:06 p.m. text message from Jones to Kendrick, asking "U around", and at 9:12 p.m., Kendrick sent outgoing text message replying "Yes." At 9:15 p.m., Jones responded (via text message) that he "need[s] 1."

• **June 23**: The DEA agents intercepted a series of text messages between Jaden "Jordy" Robertson and Kendrick, which included, in relevant part: an incoming 3:25 a.m. text from Robertson stating "Wats man? I will have some-

thing today for u," and an outgoing 8:01 p.m. text message from Kendrick to Robertson stating, "Hey I need to buy 1 too."

3. *The Search Warrant and Kendrick Arrest.*
Given the incriminating wiretap communications and other events (including, *inter alia*, Jones's drug transactions with the informant and the assault of the informant in March), SA Arseneaux concluded that based on his experience, Kendrick was Jones's supplier. He also believed there was probable cause to search Jones's and Kendrick's adjacent homes for evidence of drug trafficking. A search warrant application was presented to a magistrate judge, and the judge authorized the search.

In executing the warrant on Kendrick's home, the DEA officials located and seized: (1) a digital scale located on Kendrick's person; (2) two bottles of mannitol; (3) scattered cash amounting to roughly $10,000; (4) one loaded firearm; (5) an invoice listing items commonly used for growing marijuana; (6) packaging material; (7) a money counting machine; (8) a bulletproof vest; and, (9) concealed under the floorboard in the bedroom closet, a compartment that contained four handguns, ammunition, cash, a ski mask, and gloves. No narcotics were seized. The DEA agents arrested Kendrick (along with his co-defendants Jones, Carter, Michael Sanders, and Reshad Frank), and a grand jury indicted them in a nine-count complaint for offenses related to drug trafficking.

Kendrick moved to suppress the evidence recovered from the Title III wiretaps. Kendrick's main argument focused on a discrepancy between SA Arseneaux's affidavit and a SJPSO police report describing the January 2016 transaction involving the informant and Jones. While the informant stated that Jones met with Kendrick during that drug transaction (*see, supra*, Sect.A.1), this police report stated that "the individual that was present . . . was in fact [codefendant] Travis Carter," not Kendrick. Kendrick claims that the Government deliberately misidentified him. In response, the Government posited that all the wiretaps were supported by probable cause and Kendrick's arguments point to SA Arseneaux's credibility, which is a jury question. The district court held a hearing to determine whether Kendrick could demonstrate that the Government's affidavits contained deliberate falsehoods or were made with reckless disregard for the truth—thus, warranting an evidentiary hearing under *Franks v. Delaware*. 438 U.S. 154 (1978). After hearing the parties' arguments, the court concluded that there were no deliberate falsehoods in the challenged affidavit and denied the motion.

Motion to Suppress and *Franks* Hearing

In addressing a *Franks* hearing request, the Supreme Court has determined that "the Fourth Amendment entitles a defendant to a hearing on the veracity of a warrant affidavit if he can make a sufficient preliminary showing that the affiant officer obtained the warrant by recklessly including material falsehoods in a warrant application." If the preliminary showing is made and the hearing is granted, a warrant "must be voided if the defendant shows by a preponderance of the evidence that the affidavit supporting the warrant contained a false statement made intentionally or with reckless disregard for the truth and, after setting aside the false statement, the affidavit's remaining content is insufficient to establish probable cause." To resolve a challenge to an affidavit's veracity, we first determine if it contains a false statement or material omission. If so, then we decide whether "the false statement [or omission was] made intentionally or with reckless disregard for the truth." Finally, "if the false statement is excised, does the remaining content in the affidavit fail to establish probable cause?" (*Ed. Note: If possible, have your warrant affidavits establish probable cause in multiple, independent ways.*) Kendrick contends that SA Arseneaux's Title III wiretap affidavit contained false statements and material omissions that were reckless. Once these misstatements are removed under *Franks*, Kendrick maintains that what remains in the affidavit is SA Arseneaux's conclusory interpretations of Kendrick's otherwise innocuous calls and text—which are insufficient to support probable cause. We disagree. Probable cause still exists even if the allegedly false statements are excised. "Probable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought [by the warrant] constitute fruits, instru-

mentalities, or evidence of a crime."

The following table illustrates Kendrick's challenged statements in comparison to the affidavit's remaining content:

Alleged Falsehoods and Omissions

• Misidentifying Kendrick as the individual involved in the January 2016 transaction with Jones and the confidential informant, when it was in fact Carter;
• Omitting context from the May 12 call that Jones and Kendrick had already spoken that day about meeting up before Jones received a request for narcotics, suggestingthat the two had a legitimatereason for the call unrelated to drugs;
• Misclassifying a May 17, 2016 call as *outgoing* from Jones to Kendrick, when in fact it was *incoming* from Kendrick to Jones;
• Omitting exculpatory context from the same May 17 call in which Kendrick and Jones discussed non-drug-related topics including a basketball game for approximately four minutes after Kendrick asked Jones what he had going on during a lull in the conversation;
• May 20 call misclassifying Kendrick as the person near the Valero gas station, when in fact it was Jones; and
• Omitting social calls between Kendrick and Jones that support
the assertion that they had non drug-related communications

• February 17 transaction where the infor ant identified Kendrick
as the supplier that Jones meets with during the drug deal;
• May 12 events in which an unidentified individual contacted Jones for a dime and a minute later, Jones contacted Kendrick to determine his location;
• May 17 exchange between Jones and Kendrick in which Jones said he needed Kendrick which occurred five minutes after a caller asked Jones if he resupplied his drug inventory; and
• May 20 text message from Jones to Kendrick stating "Bring me 1" followed by them coordinating a meetup location.

The remaining *unchallenged* affidavit content, *i.e.*, the February 17 transaction, the May 12 events, the May 17 exchange and the May 20 text message, along with the insertion of the improperly omitted context of the May 12 and May 17 calls, sets out events that SA Arseneaux believed indicated that cocaine and Kendrick distributing crack cocaine to local dealers like Jones. Indeed, the affidavit's contents undoubtedly confirm that Jones sold drugs to the informant on one occasion where he met with Kendrick amidst completing the drug transaction; and when Jones needed to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet. Consequently, we find that the totality of the circumstances supports a probable cause finding.

In sum, because Kendrick failed to make "a sufficient preliminary showing that the affiant officer obtained the warrant by recklessly including material falsehoods in a warrant application," the district court did not err in denying his request for a *Franks* hearing. Even if Kendrick had made a sufficient preliminary showing, he still would not have been entitled to relief. This is because, after excising the alleged falsehoods and omissions and inserting the improperly omitted context of the May 12 and 17 calls and texts, the affidavit still included numerous other incriminating facts regarding Kendrick and his involvement with Jones, giving rise to probable cause. The district court did not err in denying Kendrick's request for a *Franks* hearing. The district court's denial of Kendrick's motion to suppress was warranted.

(discussion of other claims on appeal is omitted.)

For the reasons set forth above, we AFFIRM the district court's motion to suppress finding; Kendrick's conspiracy to distribute conviction; and the court's sentencing calculation.

***U.S. v. Kendrick, Jr.,* No. 19-30375, 5th Cir., Nov. 03rd, 2020.**

SEARCH & SEIZURE, cell phone search based on inadequate warrant disallowed. Good Faith exception discussed.

In this appeal, we are asked to determine whether the good faith exception to the Fourth Amendment's exclusionary rule allows officers to search the photographs on a defendant's cellphones for evidence of drug possession, when the affidavits supporting the search warrants were based only on evidence of personal drug possession and an officer's generalized allegations about the behavior of drug traffickers—not drug users. We hold that the officers' affidavits do not provide probable cause to search the photographs stored on the defendant's cellphones; and further, we hold that the good faith exception does not apply because the officers' reliance on the defective warrants was objectively unreasonable. And while respecting the "great deference" that the presiding judge is owed, we further hold that he did not have a substantial basis for his probable cause determination with regard to the photographs. We thus conclude that the digital images found on Morton's cellphones are inadmissible, and his conviction is therefore VACATED. Accordingly, the case is REMANDED for further proceedings not inconsistent with this opinion.

Morton was stopped for speeding near Palo Pinto, Texas. After the officers smelled marijuana, he gave consent to search his van. Officers found sixteen ecstasy pills, one small bag of marijuana, and a glass pipe. When, however, they discovered children's school supplies, a lollipop, 14 sex toys, and 100 pairs of women's underwear in the vehicle, they became more concerned that Morton might be a pedophile. After arresting Morton for drug possession, one of the officers, Texas Department of Public Safety (DPS) Trooper Burt Blue, applied for warrants to search Morton's three cellphones that were found in the van. Trooper Blue's affidavits for the search warrants mentioned no concerns about child exploitation; instead, the warrants purported to seek more evidence of Morton's criminal drug activity based on Trooper Blue's training and experience—fourteen years in law enforcement and eight years as a "DRE-Drug Recognition Expert"—as well as the drugs found in Morton's possession and his admission that the drugs were in fact marijuana and ecstasy. Relying on these affidavits, a judge issued warrants to search Morton's phones. While searching the phones' photographs, Trooper Blue and another officer came across sexually explicit images of children. The officers then sought and received another set of warrants to further search the phones for child pornography, ultimately finding 19,270 images of sexually exploited minors. The government then indicted Morton for a violation of 18 U.S.C. § 2252(a)(2) for the child pornography found on his three cellphones. The subject of drugs had vaporized. In pretrial proceedings, Morton moved to suppress this pornographic evidence. He argued that the affidavits in support of the first set of warrants failed to establish probable cause to search for his additional criminal drug activity. The government responded by stating that the warrants were supported by probable cause and, if not, then the good faith exception to the exclusionary rule should apply. The district court ruled in favor of the government, and Morton later pled guilty to the child pornography charge while reserving his right to appeal the district court's suppression decision. He was sentenced to nine years in prison, and this appeal of the suppression ruling followed.

First, we decide whether the good faith exception should apply. If the good faith exception applies, then no further inquiry is required. If the good faith exception does not apply, we proceed to a second step of analysis, in which we review whether the issuing judge had a substantial basis for determining that probable cause existed. The good faith exception to the suppression of evidence obtained in violation of the Fourth Amendment arises when an officer's reliance on a defective search warrant is "objectively reasonable." In such a case, the evidence obtained from the search "will not be excluded." This court has decided that the good faith exception applies to most searches undertaken pursuant to a warrant unless one of the four situations enumerated in *Leon* removes the warrant from the exception's protection. Only one of these "exceptions to the good faith exception" is relevant here: Morton alleges that the warrant "so lack[ed] indicia of probable cause" that the officers' reliance on it was "entirely unreasonable."

To determine if there were indicia of probable cause, the reviewing court will usually be required to look at the affidavit supporting the warrant, but, even so, all of the circumstances surrounding the warrant's issuance may be considered. Affidavits must raise a "fair probability" or a "substantial chance" that criminal evidence will be found in the place to be searched for there to be probable cause. Here, as suggested by this court's precedent, we turn to Trooper Blue's affidavits supporting the search warrants. The affidavits seek approval to search Morton's contacts, call logs, text messages, and photographs for evidence of his drug possession crimes. As the government properly conceded at oral argument,2 separate probable cause is required to search each of the categories of information found on the cellphones. Although "[t]reating a cell phone as a container . . . is a bit strained," the Supreme Court has explained that cellphones do "collect[] in one place many distinct types of information." And the Court's opinion in *Riley* went to great lengths to explain the range of possible types of information contained on cellphones.

Riley made clear that these distinct types of information, often stored in different components of the phone, should be analyzed separately. This requirement is imposed because "a cell phone's capacity allows even just one type of information to convey far more than previously possible." Just by looking at one category of information—for example, "a thousand photographs labeled with dates, locations, and descriptions" or "a record of all [a defendant's] communications . . . as would routinely be kept on a phone"—"the sum of an individual's private life can be reconstructed." In short, *Riley* rejected the premise that permitting a search of *all* content on a cellphone is "materially indistinguishable" from other types of searches. Absent unusual circumstances, probable cause is required to search each category of content. This distinction dovetails with the Fourth Amendment's imperative that the "place to be searched" be "particularly describ[ed]." Probable cause and particularity are concomitant because "—at least under some circumstances—the lack of a more specific description will make it apparent that there has not been a sufficient showing to the magistrate that the described items are to be found in a particular place." Here, this observation means that the facts as alleged in Trooper Blue's affidavits must raise a "fair probability" or a "substantial chance" that evidence relevant to Morton's crime—that is, simple drug possession— will be found in each place to be searched: his contacts, his call logs, his text messages, and his photographs. There must be a specific factual basis in the affidavit that connects each cellphone feature to be searched to the drug possession crimes with which Morton was initially charged.

The affidavits successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession. In attesting that probable cause exists, officers may rely on their experience, training, and all the facts available to them. Here, Trooper Blue relied on his fourteen years in law enforcement and eight years as a "DRE-Drug Recognition Expert" to assert that suspects' call logs often show calls "arrang[ing] for the illicit receipt and delivery of controlled substances"; stored numbers identify "suppliers of illicit narcotics"; and text messages "may concern conversations" along these lines as well. Since this is true of drug possession suspects in general, and Morton had been found with drugs, Trooper Blue credibly alleges that there is a "fair probability" that these features of Morton's phone would contain similar evidence of Morton's drug possession charges. These conclusions are supported by simple logic. To possess drugs, one must have purchased them; contacts, call records, and text messages could all easily harbor proof of this purchase. For example, text messages could show a conversation with a seller haggling over the drugs' cost or arranging a location to meet for the exchange. Similarly, Morton could have had his source of drugs listed in his contacts as "dealer" or some similar name, and recent calls with such a person could show a recent purchase. The affidavit makes all of these points. For this reason, we hold that there was probable cause to search Morton's contacts, call records, and text messages for evidence relating to his illegal drug possession. But the affidavits also asserted probable cause to believe that the photographs on Morton's phones contained evidence of other drug crimes, and on this claim, they fail the test of probable cause as related to the crime of possession. That is, they fall short of raising a "substantial chance" that the photographs on Morton's phones would contain evidence pertinent to his crime of simple drug possession. As we have said, officers are permitted to rely on training and experience when attesting that probable cause exists, but they must not turn a blind eye to details that *do not* support probable cause for the particular crime. Here, Trooper

Blue supplied two facts to provide probable cause to search the images on Morton's phones. First, Morton was found with less than two ounces of marijuana, a pipe, and sixteen pills that Morton stated were ecstasy. Second, based on Trooper Blue's training and experience, "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs." This background led Trooper Blue to assert that "*photograph images* stored in the cellular telephone may identify *other co-conspirators and show images of illicit drugs and currency derived from the sale of illicit drugs*." These photographs would, in turn, be evidence of "other criminal activity . . . *in furtherance of narcotics trafficking*" and Morton's drug possession crimes. The search warrant is thus expanded to seek information of an alleged narcotics trafficking conspiracy based solely on Morton's arrest for, and evidence of, simple drug possession. The syllogism that Trooper Blue offers to gain access to Morton's photographs does not provide adequate grounds for the extensive search. In short, the syllogism is (1) Morton was found with personal-use quantities of drugs; and (2) drug dealers often take photos of drugs, cash, and coconspirators; it therefore follows that (3) the photographs on Morton's phones will provide evidence of Morton's relationship to drug trafficking. The fallacy of this syllogism is that it relies on a premise that cannot be established, namely that Morton was dealing drugs. And here, Trooper Blue disregarded key facts that show that the evidence did not support probable cause that Morton was a drug dealer. To begin, the quantity of drugs Morton possessed can best be described as personal use: a single small bag of marijuana and a few ecstasy pills. Further, Morton did not have scales, weapons, or individual plastic bags that are usually associated with those who sell drugs. It is also significant that the officers arrested Morton for possession of marijuana and ecstasy but not distribution of these drugs. In sum, indications of drug trafficking were lacking: no significant amount of drugs; paraphernalia for personal use, not sale; and no large amounts of cash. Or precisely: there was *no* evidence supporting drug trafficking. Nevertheless, Trooper Blue relied on his knowledge of the behavior of *drug traffickers* to support a search of Morton's photos. Again, we emphasize that the only times Morton's photographs are mentioned in the affidavits are in connection with statements about the behavior of drug traffickers: that "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs," and that "photograph images stored in the cellular telephone may identify other coconspirators and show images of illicit drugs and currency derived from the sale of illicit drugs." These suggestions relating to the behavior of *drug traffickers* may well be true, but Trooper Blue cannot rely on these assertions to search the photo contents of the cellphones of a suspect charged with simple possession. Nor was Trooper Blue permitted, in his affidavit, to ignore the evidence that negated probable cause as to trafficking.

Since it seems that no evidence supported probable cause to believe that Morton was dealing in drugs, the affidavit leaves us with only the allegations that (1) Morton was found with drugs so (2) it therefore follows that the photographs on Morton's phones will provide evidence of Morton's crime of drug possession. With only this bare factual support that Morton possessed drugs, the affidavits contain nothing to link Morton's marijuana and ecstasy with the photographs on his phones. The affidavits thus do not create a "fair probability" or a "substantial chance" that evidence of the crime of drug possession will be found in the photographs on Morton's cellphones. Therefore, under these facts and based on the specific language in these affidavits, we hold that probable cause was lacking to search Morton's photographs for proof of his illegal drug possession. Having demonstrated that the warrants to search the photographs stored on Morton's cellphones were not supported by probable cause, we next turn to the question of whether the evidence produced by the search may nevertheless be admitted based upon the good faith exception. To resolve this question, we ask whether the officers' good faith reliance on these defective warrants was objectively reasonable.

In reviewing whether an officer's reliance is reasonable under the good faith exception, we ask "whether a reasonably well-trained officer would have known that the search was illegal" despite the magistrate's approval. The Supreme Court has observed: "[M]any situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." And further, "[m]ere affirmance of belief or suspicion is not enough." The facts here lead to the sensible conclusion that Mor-

ton was a consumer of drugs; the facts do not lead to a sensible conclusion that Morton was a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval. Consequently, the search here does not receive the protection of the good faith exception to the exclusionary rule.

However, the good faith exception, applicable to the officers, does not end our analysis. As we have said, if the good faith exception does not save the search, we move to a second step: whether the magistrate who issued the warrant had a "substantial basis" for determining that probable cause to search the cellphones existed. While the good faith analysis focuses on what an objectively reasonable police officer would have known to be permissible, this second step focuses on the magistrate's decision. The magistrate is permitted to draw reasonable inferences from the material he receives, and his determination of probable cause is entitled to "great deference" by the reviewing court in all "doubtful or marginal cases." At the same time, "a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis." Here, even giving the magistrate's determination the deference due, we hold that the magistrate did not have a substantial basis for determining that probable cause existed to extend the search to the photographs on the cellphones. Even if the warrants provided probable cause to search some of the phones' "drawers" or "file cabinets," the photographs "file cabinet" could not be searched because the information in the officer's affidavits supporting a search of the cellphones only related to drug trafficking, not simple possession of drugs. There was thus no substantial basis for the magistrate's conclusion that probable cause existed to search Morton's photographs, and the search is not saved by the magistrate's authority. The search was unconstitutional, not subject to any exceptions, and the evidence must be suppressed as inadmissible.

Today, we have held that a reasonably well-trained officer would have known that probable cause was lacking to search the photographs stored on the defendant's cellphones for evidence related to drug possession, which was the only crime supporting a search. Moreover, we have held that any additional assertions in the affidavits were too minimal and generalized to provide probable cause for the magistrate to authorize the search of the photographs. Because the officers' search of the stored photographs pursuant to the first warrants was impermissible, obviously the use of that information—which was the evidence asserted to secure the second set of warrants—tainted the evidence obtained as a result of that second search, making it the unconstitutional "fruit of the poisonous tree." Therefore, the evidence obtained as a result of the se ond set of warrants is inadmissible.

REVERSED, VACATED, and REMANDED.

***U.S. v. Morton*, No. 19-10842, 5th Cir., Jan. 05, 2021.**

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CELL PHONE SEARCH

A jury convicted Charles Fulton, Sr. on four counts of sex trafficking and one count of conspiracy. The most significant issue concerns a long-delayed search of his cellphone. Fulton also makes arguments drawn from the Confrontation and Grand Jury clauses of the Constitution, and he challenges the sufficiency of the evidence. We AFFIRM.

In October 2014, a Galveston juvenile probation officer learned from the father of a juvenile she supervised that the girl was pictured in an online advertisement offering her services as an "escort" – in effect, a prostitute. The probation officer began to investigate and saw that the house where the girl had been arrested was a location where other young girls consistently were arrested. She began monitoring incoming police reports, spoke with some of the girls, compiled a list of names and ages, and gathered information from other probation officers. Her investi-

gation revealed common links among the girls: Charles Fulton, Sr. and a residence on Avenue L. In February and early March 2015, the Galveston Police Department, in tandem with the FBI, began an investigation. Police discovered that Fulton acted as the girls' pimp, directing them to prostitution dates; providing them with food, condoms, housing, and drugs; and having sex with some of them as young as 15.

In May 2016, Fulton was indicted in the United States District Court for the Southern District of Texas on six counts of sex trafficking in violation of 18 U.S.C. § 1591(a)–(b) (2015), with a different minor victim identified in each count. Fulton was also charged with a seventh count for conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c). He was found guilty after a jury trial on four of the substantive counts and on the conspiracy count. The district court sentenced him to prison for concurrent life terms.

We will analyze four issues. First, Fulton asserts the district court admitted evidence obtained from his cellphone in violation of the Fourth Amendment.

I. Search of Fulton's phone

In February 2015, Galveston police obtained a search warrant on the Avenue L house where the prostitution was based. The warrant, though, was due to a separate investigation into Fulton's narcotics activities. Fulton's cellphone was seized. Nine days later, police obtained a second warrant to examine its contents but were unable to bypass the phone's security features. Around this same time, the FBI agent assisting with the Fulton sex-trafficking investigation learned that the Galveston police had the phone. The agent acquired it to determine if the FBI could access the phone's data. Three weeks later, that agent obtained a federal warrant to search the phone. Still, it took a year before the data on the phone was accessed. The FBI discovered evidence that helped piece together Fulton's involvement with the minor victims. Fulton moved to suppress the evidence, but the district court denied the motion. At trial, the Government introduced evidence of the phone's contents through the testimony of the FBI agent and of minor victims. The district court also admitted evidence such as text messages, a photograph, and the results of searches of the phone's files, linking Fulton to five minor victims and revealing behaviors consistent with sex trafficking.

On appeal, Fulton argues that the phone's seizure in the February 2015 raid violated the Fourth Amendment. He alternatively argues that even if the initial seizure had been lawful, the nine-day delay in obtaining a warrant to search it was unconstitutional. At oral argument, Fulton's counsel stated that those two arguments are the limit of the objections to the search and seizure. Thus, no issue is made about the FBI's obtaining the phone, procuring its own search warrant, and finally accessing the data on the phone a year later.

A. Whether the narcotics warrant authorized the phone's seizure

We start with whether the initial seizure of the phone was proper. Fulton contends "the warrant did not particularly describe the phone as one of the items to be seized." The Constitution states that a warrant should not issue without "particularly describing" what is to be seized. U.S. CONST. amend. IV. A warrant's particularity is sufficient if "a reasonable officer would know what items he is permitted to seize," which does not mean all items authorized to be taken must be specifically identified. "We have upheld searches as valid under the particularity requirement where a searched or seized item was not named in the warrant, either specifically or by type, but was the functional equivalent of other items that were adequately described."

This narcotics warrant did not mention cellphones. The alleged equivalent was a reference to "ledgers," which is a "book . . . ordinarily employed for recording . . . transactions." *Ledger*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). The government argues that is enough, because this court has held that a cellphone that is "used as a mode of both spoken and written communication and containing text messages and call logs, served as the equivalent of records and documentation of sales or other drug activity." In that precedent, a warrant permitted seizure of a cellphone when it referred to "personal assets including computers, disks, printers and monitors utilized in the drug trafficking organization." That is because what was seized were "the functional equivalents of several items listed" on the warrant. We also held that if meaningful particularity is not possible, "generic language suffices if it particularizes the types of items to be seized."

We do not see the same factors involved in the present case. There was nothing in the Galveston warrant suggesting that anything similar to computers or even electronics was to be seized. Moreover, the officer in this case was a veteran of the Galveston Police Department's narcotics unit, and he indicated at the suppression hearing that he knew cellphones are used in the drug trade. Though a ledger can serve one of the myriad purposes of a cellphone, we do not extend the concept of "functional equivalency" to items so different, particularly one as specific, distinguishable, and anticipatable as a cellphone.

We now examine an exception to the exclusionary rule that nonetheless allows the introduction of the evidence from the phone.

B. Good faith

An exception for good faith may allow the introduction of evidence unlawfully obtained "[w]hen police act under a warrant that is invalid for lack of probable cause." *Herring v. United States*, 555 U.S. 135, 142 (2009). Here, of course, we have held the initial seizure of the phone to be invalid because, regardless of probable cause, the phone was not covered by the warrant.

To constitute good faith, the "executing officer's reliance on the [deficient] warrant [must be] objectively reasonable and made in good faith." The Government argues the FBI agent's reliance on the federal search warrant meets these requirements. Fulton argues we should the good faith exception should not apply "to situations where law enforcement unreasonably delays in obtaining a search warrant." The district court refused to consider this exception because it held the phone and its contents to be admissible on other grounds.

In *Massi*, law enforcement officers prolonged a proper investigatory stop based on reasonable suspicion well beyond the time permitted. The officers detained the suspects for several hours "until evidence could be corroborated, an affidavit prepared, and the search warrant obtained."

We applied the following test to determine whether the invalid seizure of the suspects while evidentiary justification for a warrant was developed would nonetheless allow the introduction of evidence that was later obtained: (1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith.

This same approach can be applied when, as here, the initial seizure of an object was without justification, but a later-obtained warrant led to the discovery of incriminating evidence.

We have already discussed the events that followed the seizure of the cellphone. We conclude that viewed objectively, an FBI agent who obtained a search warrant in these circumstances would not have had reason to believe the seizure and continued possession of the cellphone by the Galveston police were unlawful. We so conclude because the question of whether the warrant applied to the cellphone does not lead to an easy negative answer, though that is the one we have given. Consequently, the seizure of the cellphone was "close enough to the line of validity" to permit the officer to prepare the second warrant that led to the search of the cellphone. The federal search warrant was "sought and executed by a law enforcement officer in good faith."

The cellphone evidence obtained was properly admitted.

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Affirmed.

U. S. v. Fulton, Sr., 5th Circuit, June 27th, 2019.

BLOOD DRAW (U.S. Supreme Court)

In this case, we return to a topic that we have addressed twice in recent years: the circumstances under which a police officer may administer a warrantless blood alcohol concentration (BAC) test to a motorist who appears to have been driving under the influence of alcohol. We have previously addressed what officers may do in two broad categories of cases. First, an officer may conduct a BAC test if the facts of a particular case bring it within the exigent-circumstances exception to the Fourth Amendment's general requirement of a warrant. Second, if an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest. Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigentcircumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed.

Today, "all States have laws that prohibit motorists from driving with a [BAC] that exceeds a specified level." And to help enforce BAC limits, every State has passed what are popularly called implied-consent laws. Ibid. As "a condition of the privilege of " using the public roads, these laws require that drivers submit to BAC testing "when there is sufficient reason to believe they are violating the State's drunk-driving laws."

Wisconsin's implied-consent law is much like those of the other 49 States and the District of Columbia. It deems drivers to have consented to breath or blood tests if an officer has reason to believe they have committed one of several drug- or alcohol-related offenses. Officers seeking to conduct a BAC test must read aloud a statement declaring their intent to administer the test and advising drivers of their options and the implications of their choice. If a driver's BAC level proves too high, his license will be suspended; but if he refuses testing, his license will be revoked and his refusal may be used against him in court. No test will be administered if a driver refuses— or, as the State would put it, "withdraws" his statutorily presumed consent. But "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have" withdrawn it. More than half the States have provisions like this one regarding unconscious drivers.

The sequence of events that gave rise to this case began when Officer Alexander Jaeger of the Sheboygan Police Department received a report that petitioner Gerald Mitchell, appearing to be very drunk, had climbed into a van and driven off. Jaeger soon found Mitchell wandering near a lake. Stumbling and slurring his words, Mitchell could hardly stand without the support of two officers. Jaeger judged a field sobriety test hopeless, if not dangerous, and gave Mitchell a preliminary breath test. It registered a BAC level of 0.24%, triple the legal limit for driving in Wisconsin. Jaeger arrested Mitchell for operating a vehicle while intoxicated and, as is standard practice, drove him to a police station for a more reliable breath test using better equipment. On the way, Mitchell's condition continued to deteriorate—so much so that by the time the squad car had reached the station, he was too lethargic even for a breath test. Jaeger therefore drove Mitchell to a nearby hospital for a blood test; Mitchell lost consciousness on the ride over and had to be wheeled in. Even so, Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of his blood showed that his BAC, about 90 minutes after his arrest, was 0.222%. Mitchell was charged with violating two related drunk-driving provisions. He moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against "unreasonable searches" because it was conducted without a warrant. Wisconsin chose to rest its response on the notion that its implied-consent law (together with Mitchell's free choice to drive on its highways) rendered the blood test a consensual one, thus curing any Fourth Amendment problem. In the end, the

trial court denied Mitchell's motion to suppress, and a jury found him guilty of the charged offenses. The intermediate appellate court certified two questions to the Wisconsin Supreme Court: first, whether compliance with the State's implied-consent law was sufficient to show that Mitchell's test was consistent with the Fourth Amendment and, second, whether a warrantless blood draw from an unconscious person violates the Fourth Amendment. The Wisconsin Supreme Court affirmed Mitchell's convictions, and we granted certiorari, to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement,

In considering Wisconsin's implied-consent law, we do not write on a blank slate. "Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." But our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize. Instead, we have based our decisions on the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. That scheme is centered on legally specified BAC limits for drivers—limits enforced by the BAC tests promoted by implied-consent laws. Over the last 50 years, we have approved many of the defining elements of this scheme. We have held that forcing drunk-driving suspects to undergo a blood test does not violate their constitutional right against self incrimination. *See Schmerber v. California*, 384 U. S. 757, 765 (1966). Nor does using their refusal against them in court. *See South Dakota v. Neville*, 459 U. S. 553, 563 (1983). And punishing that refusal with automatic license revocation does not violate drivers' due process rights if they have been arrested upon probable cause, *Mackey v. Montrym*, 443 U. S. 1 (1979); on the contrary, this kind of summary penalty is "unquestionably legitimate." These cases generally concerned the Fifth and Fourteenth Amendments, but motorists charged with drunk driving have also invoked the Fourth Amendment's ban on "unreasonable searches" since BAC tests are "searches." Though our precedent normally requires a warrant for a lawful search, there are well-defined exceptions to this rule. In *Birchfield,* we applied precedent on the "search-incident to-arrest" exception to BAC testing of conscious drunk driving suspects. We held that their drunk-driving arrests, taken alone, justify warrantless breath tests but not blood tests, since breath tests are less intrusive, just as informative, and (in the case of conscious suspects) readily available. We have also reviewed BAC tests under the "exigent circumstances" exception—which, as noted, allows warrantless searches "to prevent the imminent destruction of evidence." In *McNeely*, we were asked if this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to "natural metabolic processes."

We answered that the fleeting quality of BAC evidence alone is not enough.. But in *Schmerber* it did justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the "further delay" caused by a warrant application really "would have threatened the destruction of evidence." Like *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the minimum degree of urgency common to all drunk driving cases. In *Schmerber*, a car accident heightened that urgency. And here Mitchell's medical condition did just the same. Mitchell's stupor and eventual unconsciousness also deprived officials of a reasonable opportunity to administer a breath test. To be sure, Officer Jaeger managed to conduct "a preliminary breath test" using a portable machine when he first encountered Mitchell at the lake. But he had no reasonable opportunity to give Mitchell a breath test using "evidence-grade breath testing machinery." As a result, it was reasonable for Jaeger to seek a better breath test at the station; he acted with reasonable dispatch to procure one; and when Mitchell's condition got in the way, it was reasonable for Jaeger to pursue a blood test. As JUSTICE SOTOMAYOR explained in her partial dissent in *Birchfield*: "There is a common misconception that breath tests are conducted roadside, immediately after a driver is arrested. While some preliminary testing is conducted roadside, reliability concerns with roadside tests confine their use in most circumstances to establishing probable cause for an arrest. . . . The standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station, governmental building, or mobile testing facility where officers can access reliable, evidence-grade breath testing machinery." Because the "standard evidentiary breath test is conducted after a motorist is arrested and transported to a police station" or another appropriate facility, the important question here is what officers may do when a driver's unconsciousness (or stupor) eliminates any reasonable opportunity for that kind of breath test.

The Fourth Amendment guards the "right of the people to be secure in their persons . . . against unreasonable searches" and provides that "no Warrants shall issue, but upon probable cause." A blood draw is a search of the person, so we must determine if its administration here without a warrant was reasonable. Though we have held that a warrant is normally required, we have also "made it clear that there are exceptions to the warrant requirement." And under the exception for exigent circumstances, a warrantless search is allowed when "'there is compelling need for official action and no time to secure a warrant.'" In *McNeely,* we considered how the exigent circumstances exception applies to the broad category of cases in which a police officer has probable cause to believe that a motorist was driving under the influence of alcohol, and we do not revisit that question. Nor do we settle whether the exigent-circumstances exception covers the specific facts of this case. Instead, we address how the exception bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers.3 In those cases, the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant.

The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential. Here we add a word about each of these points.

First, highway safety is a vital public interest. For decades, we have strained our vocal chords to give adequate expression to the stakes. We have called highway safety a "compelling interest,"; we have called it "paramount," Twice we have referred to the effects of irresponsible driving as "slaughter" comparable to the ravages of war. We have spoken of "carnage," and even "frightful carnage," The frequency of preventable collisions, we have said, is "tragic," and "astounding," And behind this fervent language lie chilling figures, all captured in the fact that from 1982 to 2016, alcohol-related accidents took roughly 10,000 to 20,000 lives in this Nation every single year. See National Highway Traffic Safety Admin. (NHTSA), Traffic Safety Facts 2016, p. 40 (May 2018). In the best years, that would add up to more than one fatality per hour. Second, when it comes to fighting these harms and promoting highway safety, federal and state lawmakers have long been convinced that specified BAC limits make a big difference. States resorted to these limits when earlier laws that included no "statistical definition of intoxication" proved ineffectual or hard to enforce The maximum permissible BAC, initially set at 0.15%, was first lowered to 0.10% and then to 0.08%. Congress encouraged this process by conditioning the award of federal highway funds on the establishment of a BAC limit of 0.08%, and every State has adopted this limit. Not only that, many States, including Wisconsin, have passed laws imposing increased penalties for recidivists or for drivers with a BAC level that exceeds a higher threshold.

There is good reason to think this strategy has worked. As we noted in Birchfield, these tougher measures corresponded with a dramatic drop in highway deaths and injuries: From the mid-1970's to the mid-1980's, "the number of annual fatalities averaged 25,000; by 2014 . . . , the number had fallen to below 10,000."

Third, enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. And we have recognized that "[e]xtraction of blood samples for testing is a highly effective means of " measuring "the influence of alcohol." Enforcement of BAC limits also requires prompt testing because it is "a biological certainty" that "[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. . . . Evidence is literally disappearing by the minute." McNeely, 569 U. S., at 169 (opinion of ROBERTS, C. J.). As noted, the ephemeral nature of BAC was "essential to our holding in Schmerber," which itself allowed a warrantless blood test for BAC. And even when we later held that the exigent-circumstances exception would not permit a warrantless blood draw in every drunk-driving case, we acknowledged that delays in BAC testing can "raise questions about . . . accuracy."

It is no wonder, then, that the implied-consent laws that incentivize prompt BAC testing have been with us for 65 years and now exist in all 50 States. These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests.

Finally, when a breath test is unavailable to promote those interests, "a blood draw becomes necessary." Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above.

Indeed, not only is the link to pressing interests here tighter; the interests themselves are greater: Drivers who are drunk enough to pass out at the wheel or soon afterward pose a much greater risk. It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish. For these reasons, there clearly is a "compelling need" for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test. The only question left, under our exigency doctrine, is whether this compelling need justifies a warrantless search because there is, furthermore, "'no time to secure a warrant.'"

We held that there was no time to secure a warrant before a blood test of a drunk-driving suspect in *Schmerber* because the officer there could "reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." So even if the constant dissipation of BAC evidence alone does not create an exigency, *Schmerber* shows that it does so when combined with other pressing needs:

> "We are told that [1] the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where [2] time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case [without a warrant] was . . . appropriate . . . ." 384 U. S., at 770–771.

Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

In *Schmerber*, the extra factor giving rise to urgent needs that would only add to the delay caused by a warrant application was a car accident; here it is the driver's unconsciousness. Indeed, unconsciousness does not just create pressing needs; it is itself a medical emergency. It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. All of that sets this case apart from the uncomplicated drunk-driving scenarios addressed in *McNeely*. Just as the ramifications of a car accident pushed *Schmerber* over the line into exigency, so does the condition of an unconscious driver bring his blood draw under the exception. In such a case, as in *Schmerber*, an officer could "reasonably have believed that he was confronted with an emergency."

Indeed, in many unconscious-driver cases, the exigency will be more acute, as elaborated in the briefing and argument in this case. A driver so drunk as to lose consciousness is quite likely to crash, especially if he passes out before managing to park. And then the accident might give officers a slew of urgent tasks beyond that of securing (and working around) medical care for the suspect. Police may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves until medical personnel arrive at the scene. In some cases, they may have to deal with fatalities. They may have to preserve evidence at the scene and block or redirect traffic to prevent further accidents. These pressing matters, too, would require responsible officers to put off applying for a warrant, and that would only exacerbate the delay—and imprecision—of any subsequent BAC test. In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which

the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

Mitchell objects that a warrantless search is unnecessary in cases involving unconscious drivers because warrants these days can be obtained faster and more easily. But even in our age of rapid communication, "[w]arrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. . . . And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." In other words, with better technology, the time required has shrunk, but it has not disappeared. In the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs. That is just what it means for these situations to be emergencies.

(emphasis by ed.)

When police have ***probable cause*** to believe a person has committed a drunk-driving offense ***and the driver's unconsciousness*** or stupor ***requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test***, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. ***We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.*** Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary. * * * The judgment of the Supreme Court of Wisconsin is vacated, and the case is remanded for further proceedings.

Mitchell v. Wisconsin, U.S. Supreme Court, June 27, 2019.
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EXIGENT CIRCUMSTANCE

A jury convicted Lazandy Daniels of distributing crack cocaine, aiding and abetting possession with intent to distribute crack cocaine, and conspiring to distribute powder and crack cocaine. Daniels asserts three errors: (1) the district court wrongly denied his motion to suppress evidence; (2) the district court wrongly denied him the opportunity to cross-examine an adverse witness in violation of the Sixth Amendment; and (3) the trial evidence was insufficient to convict him. We reject Daniels's arguments and AFFIRM his convictions.

This story starts with Craig James, a cocaine dealer who made his living transporting drugs and money between Houston and New Orleans. The defendant, Daniels, met James through his brother, Lindsey Daniels. Lindsey was a middle man, purchasing cocaine from James and then turning around and reselling it. As part of their partnership, Lindsey let James use his New Orleans salvage yard for transporting drugs. James would buy cars at auction in one city, store cocaine in them, and transport the cars to the other city. He also used this strategy to move money. The law eventually caught up with Lindsey. But James continued to use the salvage yard. Daniels started working more closely with James, helping him unload the cocaine from the cars and pack them with money before they returned to Houston. Sometimes Daniels was around when James distributed the drugs, and he would help James package the concomitant cash in cellophane. Daniels even dabbled in the drug game himself: James testified (and others confirmed) that he occasionally gave Daniels small amounts of cocaine to sell.

Besides helping James move cocaine, Daniels acted as James's chauffeur. When James was in New Orleans, Daniels would "[t]ake [James] to go get food, pick [him] up from the airport, take [him] to [his] hotel room, things like that." James said he asked Daniels to carry out these tasks because Daniels "was a friend . . . . It wasn't just

all business. He was a friend. I trusted him."

May 4, 2015 State Arrest
In May 2015, Daniels was arrested for selling crack cocaine outside his house. While conducting surveillance as part of a street-level narcotics investigation, New Orleans police Sergeant Joseph Davis noticed a woman in a white SUV stop her car, step out, and approach Daniels, who was standing on the street. She handed something to Daniels, who went into his house. Daniels came back out and handed her another object; then she got back into her car.

Suspicious, Davis followed the SUV and radioed his fellow officers to pull it over. While attempting to do so, Officer Jeraire Bridges saw the woman drop a small item from her window. Once the woman had pulled over, Bridges retrieved the dropped item. It appeared (and was later confirmed) to be a plastic bag of crack cocaine. The officers arrested the woman.

Later that day, New Orleans police officers arrested Daniels. The officers found him sitting in a pickup truck outside his house. The officers searched the truck and the house, finding $2,325 in cash in the vehicle, a video recording system monitoring the residence, and what turned out to be cocaine residue in a mug in the house. Daniels was charged in Orleans Parish Criminal District Court with possession with the intent to distribute cocaine.

December 2, 2015 Drug Enforcement Agency Arrest
These December incidents were initially unrelated to Daniels's May arrest—they arose out of the DEA's separate surveillance spearheaded by Agents Justin Moran and Christopher Johnson. Thanks to a confidential tip, the DEA learned that James was coming to New Orleans in early December to collect some money. Upon his arrival, James took a taxi to the Super 8 Motel on Chef Menteur Highway and rented a room.

James testified that on December 1, 2015, a friend paid him an evening visit, bringing James a duffle bag filled with various drug paraphernalia, including a scale and cowboy boots stuffed with a cutting agent. Daniels came by that evening and the next morning to "check on" James. Around noon, Daniels left to go to his brother's salvage yard. He returned around 12:34 p.m. Before entering the motel, he retrieved from his trunk a long, thin item that he kept under his jacket. The concealed item was a roll of cellophane for wrapping cash, but the surveilling DEA agents thought it might be a weapon.

Around 2:00 p.m., James's brother-in-law, Joppa Jackson (whom the DEA agents recognized from previous narcotics investigations), came to the motel in his pickup truck. James left Daniels in the motel room and got into the pickup, which never left the parking lot. After a bit, James got out of the truck with a bag of money, repayment for cocaine James had given Joppa.
Eight minutes later, Daniels and James left the motel to dine at a restaurant for a couple hours. The pair returned to the motel room in the late afternoon. At around 6:40 p.m., Leon Jackson, James's other brother-in-law, arrived. When Leon exited the motel, DEA Agent Demond Lockhart approached him to perform an investigatory stop. Agent Lockhart searched Leon's bag and vehicle and hit the jackpot: several thousand dollars.

The Knock-and-Talk
After interviewing Leon Jackson, the DEA agents decided to do a "knock-and-talk," (when officers knock on a door, contact the resident, and ask to search the residence). As he approached the room, DEA Agent Michael Greaves could smell marijuana. Agent Greaves knocked on the door, and James asked who was there. Greaves initially pretended that he had hit James's car. James did not open the door. Greaves then announced that he was with the police and asked James to open the door so they could talk.

After knocking for two minutes, Greaves heard Moran, who was standing to his left by the motel-room's window, say that he could hear the toilet flushing. Greaves, inferring that James was destroying evidence, decided to kick

down the door. DEA Agent Kevin Treigle searched the bathroom, finding Daniels seated on the toilet, fully clothed, with the seat cover down.

In the room, the officers found a long roll of cellophane, a plastic bag filled with cutting agent, a black duffle bag with lots of cash, much of which was wrapped in cellophane, a digital scale, and crack cocaine. They seized approximately $286,000 and approximately six ounces of crack cocaine.

Daniels was charged with one count of conspiracy to distribute 5 kilograms or more of powder cocaine and 28 grams or more of crack cocaine; one count of distributing crack cocaine on May 4, 2015; and one count of possessing with intent to distribute 28 grams or more of crack cocaine on December 2, 2015.

Daniels moved to suppress the motel-search evidence, arguing that no exigency supported the warrantless search. The district court conducted a suppression hearing. Several DEA agents testified regarding the knock-and-talk and resulting search. Pertinently, DEA Agent Francisco Del Valle testified that he had heard the toilet flush while Agent Greaves was knocking on the motel-room door. Daniels had the opportunity to cross-examine each of the Government's witnesses.
Daniels also attempted to subpoena Agent Moran to have him testify at the hearing. At the time, Moran was under investigation for misconduct, and he asserted his Fifth Amendment rights. Although the court did not require Moran to testify, it allowed Daniels's counsel to explain what he wanted to ask Moran.

The district court denied Daniels's motion to suppress, holding that he didn't have standing to challenge the motel-room search because there was no evidence indicating he intended to stay overnight. And even if Daniels had standing, the Fourth Amendment's exigency exception permitted the search. The flushing sounds gave the officers "probable cause to believe that there was evidence of criminal activity in the room, and that the evidence was being destroyed."

In preparation for trial, the Government filed a motion in limine to preclude Daniels from attacking the credibility of its witnesses based on Agent Moran's alleged misconduct. The Government asked the court to prohibit Daniels from "[i]nflaming the [j]ury" by referencing the investigation during trial, arguing that it was irrelevant. The district court granted the motion, finding Moran's alleged misconduct "unrelated to the matter at hand."

The case went before a jury. The Government called twelve witnesses, among them Agents Greaves and Treigle (the New Orleans police officers involved in the May 4 arrest) and Daniels's alleged co-conspirators, Joppa Jackson and James. At the close of the Government's case in chief, Daniels moved for judgment of acquittal, which the court denied. Daniels submitted several exhibits to the jury, but he did not testify in his own defense or call any witnesses to testify. The jury found Daniels guilty of all three counts. The court sentenced Daniels to 240 months' imprisonment as to all three counts, to be served concurrently, and ten years of supervised release. Daniels appealed.

First, Daniels challenges the district court's denial of his motion to suppress the evidence from the motel-room search. "The exclusionary rule allows a defendant to suppress the evidentiary fruits of a violation of his Fourth Amendment rights" to be free of unreasonable searches and seizures.5 Although "searches and seizures inside a home without a warrant are presumptively unreasonable," an officer may search a person's property if "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." A valid exigency exists when an officer believes that evidence is being destroyed—although an officer "may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." In other words, an officer may not "engag[e] or threaten[] to engage in conduct that violates the Fourth Amendment" in order to create an exigency justifying warrantless entry.

Assuming without deciding the issue of standing, we will first address whether there was an exigency justifying the search. To do so, we use a non-exhaustive five-factor test:

the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the reasonable belief that contraband is about to be removed; (3) the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; (4) the information indicating that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that

efforts to dispose of it and to escape are characteristics in which those trafficking in contraband generally engage.

Daniels argues that a "single toilet flush" was not enough to justify entry. If a solitary flush were the only evidence of exigency in the record, he might be right. But the officers relied on more than just the flush. In fact, they were flush with exigency evidence. After he knocked, Agent Greaves could hear "running throughout the room, running back and forth like from the right side where the door was back to the left side by the window." He says there were times when James's "voice was real close to the door" and when he "could tell he was much further away from the door," indicating that James was running back and forth.12 Agent Greaves had told James he was a police officer, so he was "aware that the police [were] on [his] trail." And Agent Webber testified that it is "not uncommon for drug dealers to flush narcotics down the toilet."

Combined with the toilet-flushing sounds, this all reasonably suggests that the room's occupants might have been attempting to destroy evidence. The *Aguirre* factors therefore suggest that exigent circumstances existed justifying the warrantless search. So, the district court did not err in finding there was an exigency to justify the warrantless search. The officers had a full house of evidence, and a full house beats a flush.

Now that we know an exigency existed, we must ask whether the officers *created* the exigency. Daniels says the officers' aggressive conduct made him believe that he was trapped, in violation of the Fourth Amendment, thereby creating the exigency. But the officers acted within the bounds of our caselaw. In *King*, police "banged on the door as loud as [they] could," but that did not create the exigency. Even though the defendant argued that the officers "demanded" entry, he couldn't back that up with any evidence in the record. Likewise, Daniels does not point to any evidence in the record that the agents actually threatened his Fourth Amendment rights. While the officers here knocked vigorously, the knocking was relatively brief—around two minutes —- and the officers did not attempt to force entry prior to hearing the toilet flush.

The officers did not create the exigency. Daniels fails to meet his burden of showing a Fourth Amendment violation. So, the district court did not err in denying his motion to suppress.
….
For the reasons explained above, we AFFIRM Daniels's convictions.

U. S. v. Daniels, 5th Cir., July 10th, 2019.
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VEHICLE SEARCH – DURATION OF DETENTION

A federal grand jury returned a three-count indictment charging Rafael Tello with transporting an illegal alien within the United States by means of a motor vehicle. At an immigration checkpoint, the aliens were found hidden in a storage compartment in the sleeper area of the tractor-trailer that Tello was driving. The case proceeded to trial on the first two counts. Midway through the trial, after the two Border Patrol agents had testified, Tello moved to suppress the evidence found during the immigration-checkpoint stop. The district court denied the motion and the jury found Tello guilty of both counts. Tello was sentenced to concurrent terms of 27 months of imprisonment and two years of supervised release. For the reasons below, we AFFIRM.

Shortly before 1:00 a.m. on August 1, 2017, a tractor-trailer entered the primary inspection lane at the U.S. Border Patrol checkpoint south of Falfurrias, Texas. Agent Villanueva was on duty in the primary inspection lane. A Border Patrol service canine and its handler were working with him. Tello was driving the tractor-trailer. Agent Villanueva's first question was: "[A]re you a citizen – are you a United States citizen?" He replied that he was a naturalized citizen. Agent Villanueva was satisfied with this answer so he did not ask for proof of citizenship. Agent Villanueva next asked Tello what he was hauling in the trailer. He asked this question to give the Border Patrol service canine more time to conduct a canine sniff of the tractor-trailer: Because at that point, kind of I looked – because usually when I start [questioning], I also keep in mind that I have the K9 handler working with me; because sometimes, you know, the vehicles coming up to our inspection, and the dog might be alerting right away, but – and sometimes, we question these occupants. And we might be doing a simple question, so we might relieve the vehicle right away. But at this time, the K9 [handler] kind of glanced over at me, you know, give me a little bit more time. So that's kind of why I questioned a little bit more.

Tello answered that he was hauling carrots and handed the agent a bill of lading. Agent Villanueva asked him whether he had made any stops after loading the carrots in the trailer. Tello answered that he was coming from Pharr, Texas and had not made any stops. Agent Villanueva testified that Tello did not appear to be nervous and there was no indication that he was hiding anything. The canine handler told Agent Villanueva that he needed to send the tractor-trailer to the secondary inspection area. The agent then asked Tello for consent to search and backscatter (x-ray) the tractor-trailer, and he agreed. This happened about 30 seconds into the checkpoint stop. In the secondary inspection area, another agent (Agent Reyes) boarded the tractor-trailer to conduct a physical inspection in advance of the backscatter inspection, a routine precaution to minimize the risk of exposing possible occupants to radiation. Under the bed in the sleeper area of the tractor-trailer was a small hole through which Agent Reyes could see a person's torso. He unlatched the bed and found three persons hiding in the storage compartment. These persons were citizens of Honduras who were illegally present in the United States.

Tello argued that the agents had impermissibly extended the immigration-checkpoint stop beyond its legitimate, limited immigration purpose before asking him for his consent to search the tractor-trailer.

The district court denied the motion to suppress. The jury found Tello guilty of both counts. On April 11, 2018, the district court sentenced him to concurrent terms of 27 months' imprisonment and two years' supervised release. Tello appeals the district court's denial of his motion to suppress.

"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.'" Ordinarily, a search or seizure is unreasonable "in the absence of individualized suspicion of wrongdoing." At a fixed checkpoint, however, which has as its primary purpose identifying illegal immigrants, vehicles may be briefly detained in furtherance of that purpose, and the occupants questioned, without either a warrant or any individualized reasonable suspicion. The permissible duration of the stop includes the time necessary to inquire about citizenship status, ascertain the number and identity of the vehicle's occupants, request documentation, and seek consent to extend the detention.

We have avoided scrutinizing the questions a Border Patrol agent asks at the checkpoint, instead focusing on the duration of the stop:

> We decline a protocol that measures the pertinence of questions to the immigration purpose by an after-the-fact standard for admissibility at trial. So long as a checkpoint is validly created, policing the duration of the stop is the most practical enforcing discipline of purpose. The key is the rule that a stop may not exceed its permissible duration unless the officer has reasonable suspicion. We deploy a test that is both workable and which reinforces our resistance to parsing the relevance of particular questions. To scrutinize too closely a set of questions asked by a Border Patrol agent would engage judges in an enterprise for which they are ill-equipped and would court inquiry into the subjective purpose of the officer asking the questions.

Border Patrol agents may conduct a canine sniff to search for drugs or concealed aliens at immigration checkpoints so long as the sniff does not lengthen the stop beyond the time necessary to verify the immigration status of a vehicle's passengers. The critical question is not whether the canine sniff occurs before or after the purpose of the stop is completed, but whether conducting the sniff prolongs the purpose of the stop.

Tello avers that the immigration-inspection purpose of the checkpoint stop was completed when Agent Villanueva received the answer that Tello is a United States citizen and was satisfied by that answer. He argues that, as the agent admitted at trial, the questions about what he was hauling in his trailer and whether he had any stops after loading the trailer were unrelated to his citizenship. Rather, the agent's purpose in asking the questions was to give the Border Patrol service canine more time to conduct a canine sniff of the tractor trailer to look for violations of immigration law, which Tello maintains extended the stop beyond its permissible scope and made it unconstitutional.

[w]e find that the canine sniff here did not prolong the immigration stop. Tello does not dispute that the stop lasted

approximately 30 seconds. Agent Villanueva asked Tello about his citizenship, cargo, and travel, all of which are permissible questions. As we have stated, "questions about travel including origin and destination would be commonplace for an agent to ask during an immigration inspection."

When Agent Villanueva started questioning Tello about his citizenship, the canine and its handler were already circling the tractor-trailer. Therefore, Agent Villanueva's questioning occurred simultaneously with the canine sniff. At most, mere seconds elapsed before the dog alerted and Tello consented to a search.

Moreover, the duration of the stop was significantly less than or comparable to the time frames we have found acceptable for immigration stops.

However, Tello criticizes the length-based approach to judging the permissible duration of a stop created by *Machuca-Barrera* and avows that it cannot survive *Rodriguez*. Tello's argument overextends *Rodriguez*. *Rodriguez* involved a traffic stop. The officer checked the defendant's license and registration, the passenger's license, and ran a records check on them. The officer then called for a second officer and issued a warning ticket. Although "all the reason[s] for the stop" were "out of the way," the defendant was not "free to leave" and refused to allow the officer to walk his dog around the SUV. When the second officer arrived, the original officer retrieved his dog who alerted. Approximately seven or eight minutes had elapsed since the officer had issued the warning ticket. A search "revealed a large bag of methamphetamine." The overall duration of the stop was 29 minutes. The defendant moved to suppress the evidence and the magistrate judge found that, because the post-warning detention and search were not supported by reasonable suspicion, a Fourth Amendment violation had occurred. However, the magistrate judge concluded that, consistent with Eighth Circuit precedent, the wait was a de minimis intrusion. Adopting the magistrate judge's factual findings and legal conclusions, the district court denied the motion, and the Eighth Circuit affirmed. The Supreme Court granted certiorari on the question of "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, to conduct a dog sniff." The Supreme Court reversed, holding that authority for the traffic stop ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed." In addition to determining whether to issue a traffic ticket, an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop," but not in a way that "measurably extend[s] the duration of the stop." These inquiries, such as checking a driver's license, registration, and insurance and determining whether there are outstanding warrants, further the purpose of the traffic laws and ensure "that vehicles on the road are operated safely and responsibly."

Tello argues that *Rodriguez* prohibits officers at immigration checkpoints from asking anything other than a brief question or two directly about citizenship and for supporting documentation. However, the Supreme Court recognized in *Martinez-Fuerte* that an immigration stop may take up to five minutes, and the intrusion, which can include referral to secondary inspection, "is sufficiently minimal that no particularized reason need exist to justify it." "Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved," and "incidents of checkpoint operation also must be committed to the discretion of such officials."

Rodriguez does not change this law. Notably, *Rodriguez* dealt with a traffic stop; this is an immigration stop where canine sniffs are more relevant to the purpose of the stop. Rodriguez also does not dictate a script that agents must follow. Rather, Rodriguez simply allows for stops of a "tolerable duration"—a duration that is circumscribed by the reason for the stop. The Supreme Court cautioned against investigation into other possible crimes which add time to the stop and can make the continued seizure unconstitutional.

There is no evidence in this case that the canine was looking for drugs or other possible crimes. Agent Villanueva testified that the handler and canine were conducting an immigration inspection. Agent Villanueva agreed that he "wanted to make sure that the dog had time to finish its inspection of the vehicle" and that it "probably takes a little more time for a Border Patrol K9 to sniff a tractor-trailer than a four-door sedan." The canine handler noted he was trying to determine whether "there's an immigration violation, even something going on in a vehicle that you can't see, because someone's hidden somewhere[.]" This type of checkpoint operation, lasting approximately 30 seconds, is reasonable and fits squarely within the officials' discretion and case law.

Tello makes a secondary argument: his consent did not dissipate the taint of the prior constitutional violation. Because we find that the stop was constitutionally permissible, we are not obligated to reach the consent issue. Nevertheless, we note that Tello gave valid consent.

The district court's judgment is AFFIRMED.

***U.S.v. Tello*, No. 18-40347, Fifth Circuit, May 21, 2019.**

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WARRANT, GOOD FAITH ; Conspiracy elements

This case involves a direct criminal appeal by seven defendants from a jury trial that resulted in each defendant's conviction on a single count: conspiracy to possess with intent to distribute 50 grams or more of methamphetamine ("meth"). The defendants—Charles Ben Bounds, aka "Pretty Boy" ("Bounds"), Nicole Cynthia Herrera, aka "Nikki Single" ("Herrera"), Michael Clay Heaslet ("Heaslet"), Billy Ray Skaggs ("Skaggs"), Kevin Kyle Killough, aka "Kilo" ("Killough"), Billy Fred Gentry, Jr., aka Fred Gentry ("Gentry"), and Trae Short aka "Twig" ("Short")—each appeal a distinct set of issues ranging from pretrial rulings to sentencing decisions. We hold that the district court erred in calculating the quantity of drugs attributable to Killough at sentencing. We AFFIRM on all other issues. We therefore VACATE Killough's sentence and REMAND to the district court for resentencing.

…the district court sentenced each defendant separately… Heaslet and Herrera jointly assert that the district court violated their Sixth Amendment right of confrontation by allowing witness Holliday to invoke the Fifth Amendment privilege… Skaggs appeals the district court's denial of his request for funds under the Criminal Justice Act ("CJA") to hire an investigator. Gentry appeals the district court's denial of his motion for acquittal. He also argues that the district court erred in calculating the quantity of drugs attributable to him at sentencing… We AFFIRM.

Killough appeals the district court's calculation of the quantity of drugs attributable to him at sentencing and the substantive reasonableness of his sentence. Because there was no information containing sufficient indicia of reliability to support the district court's calculation of drugs attributable to Killough, we VACATE Killough's sentence and REMAND for resentencing.

…Skaggs preserved his challenge to the sufficiency of the evidence by moving for acquittal… "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

To convict Skaggs of conspiracy to possess with intent to distribute 50 grams or more of meth, 21 U.S.C. § 846, the jury was required to find that:

> (1) two or more persons agreed to possess meth with the intent to distribute it;
>
> (2) Skaggs knew of the unlawful purpose of the agreement;
>
> (3) Skaggs joined in the agreement willfully, that is, with intent to further its unlawful purpose;
>
> (4) the overall scope of the conspiracy involved at least 50 grams of a mixture containing a detectable amount of meth;
>
> (5) Skaggs knew or reasonably should have known that the scope of the conspiracy involved at least 50 grams of a mixture containing a detectable amount of meth.

"[A] defendant may be convicted of a conspiracy if the evidence shows that he only participated at one level of the conspiracy charged in the indictment, and only played a minor role in the conspiracy." "The government does

not have to prove that the defendant knew all of the details of the unlawful enterprise or the number or identities of all of the co-conspirators, as long as there is evidence from which the jury could reasonably infer that the defendant knowingly participated in some manner in the overall objective of the conspiracy." Id. However, "the government may not prove up a conspiracy merely by presenting evidence placing the defendant in a climate of activity that reeks of something foul."

Judge testified that she introduced Skaggs to Bowden, a supplier named in the indictment. Specifically, Judge explained, "I called [Bowden] and asked her if she could bring me some dope for my Brownwood people. She came and she met him." Judge testified that they engaged in a transaction involving half a pound of meth. This testimony describes an agreement between Skaggs and Bowden, a named co-conspirator, to possess with intent to distribute more than 50 grams of meth, and it, along with the other evidence admitted against Skaggs, is enough to show that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We AFFIRM.

Short appeals the district court's denial of his motion for acquittal and the district court's calculation of the quantity of drugs attributable to him at sentencing. We AFFIRM.

Bounds argues that the district court erred in denying his motions to substitute counsel… [*This appeal was denied by the Court*]

Herrera

Herrera appeals the district court's denial of her motion to suppress evidence obtained from a search of two cell phones found in her possession.2 She alleges that there was no probable cause for a search warrant because the facts in the affidavit supporting the search warrant were stale and the affidavit supporting the search warrant lacked any evidence establishing a nexus between her cell phones and ongoing drug activity. She also argues that the good faith exception to the exclusionary rule should not apply. We AFFIRM.

Summary of Relevant Facts and Proceedings

In 2015, the DEA and Homeland Security began investigating allegations that Herrera had been distributing meth since October 2014. On June 30, 2016, she was arrested. At the time of her arrest, Herrera possessed two cell phones—an LG phone and an Alcatel phone, which the government seized. On July 5, the government applied for a warrant to search the phones. The search warrant application contained an affidavit from Special Agent Perry Moore ("Moore"), a DEA Task Force Officer with the Fort Worth Police Department. In it, Agent Moore states that based on his knowledge, training, and expertise in investigating narcotics offenses, "drug traffickers utilize multiple cellular telephones to conduct drug trafficking business," and "communicate via traditional phone calls, and the sending/receiving of electronic communications via multimedia message service (MMS) and short message service (SMS) messages." He further states: In 2014, Agents/Officers received information that Nicole HERRERA was currently trafficking multiple ounce quantities of crystal methamphetamine in the Fort Worth, Texas area. Co-conspirator Sarah Kirkpatrick identified Nicole HERRERA as a methamphetamine distributor who she knew was supplying multi ounce quantities of methamphetamine to her boyfriend, another co-conspirator. Sarah Kirkpatrick stated that in 2015 on multiple occasions she traveled with her boyfriend to meet Nicole HERRERA and receive four (4) ounce quantities of methamphetamine from Nicole HERRERA. Co-conspirator Audra BOWDEN confirmed that Nicole HERRERA was involved in distributing methamphetamine. Audra BOWDEN confirmed that based on her participation in the conspiracy and through conversations that [she knew that] Sarah KIRKPATRICK and her boyfriend were receiving methamphetamine from Nicole HERRERA. The search warrant application did not report that Sarah Kirkpatrick's boyfriend, Robert Everhart ("Everhart"), was arrested in June 2015. On June 28, 2016, a magistrate judge approved the warrant. The government searched Herrera's two phones. Prior to trial, Herrera filed a motion to suppress the text messages recovered from the phone. Her motion was denied after a hearing, and the government admitted a two-page exhibit at trial displaying some of the text messages retrieved from the LG and Alcatel phones.

Analysis

"When examining a district court's ruling on a motion to suppress, we review questions of law de novo and factual findings for clear error, viewing the evidence in the light most favorable to the prevailing party." "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." In cases where the government obtained a warrant, "[a] magistrate's determination of probable cause is entitled to great deference by reviewing courts." This court considers probable cause questions in "two stages." First, the court determines "whether the good-faith exception to the exclusionary rule . . . applies. If it does, [the court] need not reach the question of probable cause for the warrant unless it presents a novel question of law, resolution of which is necessary to guide future action by law enforcement officers and magistrates." Herrera does not argue that this case presents a novel question of law.

"Under the good-faith exception, evidence obtained during the execution of a warrant later determined to be deficient is admissible nonetheless, so long as the executing officers' reliance on the warrant was objectively reasonable and in good faith." Id. Herrera provides two reasons why the good faith exception should not apply in this case: (1) Agent Moore's failure to inform the court that Everhart was incarcerated in June 2015 evidenced recklessness in preparing the affidavit, and (2) the warrant was based on an affidavit that was facially deficient in terms of its particularity. The good-faith exception does not apply where the magistrate judge "was misled by information in an affidavit that the affiant knew was false or would have known except for reckless disregard of the truth." Material omissions are treated similarly. Herrera asserts that inclusion of Everhart's arrest in the affidavit was necessary to alert the magistrate judge to the fact that Herrera's alleged participation in drug trafficking activities was not ongoing. However, nothing in the affidavit suggests that Herrera continued selling drugs to Everhart at any time after 2015. Therefore, the omission did not render the affidavit misleading. The good-faith exception is also unavailable "where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." "Bare bones affidavits typically contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." The affidavit in this case was not bare bones. It included facts and circumstances from which the magistrate judge could have independently determined that probable cause existed. Specifically, the affidavit named two co-conspirator witnesses (Sarah Kirkpatrick and Audra Bowden) who identified Herrera as having sold a precise quantity (four ounces) of meth on multiple occasions in a certain year, and Agent Moore explained why his experience as a narcotics officer led him to believe that Herrera's phones likely contained evidence of that drug trafficking. Because we find that application of the good faith exception is appropriate in this case, we need not decide whether there was probable cause for the warrant.

***U.S. v. Gentry, Jr., et. al*., 5th Cir., Oct. 28th, 2019.**

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SEARCH & SEIZURE – CELL PHONE SEARCH - CONSENT

The Department of Homeland Security (DHS) suspected Cristofer Gallegos-Espinal (Gallegos) of participating in his mother's alien-smuggling conspiracy. But when federal agents persuaded Gallegos voluntarily to consent to a thorough search of his iPhone, they discovered evidence of an unrelated crime: possession of child pornography. This discovery led to a three-count indictment charging Gallegos with sex offenses with a minor and destruction of evidence. In the pretrial proceedings below, the district court suppressed three incriminating videos that the government discovered in the course of an examination of extracted data from Gallegos's iPhone. The court ruled that Gallegos's written consent to a "complete search" of the iPhone could not support a review of extracted data three days after the phone was returned.

Because Gallegos signed a consent form that, in its broad terms, encompasses the search and seizure conducted, and because Gallegos failed affirmatively to limit the scope of his broad consent, we reverse and vacate the district court's suppression of evidence and remand for further proceedings not inconsistent with this opinion.

On September 19, 2017, DHS agents closed in on Aleida Ruedo Espinal (Aleida), one of the primary targets of an alien-smuggling investigation. When the agents arrested Aleida and searched her home, she requested that her minor children be left in the custody of her adult son, defendant Cristofer Gallegos-Espinal. The agents quickly obliged. Gallegos was a secondary target in their alien-smuggling investigation, so Aleida's request presented an opportunity to look for evidence tying Gallegos to his mother's smuggling operation. When Gallegos arrived at the scene, about twenty law enforcement officers were there to greet him. Agents conducted a pat down for officer safety, and then searched Gallegos's vehicle for weapons. These initial searches did not uncover any weapons or other contraband. Gallegos, however, was in possession of a gray Samsung cell phone. No contraband having been found, Gallegos was permitted to enter his mother's house, where he was introduced to Case Agent Richard Newman. Agent Newman explained to Gallegos that he had been called to the scene because his mother had requested that he take custody of his younger siblings.

Agent Newman testified that when he first spoke to Gallegos his goal was to review Gallegos's gray Samsung. He wanted to look for certain banking information because he suspected that Gallegos was a "financial facilitator" in his mother's alien-smuggling network. At the same time, he also wanted to make sure not to tip Gallegos off to his suspicions. So, he decided to "use an absurd example of why [he] wanted to [see the] phone." He suggested that, before Gallegos could take custody of a minor child, he and the other agents would need to search Gallegos's vehicle a second time for "something illegal" and also "look through [Gallegos's] phone to make sure [there was not] any child pornography on it." This "absurd example" brought on a chuckle from Gallegos and a few of the agents in the vicinity, apparently because Gallegos believed (and the agents pretended to believe) that the search of the cell phone was a frivolous formality.

Gallegos agreed to the requested searches of his vehicle and gray Samsung, and in each case his consent was registered both orally and in writing. The written document reflecting Gallegos's consent, which was signed by Gallegos, was a standard consent form. The consent authorized "a complete search of [Gallegos's] Phone & car." In addition to a "complete search," the consent further authorized a seizure: specifically, it permitted agents to "take any letters, papers, materials, or other property which they may desire to examine." Finally, the signed consent form put Gallegos on notice that a search or seizure might produce evidence that could be used against him in a later criminal proceeding.

At this point, the investigation began to occur simultaneously on two fronts. Agent Newman and others remained in Aleida's house and started to search the gray Samsung. Other agents, having received Gallegos's consent for a thorough search of the vehicle, left the house and returned to the vehicle to begin that search.

We turn first to the search of the gray Samsung, which occurred in Aleida's kitchen. One of the agents hooked the phone up to an electronic extracting device called a "Cellebrite" to extract (*i.e.*, copy) its data. At some point, Gallegos observed the Cellebrite extraction taking place. In fact, he sat at the table where the extraction was taking place and could see clearly the agents connecting wires from the Cellebrite to the gray Samsung. It is clear that, at that point, he knew more than a "look through" was occurring, but he still made no objection or comment.

While the gray Samsung was connected to the Cellebrite, some of the agents were outside conducting the second vehicle search. Although the signed consent form initially identified only Gallegos's vehicle and gray Samsung as the property subject to search, these agents soon discovered a second cell phone (a white iPhone). Gallegos orally consented to a search of the iPhone, which was then inserted into the form. Gallegos does not challenge the validity of this amendment of the consent form. The agents' testimony suggests that, after giving consent to search the iPhone orally, Gallegos personally wrote the iPhone's twelve-digit passcode onto the consent form that he had earlier signed. Gallegos remembers it differently, but he does not deny providing the passcode. According to his declaration, Gallegos orally gave the passcode to the agents and watched as an agent added the passcode to the consent form, to which he made no comment. In any event, the agents were given the passcode, the consent form was

modified to include the iPhone, and the phone was seized, without objection from Gallegos, for a later inspection.

Meanwhile, back in the kitchen, the extraction of the gray Samsung was nearing completion. The extraction had lasted more than forty-five minutes, and a visual display on the Cellebrite's screen had tracked the progress of the download, which Gallegos had observed in part. The download was a "logical extraction," which means that the Cellebrite copied only data that would be visible during a manual search of the phone. By contrast, a "physical" extraction would have downloaded deleted data as well.

When the agents finished their logical extraction of the gray Samsung, they asked Gallegos to accompany them to the Homeland Security Investigations building in Houston for an interview about his mother's smuggling activities. At this point, the agents were in possession of both phones: the gray Samsung and the white iPhone. Once at the office, the iPhone, which had not yet been examined, was subjected to a logical extraction, but not in Gallegos's presence. After the interview was over, the agents returned both the Samsung and the iPhone to Gallegos—meaning that the phones were returned on the same day that they were consensually seized. At this point, it should be noted that the gray Samsung is not involved in this appeal. No search of the Samsung produced evidence relevant to this case.

The white iPhone is the focus of this appeal. Three days after the logical extraction, an examination of that data taken from the iPhone showed that Gallegos was in possession of child pornography. In the iPhone's photo gallery, Gallegos had stored (without deleting) three videos depicting his sexual abuse of a young girl, whom Gallegos identifies as his "young minor sister." These images would have been accessible to an agent conducting a manual search of the iPhone. When the pornographic videos were discovered, the case was reassigned to agents with more experience in child pornography cases, including Special Agent Richard Wilfong, a specialist in cyber investigations. Special Agent Wilfong applied for a warrant to search Gallegos's iPhone and to further probe its data. He testified that his purpose in seeking a warrant was to determine "where the videos were created" and to "see if [they] had been distributed anywhere." When it came time to execute the warrant on Gallegos's iPhone (which had been returned to him on the day it was searched), Wilfong's team located Gallegos and asked him where his phone was. He told them that it was at his aunt's house, but that turned out not to be true. Eventually, Gallegos met the agents at his aunt's house, with the iPhone in his possession, and told them that he forgot he had left the phone in his car. The phone was handed over, but the agents soon discovered that it had been restored to factory settings and that its incriminating videos had been erased. As far as the record shows, no additional evidence of child pornography was discovered on the device.

The government's investigation ultimately produced a three-count indictment charging Gallegos with sexual exploitation of a child under 18 U.S.C. § 2251, possession of child pornography under 18 U.S.C. § 2252A, and destruction of property under 18 U.S.C. § 2232. Following the indictment, Gallegos moved to suppress "all data downloaded from [his] Iphone," including the three incriminating videos. He argued that investigators had violated the Fourth Amendment in several ways, including by eliciting involuntary consent, by exceeding the scope of any consent given, and by relying on a deficient search warrant. The court held a two-day suppression hearing to resolve the motion. The district court disagreed with most of Gallegos's arguments for suppression, including his arguments concerning voluntariness and the alleged deficiency of the search warrant. Furthermore, the court rejected Gallegos's argument that the Cellebrite extraction of his data was beyond the scope of his consent, holding that under the circumstances "a reasonable person would have believed his [iPhone] data was being downloaded, and . . . it was Gallegos's responsibility to limit the scope of consent to a manual search." But the forensic examination of extracted data—which occurred after the iPhone was returned to Gallegos—was a different matter. The district court held that the government's review of extracted data occurred too long after Gallegos's "cell phones were returned to his physical possession and he was no longer going to be taking custody of his siblings." This timely government appeal followed. The sole issue in this interlocutory appeal is whether the government exceeded the scope of Gallegos's consent by reviewing extracted evidence after the iPhone was returned and before

a search warrant was obtained, notwithstanding the broad terms of Gallegos's consent to search the phone. "Where there is ambiguity regarding the scope of a consent, the defendant has the responsibility to affirmatively limit its scope."

The Supreme Court's standard for measuring the scope of a consent is one "of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Although this standard focuses on the term "exchange," which usually occurs orally between the parties at the scene of the event, we have previously applied it to written consents. The question that will resolve this appeal is thus framed: how would a typical reasonable person interpret the written consent? Even though that is a question of law, "factual circumstances are highly relevant when determining what [a] reasonable person would have believed to be the outer bounds of the consent that was given." For that reason, we "take account of any express or implied limitations or qualifications attending . . . consent which establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity."

Turning to the present case, we begin by examining the totality of the circumstances surrounding Gallegos's consent. The record shows that Gallegos first consented orally and that his oral consent was then "reduce[d] . . . to writing." To reduce the earlier oral consent to writing, agents had Gallegos personally execute a written agreement laying out the scope of his consent. Without a doubt, the terms of this written consent are broad.5 The agreement authorized "complete" searches of Gallegos's vehicle and gray Samsung; it also permitted the seizure of "any letters, papers, materials, or other property which [the agents] may desire to examine." Furthermore, the agreement directly and unambiguously contemplated the search of a *cell phone*, *i.e.*, an electronic device packed with personal information. Here, it can be reasonably assumed that Gallegos knew that the contents of his phone would be the subject of the search. One agent even testified that Gallegos *personally* wrote "gray Samsung" into the agreement, and Gallegos's declaration does not contradict such testimony. Finally, as previously noted, Gallegos does not dispute that the original agreement was validly amended to encompass the iPhone. Nor does he challenge the conclusion that, after the written amendment to the consent, the iPhone could be searched on the same terms as the Samsung and the vehicle, the two original subjects of the consent agreement.

The record thus establishes that Gallegos's consent is reliably reflected in the terms of the written consent agreement, which relate directly to the property at issue (Gallegos's white iPhone). Our task is simply to apply the terms of the agreement as a typical reasonable person would understand those terms.

So, turning to that task, we emphasize again that the terms of the agreement are plainly broad. The agreement includes consent for a "complete" search and a seizure of "any . . . property." Applying the terms as written, we are compelled to conclude that the search did not exceed the scope of consent, by extracting the iPhone's data or in later reviewing it. No aspect of the search fell outside the range of conduct that a typical reasonable person would expect from a "complete" iPhone search or from the subsequent seizure of any "materials . . . which [the government] may desire to examine." A typical reasonable owner of a cell phone would know that a cell phone contains extensive personal information and would understand that a "complete" cell phone search refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's "complete" contents. A typical reasonable owner of a cell phone would also realize that permission to seize "materials" includes permission to seize (and examine) such information.

We thus hold that the government's extraction of data and later review of that data did not exceed the scope of consent as plainly, unmistakably, and voluntarily set out in the consentagreement. Because the scope of consent was the only basis for evidentiary suppression argued on appeal, we hold that the district court's suppression of evidence was reversible error.

***U.S. v. Gellegos-Espinal*, No. 19-20427, 5th Circuit, Aug. 17, 2020.**

WARRANT, CELL PHONE DATA, GOOD FAITH EXCEPTION.

Armed with a court order but no warrant, FBI agents obtained historical cell-site location information ("CSLI") for the phone of a suspected serial bank robber, Eric Beverly. Before the government could use that information at trial (to show that Beverly's phone was at or near the banks at the time they were robbed) the Supreme Court held in Carpenter v. United States that if the government wants CSLI it needs a valid search warrant. 138 S. Ct. 2206, 2221 (2018). So, on the same day Carpenter was decided, federal prosecutors applied for—and got—a search warrant for the CSLI they already had (plus quite a bit more). Beverly moved to suppress the CSLI and other related evidence, claiming the warrant was obtained in bad faith. The district court agreed, suppressing the CSLI and declaring the court order and warrant void. The government appeals that order. Because the district court should have applied various strands of the good-faith exception to the warrant requirement, we reverse. I. In the summer of 2014, surveillance cameras across the Houston area began capturing a string of armed bank robberies. The robberies consistently involved a group of masked individuals, two or three of whom would enter a bank, hold up the lobby, and empty the teller drawers—all in less than sixty seconds—before driving off in a black Dodge Ram pickup with chrome nerf bars1 and two bullet holes in the back. Sometimes other vehicles were also used, including a silver Infiniti SUV. During the holdups, the robbers would communicate via three-way cell phone calls. They never entered the bank vaults, but instead took money only from teller drawers. Still, the robbers managed to steal as much as $20,000–$30,000 from some of the banks, all of which were FDIC insured. The government finally caught a break in the investigation on January 24, 2015, when agents lifted a palm print from a spot where one of the robbers had vaulted over a teller counter (as recorded in the security footage). The FBI matched the print to Jeremy Davis, who was arrested on May 5, 2015, while driving the black Dodge Ram seen in the videos. The truck turned out to be registered to Davis's mother. Davis confessed, admitting participation in twenty bank robberies and three jewelry store smash-and-grabs. He also named five of his accomplices, one of whom was Eric Beverly. According to Davis, Beverly was responsible for handing out the guns, masks, and gloves before each robbery, and Beverly along with another accomplice did most of the planning. Investigators later tied Beverly to the silver Infiniti SUV seen on some of the surveillance tapes. They learned that Beverly had bought the vehicle from a Craigslist seller in a Target parking lot for $9,000 but had never changed over the registration. The government also interviewed at least two people who indicated that Davis and Beverly were friends. Meanwhile, on May 28, 2015, the government applied for an order pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d), directing T-Mobile to provide subscriber information, toll records, and historical CSLI for Davis's iPhone.2 A federal magistrate judge issued the requested order that same day. Armed with the order, the government did not seek a warrant for Davis's historical CSLI. The government subsequently associated four other phone numbers with Davis's co-conspirators and submitted a second § 2703(d) application requesting subscriber information, toll records, and historical CSLI for those phone numbers. The same magistrate judge issued an order for the additional phone numbers on July 8, 2015, requiring T-Mobile to provide CSLI for the period between January 24, 2015 and May 5, 2015. Subscriber information provided by T-Mobile confirmed that one of the numbers was registered to Beverly. Sometime in August 2015, Beverly was arrested for an unrelated probation violation and placed in a Texas state jail. On May 26, 2016, while Beverly was still incarcerated in the state facility, he was charged by federal indictment with multiple counts of conspiracy, armed bank robbery, attempted armed bank robbery, and brandishing a firearm during a crime of violence. Beverly was transferred into federal custody on June 1, 2016. On June 22, 2018, less than two months before the start of Beverly's federal trial, the Supreme Court handed down its decision in Carpenter, in which the Court held that obtaining CSLI constituted a "search" under the Fourth Amendment and therefore required a valid warrant supported by probable cause. 138 S. Ct. at 2220–21. Out of "an abundance of caution" the government applied for and obtained a search warrant that very day for Beverly's cell phone information, including historical CSLI, subscriber information, and toll records associated with his T-Mobile account. Notably, the government's warrant application sought historical CSLI for the period extending from August 25, 2014 until May 2, 2015—more than double the amount of time covered by the previous § 2703(d) order. Although the application omitted the fact that the government already possessed some of the information to be searched, the issuing magistrate judge was apparently aware of Carpenter and agreed that obtaining a search warrant was a "good idea." In response to Carpenter and the government's contemporaneous search warrant, Beverly moved to suppress the warrant and the "numbers, cell site information, and names" gathered as fruit of the two § 2703(d) orders. The district court granted the motion on October 25, 2018, voiding the "warrant and the order,"

and suppressing the "cell-site location data and all evidence that has been derived from them . . . as infected by the same virus." The government timely appealed.

On appeal of a motion to suppress, legal conclusions are reviewed de novo while factual findings are reviewed for clear error. "The party seeking suppression 'has the burden of proving, by a preponderance of the evidence, that the evidence in question was obtained in violation of his Fourth Amendment rights.'" Evidence is viewed in the light most favorable to the prevailing party.

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The basic purpose of the Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." It protects against government intrusion into areas where people have reasonable expectations of privacy. Where the government seeks to intrude upon such private spheres, it generally needs a warrant supported by probable cause.

"The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . . ." The reason is that exclusion of such evidence would not cure the wrong condemned by the Amendment: the unlawful search or seizure itself. However, courts have embraced the so-called "exclusionary rule"—a judicially created remedy that precludes the use of evidence obtained from an unconstitutional search or seizure—in order "to safeguard Fourth Amendment rights generally through its deterrent effect."

An exception to the exclusionary rule exists where government investigators acted with an objectively reasonable good-faith belief that their conduct was lawful. This "good-faith exception" to the exclusionary rule is grounded in the observation that where official action is "pursued in complete good faith . . . the deterrence rationale loses much of its force." … *see also* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) ("[T]he exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones.").

The good-faith exception to the exclusionary rule, first articulated over forty years ago in Leon, has been applied to a range of cases.

In Leon itself, the exception was applied where police acted in reliance on a warrant that was later held to be unsupported by probable cause. However, the Court in *Leon* recognized several limitations on the good-faith exception.. As distilled in later cases, the good-faith exception will <u>not</u> apply:

> (1) When the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false;
>
> (2) When the issuing magistrate wholly abandoned his judicial role;
>
> (3) When the warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and
>
> (4) When the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid.

For clarity and convenience, we refer—in this opinion—to the warrant-without-probable-cause strand of the good-faith exception as the "Leon exception."

The good-faith exception has also been applied to evidence obtained from warrantless searches later held to be unconstitutional. In Illinois v. Krull, for example, the Supreme Court applied the good-faith exception where officers had "act[ed] in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute [was] ultimately found to violate the Fourth Amendment." The Court reasoned that if a "statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." Similarly, the Supreme Court has applied the good-faith exception to a warrantless search that complied with binding appellate precedent that was later overruled. In *Davis*, police con-

ducted a vehicle search in reasonable reliance on binding circuit precedent, but several years later—while the defendant's criminal appeal was still pending—the Supreme Court held that such searches were unconstitutional. The Court applied the good-faith exception on the ground that excluding the relevant evidence would not foster the appropriate deterrent effect. To distinguish it from the Leon exception, we refer to this strand of the good-faith exception—where a warrantless search is authorized by statute or binding precedent later ruled unconstitutional—as the "*Krull* exception."

In 1986, Congress enacted the Stored Communications Act ("SCA"). 18 U.S.C. §§ 2701–2711. As amended in 1994, the SCA permits a law enforcement agency to obtain a court order compelling the disclosure of certain telecommunications records when the agency "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This standard, which is less stringent than the probable cause standard generally required for a search warrant, is derived from the Supreme Court's decision in Terry v. Ohio.

In 2013, when the constitutionality of § 2703(d) was challenged in the Fifth Circuit, a divided panel held that the statute was constitutional even when applied to the disclosure of historical CSLI. The majority reasoned that CSLI records were business records of cell service providers and that, under the third-party doctrine, cell phone users did not have a reasonable expectation of privacy in those records.

Eventually the same question reached the Supreme Court, which, as noted above, held on June 22, 2018 that § 2703(d) was unconstitutional. The Court determined that obtaining CSLI from a wireless carrier amounts to a search under the Fourth Amendment because an individual has "a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." The Court rejected the argument that because CSLI was shared with and retained by wireless carriers, the request for such information amounted to "a garden variety request for information from a third-party witness." The Court concluded that to acquire CSLI records "the Government must generally obtain a warrant supported by probable cause," unless the search "falls within a specific exception to the warrant requirement."

In the present appeal, the United States argues that the district court erred in suppressing Beverly's historical CSLI because it failed to apply the good-faith exception. Beverly responds that the good-faith exception does not apply because investigators acted in bad faith when they sought a warrant— the day *Carpenter* was decided—for CSLI they already had. Confusion arises because each party uses the term "good-faith exception" to refer to a different strand of the exception, without realizing that the other side is operating on a different wavelength. The United States approaches the case under the *Krull* exception and therefore focuses its good-faith arguments on the pre-*Carpenter* warrantless § 2703(d) order. Beverly treats the case under the *Leon* exception, devoting his attention to the post-*Carpenter* search warrant. As a result, the parties' arguments often pass in the night.

Complicating matters, the parties treat the suppressed CSLI evidence as a single unit, but really it is two: (1) the 102 days' worth of CSLI records covering January 24, 2015 through May 5, 2015 (the "2015 CSLI"), first authorized by the § 2703(d) order in July 2015; and (2) the 152 days' worth of CSLI records covering August 25, 2014 through January 23, 2015 (the "2014 CSLI"), first authorized by the post-*Carpenter* search warrant in 2018.3 Because the issues differ, we deal with the two units of CSLI evidence separately, beginning with the CSLI evidence that was obtained first—the 2015 CSLI—and then turning to the CSLI evidence that was obtained three years later—the 2014 CSLI. We hold that the *Krull* strand of the good-faith exception properly applies to the 2015 CSLI, since it was obtained pursuant to a pre-*Carpenter* warrantless order authorized by statute. Because the government pursued the statutory order in good faith, the CSLI should not have been suppressed. As for the 2014 CSLI, we hold that the *Leon* strand of the good-faith exception applies because those records were first sought and obtained under a post-*Carpenter* search warrant. The 2014 CSLI should not have been suppressed because the government acted in good faith when applying for the search warrant and, even if the government did not act in good faith, the warrant was supported by probable cause. Finally, we hold that any suppression of toll records and subscriber information under *Carpenter* was erroneous because *Carpenter* only applies to evidence that can be used to track a person's physical movements over time.

The government obtained the 2015 CSLI for Beverly's phone pursuant to a § 2703(d) order issued on July 8, 2015. Three years later, on the day *Carpenter* was decided, the government applied for—and got—a search warrant for this same CSLI. The district court characterized the government's warrant application as "meretricious" and stated that "the whole business was feigned." While acknowledging that the good-faith exception "allows a court to admit evidence obtained in compliance with a law later ruled unconstitutional," the court declined to apply the exception, reckoning that to do so "would render the Fourth Amendment empty." We reject the district court's analysis because the good-faith exception— specifically, the *Krull* exception—properly applies. Just like in Krull, the investigators who obtained Beverly's CSLI in 2015 conducted a warrantless search authorized by a statute that was not found to be unconstitutional until after the search—in this case, years after. Furthermore, just like in *Davis*, the operative statute had been deemed constitutional at the time of the search by then-controlling judicial precedent. By all accounts, the FBI investigators acted in good faith in 2015 when they reasonably relied on the authorization provided by § 2703(d).4 Moreover, as in *Krull* and *Davis*, the deterrent rationale behind the exclusionary rule is inapplicable here: there is no reason to deter law enforcement officers from acting pursuant to federal statutes, especially those that have been upheld as valid by the relevant circuit court of appeals.

We find additional support for our holding in the fact that every one of our sister courts to have considered this question since *Carpenter* has agreed that the good-faith exception—specifically, the Krull exception—applies to CSLI obtained under § 2703(d) prior to *Carpenter*.

The 2014 CSLI presents a slightly different issue. Unlike Beverly's 2015 CSLI (which the government first obtained back in 2015 under the § 2703(d) order), the record reflects that the government never sought or obtained the 2014 CSLI until it applied for the search warrant the day *Carpenter* came down in 2018. Because the government never obtained the 2014 CSLI under a pre-*Carpenter* statutory order, the *Krull* exception does not apply. Instead, we must subject the 2014 CSLI to a separate exclusionary rule analysis, the proper focus of which is the 2018 search warrant.

"We apply a two-step test to determine whether to suppress evidence under the exclusionary rule: first, we ask whether the good faith exception to the rule applies, and second, we ask whether the warrant was supported by probable cause."

As noted earlier, the parties do not bifurcate the CSLI in their arguments, with the result that neither party directly addresses how we should treat the 2014 CSLI in relation to the 2018 warrant. The government argues generally that investigators applied for the search warrant in good faith, and that the warrant was supported by probable cause. Beverly's refrain is that "the government did not act in good faith" in obtaining the 2018 warrant. He also contends that the warrant is "fruit of the poisonous tree" because the evidence mustered in the warrant application was derived from Davis's CSLI, which—according to Beverly—was obtained via an unconstitutional § 2703(d) order.

For its part, the district court interpreted the addition of the previously unrequested 2014 CSLI to the 2018 warrant application as an underhanded attempt to "save" the government's bad-faith request for evidence it already had—namely, the 2015 CSLI. As a result, the district court suppressed the 2014 CSLI and the 2015 CSLI. But, as discussed above, the district court misapplied the *Krull* exception and should not have suppressed the 2015 CSLI. Because it was based on an error of law, we give no deference to the district court's finding that the government acted in bad faith in 2018.

Applying our two-step test, we hold that the good-faith exception— specifically, the Leon exception—properly applies to the 2014 CSLI. Because the government did not already possess the 2014 CSLI when it applied for the search warrant in 2018, its application was made in good faith. We further hold that even if the application was made in bad faith, the 2014 CSLI would still be admissible because the warrant was supported by probable cause.

The *Leon* strand of the good-faith exception applies here because the government first sought and obtained the 2014 CSLI in reliance on a search warrant, which may or may not have been supported by probable cause. To be sure,

the *Leon* exception comes with a number of limitations, the first of which dictates that the good-faith exception will not apply if the warrant application is misleading. The party challenging the good-faith exception bears the burden of establishing "that material misstatements or omissions are contained in the supporting affidavit and that if those statements were excised (or the omitted information included), the affidavit would be insufficient to support the warrant." Beverly does not meet this burden.

Beverly argues that the government's warrant application was misleading because the government "failed to disclose to the magistrate that it already had the information for which it sought a warrant." That argument would be worth considering if the focus here was the 2015 CSLI, which the government did indeed already possess. But, as discussed above, that evidence—the 2015 CSLI—comes in separately by means of the *Krull* exception, rendering the warrant irrelevant. With respect to the 2014 CSLI at issue here, where the warrant matters, the record reflects that the government did not already possess the information it sought. Beverly's argument is therefore unpersuasive, and he offers no alternative reasons for thinking that the government's failure to reveal its possession of the 2015 CSLI triggers the first *Leon l*imitation.

But even if the government's failure to reveal its possession of the 2015 CSLI amounted to bad faith with respect to the 2014 CSLI, the government would still prevail under step two: probable cause. Probable cause means "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." A search warrant application must show probable cause "to justify listing those items as potential evidence subject to seizure."

Here, the government's search warrant application satisfies the probable cause standard.8 The application describes the FBI's investigation and how Davis's palm print was lifted from a teller counter in January 2015. It recounts Davis's subsequent arrest and how the Dodge Ram he was driving matched the truck used in the bank robberies. It further describes how Davis provided investigators with his phone number and fingered his co-conspirators, including Beverly, saying they participated in every one of the robberies between August 24, 2014 and May 2, 2015. The application highlights Davis's admission that the robbers communicated by cell phone immediately before, during, and after the bank robberies. Finally, the application states that "follow up investigations" confirmed Beverly's phone number—the one for which the government was requesting CSLI data. A prudent person looking at these facts and circumstances would be justified in believing that Beverly participated in the bank robberies.

Beverly's "fruit of the poisonous tree" response is unavailing. For one thing, there is no poisonous tree: the CSLI obtained for Davis's phone pursuant to § 2703(d) would be admissible under the *Krull* exception, just like Beverly's 2015 CSLI. More fundamentally, though, Beverly lacks standing to assert that the search of Davis's phone records was unconstitutional. Beverly had no expectation of privacy in Davis's phone data, even if the search was unconstitutional as to Davis.

In sum, the district court should have applied the Leon strand of the good-faith exception and denied Beverly's motion to suppress the 2014 CSLI. Or, in the alternative, the district court should have denied the motion to suppress because the 2018 search warrant was supported by probable cause.

Finally, the government argues that the district court erred in suppressing Beverly's toll records and subscriber information obtained under the § 2703(d) order. To the extent that the district court intended to suppress this evidence, it erred.

The parties agree that *Carpenter's* holding only applies to evidence that can reveal a person's physical movements over time. Beverly contends that because the government "doubtless" will attempt to use his toll records and subscriber information to track his location over time, the toll records and subscriber information are equivalent to CSLI under *Carpenter's* reasoning. We disagree. Beverly fails to articulate any credible grounds for accepting the first premise of his argument: namely, that toll records and subscriber records will be or even can be used to track

someone's physical location over time. With no showing of that, Beverly's attempt to force this evidence into *Carpenter's* holding is a nonstarter. In any event, *Carpenter* cautioned that it was a "narrow" decision that did not address, among other things, "other business records that might incidentally reveal location." We therefore decline to expand *Carpenter* in the way Beverly urges.

For the forgoing reasons, we hold that the district court erred in granting Beverly's motion to suppress.

***U.S. v. Beverly*, No. 18-20729, Fifth Circuit, Nov. 14th, 2019.**

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PROBABLE CAUSE – BLOOD DRAW

Jonathan Forbes sued Deputy Lucas Paige for alleged Fourth and Fourteenth Amendment violations, arguing, among other things, that Deputy Paige arrested Forbes and subjected him to a blood draw in violation of his constitutional rights. The district court granted summary judgment in favor of Deputy Paige. We agree that Forbes fails to raise a genuine dispute of material fact and thus affirm.

In the wee hours, around 2:30 a.m., Deputy Paige observed a "brand new Corvette" in the far-right lane of the Hardy Toll Road in Houston. He claims the car was swerving, so he initiated his dashboard camera. Deputy Paige drove closer to the Corvette, with both cars traveling about sixty miles per hour in a sixty-five mile per hour zone. As Deputy Paige approached the Corvette from the middle lane, the sports car shifted gears and sped away. Deputy Paige flipped on his lights and siren and pursued the fleeing vehicle, reaching a top speed of 109 miles per hour before the Corvette pulled over on the right shoulder of the highway.

Deputy Paige approached the driver and asked him to turn off the car's engine. The driver, Forbes, complied and produced his driver's license. Deputy Paige and Forbes exchanged brief pleasantries before the deputy asked, "What was that about?," referring to Forbes's acceleration. Forbes responded, "I am a dumb a**." Deputy Paige asked Forbes a few questions about his whereabouts that evening, and Forbes claimed he was coming from dinner at a restaurant. Given the hour, Deputy Paige further inquired if Forbes was eating dinner until 2:00 a.m. Forbes answered, "Pretty much, yeah."

Deputy Paige then asked Forbes to step out of the Corvette and stand near the trunk. The deputy performed a protective pat down and asked Forbes how much he had had to drink that night. Forbes did not offer an oral reply, but put his hands out as if offering his wrists for handcuffs. Deputy Paige asked, "That much?" Again, Forbes did not reply. Deputy Paige then asked, "You're not gonna say anything?" This time, Forbes answered, "No, sir."

Deputy Paige handcuffed Forbes, patted him down a second time, and placed him in the patrol car. When the pair arrived at the Houston Police Department, Deputy Paige asked Forbes to provide a breath or blood sample. Forbes declined. So Deputy Paige sought a warrant to conduct a blood draw. The warrant affidavit, which Deputy Paige reviewed and signed but did not transcribe, provided that:
[O]n July 25, 2015[,] at approximately 2:35AM, [I] was on patrol on 20300 Hardy Toll Rd., a public place and pub-

lic road located in Houston, Harris County, Texas when [I] observed a white 2015 Chevrolet Corvette motor vehicle weaving inside of its traffic lane. As [I] got closer to the Corvette, [I] observed it to rapidly accelerate away from [me] so [I] conducted a traffic stop, made contact with the driver of the Corvette and identified him by his Texas Driver's License . . . as Jonathan Robert Forbes. I came into contact with [Forbes] and noticed him to have slurred speech, glossy red eyes and a mild odor of an alcoholic beverage emitting from his breath and person. I asked [Forbes] to perform some field sobriety tests to determine [his] level of intoxication, including the Horizontal Gaze Nystagmus Test, the One Leg Stand Test[,] and the Walk and Turn Test. . . .
[Forbes] refused to perform the Horizontal Gaze Nystagmus Test, the One Leg Stand Test[,] and the Walk and Turn Test.

Therefore, I placed [Forbes] under arrest and transported [him] to the police station. At the station, [I] offered [Forbes] an opportunity to provide a sample of [his] breath and/or blood and [Forbes] declined to provide a sample. This is a violation of the Texas Implied Consent law and is also an indication to me that [Forbes] is attempting to hide evidence of [his] level of intoxication.

The magistrate judge issued a warrant for a blood draw, which was taken around 4:00 a.m., an hour and a half after the traffic stop. Forbes's blood-alcohol content was 0.09, exceeding the legal limit of 0.08.

The case against Forbes was eventually dropped, and Forbes brought suit against Deputy Paige and Harris County, asserting Fourth, Fifth, and Fourteenth Amendment violations under 42 U.S.C. § 1983. Forbes alleged that Deputy Paige arrested him without probable cause and made misrepresentations to the magistrate judge to obtain the blood-draw warrant. He also alleged that Harris County had a policy or custom of making DWI arrests without probable cause and was deliberately indifferent to the need for training. The district court granted summary judgment against Forbes on each claim.

On appeal, Forbes challenges only the district court's grant of summary judgment with respect to Deputy Paige. He asserts that Deputy Paige (1) violated the Fourth Amendment when he placed Forbes under arrest; and (2) violated the Fourth and Fourteenth Amendment when he made false representations to secure the blood-draw warrant.

We review a district court's summary-judgment decision de novo, applying the same standards as the district court. Summary judgment must be granted 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." A dispute is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmovant. And a fact is material if its resolution could affect the outcome of the action.

At this stage, we review all facts and draw all reasonable inferences in the light most favorable to Forbes, the nonmoving party. In cases such as this one, however, when the burden of proof at trial ultimately rests on the nonmovant, the moving party "must merely demonstrate an absence of evidentiary support in the record for the

nonmovant's case," while the nonmovant "must come forward with specific facts showing that there is a genuine issue for trial." *Id.* (internal quotations omitted). We are "not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence." And ultimately, we may "affirm a grant of summary judgment on any grounds supported by the record and presented to the district court."

Deputy Paige did not violate Forbes's Fourth Amendments rights when he arrested him without a warrant.4 A warrantless arrest violates a suspect's Fourth Amendment rights "if the arresting officer lacks probable cause to believe that the suspect has committed a crime." Probable cause exists when the facts and circumstances within the officer's knowledge "are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." This "is not a high bar." The Supreme Court has explained that "[b]ecause probable cause deals with probabilities and depends on the totality of the circumstances, . . . it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules." As long as "the officer was aware of facts justifying a reasonable belief that an offense was being committed, whether or not the officer charged the arrestee with that specific offense," the probable-cause standard is satisfied, and the arrest is permissible.

Here, Deputy Paige claims that he had probable cause for the arrest because Forbes (1) was swerving within his lane, (2) accelerated haphazardly to over 100 miles per hour, (3) smelled faintly of alcohol, (4) slurred his speech, (5) had "pretty much" been at a restaurant until 2:00 a.m., (6) appeared to have glossy, red eyes, and (7) refused to answer how many drinks he had consumed, instead holding his hands out as if yielding to being handcuffed.

Forbes contends that he has raised a genuine dispute of material fact as to probable cause because he (1) did not smell of alcohol, (2) was not slurring his speech, and (3) did not have glossy, red eyes. And he insists that, without these facts, no reasonable officer could have found probable cause to execute an arrest for driving while intoxicated.

First, we disregard Forbes's claim on appeal that he did not have glossy, red eyes as it contradicts his sworn deposition testimony, in which Forbes agreed his eyes were red but blamed the redness on either his allergies or the late hour. As for the other two facts, even assuming, without deciding, that Forbes raised a genuine factual dispute regarding whether he smelled of alcohol or slurred his words, the dispute is not "material" as its resolution cannot affect the outcome of the action.

Deputy Paige still had probable cause to arrest Forbes for driving while intoxicated. Deputy Paige pulled Forbes over after Forbes accelerated away from the deputy at a high rate of speed; Forbes claimed to have "pretty much" been eating dinner until 2:00 a.m., after the bars, and long after most restaurants, had closed. Forbes also refused to answer how many drinks he had consumed that evening, instead holding his arms out as if surrendering to handcuffs. From these facts a reasonable officer would believe that Forbes was committing a crime—specifically, driving while intoxicated. We, therefore, affirm the district court's grant of summary judgment on this issue.

Deputy Paige likewise did not violate Forbes's constitutional rights in securing the blood-draw warrant. Forbes alleges that Deputy Paige falsified the affidavit supporting the warrant, flouting Forbes's Fourth and Fourteenth Amendment rights. Forbes first notes that the affidavit claims Deputy Paige conducted field-sobriety tests, though he did not. He is correct on this point, and Deputy Paige admits that this detail was included in the affidavit erroneously. When an affidavit contains faults, such as this one, we review the affidavit as if the faulty statements were removed and independently assess whether the corrected attestation still supports the issuance of the warrant.

So, we now consider Deputy Paige's affidavit as though it only contains the following facts: Forbes (1) was weaving inside his traffic lane; (2) rapidly accelerated away from the officer; (3) slurred his speech; (4) had glossy, red eyes; (5) smelled mildly of alcohol; and (6) refused to provide a blood or breath sample. These facts, exclusive of Deputy Paige's misstatements, would support probable cause for a blood-draw warrant.

But that is not the end of our inquiry. Forbes argues that Deputy Paige's affidavit was falsified—beyond Deputy Paige's admitted misstatements—because Forbes, in his belief, was not swerving, was not slurring his speech, did not have glossy or reddened eyes, and did not smell of alcohol.7 Despite Forbes's claims of dishonesty, "[t]here is . . . a presumption of validity with respect to the affidavit supporting [a] search warrant." To overcome this presumption, "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." Forbes therefore is required to not only allege that Deputy Paige deliberately, or with reckless disregard for the truth, attested to falsehoods, but Forbes is also required to offer *proof* of deliberate falsities. Even a proven misstatement, if made negligently instead of intentionally or recklessly, will not be vitiated if Forbes does not provide evidence "directly illuminating the state of mind of [Deputy Paige]." Aside from the admitted misstatement regarding field-sobriety testing, Forbes has not offered any evidence to support a finding that Deputy Paige made false statements in the first instance, let alone that he did so intentionally or recklessly. Forbes relies on conclusory allegations and speculation to support his claims of falsity, to which we give no credence when reviewing a summary-judgment order. We therefore review the corrected affidavit with the enumerated facts above, which, as noted, sufficiently established probable cause to obtain a blood sample. Because Forbes has not raised a genuine dispute of material fact regarding whether the corrected affidavit was tainted, and the corrected affidavit provided probable cause to issue the blood-draw warrant, summary judgment was proper.

Although we review the facts in the light most favorable to the nonmoving party on summary-judgment review, Forbes was required to provide more than conclusory allegations of wrongdoing. Because he has failed to meet his burden, and no genuine disputes of material fact remain for trial, we AFFIRM the district court's grant of summary judgment.

***Forbes v. Harris Co., et al.*, No. 19-20431, 5th Circuit, March 04th, 2020.**

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A jury found Walter Glenn guilty of conspiracy, access device fraud, and identity theft for his role in a fraudulent check-cashing scheme. The district court denied two motions to suppress evidence taken from a rental car that Glenn was driving. Glenn contends the district court erred by admitting the evidence. He also challenges his sentence. We AFFIRM.

In September 2014, Walter Glenn, Larry Walker and Thomas James were in a rental car, traveling through Louisiana on Interstate 10. Glenn was driving. Sergeant Donald Dawsey of the West Baton Rouge Parish Sheriff's office stopped them for what he believed was a traffic violation. Dawsey walked to the vehicle and had Glenn give him his driver's license and insurance verification. Dawsey immediately noticed a set of screwdrivers in the door of the vehicle. The officer then had Glenn get out and go to the rear of the car. There, Dawsey pointed to the license plate, which was obscured with a tinted plastic cover and said the cover was the violation that caused the stop. Dawsey, who had two decades of experience with the sheriff's office at the time, later explained at a hearing that motorists often use such license plate covers to evade identification by traffic cameras. Glenn stated the cover was affixed to the license plate at the time of the rental and repeatedly offered to remove it.

At the back of the car, Glenn explained that Walker had rented the vehicle. After questioning Glenn, Dawsey spoke with Walker and got the rental agreement, then returned to Glenn at the rear of the car for further questioning. Dawsey then told Glenn to stay behind the rental car while Dawsey returned to his cruiser to verify some of the information he had just received. By this point, about six and half minutes had passed since Glenn drove the vehicle onto the shoulder of the interstate and stopped.

When Dawsey returned to his cruiser, he did not in fact input the information; instead he called for assistance. Several minutes later, Dawsey returned to question Glenn further, eventually asking if he could search the car. Glenn responded, "Yeah. You can search it." Dawsey told Walker that Glenn had consented to a search, to which Walker replied, "he said you can search it, search it." Walker and James stepped to the rear of the car, and Dawsey and other officers searched the car. They found, among other things, over 100 blank ID cards, dozens of blank checks, holographic overlays, a printer, envelopes with names and social security numbers, computer equipment, and $95,000.

The subsequent investigation revealed that Glenn, Walker, and James were involved in a multi-state counterfeit check scheme and had been in Texas to cash counterfeit checks. The Government charged them with conspiracy to make and pass counterfeit checks, produce fraudulent IDs, and use unauthorized access devices (*i.e.*, social security numbers). It also charged them with access device fraud and aggravated identity theft.

In 2016, all three filed suppression motions challenging the legality of the stop and the search of the entire vehicle. The district court denied Glenn's and James' motions and partially denied Walker's, holding: the stop was lawful; the officer had reasonable suspicion for extending the stop; and, Glenn and James lacked standing to challenge the search of the vehicle. In partially granting Walker's motion, the court ruled his consent to the search was not voluntary. The Government appealed. We affirmed the district court's partial grant of Walker's motion to suppress, and the Government dismissed his charges. *See United States v. Walker*, 706 F. App'x 152, 154-56 (5th Cir. 2017).

James and Glenn's cases were held in abeyance during the pendency of the interlocutory appeal concerning Walker. Following our opinion in *Walker*, Glenn and James filed a second joint suppression motion primarily regarding their personal items found in bags and luggage within the car. The district court again refused to suppress any evidence as to Glenn, concluding Glenn gave valid consent to the search. The court granted James' motion to suppress items found in his personal bag, and James later pled guilty to all counts. Only Glenn went to trial where the jury found him guilty of all charges. The district court sentenced him to 120 months in prison.

On appeal, Glenn challenges the district court's denials of his motions to suppress and several sentencing decisions.

As he did in district court, on appeal Glenn contends all the evidence seized from the rental vehicle should have been suppressed. He does not renew as an independent argument his specific challenge to the search of his personal bag in the trunk. Three envelopes of cash were found in that bag. His primary appellate argument is that Dawsey improperly obtained his consent to search. We review fact-findings as to the voluntariness of consent to search for clear error. If consent followed a violation of the Fourth Amendment, that consent must also be "an independent act of free will." Glenn argues this additional requirement applies here because Dawsey detained him for an unreasonable time on the side of I-10.

Whether Glenn has standing to challenge the search of the entire car is unclear. At the time the district court denied Glenn's motions to suppress, Fifth Circuit precedent provided that a driver of a rental vehicle who was not authorized under the rental agreement did not have a reasonable expectation of privacy in the vehicle; such a driver thus lacked standing to contest its search. Glenn contends we should hold he has standing under the recent Supreme Court opinion in *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018). Because we consider the issue a close one, and an absence of standing is not a jurisdictional defect in this context, *id.* at 1530, we decline to analyze the issue today in light of our resolution of the merits of Glenn's Fourth Amendment claim.

An officer can extend a stop only "as long as is reasonably necessary to effectuate the purpose of the stop." Thus, an officer has the time needed to issue a traffic citation, examine the driver's license, insurance, and registration, and ascertain if there are outstanding warrants. An officer's inquiries must be limited to the time in which the "tasks tied to the traffic infraction are — or reasonably should have been — completed."

Extending the stop beyond what is needed for the initially relevant tasks is proper if "an officer develops reasonable suspicion of another crime" during that time, allowing the officer to "prolong the suspect's detention until he has dispelled that newly-formed suspicion." A reasonable suspicion is one that has "a particularized and objective basis for suspecting the person stopped of criminal activity;" it is "more than an inchoate and unparticularized suspicion or hunch." Of principal relevance in the totality of circumstances that an officer is to consider "will be the events which occurred leading up to the . . . search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion."

The Government concedes that the initial purposes of the traffic stop were complete when Dawsey went to his cruiser to request assistance from other officers. The Government identifies numerous facts to support that, before that point, Dawsey gained reasonable suspicion that Glenn and his co-defendants were involved in criminal activity: (1) they were in a rental vehicle, and such vehicles are often used for drug-trafficking; (2) they were driving on I-10, which is known for drug-trafficking; (3) the rental vehicle had a tinted license-plate cover, which Dawsey had never seen in his 20 years as a police officer; (4) Dawsey immediately noticed a set of screwdrivers in the door of the vehicle, which could have been used to affix the license-plate cover; (5) Glenn was very anxious to remove the license-plate cover; (6) Glenn and Walker both mispronounced Beaumont, where they had allegedly been staying with family for the weekend; (7) their purported itinerary was "implausible" in Dawsey's opinion; (8) Glenn and Walker provided inconsistent information regarding Walker's residence and mode of transportation to Connecticut; and (9) the interior of the vehicle looked "lived in," which, in Dawsey's view, was inconsistent with Glenn's story of staying with family for the weekend.

The district court did not state that all of these circumstances were relevant, but it did conclude that reasonable suspicion arose for extending the stop because these individuals were traveling in a rental vehicle on a known drug-trafficking corridor having a tinted cover over the license-plate with screwdrivers likely used to affix the cover. There was no error when, after considering the totality of the circumstances, the district court held that Dawsey had reasonable suspicion of illegal activity to extend the stop.

C. Glenn's consent to search

The Government must prove Glenn voluntarily consented to the search by a preponderance of the evidence. We use the following test to determine voluntariness:

(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

The district court found that some factors favored Glenn, but that there were no coercive police procedures, Glenn was cooperative, and Glenn appeared to be intelligent and well-educated. The District Court concluded that Glenn had voluntarily consented.

We find no clear error in this finding and thus no error in admitting the evidence from the search of the car.

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AFFIRMED.

U. S. v. Glenn, 5th Circuit, July 26th, 2019.

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SEARCH & SEIZURE, REASONABLE SUSPICION, STOP & FRISK

Pizarro Thomas appeals from his conviction for being a felon in possession of a firearm. He challenges the district court's denial of his motion to suppress evidence of a firearm discovered during a stop and frisk. This case requires us to analyze the reasonableness of officers' suspicions as to a particular individual when the uncertainty is not whether a crime has occurred but who within a group committed it. We AFFIRM.

On June 18, 2018, around 5:30 p.m., Officers Alan Hovis and Benito Garcia were patrolling the "Five Points" area of Dallas, an area known for pervasive crime involving drugs and violence. Earlier that day, the officers were informed that a vehicle stolen in an aggravated robbery had been identified in the area by an automatic license plate reader ("ALPR"). The officers were driving through the area in a marked patrol vehicle specifically for the purpose of locating the stolen vehicle, a silver Toyota Camry. The aggravated robbery occurred on June 8, ten days before these events. The record does not make clear whether the officers were aware that the crime happened ten days earlier, though they knew it had not occurred in the last few hours. Information about the date of the crime was available to the officers and included in the National Crime Information Center ("NCIC") database that they accessed before making the stop.

The record shows the robbery was committed by two black males. At the time, though, the officers did not have a description of the people involved in the crime, and there is no indication that they knew how many individuals had been involved. What they knew was the description of the vehicle, its license plate number, the location where it was spotted by the ALPR, and that it was stolen in an aggravated robbery involving a firearm. With that information, the officers drove to the apartment complex where the ALPR identified the stolen vehicle. As they drove through the complex, they saw the stolen vehicle backed into a covered parking spot near the entrance to one of the apartment buildings. They kept driving past the vehicle and, at that time, one of the officers confirmed via the NCIC database that the license plate matched that of the vehicle reported stolen. During that initial pass, the officers observed two people sitting inside the stolen vehicle, while another four people — including Thomas — were standing in the immediate vicinity of and surrounding the vehicle. According to Officer Hovis, the people outside the vehicle "were either touching it or talking to the people that were in it; talking no more than seven feet away from it." It appeared to him that all six people knew each other and were having a conversation as a group. Of the four people outside the vehicle, Thomas was standing closest to the vehicle, by the driver's side front tire. The officers' suspicions as to Thomas were based entirely on his presence in a high-crime area, his proximity to the stolen vehicle, and his interaction with others in and around the vehicle. No crime unrelated to the presence of the

stolen vehicle was witnessed. They could not overhear any of the group's conversation. There is no suggestion that either officer had encountered Thomas before or was aware of his criminal history. Relying on what they observed and what they knew from the report of the aggravated robbery, the officers decided to stop and frisk these individuals, implicitly invoking their authority under *Terry v. Ohio.*

The officers decided to detain all six people "[b]ecause they were around the [vehicle] that was taken in an aggravated robbery." They made a U-turn, drove back to the stolen vehicle, and stopped near it. They quickly exited, drew their firearms, and approached the group. According to Officer Hovis, the officers drew their firearms because the underlying crime "was an aggravated robbery, so a weapon [was] involved." That drove a concern that any or all of the people might be armed. Outnumbered six to two, the officers "wanted to surprise them and detain everybody without actually using any other force."

As they approached the group, the officers ordered everybody to get on the ground. All complied. The officers then handcuffed four of the six people, including Thomas, behind their backs as they were lying face down. They would have handcuffed everybody, but they only had four sets of handcuffs. Thomas and the others were kept on the ground for about ten minutes.

At some point, the officers called for additional officers, who arrived shortly after Thomas was handcuffed. In the meantime, the officers began to frisk each person for weapons. Officer Hovis stated that it was necessary to frisk even those who were on the ground and handcuffed behind their backs because it remained possible for them to access a concealed weapon. Officer Hovis eventually patted down Thomas and found a loaded firearm in his waist area. It was later determined to be stolen. Once the determination to arrest Thomas was made, other officers conducted a search incident to his arrest and found cocaine in his hat. Relevant to one of Thomas's arguments on appeal, Officer Hovis could not recall whether he or any other officer questioned Thomas about the stolen vehicle. He testified that he "knew that [he] was most likely not going to" question Thomas about the aggravated robbery because Dallas Police Department policy prohibited an officer from asking questions about the underlying crime unless the detective assigned to the investigation was present.

Thomas was indicted in August 2018 for being a felon in possession of a firearm. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(2). He filed a motion to suppress evidence derived from the stop and frisk. He argued that it was not enough to justify the stop that officers saw him "in the vicinity" of the stolen vehicle and "reportedly saw him speak to the occupants." The Government opposed the motion, contending that the officers conducted a "by-the-book *Terry* stop and frisk." At a hearing on the motion, Officer Hovis was the only witness to testify. The district court denied the motion, determining, first, that the officers discovered the weapon while conducting an investigatory *Terry* stop, not an arrest. Second, it concluded that it was reasonable to detain all six people because "[t]hey were in a high-crime area and surrounding a stolen vehicle." The court rejected the argument that the officers could detain only those inside the vehicle and needed to order the others to disperse. The court explained that such a requirement would not be "consistent with protecting the officers' safety." Third, the court explained that it was reasonable to suspect that any or all of the people were armed, given the circumstances of the underlying aggravated robbery. Fourth, it determined that the officers' showing of force, ordering Thomas to the ground, and handcuffing him were reasonable under the circumstances. Thomas pled not guilty but agreed to have a bench trial. He stipulated that the Government could prove the basic facts necessary for conviction and reserved the right to appeal the denial of his motion to suppress. Thomas timely appealed solely on the issue of the suppression motion.

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." Warrantless searches and seizures are *per se* unreasonable unless one of the recognized exceptions applies. The Government bears the burden of showing that a warrantless search or seizure fits within one of the exceptions.

One exception to the warrant requirement, first articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), permits officers to conduct "an investigatory stop (temporary detention) and frisk (pat-down for weapons) . . . if two conditions are met." First, the investigatory stop must be supported by a reasonable suspicion "that the person apprehended is committing or has committed a criminal offense." *Id.* Second, assuming the initial stop is lawful, the officer may conduct a protective pat down if the officer "reasonably suspect[s] that the person stopped is armed and dangerous."

When conducting a stop and frisk, officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." The officers' manner of conducting the stop and frisk does not violate the Fourth Amendment unless they "were unreasonable in failing to use less intrusive procedures to safely conduct their investigation."

Each police action must be "justified at its inception." "Reasonable suspicion must exist *before* the initiation of an investigatory detention." Similarly, reasonable suspicion that the suspect is armed and dangerous must exist before an officer may conduct a frisk, but those facts may emerge after the officer initiates the stop.

Thomas makes three arguments on appeal: (1) the stop violated the Fourth Amendment because the officers lacked reasonable suspicion that he was involved in criminal activity; (2) the manner in which he was detained — the officers' drawing their firearms, ordering him to the ground, and handcuffing him behind his back — converted the stop into a *de facto* arrest unsupported by probable cause; and (3) the stop cannot be justified under *Terry* because the officers knew that department policy prohibited their questioning him about the aggravated robbery, and therefore they lacked an investigatory purpose for the stop. We will consider the issues in that order.

Reasonable suspicion to support the stop and the frisk

Reasonable suspicion to support an investigatory stop exists if the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." This standard is met if "specific and articulable facts" give rise to a suspicion that the person stopped "has committed, is committing, or is about to commit a crime." "[T]he level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." The standard "permit[s] officers to make commonsense judgments and inferences about human behavior." Moreover, the Supreme Court has repeatedly recognized that officers "need not rule out the possibility of innocent conduct." Rather, observations capable of innocent explanation may, in the aggregate, amount to reasonable suspicion. "[T]he essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account." Based on this framework, we must determine whether the officers had a particularized and objective basis for suspecting that Thomas was involved in the completed crime of an aggravated robbery. One factor is that Thomas was encountered in a high-crime area, which provides some support for the stop. However, "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing [or has committed] a crime." Thomas's connection to the stolen vehicle, through his close physical proximity and his association with others inside and around the vehicle, is another specific and articulable fact. In urging otherwise, Thomas contends that the stop was unreasonable because the officers lacked suspicions that were particularized to him. He argues that a person cannot be subjected to a *Terry* stop based solely on his proximity to another person suspected of criminal activity. Any "suspect's companionship with or propinquity to an individual independently suspected of criminal activity is a factor to be considered in assessing the reasonableness of a seizure." It was therefore relevant that officers saw Thomas's close interaction with a man sitting in the vehicle's driver seat, as the latter could be independently suspected of involvement in the aggravated robbery.

Thomas emphasizes the fact that he was not inside the stolen vehicle. He sees it as significant that a police report stated that the aggravated robbery was committed by "two African-American males," and that there were two peo-

ple inside the vehicle while Thomas was outside. Further, he contends there is no evidence that he was exercising control over the vehicle. According to Thomas, these facts dispel reasonableness. Certainly, all the facts must be considered in judging reasonableness. Sometimes, "the presence of additional facts might dispel reasonable suspicion." In analyzing a *Terry* stop, though, the "facts [must] be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"

There is no indication in the record that the officers knew how many people were involved in the crime or that such information was available. It was not shown that the report mentioned during the suppression hearing was available to the officers. Thus, the report's details are not relevant in our analysis. Looking at the actions of these officers from an objective standard, as *Terry* requires, it was not unreasonable for them to be uncertain how many people had responsibility for the earlier robbery. Further, regardless of how many people had participated in the earlier crime, it was not unreasonable to suspect that those inside the vehicle might not be the culprits and instead were only being allowed to admire the vehicle stolen by someone standing outside. Thomas was standing next to the driver's door of the stolen vehicle, which could create suspicions that he was discussing with those inside some details of "his" vehicle. Again, all the officers needed was reasonable suspicion as to Thomas, not probable cause. We see nothing in the facts of this encounter that would have allowed the officers to rank which people in the small group next to or inside the vehicle were the most likely offenders. Based on the facts before the officers, it was not unreasonable to suspect that Thomas was involved in the aggravated robbery.

Thomas also argues that it is significant that ten days had passed since the aggravated robbery was committed. The passage of a meaningful period of time since a crime can be a factor in considering reasonableness. In some circumstances, the shorter the temporal gap, the more likely it is that someone in the vicinity of the crime was involved. In this case, the record is unclear about the officers' knowledge of the ten-day gap; they did at least know the crime had not occurred in the last few minutes. Based on his physical proximity to the stolen vehicle and his association with others next to and inside the vehicle, we cannot say that the passage of time since the vehicle was stolen eliminates the reasonableness of the officers' suspicions — of course, no certainty was needed — that Thomas was involved.

The Fourth Amendment does not require that the officers dispel all possible innocent explanations before stopping Thomas. Objectively innocent activities may, in the aggregate, amount to reasonable suspicion of criminal activity. *Id.* Thomas contends that "he was simply visiting and socializing with other people at the apartment complex, a completely lawful act." Even if that is correct, it does not eliminate the reasonableness of suspicion that Thomas, based on his proximity to the vehicle and his association with others inside and around it, was involved.

Regardless, the decision to stop Thomas was not based on his proximity to a person already Identified as the suspect of criminal activity. Instead, no specific person had been identified as a suspect for the aggravated robbery; Thomas was one of a few people to whom suspicion Reasonably attached. Thomas's close physical proximity to a vehicle that was known to be stolen and his conversation with the person in the driver's seat provide support for suspicions particularized to him.

We hold that the officers were reasonable in suspecting that at least some of the people around and inside the vehicle had been involved in the aggravated robbery. On the other hand, we are not holding that officers would have *carte blanche* to detain an entire group, no matter how large, simply because they have reasonable suspicion that among them is someone who has committed an offense. Suspicion must be particularized based on the relevant facts. Thomas and only a few others were surrounding a stolen vehicle and engaging in group conversation. Thomas was the closest to the driver's seat, potentially explaining the details of his recent acquisition to those seated inside.

Thomas does not appear to challenge the officers' authority to conduct a frisk. "[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." Assuming the initial stop was lawful, "[i]n order to ensure their safety during the stop, police may frisk the subject for weapons that they reasonably suspect he may carry." Further, "when someone engages in suspicious activity in a high crime area, where weapons and violence abound, police officers must be particularly cautious in approaching and questioning him."

II. Exceeding permissible scope of an investigatory stop

Thomas contends that his detention was actually a *de facto* arrest requiring probable cause, not an investigatory stop requiring only reasonable suspicion. He argues that the officers' drawing their firearms, ordering him to the ground, and handcuffing him behind his back before frisking him converted the stop into an arrest.

Our analysis of whether the actions by officers prior to the discovery of Thomas's firearm exceeded the scope of a proper *Terry* stop is directed by the principle that officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop."

"[U]sing some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect — whether singly or in combination — do not automatically convert an investigatory detention into an arrest requiring probable cause."

In a case involving an investigation into a bank robbery, we held that it was reasonable for an officer to draw his weapon, order the suspect to lie on the ground, and handcuff him before a frisk. In another *Terry* stop case, we held that it was reasonable to detain a suspect at gunpoint, handcuff the suspect, and place the suspect in a police car.

At the time of the stop, the officers were outnumbered six to two in a high-crime area known for drug and violent crime. Further, the crime they were investigating was an aggravated robbery involving a weapon. The officers made a judgment call "to surprise them and detain everybody without actually using any other force." According to Officer Hovis, Thomas and the others were kept on the ground for about ten minutes. On these facts, the officers' actions were reasonable. As to the length of the detention, apparently about ten minutes, *Terry* stops of that length are permissible.

The officers' actions were reasonable under the circumstances, and the stop was not converted into an arrest prior to Thomas being frisked.

III. Department policy precluding investigatory questioning

Thomas argues that his detention cannot be justified under *Terry* because, pursuant to a Dallas Police Department policy, the officers were prohibited from asking the detainees about the aggravated robbery because only the detective assigned to the offense is to question a suspect. According to Thomas, officers cannot rely on *Terry* unless they have an investigatory purpose in mind. Based on the department policy, Thomas argues that the officers in this case lacked the requisite investigatory purpose. It would seem that accepting this argument could largely prohibit Dallas police from engaging in *Terry* stops. It is unnecessary, though, to explore how the dictates of the policy might have affected the proper rationale for the stop. The issue before us is whether the officers' conduct violated the Fourth Amendment or, instead, was permissible under *Terry*.

Whether a police department's specific policy limits officers from engaging in conduct that the Constitution permits has little relevance to the question of whether to suppress evidence due to a violation of the Constitution it-

self. The Supreme Court has held an arrest by state officers to be constitutional even though the arrest violated a more-stringent state-law limitation for minor offenses. The Dallas Police Department's local policy does not affect the constitutionality of the officers' conduct in this case. AFFIRMED.

***U.S. v. Thomas*, No. 20-10757, Fifth Circuit, May 17th, 2021.**
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PROBABLE CAUSE – WIRETAP

Defendant-Appellant Troy "99" Kendrick was charged and convicted of conspiracy to distribute cocaine base ("crack cocaine") and possession of a firearm by a convicted felon. He now contests the Government's Title III wiretap that intercepted calls and text messages from his phone, the sufficiency of the evidence on his drug conspiracy conviction, the district court's sentencing enhancement for possessing a firearm, and the effectiveness of counsel. We affirm.

The wiretap events are drawn from Drug Enforcement Administration (DEA) Special Agent (SA) Scott Arseneaux's supporting warrant affidavits.

1. *The Garrick Jones Surveillance and Wiretap*. The DEA and St. John Parish Sheriff's Office (SJPSO) initially investigated Kendrick's co-defendant Garrick "Gnu" Jones and used a reliable confidential source/informant to surveil Jones distributing crack cocaine. The narcotics transactions involving the informant and Jones occurred on January 4 and February 17 of 2016, and on March 10, the informant was involved in a physical altercation with Jones.

• **January 4**: The DEA and SJPSO officials witnessed the informant contact Jones at his phone number, Telephone #1,1 to arrange meetings to purchase crack cocaine. The informant met with Jones at Jones's Reserve, Louisiana home and purchased 12 grams of crack cocaine. According to the informant, he witnessed Jones initially meet Kendrick in the front of Jones's home to purchase crack cocaine before subsequently selling the narcotics to the informant.2

• **February 17**: The DEA and SJPSO again observed the informant contact Jones (via Telephone #1) to arrange a meeting to purchase a half-ounce of crack cocaine from Jones. Once the informant and Jones agreed to meet, the DEA and SJPSO surveillance units followed the informant as he or she traveled to Jones's home wearing a recording device. After the informant arrived at Jones's residence, the DEA and SJPSO observed Jones walk to the next-door neighbor's home to meet with an unknown individual, who was later identified as Kendrick.3 After meeting with Kendrick, Jones returned to his residence to complete his transaction with the informant that was for approximately 12 grams of crack cocaine.

• **March 10**: The DEA and SJPSO directed the informant to contact Jones to purchase more crack cocaine, but Jones never responded. Later that day, co-defendant Travis "Tree" Carter (1) contacted the informant; (2) informed the informant that Carter would be taking over for Jones; and (3) told the informant to meet him at another Reserve location. The informant met with Carter and shortly thereafter, sent a distress signal to the DEA and SJPSO. The DEA and SJPSO officials arrived and witnessed Jones and Carter fleeing the scene after attempting to assault the informant with a piece of lumber. Jones and Carter were arrested and subsequently released because the informant did not want to press charges in fear of retaliation.
In late April, SA Arseneaux attested to the foregoing investigative facts as a basis for probable cause to obtain a wiretap on Jones's Telephone #1. A district judge signed an order authorizing the Title III wire intercepts, and on May 12, the DEA officials began monitoring Telephone #1.

• **May 12**: The DEA agents intercepted an incoming 4:07 p.m. call from an unidentified woman calling Jones. The unidentified woman asked for "a dime," and Jones confirmed that he was in possession of one. A minute later (4:08 p.m.), Jones sent a text message to a number associated with Telephone #2, which the authorities determined

was Kendrick's telephone number. Jones's text message asked Kendrick where he was located, and Kendrick responded: "leaving Home Depot."

• **May 17**: The DEA agents intercepted an incoming 9:32 a.m. call from another woman calling Jones. During the call, Jones described a recent situation where he "flushed everything [he] had last night" because he was supposedly concerned about law enforcement surrounding his home. The caller then inquired as to whether Jones "re-up['ed]," and Jones stated that he was "waiting on my [sic] to come through right now." Five minutes after the call ended (9:37 a.m.), the agents intercepted an outgoing call from Jones to Telephone #2, where Kendrick picked up and greeted Jones. Jones replied that he "need[ed] [Kendrick] til tomorrow man" to which Kendrick stated, "I got you." Jones subsequently sent an outgoing 3:31 p.m. text message to the number that called him at 9:32 a.m., stating "I'm back gud."

• **May 20**: Jones sent an outgoing 5:00 p.m. text message to Telephone #2, stating "Bring me 1." At 5:48 p.m., Kendrick (using Telephone #2) called Jones, asking Jones where Jones was currently located. Jones informed

Kendrick that he was "in the truck with Tree [and that he was] coming to get that [in a] little bit, man." Kendrick told Jones that he was at a Valero gas station and Jones confirmed that he was "about to be coming to get that."

• Using pen registers and other trap and trace data, the DEA determined that, from May 1 to May 24, there were 8,340 calls and 6017 text messages exchanged between Telephone #1 and Telephone #2.

2. *The Kendrick Wiretap*. Based on the foregoing intel, SA Arseneaux submitted a Title III wiretap affidavit in which he attested and analyzed the investigative facts to conclude (based on his experience) that Jones relied on Kendrick as his drug supplier. He also believed that there was probable cause to monitor Kendrick's Telephone #2, and on June 13, the Title III wiretap request was granted (via court order) for a 30-day window.

• **June 13**: The DEA agents intercepted an incoming 3:59 p.m. text message from Kendrick to Jones, stating "Wya"—which is a common acronym for "where you at." One minute later (4:00 p.m.), the agents intercepted an incoming text message from Jones to Kendrick, stating "Da Crib. I need 1," and within seconds, Kendrick replied via text message, "[c]oming."

• **June 22**: The DEA agents intercepted an incoming 9:06 p.m. text message from Jones to Kendrick, asking "U around", and at 9:12 p.m., Kendrick sent outgoing text message replying "Yes." At 9:15 p.m., Jones responded (via text message) that he "need[s] 1."

• **June 23**: The DEA agents intercepted a series of text messages between Jaden "Jordy" Robertson and Kendrick, which included, in relevant part: an incoming 3:25 a.m. text from Robertson stating "Wats man? I will have something today for u," and an outgoing 8:01 p.m. text message from Kendrick to Robertson stating, "Hey I need to buy 1 too."

3. *The Search Warrant and Kendrick Arrest.* Given the incriminating wiretap communications and other events (including, *inter alia*, Jones's drug transactions with the informant and the assault of the informant in March), SA Arseneaux concluded that based on his experience, Kendrick was Jones's supplier. He also believed there was probable cause to search Jones's and Kendrick's adjacent homes for evidence of drug trafficking. A search warrant application was presented to a magistrate judge, and the judge authorized the search.

In executing the warrant on Kendrick's home, the DEA officials located and seized: (1) a digital scale located on Kendrick's person; (2) two bottles of mannitol; (3) scattered cash amounting to roughly $10,000; (4) one loaded firearm; (5) an invoice listing items commonly used for growing marijuana; (6) packaging material; (7) a money counting machine; (8) a bulletproof vest; and, (9) concealed under the floorboard in the bedroom closet, a compartment that contained four handguns, ammunition, cash, a ski mask, and gloves. No narcotics were seized.

The DEA agents arrested Kendrick (along with his co-defendants Jones, Carter, Michael Sanders, and Reshad Frank), and a grand jury indicted them in a nine-count complaint for offenses related to drug trafficking.

Motion to Suppress

Kendrick moved to suppress the evidence recovered from the Title III wiretaps.4 Kendrick's main argument focused on a discrepancy between SA Arseneaux's affidavit and a SJPSO police report describing the January 2016 transaction involving the informant and Jones. While the informant stated that Jones met with Kendrick during that drug transaction (*see, supra*, Sect.A.1), this police report stated that "the individual that was present . . . was in fact [codefendant] Travis Carter," not Kendrick. Kendrick claims that the Government deliberately misidentified him. In response, the Government posited that all the wiretaps were supported by probable cause and Kendrick's arguments point to SA Arseneaux's credibility, which is a jury question. The district court held a hearing to determine whether Kendrick could demonstrate that the Government's affidavits contained deliberate falsehoods or were made with reckless disregard for the truth—thus, warranting an evidentiary hearing under *Franks v. Delaware*. 438 U.S. 154 (1978). After hearing the parties' arguments, the court concluded that there were no deliberate falsehoods in the challenged affidavit and denied the motion.

Motion to Suppress and *Franks* Hearing

According to Kendrick, the district court erred in its suppression motion ruling and denial of a *Franks* hearing. On review of a district court's motion to suppress ruling, we review factual findings for clear error and conclusions of law de novo.

In reviewing a motion to suppress and *Franks* hearing request, we've stated that a warrant "must be voided if the defendant shows . . . that the affidavit supporting the warrant contained a false statement made intentionally or with reckless disregard for the truth and, after setting aside the false statement, the affidavit's remaining content is insufficient to establish probable cause." To resolve a challenge to an affidavit's veracity, we first determine if it contains a false statement or material omission; if so, then we decide whether "the false statement [or omission was] made intentionally or with reckless disregard for the truth"; if so, (3) we must ask "if the false statement is excised, does the remaining content in the affidavit fail to establish probable cause?"

Kendrick contends that SA Arseneaux's Title III wiretap affidavit contained false statements and material omissions that were reckless. Once these misstatements are removed under *Franks*, Kendrick maintains that what remains in the affidavit is SA Arseneaux's conclusory interpretations of Kendrick's otherwise innocuous calls and text—which are insufficient to support probable cause. We disagree. Probable cause still exists even if the allegedly false statements are excised.

"Probable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought [by the warrant] constitute fruits, instrumentalities, or evidence of a crime."

The following table illustrates Kendrick's challenged statements in comparison to the affidavit's remaining content:

<u>Alleged Falsehoods and Omissions</u>

Misidentifying Kendrick as the individual involved in the January 2016 transaction with Jones and the confidential informant, when it was in fact Carter;

Misclassifying a May 17, 2016 call as *outgoing* from Jones to Kendrick, when in fact it was *incoming* from Kendrick to Jones;

Omitting exculpatory context from the same May 17 call in which Kendrick and Jones discussed non-drug-related topics including a basketball game;

Misclassifying Kendrick as the person near the Valero gas station, when in fact it was Jones; and

• Omitting social calls between Kendrick and Jones (including a May 12 call) that support the assertion that they had non-drug-related communications.

Unchallenged Affidavit Content

February 17 transaction where the informant identified Kendrick as the supplier that Jones meets with during the drug deal;

• May 12 events in which an unidentified individual contacted

Jones for a dime and a minute later, Jones contacted Kendrick to determine his location;

• May 17 exchange between Jones and Kendrick in which Jones said he needed Kendrick which occurred five minutes after a caller asked Jones if he resupplied his drug inventory;

• May 20 text message from Jones to Kendrick stating "Bring me 1" followed by them coordinating a meetup location; and

• The pen register and trace data that provided that Kendrick and Jones participated in 8,340 calls and exchanged 6017 text messages in a little over three weeks.

The remaining *unchallenged* affidavit content sets out events that SA Arseneaux believed indicated that trafficking offenses had been committed, including Jones selling crack cocaine and Kendrick distributing crack cocaine to local dealers like Jones. Indeed, the affidavit's contents undoubtedly confirm that Jones sold drugs to the informant on one occasion where he met with Kendrick amidst completing the drug transaction; and when Jones needed to make local drug sales, he contacted Kendrick about resupplying him and they made efforts to meet. Coupling this with the sheer number of communications exchanged between them, we find that the totality of the circumstance supports a probable cause finding. ("Probable cause existed here without any of the challenged material."). Thus, the bottom line is that even after excising these alleged falsehoods and omissions, the affidavit still included many other facts that incriminated Kendrick and his involvement with Jones, giving rise to probable cause.

Kendrick was therefore not entitled to an evidentiary *Franks* hearing, and the district court correctly denied Kendrick's motion to suppress.

(Other appellate and sentencing issues were resolved against the defendant.)

For the reasons set forth above, we AFFIRM the district court's motion to suppress finding; Kendrick's conspiracy to distribute conviction; and the court's sentencing calculation.

***U.S. v. Kendrick, Jr.*, 5th Cir.# 19-30375, July 24, 2020**.

Andre Staggers, Leonard Morrison, and Corey Session were jointly indicted and tried in a drug-conspiracy prosecution. Staggers and Session were found guilty of the charged conspiracy, but Morrison was found not guilty. The jury also found that both Staggers and Session knew or reasonably should have known that the conspiracy involved one kilogram or more of heroin. Because of their prior convictions, Staggers and Session each received a mandatory term of life in prison due to the jury's verdict on the conspiracy charge and its drug-quantity finding. Several weeks after they were sentenced, Congress passed the First Step Act, which reduced the mandatory minimum sentence applicable to defendants like Staggers and Session. On appeal, Staggers and Session argue that they should be resentenced, since their convictions were not final when the First Step Act became effective. We conclude, however, that the relevant provisions of the First Step Act do not apply to defendants who were sentenced before the Act's effective date.

In addition to finding Staggers and Session guilty of conspiracy, the jury found all three defendants guilty of violating 18 U.S.C. § 922(g)(1), which prohibits convicted felons from possessing firearms. When the district court tried this case, our precedent—along with precedent from every other circuit court to have considered the issue—held that knowledge of one's felon status was not an element of a § 922(g)(1) offense. The Supreme Court overruled this precedent while this appeal was pending, so Staggers and Morrison now contend that they are entitled to a new trial. We hold that they are not so entitled.

Finally, we address several issues, each of which affects only one defendant. Morrison argues that the warrantless search of his home was not consensual and that the district court should therefore have granted his motion to suppress the fruits of that search. Session, meanwhile, contends that one of the district court's evidentiary rulings was an abuse of discretion and that there was legally insufficient evidence for the jury to conclude that he knew or reasonably should have known that the conspiracy involved one kilogram or more of heroin.
We conclude that Morrison's argument regarding his motion to suppress is the only single-defendant issue having any merit. At the suppression hearing, the district court heard testimony setting out two very different versions of events regarding the search of Morrison's home. Both versions agreed, however, that no one objected when law-enforcement officers entered Morrison's home. The district court erroneously believed that this was enough to render the entry—and the subsequent search—consensual, so it did not decide which version of events to credit. Because a credibility determination was necessary, we vacate the district court's decision to deny Morrison's motion to suppress and remand for further proceedings. In all other respects, we affirm the judgment of the district court.

The Drug Enforcement Administration, in partnership with state and local law enforcement, began investigating drug trafficking in LaPlace and St. Rose, Louisiana after receiving a tip from a confidential informant in January 2015. The DEA subsequently obtained judicial authorization for wiretaps of telephones belonging to Andre Staggers, Corey Session, and two other subjects of the investigation. Based in part on these wiretaps, the DEA obtained search warrants for Staggers's residence, Session's residence, and a suspected stash house.

The DEA executed those search warrants on February 25, 2016. At Staggers's residence, the DEA found: (i) approximately 460 grams of heroin; (ii) a loaded assault rifle; (iii) drug paraphernalia; (iv) a money counter; (v) over $460,000 in cash; and (vi) mail addressed to Staggers. Session's residence contained: (i) a loaded assault rifle; (ii) a loaded pistol; (iii) bottles of mannitol, a cutting agent used to dilute cocaine and heroin; (iv) drug paraphernalia; (v) over $1,000 in cash; and (vi) mail addressed to Session. Inside the third house, the suspected stash house, the DEA seized: (i) over 500 grams of heroin; (ii) 11 grams of powder cocaine; (iii) 37 grams of crack cocaine; (iv) an assault rifle; (v) a pistol; (vi) ammunition of various calibers; (vii) bottles of mannitol; (viii) drug paraphernalia; (ix) a money counter; (x) $14,000 in cash; (xi) mail addressed to Session; and (xii) identification cards belonging to Session.

On the same day, the DEA conducted a warrantless search of Morrison's residence. The United States and Morrison disagree about whether this search was consensual—and, hence, whether it yielded admissible evidence—

but they do not dispute its results. As relevant to this appeal, the law-enforcement officers searching Morrison's house asked him whether there was a weapon in the house. Morrison told them that he found a firearm in his attic and moved it to his bedroom closet for safekeeping. The officers found that firearm, which was partially loaded, in the location that Morrison had indicated.

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In addition to the conspiracy charge, all three defendants were charged with violating 18 U.S.C. § 922(g)(1), which prohibits felons from possessing firearms.

Before trial, Morrison moved the district court to suppress the evidence obtained during the warrantless search of his residence, arguing that the search—particularly the initial entry of law-enforcement agents into his house—was not consensual. The district court held an evidentiary hearing at which the United States called the two law-enforcement officers who made that entry, Rohn Bordelon and David Biondolillo, to the stand. Bordelon and Biondolillo testified that they knocked on Morrison's door at approximately 6:00 a.m. and identified themselves to Shlonda Jupiter—Morrison's live-in girlfriend and the mother of his children—who answered the door. They asked her whether Morrison was present and, while speaking with Jupiter, the officers saw Morrison in the hallway behind her, which led Bordelon to call out to him. Bordelon testified that: (i) Jupiter "stepped back and opened the door some more"; (ii) he subsequently asked Morrison whether he could come inside and talk; and (iii) Morrison answered in the affirmative. Similarly, Biondolillo testified that he remembered Jupiter "kind of moving out the way, her opening the door allowing us in."

Once inside, Bordelon told Morrison that he "smelled a strong odor of burnt marijuana and that it smelled like it was still burning." Morrison replied that he had smoked a marijuana cigarette the night before. Bordelon commented that it smelled like the marijuana was still burning, which prompted Morrison to lead Bordelon to the master bedroom to show him a partially burnt marijuana cigarette on the dresser. At about this time, Bordelon read Morrison his *Miranda* rights and Morrison agreed to continue talking to Bordelon. Bordelon then asked Morrison for consent to search the property and to sign a consent-to-search form. Morrison gave his consent and signed the form after Bordelon explained its contents. Both Bordelon and Biondolillo testified that no one threatened to arrest Jupiter or take away Morrison's children if he refused to sign.

Morrison, on the other hand, called Jupiter as a witness, and she told a significantly different story regarding the initial entry into her residence. Jupiter testified that she stood between the door and the doorframe while talking to Bordelon and Biondolillo, who "pushed the door open and came bumping in." According to Jupiter, Bordelon and Biondolillo did not speak to Morrison while standing outside the house, much less obtain permission from Morrison to enter. Instead, the officers "pushed past" Jupiter and stood in the living room until Jupiter brought Morrison out of the bedroom to speak with them. Additionally, Jupiter testified that, after being released from jail following his arrest, Morrison "said they told him they was going to take the kids and bring [her] to jail" if he did not sign the consent-to-search form.

The district court denied Morrison's motion to suppress. It found that Bordelon and Biondolillo did not coerce Morrison to sign the consent-to-search form by threatening to arrest Jupiter or take away Morrison's children, although the district court allowed that "Morrison may have told Jupiter that the officers threatened him." The district court also found that "under the totality of the circumstances, Jupiter gave implied consent for the officers to enter the residence." The district court did not, however, decide whether Jupiter's testimony or the testimony of Bordelon and Biondolillo was more credible. Such a credibility determination was unnecessary, in the district court's view, because the district court believed that "testimony of all parties indicates that there was no forced entry nor antagonistic response" and "Jupiter did not testify that the officers physically moved her out of the way."

The case went to trial in August 2018. The United States presented evidence regarding the firearm found at Morrison's home as well as the evidence found while executing the search warrants for Staggers's residence, Session's residence, and the suspected stash house.

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The jury found all three defendants guilty of possessing a firearm in violation of § 922(g)(1). The jury found Staggers and Session—but not Morrison—guilty of conspiring to distribute and to possess with intent to distribute heroin and cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A), 846.

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We now turn to an issue that is raised by Morrison alone, whether the district court erred by denying his motion to suppress. "When a district court denies a motion to suppress evidence, we review the factual findings for clear error and legal conclusions about the constitutionality of the conduct of law enforcement officers *de novo*." "Under the Fourth Amendment, a warrantless search of a person's home is presumptively unreasonable, and it is the government's burden to bring the search within an exception to the warrant requirement." *The government does not need a warrant if it receives: (i) consent; (ii) that is voluntarily given; (iii) by someone with actual or apparent authority; and (iv) the search does not exceed the scope of the consent received. (EMPHASIS BY ED.)*

In challenging the denial of his motion to suppress, Morrison argues that the district court clearly erred when it evaluated the first, second, and third elements of a consent search. We remand for further proceedings regarding whether consent was given, but we conclude that the district court did not clearly err regarding voluntariness or authority.

Consent to a search does not need to be explicit, but it can be inferred from silence or failure to object to a search only if that silence follows a request for consent. Consent may also be inferred from actions that reasonably communicate consent.

The district court concluded that Morrison's girlfriend, Shlonda Jupiter, gave implied consent for two law-enforcement officers, Rohn Bordelon and David Biondolillo, to enter her residence. The district court acknowledged that "[t]he officers testified that Jupiter initially opened the door about half way and then opened it wider and stepped aside for them to enter" while Jupiter "testified that she opened the door a little and stood between the door and the frame, but that she did not open it wider and step aside to allow the officers in." The district court did not decide to credit one version of events over the other; instead, it reasoned that Jupiter gave implied consent because "testimony of all parties indicates that there was no forced entry nor antagonistic response" and "Jupiter did not testify that the officers physically moved her out of the way."

This reasoning is faulty. The officers did not testify—nor did the district court find—that they asked Jupiter for permission to enter, so her failure to object does not constitute implied consent. Thus, Jupiter implicitly consented to the officers' entry, if at all, by opening the door wider and stepping aside, a gesture that could be understood as communicating consent depending on the surrounding circumstances. But the district court, while aware of the conflicting testimony on this point, elected not to resolve it.

The United States asks us to infer that the district court made the requisite finding, i.e., that Jupiter opened the door wider and stepped back to allow the officers to enter, but we decline to do so. A district court "must state its essential findings on the record" if "factual issues are involved in deciding a motion." Where a district court fails to make a finding, we will ordinarily affirm if "any reasonable view of the evidence supports" the district court's decision. This practice assumes, however, that the district court "asked the right legal questions in making its ruling" and "actually weighed the evidence bearing on the facts needed to answer them." If there is "a basis to question" one of those assumptions, we may remand instead of affirming.

There is reason to question both assumptions in this case. As to the first assumption, the district court erroneously believed, contrary to our precedent, that Jupiter's failure to object to the officers' entry constituted implied consent absent a request for consent from the officers. Regarding the second, the district court avoided weighing the conflicting testimony presented and instead based its decision on matters about which Jupiter and the law-enforcement officers agreed. Because the district court did not make a necessary finding, and because we are not cer-

tain how the district court would have ruled if it had addressed the issue, we remand for further proceedings.

Morrison argues that, even if Jupiter gave implied consent, it was not given voluntarily, but the district court did not clearly err by concluding otherwise. *Voluntariness depends on the totality of the circumstances, and we have identified six relevant factors:*
the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. (EMPHASIS BY ED.)

According to Morrison, the district court erred in applying the coercive-procedures factor, impermissibly shifted the burden of proof to Morrison, and incorrectly analyzed the totality of the circumstances.
We disagree. First, the district court did not clearly err in analyzing the coercion factor. The court concluded that the knock-and-talk conducted by Borden and Biondolillo was noncoercive, because it was peaceful, the officers "did not shout at or threaten Jupiter," and the officers had their weapons holstered. This supports a finding of voluntariness. That the officers arrived in the early morning does not necessarily render the knock-and-talk coercive or unreasonable.

Second, the district court did not improperly shift the burden of proof to Morrison. Morrison claims that the United States did not present evidence of Jupiter's awareness of her right to refuse consent, her intelligence, or her belief that incriminating evidence would be found. But the district court did not clearly err in concluding that the Government met its burden on these issues; we have allowed such conclusions to stand when defendants have "presented no evidence that [the consenting party] was unaware of h[er] right to deny consent, nor any evidence that [s]he was mentally deficient or unable to exercise h[er] free will in consenting." Besides, Jupiter's testimony indicates she knew that she could refuse consent, because she claimed that she "was about to shut the door" on the officers when they barged in. And because the record "leads us to conclude that [Jupiter] had at least average intelligence and education," the district court's failure to make a specific finding on that factor does not merit reversal.

Last, the district court's evaluation of the totality of the circumstances was not clearly erroneous, because several of the relevant factors indicate that Jupiter's consent, if given, was voluntary. Jupiter was not in custody or arrested, and the officers did not use coercive procedures. And Jupiter's testimony that she retrieved Morrison while Borden and Biondolillo waited in the living room evidences cooperation with law enforcement. Paired with the absence of any compelling evidence of involuntariness, this leads us to conclude that the district court did not clearly err when it found, based on the totality of the circumstances, that Jupiter acted voluntarily.

Morrison's final argument regarding his motion to suppress is that the district court clearly erred by concluding that Jupiter had authority to consent to the officers' entry. To be valid, consent must be given by the defendant or by a third party with actual or apparent authority. Actual authority exists when the third party and the defendant "mutually used the property searched and had joint access to and control of it for most purposes." Apparent authority exists when "the searching officers 'reasonably (though erroneously) believed that the person who has consented to their' search had the authority to so consent." Because Jupiter lived with Morrison, the district court did not clearly err by concluding that she had actual authority.

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As to Session and Staggers, we AFFIRM the judgment of the district court in all respects. As to Morrison, we VACATE the conviction and sentence and REMAND to the district court to obtain additional findings. If the district court again denies Morrison's motion to suppress, it shall reinstate the conviction and sentence.

U.S. V. MORRISON, et. al., 5th Circuit, # 18-31213, June 09th, 2020.

SEARCH & SEIZURE – CONSENT
REASONABLE SUSPICION – EXTENDING TRAFFIC STOP

Andres Soriano appeals the district court's denial of his motion to suppress on grounds that he did not voluntarily consent to the search of his vehicle conducted during a traffic stop. For the following reasons, we AFFIRM.

In August 2018, Soriano was arrested during a traffic stop after a search of his vehicle revealed a suitcase that contained nine bundles of a substance later determined to be cocaine having a total weight of 10,715 grams. He was charged with possession with the intent to distribute five kilograms or more of cocaine. *See* 21 U.S.C. § 841.

Soriano moved to suppress the discovery of the cocaine. He contended that the police officers who conducted the traffic stop, Carla Rodriguez-Montelongo and Javier Ramirez, "unjustifiably prolonged his detention beyond the amount of time needed to complete the purpose of the traffic stop" in violation of his Fourth Amendment rights. He also argued that his consent to search his vehicle was involuntary under this court's six-part test for determining whether consent was given freely and voluntarily.

The magistrate judge (MJ) conducted a hearing on Soriano's motion. Officer Rodriguez testified at the hearing that on the day in question, she was traveling eastbound on Interstate 10 with her partner, Officer Ramirez, performing routine traffic patrol. Soriano was travelling in his vehicle eastbound and passed Officer Rodriguez's patrol car. The speed limit was 80 miles per hour and Officer Rodriguez clocked Soriano driving at 90 miles per hour. She also observed that the vehicle's window tint appeared to exceed the legal limit. She activated her emergency lights to make a traffic stop, which automatically activated the patrol car's dash-cam video and the officers' body cameras.

Officer Rodriguez1 approached Soriano's vehicle on the passenger side and speaking in Spanish, informed Soriano of the reason for the traffic stop: "speed and the window tint." She ran a "tint meter" on Soriano's windows, which confirmed that his window tint exceeded the legal limit. Soriano then volunteered that his driver's license had been suspended for approximately two years due to his prior receipt of tickets for speeding and driving without insurance.

Officer Rodriguez asked Soriano where he was going, and he responded that he was traveling from El Paso to Odessa to see his mother and brother and that he planned to return that day, that night, or the next day. According to Officer Rodriguez, it was rare for people to make such a trip on a Sunday. In her experience, people would typically leave on Friday and return the following Sunday or Monday, particularly if they planned to visit family. Soriano's story did not seem credible to her and raised her suspicion that he was not being truthful.
Officer Rodriguez asked for Soriano's registration and he handed it to her. She asked him when was the last time that he had been pulled over, and he responded that it had been a while because he usually drove cautiously. She asked if Soriano had ever been arrested and he asked her to repeat the question, which raised "red flags" with her because she believed that he was stalling to come up with an answer. Soriano stated that he had been arrested a year and a half prior "for tickets."

Officer Rodriguez asked Soriano to roll down the rear window and she observed a large duffle bag or suitcase in the back seat. This made her suspect that Soriano was not being truthful because he had told her that he was returning that night or the next day, but the bag appeared too large for such a short trip. When Officer Rodriguez questioned Soriano about the size of the suitcase, he stated that he was actually going to stay in Odessa for a couple of days. When Rodriguez confronted him with the discrepancy in his story—short versus long stay—he began to backpedal and replied that he was not sure if his mother was home so he may end up returning sooner than he had planned. Officer Rodriguez testified that she found Soriano's explanation strange because he had not called his mother to confirm that she would be home before driving so far to see her. She then testified that at this point, Soriano seemed very nervous because his face was flushed and he was beginning to sweat. She suspected that he was

hiding something.

Officer Rodriguez asked Soriano to exit the vehicle. She asked if he had anything illegal in the vehicle and he immediately looked at the car. She testified that based on her training and experience, she took Soriano's reaction as a sign that the car likely contained contraband. She asked Soriano about the contents of the suitcase and he responded that it contained clothes and showed her the top layer of clothes. She asked Soriano what was in his trunk, and he opened it. The trunk contained multiple gallon containers of gasoline and he explained that gasoline was "cheaper in El Paso."

Officer Rodriguez told Soriano that he would receive a citation for driving without a license and that they would proceed after a records check. She returned to her patrol car to run "criminal history" and "border" checks. She learned that Soriano had been arrested two months prior for theft, unlawful possession of a dangerous weapon, and possession of a controlled substance. Her suspicions escalated due to the disparity between this information and Soriano's earlier statement that he had been arrested a year and a half prior "for tickets." She returned to Soriano's vehicle and questioned him about the discrepancy and he admitted to having been arrested for theft but did not mention the weapon and controlled substance charges.
Officer Rodriguez then asked if Soriano had anything illegal in the vehicle such as cocaine, marijuana, ecstasy, or large amounts of money. He replied "Nothing, nothing" but she observed that he appeared to grow more nervous. She then asked, "Do you give me permission to check the car?" and Soriano responded, "Check it." She continued, "If I call the dog right now from the checkpoint, do you think it will alert?" Soriano replied, "No, you can bring him." She then informed him that he would receive a citation for not having a license and for speeding and a warning for the tint. Both officers put on their gloves in anticipation of searching Soriano's vehicle. She asked him to empty his pockets, which revealed $2,000 in his wallet. He explained that the money was from his work as a cook and manager.

Officer Rodriguez testified that she searched Soriano's vehicle based on his voluntary consent and that she was detaining him based on her reasonable suspicion. She did not place him under arrest or put him in her patrol car. She then discovered nine "kilo sized bundles" of cocaine in the suitcase and placed Soriano under arrest.

After considering the testimony and arguments from counsel, the MJ recommended that the district court deny Soriano's suppression motion. The MJ found that Officer Rodriguez had reasonable suspicion to extend the traffic stop and that the totality of the evidence weighed in favor of a finding that Soriano voluntarily consented to the search. The district court adopted the MJ's report and denied Soriano's motion to suppress.

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The sole issue on appeal is whether the district court erred in concluding that Soriano voluntarily consented to the search of his vehicle. We hold that it did not.
…
If a factual finding is "plausible in light of the record as a whole," it is not clearly erroneous.
…
A warrantless search is presumptively unreasonable, subject to certain exceptions, such as voluntary consent. "The voluntariness of consent is a question of fact to be determined from a totality of the circumstances." To evaluate the voluntariness of consent, we consider the following six factors: (*emphasis by ed.*) "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found."

Here, the district court determined that three factors weighed against a finding of voluntariness: Soriano was involuntarily detained; Officer Rodriguez did not inform him of his right to refuse consent; and Soriano likely be-

lieved that incriminating evidence would be found. It also found that three factors favored a finding of voluntariness: the lack of coercive police procedures; the extent of Soriano's cooperation; and Soriano's education and intelligence. Although the factors were essentially even on both sides, the district court concluded that, based on the totality of the circumstances, Soriano's consent was voluntary. We agree and will discuss each factor in turn.

A. Voluntariness of Custodial Status

Voluntariness of custodial status turns on whether a reasonable person in the defendant's position would feel free to terminate the encounter. Whether an investigating officer has returned a defendant's license and documents and has provided the citation as promised are relevant to whether a reasonable person would feel free to terminate the encounter.

After Soriano provided Officer Rodriguez with his vehicle's registration approximately four minutes into the encounter, she continued to retain possession of the registration throughout the period that she questioned Soriano and at the time that he consented to the search. She also informed Soriano that she intended to issue him a citation for driving without a license, yet she had not issued that citation as of the time that he consented to the search.

A reasonable person in Soriano's position "might not have felt free to leave until he was issued the promised [citation] and his [registration] had been returned." *Id*. Accordingly, it was not clearly erroneous for the district court to weigh this factor against a finding of voluntariness.

B. Presence of Coercive Police Procedures

Soriano contends that Officer Rodriguez employed coercive police procedures when she suggested that Soriano was not being truthful, repeatedly asked whether he had any illegal substances, and deceived him by telling him that Officer Ramirez agreed that her questions were clear. The district court concluded that no coercive police procedures were utilized in obtaining Soriano's consent to search his vehicle. Although Officer Rodriguez pointed out the inconsistencies in Soriano's statements, the district court found that her statements and questions were not intended to trick him into consenting. The district court also noted that Soriano failed to point to case law indicating that confronting a defendant with inconsistent statements is a coercive police procedure. We agree. Officer Rodriguez's statements—made during a valid traffic stop that was prolonged due to reasonable suspicion—were a means of investigating in order to confirm or dispel her suspicions.

As to the issue of deceit, after Officer Rodriguez ran the criminal history and immigration checks in the patrol car and returned and confronted Soriano with the fact that he had lied about his most recent arrest, he acted confused about her questions. Officer Rodriguez told Soriano that she believed that her questions had been clear and that Officer Ramirez agreed that her questions were clear. In actuality, however, the extent of the interaction between Officers Rodriguez and Ramirez was limited to Rodriguez remarking "seems kind of weird" and Ramirez responding "yes." In other words, Officer Ramirez never explicitly told Officer Rodriguez that he believed that her questions were clear. Soriano argues that Rodriguez used this misrepresentation of unanimity to pressure him and that doing so amplified the coercive nature of her accusations.

The district court determined that Officer Rodriguez's statement to Soriano, despite being untruthful, was not the type of "trickery" this court has deemed a coercive tactic. Additionally, the district court observed that the statement was meant to ensure that Soriano understood Officer Rodriguez throughout the entire stop and to prompt him to answer truthfully—not to pressure him to consent to the search. We agree.

The video footage of the encounter makes clear that although both officers were present, Officer Ramirez never directly questioned or was involved in questioning Soriano. Moreover, Soriano does not challenge the district court's finding that Officer Rodriguez's statement was intended to ensure that Soriano understood her and to prompt his truthfulness but not to pressure him to consent to the search. Soriano has failed to show that the district court clearly erred in holding that this factor weighed in favor of a finding of voluntariness.

C. Cooperation with the Police

Cooperation by the defendant is a factor favoring a finding that consent was voluntary. The district court adopted the MJ's conclusion that Soriano was more cooperative than not and that this factor weighed in favor of voluntariness. We agree.

In addition to opening his trunk after Officer Rodriguez requested that he do so, Soriano also allowed her to test the tint of his driver's side window and showed her the top layer of clothes in his suitcase when she asked what was inside of it. Although Officer Rodriguez pointed out several instances where Soriano expressed nervousness, she also noted that he appeared to be calm and cooperative at several other points during the encounter. Thus, viewing the evidence in the light most favorable to the Government, the finding that Soriano "was more cooperative than not," is plausible, and its conclusion that this factor weighed in favor of voluntariness was not clear error.

D. Right to Refuse Consent

An officer's failure to inform a suspect that he has a right to refuse to consent to a search militates against voluntariness. The district court adopted the MJ's determination that Officer Rodriguez never informed Soriano of his right to refuse consent and that factor weighed against voluntariness. The Government does not directly challenge this determination but contends that Soriano's experience with law enforcement should offset the amount of weight for this factor.

In *United States v. Ponce*, we held that "experience in the criminal justice system can offset 'any weight' accorded to an officer's failure to advise a suspect of his right to resist a search." Here, Soriano's presentence report (PSR) indicates that, while he has no prior convictions, he has been arrested on three occasions. Still, neither the MJ nor the district court made any findings as to whether Soriano's criminal history would provide him with enough familiarity with the criminal justice system to result in his knowledge of the right to refuse consent. Because the extent of Soriano's familiarity with law enforcement procedures and its impact on his actions is unclear, the Government has not shown that the MJ clearly erred in determining that this factor weighed against voluntariness.

E. Education and Intelligence

The district court found that Soriano's education, although limited, did not indicate that he was susceptible to coercion. The court further observed that Soriano's previous interactions with police indicated that he was not a newcomer to the law. Moreover, Soriano's helpful demeanor during the stop, his interaction with the police, and his testimony indicated that he was at least of average intelligence. On these grounds, the district court concluded that this factor weighed "marginally in favor of voluntariness." We agree.

Soriano was 37 years old at the time of his arrest and had completed six years of formal education in Mexico. Officer Rodriguez testified that Soriano seemed able to understand and answer her questions. Our review of the transcript of the traffic stop confirms that Soriano was responsive to Officer Rodriguez's questions and understood the import of the traffic stop. For these reasons, we conclude that the district court's finding that Soriano was at least of "average intelligence" was plausible. Accordingly, its determination that this factor "weighs marginally in favor of voluntariness" was not clear error.

F. Belief that No Incriminating Evidence will be Found

An awareness or belief that no incriminating evidence will be found weighs in favor of a finding of voluntariness. Consequently, an awareness or belief that some incriminating evidence will be found weighs against a finding of voluntariness.

The record arguably supports the finding that Soriano did not believe that any incriminating evidence would be found if his car was searched. As noted, Officer Rodriguez asked Soriano "Do you give me permission to check the car?" and he replied, "Check it." She continued "If I call the dog right now from the checkpoint, do you think it will alert?" Soriano responded, "No, you can bring him." Likewise, the district court opined that at the time of consent, Soriano had already opened his suitcase to show the officers its contents and that it was possible that he

believed a search would not reveal the cocaine because he had already exposed the contents of the suitcase. Nevertheless, the district court still agreed with the MJ's conclusion that this factor weighed "marginally" against a finding of voluntariness given the lack of evidence on this point. Because this conclusion is plausible given the limited record, there was no clear error.

Our review of the video, the transcript, and the complete record confirms that the district court carefully analyzed the controlling six-factor balancing test in view of the evidence presented to it. Its analysis was methodical and not skewed one way or the other. In sum, the district court's analysis of the consent factors was "plausible in light of the record as a whole." Accordingly, we hold that the district court did not clearly err in concluding that Soriano voluntarily consented to the search of his vehicle. The district court's denial of Soriano's motion to suppress is AFFIRMED.

***U.S. v. Soriano*, No. 19-50832, 5th Cir., Sept. 18, 2020.**
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SEARCH & SEIZURE. TRAFFIC STOP

This case raises a recurring question: did law enforcement officers conduct an "unreasonable" seizure under the Fourth Amendment by extending what began as a routine traffic stop?
Agreeing with the district court that the traffic stop here was not unreasonable under the Fourth Amendment, we AFFIRM.

Just before 6:00 one evening in October 2017, Officer Hunter Solomon of the Hernando Police Department pulled a black Chevy Suburban over on northbound Interstate 55 in Hernando, Mississippi, because it had an improperly displayed license plate. As Solomon walked to the vehicle, he saw that the vehicle actually had a temporary license displayed in its tinted rear windshield. Solomon approached the vehicle, and defendant Corey Smith, the driver, produced his license. At Solomon's invitation, Smith got out and walked to the rear of the Suburban so Solomon could show Smith why he had been pulled over. During this conversation, Solomon asked Smith about his itinerary and passengers. Smith said he had found a good deal on a small icemaker1 for his Fort Worth, Texas, restaurant on Craigslist and was headed to Indiana to pick it up. Solomon asked about the machine's size (it was apparently a small one) and then asked why it made sense to drive all the way from Texas to Indiana to pick up a small icemaker rather than just having the machine shipped to Texas. Smith did not have a good answer.

Note 1 A daiquiri machine may also have been involved.

Smith also told Solomon that his two passengers used to work for him and were helping him pick up the icemaker. (Curiously, Smith only knew the name of one passenger.) He told Solomon that he had picked up the men in Jackson, Mississippi. The plan was for the men to spend the night in nearby Memphis, Tennessee, and then continue to Indiana the following day. Having heard this story, and finding it somewhat implausible, Solomon decided to verify it with the two passengers, Willie Carroll and Gregory Carter. He left Smith at the rear of the vehicle with another officer, Davis, who had just arrived as backup. Solomon first got Carroll's and Carter's names and asked dispatch to run a background check. While that was being taken care of, he asked Carroll and Carter about their itinerary.

Their stories diverged from Smith's. Carroll told Solomon that he did not really know Smith. He said that the three men were headed to Memphis for a party and that they would return to Jackson the next day. Carroll had no idea about a trip to Indiana for an icemaker. Carter's story was similar. He said the men were headed to Memphis for a party but was unsure when they would be returning to Jackson. Carter also had no idea about any trip to Indiana. Solomon viewed the men's divergent stories, combined with the fact that they were travelling on the interstate (a route frequently used for transporting contraband), as "red flags." Solomon believed the men were hiding narcotics.

By 6:09 p.m., both Carroll's and Carter's IDs had been verified. But at 6:10 p.m., the background check returned an outstanding warrant on Carroll. So Solomon arrested Carroll at approximately 6:12 p.m. and placed him in Davis' patrol unit. He then asked Smith for consent to search the Suburban. Smith became "a little defensive," and raised his voice. Smith said he did not want his vehicle searched because he did not know what the passengers might have placed in the car. Around the same time, Solomon requested a more detailed background check (a "CQH") on all three men. The CQH took at least six minutes. At some point after that, likely around 6:18 p.m. (Solomon's report and testimony are unclear on the exact time), the CQH on Carter revealed that he had four prior drug arrests, including two for possession with intent to sell.

Because of all this, and despite Smith's refusal to consent to a vehicle search, Solomon decided to deploy his K-9 unit, Krash, for a drug sniff. The search began at 6:20 or 6:21 p.m. Less than a minute later, as Krash approached the rear door on the passenger's side, he jerked his head back and began to sniff the car door intensely. Krash then sat down, indicating that he smelled narcotics. Solomon determined that Krash's alert gave him probable cause to search the Suburban.

Solomon then put Krash back into his patrol unit and began searching. In the front part of the car, Solomon found an envelope addressed to Smith. Inside was a stack of "blank metal social security cards" and "a hand[-]written list of finical [sic] companies with addresses and email addresses that appeared to be made up." The items were located sometime before 6:40 p.m.2 Solomon then paused the search and contacted a detective to help him search the rest of the vehicle. They eventually uncovered fake IDs, authentic IDs with matching social security cards, a printer, blank check stubs, and other items. Smith and Carter were arrested. No narcotics were found.

Smith was indicted on various charges related to fraud and identity theft. He moved to suppress the evidence obtained from the vehicle search, arguing that the Fourth Amendment prohibited the extension of the initial traffic stop. The district court held an evidentiary hearing and then denied Smith's motion. Smith entered a conditional guilty plea preserving his right to appeal the denial of his motion to suppress. The court sentenced him to 36 months in prison and three years of supervised release. Smith timely appealed.

We will uphold the district court's ruling "if there is any reasonable view of the evidence to support it."

On appeal, Smith makes three primary arguments.3 First, he argues that Officer Solomon unreasonably extended the traffic stop by continuing to question Smith and his passengers beyond 6:04 p.m., the point at which Smith believes the stop reasonably should have been completed. Second, Smith contends that, even if the stop could reasonably have been extended beyond 6:04 p.m., by 6:12 p.m. it is clear that Solomon had no further reasonable suspicion that could support a further extension of the stop and the ensuing narcotics investigation. Finally, Smith believes that Solomon unreasonably extended the stop by waiting approximately ten minutes to deploy Krash after he began the narcotics investigation. For the reasons we discuss below, none of these arguments is persuasive. We set forth the applicable Fourth Amendment principles before addressing each of Smith's arguments in turn.

A Fourth Amendment "seizure" occurs when an officer stops a vehicle and detains its occupants. "We analyze the legality of traffic stops for Fourth Amendment purposes under the standard articulated by the Supreme Court in *Terry v. Ohio*…" This involves two steps. First, we determine whether the stop was justified at its inception. "For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle."

Second, if the stop was justified, we ask whether "the officer's subsequent actions were reasonably related in scope to the circumstances that caused him to stop the vehicle in the first place." "A seizure for a traffic violation justifies a police investigation of that violation." As part of that investigation, "an officer may examine driver's licenses and vehicle registrations and run computer checks." "He may also ask about the purpose and itinerary of the occupants' trip . . . ." And he may ask "similar question[s] of the vehicle's occupants to verify the information provided by the driver." There is no hard-and-fast time limit for "reasonable" traffic stops. Rather, the stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." "[T]he 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." "Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." "If the officer develops reasonable suspicion of additional criminal activity during his investigation of the circumstances that originally caused the stop, he may further detain its occupants for a reasonable time while appropriately attempting to dispel this reasonable suspicion." "[R]easonable suspicion exists when the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search and seizure." "Reasonable suspicion is a low threshold" and requires only "some minimal level of objective justification." Reason-

able suspicion demands something more than a "mere 'hunch'" but "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." Our inquiry views "the totality of the circumstances and the collective knowledge and experience of the officer." We give due weight to the officer's factual inferences because officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"

Smith first argues that the stop should have ended at 6:04 p.m., because by that time Officer Solomon had seen that the vehicle had a temporary license plate and had confirmed that Smith's driver's license was valid. We are unpersuaded. Smith concedes that Solomon had reasonable suspicion to pull him over. So, the initial traffic stop was legal and the first prong of the *Terry* inquiry is satisfied. As part of the traffic stop, Solomon could examine the driver's licenses of the vehicle's occupants and check for any outstanding warrants, ask Smith about the purpose and destination of their journey, and ask similar questions to Carroll and Carter to verify Smith's statements. Thus, to the extent that Smith argues that any of those actions unreasonably prolonged the traffic stop beyond 6:04 p.m., his arguments fail. The computer checks on both Carroll's and Carter's licenses took until at least 6:09 or 6:10 p.m. Thus the initial traffic stop was reasonable at least until that time.
Smith next argues that, even if the stop was reasonably extended beyond 6:04 p.m., it was unreasonable to extend the stop beyond 6:12 p.m. in order to conduct a narcotics investigation. The district court disagreed. So do we.

To justify extension of the initial traffic stop, Officer Solomon's reasonable suspicion must have arisen, at the latest, by 6:12 p.m. "[T]he 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." Officer Solomon admitted that, by 6:12 p.m., there was not "anything else to do regarding the investigation of the improperly displayed tag." Thus, any reasonable suspicion justifying an extension of the stop must have arisen before that point, or continuation of the stop would be unreasonable.

Officer Solomon's interactions with the three men provided reasonable suspicion to conduct a narcotics investigation, thus justifying an extension of the stop. First, Officer Solomon noted the implausibility of elements of Smith's story. Smith stated that the icemaker he was going to pick up was not a large machine. But he had no explanation for why he needed three adult men to pick up a machine of that size. Nor could he explain why it made sense to drive all the way from Fort Worth, Texas to Indiana rather than just having the machine shipped.

Second, Smith, Carter, and Carroll gave contradictory stories about their destination, the purpose of their trip, and their relationships to each other. Smith claimed the men were headed to Indiana to pick up restaurant equipment; Carroll and Carter both asserted they were headed to a party in Memphis. Smith claimed Carroll and Carter were previous employees; Carroll informed Officer Solomon that he did not really know Smith. Smith did not even know the name of one of the men. Further, the stories from Carter and Carroll did not match up with each other—one of the men stated they would be returning to Jackson the following day, while the other stated he was unsure when they would be returning. At oral argument, Smith conceded that these inconsistencies were "significant."

The district court and Smith are correct that these inconsistencies were significant, and we conclude they lean in favor of reasonable suspicion. This is particularly true where, as here, Officer Solomon "dr[ew] on [his] experience . . . to make inferences from and deductions about the cumulative information available to [him] that 'might well elude an untrained person.'" Officer Solomon testified that, in his experience, when drivers are dishonest after being pulled over, it usually indicates that they are hiding contraband.

Third, Smith and his companions were traveling along an interstate known for transportation of contraband. While we agree with the Tenth Circuit that "the probativeness of a particular defendant's route is minimal," we have consistently considered travel along known drug corridors as a relevant—even if not dispositive—piece of the reasonable suspicion puzzle. For example, in *Pack*, we considered the fact that the defendant and his girlfriend "were traveling along a drug trafficking corridor." Similarly, we considered the fact that the defendants were traveling on a "known drug-trafficking corridor."

6 Thus, to the extent Smith argues that we cannot consider his presence on I-55, he is incorrect. Smith's travel on I-55 supports reasonable suspicion on these facts.

Finally, we note that by 6:10 p.m., Officer Solomon knew that one of the vehicle's occupants had an outstanding arrest warrant for a parole violation. This fact could have contributed to Officer Solomon's reasonable suspicion.

In sum, the record supports Officer Solomon's reasonable suspicion, based on his experience, "that criminal activity 'may [have been] afoot.'" The record establishes this reasonable suspicion arose by 6:12 p.m. We therefore conclude that the extension of the stop beyond that time so that Officer Solomon could conduct a narcotics investigation did not violate the Fourth Amendment.

Finally, Smith argues that, even if it was reasonable for Officer Solomon to begin a narcotics investigation, that investigation was unreasonably extended by Officer Solomon's decision to wait until 6:21 p.m. to have Krash conduct the drug sweep. In Smith's view, Officer Solomon should have immediately deployed Krash at 6:11 or 6:12 p.m. rather than "[sitting] around idly" until 6:21p.m.[7] The district court performed no independent analysis n this issue, but concluded it did "not find the time from when the investigation began until Krash was deployed to be an unreasonable delay."

We agree with the district court that the delay was not unreasonable under the circumstances. Smith's argument boils down to disagreeing with Officer Solomon's decision to wait until the in-depth background checks finished before deploying Krash. He offers no legal authority showing this ten-minute period was unreasonable. Rather, he suggests it was unreasonable because, when Solomon finally did conduct a sweep with Krash, it took "only a minute or two." He articulates no other reason.

But "*post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Sharpe*, 470 U.S. 675,686–87 (1985). "[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable."*Id.*at 687 (quoting *Cady v. Dombrowski*,413 U.S. 433,447(1973)). The appropriate inquiry "is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."

The record does not suggest that Solomon unreasonably dragged the investigation out. Rather, during the ten-minute interval Smith challenges, the record shows that Solomon was waiting for in-depth background checks on all three men, as well as trying to secure consent to search the vehicle.

For those reasons, we conclude Officer Solomon did not act unreasonably by waiting until 6:21 p.m. to deploy Krash for the drug sweep.

* * *

After viewing the totality of the circumstances, we conclude that the district court's decision to deny Smith's motion to suppress is supported by a reasonable view of the evidence in the record. *See Massi*, 761 F.3d at 520.

The district court's judgment is therefore AFFIRMED.

***U.S. v. Smith,* 5th Cir., No. 19-60340, Mar. 12, 2020.**

2. EVIDENCE

EVIDENCE – DRUG POSSESSION

A jury convicted Samuel Crittenden and his wife Carla Dominguez of possession with intent to distribute 500 grams or more of methamphetamine. The district court granted Crittenden a new trial because the record does not show that he knew that the bags he removed from his house—and the bag his wife requested that he bring her—contained methamphetamine or any other controlled substance. Because the district court did not abuse its discretion in granting Crittenden a new trial, we AFFIRM.

In 2017, Federal Bureau of Investigation agents received a tip from the Drug Enforcement Agency field office in Juarez, Mexico, that ten pounds of methamphetamine was being stored at a house in El Paso. The FBI agents enlisted a cooperating informant to call Dominguez's phone number, which was associated with the tip, in order to

arrange a controlled methamphetamine purchase. In a series of phone calls over the next few days, Dominguez and the informant discussed the informant's ostensible interest in "windows"—a street term for methamphetamine. The informant met Dominguez in person in the parking lot of a JCPenney where they discussed the sale of "crystal," and the informant offered to buy "ten" for $35,000. The two agreed to meet again after Dominguez had verified how much supply she had.

After the meeting, the agents surveilled Dominguez as she returned to the house she shared with Crittenden. Thereafter, the agents observed the two depart the home in separate cars. One of the agents followed Crittenden to another home on Byway Drive in El Paso, where Crittenden exited his vehicle and went inside. The agent broke off the surveillance and rejoined the remaining agents that had continued to surveil Dominguez. Dominguez, however, ultimately led the agents back to the Byway Drive residence. The agents observed a male who was likely Crittenden1 exit the house and hand Dominguez a black bag through the window of her car.

Dominguez then drove away from the house. When law enforcement intercepted her, they found a black leather handbag containing ten bundles of methamphetamine collectively weighing 4.2 kilograms. Law enforcement then interviewed Crittenden. According to the agents' later testimony, Crittenden stated that he had moved the bags—which were Dominguez's—to the Byway Drive residence, believing that they contained marijuana. When Dominguez asked him to retrieve one of the bags for her, he did so. A resident of the Byway Drive house would later testify that Crittenden had asked him if he could stay at the Byway Drive house and store some personal effects in the attic because he was having a fight with Dominguez. After receiving consent from the residents of the Byway Drive house to search the attic, law enforcement recovered three roller suitcases filled with 1.65 kilograms of methamphetamine and 47 kilograms of marijuana.

Dominguez and Crittenden were charged in the Western District of Texas with (1) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); (2) possession with intent to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii); and (3) conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846. At trial, Dominguez took the stand as the sole witness for the defense. She testified that she used to buy marijuana for her and her friends' personal use from an individual named Juan Diaz. Dominguez stated that this relationship ended when, in 2015, she and Crittenden decided to have a fifth child together and resolved "to get closer to God and to take care of [their] family together without having any kind of partying or drug use." She said that she did not hear from Diaz again until he called her in January of 2017 and asked her if she could retrieve his car, which he said had been left on the U.S. side of the border as a result of a fight he had with his girlfriend, and hold it at her house until his sister could pick it up the following day. Dominguez testified that she agreed and retrieved the car, but when Juan's sister arrived, she took several bags and a large plastic container out of the trunk, gave them to Dominguez, and quickly left before Dominguez could object.

With regard to the series of phone calls, Dominguez testified that she first did not understand what the calls concerned and assumed they were in regard to some broken windows in her house. When the calls continued, Dominguez stated, she began to suspect that the packages contained drugs or other contraband and that her and her family's lives were in danger, so she went along with meeting the individuals who contacted her in order to get rid of the packages. Dominguez stated that when she told Crittenden about what was occurring, Crittenden said that he did not want to have anything to do with the matter and that he did not want the packages to be in the house with their children. According to Dominguez, Crittenden then moved the packages to the Byway Drive residence to get them out of the house.

Dominguez testified that she just instructed Crittenden to "grab a bag" from the Byway Drive house on the day she met with the informant without specifying the contents of the bag. She stated that Crittenden was not involved

in any of the transactions and did not know Diaz.

Following the close of evidence, the jury convicted both defendants on all counts.

Crittenden then renewed a properly preserved motion for judgment of acquittal, or, in the alternative, for a new trial. The district court granted the motion for a new trial. In its memorandum opinion, the district court concluded that the Government failed to prove that Crittenden participated in a conspiracy or that he had the knowledge of the nature of the controlled substance he possessed that was required to convict him of possessing methamphetamine with the intent to distribute. As to the possession count, the court stated,

> [N]o direct or circumstantial evidence was presented during the first trial to show beyond a reasonable doubt that Mr. Crittenden knew the contraband was comprised of any controlled substances listed on the schedules or that he knew the identity of the controlled substances he possessed.
> . . . .

The Government argues that the second element was established because Mr. Crittenden had knowledge. To support its argument, the Government specifically points to the moment in which Mr. Crittenden was questioned by authorities and he admitted that he moved what he believed to be marijuana. But, because the Court finds that belief is not enough to establish knowledge, it disagrees with the Government and adheres to the definition laid out by the Supreme Court in *McFadden.* In *McFadden*, the Supreme Court determined that knowledge can only be established in two ways: either by knowledge that a controlled substance is listed or by knowledge of the identity of a scheduled controlled substance.

Here, neither of these definitions was established beyond a reasonable doubt by the Government. Any proof—direct or circumstantial—that was introduced during the first trial failed to show that Mr. Crittenden knew the contraband was comprised of any controlled substances listed on the schedules or that he knew the identity of the controlled substances he possessed. Mr. Crittenden never opened the bags to see what was inside. He placed the bags in several suitcases and immediately removed them to the Byway residence, away from his home and family. This testimony, viewed, in the context of all of the evidence offered during the first trial shows, at most, that Mr. Crittenden believed the bags contained something illegal. More specifically, the testimony shows, if anything, that Mr. Crittenden believed the bags contained marijuana. The Court finds this thought or belief insufficient to establish knowledge.

The Government contends that it "provided ample evidence of Crittenden's knowledge," namely (1) testimony that Crittenden moved the bags to the Byway Drive house, (2) testimony that Crittenden retrieved a bag containing methamphetamine on Dominguez's request, and (3) some agents' testimony that Crittenden told them he "thought the bags contained marijuana." We conclude that the district court correctly stated the relevant law and permissibly applied it to the facts of this case.

As to the governing legal principles, the district court properly noted that the "knowledge requirement [of § 841(a)] may be met by showing that the defendant knew he possessed a substance listed on the schedules." The district court also properly concluded that a defendant's mere "belief" that he possessed a controlled substance—divorced from other factors such as deliberate ignorance—"is not enough to establish knowledge."

In some instances, the knowledge element of a controlled substance offense can be satisfied when a defendant knows there is a high probability that he possesses drugs but deliberately endeavors to avoid confirming those suspicions. However, the Government has never argued deliberate ignorance in this case, and the jury was not instructed on it. We therefore express no opinion regarding whether the evidence demonstrated Crittenden's deliberate ignorance.

The Government fares no better on the facts. There was no evidence that the methamphetamine at issue belonged to Crittenden or that Crittenden was attempting to sell the drugs; rather, federal agents seized the methamphetamine from Dominguez pursuant to a transaction the confidential informant set up with Dominguez. Although the jury originally convicted Crittenden of conspiring with Dominguez to sell the drugs, the evidence supposedly showing Crittenden's involvement in any such conspiracy was so insufficient that the Government did not even appeal when the district court granted a new trial on the conspiracy counts.

In fact, the evidence does not show that Crittenden ever laid eyes on the drugs themselves—not when he moved the bags into the Byway Drive residence, and not when he retrieved a bag on Dominguez's instructions. At oral argument, the Government pointed to Dominguez's testimony that Crittenden "probably" moved the drug packages from their original container to the bags before moving them to the Byway Drive residence. Oral Argument at 7:30. But Dominguez also admitted that she "wasn't there" when the drug packages were moved into the bags and therefore "wouldn't be able to tell you if it was [Crittenden] or someone else." At any rate, the district court was not required to credit Dominguez's testimony in granting the motion for new trial.

Despite the Government's repeated prodding, Dominguez expressly disavowed telling Crittenden that the bag she asked him to retrieve contained any drugs at all, testifying instead that she told Crittenden to "just grab a bag." The evidence shows only that Crittenden complied with Dominguez's request by bringing her a bag. Nothing more.

Some FBI agents testified that Crittenden told them that he "believed"— incorrectly, as it turned out—that "the bags contained marijuana."5 That is why he "removed them . . . from his home and family" by putting them in the Byway Drive house. But, as previously explained, the district court properly concluded that testimony "show[ing], if anything, that Mr. Crittenden believed the bags contained marijuana" is insufficient to prove knowledge. As a result, it was not an abuse of discretion for the district court to grant Crittenden a new trial on the basis of insufficient evidence of knowledge.

For the forgoing reasons, the district court's order granting a new trial is AFFIRMED.

***U.S. v. CRITTENDEN*, No. 18-50635, 5th Cir., Aug. 20th, 2020.**
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EVIDENCE – HEARSAY TESTIMONY

A jury convicted Michael Maes of crimes stemming from a methamphetamine distribution and money laundering conspiracy. The district court sentenced him to life imprisonment. Maes now appeals both his conviction and his sentence, challenging a number of rulings that the district court made before, during, and after trial. For the following reasons, we affirm Maes's conviction and sentence.

In August 2018, a nine-count Second Superseding Indictment charged Michael Maes with participating in a methamphetamine distribution and money laundering conspiracy. The case proceeded to trial in September 2018. Maes's four co-conspirators—who had by then pleaded guilty to single-count bills of information—testified for the Government. Maes testified in his own defense. Other witnesses also testified. The jury found Maes guilty on eight of the nine counts he faced. In December 2018, the district court sentenced Maes to a within-Guidelines term of life imprisonment on counts one and two, the methamphetamine-related charges. The court sentenced Maes to within-Guidelines terms of 240 months each for counts

three and five through nine, the money laundering charges.

Maes raises a number of issues in this appeal. We address them individually in the same order he presents them.

Fabeon Minor's testimony

Maes met Fabeon Minor while the two were housed in the same area of a Mississippi jail. Later on, Minor was housed separately from Maes in a different area of the same jail. Also housed in this different area of the jail at the same time as Minor were three of Maes's four co-conspirators: Sean Ufland, Michael Denham, and Roland Jackson.

After the Government rested at trial, Maes made it known that he intended to call Minor as a surprise witness. Maes's counsel explained that he had just learned that Minor had overheard three of Maes's co-conspirators concocting a plan in jail to coordinate their testimony in a way that would help them and hurt Maes. During a lunch break at trial, lawyers for both sides met with Minor to hear what he had to say. Following this meeting, the Government objected to Minor's testimony on hearsay grounds. Maes's counsel argued that the testimony was admissible.

The district court decided to hear proffered testimony from Minor outside the presence of the jury. During his proffer, Minor explained that he heard Maes's three co-conspirators hatch a plan to pin methamphetamine on Maes so they could reduce their potential prison time. The district court then heard additional argument about whether Minor should be allowed to testify.
The Government reiterated its position that Minor's testimony was textbook hearsay—he would testify to what he heard the others say—that did not fit into any exception. Maes's counsel responded that the testimony was not hearsay because it was not being offered for the truth of the matter asserted and, even if it was hearsay, it nonetheless qualified for the admission against a party opponent exception. The district court recessed to consider the issue.

Returning to the bench, the district court orally explained, in great detail, its ruling on the issue. It began by recognizing that Maes's failure to timely identify Minor as a witness prejudiced the Government because it lacked time to investigate his assertions. The court then rejected Maes's arguments that the proposed testimony was not hearsay and that it qualified for the admission against a party opponent exception. Finally, it *sua sponte* considered whether a portion of Minor's testimony nevertheless qualified as an exception to hearsay under Federal Rule of Evidence 803(3) as a then-existing mental, emotional, or physical condition. Citing two Fifth Circuit cases, the district court explained that Minor would be allowed to testify about what he heard the trio planning. That is, he could testify that he heard them concocting a plan to coordinate their testimony and pin methamphetamine on Maes because such statements fit within the 803(3) exception. *See* FED.R.EVID. 803(3)(excepting from the hearsay rule a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan)"). Minor could not, however, testify that he heard the trio describe *why* they wanted to form the plan, because such statements did not fall within the exception.

The jury returned to the courtroom to hear Minor's testimony. Maes's counsel asked Minor on direct examination "what, if anything, did you hear [Maes's three co-conspirators]say with respect to" Maes. Minor responded that they "were stating that they were going to get time cut—[,]"which clearly violated the district court's limiting instruction because it related to *why* the trio had taken this action. At this point, Maes's counsel interrupted Minor and re-stated his question as whether he heard "them say anything with respect to meth[.]"Minor responded that Denham "was saying he was going to put a lot of ice on Michael Maes." Minor explained that "ice" was a synonym for methamphetamine.

Maes now argues for the first time on appeal that the district court reversibly erred by limiting Minor's testimony because his statements as to *why* the co-conspirators had formed the alleged plan should have been admissible as extrinsic evidence of prior inconsistent statements under Federal Rule of Evidence 613(b). That is, Maes argues that Ufland, Denham, and Jackson each testified on cross-examination that they never said they intended to coordinate their testimony in an effort to reduce their sentences. And because Minor sought to testify that these state-

ments by each co-conspirator were not true, Minor's testimony should have been admitted as extrinsic evidence to show that the three had lied.

A challenge to a district court's ruling excluding evidence is reviewed for abuse of discretion subject to the harmless error analysis if the challenge was preserved below. Unpreserved errors of the same variety are reviewed for plain error. To be considered preserved for appeal, a defendant's objection to a district court's ruling must be "on the specific grounds" raised below.

Here, Maes argued below that Minor's testimony was admissible because it was not hearsay and, in the alternative, because it fit into the admission against a party opponent exception. He never argued that the testimony should be admissible under Rule 613(b). He therefore never "alert[ed] the district court to the nature of the alleged error" so as "to provide an opportunity for correction," which is required to preserve the error. Because this case is like *United States v. Johnson*, and Maes failed to properly preserve the specific error raised on appeal, we review his Rule 613(b) challenge for plain error.

To succeed on plain error review, a defendant must show that: "(1) the district court committed an error, (2) the error is plain, (3) the error affects [the] appellant's substantial rights, and (4) failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings." Maes has failed to establish any of the four necessary elements to succeed on this challenge.

Under Federal Rule of Evidence 613(b), "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." If a witness never denies making a certain statement, there can be no showing of inconsistency, and Rule 613(b) does not apply. Here, none of the three co-conspirators housed with Minor denied coordinating a plan *to reduce their sentences*. Accordingly, 613(b) did not apply to Minor's proposed testimony regarding the trio's motives in coordinating testimony, and the district court did not err, let alone plainly err, by declining to admit it on those grounds.

Even if the court had plainly erred, Maes cannot show that the ruling partially excluding Minor's proposed testimony affected Maes's substantial rights. He cannot make this showing because the jury actually heard the "disallowed" testimony. In violation of the district court's order, Minor testified that the trio hatched a plan to get their prison time cut, and the district court did not instruct the jury to disregard the testimony. Compounding the problem, Maes's lawyer emphasized this disallowed-but-introduced testimony during his closing argument, saying Minor "told you . . . how they were going to put meth on [Maes] because meth is what the government needs in order for us to get our sentence reduced and get out of here." In sum, the district court's ruling did not prevent Minor from testifying as Maes desired; and Maes's lawyer emphasized this during his closing argument.
For all of these reasons, Maes has failed to show that the district court plainly erred in limiting Minor's testimony.

[*discussion regarding other procedural, evidentiary and sentencing matters omitted*.]

For the foregoing reasons, we hold that Maes has failed to show that the district court reversibly erred in any respect. We therefore AFFIRM his conviction and life sentence.

***U.S. v. MAES*, 5th Cir. no. 18-60881, June 01, 2020.**

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EVIDENCE – DRUG, WEAPON POSSESSION; OFFICER CREDIBILITY

A jury convicted Laroy Johnson of illegally possessing drugs and guns. On appeal, Johnson raises several evidentiary issues, including whether incriminating jail phone recordings were improperly authenticated, whether two officers wrongly testified about why drug dealers typically use guns to ply their trade, and whether the prosecutor improperly argued that an officer had no reason to lie on the stand. We affirm.

On April 26, 2016, Irving County narcotics officers broke down the door of Room G1086 at the Budget Suites Hotel to find Laroy Johnson sitting on a couch amidst a cornucopia of drug-dealing paraphernalia. The officers found 20 grams of heroin in the refrigerator (enough for 100-200 street-level "sells"); a heroin-dusted digital scale, a razor blade, and a baggie of Xanax on the table; six cell phones; $5,000 cash (mostly in twenties); several gift cards in various places; and a loaded Glock handgun under the bedroom mattress. They arrested Johnson and a grand jury later indicted him for one count of possessing heroin with intent to distribute, one count of being a felon in possession of a firearm, and one count of possessing a firearm in furtherance of drug trafficking.

While awaiting trial at the Irving County Jail, Johnson made several phone calls to loved ones that the government later introduced at trial. During those calls, Johnson stated that he had previously planned to take a gun to his grandmother's house and that his child's mother had likely informed the police that he was selling drugs at the hotel. He also talked to a woman who had planned to stop by his hotel room on the day he was arrested and told her that police would not have arrested her because "[e]verything in there is mine."

To authenticate the recordings, the government presented two witnesses—James Ryan, a technician employed by Securus Technologies who maintained the jail's phone equipment, and Detective Tim Hilton, a police officer who identified Johnson on the calls. First, Ryan testified that he personally installed the jail's phone system, monitored it, and repaired it when necessary. Ryan also described the automated recording and storage process. The jail assigns inmates an individual pin number they must enter to make a call. When an inmate picks up the phone and enters his pin, the system automatically records his call and digitally stores the call on a secure data server in Atlanta. Specifically, Ryan explained:

> [The call] goes through a series of servers that collects the voice, the called party information, and combines that information and then it records it at that data center and then the data center streams it out to the public switch telephone network like AT&T or Southwestern Bell, and then it hits the calling party phone.

Ryan further testified that the system produced accurate recordings because "the voice recording and data stream all with the call information is all recorded at the same time." Second, Detective Hilton searched for Johnson's phone recordings by name and date in the Securus database, burned them to a CD, listened to the calls, and identified Johnson as the speaker. Hilton testified that he could correctly identify Johnson because he had spoken with him in person and because in one of the calls Johnson was identified by name.

At trial, Johnson objected to the admission of the phone recordings, arguing they had not been properly authenticated because the government had not shown the recording equipment was in "good working order and capable of producing an accurate recording" at the precise time the recordings were made. The judge overruled the objection, stating (outside the jury's hearing) that "between [Detective Hilton] and Mr. James Ryan, I think the proper predicate has been established . . . as to authenticity."

Detective Hilton and another law enforcement officer, DEA Special Agent James Henderson, testified at trial that drug dealers routinely use guns as part of their operations. When the prosecutor asked Hilton why drug dealers have firearms, Johnson objected (unsuccessfully) on speculation and relevance grounds. Hilton then answered:

> Well, the main reason is in the criminal world, drug rip offs are big business for them, so drug dealers know people know they have drugs and they know they have cash. On the other hand, customers need to know that the drug dealers are armed so they don't try and steal from them or try and come back and rob them, so it is something that is common. It is very typical.

Agent Henderson similarly testified:

> In my experience, drug traffickers use firearms primarily for protection, protection of their products[,] their drugs or their money, the revenue. And they also use it for intimidation in my experience, that is why they have the firearm.

Johnson did not object to Henderson's statement.

Detective Kyle Fleischer testified at trial that during the hotel room search Johnson admitted he had drugs in the fridge and a gun under the mattress. Fleischer stated that Johnson told him something to the effect that, "[H]ey, man, I am not going to waste your time. I am going to show you where the dope is. The dope is in the fridge, and the gun is under the bed." On cross examination, Johnson questioned Fleischer about why that statement was not in the original police report. Fleischer responded that he had not written the report and that a supplemental police report did include the statement. Johnson pointed out that the supplemental report contained only part of the statement: it described Johnson's admission about the heroin but did not mention the gun. Fleischer replied that this was due to a mistake in communication and the length of time between the incident and when he was asked to review the report. Fleischer also testified that police reports are summaries and not word-for-word transcriptions.
Later, during closing argument, Johnson's attorney suggested that Detective Fleischer had lied about Johnson's hotel room admission. Johnson's attorney stated:

> Isn't it interesting that a year-and-a-half later, two weeks before trial, this statement somehow gets reduced to writing and the only thing that is written down is something about drugs. . . . You don't write that down. Isn't that convenient? If you come in later on, that is what he said. Did you write it down. No, I didn't write a report. Well, I just kind of do a summary. Give me a break. If he said he killed five people, they would write it down. It is no different. . . . They want to say I didn't write it down it is just a summary. They know that is what he said. Gee, that is pretty convenient. . . . So I don't think you can give that any weight whatsoever that [Johnson] made that statement . . . .

The prosecutor retorted during his own closing by pointing to Fleischer's lack of motive to lie:

> Ladies and gentlemen, [Johnson's] case is a serious uphill battle in this case. When you come in to court and you have evidence both direct and circumstantial that is overwhelming against your client, what do you do? You say law enforcement could have done more and you call into question their credibility. Think about what he is telling you. Officer Fleischer is not the lead agent on this case. You think this is a huge big case that he is willing to put his career on the line. He is suggesting to you when he came in this court and looked you in the eye and took an oath to tell the truth and completely fabricated a statement.

Johnson did not object.
The jury subsequently convicted Johnson on all three counts, and the district court sentenced him to 96 months imprisonment. Johnson timely appealed his conviction.

On appeal, Johnson contests two of the district court's evidentiary rulings and, further, claims that prosecutorial misconduct requires reversal. Specifically, Johnson contends the court erred in admitting the jail phone recordings, which he claims were not properly authenticated. Johnson also contends the court erred in admitting the officers' testimony about why drug dealers typically carry guns, which Johnson characterizes as prohibited expert *mens rea* testimony. Finally, Johnson contends the prosecutor's closing argument suggesting that Detective Fleischer had no reason to lie constituted impermissible witness bolstering. We examine each argument in turn.

Johnson first challenges admission of the jail phone recordings, arguing they were not properly authenticated. We review a district court's evidentiary rulings for abuse of discretion subject to harmless error analysis. "For any of the evidentiary rulings to be reversible error, the admission of the evidence in question must have substantially prejudiced the defendant's rights."

Johnson claims the district court abused its discretion in admitting the jail phone recordings because the government failed to show the recording equipment was in "good working order and capable of producing an accurate recording" at the precise time the recordings were made. He further maintains that this error substantially prejudiced him, and that no harmless error exists. In Johnson's view, the government did not meet its burden to show the recordings were properly authenticated because it did not "produce evidence sufficient to support a finding that the item[s] [are] what the proponent claims [they are]."

Generally, "[t]o establish authenticity [of intercepted telephone recordings], the Government must demonstrate:

1) the operator's competency, 2) the fidelity of the recording equipment, 3) the absence of material alterations, and 4) the identification of relevant sounds or voices." This is not a rigid formula, however. "The party seeking to establish authenticity need not meet all the factors set out in *Biggins,* if upon independent examination, the district court is convinced that the recording accurately reproduces the auditory experience." Here, the government produced sufficient evidence to authenticate the recordings and satisfied each *Biggins* factor.

As to factor one (operator competency), because the Securus recording system is an automated process, operator competency is not particularly salient. Nonetheless, Ryan's testimony clearly showed his knowledge about the equipment and recording process. Ryan testified that he personally installed the jail's phone system, monitored it, and repaired it when necessary. He also described the automated recording and storage process in detail.
As to factor two (equipment fidelity), Ryan testified about the trustworthiness of the equipment and that it worked as intended. He testified that Securus regularly "maintain[s] the cameras and recording equipment to make sure they are operating properly," and that he "monitor[ed] and repair[ed] those systems" himself. Moreover, Johnson does not dispute that he made the calls using his pin number and that the calls were recorded and found on Securus's server.

As to factor three (absence of alterations), Johnson does not claim the recordings were materially altered, but, in any event, testimony from both Ryan and Detective Hilton shows they were not. Ryan testified that the system produced accurate recordings because "the voice recording and data stream all with the call information is all recorded at the same time." Therefore, because the process is automated, the very fact that the recordings exist and could be played pointed strongly to their accuracy. Additionally, Hilton verified the recordings' chain of custody from the time he downloaded the calls until he turned them over to the prosecutor.
As to the final factor (identification of sounds or voices), Detective Hilton identified Johnson on the recordings. Hilton testified that he could correctly identify Johnson because he had spoken with him in person and because, on one of the calls, Johnson was identified by name. Other calls contained discussions about relevant aspects of the search—from details about the drugs to Johnson's hotel room number.

Even if the government had not satisfied each *Biggins* factor, the calls would still be admissible "if upon independent examination, the district court [wa]s convinced that the recording[s] accurately reproduce[ ] the auditory experience." The district court was rightly convinced here. When overruling Johnson's objection, the court stated that "between [Detective Hilton] and Mr. James Ryan, I think the proper predicate has been established . . . as to authenticity." Our precedent supports that conclusion. In *Green*, the defendant challenged the admission of intercepted jail calls because the government "did not adequately demonstrate how the recording equipment worked, who worked it, what kind of training the operator had, whether the equipment was reliable, and when the recordings were made." We held the district court did not abuse its discretion in determining the calls were authenticated because,

> [a]fter reviewing the record, we [we]re persuaded that the intercepted telephone recordings accurately reproduce the auditory experience. As one of the case agents overseeing the wiretap operation, [the witness] possessed knowledge of the reliability of the intercepted telephone recordings. Having met [the defendant], [the witness] was also able to identify his voice.

Additionally, agents had listened to the calls and "corroborated [the defendant's] conversations with his actions on numerous occasions." Detective Hilton similarly identified Johnson here, based on his previous interactions with Johnson and the content of the calls. In sum, the district court did not abuse its discretion by admitting the recordings.

Johnson next challenges the admission of Detective Hilton's and Agent Henderson's trial testimony regarding why drug dealers routinely use guns in their crimes. Johnson asserts that the statements were improper expert opinion on whether he had the mental state to commit the crime. Although evidentiary rulings are usually reviewed for abuse of discretion, a defendant must preserve error. Johnson argues he did so by objecting to Detective Hilton's statements. But Johnson did not object on Rule 704(b) grounds. When the prosecutor asked Hilton why drug dealers have firearms, Johnson objected only on the grounds of speculation and relevance. That objection did not pre-

serve the error Johnson now urges because it was not "sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction."

We therefore review for plain error, which requires the four-fold showing that "(1) the district court committed an error, (2) the error is plain, (3) the error affects [appellant's] substantial rights, and (4) failure to correct the error would seriously affect the fairness, integrity, or public reputation of judicial proceedings."

"In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Fed. R. Evid. 704(b). Johnson contends that both Hilton's and Henderson's testimony violated that rule because their testimony that drug dealers usually carry guns in order to protect themselves, their drugs, and their revenue goes to the mental state or condition required by 18 U.S.C. § 924(c)(1)(A).

That statute, however, "does not answer the question of the requisite mental state," and so we have had to tease it out in our cases. In doing so, we have explained that the "'mere presence' of a firearm at a crime scene" is insufficient, meaning that the statutory "*mens rea* is more than strict liability." At the opposite extreme, however, the statute does not require evidence of "a defendant's intent regarding the weapon." What the statute demands, instead, is evidence "specific to the particular defendant, showing that his or her possession *actually furthered* the [crime]." To identify such evidence, *Ceballos-Torres* offered a non-exclusive list of circumstantial factors: "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." In sum, under our precedent—as recently "reaffirm[ed]" by *Smith*—the mental state "requirement" in § 924(c)(1)(A) is "knowing possession with a nexus linking the defendant and firearm to the offense."

We need not resolve this issue, however. Even assuming that the district court violated Rule 704(b) by admitting Hilton's and Henderson's testimony—and even assuming that error was "plain" under our precedents—we nonetheless find no effect on Johnson's substantial rights. "We may not correct an error that a defendant failed to raise in the district court unless the error . . also affects the defendant's substantial rights." "As a general rule, an error affects a defendant's substantial rights only if the error was prejudicial." "Error is prejudicial if there is a reasonable probability that the result of the proceedings would have been different but for the error." The probability of a different result must be sufficient to undermine confidence in the outcome of the proceedings.

Here, even if the district court had excluded the challenged testimony, the probability of a different result is insufficient to undermine confidence in the outcome of the proceedings. As noted above, the government did not need to show Johnson's subjective intent for possessing the gun; it needed only to establish "knowing possession" and—through the *Ceballos-Torres* factors, on which the jury was instructed—a "nexus linking the defendant and the firearm to the offense." Evidence of both was overwhelming. Both the Glock and the drugs were in the same hotel room, under Johnson's control. Since Johnson was a convicted felon, he had no legal right to possess a gun. In the room, Johnson also had enough heroin for 100–200 street-level sells, along with drug dealing paraphernalia and $5,000 cash. Although the gun was under the mattress in the bedroom, it remained unlocked, accessible, and loaded. Moreover, when the police burst into the hotel room, Johnson disclosed the location of the "dope" and the gun in the same breath. Later, in his phone calls from jail, Johnson lamented that he had not removed the gun and deposited it at his grandmother's house. Taken together, this evidence clearly establishes that Johnson knowingly possessed the gun in furtherance of drug trafficking—a far cry from the "unloaded antique[ ] mounted on the wall" or the "locked and unloaded" lawfully-possessed hunting rifle contemplated in *Ceballos-Torres*.

Lastly, Johnson challenges the prosecutor's statement during closing argument that Detective Fleischer had no reason to lie about Johnson's admitting there was heroin in the fridge and a gun under the mattress.2 Johnson contends the district court erred in failing to intervene during the argument, depriving him of a fair trial. Because Johnson did not object to the prosecutor's statement, we again review for plain error. Generally, a prosecutor cannot bolster a police officer's credibility by appealing to his authority as a police officer. On the other hand, a pros-

ecutor may speak to a law enforcement witness's credibility at closing if the statement is supported by prior evidence. And even if statements of that nature extend past the evidence, we have sometimes allowed them where they amount merely to proportionate, common-sense observations about a witness's lack of motive to lie. Admittedly, the prosecutor's suggestion that Detective Fleischer had no motive to lie was not simply a restatement of any prior evidence. At the same time, however, the prosecutor made the statement to rehabilitate Fleischer after defense counsel suggested repeatedly that Fleischer fabricated his account of Johnson's confession on the eve of trial. Ultimately, however, we need not decide whether it was actual error for the district court to allow the prosecutor's statement, because any error was not "clear and obvious." In sum, the district court did not plainly err by allowing the prosecutor to suggest that Detective Fleischer had no reason to lie.

AFFIRMED.

U.S. v. Johnson, No. 17-11452, Fifth Cir., 11/05/19.

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EVIDENCE - STATEMENT FROM CONF. INFORMANT

Upon *sua sponte* panel rehearing, we withdraw our prior opinion, *United States v. Jones*, 924 F.3d 219 (5th Cir. 2019), and substitute the following:

Coy Jones was convicted by a jury of possessing and conspiring to possess with the intent to distribute methamphetamine, possessing a firearm as a convicted felon, and possessing a firearm in furtherance of a drug trafficking crime. We hold that Jones's rights under the Confrontation Clause were violated when a law enforcement officer testified that he knew Jones had received a large amount of methamphetamine because of what the officer was told by a confidential informant. This error was not invited by the defense and was not harmless. We therefore vacate Jones's convictions and the related revocation of his supervised release and remand for further proceedings.

Jones was arrested in the course of an investigation into suspected large-scale methamphetamine distribution by Eredy Cruz-Ortiz. Acting on tips from a confidential informant, law enforcement officers observed Cruz-Ortiz meet with various individuals in Austin-area parking lots between August 2016 and May 2017. On August 23, 2016, for instance, Cruz-Ortiz met with Imran Rehman to sell him methamphetamine. Rehman later testified that he met with Cruz-Ortiz about 25 to 30 times to purchase methamphetamine. Another individual, Julio Rogel Diaz, met with Cruz-Ortiz in a parking lot on September 23, 2016, and was subsequently stopped by law enforcement with about 700 grams of methamphetamine.

Law enforcement officers also observed Jones meet with Cruz-Ortiz on several occasions. On both September 20 and September 28, 2016, Jones was seen briefly entering Cruz-Ortiz's vehicle in a Target parking lot and leaving the vehicle holding a bag. On the latter occasion, Jones drove from parking spot to parking spot for about an hour before Cruz-Ortiz arrived, but did not enter any stores. Jones was not searched or arrested on either date, and law enforcement officers were unable to definitively ascertain the content of the bags. On October 6, 2016, Jones was again observed in the Target parking lot moving from spot to spot, but he left without meeting anyone. Detective Michelle Langham, one of the case agents on the investigation, testified that she believed Jones left because he spotted surveillance units.

About six months later, on April 3, 2017, law enforcement officers—again acting on a tip from their confidential informant—conducted surveillance of the parking lot of a Valero/Wag-A-Bag gas station. Detective Langham testified that the surveillance team observed Jones arrive, pull up to the gas pumps, drive back and forth in the area for about an hour, return to the parking lot, and meet up with Cruz-Ortiz's vehicle. Both vehicles then drove out of the parking lot in tandem. Detective Langham acknowledged that she did not observe any exchange of items

between Jones and Cruz-Ortiz and she did not stop Jones or seize any drugs on this date.

The central events in this case occurred on May 3, 2017. Special Agent Royce Clayborne received a tip from the confidential informant that a drug deal would occur at the same Valero on May 3, 2017. A surveillance team set up in the area and observed Jones arrive and pull alongside a truck driven by someone they identified as Cruz-Ortiz's roommate. Detective Langham testified that Jones gestured to the other driver, and both vehicles drove off together. Officers followed the two vehicles as they left the gas station and traveled down County Road 213, a lightly traveled rural road. The vehicles briefly passed out of view. When Detective Langham drove by, she saw the two vehicles meet for less than a minute in a dirt pull-off on the side of the road and then drive off in different directions. Nobody saw any transaction or exchange of items between Jones and the other driver, and nobody observed Jones in possession of a firearm. The individual believed to be Cruz-Ortiz's roommate was not followed or stopped after this encounter.

Officers instead followed Jones as he turned onto County Road 201. Detective Langham directed a sheriff's deputy to stop Jones for a traffic violation. Jones did not immediately stop when the deputy activated his emergency lights. Instead, Jones abruptly sped up and drove up to 90 miles per hour on a 40-mile-an-hour road for about a mile, passing out of view at certain points. Law enforcement officers did not observe Jones throw anything from his truck but, when Jones finally stopped, the windows on both sides of his truck were down. Officers arrested Jones and searched his truck, but found no drugs or firearms.

With the assistance of canine units, law enforcement then searched both sides of County Road 201. After one to two hours of searching, officers found an unloaded pistol in a cactus patch on what would have been the passenger side of Jones's vehicle, about a quarter of a mile from where Jones ultimately stopped. The pistol was wedged into a cactus and covered in dirt and cactus pollen. Detective Langham testified that the pistol was not rusted and was not covered by leaves or other objects, and she did not believe it had been there for a long period of time. Officers also found a gun magazine nearby.

A sheriff's deputy driving to collect the gun noticed a Ziploc bag approximately a quarter of a mile from where the gun was found and on the opposite side of the road. The Ziploc, found next to a reusable plastic bag, contained about 982 grams of methamphetamine. Detective Langham testified that both the gun and the methamphetamine were found in an area where the sheriff's deputy lost sight of Jones as he sped down the road. Detective Langham and Agent Clayborne testified that they had extensive experience in drug investigations and had never randomly encountered a kilogram of methamphetamine on the side of the road. Fingerprint analysis was conducted, but there were no usable prints on the methamphetamine bag or the pistol, and the usable prints on the reusable plastic bag were either inconclusive or did not match Jones.

Jones was interrogated on the night of his arrest. He told a detective that he did not intentionally flee the sheriff's deputy but was instead attempting to get away from an individual who attempted to fight him at the Valero. Jones stated that he did not see the deputy or his blue lights. As Jones now acknowledges, this description of a fight at the Valero was inconsistent with what the surveillance team observed. Jones did not admit to possessing a firearm or to possessing methamphetamine.

Jones was subsequently charged with (1) possession with intent to distribute 500 grams or more of methamphetamine, (2) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, (3) possession of a firearm by a convicted felon, and (4) possession of a firearm in furtherance of a drug trafficking crime. The government filed notice of its intent to introduce evidence of other crimes under Federal Rule of Evidence 404(b), and Jones filed a motion to exclude this evidence. Jones also filed pretrial motions to compel disclosure of the identity of the government's confidential informant and to exclude testimony related to the confidential informant under Federal Rule of Evidence 403 and the Confrontation Clause of the Sixth Amendment. The district court denied the motion to disclose the confidential informant, and stated that it was denying the motion to exclude testimony "at this time prior to trial." The court explained that "[t]he information, I suspect, is simply going to be a suspected drug transaction at that address," but noted that "[i]f the government is going to go further, the govern-

ment needs to tell counsel."

The case proceeded to a four-day jury trial. At trial, law enforcement officers testified about their investigation into Cruz-Ortiz's suspected methamphetamine distribution and their surveillance of Cruz-Ortiz and Jones. This testimony included multiple references to tips and other information received from the confidential informant. Jones objected to this testimony on hearsay grounds. The district court sustained some objections, but determined that other references to the confidential informant were admissible to explain the officers' actions rather than for the truth of the matter asserted in the statements.

Over Jones's continued objection, the district court also admitted evidence of Jones's prior judgment of conviction. The district court instructed the jury that it could not consider the prior conviction as proof of the crimes charged, except as to the charge for being a felon in possession of a firearm. The district court further instructed the jury that, if it found beyond a reasonable doubt from other evidence that Jones committed the acts charged in the indictment, it could consider evidence of similar acts allegedly committed on other occasions to determine intent, motive, opportunity, plan, or absence of mistake.
The district court denied Jones's motion for a judgment of acquittal, and the jury found Jones guilty on all four counts. The district court later denied a post-trial motion for judgment of acquittal or, alternatively, a new trial. Jones was sentenced to a total of 300 months' imprisonment, the mandatory minimum for his offenses. At the same sentencing hearing, the district court found that Jones violated his supervised release on the 2010 federal conviction because of his new criminal conviction in this case. The district court sentenced Jones to 18 months' imprisonment on the revocation, to run consecutively to his 300 month term.

Jones now appeals his convictions and the revocation of his supervised release. He argues that (1) the district court erred by admitting evidence of his prior conviction, (2) testimony regarding the confidential informant violated his rights under the Confrontation Clause, (3) the district court erred by not ordering disclosure of the identity of the confidential informant, and (4) the evidence was insufficient to support the jury's verdict on any of the four counts. Jones further contends that his revocation judgment must be vacated because it was predicated on an invalid conviction. We address each argument in turn.

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We turn next to Jones's challenge under the Confrontation Clause. The Sixth Amendment provides a criminal defendant with the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. "[T]his bedrock procedural guarantee" protects against convictions based on out-of-court accusations that the defendant cannot test "in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 42, 61 (2004). To satisfy the Confrontation Clause, "[t]estimonial statements of witnesses absent from trial" may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."

Prior to and during trial, Jones made multiple objections to the government's use of information from its confidential informant. We focus our Confrontation Clause analysis on the following series of exchanges with Agent Clayborne. The first occurred on direct examination:
Prosecutor: [B]ased on the information you'd received, Coy Jones had received a large amount of methamphetamine?
Defense: Objection. Hearsay.
Prosecutor: I'll withdraw the question.
The Court: That objection is overruled.
Prosecutor: I'll withdraw the question, your Honor. The Court: All right.
Prosecutor: Why did you follow Coy Jones as opposed to the other guy?
Agent Clayborne: Well, we knew that Coy Jones had just received a large amount of methamphetamine.
Prosecutor: And once you knew that he had received that methamphetamine, what did you do?
Agent Clayborne: We were coordinating a traffic stop of the vehicle driven by Coy Jones, which is the white truck.

Prosecutor: And why did you want to stop that vehicle?
Agent Clayborne: Because it had methamphetamine, we wanted to seize it and arrest Coy Jones.
On cross-examination, defense counsel questioned Agent Clayborne regarding his asserted knowledge that Jones had received methamphetamine:

Defense: [Y]ou didn't see any interaction between Mr. Jones and the silver truck, right?
Agent Clayborne: That's correct.
Defense: But you testified that you knew Jones had received a large amount of methamphetamine.
Agent Clayborne: That's correct.
Defense: But you didn't know that, right? You hadn't seen anything. You hadn't seen an exchange of methamphetamine or money.
Agent Clayborne: But I knew it was.Defense: You believed it, but you didn't know it.

Agent Clayborne: I knew it. I mean, if you're asking me, I knew it.

Defense counsel then moved on to other questions. On re-direct examination, the government returned to the subject of Agent Clayborne's knowledge of Jones's methamphetamine possession:
Prosecutor: [Defense counsel] also asked you, let me characterize this, sort of confronted you about when you said you knew a drug deal had gone down, but you had not seen anything. Do you recall that?
Agent Clayborne: That's correct.
Prosecutor: How did you know that a drug deal had, in fact, occurred?
Agent Clayborne: So once we saw or the other units saw what looked like a drug deal, *I made a phone call to my confidential source, who then made some phone calls himself and got back to me that the deal had happened.* (emphasis added).
Prosecutor: Based on that information, you decided to stop Coy Jones?
Agent Clayborne: That's correct.
Defense counsel asked to approach the bench and renewed the motion for disclosure of the confidential informant. Counsel argued that Agent Clayborne testified about the content of what the informant said and that Jones had the right to confront the witnesses against him. The district court stated that the testimony regarding the confidential informant came in response to defense questions on cross-examination and that the defense opened the door to the testimony. The court also denied Jones's renewed motion to turn over reports on the confidential informant.

"Police officers cannot, through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." An officer's testimony need not repeat the absent witness's exact statement to implicate the Confrontation Clause. Rather, "[w]here an officer's testimony leads to the clear and logical inference that out-of-court declarants believed and said that the defendant was guilty of the crime charged, Confrontation Clause protections are triggered."

Agent Clayborne testified that he *knew* that Jones had received a large amount of methamphetamine because of what the confidential informant told him he heard from others. The jury was not required to make any logical inferences, clear or otherwise, to link the informant's statement (double hearsay) to Jones's guilt of the charged offense of methamphetamine possession. The government reinforced this connection during both opening and closing statements. In opening remarks, the prosecutor described the May 3, 2017, surveillance and stated: "Of course, the information the agents have at this point is that Coy Jones is now in possession of a large amount of methamphetamine, so they follow Coy Jones." In closing arguments, the prosecutor told the jury:

And then, as you heard from Agent Clayborne when the defense asked him, how do you know the drug deal happened? Well, the informant told me. We called the informant and said, did the deal happen and he said, yep, it sure did. And that's why they chose to follow Coy Jones because they knew he had the drugs.
In light of this testimony and argument, we differ with the government's assertion that the informant's statements did not directly identify Jones. Both Agent Clayborne and the prosecution "blatantly link[ed]" Jones to the drug

deal and "eliminated all doubt" as to who the informant was referring to.

The government does not dispute that the confidential informant's statements regarding the drug deal are inadmissible under the Confrontation Clause as substantive evidence of Jones's guilt. It argues instead that the informant's statements were not introduced for their truth, but simply to explain the actions of law enforcement officers. The district court instructed the jury that testimony regarding the confidential informant "was admitted only to explain why law enforcement was conducting various surveillance operations," and could not be used "as evidence the defendant, or anyone else, actually engaged in a drug transaction."

Testifying officers may refer to out-of-court statements to "provide context for their investigation or explain 'background' facts," so long as the "out-of-court statements are not offered for the truth of the matter asserted therein, but instead for another purpose: to explain the officer's actions." We have made clear that "[w]hen such evidence comes into play, the prosecution must be circumspect in its use, and the trial court must be vigilant in preventing its abuse." ("[C]ourts must be vigilant in ensuring that these attempts to 'explain the officer's actions' with out-of-court statements do not allow the backdoor introduction of highly inculpatory statements that the jury may also consider for their truth.")

Such vigilance is necessary to preserve the core guarantees of the Confrontation Clause. A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officer was able to obtain a search warrant.

"Statements exceeding the limited need to explain an officer's actions can violate the Sixth Amendment—where a nontestifying witness specifically links a defendant to the crime, testimony becomes inadmissible hearsay."

(explaining that testimony regarding a tip is permissible "provided that it is simply background information showing the police officers did not act without reason and, in addition, that it does not point specifically to the defendant"). Because Agent Clayborne's testimony about his conversation with the confidential informant "point[ed] directly at the defendant and his guilt in the crime charged," it was not a permissible use of tipster evidence. Thus, the introduction of this statement at trial violated the Confrontation Clause.

Jones also appeals the denial of his motion to disclose the identity of the confidential informant. We review a district court's decision to deny disclosure of an informant's identity for abuse of discretion. *United States v. Ibarra*, 493 F.3d 526, 531 (5th Cir. 2007). There is "no fixed rule" in this area because "[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S. 53, 62 (1957). "We apply a three factor test to determine whether the identity of a confidential informant should be disclosed: '(1) the level of the informant's activity; (2) the helpfulness of the disclosure to the asserted defense; and (3) the Government's interest in nondisclosure.'" *United States v. Ortega*, 854 F.3d 818, 824 (5th Cir. 2017) (quoting *Ibarra*, 493 F.3d at 531).

In response to Jones's request for disclosure, the government represented that the informant "just gave a tip," "was not on the scene on any of this that will be the subject of trial," and "would not be a fact witness." The district court held an *ex parte* hearing with the government and subsequently denied Jones's motion for disclosure of the confidential informant, citing safety concerns and the government's long relationship with the informant. We have affirmed the denial of a request for disclosure when the confidential informant "was a mere tipster," the informant did not provide information that would aid the defense, and disclosure posed risks to the safety of the informant and his family and could jeopardize other ongoing investigations. *Ibarra*, 493 F.3d at 532.

Upon review of the transcript of the *ex parte* hearing, we concur in the district court's assessment that disclosure of the informant's identity could be dangerous for the informant and his family. It is not clear from the record, however, whether the district court fully considered the level of the informant's involvement in the contested conduct and the potential helpfulness of disclosure to Jones's defense. These factors are closely tied to our Confrontation Clause analysis. As explained above, the government's use of the confidential informant at Jones's trial exceeded

the scope of a "mere tipster." The government instead elicited testimony that the confidential informant confirmed facts central to its case—that a drug deal occurred on May 3, 2017, and that Jones received a large amount of methamphetamine in that transaction.

Jones argues that disclosure of the informant's identity would have been helpful to his defense because the informant could have been cross-examined regarding the benefits he received in exchange for assisting law enforcement as well as his own criminal history. This information was discussed during the district court's *ex parte* hearing with the government but was not disclosed to Jones before trial.7 The value of impeachment evidence depends on how a witness is used at trial and whether the witness's credibility is a relevant issue in the case.

Here, the government relied on the confidential informant's representation that a drug transaction was completed on May 3, 2017. Moreover, the government highlighted the trustworthiness of the confidential informant during closing arguments. The government noted that the informant had provided reliable information about Cruz-Ortiz on multiple occasions and that law enforcement officers were "able to confirm what they're being told by their informant, based on the information he gives them." The government also emphasized that the informant was providing information about Cruz-Ortiz, not Jones, and "[i]t's not like the CI is trying to frame up Coy Jones." Under these circumstances, an opportunity to challenge the informant's motivations and credibility could have been helpful to the defense.

Given our holding on Jones's Confrontation Clause challenge, we expect the government to make different use of the confidential informant at any new trial. We thus remand to the district court to reconsider Jones's motion for disclosure in connection with a new trial.

The judgment of conviction is VACATED on all counts and this matter is REMANDED for further proceedings consistent with this opinion. The judgment of revocation is also VACATED and REMANDED.

U.S. v. Jones, 5th Circuit, July 02nd, 2019.
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EVIDENCE – MENS REA AND PRE-MEDITATION.

Kadeem Burden and Timmy Scott appeal their convictions and sentences for unlawfully possessing firearms as felons. We affirm.

Police officer Jesse Barcelona was driving his patrol car when he approached an intersection. Facing in the perpendicular direction were an SUV and a Mercedes. As Barcelona passed through the intersection, two or three black males in white t-shirts and blue jean shorts exited the SUV, approached the Mercedes, and began repeatedly discharging firearms into it. When Barcelona turned his car around to return to the scene, the SUV sped away, leaving the shooters running after it with Barcelona in pursuit (the occupants of the Mercedes, providentially it would seem, were uninjured).

The shooters turned to look at Barcelona's approaching car. Barcelona "could tell that one [of them] was still armed with what appeared to be an AK-47 rifle." Further, "they appeared to have something [black] covering their face[s]." They then ran into the local residential block, around which Barcelona (and other officers) secured a perimeter while awaiting the arrival of a canine unit.

Shortly thereafter, an officer at the perimeter spotted two black males, "fully clothed," "come out . . . from behind a residence and then run back in." "Under a minute" later, two black men "came back out . . , not clothed . . . [and were] [s]weating pretty profusely." With hands raised, the two men shouted "[w]e just got robbed, we just got

robbed." The officers "[took] them into custody[and] place[d] them in the back of" a police car, awaiting further instruction.

Inside the perimeter and assisted by a dog tracker, officers (including Barcelona) recovered various items. By one side of a house they found "a black plastic Halloween-style mask on the ground," and underneath the other side they found another such mask and two firearms.1 Before completing their search, the unit discovered two cellular phones on the ground and "a pair of blue jean shorts and a pair of white Nike shoes" nearby.

Upon returning to the perimeter, Barcelona went to the police car, where he "observed Mr. Kadeem Burden [ ] wearing only black or dark-colored under-wear and some socks, and Mr. Scott was only wearing . . . [b]lue jean-style shorts." Based on their general physical appearance, Barcelona "firmly believe[d] that those were the two individuals [he] observed shooting the fire-arms," though he had not seen the shooters' faces uncovered.

DNA and forensic examination linked Burden to one of the weapons and Scott to both phones and one of the masks. Further examination established that the nineteen bullets came from one or both of the firearms discovered at the scene.

Burden and Scott were charged in an indictment alleging solely that they, "having each individually been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony, knowingly did possess firearms . . . [that] had previously been shipped and transported in interstate commerce" in violation of 18 U.S.C. § 922(g)(1). The indictment did not allege that they knew of their felon status at the time of their possession, though both stipulated at trial that they were in fact felons at the time of their arrest.

Days after his federal arrest, Burden admitted to the Louisiana Parole Board that he had violated the conditions of his state parole by possessing a firearm. That prompted Scott to file a severance motion, which the district court denied. Notwithstanding that denial, the court instructed the jury that it was not to consider Burden's admission as evidence against Scott.

At trial, evidence was presented establishing that the defendants, upon surrendering to the officers, had claimed that they had just been robbed of their clothing (presumably by the shooters). That jury failed to reach a verdict.

Before the second trial, the district court ordered that the parties obtain its prior approval before "mention[ing] or elicit[ing] any testimony" regarding the supposed robbery. No party objected; neither did any party proceed to seek such approval. The second jury thus heard nothing about the defendants' robbery-related statements. After receiving the court's instructions outlining the elements of the crime—including that "[t]he government must prove that the defendant knew that he possessed a firearm, but not that the defendant knew that he was a qualifying felon"—the second jury found both men guilty.

The final presentence reports ("PSRs") recommended finding that the defendants "used and possessed" the firearms "in connection with attempted first degree murder." Neither defendant objected to his PSR, whose findings the district court therefore adopted.

The appeal presents four broad issues: (1) the denial of Scott's motion for severance, (2) errors relating to the defendants' knowledge (or lack thereof) that they were felons at the time of the incident, (3) the district court's limitation on evidence or testimony regarding the defendants' robbery claims, and (4) the cross-reference to attempted first-degree murder at sentencing.

……

After the convictions but before this appeal, the Supreme Court decided *Rehaif v. United States*. It "held that the *mens rea* requirement in 18 U.S.C. § 924(a)(2)—'knowingly'—applies to both the 'conduct' and 'status' elements in § 922(g) "That is, the Government 'must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status [here, being a felon] when he possessed it.'"

….

That standard, *i.e.*, "[d]emonstrating prejudice under *Rehaif*[,] will be difficult for most convicted felons for one simple reason: Convicted felons typically know they're convicted felons[,] [a]nd they know the Government would

have little trouble proving that they knew."

This case is a perfect illustration. Burden's arrest for felony possession "occurred only days [after he was] released on [his] first parole for simple robbery," and Scott had been paroled from a three-year suspended prison sentence for simple burglary only a few months earlier.8 Moreover, both defendants stipulated at trial that they were felons. The notion that either was unaware, as of October 2017, that he had been convicted of a felony, or that the government would have been unable to prove it, is unrealistic.9 Accordingly, the defendants cannot meet their burden to show that *Rehaif* error affected their substantial rights.

…
The only evidence relating to whether the defendants knew that they were convicted felons at the time of their arrests was the stipulation at trial that they were in fact convicted felons. Although that stipulation alone does not necessarily place the question entirely beyond debate, "absent any evidence suggesting ignorance, a jury applying the beyond-a-reasonable-doubt standard *could* infer that [the] defendant[s] knew that [they were] convicted felon[s] from the mere existence of [their] felony conviction[s]."
…
The defendants claim that "no evidence was presented at trial, either direct or circumstantial, that could reasonably lead to a conclusion that the act was premeditated." They note that the evidence establishes merely that "[t]wo men exited the[ir] SUV and opened fire on the occupants of the Mercedes" that had stopped behind them while they themselves were at a stop sign. Because "[b]oth the driver and the passenger of the Mercedes denied any knowledge of who shot at them," defendants suggest, the record shows that "the shooting . . . was a spur of the moment crime of convenience, rather than any deliberate, considered murder plot." It would have been rather "convenient" indeed that the shooters possessed not only two fully loaded, high-powered firearms but also two black plastic masks, that they happened to be wearing when they decided, apparently unprovoked and on the "spur of the moment," to exit their vehicle and fire nineteen rounds into the victims' occupied Mercedes.

Defendants have shown, at most, that the shooters might not have held a "deliberate, considered, murder plot" specifically to kill the persons who were occupying the Mercedes. In that sense, it might have been "convenient" that the Mercedes and its occupants happened to stop behind the shooters' vehicle. It might be true that the shooters cared not for the identity of the Mercedes's occupants; perhaps they would have opened fire on *anyone* unlucky enough to have found themselves behind the shooters' SUV. And, had no such person arrived, it is perfectly plausible that the shooters would not have attempted to kill anyone at all.

But all that is entirely irrelevant. "Perhaps the best that can be said of deliberation is that it requires a 'cool mind' that is capable of reflection, and of premeditation that it requires that the one with the 'cool mind' did, in fact, reflect, at least for a short period of time before his act of attempted] killing."[15]That "period of time 'does not [necessarily] require the lapse of days or hours[,]or even minutes.'"

The record supports the finding that the shooters coolly reflected on their actions before taking them. As the defendants themselves note, there is no evidence that the shooters and the victims had ever previously interacted or known of the other's existence; in other words, nothing suggests the shooters were in a state of provocation that might have denied them the ability to reflect on their actions. Neither is there any evidence that the defendants are or were fundamentally incapable of such reflection. Even if there were no grand plot to murder specifically the persons occupying the Mercedes, there was ample opportunity to appreciate the situation while readying and wielding the guns, donning the masks, exiting the SUV, walking to the Mercedes, and opening fire repeatedly. That time was enough, and, again, that they "wore . . . mask[s] . . .greatly undermines" the notion that their actions were not pre-meditated.

The district court did not err. The judgments of conviction and sentence are Affirmed.

***U.S. v. Burden and Scott*, No. 19-30394, 5th Cir. July 02, 2020.**

EVIDENCE. SELF DEFENSE

A jury convicted Appellant of deadly conduct and sentenced him to four years in prison. He claims the trial court erred in denying him a jury instruction on self-defense against multiple assailants. The court of appeals concluded that Appellant was not entitled to a self-defense instruction at all, and the failure to include multiple assailants language was not error. We disagree and hold that Appellant was entitled to a jury instruction on multiple assailants, and the failure to include it was harmful. We remand the case to the trial court for further proceedings.

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31(a). A person is justified in using deadly force against another if he would be justified in using force, and he reasonably believes deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. TEX. PENAL CODE § 9.32(a). The evidence does not have to show that the victim was actually using or attempting to use unlawful deadly force because a person has the right to defend himself from apparent danger as he reasonably apprehends it.

Self-defense is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct. He cannot both invoke self-defense and flatly deny the charged conduct. Regardless of the strength or credibility of the evidence, a defendant is entitled to an instruction on any defensive issue that is raised by the evidence. A defensive issue is raised by the evidence if there is sufficient evidence to support a rational jury finding as to each element of the defense. We view the evidence in the light most favorable to the defendant's requested defensive instruction. A trial court errs to refuse a self-defense instruction if there is some evidence, viewed in the light most favorable to the defendant, that will support its elements.

When the evidence viewed from the defendant's standpoint shows an attack or threatened attack by more than one assailant, the defendant is entitled to a multiple assailants instruction. The issue may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor.
In *Sanders v. State*, Sanders was hit in the head with a pool cue and chased into the parking lot by several men who were yelling racial epithets at him. He fired three shots in their direction, killing one of them. Sanders was entitled to a multiple assailants instruction even though the deceased had not personally attacked him. Thus, "multiple assailants" does not require evidence that each person defended against was an aggressor in his own right; it requires evidence that the defendant had a reasonable fear of serious bodily injury from a group of people acting together.

Background
Appellant had packed up his belongings to move from Texarkana to Broken Bow, Oklahoma. On the way out of town, he and his friend, Cody Bryan, stopped at the Silver Star restaurant where Appellant's ex-girlfriend, Summer Varley, worked as a waitress. He texted her to see if she was working that evening, and she answered that she was not. She said she was in the bar drinking with some friends and suggested that Appellant buy her a drink. Varley's drinking companions were Jordan Royal, Austin Crumpton, Damon Prichard, and Joshua Stevenson.

When Appellant and Bryan arrived at Silver Star, Royal met them at the door, squeezed Appellant's hand "pretty intently," and told Appellant not to speak to Varley. Royal was much larger than Appellant, and Appellant found him to be intimidating.

Appellant assured Royal they were just there to eat and were not planning to talk to Varley. Since Varley and her friends were in the bar, Appellant and Bryan sat in the main dining area. Nevertheless, Prichard approached their table "with a pretty aggressive nature" and exchanged words with them. Bryan noticed that Prichard exhibited signs of intoxication. Varley approached them, too, and called Appellant an "asshole." After these interactions, Ap-

pellant and Bryan thought "it would be a bad idea to stick around too long" and decided to pay their tab and leave quickly rather than eat at Silver Star.

When Appellant and Bryan exited the restaurant, they found Varley, Royal, Prichard, Stevenson, and Crumpton congregated near the door. According to Varley, Royal was intoxicated and upset at Appellant. She knew that Royal was going to try to attack Appellant and, concerned for Appellant's safety, Varley approached him and told him he needed to leave. Crumpton testified that the group was "mouthing" at Appellant and Bryan; Prichard testified that there was an "altercation, a bunch of talking mess, and then it escalated." According to Prichard, the group moved into the parking lot because "it was heated at the moment."

As Appellant and Bryan tried to walk to their car, Royal punched Bryan, knocking him out. Appellant saw Royal, Crumpton, and Prichard standing over Bryan and saw Royal motion for Stevenson to go around the cars to chase Appellant down. Appellant continued to retreat with Royal and Stevenson in pursuit of him. Crumpton and Varley also followed Royal into the parking lot. Varley testified that "everyone was going after [Appellant]" and agreed that there were multiple assailants on Appellant and Bryan.

Appellant said a hand reached around his face, "fish-hooked" his eye, and turned him around. He realized it was Royal who was grabbing him and on top of him, and he heard footsteps coming up from behind him. As Appellant and Royal were wrestling, Appellant pulled a pistol out of his pocket, chambered a round, and fired three shots. He testified that he did so because he feared for his and Bryan's safety, they were being mobbed by multiple assailants, and he had no other alternative because he had already tried to retreat. One shot hit a parked car, one hit Royal in the leg, and one hit Varley in the chest.

Appellant went back into the restaurant, asked the staff to call 9-1-1, placed the pistol on the counter in the kitchen, held his hands up, and waited for police to arrive. He admitted to the officers that he had fired the gun.

Appellant was charged with aggravated assault with a deadly weapon for shooting Royal and deadly conduct for knowingly discharging a firearm in the direction of Varley and Crumpton. The jury charge included self-defense instructions for both offenses based on the conduct of Royal, but the trial judge declined to include Appellant's requested self-defense instruction related to the conduct of Royal "or others with him." The jury found Appellant guilty of deadly conduct but hung on aggravated assault.

In the light most favorable to the requested instruction, the evidence showed that five people who were united in their hostile intent acted together to intimidate and chase Appellant and Bryan. Right before firing the gun, Appellant heard Royal hit Bryan. When he turned around, he saw Royal, Crumpton, and Prichard standing over an unconscious Bryan, and saw Royal motion for Stevenson to chase Appellant as he was trying to flee. Varley and Crumpton followed. Royal, who was bigger than Appellant, grabbed him by the eye socket, and jumped on top of him. While he was wrestling with Royal, Appellant heard approaching footsteps, and he fired because he felt he had no other choice. On this evidence a rational jury could have found that Appellant reasonably believed that deadly force was immediately necessary to protect himself from the group's apparent or attempted use of deadly force against himself and Bryan.
It does not matter whether Crumpton or Varley individually used deadly force against Appellant; it matters whether Appellant had a reasonable apprehension of actual or apparent danger from a group of assailants that included Crumpton and Varley. "If there is evidence of more assailants than one, the charge must inform the jury that the accused can defend against either, and it is error to require the jury to believe or find that there was more than one assailant attacking the accused."

The State Prosecuting Attorney as *amicus curiae* argues that Appellant did not satisfy the confession-and-avoidance requirement for self-defense because he did not admit to knowingly shooting in the direction of Crumpton and Varley. The State took a different position at trial, maintaining that Appellant admitted to all of the elements of deadly conduct on cross examination:
State: "That you did then and there knowingly discharge your firearm?"

Appellant: "Yes, sir"
***
State: "You fired your weapon in the direction of one or more individuals. Is that correct, sir?"
Appellant: "Yes, sir."
State: "Those are all the elements that the State has to prove to deadly conduct."
The State Prosecuting Attorney also argues that Section 9.31 requires evidence that the victim was an assailant in his own right because self-defense is couched in terms of using force against "another" and against "the other's" use or attempted use of unlawful force and because self-defense is based on reciprocity. But Section 9.31 encompasses "others" because "another" is defined by the Penal Code, and Penal Code definitions apply to grammatical variations of the defined terms. TEX. PENAL CODE § 1.07(a)(5) (definition of "another"), (b) (grammatical variations apply to defined terms). And self- defense is based on reasonableness.

The State Prosecuting Attorney maintains that the trial court's instructions gave Appellant what he wanted: the right to defend against Varley and Crumpton because of Royal's actions. But the instructions focused exclusively on Royal's actions whereas the evidence viewed in the light most favorable to Appellant showed that he was facing a mob. This "unduly limited the jury in passing upon appellant's right of self-defense."

Since the evidence demonstrated that Appellant had a reasonable apprehension of apparent danger from multiple assailants, he was entitled to the instruction.

(harmless error discussion is omitted)

By contrast, correct instructions would have authorized an acquittal if Appellant reasonably believed that shooting in the direction of Varley and Crumpton had been immediately necessary to protect himself against "Royal or others" and would have required rejection of self-defense if Appellant did not reasonably believe that shooting at Varley and Crumpton was immediately necessary to protect himself against deadly force by "Royal or others." The difference between the instructions that were given and those that should have been given is the difference between foreclosing self-defense and allowing fair consideration of it. That difference clearly demonstrates that Appellant was harmed by the refusal to instruct on multiple assailants. Thus it is unnecessary to further assess harm in relation to other charge errors such as: the failure to put the burden of persuasion on the State with respect to self-defense, the failure to instruct on the presumption of reasonableness with respect to a defendant's belief that deadly force is immediately necessary, and conditioning self-defense on the duty to retreat.

Appellant was entitled to a self-defense instruction that referenced "Royal or others." The failure to give it was calculated to injure Appellant's rights. We reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings consistent with this opinion.

***Jordan v. State*, Tex. Crim. App., No. PD-0899-18, Feb. 05th, 2020.**
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EVIDENCE – POSSESSION OF FIREARM BY A FELON.

While at a friend's house, Tredon Smith touched a Smith & Wesson .38 caliber revolver. He later pleaded guilty to being a felon in possession of that firearm in violation of 18 U.S.C. § 922(g)(1). In connection with his guilty plea, he signed a factual basis document indicating the only interaction he had with the firearm was that he had "touched" it. The district court accepted that factual basis as sufficient to sustain Smith's § 922(g)(1) conviction. For the following reasons, we VACATE Smith's guilty plea, conviction, and sentence and REMAND for entry of a new plea and necessary proceedings thereafter.

Midland, Texas police officers arrested Smith after they recovered three stolen firearms on April 6, 2019. Following his arrest, Smith was shown a picture of one of the firearms—a Smith & Wesson .38 caliber revolver—which he admitted to having seen and touched at a friend's house. He stated that he did not remember touching the other firearms. Smith was later arrested and charged with being a felon in possession of the .38 revolver on or about April 29, 2019 in violation of 18 U.S.C. § 922(g)(1). Smith pleaded guilty to the charge. In connection with that plea,

Smith signed a factual basis indicating that he had "touched" the firearm, which the district court accepted as a sufficient basis for his conviction. The district court then sentenced Smith to 57 months of imprisonment, with three years of supervised release to follow. Smith timely appealed.

Smith challenges his plea colloquy, primarily contending that the district court incorrectly concluded that his admission to having "touched" the .38 revolver constituted a sufficient basis for possession as required to sustain a conviction under 18 U.S.C. § 922(g)(1).

Among other requirements, Federal Rule of Criminal Procedure 11 requires a federal district court taking a guilty plea to independently evaluate whether the defendant's admitted-to conduct actually constitutes a violation of the statute under which he is charged.

…….

But where, as here, review is for plain error, we may also "scan the entire record" for any other facts supporting the conviction. *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010). Smith pleaded guilty to possessing the .38 revolver in violation of 18 U.S.C. § 922(g)(1). That statute prohibits a felon like Smith from "knowingly possess[ing] a firearm," either actually or constructively. But where, as here, review is for plain error, we may also "scan the entire record" for any other facts supporting the conviction. *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010). Smith pleaded guilty to possessing the .38 revolver in violation of 18 U.S.C. § 922(g)(1). That statute prohibits a felon like Smith from "knowingly possess[ing] a firearm," either actually or constructively.

A defendant has actual possession over a firearm when he has "direct physical control"—such as when he has the firearm "on his person," is seen "carrying the firearm," or is tied to the firearm with "forensic evidence." Constructive possession is broader: a defendant has constructive possession when he has "ownership, dominion, or control" over either the firearm itself or over the premises in which the firearm is found. The common denominator between the two is control; absent some indication that the defendant controlled the firearm, conviction is improper under either theory of possession.

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The dissenting opinion focuses on Smith's other "criminal activities"—stating that Smith "is a leader of a street gang" and that Smith was found "fleeing the scene of a vehicle burglary" two months after his touching of the .38 revolver as "relevant," but they are not.

The dispositive question in this appeal is whether there was a sufficient factual basis to convict Smith for possessing the .38 revolver. That he may have been involved in other misconduct—even misconduct involving *other* firearms—says nothing at all about whether he possessed *this* firearm.

There is no evidence in the record that Smith had either actual or constructive possession of the .38 revolver (indeed, the Government all but abandoned the notion of constructive possession). At the outset, it is undisputed that Smith did not control the relevant premises (his friend's residence), and there is no evidence in the record that Smith owned the .38 revolver or otherwise controlled it or its location. Turning to direct possession, the only evidence in the entire record regarding Smith's interaction with the .38 revolver is his admission to "touching" the firearm. We see no evidence that Smith's fingerprints were actually on the firearm. The factual basis does not say that they were. It merely indicates that officers asked Smith "why his fingerprints *would be*" there. A detective's question

is not evidence of a fact: it could just as easily be an interrogation tactic to get Smith to confess; indeed, the officers posed the same question with respect to two *other* firearms that Smith maintains he never touched at all. In fact, we see no actual evidence of any fingerprints whatsoever (and the Government points to nothing else), let alone the sort of fingerprint evidence that would suggest Smith controlled the firearm. If the Government had that evidence, presumably, it could easily have included it in the record since possession of other firearms was a question in the sentencing process.

The Government also seems to suggest that possession can be inferred from the fact that Smith knew the caliber of the .38 revolver without officers mentioning it to him. But even if we made the questionable assumption that an individual's knowledge of an object's features can imply prior control over the object,8 the officers here showed Smith the picture of the .38 revolver before he told them its caliber. So, there is no evidence that Smith had private knowledge indicating prior control; he could have simply determined the caliber by looking at the picture. Dominion or control over this particular firearm was not necessary to know that fact.

The plain text of § 922(g), logic, and an analysis of our precedents all reveal that mere touching is insufficient to establish possession. First, the text. The statute, § 922(g), proscribes only "possess[ing] . . . [a] firearm." 18 U.S.C. § 922(g). A look at the dictionary confirms the common-sense intuition that possession does not encompass mere touching; to possess something is to control it—it is "to be master of" the thing or "to have and hold [it] as property."

No one would confuse the simple act of laying a hand or finger on an item, on its own, as making someone the "master" over the item. Every day, humans touch countless things we don't "possess," such as countertops at the grocery store. To say all of those interactions are *possession* wildly expands the logical definition of that word.

Consistent with our discussion of the common sense of the word, we have repeatedly emphasized that possession requires something more than touching. Moreover, we have endorsed jury instructions that prevent a jury from convicting on a possession charge for mere touching alone.

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We therefore need not decide every interaction with an item that could qualify as possession. We simply conclude that the level of interaction here (which, as we have discussed, begins and ends with "touching"), without more, is not enough. The dissenting opinion's various questions—"grip it? Brandish it? Hold it[?]"—are not at issue in this case.

The bottom line: our case law, like the plain text itself, confirms that merely touching an item is not enough to possess it.

At bottom, the dissenting opinion's primary argument to the contrary boils down to the relatively uncontroversial proposition that the length of possession is irrelevant under § 922(g). We agree, but the problem is not whether Smith possessed the firearm for a long enough period of time, it is whether Smith possessed the firearm *at all*.

Thus, given § 922(g)'s plain text and the overwhelming weight of case law on the subject, we conclude that the district court committed a clear and obvious error in treating Smith's admission to touching the .38 revolver as a sufficient factual basis for his guilty plea on that charge.

In sum, we hold that the district court plainly erred in accepting Smith's guilty plea to possessing the .38 revolver on the sole basis that he had touched the firearm. As that error affected the fairness and integrity of Smith's conviction, we VACATE Smith's guilty plea, conviction, and sentence and REMAND for entry of a new plea and necessary proceedings thereafter.

***U.S. v. Smith*, No. 20-50304, Fifth Circuit, May 05th, 2021.**

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EVIDENCE – POSSESSION OF FIREARM IN FURTHERANCE OF DRUG POSSESSION.

Appellant Adam Cooper pleaded guilty to one count of possession with intent to distribute methamphetamine and one count of possession of a firearm in furtherance of a drug-trafficking crime. On appeal, Cooper contends that the facts do not support his guilt of the firearm offense. Because there is a sufficient factual basis to show Cooper possessed a firearm in furtherance of a drug-trafficking crime, we AFFIRM. Nevertheless, because the court's judgment erroneously indicates that Cooper pleaded guilty to the second superseding indictment—when in fact he pleaded guilty to the superseding indictment—we REMAND for correction of the judgment under Federal Rule of Criminal Procedure 36.

(*The extended discussion of the error in pleading is omitted*)

We now turn to the merits of Cooper's appeal. Cooper makes two interrelated arguments on appeal: first, that the district court should have inquired as to whether there was a sufficient factual basis to support Cooper's guilty plea to count 2, the firearm count; second, that the factual basis is, in fact, insufficient to show that his possession of the firearm was in furtherance of the drug-trafficking offense because he did not know that the firearm was in the car. Cooper's first argument that the district court should have inquired further is meritless. Cooper correctly states that the district court has a "duty to compare the factual basis to the elements of the offense to determine if the factual basis supports conviction before accepting the plea." The district court, however, satisfied this duty through the Rule 11 colloquy conducted by the magistrate judge at the plea hearing.

Cooper properly consented to the magistrate judge conducting the colloquy; the magistrate judge explored the factual basis for count two by comparing the available facts to the elements of the offense alleged; and the district judge reviewed and accepted Cooper's guilty plea.

Cooper's second argument that the factual basis was insufficient also fails. Because Cooper did not challenge the sufficiency of the factual basis for his guilty plea in the district court, this court reviews for plain error. To show plain error, Cooper must show a forfeited error that is clear or obvious and that affects his substantial rights. We may, in our discretion, correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

To determine if the facts support Cooper's guilty plea to count 2, we may consult all relevant materials in the record. This includes the indictment itself, evidence available at the plea hearing, evidence "adduced after the acceptance of a guilty plea but before or at sentencing," the pre-sentencing report, *et cetera*.

According to Cooper, his possession of the firearm could not have been "in furtherance" of the drug-trafficking offense in count 1 because he did not have any "prior knowledge of [the firearm] before Marriott entered the vehicle." Possession of a firearm is "in furtherance" of a drug-trafficking offense if the possession furthers, advances, or helps forward that offense.3 This possession must be "knowing possession with a nexus linking the defendant and the firearm to the [drug-trafficking] offense." *Smith*, 878 F.3d at 502.

Cooper points to the fact that the firearm was found in Marriott's closed backpack on the passenger side of the car as evidence that he did not know about the firearm. He does not, however, address the fact that the backpack also contained drug paraphernalia and plastic baggies commonly used in the distribution process. While Cooper claims he did not know about the contents of the backpack, he knew about the backpack itself, and he certainly knew about the methamphetamine he was transporting. Furthermore, firearms are common "tools of the trade" of drug trafficking. Together, this evidence is more than sufficient to support the conclusion that Cooper knew about the firearm and that the possession was in furtherance of the methamphetamine trafficking charged in count 1. Cooper

does not show any plain error.

Finally, Cooper forfeited any argument he might have under *Rosemond* by not briefing the issue. Our March 30 order instructed Cooper's counsel to either file a supplemental *Anders* brief addressing *Rosemond* or "a brief on the merits addressing any nonfrivolous issues that counsel deems appropriate." Consistent with that order, Cooper's counsel chose the latter route, filing a brief on the merits which does not address *Rosemond*. In *Rosemond*, the Supreme Court addressed the issue of the *mens rea* required to aid and abet the possession of a firearm in furtherance of a drug-trafficking offense in violation of 18 U.S.C. §§ 2 and 924(c). 572 U.S. at 75. Cooper does not cite to *Rosemond*, and he discusses instead the distinct *mens rea* issue of the knowledge required to directly commit—rather than aid and abet—a § 924(c) offense. Assuming *arguendo* that Cooper did not forfeit a *Rosemond* argument, any *Rosemond* challenge would fail on this record. In *Rosemond* the Supreme Court explained that § 924(c) is a "combination crime" because it requires not just the possession of a firearm but also the commission a drug-trafficking crime. 572 U.S. at 71, 75. To show that the defendant intended to facilitate the commission of a § 924(c) offense—the intent requirement for aiding and abetting—the government must show that the defendant intended the commission of both aspects of § 924(c). This means that the government must show, at least, that the defendant had advance knowledge of the presence of a firearm.

The record contains Cooper's own admission that he possessed the firearm:

[THE PROSECUTOR:] The defendant admits and agrees that he possessed with intent to distribute more than 50 grams of actual methamphetamine, and that he possessed a firearm in furtherance of that offense.

THE COURT: Mr. Cooper, do you agree with the factual summary as read by the government's attorney?

THE DEFENDANT: Yes, your Honor. . .

THE COURT: Okay. Mr. Cooper, is there anything that you disagree with in that factual summary that you would like to change, make objections to?

THE DEFENDANT: No, your Honor.

THE COURT: All right. Does the factual summary accurately state what you did in this case?

THE DEFENDANT: Yes, your Honor.

It is well settled in this Circuit that an admission during a plea colloquy can support a guilty plea. *See United States v. Chandler*, 125 F.3d 892, 898 (5th Cir. 1997) (determining that defendant's admissions supported conviction).

The record also contains circumstantial evidence supporting Cooper's advance knowledge, such as the presence of the firearm in Cooper's car and the proximity of the gun to paraphernalia of drug distribution. The district court did not plainly err in accepting Cooper's guilty plea.

For the foregoing reasons, we AFFIRM the judgment of the district court but REMAND the case for correction of the judgment under Rule 36 to reflect that Cooper pleaded guilty to the superseding indictment.

***U.S. v. Cooper*, No. 19-50119, 5th Cir., Nov. 09, 2020.**

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EVIDENCE. ACCOMPLICE STATEMENT

DISSENTING OPINION

This case stems from the burning down of Applicant's house. Investigators concluded that the fire was intentionally set and that, after speaking to Applicant's ex-girlfriend, Applicant set it. She told them that she knew Applicant burned his house down because she was with him when he did it. According to her, she was only there because Applicant forced her to go. His defense was that he was not there and that he did not know who set the fire.

In *Zamora v. State*, we said that "[t]he accomplice-witness rule cannot be reasonably categorized as a defensive issue that a defense attorney might forego as a matter of strategy" and that "it is difficult to envision that any competent attorney would reasonably forego an accomplice-witness jury instruction as a matter of strategy based on his theory of the case."

This case convinces me otherwise. From opening to close, Applicant's defense was that he was not there and that he did not know who committed the crime, and in line with that defense, trial counsel did not ask for an accomplice-witness instruction. Now, relying on *Zamora*, Applicant argues that trial counsel was ineffective because he should have asked for an accomplice-witness instruction, or at least objected to its omission. I think that we should reexamine our holding in *Zamora*.

Imagine sticking to the same story the entire trial: you were not there when your house was set on fire, and you do not know who set it on fire, but at the last inute the jury was told that your ex-girlfriend might have been your accomplice. Despite the *Zamora* argument, the instruction here would not help. The point of the "go for broke" argument is to present the jury with two choices—he did it or he did not. But giving the accomplice instruction makes it appear as if you were really arguing that, "I had nothing to do with the crime, unless you think I did, in which case my ex-girlfriend was my accomplice."

If I were the defense attorney, I would not have wanted the jury to retire to deliberate thinking that I was trying to hedge my client's bets at the last minute by having it both ways. I might have even felt compelled to spend part of my closing arguments trying to clarify that we did not want the instruction and to emphatically emphasize that my client's ex-girlfriend could not have been an accomplice because my client was not there. But such an attempt would likely be confusing and unsuccessful given that the "accomplice bell" had already been rung. Instead, it would probably only draw the jury's attention to an issue that I never wanted it to think about it in the first place. On the other hand, not attempting to clarify the comments leaves the jury to fend for itself in figuring out what to make of this whole "accomplice" thing that no one ever mentioned at trial.

1It is certainly understandable why, in this post-conviction proceeding, Applicant is now taking the position that he is entitled to a new trial because defense counsel was ineffective in not asking for the instruction.

I think we should take the opportunity to file and set this case so that we can reexamine our decision in *Zamora* to decide whether it should be overruled to the extent that it holds that a defense attorney cannot strategically forego an accomplice-witness instruction when the facts call for it. With these comments, I respectfully dissent.

***Ex Parte Ross, Applicant*, Tex. Crim. App., No. WR-84,576-02, Feb. 12, 2020.**
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ELEMENTS – TAMPERING WITH EVIDENCE

Karl Dean Stahmann, Appellant, was involved in an automobile accident, after which he threw a bottle of promethazine, a controlled substance, over a nearby wire fence before law enforcement arrived. The bottle landed two to three feet past the fence in plain view. He was convicted of third-degree felony tampering with physical evidence and was sentenced to 10 years' confinement and fined $5,000. The judge suspended his sentence and placed him on community supervision for 10 years. Stahmann appealed, arguing in part that the evidence was insufficient to prove that he destroyed, altered, or concealed the prescription bottle. The court of appeals agreed that the evidence was insufficient, but instead of rendering an acquittal, it reformed the judgment to show that Stahmann was convicted of the lesser-included offense of attempted tampering with physical evidence, a state-jail felony.

We will affirm the judgment of the court of appeals.

Around 4:30 p.m. or 5:00 p.m. on July 1, 2012, Noberto Gonzalez was driving with his family from New Braunfels towards Marble Falls on Highway 46 near Canyon Lake when he was involved in an automobile accident. Stahmann was driving in the opposite direction when he stopped to turn left across the highway into a gated community. As Stahmann turned left, Gonzalez's SUV broadsided Stahmann's van. Gonzalez said that Stahmann appeared to be looking down and did not notice his approaching SUV. There is no dispute that Stahmann did not use his turn signal or that he did not yield the right of way. Ronnie Ballard and Michael Freeman, two bystanders, were driving home together when they happened upon the car accident and stopped to render aid. Ballard and Freeman were the first to approach Stahmann's van. As they neared the van, Stahmann exited through the driver's-side door. When Ballard and Freeman reached the van and began checking on Stahmann's unconscious passenger, they noticed that Stahmann had walked in front of the van, near a wire game fence meant to keep animals inside the property, and threw something over it.

Ballard testified that Stahmann "walked towards the fence that was — there was a gated fence right near the accident scene. At that time, I saw him throw something over the — over the fence into — near a tree at the bottom of that tree. It looks like — looked to be, like, a prescription medicine bottle." According to Freeman, he was not far from Stahmann when Stahmann threw the bottle, and Freeman saw the bottle "land[] right there next to — to the fence, maybe a couple of feet away." He said that it landed "plain as day right there in the — he tried to throw it in the bush, but it didn't make it." (The bottle was close enough that one officer attempted to retrieve it through the fence with his asp, a short, expandable baton.) Both Ballard and Freeman said that they never lost sight of the pill bottle. When the first officer arrived on-scene, Comal County Deputy Chris Koepp, Ballard and Freeman told Koepp about the bottle and pointed it out to him. Koepp said that he could see the bottle "very clearly." When asked by the State whether the bottle was concealed, he said that it was, but on cross-examination, and after his memory was refreshed with his own prior testimony, he agreed that the pill bottle was in plain view on top of the grass.

INDICTMENT
In two counts, the State alleged that,

[O]n or about the 1st day of July, 2012, KARL DEAN STAHMANN, hereinafter styled Defendant, knowing that an investigation was pending or in progress, did then and there alter, destroy or conceal a thing, to-wit: a bottle of pills, with intent to impair its verity or availability as evidence in the investigation.
* * *
[O]n or about the 1st day of July, 2012, KARL DEAN STAHMANN, hereinafter styled Defendant, knowing that an offense had been committed, did then and there alter, destroy or conceal a thing, to-wit: a bottle of pills, with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to said offense.

The State had to prove either that (1) knowing that an investigation or official proceeding was pending or in progress, (2) Stahmann altered, destroyed, or concealed a bottle of pills, (3) with the intent to impair its verity or availability as evidence in the investigation or official proceeding; *or that* (1) knowing that an offense was committed, (2) he altered, destroyed, or concealed a bottle of pills, (3) with the intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense.

Statutory construction is a question of law we review de novo. When interpreting the language of a statute, we read words and phrases in context and construe them according to normal rules of grammar and usage.. We give effect to each word, phrase, clause, and sentence when reasonably possible. If the language of the statute is plain, we effectuate that plain language so long as doing so does not lead to absurd results. If the language is ambiguous

or effectuating it would lead to absurd results, we can review a variety of extra-textual resources to determine its meaning.

The tampering-with-physical-evidence statute, Section 37.09 of the Penal Code,
states in relevant part that,
(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:
(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or
* * *
(d) A person commits an offense if the person:
(1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense; or
* * *
TEX. PENAL CODE § 37.09(a)(1), (d)(1).

Our tampering-with-physical-evidence statute is derived from the Model Penal Code. Many states, like Texas, have adopted slightly different versions of the statute. For example, while the Texas statute refers only to "altering, destroying, or concealing," the Model Penal Code and other states have specified that a person is also guilty if he "removes" any record, document, or thing. Some states have included novel theories of tampering, such as when a defendant moves, suppresses, 7 mutilates, 8 hides 9 places,10 or disguises physical evidence.11

7 *State v. Jones*, No. 2007-K-1052 (La. 6/3/08); 983 So. 2d 95, 102.
8DEL. CODE tit. 11, § 1269 ("the person suppresses [physical evidence] by any act of concealment, alteration or destruction").
9N.M. STAT. § 30-22-5; *see State v. Rudolfo*, 2006-NMSC-035, 144 N.M. 305, 311–12, 187 P.3d 170, 177 (holding evidence of tampering sufficient where the defendant hid the murder weapon in his car).
10ALASKA STAT. § 11.56.610(a)(1).
11720 ILL. COMP. STAT. 5/31-4 ("disguises physical evidence"); GA. CODE § 16-10-94(a); MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. art. IV, § 21-26(A)(3)(a); WIS. STAT. § 946.47(1)(b).

The Kentucky Supreme Court, interpreting the word "remove," said that it means "the act of changing the location or position of a piece of an object in a way that moves it from the scene of the crime."

Another court held that the crucial inquiry is whether the "defendant's actions disguised the evidentiary value of the article." The Louisiana Supreme Court said that its tampering-with-physical-evidence statute is the broadest in the nation. Under that statute, a person is guilty if he "moves" evidence with the requisite intent and knowledge. Although our statute does not include a "moves" theory of liability, the State argues that we should interpret "alter" to include anything that is "moved."

The word "alter" must be interpreted according to its common usage because it is not statutorily defined. The State argues that "alter" in its common usage means "to 'change in character or composition, typically in a comparatively small but significant way'" and that the character of a thing is changed when it is moved, no matter how *de minimis* the movement. Under this theory, Stahmann would be guilty of tampering with the pill bottle the moment he touched it in his pocket with the intent to impair its availability as evidence. We are not persuaded. If the legislature intended for the mere movement of a physical thing to constitute tampering, it could have said that. We think the more reasonable interpretation is that, when a defendant is alleged to have altered a physical thing, like the pill bottle in this case, in its common usage "alter" means that the defendant changed or modified the thing itself, not that he merely changed its geographic location.

The cases cited by the State do not change our conclusion. The State argues that the court of appeals in *Carnley v. State* held that "moving a car constituted altering the car" for purposes of the tampering statute. However, the court in that case explicitly said that it did not resolve the issue because the parties agreed that "[*Carnley*] altered the Pontiac by moving it." The State also cites *[several case cites omitted.]* all of which deal with corpses. All three cases are distinguishable. This case does not deal with a corpse, which is quantitatively different than the prescription pill bottle at issue here, and this case does not deal with altering the location *and* physical state of the pill

bottle, only its location. With this background, we conclude that the evidence is insufficient to prove that Stahmann altered the prescription pill bottle when he threw it over the fence because the mere act of throwing the pill bottle did not change the bottle itself. Having found the evidence of alteration insufficient, we next turn to whether the evidence of concealment was sufficient.

The State argues that "conceal" means to remove from sight or notice, even if only temporarily, and that the statute refers to concealing evidence from law enforcement. According to the State's argument, it does not matter that Ballard and Freeman never lost sight of the pill bottle, that they directed Koepp to the bottle, that Koepp could see it. "very clearly," or that the bottle was easily retrieved, because Stahmann concealed it from Koepp when he threw it over the fence before Koepp arrived to investigate.

Even if we assume without deciding that the statute applies to only law enforcement, as the State argues, we conclude that the pill bottle in this case was not concealed from law enforcement. What the witnesses saw and told law enforcement informs whether the physical evidence was concealed from law enforcement. The outcome of this case might be different had Ballard and Freeman not been there, had they lost sight of what Stahmann threw or where it landed, had they not spoken to Koepp and directed him to the pill bottle when he arrived, or had Koepp had a difficult time locating it. But those are not the facts of this case.

The State argues that *Munsch v. State* and *Lujan v. State* require a different result, but we disagree. In *Munsch*, police found a bag containing 16.94 grams of methamphetamine after a traffic stop when the driver told police on the way to the county jail that Munsch threw a bag of methamphetamine out of the passenger-side window while they were being pulled over. After returning to the scene, the police officer located the bag with his flashlight, although he had difficulty doing so because it was dark outside. In *Lujan*, as a police officer approached Lujan on foot to detain him for possible drug activity, he noticed that Lujan "took his right hand from his left side and moved it towards the center 'as if he was throwing something.'" The officer found a crack pipe on the ground. According to the State, this case and *Munsch* are similar because in both cases law enforcement would not have found the evidence without the assistance of a third-party witness. We think that *Munsch* is distinguishable. The evidence in that case established that it was not until the driver was arrested and secured in the police cruiser that she told the officer about the bag of drugs. In this case, however, Ballard and Freeman told Koepp about the bottle as soon as he arrived. Koepp had not even begun his on-scene investigation. Second, it was difficult for the officer in *Munsch* to find the bag even after the driver told him about it since it was dark and Munsch threw it out of the passenger side window while the vehicle was still moving. But here, Ballard and Freeman showed Koepp exactly where the bottle was, and Koepp saw the bottle "very clearly" in the afternoon daylight. The State argues that *Lujan* shows that a defendant need not successfully conceal something to be guilty of tampering with evidence by concealment, but we agree with the court of appeals that "[a]ctual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation.". We also agree with the court of appeals that intent and concealment are two distinct elements of the offense and that the *Lujan* Court erred if it concluded otherwise. While a rational jury could have reasonably inferred that Stahmann intended to conceal the pill bottle when he threw it over the wire fence, the evidence shows that he failed to conceal it as he intended because the bottle landed short of the bush in plain view on top of some grass.

The evidence is insufficient to prove that Stahmann concealed the pill bottle when he threw it over the fence.

Because we did not grant review of the court of appeals's holding reforming Stahmann's conviction, we do not address that holding and affirm the judgment of the court of appeals.

***Stahmann v. State*, Court of Crim. Appeals no. PD-0556-18, April 22, 2020**.
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3. ELEMENTS OF OFFENSES:

ROBBERY – ELEMENTS AND EVIDENCE

Walter Freeman Jordan, III and Johnathon Nico Wise were found guilty, along with several co-defendants, of aiding and abetting aggravated credit union robbery in violation of 18 U.S.C. § 2113(a), (d)(2). Jordan was additionally found guilty of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii), (c)(2). They both appeal their convictions and sentences.

Jordan argues that (1) there was insufficient evidence to sustain his conviction; (2) the district court erred in permitting testimony that identified Jordan and Wise as brothers; and (3) the district court erred in permitting co-defendants' testimony regarding their own guilty pleas. Wise similarly argues that (4) there was insufficient evidence to support his conviction; and (5) the district court erred in permitting testimony that identified Jordan and Wise as brothers. He additionally argues that (6) the district court plainly erred in failing to give a *Rosemond* instruction; (7) the district court clearly erred in applying a sentencing enhancement for the use of a firearm; and (8) the district court clearly erred in denying a Guidelines reduction for Wise's allegedly minimal role in the robbery.

We AFFIRM the convictions and sentences.

Because Jordan and Wise both challenge the sufficiency of the evidence, it's necessary for us to dive into the record to understand what evidence was before the jury. We read the facts in the light most favorable to the jury's verdict.
On July 24, 2017, the Houston Police Department was investigating Walter Jordan and monitoring a phone number—ending in 6601—attributed to him. By following cell tower signals, officers observed the phone move from the Third Ward of Houston to the Cinco Ranch area. At the same time, surveilling officers followed Jordan as he drove a maroon Volkswagen Jetta from the Third Ward of Houston to the Cinco Ranch area. Both the phone and Jordan then traveled back to the Third Ward, at which point officers saw Jordan exit the Jetta.

The next morning, officers observed the phone move from its usual nighttime location earlier than usual, prompting them to begin surveillance on Greenmont Street. There, they identified a silver Chevrolet Malibu, black Toyota Tundra, silver Nissan Rogue, and the maroon Jetta that Jordan had been driving the day before. Jordan, Wise, and others moved between the vehicles over the course of a couple of hours, and eventually, all four cars filed out in formation. As the four vehicles pulled off of Greenmont, heading west, officers followed in unmarked vehicles.

The vehicles drove to the Cinco Ranch area—the same area that Jordan had traveled to the day before. The four cars under surveillance then "scrambled." The fleet of about twenty officers initially followed the cars moving in various directions but then set up posts at different locations around the area. From their respective posts, the officers were able to continue observing the vehicles' movements. The 6601 phone was in the Cinco Ranch area at this time as well, with the signal bouncing between two nearby towers.

Officers noticed that the four cars seemed to be focused on First Community Credit Union. Each car spent about fifty minutes either parked—facing the credit union—or circling various streets that ultimately led back to the credit union. Eventually, the Tundra pulled into a parking spot in front of the credit union, and three men exited the truck and ran inside. A fourth man followed shortly after. Because the men's faces and hands were covered, officers were unable to physically identify them.
Once inside the credit union, two of the men jumped over the teller counter, demanded that the tellers get on the ground, and asked where the money was kept. One teller was then instructed to get back up and unlock her drawer; the robbers proceeded to go through the tellers' drawers, ultimately collecting money from two, including "bait bills." The robbers then attempted to get into the vault, striking one bank employee when he failed to open it.

When a teller informed them that she didn't know the vault combination either, one of the robbers lifted his shirt,

revealed the gun in his waistband, and instructed her to get back on the ground. Shortly after, another person came into the credit union and shouted, "The cops are down the street." The robbers jumped back over the teller counter and fled the credit union. On their way out, one of the robbers pointed a gun at a customer attempting to enter the credit union, prompting the customer to turn around and return to his car. After the robbers returned to the Tundra and began driving away, the Rogue, Jetta, and Malibu—which had been parked in various spots near the credit union—followed. Officers in marked vehicles followed the Tundra, while officers in unmarked vehicles stopped the others. Deandre Santee and Wise occupied the Rogue, Daryl Anderson occupied the Jetta, and Jaylen Loring occupied the Malibu. All four were detained.

Meanwhile, the officers' pursuit of the Tundra and its four occupants continued. The cars flew down the highway at speeds around 130 miles per hour until the Tundra exited. After it was off the highway, the Tundra made numerous turns, flew through red lights, and drove into oncoming traffic, eventually hitting a dead end. With nowhere left to turn, the Tundra's driver slammed on his breaks, and the passengers jumped out of the still-moving vehicle and began to flee on foot. One passenger—Raymond Pace—was not fast enough to get out of the Tundra's way and was crushed between the front bumper and a fence; officers called for medical assistance and placed Pace under arrest. The three other passengers continued running toward an apartment complex at the fence line.

Officers learned that Jordan's brother, Terrance, lived in the apartment complex and promptly obtained a search warrant for his unit. With resistance, officers were able to make their way into the apartment. Inside, they noticed still-wet hoodies in the washing machine that had the same markings as the ones worn by the robbers and a shoebox with a gun and pair of gloves that matched the gloves worn by the robbers. Outside of the unit, but still in the apartment complex, officers located a backpack on a small balcony between the second and third floors, which contained hoodies and gloves that matched the ones worn by the robbers and a pillowcase with cash, including the credit union's bait bills. Back at the Tundra, officers catalogued, among other things, gloves and a pistol found underneath the front passenger seat. They also retrieved a phone off of Pace that matched the 6601 number affiliated with Jordan, and another three phones were retrieved from inside the Rogue, one of which matched another phone number affiliated with Jordan. Phone records later confirmed that these phones were engaged in multiple calls with one another throughout the robbery.

The Trial Testimony

Anderson and Loring, two of the individuals arrested in companion cars, testified against Jordan and Wise at trial. During direct examination, the prosecutor elicited testimony that both had pled guilty to aiding and abetting the robbery of the First Community Credit Union. They both also acknowledged that their goal in testifying was to reduce their sentences.

In his testimony, Anderson acknowledged his past convictions for giving a false name to a police officer, possessing a controlled substance, and displaying a false license plate. He then went on to explain his relationship with Jordan. Anderson told the jury that he had known Jordan most of his life and that, on the morning of the robbery, Jordan had enlisted his help in being a lookout during the robbery. At first, Anderson refused and left Greenmont Street with his "good friend," Santee. But then Jordan called him and begged for his help, promising that Anderson's only role would just be as "some extra eyes." Anderson agreed to be a lookout, and Jordan filled him in on the details. Santee and Anderson then sat in Santee's Rogue, and Santee asked what he was supposed to do. Anderson didn't give Santee any specific instructions but told him just to follow. Minutes later, Wise, who had been in the Jetta, got into the Rogue with Santee. Anderson got into the Jetta. Jordan entered the driver's seat of the Tundra. And the cars set off for the credit union. En route, those in the Tundra, Jetta, and Rogue engaged in a three-way call. The purpose of the call wasn't to chat, but to keep one another informed if any cops came into view or trouble arose. The driver of the Malibu, a woman who Anderson didn't know, joined the call as well; she let them know the credit union was all clear. Anderson testified that the Tundra then parked in front of the credit union, those in the Tundra went into the bank for ten to fifteen minutes, and then they came back out and fled. Anderson attempted to follow them, but was soon cut off by unmarked police vehicles and placed under arrest.

Loring testified that she met Jordan, also known as Wacko, on Instagram about a week before the robbery when he messaged her about the opportunity to make quick money. They met a couple of times over that week, and Jordan filled her in on his plan. Loring testified that Jordan was the driver of the Tundra on the day of the robbery and that Jordan called her during their drive to the credit union to say, "Follow us," which she did in her Malibu. She continued to hear other voices during the drive, as though the phone was on speaker, but no one was speaking directly to those on the phone call. The only voice she recognized was Jordan's. At his direction, Loring went into the bank to ensure security wasn't inside—it wasn't. The Tundra then pulled into the parking lot, and the to-be robbers went inside. Loring remained on the phone throughout. She then saw the men leave the credit union, get back in the Tundra, and pull out. Loring attempted to follow, but she was quickly pulled over and arrested.

In addition to Loring and Anderson, numerous officers testified. Among them was Sergeant David Helms, who provided testimony regarding the evidence collected at the scene, forensic testing, and the relationship of the defendants. Specifically, he testified, over defense counsel's objections, that Wise and Jordan were brothers. During cross examination, defense counsel confirmed that Sergeant Helms acquired this knowledge during the course of the investigation and that neither Jordan nor Wise "tr[ied] to hide it from [him]."

…

Issues regarding sufficiency of the evidence are largely fact-based questions that we review de novo. And we "must affirm a conviction if, after viewing the evidence and all reasonable inferences 'in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Importantly, this means that our review is "limited to whether the jury's verdict was *reasonable*, not whether we believe it to be *correct*."

Jordan argues that the evidence is insufficient to support a finding of guilt because the Government's case impermissibly "pile[d] inference upon inference" and there was no DNA or fingerprint evidence to link Jordan to the crimes. His argument is unavailing. As the Government notes, the testimony of Anderson and Loring alone is sufficient to warrant a guilty verdict against Jordan on the first count—aiding and abetting robbery.10 Anderson testified that Jordan enlisted his help in the robbery, was the driver of the Tundra, and was on the phone with him throughout the robbery. Loring also testified that Jordan enlisted her help in the robbery, was the driver of the Tundra, and was on the phone with her throughout the robbery. This testimony is substantial enough, on their face, to demonstrate that Jordan was involved in the robbery of the credit union.

Jordan argues that Anderson and Loring's testimony cannot support his conviction because they are incredible. However, "[t]he jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses." And, despite Jordan's assertion in his reply brief, none of Loring or Anderson's statements were so outside the realm of possibility that no juror could have believed them.13 Jordan's counsel had every opportunity to impeach both Anderson and Loring for their previous acts of dishonesty and any inconsistencies in their testimony, and the jury independently weighed that testimony and determined that the evidence was sufficient to support a finding of guilt. We do not second-guess such findings.

And even if Anderson and Loring's testimony wasn't credible, the other evidence presented at trial is sufficient to support a guilty verdict. Officers observed Jordan drive to and from the location of the robbery the day before the robbery in a vehicle that was used as a lookout during the robbery; a phone associated with Jordan moved in the same direction as Jordan the day before the robbery, and then that phone was used during the robbery and found on a co-defendant; and the bait bills and clothing worn by the robbers were found in or around Jordan's brother's apartment complex immediately after the robbery. From this evidence alone, a reasonable juror could conclude that Jordan participated in the robbery.

As for the second count—aiding and abetting the brandishing of a firearm during and in relation to a crime of violence—the evidence also supports conviction. Anderson and Loring's testimony demonstrates that Jordan played a leadership role in organizing the robbery. Witnesses testified that a gun was brandished at a teller and pointed at a customer. A pistol was found in the Tundra driven by Jordan. And another gun was found in a shoebox at Jordan's brother's apartment under gloves resembling those used in the robbery. From this evidence, a reasonable jury could, and did, conclude that Jordan was aware that a firearm would be brandished in the commission of the robbery.

Jordan argues that the evidence is insufficient to link him to the crime because the pistol in the car was not loaded and his fingerprints weren't on the weapon. However, whether Jordan ever held the pistol is of no moment because "[w]hover commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." And the jury made a specific finding that Jordan had advance knowledge that a firearm would be used by someone during the crime. Given Jordan's role in the robbery, that a firearm actually was brandished in the credit union and pointed at a customer, and that Jordan was driving the car that housed a pistol, the jury's guilty verdict was reasonable.

We review evidentiary rulings for an abuse of discretion, subject to the harmless error rule.18 An abuse of discretion occurs when a ruling is grounded in a legal error or based on a clearly erroneous analysis of the evidence.19 But even if such an error occurs, we will not reverse if the guilty verdict was unattributable to the error—the harmless error rule.

Though the Government has forfeited its argument as to whether an error occurred, it has not waived its argument as to whether the error was harmless. As the Government notes, the testimony was harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Before Officer Helms' testimony was presented, the jury had already heard testimony from two co-defendants who described Jordan's involvement in the robbery and from other officers who had traced Jordan's phone along the robbery route and described the clothing and bait bills found at the apartment complex of Jordan's other brother, Terrance. Because this substantial evidence supports the conclusion that Jordan was guilty of aiding and abetting robbery, during which a firearm was used—absent information about a relationship between Jordan and Wise—any error was harmless.

A review of the record and relevant case law demonstrates that Jordan was convicted on the basis of sufficient evidence; the admission of evidence regarding his relationship to Wise was, at worst, harmless error; and the district court did not plainly err in admitting testimony of Anderson and Loring's guilty pleas.

The evidence was sufficient to support the jury's finding of guilt against Wise.

Wise argues that the evidence was insufficient to support his conviction in two respects: first, that there was no evidence Wise "aided and abetted"; second, that there was no evidence Wise had advance knowledge that a weapon would be used. We review the first argument de novo, but we review the second argument for a manifest miscarriage of justice. Both are unavailing.

Wise first argues that the jury only received evidence that he was *present* during the robbery, but that it did not receive any evidence that Wise *participated*. To be sure, "presence at the scene and close association with those involved are insufficient factors alone; nevertheless, they are *relevant* factors. (*emphasis by ed.*) . . . and coupled with the "collocation of circumstances," they may permit a jury to infer that an individual participated in the crime." [34]Wise's argumentasks us to assume that the jury ignored one of its key roles—makingrational inferences—which we cannot do.

. . .

Though the evidence of Wise's guilt is more circumstantial than evidence connecting Jordan to the crime, the record is not so devoid of evidence that his guilty conviction is "shocking." For instance, Wise was observed moving between the four robbery vehicles the morning of the crime and communicating with various co-defendants. He ultimately switched vehicles with Anderson, who had been brought into the plan only that morning, so that he would be in the same car as Santee, who didn't have any details about the robbery. The evidence also demonstrates that Wise was on a conference call with the co-defendants throughout the commission of the robbery, and he was ultimately arrested in a vehicle following the fleeing Tundra after the robbery was completed. Witnesses testified that one bank employee was assaulted during the robbery; another employee was threatened, albeit im-

plicitly, when one of the robbers brandished his firearm; and a gun was pointed at a bank customer when he tried to enter the credit union. Guns were later retrieved from the Tundra and from Jordan's brother's apartment in a shoe-box with other robbery paraphernalia. Based on this evidence, a reasonable jury, without being manifestly unjust, could conclude that Wise was aware that his co-defendants would be carrying weapons in the commission of the robbery, and that those weapons would be used to threaten or assault those the robbers confronted.

If the district court erred in admitting testimony that Jordan and Wise are brothers, the error was harmless.

We review evidentiary rulings for an abuse of discretion, subject to the harmless error rule.18 An abuse of discretion occurs when a ruling is grounded in a legal error or based on a clearly erroneous analysis of the evidence.19 But even if such an error occurs, we will not reverse if the guilty verdict was unattributable to the error—the harmless error rule.

. . .

As the Government notes, the testimony was harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict."

Neither Jordan nor Wise has shown any reversible error, and their convictions and sentences are AFFIRMED.

U. S. v. Jordan, Wise. **No. 18-20564, 5th Cir., Dec. 13th, 2019.**

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ELEMENTS. ACCESSORY TO SEXUAL ASSAULT

Appellant, Lydia Metcalf, was convicted as a party of second-degree felony sexual assault based on her husband's anal rape of their then 16-year-old daughter, Amber.1 (1Amber is the pseudonym adopted by the court of appeals, and we will continue to use it.)

Metcalf was sentenced to three years' imprisonment but was not fined. On appeal, she argued that the evidence is legally insufficient because it did not show that she had the intent to promote or assist her husband's sexual assault of their daughter. The court of appeals agreed and rendered an acquittal. We granted the State's petition for discretionary review asking us to review the decision of the court of appeals. Because we agree with the lower court, we will affirm its acquittal.

Under the hypothetically correct jury charge, the State had to prove that Metcalf, at the time of the offense, intended to promote or assist the commission of the anal penetration alleged in the indictment. But because the evidence does not show that it was Metcalf's conscious objective or desire for Allen to sexually assault Amber, the evidence is insufficient to show that she intended to promote or assist commission of that offense.

Metcalf's husband, Allen Metcalf (Allen), sexually assaulted their daughter, Amber, over several years. He pled guilty to twelve counts of second-degree sexual assault3 and three counts of indecency with a child. Metcalf was indicted on one count of anal-penetration sexual assault that occurred on or about December 2010. She was charged as the primary actor, but the jury was instructed that it could convict her as a party under Section 7.02(a)(2) or Section 7.02(a)(3). The jury convicted 4 Metcalf as a party, and she was sentenced to three years' imprisonment.

3Since this offense was committed, the legislature has added a new statutory subsection under which Allen could have been charged with first-degree felony sexual assault. Act of May 24, 2019, 86th Leg., R.S., ch. 738, § 2, 2019 Tex. Sess. Law Serv. 2049–50 (codified at TEX. PENAL CODE § 22.011(f)(2)) (citing TEX. PENAL CODE § 25.02 (prohibiting sexual intercourse and deviate sexual intercourse with certain family members)).

4Section 7.02(a)(2) and (a)(3) of the Penal Code state that,

(a) A person is criminally responsible for an offense committed by the conduct of another if:
* * *
(2) acting with intent to promote or assist the commission of the offense, h solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or

(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

TEX. PENAL CODE § 7.02(a)(2)–(a)(3).

(*The graphic description of sexual abuse over several years is omitted*.)

Amber also said that, sometimes when she cried out at night, her mother would stand by her bedroom door and ask, "What's going on?" When Allen left Amber's room, he would tell Metcalf that Amber was having a nightmare. Amber testified that she stopped crying out because she thought that her mother was "letting it happen."

When she was 15 years old, Amber told Metcalf that Allen was a "monster" who was doing "bad things," but she gave no more details, and Metcalf did not ask what she meant. Allen denied doing anything "bad," and Amber thought that Metcalf believed Allen.

When Amber was 16 years old, she came home from jogging with Allen and was crying. Amber told Metcalf that Allen had slapped her and tried to pull down her shorts. Allen admitted to slapping Amber and trying to pull down her shorts, but he denied that it was sexual. He said that Amber started "whining about having to use the bathroom" a few minutes after they left the house, "so he took her behind a tree and pulled at her shorts." Metcalf did not believe Allen that it was not sexual and kicked him out of the house, but she let him return later that day. She told police that even though she did not believe Allen, she had no proof. Before allowing Allen to return, Metcalf gave Amber a cell phone and a whistle "[i]n case [Allen] did something." According to Amber, Metcalf told Amber to call her, not the police, if something happened. Metcalf also put up a beaded curtain on Amber's bedroom door.

The court of appeals first addressed the hypothetically correct jury charge. The court of appeals concluded that, under Section 7.02(a)(3), the State had to prove that, (1) having a legal duty to prevent the commission of sexual assault (2) and acting with intent to promote or assist its commission, (3) Metcalf (4) failed to make a reasonable effort to prevent the commission of the offense of sexual assault (5) by penetration of Amber's anus (6) by the "defendant's sexual organ."

According to the lower court, to prove the intent to promote or assist, the evidence must show that "the parties were acting together, each doing some part of the execution of the common purpose," and the agreement to act "must be made before or contemporaneous with the criminal event."

The court of appeals found that the evidence insufficient to prove the "intent to promote or assist" element because it does not show that Metcalf knew about the anal penetration <u>alleged in the indictment</u>, (emphasis by ed.) so there could not have been an agreement to act.

Having found the evidence insufficient, the court proceeded to consider whether Metcalf's conviction could be reformed to reflect that she was convicted of indecency with a child. It concluded that the conviction could not be reformed because the evidence is insufficient to show that Metcalf had the intent to promote or assist the commission of indecency with a child. According to the court, Metcalf "did not witness[,] and was never told of any act of indecency with Amber committed by Allen[,] prior to the occurrence of the offense for which she was on trial," and "[a]lthough a jury could have concluded that Metcalf was concerned that Allen had sexual desires toward Amber, the allegation that Allen tried to pull down Amber's pants fell short of establishing that Allen succeeded in the act of pulling down Amber's pants or engaged in sexual contact with her." The court of appeals also distinguished cases cited by the State, explaining that the defendants in those cases actively encouraged commission of the offense, had actual knowledge of the offense, or were active participants.

The State argues that the court of appeals reached the wrong result because it considered the evidence in isolation, dismissing its cumulative impact. It agrees that Amber did not tell Metcalf that Allen had been sexually assaulting her until she was 22 years old, but it argues that the evidence is nonetheless sufficient to prove the intent to promote or assist. Specifically, it cites the following evidence,

• Amber testified that she thought that her mother was letting the abuse happen because, sometimes when Allen sexually assaulted her, she would cry out but her mother did not investigate after Allen told her that Amber was having a nightmare;

• Metcalf did not believe Allen that it was not sexual when he tried to pull down Amber's shorts while they were jogging;
• Even though Metcalf did not believe him about the jogging incident and kicked him out of the house, she let him return that same day;
• Metcalf put a beaded curtain on Amber's door, gave her an old cell phone and a whistle, and told her to call her, not the police, if Allen tried "something"; and
• Even after Metcalf walked in on Allen touching Amber's vagina and kicked him out, she allowed him to return, "indicating just how desperate she was to cater to Allen's wishes to keep him happy."

Evidence is sufficient to support a conviction if a rational jury could find each essential element of the offense beyond a reasonable doubt. When reviewing the sufficiency of the evidence, we consider all the admitted evidence in the light most favorable to the verdict.. The jury is the sole judge of the credibility of a witness's testimony and the weight to assign to that testimony.. This means that the jury can believe all, some, or none of a witness's testimony. Juries can draw reasonable inferences from the evidence so long as each inference is supported by the evidence produced at trial. "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them." The jury is not allowed to draw conclusions based on speculation even if that speculation is not wholly unreasonable because speculation is not sufficiently based on the evidence to support a finding of guilt beyond a reasonable doubt. "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." If the record supports contradictory reasonable inferences, we presume that the jury resolved the conflicts in favor of the verdict.

The sufficiency of the evidence is measured by comparing the evidence produced at trial to "the essential elements of the offense as defined by the hypothetically correct jury charge." A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." The law "authorized by the indictment" consists of the statutory elements of the offense as modified by the indictment allegations. "Party liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime."

Section 7.02(a)(3) of the Penal Code states that,

(a) A person is criminally responsible for an offense committed by the conduct of another if:
* * *
(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

To prove the intent-to-promote-or-assist element, the State must show that it was the defendant's conscious objective or desire for the primary actor to commit the crime. In assaying the record for evidence of 1intent, we look to "events before, during and after the commission of the offense."

(emphasis by ed.)

Although we can look to events taking place after commission of the offense, the intent to promote or assist must have been formed contemporaneously with, or before, the crime alleged was committed. Circumstantial evidence is as probative as direct evidence when determining whether a person was a party to an offense.

According to the court of appeals, the hypothetically correct jury charge required the State to prove that, (1) having a legal duty to prevent the commission of sexual assault[,] (2) and acting with intent to promote or assist its commission, (3) Metcalf[,] (4) failed to make a reasonable effort to prevent the commission of the offense of sexual assault[,] (5) by penetration of Amber's anus[,] (6) by the "defendant's sexual organ."

The State argues that the court of appeals erred because it required it to prove that Metcalf knew about the sexual assault alleged in the indictment. It asserts that Metcalf did not need to know whether Allen penetrated Amber's anus or vagina because those are only manner-and-means allegations, not essential elements of the offense, and therefore are not included in the hypothetically correct jury charge.

If the phrase "penetration of the anus or sexual organ" describes different manners and means of committing a sin-

gle offense, as the State argues, those allegations are not incorporated into the hypothetically correct jury charge because they are not essential elements of the offense. But if "penetration of the anus or sexual organ" defines two distinct criminal offenses, the State had to prove that Metcalf intended to promote or assist the anal penetration in the indictment because the anal-penetration allegation is an essential element of the offense.

We have previously decided an identical issue in the aggravated-sexual-assault statute. It controls our analysis here. In *Gonzales v. State*, 304 S.W.3d 838 (Tex. Crim. App. 2010), we had to decide whether the same phrase—"penetration of the anus or sexual organ"—in the aggravated-sexual-assault statute defined one or two offenses. We concluded that the phrase defined two separate offenses, reasoning that aggravated sexual assault is a nature-of-conduct offense, penetration of the anus and penetration of the sexual organ are distinct acts, and the words anus and sexual organ are written in the disjunctive.

This analysis applies with equal force to Section 22.011(a)(1)(A) of the sexual assault statute. Like the aggravated-sexual-assault statute, sexual assault is a nature-of-conduct offense, penetration of the anus and sexual organ constitute discrete acts, and the words sexual organ and anus are disjunctive.

Therefore, we conclude that "penetration of the anus or sexual organ" under Section 22.011(a)(1)(A) of the sexual-assault statute are different offenses, not merely two different ways of committing the same offense. Accordingly, those allegations are included in the hypothetically correct jury charge when assessing the sufficiency of the evidence because they are essential elements of their respective offenses.

3. The Evidence is Insufficient to Prove that Metcalf Had the Intent to Promote or Assist

The State argues that the court of appeals erred because it did not consider the cumulative impact of all the admitted evidence, instead engaging in divide-and-conquer analysis. It is true that a reviewing court must consider the cumulative impact of all the inculpatory evidence, but it cannot do so without also discussing individual pieces of evidence. Here, the court of appeals laid out the evidence and then addressed its cumulative impact.

Amber testified that the abuse began when she was 13 years old and lived in Houston. Metcalf said in a voluntary statement that one time she woke up at 2:30 a.m. "to find Allen coming back to bed. He said he was just checking on the kids[,] but I thought it was strange." Amber said that she did not tell anyone about the abuse because Allen threatened to hurt her siblings. When she was 14 years old, the family moved to Carthage.

That is also when Allen began to anally rape her. Amber called out for her mother a few times when Allen was in her room abusing her, but her mother never came to investigate.

Amber testified that sometimes her mother would stand by her door and ask, "What's going on." After Allen left the room, he would tell Metcalf that Amber was having nightmares, and Metcalf never investigated further. On another occasion when Amber cried out, two of her young siblings knocked on the bedroom door, but Allen told them to go back into the living room and watch a movie. Amber testified that she cried out for her mother when Allen committed the charged sexual assault, but she did not know if Metcalf was home. When she was 15 years old, Amber told Metcalf that Allen was a "monster" who was doing "bad things," but Amber never said what she meant, and her mother did not ask. When Amber was 16 years old, Allen slapped her and tried to pull down shorts when they were outside jogging. He admitted to Metcalf that he slapped her and tried to pull down her shorts, but he claimed that it was not sexual. Metcalf did not believe him.

She thought that it was sexual and kicked Allen out of the house again. Metcalf let Allen return to the house that same day and gave Amber a cell phone and a whistle and put up a beaded curtain on Amber's bedroom door. A year or two after the charged offense, Metcalf walked into Amber's room and saw Allen on top of her with his hand on her vagina. Metcalf kicked Allen out of the house, but she eventually allowed him to return.

After he returned, Amber and Metcalf slept together in the master bedroom for two weeks, and Allen slept on the couch. Amber testified that Allen never sexually assaulted her again.

According to the court of appeals, testimony establishing that Metcalf failed to respond to Amber's cries after Allen told her that Amber was having nightmares did not support a reasonable inference that "Metcalf knew about the anal penetration" unless other evidence showed that Metcalf did not believe Allen that Amber was having a nightmare. It continued that, "[b]ecause no other evidence was offered to support this inference, a conclusion that

Metcalf knew Amber was crying out because she was being sexually abused, instead of having nightmare, was based on speculation." The State argues that a jury could have reasonably inferred that Metcalf "saw through Allen's ruse that Amber was just having a nightmare." But we agree with the court of appeals.

We draw all reasonable inferences in favor of the verdict. But "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." While "[a] conclusion reached by speculation may not be completely unreasonable," and it might even prove to be true, it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

A rational jury could have believed or disbelieved Amber's testimony that she heard Allen tell Metcalf that Amber was just having nightmares, but there is no evidence from which a rational jury could have reasonably inferred that Metcalf did not believe Allen and that she knew he was actually sexually assaulting Amber. Similarly, while Amber's statements to Metcalf that Allen was a "monster" and was doing "bad things" are incredibly troubling, the State concedes that Amber's comments were too ambiguous to support a reasonable inference that Metcalf knew that Allen was sexually assaulting Amber. We agree. Amber never told Metcalf what she meant, and Metcalf never asked.

Without more context, Amber's comments are insufficient to support a reasonable inference that Metcalf knew that Amber meant that Allen was sexually assaulting her.

Also, a rational jury could have believed Amber's testimony that she cried out for her mother and that she was unsure whether her mother was home when she cried out, but that evidence does not support a reasonable inference that Metcalf was home, that Metcalf heard Amber, and that she did nothing because she knew that Allen was sexually assaulting her.
With respect to the jogging incident, the court of appeals found the evidence sufficient to show that Metcalf thought that Allen was sexually interested in Amber, but it concluded that Metcalf's belief does not support a reasonable inference that, since Metcalf thought that it was sexual for Allen, she must have known that Allen had been sexually assaulting Amber or that he would in the future. We agree.

According to the State, while the whistle, cell phone, and beaded curtain were ostensibly to protect Amber, the pitiful "protection" showed that Metcalf knew that Allen was sexually assaulting Amber and that she intended to promote or assist Allen in sexually assaulting Amber. The problem with the State's argument is that, if Metcalf gave Amber the whistle and cell phone and put up the beaded curtain to protect her—even though the measures were woefully inadequate—that tends to show that it was not Metcalf's intent to promote or assist Allen in sexually assaulting Amber. While a rational jury did not have to believe that Metcalf gave Amber the cell phone and whistle and put up the beaded curtain to protect her, there is no other evidence showing why Metcalf gave Amber those items and put the curtain up. In other words, even if the jury disbelieved Metcalf, it could not have reasonably inferred from that disbelief that Metcalf gave Amber the cell phone and whistle because she knew for a fact that Allen was sexually assaulting Amber and that it was her intention to promote or assist in the commission of those sexual assaults, including the charged offense.

Addressing the extraneous incident when Metcalf saw Allen sexually assaulting Amber, the court of appeals concluded that, While the 2011 incident, when coupled with Amber's statements that she cried out for her mother and believed her "mother was letting it happen," could have contributed to the belief that Metcalf may have known or suspected some untoward behavior on Allen's part prior to that incident, Amber testified that she did not inform Metcalf that Allen was sexually abusing her before the anal penetration alleged in the State's indictment occurred.

While it is indisputable that Metcalf knew that Allen was sexually assaulting Amber when she walked into Amber's room and saw Allen with his hand on Amber's vagina a year or two after the charged offense, the evidence does not prove that Metcalf knew that Allen was sexually assaulting Amber at the time of the charged offense, and there is no other evidence showing that it was Metcalf's conscious objective or desire for Allen to sexually assault Amber, so she could not have intended to promote or assist the commission of that offense. Even after viewing the cumulative impact of all the admitted evidence in the light most favorable to the verdict, we conclude that no rational jury could have reasonably inferred that Metcalf intended to promote or assist the sexual assault of Amber.

The court of appeals said that the evidence is insufficient to show that Metcalf and Allen had an "agreement to act

together to execute a common purpose" at the time, or before, the offense was committed. The State takes issue with the court of appeals's reliance on the "execute a common purpose" phrase, arguing that it only applies to the Section 7.02(a)(2), not Section 7.02(a)(3), and that it constituted an additional, unwarranted burden. We agree with the State that the cases relied on by the court of appeals to reach that conclusion are distinguishable because they deal with Section 7.02(a)(2) and that the only burden of proof that the State must meet is the essential elements of the offense set out in Section 7.02(a)(3). The decisions from this Court discussing a "common design" or "common purpose" are cases such as those in which the defendant is charged as a party when he, or a group of people including him, started a fight during which the victim was assaulted or killed. Despite the court of appeals's mistake, however, it reached the right result.

The next question is whether Metcalf's sexual assault conviction can be reformed to reflect that she was convicted of a lesser-included offense. A conviction must be reformed if (1) in finding a defendant guilty of the greater offense, the jury necessarily found that the defendant committed the lesser offense, and (2) the evidence is legally sufficient to support the defendant's conviction for the lesser offense. The court of appeals considered whether Metcalf's conviction could be reformed to reflect that she was convicted of indecency with a child as a party, but it ultimately rejected that possibility. It reasoned that, like the greater offense, the evidence is insufficient to prove that Metcalf intended to promote or assist Allen's commission of indecency with a child because Metcalf never saw, and no one ever told her, about any act of indecency prior to the anal penetration alleged in the indictment. According to the court of appeals, although "the jury could have concluded that Metcalf was concerned that Allen had sexual desires toward Amber, the allegation that Allen tried to pull down Amber's pants fell short of establishing that Allen succeeded in the act of pulling down Amber's pants or engaged in sexual contact with her." that reason, it concluded, the evidence did not show that Metcalf intended to promote or assist in the commission of indecency with a child. We agree with the court of appeals's analysis.

CONCLUSION
We hold that the evidence is insufficient to sustain Metcalf's conviction for sexual assault of a child by anal penetration and also that her conviction cannot be reformed to reflect that she was convicted of a lesser-included offense. Therefore, we affirm the court of appeals's judgment rendering an acquittal.

***Metcalf v. State*, Court of Crim. Appeals, No. PD-1246-18, April 01, 2020.**
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ELEMENTS – ROBBERY – *MENS REA*.

After a nine-day jury trial, Jermaine Webster Harris was found guilty of seventeen criminal counts, including two counts of carjacking and two counts of possessing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). Harris appeals his convictions for carjacking and possession of a firearm, contending the evidence is insufficient, and challenges the "special conditions" imposed as part of his supervised release. We affirm.

In early 2016, Jermaine Webster Harris and two codefendants were indicted in the Eastern District of Texas. Approximately eight months later, a superseding indictment named two additional codefendants. The superseding indictment charged Harris with seventeen counts. Relevant here, Harris was charged with two counts of carjacking and two counts of using, carrying, and possessing a firearm in relation to and in furtherance of a crime of violence under 18 U.S.C. § 924(c). Harris pleaded not guilty, and the case proceeded to trial. The jury convicted Harris on all counts. Harris filed a Motion for a Judgment of Acquittal, which the district court denied.

[*Sentencing discussion omitted*]

Harris contends that there was insufficient evidence to support his conviction under 18 U.S.C. § 2119 on two counts of carjacking. Specifically, he argues that there was insufficient evidence of *mens rea*.
To convict Harris of carjacking under § 2119, "the [G]overnment must prove that: 'the defendant, (1) while possessing a firearm, (2) took from the person or presence of another (3) by force and violence or intimidation (4) a motor vehicle which had moved in interstate or foreign commerce.'" "The defendants' motive in taking the car is irrelevant." The Supreme Court has explained that the intent element "of § 2119 is satisfied when the Govern-

ment proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car (or, alternatively, if unnecessary to steal the car)."

When a defendant moves for acquittal in the district court, this court reviews challenges to the sufficiency of the evidence de novo. "Appellate review is highly deferential to the jury's verdict," so the "jury's verdict will be affirmed unless no rational jury, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the offense to be satisfied beyond a reasonable doubt."

"In assessing the sufficiency of the evidence, we do not evaluate the weight of the evidence or the credibility of the witnesses." Juries are "free to choose among all reasonable constructions of the evidence," and "[d]irect and circumstantial evidence are given equal weight." In this case, the Government presented sufficient evidence to sustain Harris's carjacking convictions.

Count Four of the superseding indictment charged Harris and his codefendants with a carjacking on December 9, 2015. At trial, the Government offered testimony from two of Harris's co-conspirators, Alton Latray Marshall and Derek Polk. They provided the following testimony: Marshall, Harris, and Polk spent two days surveilling the home of a local radio Disc Jockey, Russell Martin. Marshall testified that prior to a home invasion, Harris typically researched the victims, and in this case he intended to steal Martin's Dodge Challenger. On the day that they stole the vehicle, a friend of Harris's drove Marshall, Harris, and Polk to Martin's house. When they arrived at the house, Marshall carried a baseball bat, and Harris and Polk carried firearms. Harris and Polk intended to point the guns at Martin "just to scare him," but Harris instructed Marshall to hit Martin with the bat if he did not listen to their instructions. When Martin arrived home, Harris and Polk pointed their guns at him. They checked Martin for weapons, and then ordered him to unlock the door to his house and disarm his alarm system. Marshall checked the house for valuables while Polk and Harris followed Martin to a safe in Martin's office, which was empty when opened. Martin also showed them a safe in the master bedroom closet but said he was unable to open it because it was installed at the time he purchased the home, and he did not know the combination. They then took Martin into the kitchen area where Harris duct taped him to the chair and then "rampaged the whole house." Harris "knocked over a lot of stuff" including plants and furniture. While Martin was in the chair, Polk kept a gun pointed at him. Polk tried to reassure Martin that "everything was going to be okay and that he wasn't going to be hurt," but Harris got "really . . . mad," pointed the gun at the back of Martin's head, and accused him of lying about his belongings. At one point, Polk told Martin, "[y]ou are lucky I am here. If I was not here, they would probably shoot you." While the men were ransacking the house, Martin offered other belongings, as well as money. After Martin had been tied to the chair for about ten minutes, Harris took the car keys from the counter, the intruders got into the Challenger, and Harris drove it away.

Viewing the evidence in the light most favorable to the Government, a rational jury could have found that Harris had the intent to seriously injure or kill Martin *if necessary* at the moment that he took the Dodge Challenger.

Count Eight charged Harris with a carjacking on July 25, 2015. At trial, the government presented the following testimony from Harris's co-conspirators, Polk, Marshall, and Kenneth Demarcus Cash: approximately eleven days before they stole the vehicle, Harris told Polk that he needed to get his own car by the end of the week. On July 24, Polk, Cash, Harris, and another man surveilled the house of their victims, the Davenports. During their surveillance, they discussed their intention to steal the Davenports' Audi during the home invasion. The next day, Polk, Cash, and Harris returned to the home carrying automatic weapons. Harris broke a window, entered the home, and opened the garage so Polk and Cash could also enter. Mr. Davenport, who was 77, was watching television, and the men alternated keeping an eye on him. After finding cash and a locked safe, the men approached Davenport and told him to open the safe. All three men pointed firearms at Davenport. Davenport was slow to open the safe, so Harris threatened him, saying: "if I put one in you, I bet you will open it then." Shortly thereafter Davenport was able to open the safe, and he was ordered to "lie face down on the floor" while Harris and Cash filled two duffle bags with jewelry, cash, and guns. The men then walked Davenport to the other end of the house, told him to go into the bathroom, count to 100, and not call the police. Harris and Cash slashed the Davenports' phone cords, and Cash grabbed the Audi keys off of the counter. The vehicle was involved in a crash as they began to drive away.

They then ran away on foot.

Harris argues that "the taking of the car is too attenuated from any violent acts perpetrated against Dr. Davenport." However, we only need to consider whether a rational jury could infer that Harris "possessed the intent to seriously harm or kill [Mr. Davenport] if necessary to steal the car," not whether any violent acts were perpetrated against the victim at the time that the vehicle was taken. There was sufficient evidence for a rational jury to make such an inference.

Harris relies on *United States v. Harris*, in which this court held that there was insufficient evidence to support the defendant's carjacking conviction. However, the facts of that case are distinguishable. In *Harris*, the defendant was hitchhiking and got into a stranger's car. The two men drove for a period of time, and then parked in a secluded area. According to the defendant's account, the driver pressured the defendant into engaging in sexual conduct, and when the defendant walked away the driver pursued him. At that point, the defendant shot him and covered the body. Then, he found the man's car keys and drove home. In that case, the record did not contain any evidence regarding how the two men got into the car together or arrived at the secluded area where the body was later found. "Indeed, the record lack[ed] any evidence relating to the moment [the defendant] demanded or took control of the vehicle." There was nothing from which the jury could infer the defendant's intent at the moment that he took the car, much less his intent to kill or harm.

In this case, Harris's co-conspirators testified as to the entire series of events during which Harris obtained possession of the vehicles, including the moments when he and his co-conspirators took control of the vehicles. Based on the trial testimony, a reasonable jury could conclude that, in both instances, at the moment Harris and his co-conspirators were taking each vehicle, Harris would have seriously harmed or killed the owner if necessary to take control of the vehicle. Such an inference is supported by evidence showing that Harris was in possession of a firearm when he took the vehicles, he pointed a firearm at each victim, he encouraged his co-conspirator to use physical violence against a victim if the victim did not comply, and Harris himself made threatening comments towards each victim. Harris entered each home with the intention of taking a vehicle, and the evidence supports the inference that he would have done whatever necessary to accomplish his goal.

[*Discussion regarding sentencing and other procedural issues omitted.]*

For the foregoing reasons, we AFFIRM the judgment.

U.S. v. HARRIS, 5th Circuit, No. 18-40635, June 05, 2020.

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6. CIVIL CASES:

SEARCH & SEIZURE – QUALIFIED IMMUNITY – CURTILAGE

We WITHDRAW the prior opinion filed September 24, 2020 and substitute the following.

After Deputy Steven Williams approached, questioned, and "reached to grab" Sidney Arnold just outside Arnold's home, Arnold fled, fell off a fence, and dislocated his shoulder. Arnold sued Williams pursuant to 42 U.S.C. § 1983 for violation of various constitutional rights and under Louisiana tort law. The district court disposed of all claims either through Federal Rule of Civil Procedure 12(b)(6) dismissal or Rule 56 summary judgment. Because Arnold plausibly alleged an unreasonable search, we REVERSE the dismissal of Arnold's unreasonable-search claim under § 1983 and REMAND for consideration of qualified immunity on that claim.

However, because Arnold either failed to state a claim or failed to raise a genuine dispute of material fact for his

remaining claims, we AFFIRM the district court in all remaining respects.
(*Ed. Note: This was Louisiana. The State Claims would also be summarily dismissed in Texas for other legal reasons.*)

Sidney Arnold and his brother lived in a garage apartment attached to a house while they worked for the homeowner.1 On March 18, 2017, Arnold awoke around 2:00 AM to discover Deputy Steven Williams, an officer of the East Baton Rouge Parish Sherriff's Office, just outside the garage apartment, standing under the carport. Deputy Williams told Arnold that he saw an open door on the house, and he pointed to the open door. Arnold stepped out of the garage apartment to see where Deputy Williams was pointing. Deputy Williams then asked Arnold for his name and driver's license. Arnold gave his name but told Deputy Williams that he did not have a driver's license.

Further, he told the deputy that the open door led to a laundry room but that the house could not be accessed from that laundry room. Deputy Williams then "told" Arnold to come to his police car so he could determine Arnold's identity. Arnold declined and said, "No, sir, I will wake the lady who owns the home and she will tell you who I am and that I live here and work for her." Arnold then knocked on the homeowner's window. The homeowner emerged and confirmed that both Arnold and his brother lived in the garage apartment. Deputy Williams, however, was not satisfied with the homeowner's word, "and he reached to grab Sidney Arnold and Sidney Arnold ran."

Arnold ran towards the backyard and Deputy Williams gave chase. Arnold attempted to climb a fence, but instead he fell over it and dislocated his shoulder. Arnold was apprehended and taken to the hospital. Arnold was ultimately arrested and jailed for twenty days. All charges, however, were dropped for lack of probable cause. Arnold filed a civil action against Deputy Williams under 42 U.S.C. § 1983 and Louisiana tort law. The § 1983 claims asserted illegal search and seizure in violation of the Fourth Amendment, false arrest and false imprisonment, malicious prosecution, and violation of substantive and procedural Due Process under the Fifth and Fourteenth Amendments.2 The Louisiana tort law claims alleged negligence and intentional infliction of emotional distress.

Deputy Williams moved under Rule 12(b)(6) to dismiss all of Arnold's claims. The district court granted the motion as to all of Arnold's § 1983 claims and as to his intentional-infliction-of-emotional-distress claim. The court denied the motion as to the negligence claim because "[b]reach and causation are fact bound determinations inappropriate for resolution at the pleading stage." The case proceeded through discovery, and Deputy Williams then moved for summary judgment on the remaining negligence claim. The district court granted the motion and rendered judgment in favor of Deputy Williams, dismissing the matter in its entirety.3 Arnold now appeals the 12(b)(6) dismissals of his § 1983 and intentional-infliction-of emotional-distress claims and the grant of summary judgment, as well as the district court's ruling on three evidentiary issues.

The district court dismissed both Arnold's unreasonable-search claim and his unreasonable-seizure claim under Rule 12(b)(6). We review 12(b)(6) dismissals *de novo*. Rule 8 requires that a plaintiff's pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

Fed. R. Civ. P. 8(a)(2). That is, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" A claim is facially plausible if the plaintiff alleges facts that, accepted as true, allow a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." While the court must accept the facts in the complaint as true, it will "not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions."

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must plead "two—and only two—allegations . . . . First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." The doctrine of qual-

ified immunity, however, adds a wrinkle to § 1983 pleadings when qualified immunity is relevant. However, because qualified immunity is "not simply immunity from monetary liability" but also "immunity from having to stand trial," there is an interest in qualified immunity entering a lawsuit "at the earliest possible stage of litigation."

This immunity-from-suit interest does not require that the plaintiff's original complaint exceed the short-and-plain-statement standard of Rule 8. *Anderson*, 845 F.3d at 589–90. Rather, "a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity." That is, a plaintiff must plead qualified-immunity facts with the minimal specificity that would satisfy *Twombly* and *Iqbal*. Furthermore, if the defendant first raises qualified immunity, the district court, "'*may* [*then*] *in its discretion*, insist that a plaintiff file a reply tailored to [the defendant's] answer [or motion to dismiss] pleading the defense of qualified immunity.'"

In this case, Arnold broadly addressed qualified immunity in his original complaint by alleging that Deputy Williams "knowingly violated" "clearly established law." Williams explicitly raised qualified immunity in his memorandum in support of his motion to dismiss, but the district court did not require Arnold to file a *Shultea* reply tailored to the defense of qualified immunity. In his memorandum in opposition to the motion to dismiss, Arnold addressed qualified immunity, albeit in a merely conclusory fashion: "The Court should find that qualified immunity does not apply to this case." In dismissing Arnold's unreasonable-search and unreasonableseizure claims, the district court did not determine if Williams is entitled to qualified immunity on those claims. Rather, it granted 12(b)(6) dismissal because it concluded that Arnold did not plausibly allege a search or seizure.

We first consider whether Arnold plausibly stated either an unreasonable search or an unreasonable seizure by turning to the two elements of a § 1983 claim set forth in *Gomez*: (i) deprivation of a federal right; and (ii) action under color of state law. The district court correctly recognized that Arnold sufficiently pleaded the second element, action under color of state law, for both the unreasonablesearch claim and the unreasonable-seizure claim. In reviewing Arnold's complaint, we determine that Arnold also plausibly alleged the first element as to the unreasonable-search claim but not as to the unreasonable-seizure claim.

Arnold's complaint consists of a narrative recitation of facts followed by a series of legal claims. Although the complaint is difficult to follow, the factual allegations in combination with the short legal claims plausibly state a search within the meaning of the Fourth Amendment. Arnold alleges that Williams entered the curtilage of Arnold's home, questioned him, and then asked him for identification. Arnold then summarizes these facts with the legal claim that "[a]ctions taken related to the stop, seizure and search were objectively unreasonable and violated clearly established law."

We hold that Arnold's complaint plausibly alleges a trespassory search of his home. The complaint alleges that Arnold found Williams lingering in an odd part of the curtilage under the carport at an odd hour—2:00 a.m and that Williams immediately asked for identification from Arnold when he emerged. There is nothing in the complaint to suggest that Williams knocked; to the contrary Arnold alleges that "he was awoken by the sound of someone outside his door." Arnold alleges actions that would fall outside the "implicit license" afforded private visitors. These details make plausible the allegation that Williams's search of the curtilage of Arnold's home was unreasonable insofar as it infringed on Arnold's reasonable expectation of privacy and exigent circumstances were lacking.

Conversely, Arnold's further assertions that Williams "wanted his name" and "wanted to see a driver's license" and then "told" Arnold to come to his police car do not plausibly allege a seizure. Supreme Court and Fifth Circuit caselaw makes clear that a Fourth Amendment seizure occurs in one of two ways: either an officer applies physical force or an officer makes a show of authority to which an individual submits. Arnold alleges at most an at-

tempt to apply physical force when he says that Deputy Williams "reached to grab" Arnold. He simply does not allege actual physical force. Arnold does allege a show of authority on behalf of Deputy Williams, particularly when he alleges that Deputy Williams "told" him to go to the car. Arnold does not, however, allege that he submitted to that authority. *Cf. Carroll*, 800 F.3d at 170. He alleges instead that when Deputy Williams told him to go to the car, he declined. Further, he alleges that when Deputy Williams reached to grab him, he fled. The complaint lacks allegations that would allow us, drawing all reasonable inferences in Arnold's favor, to conclude that Arnold plausibly alleged a seizure within the meaning of the Fourth Amendment. At the 12(b)(6) stage of litigation, it is inappropriate for a district court to weigh the strength of the allegations. ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder."). Instead, the district court must simply decide if the complaint plausibly alleges a claim for relief. By stating a Fourth Amendment claim under § 1983 and stating facts that make plausible an unreasonable search, Arnold meets the minimal pleading standard necessary to survive a 12(b)(6) motion to dismiss on that claim, at least as to the two § 1983 elements set forth in *Gomez*. He has not done so for his unreasonable-seizure claim.

Ordinarily, after determining that a plaintiff had plausibly alleged constitutional violations, we would turn to the qualified-immunity analysis. Here, however, "the district court found the complaint deficient on its face and never reached" qualified immunity. "Because as a general rule, we do not consider an issue not passed upon below, we remand for the district court to decide in the first instance whether [qualified immunity] defeats" Arnold's unreasonable-search claim. We therefore reverse the dismissal of the unreasonable search claim and remand for the district court to consider qualified immunity before proceeding to the merits of the case. We however affirm the dismissal of the unreasonable-seizure claim.

Arnold failed to state a false arrest/false imprisonment claim, because he failed to plausibly allege that his ultimate arrest was false. The district court was wrong to seemingly adopt the "'heightened' pleading requirement" urged by Williams. As explained above, § 1983 claims implicating qualified immunity are not subject to a heightened pleading standard. Nevertheless, after reviewing the record, we agree with the district court that "the sparse and conclusory factual allegations are insufficient to state a claim for false arrest/false imprisonment." Because Arnold's conclusory allegations do not plausibly allege false imprisonment or false arrest, 12(b)(6) dismissal was proper Specifically, to state a § 1983 claim for false arrest/false imprisonment, Arnold must plausibly allege that Williams "did not have probable cause to arrest him." It is unclear from the complaint when exactly Arnold claims he was arrested and detained, but, based on the sequence of events in the complaint, this arrest must have occurred after Arnold fled and fell over the backyard fence. The complaint does not plausibly explain why Arnold's flight and his trespass onto the neighboring property would not constitute probable cause for Williams to arrest him. Failing to plausibly allege an essential element of a false arrest/false imprisonment claim, Arnold failed to state a claim.

The judgment of the district court is REVERSED in part and AFFIRMED in part, and the case is REMANDED.

***Arnold v. Williams*, No. 19-30555, 5th Cir., Oct. 23rd, 2020.**
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JAIL INJURY – STATE LAW NEGLIGENCE CASE (*Note: this is NOT a Federal Civil rights case which is how these claims are more commonly asserted*)

In this summary-judgment appeal, we consider the liability standard that applies to an inmate's suit for personal injury allegedly sustained during his incarceration in the county jail. The inmate's injury was allegedly caused by a defective chair that collapsed during the inmate's treatment for diabetes. At issue is the application of two statutes that generally protect governmental actors and entities from liability for their own negligence in connection with certain inmate activities, including the medical treatment in this case. See TEX. CODE CRIM. PROC. art. 42.20; TEX. GOV'T CODE § 497.096. In reversing the trial court's summary judgment, which was based on these statutes, the court of appeals concluded that the statutes' liability standard of conscious indifference did not apply to some of the inmate's negligence claims. The court reasoned that the county's failure to dispose of the defective chair promptly or to warn of its defective condition were not failures "in connection with" the inmate's medical treatment and thus outside the statutes' scope. We disagree and conclude that the statutes apply to the inmate's claims. We further agree with the trial court that the inmate failed to raise a material fact issue under the statutes' heightened liability standard and accordingly reverse the court of appeals' judgment.

Robert Barham, a detention officer at the Tarrant County jail, damaged the leg of a chair he used during his work at the jail. The damaged leg caused the chair to collapse and Barham to fall to the floor. Although uninjured, Barham promptly notified his supervisor about the accident. The supervisor instructed him to place the chair in the jail's multipurpose room for disposal and to fill out a report. The multipurpose room is a locked room in the jail used for storage and, as the name implies, other purposes. Barham knew the room was occasionally used by nurses who were brought to the jail to treat diabetic inmates.

The jail's population included a significant number of inmates with diabetes, including the plaintiff here, Roderick Bonner. Four days after Officer Barham's accident with the chair, Bonner went to the multipurpose room for a diabetes treatment. While there, Bonner attempted to use the damaged chair. It collapsed once again, pitching Bonner to the floor. Bonner sued Tarrant County for injuries he allegedly suffered from the fall. Bonner's pleadings alleged the County was negligent in three respects: (1) failing to remove the broken chair from the jail within a reasonable time, (2) failing to warn Bonner of the chair's unsafe condition, and (3) directing or allowing Bonner to use the broken chair during his medical treatment. Although the County is generally immune from suit and liability under common law principles of governmental immunity, Bonner's claims invoked the legislative waiver of that immunity under the Texas Tort Claims Act. See TEX. CIV. PRAC. & REM. CODE § 101.021(2) (waiving immunity from liability for personal injury or death caused by a condition or use of personal property); see also id. § 101.025 (waiving immunity from suit for those claims).

The County's answer generally denied Bonner's allegations and affirmatively pled its immunity from liability under two similar statues, Texas Code of Criminal Procedure article 42.20 and Texas Government Code section 497.096. Later, the County filed a summary-judgment motion in which it argued that, despite the waiver of immunity under the Tort Claims Act, it retained immunity from liability for ordinary negligence claims under these two statutes. When applicable, these statutes impose a heightened standard of culpability for claims that arise from an act or omission connected with an inmate activity or program, like Bonner's diabetes treatment. See TEX. CODE CRIM. PROC. art. 42.20; TEX. GOV'T CODE § 497.096 (imposing conscious indifference or reckless disregard as the liability standard for inmate claims of injury in connection with inmate activities).

The trial court granted the County's summary-judgment motion. Bonner appealed, and the appellate court reversed the summary judgment. The court of appeals concluded that the statutory immunity did not apply to at least some of Bonner's claims. The court reasoned that Officer Barham's placement of the damaged chair in the multipurpose room and his failure to warn others about the chair's condition were not acts or failures to act in connection with Bonner's medical treatment and thus did not implicate the statutory immunities made the basis of the County's summary-judgment motion.

As relevant here, article 42.20 states that certain individuals and governmental entities are not liable for damages arising from action or inaction in connection with an inmate activity, including treatment activities, if the action

or inaction was performed in an official capacity and was not performed with conscious indifference:

An individual listed in Subsection (c) of this article and the governmental entity that the individual serves as an officer or employee are not liable for damages arising from an act or failure to act by the individual or governmental entity in connection with a community service program or work program established under this chapter or in connection with an inmate, offender, or releasee programmatic or nonprogrammatic activity, including work, educational, and treatment activities, if the act or failure to act:

(1) was performed pursuant to a court order or was otherwise performed in an official capacity; and

(2) was not performed with conscious indifference for the safety of others.

Section 497.096 similarly provides that county and sheriff's department employees are not liable for damages arising from action or inaction in connection with an inmate or offender treatment activity if the action or inaction was not intentional, wilfully negligent or performed with conscious indifference or reckless disregard:

An employee [of the sheriff's office or the county among others] . . . is not liable for damages arising from an act or failure to act in connection with community service performed by an inmate imprisoned in a facility operated by the department or in connection with an inmate or offender programmatic or nonprogrammatic activity, including work, community service, educational, and treatment activities, if the act or failure to act was not intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others.

In contrast to article 42.20, which explicitly applies to individuals and the governmental entities they serve, section 497.096 speaks only to individual immunity. This distinction is largely insignificant here because under the Texas Tort Claims Act a governmental entity cannot be liable for the actions or inactions of its employees if the employees are not liable for any reason, including their own immunity.

The statutes thus provide immunity from liability to identified governmental individuals and entities for damages that arise from their negligent acts or omissions in connection with covered programs and activities. Bonner does not dispute that his lawsuit concerns a covered activity. Nor does he deny that his allegations of negligence involve individuals and entities named in these statutes. Rather, Bonner contends that the statutes do not apply because the requisite connection between his allegations and the covered activity does not exist. He specifically focuses on the County's alleged omissions—its failure to mark the chair as broken or remove it from the jail—arguing that the damaged chair was not in the multipurpose room as part of his medical treatment but rather was there for another purpose. Bonner concludes that, as to these omissions, the relevant connection does not exist, and the statutes do not apply.

…

The County argues that a legitimate connection exists between its alleged acts and omissions and Bonner's medical treatment because Bonner would not have a claim for damages but for that connection. For example, the alleged omissions—the failure to remove the chair or warn of its condition—were legally insignificant until they intersected with Bonner's medical treatment. Had these omissions not continued through to the time of Bonner's treatment, Bonner would have no claim for damages. In short, the omissions only lead to the alleged damages because of their connection to the medical visit. Similarly, Bonner's negligence theory based on the continued use of the chair after its defective condition was known necessarily connects to the occasion of Bonner's medical encounter. Because Bonner's damages claim rests on the County's alleged negligent acts and omissions intersecting with his medical treatment, we agree that they are "in connection with" each other.

As relevant in this case, the Act waives the County's governmental immunity for personal injuries caused by a condition or use of tangible personal property, authorizing liability to the same extent as though the County were a private person. Bonner pled a negligence claim under the Act's waiver of immunity by alleging the condition or use of the damaged chair as the cause of his personal injury: its condition because the County failed to warn him

about the chair's dangerous condition; its use because Bonner was directed or allowed to use the chair during his medical treatment. Contrary to the court of appeals' analysis, Bonner does not assert that the County's act of storing the chair was a breach of any duty of care. But it would not matter even if Bonner raised that allegation. As the Attorney General points out, a claim based on the storage of the damaged chair in the multipurpose room four days before Bonner's accident is not a claim for which governmental immunity is waived under the Tort Claims Act, which "is the only, albeit limited, avenue for common-law recovery against the government."

…

The statutes, however, only immunize the County from liability to the extent its corporate actions or omissions were not performed with conscious indifference or reckless disregard for the safety of others. The County's summary-judgment motion was accordingly based on immunity from liability, not immunity from suit. The distinction is significant because immunity from suit implicates jurisdictional concerns whereas immunity from liability is an affirmative defense that must be pled and proven.

…

We, however, agree with the trial court that the statutes apply here to bar the County's liability. We further agree with the trial court's summary judgment which determined that there was no evidence or fact issue regarding the County's conscious indifference and thus no basis to negate the statutory immunity. We accordingly reverse the court of appeals' judgment and render judgment that Bonner take nothing.

Tarrant Co. v. Bonner, Tex. Sup. Court., No. 18-0431, May 24th, 2019.

7. WARRANTS AND AFFIDAVITS

WARRANT – LEGIBILITY OF MAGISTRATE SIGNATURE.

Code of Criminal Procedure Article 18.04(5) requires, in part, that a search warrant contain a legible magistrate's signature. So what effect does an illegible magistrate's signature have upon the applicability of the statutory good-faith exception? *See* TEX. CODE CRIM. PROC. art. 38.23(b) (setting forth statutory good-faith exception). The short answer is none. Therefore, we vacate the judgment of the court of appeals and remand this case to that court for further proceedings.

After Appellee Cesar Ramiro Arellano was arrested for driving while intoxicated, the arresting officer, Phillip Garcia, prepared a probable cause affidavit to support a search warrant for a blood draw. Officer Garcia submitted his sworn affidavit to the on-duty magistrate. Using a cursive signature, the magistrate signed the blank signature line of a form search warrant authorizing the search and seizure of Appellee's blood. Below the signature line appeared the words, "Magistrate, Victoria County, Texas." Aside from the cursive signature, *the magistrate's name was not typed or handwritten anywhere on the warrant. [emphasis by ed. Could the entire issue and this appeal have been avoided had this been done? Probably!]* Upon execution of the search warrant, Appellee was charged with DWI.

In the trial court, Appellee filed a motion to suppress all evidence stemming from the blood draw. At the pretrial suppression hearing, Appellee argued that the search warrant to obtain the blood specimen was facially invalid because the magistrate's signature was illegible in violation of the requirements of Code of Criminal Procedure Article 18.04(5). *See* TEX. CODE CRIM. PROC. art. 18.04(5) (providing that a search warrant "shall be sufficient" if it contains, among other "requisites," "the magistrate's name [ ] in clearly legible handwriting or in typewritten form with the magistrate's signature"). Therefore, he contended, the evidence was subject to suppression under

Code of Criminal Procedure Article 38.23(a).

The State rested without offering any evidence. Instead, the State relied on the argument that because Officer Garcia acted in good-faith reliance on a warrant issued by a neutral magistrate based on probable cause, the blood evidence should be exempted from suppression under Code of Criminal Procedure Article 38.23(b). The State contended that an illegible magistrate's signature, much like a typographical error or other technical defect, does not invalidate an otherwise valid warrant. It further asserted that Officer Garcia's sworn affidavit that was admitted into evidence was sufficient to show that he acted in good-faith reliance on the warrant. Because there was no evidence presented that Officer Garcia did not act in good faith, that the magistrate was not neutral, or that the magistrate did not issue the warrant based on probable cause, the State concluded that under the statutory good-faith exception, the evidence was not subject to suppression.

[*The identity of the Magistrate was established by the officer's affidavit.]*

The trial court granted Appellee's motion to suppress. In its written findings of fact and conclusions of law, the trial court determined that the magistrate's signature "was not in legible handwriting, nor was it accompanied by any name identifying the magistrate in either clearly legible handwriting or in typewritten form." Thus, the court concluded that the warrant was facially invalid in light of its failure to comply with Article 18.04(5). Given the warrant's facial invalidity, the court further concluded that the statutory good-faith exception could not apply because "in order to rely on the 'good faith exception' to the exclusionary rule . . . an officer must rely on a facially valid warrant." Alternatively, it reasoned that even assuming the good-faith exception could apply, there was no evidence to show that Officer Garcia objectively relied in good faith on the warrant. With regard to Officer Garcia's affidavit attached to the State's post-hearing brief, the trial court indicated that it had discretion to ignore that evidence, but at the same time stated that it believed the affidavit was inadequate to establish Officer Garcia's good faith.

On direct appeal, the court of appeals upheld the trial court's suppression ruling. The court of appeals agreed that the illegible magistrate's signature rendered the warrant facially invalid under Article 18.04, and therefore, the good-faith exception in Article 38.23(b) could not apply as a matter of law. The court of appeals also rejected the State's argument that the trial court had erred by declining to consider its documentary evidence attached to its post-suppression-hearing brief, including Officer Garcia's affidavit. It reasoned that the evidence was immaterial given the warrant's facial invalidity, and moreover, the trial court had discretion to decline to consider this evidence.

We granted the State Prosecuting Attorney's petition for discretionary review on four grounds to determine whether the court of appeals erred by upholding the trial court's suppression ruling.

The issue we must decide is whether the magistrate's illegible signature on the search warrant rendered the warrant facially invalid and thereby prohibited application of the statutory good-faith exception. *See* TEX.CODE CRIM. PROC. art. 18.04(5); art. 38.23(b). While we agree with the court of appeals that pursuant to Code of Criminal Procedure Article 18.04(5), a search warrant lacking a legible magistrate's signature is defective, we further conclude that even with such a defect, a warrant is still a warrant for purposes of Article 38.23(b). Thus, the good-faith exception will nevertheless apply when the record establishes that the officer was acting in objective good-faith reliance upon a warrant based upon a neutral magistrate's determination of probable cause. Moreover, this type of defect highlights the reason why our Legislature enacted the statutory good-faith exception. Accordingly, we hold that the good-faith exception is not automatically precluded where, as here, the defect is an illegible magistrate's signature.

[*The remainder of the opinion focuses upon legal arguments regarding applicability of the good faith statute*.]

Having determined that the good-faith exception is not automatically precluded here, we move to the State Prosecuting Attorney's two additional issues presented on discretionary review: (1) whether the blood evidence should be suppressed after applying the statutory good-faith exception to the facts of this case; and (2) whether the trial court abused its discretion by refusing to consider the documentary evidence submitted by the State with its post-suppression-hearing brief and by failing to make adequate findings of fact and conclusions of law. These issues,

however, have not been adequately considered by the court of appeals. The sole basis for the court of appeals' holding in this case was its determination that the magistrate's signature was illegible in violation of Article 18.04(5), which rendered, as a matter of law, the warrant facially invalid such that no law enforcement officer could reasonably claim good-faith reliance upon it.

The court of appeals erred in holding that reliance on the statutory good-faith exception was automatically precluded based on an illegible magistrate's signature in violation of Code of Criminal Procedure Article 18.04(5). Because the remaining issues in the case have not been properly addressed by the court of appeals, we vacate the court of appeals' judgment and remand this case to that court for it to address those issues in a manner not inconsistent with this opinion.

***State v. Arellano*, Court of Crim. Appeals no. PD-0287-19, May 06th, 2020.**

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SEARCH WARRANT – MISTAKE IN ADDRESS

A jury convicted Robert "Bob" Scully of conspiracy to defraud the United States, conspiracy to commit wire fraud, and three substantive counts of wire fraud, relating to the operation of his company, Gourmet Express. Scully appeals his conviction and sentence, arguing that (1) the IRS agents' search of his home office violated the Fourth Amendment; (2) the Government's timing in its filing of the second superseding indictment violated due process; (3) the five-year delay between the indictment and trial violated his Sixth Amendment right to a speedy trial; (4) the evidence was insufficient to sustain his wire-fraud convictions; (5) his sentence was substantively unreasonable; and (6) the district court erred in imposing restitution. For the following reasons, we AFFIRM.

Scully was the owner of Gourmet Express (Gourmet), a company that produced frozen meals. Gourmet's other two partners—Scully's nephew, Kevin Scully (Kevin), and Kenneth Sliz—shared ownership and management of the company along with Scully.

Initially, Gourmet bought shrimp for its frozen meals from U.S. brokers—firms that imported shrimp from overseas and resold them in the United States. Because this approach had high costs, Scully arranged for his sister-in-law in Thailand, Nataporn Phaengbutdee (Nataporn), to inspect shrimp there for one of Gourmet's U.S.-based suppliers. Nataporn received a commission, which was incorporated into the price Gourmet paid. Even with the added cost of the commissions, the price Gourmet paid for shrimp was reduced from around $4.80 a pound to $3.50 a pound.

Nataporn, acting at Scully's suggestion, created various companies to work as seafood inspectors for Gourmet. The first such company was Siam Star. Scully and Kevin each owned part of Siam Star for about six months, and Scully's wife eventually controlled a majority of its shares. For tax reasons, Nataporn later operated the business through a different entity, a company called N&D, and later still, to a company she created, Groupwell. Gourmet was the only food import customer for Siam Star, N&D, and Groupwell. Nataporn's companies did not physically possess the shrimp Gourmet purchased. Instead, these companies paid the shrimp producers to ship directly to Gourmet. Nataporn's commission was for inspecting the product on location at the plant and providing "boots on the ground" to ensure that the shipment was uncontaminated and safe to sell to the customer, and for assuming the risk of a failed shipment.

Scully and Kevin received a portion of this commission, often through accounts in their wives' names. Nataporn sent hundreds of thousands of dollars to her sister, Nunchanat, Scully's wife, and Nataporn's companies sent hundreds of thousands of dollars to Mika Kon, who was a relative of Kevin's wife, Terumi.

Scully and Kevin did not disclose these payments on their federal tax returns, nor did they disclose them to their

business partner Sliz. When the partnership between Sliz and Scully began to sour, Sliz started investigating and discovered that Gourmet was overpaying for its product and paying a premium to Nataporn's companies. When Sliz asked Scully who owned or controlled the companies, Scully said that he did not know.
The dispute between the partners resulted in civil litigation. Around the time the lawsuit was filed, Scully deleted documents from a folder on his computer labeled "Siam Star" and testified at a hearing that he didn't know how much Nataporn's companies were paying for the shrimp the companies sold to Gourmet; Scully was in fact in touch with the shrimp producers and instructed Nataporn on how to negotiate prices with them. Kevin created spreadsheets tracking the difference between the price Nataporn's companies paid for shrimp and the price those companies charged Gourmet.

The conflict among the partnership resulted in an outside investor, the Ilex Group, purchasing Gourmet. Scully and Kevin were paid millions for their interests in Gourmet and were able to stay on as executives and buy back in as minority shareholders in the company. Ilex bought Sliz's share, and Sliz warned Ilex about the relationship between Gourmet and Nataporn's company, Groupwell. Scully assured Ilex that "the only problem with Groupwell was not documenting the fact that my sister-in-law works there," that Groupwell was an independent entity, and that he and Kevin "weren't really privy to" any financial interest in the company. Scully and Kevin not disclose to Ilex that Nataporn controlled Groupwell and that Groupwell's only food import customer was Gourmet. Ilex later terminated Scully and Kevin after the two attempted to have a new Chief Operating Officer fired.

Concerned that Gourmet had been involved in federal crimes while he owned it, Sliz went to the IRS, which launched an investigation. IRS agents secured a warrant to search 1015 East Cliff Drive, which was Scully's residence and, according to a Gourmet company document, was also Gourmet's "West Coast Regional Office." The affidavit submitted to the magistrate judge in support of the warrant explained that Scully "converted a small apartment behind the residence into an office" where he did work for Gourmet and that officers were looking for the sort of evidence that would be found in a home office. The affiant, Agent Gary Ploetz, stated that, in his experience, "business records are kept at addresses listed as a business office." The affidavit further stated that "the latest Gourmet employee phone directory and office listing" listed 1015 East Cliff Drive as an office, and that a phone and fax number were listed for the same address.

Before preparing the warrant, agents reviewed satellite images of the location and drove past it. IRS Agent Demetrius Hardeman prepared the warrant application, and Ploetz acted as the affiant. They had the warrant application reviewed and approved by local agents and the local U.S. Attorney's Office. A federal magistrate judge reviewed and signed both the warrant and the affidavit in support. The agents involved in the seizure were each provided a copy of the warrant before the raid. While the affidavit in support of the warrant explained that Scully's home office was in a building separate from the residence, the warrant included a physical description of the primary residence only.

Scully's home office was in fact located at 1015½ East Cliff Drive, a separate building behind the primary residence and down a private sidewalk. The parcel of land contained three structures served by one driveway—the primary residence at 1015 East Cliff Drive, the home office behind the primary residence at 1015½ East Cliff Drive, and a structure to the left of the primary residence that was rented out. In addition to the primary residence, the agents searched the home office at 1015½ East Cliff Drive and seized from that location documents and an image of Scully's computer hard drive. Agent Hardeman instructed Ploetz's team to not search the third structure on the property because it was leased by someone else.
The agents also secured a warrant to search Kevin's home, and inside a cooler hidden in the crawl space underneath the home, agents found records from a foreign bank documenting the transfers to Kevin's wife from Nataporn's companies. The agents also recovered documents tracking the commissions Scully and Kevin received. The searches of both homes uncovered documents showing the commissions and the Scullys' involvement with and monitoring of Nataporn and her companies.

Note 1: The description stated in full:
The location of the premises is at the address of 1015 East Cliff Drive, Santa Cruz, CA 95062 and is described as follows:
• It is a white, wooden, one story residence with green trimming. There is a small wrap-around driveway that has one way in and out. A small sign with house number "1015" is hanging in front of the house from the roof of the porch. The front door has a screen door with green trimming.
• There are large bay-windows in the front left of the residence.
• Residences are only located on the northbound side of East Cliff Drive.
• Facing the residence from the street, there isn't a house on the right side. The home is covered by trees.

Scully moved to suppress the evidence seized from his office, arguing that the search of the office was unreasonable under the Fourth Amendment because it had a separate street address not listed on the warrant and because the physical description of the property contained in the warrant described only the primary residence and not the separate home office. At a hearing, Scully presented evidence showing that Pacific Gas and Electric had the primary residence and home office listed as separate accounts at separate addresses. Agent Hardeman testified that while he knew there was a small apartment/office located behind the primary residence, he did not know that the buildings had separate addresses and did not investigate whether the separate buildings had separate addresses or utilities. Agent Ploetz did not check with the post office to see if the home office had a separate address. The agents explained that they had treated the front house and home office as part of the same location during the search, that they did not realize that there was such an address as 1015½, and that they had sought and executed the warrant in good faith. The district court denied Scully's motion to suppress, finding that "law enforcement's activities [were] reasonable within the Fourth Amendment" and "not in violation of the good faith exception."

First, Scully argues that the district court erred in admitting evidence seized from his home office because the search violated the Fourth Amendment. He claims that the officers exceeded the scope of the warrant when they searched the home office behind his house at 1015½ East Cliff Drive because the warrant4 described only the primary residence at 1015 East Cliff Drive. The Government argues that the good-faith exception to the exclusionary rule applies because the agents did not commit the sort of deliberate, reckless, or grossly negligent violation that would warrant suppression, and, alternatively, that the good-faith exception is unnecessary because the warrant adequately described the location the agents searched, and therefore the search did not violate the Fourth Amendment.

We review "de novo the reasonableness of an officer's reliance upon a warrant issued by a magistrate." When evaluating a motion to suppress, "[w]e consider the evidence in the light most favorable to the verdict, and accept the district court's factual findings unless clearly erroneous or influenced by an incorrect view of the law."

In *United States v. Leon*, 468 U.S. 897 (1984), "the Supreme Court held that the Fourth Amendment does not require the suppression of evidence obtained as a result of objectively reasonable reliance on a warrant, even if the warrant is subsequently invalidated." "We employ a two-step process for reviewing a district court's denial of a motion to suppress when a search warrant is involved." *Id.* We first "determine whether the good-faith exception to the exclusionary rule announced in [*Leon*] applies," and if it does, the analysis ends. *Id.* "If not, we proceed to the second step, in which we 'ensure that the magistrate had a substantial basis for concluding that probable cause existed.'"

The warrant in this case presents two potential issues. First, it listed only the address for the primary residence, 1015 East Cliff Drive, and not the address for the separate home office that the agents searched, 1015½ East Cliff Drive. Second, the warrant's description of the place to be searched described only the primary residence and not the home office. We address each potential problem in turn to determine whether either, or both combined, rendered the officers' actions in searching the home office unreasonable.

We first address whether the officers were reasonable in searching the home office though it carried a different address. We conclude the agents acted reasonably and in good faith in their belief that the warrant for 1015 East Cliff Drive authorized the search of the home office.

We have previously relied on the good-faith exception to uphold the admission of evidence obtained from two separate addresses though only one address was listed in the warrant. We applied the good-faith exception in *United States v. Carrillo-Morales*, to excuse the search of 1418 West Avenue pursuant to a warrant authorizing a search of a separate address, 1414 West Avenue. The location of 1414 West Avenue contained two buildings: an office building for a body shop business, and an adjoining garage shop. The defendant "lived in the shop," and the officers searched that residence as well, "which [the defendant] claimed was 1418 West Avenue rather than 1414 West Avenue." The search warrant authorized a search of only 1414 West Avenue, the address of the body shop. In concluding that the good-faith exception applied, we considered that (1) the defendant's residence "was inside the building where the garage area was located"; (2) "[t]he number 1414 was painted on the outside of that building"; (3) "[t]he two buildings on the premises were similar in appearance and separated by an awning"; and (4) "the name Crown Paint and Body Shop was on both buildings."

Similarly, we upheld a search of two office buildings—located at 9172 Highway 51 N., Suite B, and 9170 Highway 51 N.—where both offices were occupied by the same company, KMC, but the warrant specified only the 9172-B address. Despite deciding the case on other grounds, we "nonetheless point[ed] out briefly that [the defendants'] substantive complaint is contrary to the well-established law concerning the specificity required in warrants." We explained that an error in description is not always fatal, that "the agents checked the city business license records, bank records at a local bank, corporate filings with the Mississippi Secretary of State, and the address on KMC letterhead to ascertain KMC's address," that the offices were in the same building complex, and that "the door to 9170 was only 25 to 30 feet away from the door to 9172-B." On those facts, we "conclude[d] that the description of the KMC location contained in the search warrant was sufficient to support a search of the KMC office at 9170."

Finally, in *United States v. Melancon*, we concluded that the search of a defendant's residence (located at Route 2, Box 622) and his business (located at Route 2, Box 623) was authorized by warrant listing only the business address as the place to be searched. We noted that no fence separated the parcels, and there was a pathway worn between them. Moreover, the defendant listed Box 623 as both his business address and residence in his application for a federal firearms license. The district court found no "reason to divide the premises in two lots when the physical aspect of this whole set-up showed it was clearly one establishment with a worn pathway between the two and obviously Mr. Melancon lived in one and worked in the other." We affirmed the district court's denial of the motion to suppress, concluding "that the description of Melancon's property provides no basis for the invalidation of the search."

Turning to the case at bar, in determining the place to be searched as 1015 East Cliff Drive, the agents relied on the Gourmet corporate documents listing the West Coast Regional Office at that address, including "the latest Gourmet employee phone directory and office listing," and a phone and fax number listed for the that address. They reviewed photographs and satellite imagery, drove past the location, and relied on information provided by Sliz. Though the Government could have done more and with additional research may have discovered the separate addresses, it was reasonable to believe that the address listed on the company documents as the West Coast Regional Office was in fact the address of the office. Moreover, no signs or markings indicated that the home office carried a separate address, and both structures were similar in appearance, were contained on a singular rectangular lot within the same fenced area, appeared to be connected by the same utility wires, and were connected by a sidewalk. Under the circumstances, the officers acted reasonably and in good faith in not including the address 1015½ East Cliff in the warrant application and in believing that the warrant for 1015 East Cliff Drive covered both buildings.

We next determine whether the officers were objectively reasonable and acting in good faith in their belief that the warrant containing a physical description of only the primary residence authorized the search of a separate building behind the primary residence. Based on the circumstances of this case, we conclude that they were.

Our court and others have upheld searches where the warrant lacked a physical description of a second location searched by the officers. *See United States v. Bansal*, 663 F.3d 634, 663 (3d Cir. 2011) (warrant that authorized search of "premises" at address authorized search of detached garage); *United States v. Gahagan*, 865 F.2d 1490, 1492, 1499 (6th Cir. 1989); *United States v. Prout*, 526 F.2d 380, 386 (5th Cir. 1976) (warrant that authorized search of address of real estate office authorized search of apartment with separate address "[g]iven the physical layout of the premises and their use by [the defendants], as observed by surveillance officers" because both premises shared a common foyer and "there was little likelihood that the wrong premises would be searched").

The Sixth Circuit has upheld a search where the officers searched a building not described in the warrant and located at an address not listed in the warrant. The warrant in that case listed and described only 7609 Douglas Lake Road, one of four separate dwellings in the rural area, as the place to be searched, but the officers searched one other nearby dwelling that carried a separate address. The Sixth Circuit determined that the search was valid because one of the officers involved in executing the warrant was also the affiant on the application for the warrant, the search was confined to the areas that the officer described, and the officer "conducted a pre search briefing session for those officers who participated in the search and provided them a description of the premises to be searched." Specifically, that court held "that when one of the executing officers is the affiant who describes the property to the judge, and the judge finds probable cause to search the property as described by the affiant, and the search is confined to the areas which the affiant described, then the search, in this case, is in compliance with the fourth amendment." We have previously approved the practice of referencing the affidavit supporting the warrant where "the warrant is ambiguous, but fairly directs attention to the place actually searched." *See United States v. Haydel*, 649 F.2d 1152, 1156-57 (5th Cir. 1981). In that case, we concluded:

When the search warrant is read in conjunction with the affidavit, it is clear that the target of the search was the residence of [the defendant's father]. There was no danger that the less-than-perfect description on the face of the warrant allowed the officers to conduct a random search. When the warrant is read in circumstances' light, the object of the search authorized was clear.

Similarly here, the officer who executed the warrant, Agent Ploetz, was also the agent who submitted warrant and the affidavit in support to the magistrate judge. The affidavit, which was submitted to and signed by the magistrate judge alongside the warrant, described Scully's home office, explained that Scully did work for Gourmet there, and that the agents were looking for business records contained in the home office. The judge found probable cause to search the property as described by Agent Ploetz, and the search was confined to the areas described by him.

Prior to executing the warrant, Agent Ploetz met with the other executing agents to make sure they knew what to search, and he testified that "we were clear that we were going to be searching the main house and the additional structures on the property," except for the "rented" structure, which Ploetz instructed not to search. It is "clear that the executing officers were in a position to be aided by [the affidavit]" because Agent Ploetz, as the affiant, knew what the affidavit contained and was instructing agents while executing the warrant. Because Agent Ploetz was both the affiant and executing officer, and because he instructed the other officers on what places to search, "[t]here was no danger that the less-than-perfect description on the face of the warrant allowed the officers to conduct a random search." "When the warrant is read in circumstances' light, the object of the search authorized was clear," and therefore the officers acted in objectively reasonable good faith in believing that the warrant in this case authorized a search of the home office.

We therefore conclude that the district court did not err in denying Scully's motion to suppress the evidence found in his home office.

[*Sections of the opinion dealing with due process and speed trial issues are omitted. Ed.]*

For the foregoing reasons, the judgment of the district court is AFFIRMED.

***U.S. v. Scully*, No. 16-51429, 5th Circuit, Mar. 04, 2020.**

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SEARCH WARRANTS ARE PUBLIC RECORD: A.G. OPINION

We note at the outset that the context for your question involves search warrants and related documents **in the possession of a district clerk**. A district clerk holds court case records on behalf of the courts served by the clerk. *See* TEX. GOV'T CODE § 51.303(b) (directing the clerk, among other duties, to record "the acts and proceedings of the court" and the "executions issued and the returns on the executions"); *see also* TEX. CODE CRIM. PROC. art. 2.21(a) (providing that in a criminal proceeding the clerk of the district court shall "receive and file all papers" and "issue all process" of the court, among other responsibilities). As such, the district clerk holds a search warrant, warrant return, and related inventory list on behalf of the judiciary. The Public Information Act, about which you primarily ask, expressly excludes the judiciary. *See* TEX. GOV'T CODE §§ 552.002(a)(1) (defining the public information to which it applies as that which is "written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . *by a governmental body*" (emphasis added)), 552.003(1)(B)(i) (providing that for purposes of the Act, a governmental body "does not include . . . the judiciary"); *see also* Tex. Att'y Gen. ORD-671 (2001) at 2–3 (noting the information a district clerk collects pursuant to Government Code section 51.303(b) is "collected, assembled, or maintained for the judiciary and is not public information under the Act"). The Public Information Act states that "[a]ccess to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules." TEX. GOV'T CODE § 552.0035(a).

The Texas Supreme Court adopted Rule of Judicial Administration 12.4, which generally makes judicial records open to the public for inspection and copying. TEX. R. JUD. ADMIN. 12.4(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. F app. However, this general right does not apply to judicial records "covered by Rule[] 12.3," which includes "records or information relating to
[a]. . . search warrant." *Id.* 12.4(a), 12.3(c). Instead, "access to [such records or information] is controlled by . . . state or federal court rule, including a rule of civil or criminal procedure, appellate procedure or evidence[,] or . . . common law, court order, judicial decision, or another provision of law." *Id.* 12.3(c). Accordingly, we consider your question in the context of the Code of Criminal Procedure.

Chapter 18 of that code governs the search warrant process. *See generally* TEX. CODE CRIM. PROC. arts. 18.01–.24. "A 'search warrant' is a written order, issued by a magistrate and directed to a peace officer, commanding him to search for any property or thing and to seize the same and bring it before such magistrate . . . ." *Id.* art. 18.01(a); *see also id.* art. 18.04 (listing the requisites for a sufficient warrant). An applicant for a search warrant must file a sworn affidavit setting forth substantial facts establishing probable cause to the magistrate's satisfaction before the warrant may issue. *Id.* art. 18.01(b). "On searching the place . . . the officer executing the warrant shall present a copy of the warrant to the owner" or the person in possession of the place, if they are present. *Id.* art. 18.06(b). Before taking any property, the officer must "prepare a written inventory" of it, endorse it with his name, and give it to the owner or possessor. *Id*. If neither the owner nor the possessor is present when the warrant is executed, the officer must "leave a copy of the warrant and the inventory at the place." *Id.* When the officer returns the search warrant to the magistrate, the officer must "state on the back of the same, or on some paper attached to it, the manner in which the warrant" was executed and "also deliver to the magistrate a copy of the inventory of the property taken." *Id.* art. 18.10. Other than the entitlement of the owner or possessor of the place searched to a copy of the warrant and written inventory, the Legislature did not directly address what right anyone else might have to those particular documents, or to the warrant return the officer delivers to the magistrate. Instead, chapter 18 provides only that the sworn affidavit supporting a search warrant generally becomes "public information when the search

warrant for which the affidavit was presented is executed." *Id.* art. 18.01(b).

A court's "primary goal in construing a statute is to give effect to the Legislature's intent." *Shinogle v. Whitlock*, 596 S.W.3d 772, 776 (Tex. 2020). A court "must always consider the statute as a whole rather than its isolated provisions" and "not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone." *Id*. at 776–77. But in considering the statute as a whole, a court must also give "effect to each provision so that none is rendered meaningless or mere surplusage." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016). In article 18.01(b), the Legislature addressed the public nature of an affidavit supporting a search warrant but not the warrant itself, the return, or the inventory. By contrast, in the related context of arrest warrants, the Legislature expressly included the warrants themselves in its declaration of the "public information" to which a magistrate must provide access when the arrest warrant is executed. *See* TEX. CODE CRIM. PROC. art. 15.26 ("The *arrest warrant, and* any affidavit presented to the magistrate in support . . . is public information . . . ." (emphasis added)). Ordinarily, "[w]hen the Legislature expresses its intent regarding a subject in one setting, but . . . remains silent on that subject in another, [a court] generally abide[s] by the rule that such silence is intentional." *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013). However, the Legislature provided a mechanism for a magistrate to temporarily seal a search warrant affidavit, in which it stated that an order to block disclosure of the affidavit to the public "may not . . . prohibit the disclosure of information relating to the contents of a search warrant, the return of a search warrant, or the inventory of property taken pursuant to a search warrant." TEX. CODE CRIM. PROC. art. 18.011(d)(1). Thus, while not expressing its intent regarding the status of a search warrant in the same way as for an arrest warrant, the Legislature could not have been more clear that the contents of the search warrant, warrant return, or inventory may not be blocked. *Id.* Given this express language in article 18.011(d)(1), a court would likely conclude that a search warrant, warrant return, and property inventory are subject to public disclosure **by a district clerk.**

Opinion No. KP-0335, Oct. 20, 2020.

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8. LEGISLATIVE DEVELOPMENTS

Numerous changes to law enforcement, requirements upon officers and criminal laws have recently occurred at both the State and Federal level. Due to volume, attempting to cover these changes is beyond the scope of this Peace Officer's Guide. Officers are referred to the various legislative services available online for texts of specific bills. Officers are also referred to the upcoming new Legislative Developments Course being developed by TCOLE at this time. However, some of the legislation which appears significant at this time includes the following. As always, the true effect of new legislation will often require exhaustion of various court challenges.

House Bill 9 enhances punishments for blocking public roadways.

House Bill 1927 provides for 'Constitutional Carry' of weapons in the State and has probably received the most publicity; thus, numerous judicial interpretations are expected. Related bills include HB 29 (regarding the provision of secure weapon storage if agencies so choose);

House Bill 39 extends the duration of certain protective orders if the subject of the Order has been incarcerated. (This is a very complex area and close reading of the statutes, amendments and particular orders is highly recommended).

House Bill 315 allows purchase of a uniform (in addition to the firearm) by certain retired or medically discharged officers.

House Bill 624 enhances the penalty for certain offenses committed against public servants or their families.

House Bill 792 allows some Cities to employ revised work schedules for police dispatchers.

House bill 929 deals with police body cameras and circumstances in which they may be switched off.

House Bill 558 requires officers to take blood/breath samples from persons arrested in certain circumstances (dealing with serious accidents caused by a DWI suspect).

House Bill 957 firearm suppressors not subject to Federal regulation are no longer illegal under Texas law.

House Bill 1069 allows certain first responders to carry handguns and prescribes training for same.

House Bill 1156 creates the offense of financial abuse of the elderly.

House Bill 1758 regulates (limits) the use of force by a drone deployed by law enforcement.

House Bill 1694 creates defenses for certain drug offenders in circumstances where emergency medical assistance has been called (This one requires close reading and will likely require substantial on-scene investigation by arresting officers).

House Bill 1419 adds data entry requirements in missing children investigations.

House Bill 2366 creates an offense for endangering or injuring law enforcement officers with fireworks.

House Bill 2462 adds to the procedures required in response to reports of sexual assault.

House Bill 2622 prohibits enforcement of certain Federal firearms regulations by Texas officers.

House Bill 3363 relates to procedures for search warrants for electronic information and emergency disclosure of certain information.

House Bill 3665 expands the definition of a bicycle.

House Bill 3712 adds required training (mostly regarding use of force) **and requires model policies.**

Senate Bill 20 regulates a hotel's ability to restrict handgun carry and possession.

Senate Bill 24 enhances and clarifies the ability of law enforcement agencies to review applicant material during background investigations.

Senate Bill 69 restricts use of force by officers (consistent with House Bill 3712 above).

Senate Bill 111 requires disclosures by law enforcement agencies to prosecutors to comply with *Brady* obligations.

Senate Bill 112 mandates that search warrant affidavits are now public record.

Senate Bill 198 lays out procedures for weapon proficiency certificates issued to retired officers.

Senate Bill 530 adds internet postings to the harassment offense.

Senate Bill 768 adds a penalty group for fentanyl.

Senate Bill 1047 allows execution of a blood specimen search warrant in adjacent counties to that in which the warrant was issued.

Senate Bill 1056 creates the offense of making a false report to induce an emergency response (swatting).

Senate Bill 1359 requires mental health leave for officers after traumatic experiences.

Senate Bill 1495 deals with penalties and definitions related to reckless driving.

Several additional bills were enacted which deal with procedures related to specific offenses or with certain classes of law enforcement officers. A more complete list of bills passed by the recent Texas Legislature session may be found at https://capitol.texas.gov/Reports/Report.aspx?LegSess=87R&ID=effectivesept1

9. REASONABLE SUSPICION

REASONABLE SUSPICION – TRAFFIC STOP

This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

Kansas charged respondent Charles Glover, Jr., withdriving as a habitual violator after a traffic stop revealed that he was driving with a revoked license. Glover filed a motion to suppress all evidence seized during the stop, claiming that the officer lacked reasonable suspicion. Neither Glover nor the police officer testified at the suppression hearing. Instead, the parties stipulated to the following facts:

"1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff 's Office.

2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.

Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickuptruck.

Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.

Deputy Mehrer assumed the registered owner of thetruck was also the driver, Charles Glover Jr.

Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.

The driver of the truck was identified as the defendant, Charles Glover Jr."

The District Court granted Glover's motion to suppress. The Court of Appeals reversed, holding that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion."

The Kansas Supreme Court reversed. According to the court, Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to "only a hunch" that Glover was engaging in criminal activity. The court further explained that Deputy Mehrer's "hunch" involved "applying and stacking unstated assumptions that are unreasonable without further factual basis," namely, that "the registered owner was likely the primary driver of the vehicle" and that "the owner will likely disregard the suspension or revocation order and continue to drive." We granted Kansas' petition for a writ of certiorari, and now reverse.

Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic

stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."

Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." The standard "depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act." Courts "cannot reasonably demand scientific certainty . . . where none exists." Rather, they must permit officers to make "common sense judgments and inferences about human behavior."

We have previously recognized that States have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed." With this in mind, we turn to whether the facts known to Deputy Mehrer at the time of the stop gave rise to reason- able suspicion. We conclude that they did.

Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy for, as we have explained, "[t]o be reasonable is not to be perfect,"

Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

See, e.g., 2 T. Neuman et al., National Coop. Hwy. Research Program Report 500: A Guide for Addressing Collisions Involving Unlicensed Drivers and Drivers With Suspended or Revoked Licenses, p. III–1 (2003) (noting that 75% of drivers with suspended or revoked licenses continue to drive); National Hwy. and Traffic Safety Admin., Research Note: Driver License Compliance Status in Fatal Crashes 2 (Oct. 2014) (noting that approximately 19% of motor vehicle fatalities from 2008–2012 "involved drivers with invalid licenses").

Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive. The Division of Vehicles of the Kansas Department of Revenue (Division) "shall" revoke a driver's license upon certain convictions for involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer, or conviction of a felony in which a motor vehicle is used. Reckless driving is defined as "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." The Division also has discretion to revoke a license if a driver "[h]as been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways," "has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period," "is incompetent to drive a motor vehicle," or "has been convicted of a moving traffic violation, committed at a time when the person's driving privileges were restricted, suspended[,]

or revoked." Other reasons include violating license restrictions, and being a habitual violator, which Kansas defines as a resident or nonresident who has been convicted three or more times within the past five years of certain enumerated driving offenses. The concerns motivating the State's various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle.

Glover and the dissent respond with two arguments as to why Deputy Mehrer lacked reasonable suspicion. Neither is persuasive.

First, Glover and the dissent argue that Deputy Mehrer's inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite. In *Navarette*, we noted a number of behaviors—including driving in the median, crossing the center line on a highway, and swerving—that as a matter of common sense provide "sound indicia of drunk driving." In *Wardlow*, we made the unremarkable observation that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion" and therefore could factor into a police officer's reasonable suspicion determination. And in *Sokolow*, we recognized that the defendant's method of payment for an airplane ticket contributed to the agents' reasonable suspicion of drug trafficking because we "fe[lt] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check" rather than cash. The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.

The dissent reads our cases differently, contending that they permit an officer to use only the common sense derived from his "experiences in law enforcement." Such a standard defies the "common sense" understanding of common sense, *i.e.*, information that is accessible to people generally, not just some specialized subset of society. More importantly, this standard appears nowhere in our precedent. In fact, we have stated that reasonable suspicion is an "abstract" concept that cannot be reduced to "a neat set of legal rules," and we have repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness. This is precisely what the dissent's rule would do by insisting that officers must be treated as bifurcated persons, completely precluded from drawing factual inferences based on the commonly held knowledge they have acquired in their everyday lives.

The dissent's rule would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes. And by removing common sense as a source of evidence, the dissent would considerably narrow the daylight between the showing required for probable cause and the "less stringent" showing required for reasonable suspicion. Finally, it would impermissibly tie a traffic stop's validity to the officer's length of service. Such requirements are inconsistent with our Fourth Amendment jurisprudence, and we decline to adopt them here.

In reaching this conclusion, we in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations. We simply hold that such experience is not *required* in every instance.

Glover and the dissent also contend that adopting Kansas' view would eviscerate the need for officers to base reasonable suspicion on "specific and articulable facts" particularized to the individual, because police could instead rely exclusively on probabilities. Their argument carries little force. As an initial matter, we have previously stated that officers, like jurors, may rely on probabilities in the reasonable suspicion context. Moreover, as explained above, Deputy Mehrer did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially en-

gaged in specific criminal activity—driving with a revoked license. Traffic stops of this nature do not delegate to officers "broad and unlimited discretion" to stop drivers at random. Nor do they allow officers to stop drivers whose conduct is no different from any other driver's. Accordingly, combining database information and commonsense judgments in this context is fully consonant with this Court's Fourth Amendment precedents.

This Court's precedents have repeatedly affirmed that "'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" Under the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked. We emphasize the narrow scope of our holding. Like all seizures, "[t]he officer's action must be 'justified at its inception.'" "The standard takes into account the totality of the circumstances—the whole picture." As a result, the presence of additional facts might dispel reasonable suspicion. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." Here, Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified.

For the foregoing reasons, we reverse the judgment of the Kansas Supreme Court, and we remand the case for further proceedings not inconsistent with this opinion.

***Kansas v. Glover*, U.S. Supreme Court, No. 18-556, April 6th, 2020.**

**********REASONABLE SUSPICION – EXTENDING TRAFFIC STOP

Mayra Reyes pleaded guilty of conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine

("meth") in violation of 21 U.S.C. § 846. Her plea agreement reserved the right to appeal her motion to suppress. Because the officer who pulled Reyes over had reasonable suspicion to extend the stop for a canine sniff, and because Reyes was not entitled to *Miranda* safeguards during the routine traffic stop, we affirm.

Officer Will Windham stopped Reyes, approached her car, informed her that she was speeding, and requested her driver's license and registration. Reyes volunteered that she was trying to get her kids to school. Windham found that odd because there were no passengers. He asked where the kids were, and Reyes responded that they were in Abilene—fifteen miles ahead.

Windham asked Reyes to accompany him to his patrol car while he looked up her information. According to Windham, she was "extremely hesitant" to leave the truck. After she refused, he explained that he completes traffic stops in his patrol car for safety purposes—to avoid being hit by passing vehicles and because he doesn't know what may be inside the driver's vehicle. Additionally, it was very cold. Windham found Reyes's persistent reluctance to exit her truck unusual.

f.n.1 [*The officer*] testified: "I've stopped a lot of cars, and over—get everybody out—usually everybody out of the vehicle, and I've never had nobody refuse to come out of the vehicle like the way she did not want to come out."

As she pondered exiting her vehicle, Reyes asked, "What about the truck"? Windham answered that it could stay parked where it was. As Reyes sat down in the passenger seat of the patrol car, she locked her truck. Windham—who had never seen anyone lock his or her vehicle during a traffic stop—suspected that Reyes was trying to hide something illegal.

Windham asked Reyes where she was heading, and she mumbled, "this address," as she scrolled through her phone

to find it. He inquired, "I thought you said you were taking the kids to school." She responded, "Yeah. Not my kids. My kids [are] in Grand Prairie. I'm helping a friend take her kids to school. She doesn't have a car or anything." Confirming that Reyes started her trip in Grand Prairie, Windham asked, in a surprised tone, "What time did you leave?" She replied, "About, what, three hours ago, or so?" Windham, shocked that she purported to travel three hours to take kids to school, "could tell something was not right."

Windham asked Reyes who owned the truck, which had a temporary Oklahoma tag. She replied that it was her ex-husband's. Based on his training, education, and experience, Windham surmised that narcotics couriers often use vehicles registered to others to avoid forfeiture.

As Reyes showed Windham the truck's documents, he asked whether she had ever been arrested. She stated that she had an arrest for DWI. Soon after, and while continuing to examine the truck's documents, Windham asked whether there was anything illegal in the truck. Reyes's facial expressions changed dramatically, and her eyes shifted from Windham to the front wind-shield as she shook her head and said, "No, no, no. There shouldn't be. I mean, it's brand new. It's brand new."

Sounding skeptical, Windham asked again, "So you drove all the way from Dallas, or Grand Prairie, to take these kids to school for this lady?" Reyes then added, "Not just for that. I wanted to see her." She then explained that she previously had a relationship with the woman in prison and that the woman's husband "was going to be at work." Windham told Reyes that she wasn't going to make it in time to take the kids to school. She then changed her story yet again, claiming that she was going to Abilene "just to see her, to be honest."

After typing into the computer some more, Windham asked for consent to search the truck. Reyes responded that she could not give consent because it was not her truck. He explained that she could grant consent because she had control of the truck. She refused.

At that point—roughly eight-and-a-half minutes into the stop—Windham informed Reyes that he was going to call a canine unit to perform a free-air sniff. He said that if the dog detected drugs, he would have probable cause to search inside. He requested a canine unit, then told Reyes that he was going to check the truck's vehicle identification number ("VIN") to see whether it matched the paperwork, because he was "not getting a good return" on the license plate.

Windham noted that Reyes had several items on her and asked whether she had any weapons. She emptied her pockets, which contained only a wallet and a pack of cigarettes. She asked whether she could have a cigarette, and Windham agreed to let her "stand outside and smoke" while he got the VIN. Reyes got out of the car for about thirty seconds, without smoking. After re-entering the car, she told Windham that she didn't have her lighter on her. He asked if she had one in the truck, and she responded that she did not know and mumbled that she had "probably dropped it." Windham found it odd that Reyes declined to retrieve her lighter. He testified that he had never had a smoker turn down his offer to let him or her smoke.

After Windham received Reyes's criminal background check, he asked her whether she had any other prior arrests. She said that, in addition to the DWI, she had been arrested for warrants related to tickets. Windham prodded further, and Reyes conceded that she had been arrested for a pill that was found in her ex-girlfriend's vehicle. That story evolved, however, and Reyes admitted that she was arrested for a meth offense. She said that she went to jail for that offense and later explained—her story shifting yet again—that the woman she was going to visit was her girlfriend in prison.

Within a few minutes, a canine unit arrived and conducted the sniff. The dog alerted officers that there was a controlled substance in the truck. Windham searched inside and found 127.5 grams of meth and a loaded handgun.

A grand jury indicted Reyes on various counts. She moved to suppress evidence from the stop. She contended, first, that Windham did not have reasonable suspicion to extend the stop for the canine sniff. And, second, she contended that she was entitled to *Miranda* warnings when Windham directed her into his patrol car.

After a hearing, the court held that "Windham had a reasonable suspicion to extend the traffic stop until a narcotics

detection K-9 unit could arrive." Additionally, the court ruled that Reyes was not in custody for *Miranda* purposes, so her statements were not suppressed.

Reyes pleaded guilty of conspiracy to distribute and possess with intent to distribute 50 grams or more of meth in violation of 21 U.S.C. § 846 but reserved her right to appeal the denial of the motion to suppress. She was sentenced and appeals the denial of her motion to suppress.

"On appeal of the denial of a motion to suppress, this court reviews the district court's fact findings for clear error and its legal conclusions *de novo*." "[W]e review the evidence in the light most favorable to the government as the prevailing party." The ruling "should be upheld if there is any reasonable view of the evidence to support it."

Reyes makes two assertions concerning whether Windham unlawfully extended the stop. First, she contends that "Windham lacked reasonable suspicion to detain her beyond the time reasonably necessary to conduct an investigation of the traffic violation, which was the purpose for the stop." Second, she avers that "even if Officer Windham did eventually gain reasonable suspicion to afford him the ability to prolong the stop, he did not gain reasonable suspicion until after he had already detained Reyes beyond the time reasonably necessary to conduct the traffic stop." Because Windham had reasonable suspicion to extend the stop before he called for a canine sniff, both of Reyes's theories fail.

The protection of the Fourth Amendment "extends to vehicle stops and temporary detainment of a vehicle's occupants." After lawfully stopping a driver for a traffic violation, an officer's actions must be "reasonably related in scope to the circumstances that justified the stop of the vehicle in the first place." The stop may last no longer than necessary to address the traffic violation, and constitutional authority for the seizure "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Those tasks include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."

Officers may ask questions unrelated to the purpose of the stop while waiting for computer checks to process. But officers must diligently pursue the investigation of the traffic violation. *The Fourth Amendment tolerates additional investigation unrelated to the safe and responsible operation of the vehicle only if that investigation does not lengthen the driver's detention or is supported by reasonable suspicion of additional criminal activity. [emphasis by ed.]*

If the officer develops reasonable suspicion of such activity "in the course of the stop and before the initial purpose of the stop has been fulfilled, then the detention may continue until the new reasonable suspicion has been dispelled or confirmed."
"[A] mere 'hunch' does not create reasonable suspicion." The "officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." We look at "the totality of the circumstances" in determining whether an officer had a particularized and objective basis for suspecting criminal activity. That analysis "is necessarily fact-specific, and factors which by themselves may appear innocent, may in the aggregate rise to the level of reasonable suspicion." "Of principal relevance in the totality of circumstances that an officer is to consider will be the events which occurred leading up to the . . . search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion."

Reyes advances two arguments regarding whether Windham unlawfully extended the traffic stop. First, she contends that the facts on which Windham relied do not amount to reasonable suspicion. Second, she avers that even if Windham gained reasonable suspicion to prolong the stop, he did not do so within the time reasonably necessary to conduct the stop.

The earliest time that Reyes says the stop should have been completed was when Windham called for the canine unit. Because Windham had reasonable suspicion to extend the stop by then, Reyes's arguments can be consolidated.

The government provides several specific and articulable facts to support Windham's suspicion:

• Windham knew that I-20—where Reyes was pulled over—is a known drug-trafficking corridor, and Dallas/Fort Worth—whence she came—is a known source for narcotics.

• Reyes drove a truck registered in someone else's name, with a temporary plate for a different state. In Windham's experience, couriers often drive vehicles registered to other people to avoid forfeiture.

• Throughout the stop, Reyes took unusual measures to protect the truck. She initially refused to exit it. And when she did, she locked it, even though an officer was immediately behind it in a marked patrol vehicle.

• Reyes offered inconsistent and implausible stories about the purpose of her travel—for instance, stating that she had driven three hours to take kids to school, even though there were no passengers.

• Reyes had a conviction for possession of meth.

• Reyes was unemployed, which Windham figured provided her a motive to participate in illegal activity.

• When Windham asked Reyes whether there was anything illegal in the truck—a "yes or no" question—her facial expressions changed dramatically, and she said, "There shouldn't be. It's brand new. It's brand new."

Additionally, Windham drew on his training, education, and experience in narcotics interdiction, and his familiarity with the area, to surmise from those facts his suspicion that Reyes was participating in a crime. Those articulable facts—and, in particular, Reyes's implausible stories and protectiveness of the vehicle—combine to establish reasonable suspicion.

Reyes avers that "[e]very one of the observations of Officer Windham are either specifically disclaimed by caselaw as not rising to the level of reasonable suspicion, or are analogous to other facts the caselaw disclaims." Reyes's divide-and-conquer approach, however, ignores "the Supreme Court's admonition not to treat each factor in isolation, but rather to give due regard to the totality of the circumstances." Although Reyes may have an innocent explanation for each of her actions—and some of them, such as that she came from the Dallas/Fort Worth area, provide little support for reasonable suspicion—they together gave Windham much more than a mere "hunch" of illegal activity.

[*cases cited by the defendant are distinguished by the Court*.]

Reyes contends that she was entitled to *Miranda* warnings because "the circumstances and interactions of Reyes and Officer Windham would have [led] a reasonable person to believe they were under arrest." That argument falls flat, because a person detained in a routine traffic stop is not "in custody" for *Miranda* purposes. *Miranda* applies only once "a suspect's freedom of action is curtailed to a degree associated with formal arrest."

Reyes offers no persuasive reason why *Miranda* demands the suppression of her statements during a routine traffic stop. Windham directed her to his car in a friendly manner. He even encouraged her to bring her coffee with her and sit in the front seat. She was not patted down or restrained, and Windham allowed her to leave the car to smoke a cigarette. Because the traffic stop did not have the quality of a formal arrest, *Miranda* does not apply.

AFFIRMED.

***U.S. v. Reyes*, 5th Cir. No. 19-10291, June 05th, 2020.**

REASONABLE SUSPICION, TRAFFIC STOP.

"This is where it gets good, man." This was Chimene Hamilton Onyeri's response to questions regarding charges pending against him for violent crimes. For Onyeri, criminal activity coalesced into daily life. Rather than obtain gainful employment to support himself, he engaged in a pattern of criminal conduct. And this pattern ultimately caught up to him when he attempted to assassinate a Texas state judge.

Onyeri appeals one count of his conviction for this pattern, namely his conviction for conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d). Substantively, he alleges three issues on appeal. For the reasons set forth below, we affirm the judgment of the district court on all issues.

Onyeri's criminal activities involved a multitude of misdeeds that spanned almost half a decade. Pertinent to this appeal is his criminal misconduct from late 2011 to 2015, the years during which Onyeri gathered and led his associates to engage in racketeering activity, which he cavalierly nicknamed the "Chimene, Incorporation." Because of the nature of Onyeri's challenges on appeal, a summary of some of the evidence adduced at his trial aids our discussion.

Onyeri recruited his friend Bernard Akwar to assist him in stealing credit card numbers through the use of a skimmer. As they perfected their craft, Onyeri also brought Henry Yehe into the enterprise, and Yehe would steal gift cards from the various stores they visited. Next, the conspirators would emboss the stolen credit card numbers onto the stolen gift cards and then encode the gift cards with the same credit card information. They converted these gift cards into cash by using them to purchase electronics and then selling the electronics for cash, or by using them to buy legitimate gift cards. Onyeri also engaged a bank employee to open a bank account for them using stolen identities. The conspirators placed some of their proceeds into that account.

Emboldened by their successes, Onyeri and Akwar also stole identities—"[n]ames, socials, and dates of birth"—to fabricate tax returns. They connected with Sherica Price, who would file the fraudulent returns for them. And, in the course of this scheme, they sought the assistance of several mailmen, bribing them into intercepting tax-refund checks on their behalves.
During the same period, Onyeri expanded this enterprise to include debit card fraud as well. He and Akwar researched "bezels," devices that would capture a debit card's information while it was used at an ATM, and they had one made to further their scheme. They also engaged Rasul Scott and Marcellus Burgin to assist them. The combination of these activities proved lucrative for Onyeri and his associates, resulting in ATM withdrawals of $20,000 and $40,000 at a time. But Onyeri's and Akwar's luck was not limitless: they were arrested and charged in Texas state court for some of this fraudulent misconduct in 2012. When they were apprehended, Onyeri was out on bond for other charges, including violent crimes. And, prior to facing those charges, Onyeri had been incarcerated for three years. As a result, Onyeri was not released on bond again and remained in custody for one year—but he attempted to continue to lead his criminal enterprise, even from prison.

It was at this point that the Honorable Julie H. Kocurek, a Texas state judge for the 390th District Court in Austin, was assigned to Onyeri's case. Little did Onyeri know, this was the beginning of the end for him. Onyeri ultimately pled guilty to the charges stemming from his and Akwar's 2012 arrest, and Judge Kocurek placed him on a three-year deferred adjudication probation, under which—"[p]rovided [he] obey[ed his] condition of probation and . . . successfully complete[d] probation"—he would not face conviction for these charges.

Only two and a half years later, however, the government filed a motion to proceed with an adjudication of guilt, following allegations that Onyeri had engaged in the fraudulent use of debit cards in Calcasieu Parish, Louisiana. Judge Kocurek later testified at Onyeri's trial that she insisted the District Attorney's Office move quickly with Onyeri's case and reset the case for hearing on November 8, 2015. She further testified that she suggested Onyeri

may face six to seven years in prison.

Onyeri acted quickly after this, fearing that he was going to be sent to prison. On November 6, 2015, two days before the scheduled hearing, Onyeri struck. Before Judge Kocurek and her family returned home that Friday night, he placed a trash bag in front of her driveway to create a diversion. When the vehicle stopped outside the house's gate so that Judge Kocurek's son could move the bag, Onyeri made his move, shooting Judge Kocurek through the passenger side window of her car. Although he seriously injured Judge Kocurek, he "missed," and she survived.

Despite his failed attempt to assassinate the Judge, Onyeri bragged about his role in her shooting. This led the authorities to suspect he was responsible, as an informant relayed this information. A computerized check also revealed a pending warrant for Onyeri's arrest. At this point, the officers tried a Houston address where they believed Onyeri may be located.

Finding it to be a "bad address," they turned next to Onyeri's father's house. An interview at his father's house alerted the authorities that Onyeri was likely travelling in a silver Dodge Charger with black rims, and shortly thereafter, a task force member identified the vehicle in the neighborhood, headed toward Onyeri's father's house. Officer Derek Uresti testified at trial that the officers followed the vehicle through the neighborhood, ultimately initiating a traffic stop when the Charger made an errant right-hand turn.

The officers apprehended Onyeri when they called the passengers out of the vehicle. Among other evidence, they recovered a "smashed" Samsung Galaxy cell phone from the rear floorboard of the vehicle.

Not long thereafter, Onyeri was charged in a seventeen-count indictment for RICO violations, including one count for conspiracy to commit RICO violations. The racketeering acts charged were: (1) mail fraud, (2) bribery of a public official, (3) wire fraud, (4) identity theft, (5) access device fraud, (6) conspiracy to commit money laundering, (7) money laundering, and (8) attempted murder. After a jury trial lasting twenty days, the jury found Onyeri guilty on all counts.3 Onyeri timely appealed.

Following his conviction, Onyeri's father died. Because his father had been a teacher, Onyeri was to receive benefits from the Teacher Retirement System of Texas ("TRST"). Included in the district court's judgment, however, was an order to pay restitution, and the government sought to collect the restitution through a writ of garnishment that attached to Onyeri's monthly annuity payments. Onyeri objected to the garnishment, but the district court ordered that the TRST pay Onyeri's benefits toward his restitution obligation.

On appeal, Onyeri argues that the district court erred by admitting evidence obtained from the traffic stop because it was not supported by probable cause or reasonable suspicion. He further contends that there was not sufficient evidence to support his RICO conspiracy conviction and that the district court erred by denying his motion for a judgment of acquittal.

We first address Onyeri's challenge to the district court's conclusion that the officers had probable cause to make the initial traffic stop and the resulting denial of Onyeri's motion to suppress the information obtained from his Samsung Galaxy. Analyzing the stop in its entirety, we conclude the district court was correct.

"[W]e may consider all of the evidence presented at trial, not just that presented before the ruling on the suppression motion, in the light most favorable to the prevailing party, which in this case is the Government."
"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Probable cause is a "practical, nontechnical conception." It is a "fluid concept" guided by a totality of the circumstances analysis. We have said that "the constitutionality of [an] officer's stop of [a] vehicle must stand or fall based on whether [the defendant] violated Texas law[.]" That is, the

"legal justification for the traffic stop must be 'objectively grounded.'"

Officer Uresti testified at trial that he observed the vehicle that Onyeri was riding in commit a minor traffic violation, making a wide right-hand turn into an adjacent lane. He explained how a proper right-hand turn should be made, according to the Texas Transportation Code: "when making a right turn, the operator shall approach and complete the turn closest to the . . . right-hand curb or the edge of the roadway." In this case, Officer Uresti testified, the number two lane was the proper lane for completing a right turn; "[t]he inside lane closest to the median is the number one lane, and the outside lane is the number two lane." But, he told the district court, he saw the vehicle make an improper turn "into the number one lane" in violation of Texas Transportation Code § 545.101. Officer Uresti's observation of this traffic violation therefore gave him an objectively grounded legal justification—and sufficient probable cause—to initiate the stop.

Onyeri disputes the district court's finding that Officer Uresti's\ testimony was credible. The crux of his argument centers on Officer Uresti's responses that he didn't remember certain details of the traffic stop. Onyeri argues that Officer Uresti's failure to recall aspects of the stop undermines the district court's credibility finding, and therefore, any probable cause. Onyeri's contentions are misleading. Officer Uresti also answered,

with certainty, many other questions about the traffic stop. For example, he testified that traffic was permitted to flow during the traffic stop and that the road was not obstructed. He also stated that his line of sight to the silver Charger was not obstructed in any way and that he had no doubt that he saw the Charger turn into the number one lane. These details are crucial to the determination of whether to stop the Charger, and whether the officers had probable cause. In contrast, many of the aspects of the stop that Officer Uresti could not remember were unimportant to the propriety of initiating the traffic stop.

Accordingly, we conclude that the district court correctly denied Onyeri's motion to suppress.

The judgment of the district court is therefore AFFIRMED.

***U.S. v. Onyeri*, No. 18-50869, Fifth Circuit, Apr. 28th, 2021.**
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REASONABLE SUSPICION –STOP & FRISK

Justin Harrington Darrell was arrested and charged with being a felon in possession of a firearm. He entered a conditional guilty plea, and now challenges the legality of the stop that precipitated his arrest. Finding no constitutional infirmity, we affirm Darrell's conviction and sentence.

On September 3, 2017, Alcorn County Sheriff's Deputy Shane Latch and Farmington Police Department Officer Mike Billingsley drove to a home in Corinth, Mississippi. They intended to serve an arrest warrant on one of the home's occupants, Brandy Smith, for failing to appear in court. Deputy Latch later described the residence as "a known drug house" where multiple arrests and disturbances—including a shooting—had taken place in the past. Indeed, Latch himself had made several arrests there.

(The record does not state at what time the officers departed for the house, but Darrell contends that all relevant events took place "during daytime.")

As the uniformed officers pulled up to the house in two marked squad cars, they saw a black Chevrolet Camaro

parked in the driveway. "Almost instantaneously," Appellant Justin Darrell exited the Camaro and began walking toward the back of the house. Officer Billingsley called out to Darrell and instructed him to stop, but Darrell ignored the command and continued walking away from the officers, now at an increased pace. Deputy Latch later testified that if Darrell had walked an additional fifteen to twenty feet, he would have been behind the house and outside the officers' field of vision. Once out of their sight, the officers feared, Darrell might have withdrawn a concealed weapon or warned Ms. Smith of her impending apprehension—a crime under Mississippi law. Officer Billingsley again ordered Darrell to stop. This time, Darrell complied and began walking back toward the officers. Officer Billingsley took a brown paper bag from Darrell and handed it to Deputy Latch. Inside was a bottle of whiskey—contraband in dry Alcorn County.

Officer Billingsley then asked Deputy Latch to watch Darrell while Billingsley approached the door and attempted to apprehend Ms. Smith. Deputy Latch asked Darrell what his name was, but Darrell declined to answer. Deputy Latch then noticed two knives hooked onto Darrell's belt. Latch confiscated the knives and asked Darrell if he had any other weapons. Although Darrell said no, Deputy Latch patted him down to be sure. As he did so, he felt an item in Darrell's front pocket. He asked what it was, but Darrell did not answer. Latch later testified that "when [he] edged the pocket open," he "could see the butt end of [a] pistol." Latch then "pushed [Darrell] against the car and removed the weapon," which turned out to be a loaded semiautomatic pistol with its serial number obliterated. Darrell's pocket also contained a substance believed to be methamphetamine. Deputy Latch handcuffed Darrell and placed him in a squad car.

Latch estimated that the officers' entire encounter with Darrell lasted less than a minute. Only after Darrell had been handcuffed did the officers notice a man sitting in the passenger seat of the Camaro. He had not attempted to exit the vehicle or participated in any way in the confrontation. The officers asked the passenger to step outside, identified him as Donald Dunn, and arrested him on an outstanding warrant from the City of Farmington. Both men were transported to the Alcorn County Jail and held for investigation. A few days later, the Mississippi Bureau of Narcotics confirmed that Darrell was a convicted felon.

In January 2018, Darrell was indicted for being a felon in possession of a firearm. He filed a motion to suppress, arguing that "law enforcement did not possess adequate reasonable suspicion to stop and subsequently search him." The district court denied Darrell's motion following a hearing at which Deputy Latch was the sole witness called to testify, and Darrell entered a conditional guilty plea "reserving the right to appeal the ruling on the motion to suppress evidence." On January 7, 2019, Darrell was sentenced to three years' imprisonment and a three-year term of supervised release. This appeal followed.

When evaluating a ruling on a motion to suppress, we "review[] questions of law *de novo* and findings of fact for clear error." All evidence is viewed "in the light most favorable to the party that prevailed" below—in this case, the Government.

"Warrantless searches and seizures are 'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" The Supreme Court carved out one such exception in *Terry v. Ohio*. Under *Terry*, if a law enforcement officer can point to specific, articulable facts that lead him to reasonably suspect "that criminal activity may be afoot," he may briefly detain an individual to investigate. In addition, if the officer reasonably believes that the individual is "armed and presently dangerous to the officer[] or to others, [he] may conduct a limited protective search for concealed weapons"—often called a "frisk."

Generally, the legality of such stops "is tested in two parts": "Courts first examine whether the officer's action was justified at its inception, and then inquire whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop."

As Darrell challenges only "the justification of the initial seizure," not the scope of the ensuing search, we must answer only whether, under the totality of the circumstances, the officers had reasonable suspicion to stop Darrell as he approached Ms. Smith's house.

The precise contours of the reasonable-suspicion standard remain "somewhat abstract." Certainly, reasonable suspicion is a less demanding standard than probable cause or preponderance of the evidence, but the Supreme Court has "deliberately avoided reducing it to 'a neat set of legal rules.'" Instead, it has "described reasonable suspicion simply as 'a particularized and objective basis' for suspecting the person stopped of criminal activity." In short, while reasonable suspicion is not a "finely-tuned standard[]," it is well established that "the Fourth Amendment requires at least a minimal level of objective justification for making" an investigatory stop.

The parties agree that Darrell was "seized," for purposes of the Fourth Amendment, when he complied with Officer Billingsley's second command to stop.
The question is whether the officers had reasonable, articulable suspicion to stop him based on what they had observed up until that moment.
The Government cites three key facts to support the stop. First, "Darrell exited his vehicle and attempted to flee the very moment officers pulled in behind him." Second, Darrell appeared to be heading toward the back of the house, where he could potentially "draw a gun or warn the occupants of the house." Finally, the location of the encounter—"a known drug house, where officers had made arrests and knew that a shooting had occurred"— put the officers on alert for dangerous or illegal activity. In short, "Darrell was told to stop . . . because he walked away from officers, attempting to leave their field of vision, as soon as officers arrived at a known drug house to make an arrest." Darrell counters that his behavior was innocent and that the officers had nothing but a "mere hunch," not reasonable suspicion of criminal activity.

The Government relies almost exclusively on the Supreme Court's opinion in *Illinois v. Wardlow*, so a detailed consideration of *Wardlow* must be the starting point of our analysis. In *Wardlow*, two uniformed Chicago police officers "were driving the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions." One of the officers noticed Wardlow standing next to a building "holding an opaque bag."
Wardlow "looked in the direction of the officers and fled" down an alley before being cornered by the police cruiser. An officer patted Wardlow down and discovered a loaded handgun. Like Darrell, Wardlow filed an unsuccessful motion to suppress and was ultimately convicted of being a felon in possession of a firearm.
The Supreme Court held 5–4 that the officers had reasonable, articulable suspicion that Wardlow was engaged in criminal activity. The majority relied on two salient facts to support its conclusion: (1) the stop took place in a high-crime area, and (2) Wardlow took off in an "unprovoked flight" as soon as he saw the approaching police cars.27
The majority acknowledged that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."28
Neither, however, is an officer "required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." Likewise, although flight from officers "is not necessarily indicative of wrongdoing, . . . it is certainly suggestive of such" and is properly accorded substantial weight in the *Terry* analysis. The Court held that, in combination, these two factors supported the officers' "determination of reasonable suspicion . . . based on commonsense judgments and inferences about human behavior."

The Court was careful to distinguish *Wardlow* from earlier cases in which it had recognized that "refusal to cooperate, without more," does not create reasonable suspicion. While an "individual has a right to ignore the police and go about his business," the *Wardlow* Court explained,
[f]light, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.
The four *Wardlow* dissenters had no quarrel with the majority's legal framework; indeed, they commended the majority for refusing to adopt a "bright-line rule" either categorically authorizing or prohibiting *Terry* stops based on flight from police. In this particular case, however, they were not persuaded by "the brief testimony of the offi-

cer who seized" Wardlow. In the dissenters' view, the officer's testimony left too many relevant questions unanswered. *(Ed. Note: a report writing lesson here?)* For instance, were the vehicles in the police caravan marked or unmarked? Was there anyone else on the street near Wardlow? Was it clear that Wardlow actually saw the police approaching before he ran? Without these facts, the dissenters could not be sure that the officers' suspicion was sufficient to justify the stop.

The Government is correct that Darrell's case shares several salient factual similarities with *Wardlow*. Just like Wardlow, Darrell responded to the arrival of police by making a sudden attempt to get out of the officers' sight, and in both cases the stops took place in "area[s] of expected criminal activity."

In fact, at least one of the two officers in this case had personally responded to prior reports of drug and gun crimes at Brandy Smith's address. Moreover, the ambiguities that unsettled the *Wardlow* dissenters are not present here. We know that both police vehicles were marked, both officers were in uniform, and there was no one else present outside the house. More importantly, Deputy Latch's testimony provides compelling evidence that Darrell exited his vehicle in response to the officers' arrival. On direct examination, Deputy Latch testified that Darrell got out of the car "just a couple of seconds" after the officers arrived and immediately "started down the side of the house trying to get out of sight." On cross, Latch explained where Darrell's Camaro was parked with reference to Google Maps photos of the premises. Together, the testimony and photos indicate that Darrell would have had a clear view of the driveway in his rear-view mirror as the officers approached, and no party has identified any other event that might have prompted Darrell's exit.

Still, *Wardlow* is not as exact a match as the Government contends. In *Wardlow*, the suspect broke into "unprovoked flight upon noticing the police," running down an alley until he was cornered by officers.

In this case, Darrell *walked* away from the police and never left their field of vision. It is true that Darrell increased his pace after Officer Billingsley first ordered him to stop. However, he never tried to run: "He just started walking faster until he was told the second time," at which point he complied and came to a stop. Certainly, the Government is correct that "flight . . . is the consummate act of evasion"—but we doubt Darrell's behavior can fairly be described as "flight."

The case law on flight is not clear-cut. In *United States v. Tuggle*, we stated that a "defendant does not have to *run* away for his behavior to be considered unprovoked flight." However, we focused not on the subject's "brisk walk" away from police but on other contextual factors supporting an inference of flight. We particularly concentrated on the fact that a driver who had just been conversing with the subject in an apparent drug transaction "sped off" when the police approached. Similarly in *United States v. Lawson*, the subject "began to act nervous and quickly started walking away" when an officer approached him. As the officer drew nearer, however, the subject "began running through busy streets in order to avoid" him. The Court characterized this behavior as unprovoked flight "approach[ing] that [seen] in *Illinois v. Wardlow*." Unfortunately, the opinion did not make clear precisely *when* the subject's behavior became suspiciously evasive; we are left to speculate whether the stop would have been upheld had the subject never broken into a run but instead continued walking quickly.

We have also recognized that retreat may be a tactical strategy for an armed suspect who wishes to harm the police. In *United States v. Sanders*, an officer responded to a convenience store owner's report of "a suspicious person with a gun on the premises." Upon arrival, the officer saw a man who matched the suspect's description and wore a long jacket that concealed his waistband. As the man "saw the squad car pulling up, he turned and started to walk away." This, together with several other contextual factors, justified the officer's decision to immediately draw his weapon and confront the man. The Court noted that walking away "can be used by a criminal to prepare for a violent confrontation by surreptitiously retrieving a concealed weapon then spinning back around to face the officer and use the weapon against him."

No doubt, this is the kind of tactic Deputy Latch feared when he saw Darrell "start[ing] down the side of the house trying to get out of sight." Given our thin and highly fact-dependent precedent on flight, however, we hesitate to affirm the stop on the basis of *Wardlow* alone without also considering the cases cited by Darrell.

Darrell relies extensively on two of this Court's recent Fourth Amendment cases: *United States v. Hill*51 and

United States v. Monsivais. In *Hill*, the defendant was sitting in his car with his girlfriend outside her apartment complex when a "multi-car convoy of police" approached. The police had not been called to the location; instead, they were conducting a "rolling patrol" in response to a county-wide increase in crime. This particular apartment complex was believed to be a "hotspot" for criminal activity.

Two officers parked their patrol car a few spots away from Hill's vehicle. Hill's girlfriend then got out of the car and walked briskly toward the nearby apartment building. While one officer approached the woman and began questioning her, the other knocked on the driver's side window of the car and asked Hill: "Where's your gun?" Hill said he did not have one. The officer then asked for his license, and Hill again responded that he did not have one. The officer told him to get out of the car, motioned for him to turn around, and frisked him—discovering a gun in the process. Hill was charged with being a felon in possession of a firearm.

On appeal from the district court's denial of Hill's motion to suppress, we held that the officer lacked reasonable suspicion to conduct a *Terry* stop. After all, the police were not responding to a call, Hill was not violating any traffic ordinances, and Hill himself made no attempt to evade the officers. As the Government points out, the question in *Hill* "was not whether officers had reasonable suspicion to seize Hill's passenger, who [at least arguably] attempted to flee when officers arrived, but whether the officers had reasonable suspicion to seize Hill, who sat peacefully in the vehicle after the officers arrived." Citing *Wardlow*, the *Hill* Court explained:

> Hill's girlfriend's movements, described by the officers as "quick," did not add up to a reasonable suspicion that Hill was engaged in criminal activity. . . . [The officers] lacked a reasonable basis to infer much of anything about the girlfriend exiting the car and taking a few steps towards the apartment during the same time as their arrival. . . . Moreover, the question presented is not whether the officers had reasonable suspicion to seize the girlfriend, . . . but rather whether the officers pointed to specific, articulable facts that cast reasonable suspicion on Hill, who stayed seated in his car and made no suspicious movements.

Given that Hill himself did not retreat from police, his case has little to tell us about the legal significance of Darrell's movements. As the Government points out, Darrell is more analogous to the girlfriend than the defendant in *Hill*, while Darrell's passenger is analogous to Hill himself: "Here, Darrell was involved in the suspicious behavior, while his passenger . . . just sat in the car."

The second case on which Darrell relies, *United States v. Monsivais*, also differs from his own in several critical respects. There, two patrolling officers "saw Monsivais walking east on the opposite side of the Interstate away from an apparently disabled truck." When they pulled over "to offer him roadside assistance," Monsivais "did not stop but continued walking past the squad car." The officers got out of their car and began asking Monsivais questions, to which he responded "polite[ly]" but with apparent nervousness. Monsivais "repeatedly put his hands in his pockets, but took them out" upon request. After approximately four minutes of this walking-and-talking exchange, one of the officers, Deputy Baker, stopped Monsivais and said he was going to pat him down.71 Monsivais, a Mexican citizen without legal status in the United States, admitted to having a gun in his waistband and was ultimately charged with possessing a firearm while being unlawfully present in the country.[72]

On appeal from the district court's denial of his motion to suppress, we held that the officers lacked reasonable suspicion to stop and frisk Monsivais. We noted that Deputy Baker had testified that at *no* point in the encounter did he suspect Monsivais of any criminal act. Rather, Baker decided to pat Monsivais down because he was "just acting suspicious."[74] Baker even admitted that he generally would not pursue "a stranded motorist who ran away from him and his car's flashing lights," and he offered no explanation for his decision to follow Monsivais on this occasion.[75] The Court rejected the Government's argument that "Monsivais's jittery demeanor and habit during questioning of putting his hands in his pockets" contributed to Deputy Baker's reasonable suspicion.[76] It is true, we acknowledged, that "nervous, *evasive* behavior is a pertinent factor in determining reasonable suspicion." However, there was nothing evasive about Monsivais's behavior, and his nervousness was an "entirely natural reaction to police presence."[78]

As for Monsivais's choice to continue walking past the officers' car, we emphasized that "[t]he context in which a person seeks to avoid contact with a peace officer is important."[79] Although "[r]easonable suspicion may arise when an individual flees from police," such cases "involve discernable facts or combination of facts specifically linking the fleeing individual to reasonably suspected criminality—e.g. flight *in a high-crime area* or flight *after receipt of a tip indicating criminality*."[80]

Hill and *Monsivais*do not offer Darrell the support he claims they do. In fact, under the terms of *Monsivais*, Darrell's behavior is a prototypical case of suspicious activity: flight from police in a high-crime area. The *Monsivais* language, together with *Wardlow*'s reliance on these same two factors, plainly contradicts Darrell's claim that his presence in a "high crime area and evasive behavior" are insufficient "to support a finding of reasonable suspicion." Moreover, as Deputy Latch testified, the officers reasonably feared that Darrell might draw a weapon or warn the target of their arrest warrant if he were permitted to withdraw from view. Finally, the fact that Darrell "was not seen committing any criminal activity" does not detract from the reasonableness of the officers' suspicion. *Terry* requires "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'"; it does not require certainty that a crime is in fact being committed.[81] Viewing this case under the totality of the circumstances, we hold that reasonable suspicion supported the brief investigatory stop of Darrell.

For the foregoing reasons, Appellant's conviction and sentence are affirmed.

***U.S. v. Darrell*, 5th Cir., No. 19-60087, Dec. 23rd, 2019.**

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REASONABLE SUSPICION - TRAFFIC STOP

This case raises a recurring question: did law enforcement officers conduct an "unreasonable" seizure under the Fourth Amendment by extending what began as a routine traffic stop?

Agreeing with the district court that the traffic stop here was not unreasonable under the Fourth Amendment, we AFFIRM.

Just before 6:00 one evening in October 2017, Officer Hunter Solomon of the Hernando Police Department pulled a black Chevy Suburban over on northbound Interstate 55 in Hernando, Mississippi, because it had an improperly displayed license plate. As Solomon walked to the vehicle, he saw that the vehicle actually had a temporary license displayed in its tinted rear windshield. Solomon approached the vehicle, and defendant Corey Smith, the driver, produced his license. At Solomon's invitation, Smith got out and walked to the rear of the Suburban so Solomon could show Smith why he had been pulled over. During this conversation, Solomon asked Smith about his itinerary and passengers. Smith said he had found a good deal on a small icemaker1 for his Fort Worth, Texas, restaurant on Craigslist and was headed to Indiana to pick it up. Solomon asked about the machine's size (it was apparently a small one) and then asked why it made sense to drive all the way from Texas to Indiana to pick up a small icemaker rather than just having the machine shipped to Texas. Smith did not have a good answer.

Note 1 A daiquiri machine may also have been involved.

Smith also told Solomon that his two passengers used to work for him and were helping him pick up the icemaker. (Curiously, Smith only knew the name of one passenger.) He told Solomon that he had picked up the men in Jackson, Mississippi. The plan was for the men to spend the night in nearby Memphis, Tennessee, and then continue to Indiana the following day. Having heard this story, and finding it somewhat implausible, Solomon decided to verify it with the two passengers, Willie Carroll and Gregory Carter. He left Smith at the rear of the vehicle with another officer, Davis, who had just arrived as backup. Solomon first got Carroll's and Carter's names and asked dispatch to run a background check. While that was being taken care of, he asked Carroll and Carter about their itinerary.

Their stories diverged from Smith's. Carroll told Solomon that he did not really know Smith. He said that the three men were headed to Memphis for a party and that they would return to Jackson the next day. Carroll had no idea about a trip to Indiana for an icemaker. Carter's story was similar. He said the men were headed to Memphis for a party but was unsure when they would be returning to Jackson. Carter also had no idea about any trip to Indiana. Solomon viewed the men's divergent stories, combined with the fact that they were travelling on the interstate (a route frequently used for transporting contraband), as "red flags." Solomon believed the men were hiding narcotics.

By 6:09 p.m., both Carroll's and Carter's IDs had been verified. But at 6:10 p.m., the background check returned an outstanding warrant on Carroll. So Solomon arrested Carroll at approximately 6:12 p.m. and placed him in Davis' patrol unit. He then asked Smith for consent to search the Suburban. Smith became "a little defensive," and raised his voice. Smith said he did not want his vehicle searched because he did not know what the passengers might have placed in the car. Around the same time, Solomon requested a more detailed background check (a "CQH") on all three men. The CQH took at least six minutes. At some point after that, likely around 6:18 p.m. (Solomon's report and testimony are unclear on the exact time), the CQH on Carter revealed that he had four prior drug arrests, including two for possession with intent to sell.

Because of all this, and despite Smith's refusal to consent to a vehicle search, Solomon decided to deploy his K-9 unit, Krash, for a drug sniff. The search began at 6:20 or 6:21 p.m. Less than a minute later, as Krash approached the rear door on the passenger's side, he jerked his head back and began to sniff the car door intensely. Krash then sat down, indicating that he smelled narcotics. Solomon determined that Krash's alert gave him probable cause to search the Suburban.

Solomon then put Krash back into his patrol unit and began searching. In the front part of the car, Solomon found an envelope addressed to Smith. Inside was a stack of "blank metal social security cards" and "a hand[-]written list of finical [sic] companies with addresses and email addresses that appeared to be made up." The items were located sometime before 6:40 p.m.2 Solomon then paused the search and contacted a detective to help him search the rest of the vehicle. They eventually uncovered fake IDs, authentic IDs with matching social security cards, a printer, blank check stubs, and other items. Smith and Carter were arrested. No narcotics were found.
Smith was indicted on various charges related to fraud and identity theft. He moved to suppress the evidence obtained from the vehicle search, arguing that the Fourth Amendment prohibited the extension of the initial traffic stop. The district court held an evidentiary hearing and then denied Smith's motion. Smith entered a conditional guilty plea preserving his right to appeal the denial of his motion to suppress. The court sentenced him to 36 months in prison and three years of supervised release. Smith timely appealed.

We will uphold the district court's ruling "if there is any reasonable view of the evidence to support it."

On appeal, Smith makes three primary arguments.3 First, he argues that Officer Solomon unreasonably extended the traffic stop by continuing to question Smith and his passengers beyond 6:04 p.m., the point at which Smith believes the stop reasonably should have been completed. Second, Smith contends that, even if the stop could reasonably have been extended beyond 6:04 p.m., by 6:12 p.m. it is clear that Solomon had no further reasonable suspicion that could support a further extension of the stop and the ensuing narcotics investigation. Finally, Smith believes that Solomon unreasonably extended the stop by waiting approximately ten minutes to deploy Krash after he began the narcotics investigation. For the reasons we discuss below, none of these arguments is persuasive. We set forth the applicable Fourth Amendment principles before addressing each of Smith's arguments in turn.

A Fourth Amendment "seizure" occurs when an officer stops a vehicle and detains its occupants. "We analyze the legality of traffic stops for Fourth Amendment purposes under the standard articulated by the Supreme Court in *Terry v. Ohio*…" This involves two steps. First, we determine whether the stop was justified at its inception. "For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort

of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle."

Second, if the stop was justified, we ask whether "the officer's subsequent actions were reasonably related in scope to the circumstances that caused him to stop the vehicle in the first place." "A seizure for a traffic violation justifies a police investigation of that violation." As part of that investigation, "an officer may examine driver's licenses and vehicle registrations and run computer checks." "He may also ask about the purpose and itinerary of the occupants' trip . . . ." And he may ask "similar question[s] of the vehicle's occupants to verify the information provided by the driver." There is no hard-and-fast time limit for "reasonable" traffic stops. Rather, the stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." "[T]he 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." "Authority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." "If the officer develops reasonable suspicion of additional criminal activity during his investigation of the circumstances that originally caused the stop, he may further detain its occupants for a reasonable time while appropriately attempting to dispel this reasonable suspicion." "[R]easonable suspicion exists when the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search and seizure." "Reasonable suspicion is a low threshold" and requires only "some minimal level of objective justification." Reasonable suspicion demands something more than a "mere 'hunch'" but "'considerably less than proof of wrongdoing by a preponderance of the evidence,' and 'obviously less' than is necessary for probable cause." Our inquiry views "the totality of the circumstances and the collective knowledge and experience of the officer." We give due weight to the officer's factual inferences because officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"

Smith first argues that the stop should have ended at 6:04 p.m., because by that time Officer Solomon had seen that the vehicle had a temporary license plate and had confirmed that Smith's driver's license was valid. We are unpersuaded. Smith concedes that Solomon had reasonable suspicion to pull him over. So, the initial traffic stop was legal and the first prong of the *Terry* inquiry is satisfied. As part of the traffic stop, Solomon could examine the driver's licenses of the vehicle's occupants and check for any outstanding warrants, ask Smith about the purpose and destination of their journey, and ask similar questions to Carroll and Carter to verify Smith's statements. Thus, to the extent that Smith argues that any of those actions unreasonably prolonged the traffic stop beyond 6:04 p.m., his arguments fail. The computer checks on both Carroll's and Carter's licenses took until at least 6:09 or 6:10 p.m. Thus the initial traffic stop was reasonable at least until that time.

Smith next argues that, even if the stop was reasonably extended beyond 6:04 p.m., it was unreasonable to extend the stop beyond 6:12 p.m. in order to conduct a narcotics investigation. The district court disagreed. So do we.
To justify extension of the initial traffic stop, Officer Solomon's reasonable suspicion must have arisen, at the latest, by 6:12 p.m. "[T]he 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." Officer Solomon admitted that, by 6:12 p.m., there was not "anything else to do regarding the investigation of the improperly displayed tag." Thus, any reasonable suspicion justifying an extension of the stop must have arisen before that point, or continuation of the stop would be unreasonable.
Officer Solomon's interactions with the three men provided reasonable suspicion to conduct a narcotics investigation, thus justifying an extension of the stop. First, Officer Solomon noted the implausibility of elements of Smith's story. Smith stated that the icemaker he was going to pick up was not a large machine. But he had no explanation for why he needed three adult men to pick up a machine of that size. Nor could he explain why it made sense to drive all the way from Fort Worth, Texas to Indiana rather than just having the machine shipped.

Second, Smith, Carter, and Carroll gave contradictory stories about their destination, the purpose of their trip, and

their relationships to each other. Smith claimed the men were headed to Indiana to pick up restaurant equipment; Carroll and Carter both asserted they were headed to a party in Memphis. Smith claimed Carroll and Carter were previous employees; Carroll informed Officer Solomon that he did not really know Smith. Smith did not even know the name of one of the men. Further, the stories from Carter and Carroll did not match up with each other—one of the men stated they would be returning to Jackson the following day, while the other stated he was unsure when they would be returning. At oral argument, Smith conceded that these inconsistencies were "significant." The district court and Smith are correct that these inconsistencies were significant, and we conclude they lean in favor of reasonable suspicion. This is particularly true where, as here, Officer Solomon "dr[ew] on [his] experience . . . to make inferences from and deductions about the cumulative information available to [him] that 'might well elude an untrained person.'" Officer Solomon testified that, in his experience, when drivers are dishonest after being pulled over, it usually indicates that they are hiding contraband.

Third, Smith and his companions were traveling along an interstate known for transportation of contraband. While we agree with the Tenth Circuit that "the probativeness of a particular defendant's route is minimal," we have consistently considered travel along known drug corridors as a relevant—even if not dispositive—piece of the reasonable suspicion puzzle. For example, in *Pack*, we considered the fact that the defendant and his girlfriend "were traveling along a drug trafficking corridor." Similarly, we considered the fact that the defendants were traveling on a "known drug-trafficking corridor."

6 Thus, to the extent Smith argues that we cannot consider his presence on I-55, he is incorrect. Smith's travel on I-55 supports reasonable suspicion on these facts.

Finally, we note that by 6:10 p.m., Officer Solomon knew that one of the vehicle's occupants had an outstanding arrest warrant for a parole violation. This fact could have contributed to Officer Solomon's reasonable suspicion. In sum, the record supports Officer Solomon's reasonable suspicion, based on his experience, "that criminal activity 'may [have been] afoot.'" The record establishes this reasonable suspicion arose by 6:12 p.m. We therefore conclude that the extension of the stop beyond that time so that Officer Solomon could conduct a narcotics investigation did not violate the Fourth Amendment.

Finally, Smith argues that, even if it was reasonable for Officer Solomon to begin a narcotics investigation, that investigation was unreasonably extended by Officer Solomon's decision to wait until 6:21 p.m. to have Krash conduct the drug sweep. In Smith's view, Officer Solomon should have immediately deployed Krash at 6:11 or 6:12 p.m. rather than "[sitting] around idly" until 6:21p.m.[7] The district court performed no independent analysis n this issue, but concluded it did "not find the time from when the investigation began until Krash was deployed to be an unreasonable delay."

We agree with the district court that the delay was not unreasonable under the circumstances. Smith's argument boils down to disagreeing with Officer Solomon's decision to wait until the in-depth background checks finished before deploying Krash. He offers no legal authority showing this ten-minute period was unreasonable. Rather, he suggests it was unreasonable because, when Solomon finally did conduct a sweep with Krash, it took "only a minute or two." He articulates no other reason.

But "*post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States v. Sharpe*, 470 U.S. 675,686–87 (1985). "[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable."*Id.*at 687 (quoting *Cady v. Dombrowski*,413 U.S. 433,447(1973)). The appropriate inquiry "is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."

The record does not suggest that Solomon unreasonably dragged the investigation out. Rather, during the ten-minute interval Smith challenges, the record shows that Solomon was waiting for in-depth background checks on all three men, as well as trying to secure consent to search the vehicle.

For those reasons, we conclude Officer Solomon did not act unreasonably by waiting until 6:21 p.m. to deploy Krash for the drug sweep.

* * *

After viewing the totality of the circumstances, we conclude that the district court's decision to deny Smith's motion to suppress is supported by a reasonable view of the evidence in the record. *See Massi*, 761 F.3d at 520.

The district court's judgment is therefore AFFIRMED.

***U.S. v. Smith,* 5th Cir., No. 19-60340, Mar. 12, 2020.**

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REASONABLE SUSPICION – TRAFFIC STOP

This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license. We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.

Kansas charged respondent Charles Glover, Jr., withdriving as a habitual violator after a traffic stop revealed that he was driving with a revoked license. Glover filed a motion to suppress all evidence seized during the stop, claiming that the officer lacked reasonable suspicion. Neither Glover nor the police officer testified at the suppression hearing. Instead, the parties stipulated to the following facts:

> "1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff 's Office.
> 2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.
>
> Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickuptruck.
>
> Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.
>
> Deputy Mehrer assumed the registered owner of thetruck was also the driver, Charles Glover Jr.
>
> Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.
>
> The driver of the truck was identified as the defendant, Charles Glover Jr."

The District Court granted Glover's motion to suppress. The Court of Appeals reversed, holding that "it was reasonable for [Deputy] Mehrer to infer that the driver was the owner of the vehicle" because "there were specific and articulable facts from which the officer's common-sense inference gave rise to a reasonable suspicion."

The Kansas Supreme Court reversed. According to the court, Deputy Mehrer did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to "only a hunch" that Glover was engaging in criminal activity. The court further explained that Deputy Mehrer's "hunch" involved "applying and stacking unstated assumptions that are unreasonable without further factual basis," namely, that "the registered owner was likely the primary driver of the vehicle" and that "the owner will likely disregard the suspension or revocation order and continue to drive." We granted Kansas' petition for a writ of certiorari, and now reverse.

Under this Court's precedents, the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause."

Because it is a "less demanding" standard, "reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause." The standard "depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act." Courts "cannot reasonably demand scientific certainty . . . where none exists." Rather, they must permit officers to make "common sense judgments and inferences about human behavior."

We have previously recognized that States have a "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed." With this in mind, we turn to whether the facts known to Deputy Mehrer at the time of the stop gave rise to reason- able suspicion. We conclude that they did.
Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy for, as we have explained, "[t]o be reasonable is not to be perfect,"

Glover's revoked license does not render Deputy Mehrer's inference unreasonable either. Empirical studies demonstrate what common experience readily reveals: Drivers with revoked licenses frequently continue to drive and therefore to pose safety risks to other motorists and pedestrians.

See, e.g., 2 T. Neuman et al., National Coop. Hwy. Research Program Report 500: A Guide for Addressing Collisions Involving Unlicensed Drivers and Drivers With Suspended or Revoked Licenses, p. III–1 (2003) (noting that 75% of drivers with suspended or revoked licenses continue to drive); National Hwy. and Traffic Safety Admin., Research Note: Driver License Compliance Status in Fatal Crashes 2 (Oct. 2014) (noting that approximately 19% of motor vehicle fatalities from 2008–2012 "involved drivers with invalid licenses").

Although common sense suffices to justify this inference, Kansas law reinforces that it is reasonable to infer that an individual with a revoked license may continue driving. The State's license-revocation scheme covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive. The Division of Vehicles of the Kansas Department of Revenue (Division) "shall" revoke a driver's license upon certain convictions for involuntary manslaughter, vehicular homicide, battery, reckless driving, fleeing or attempting to elude a police officer, or conviction of a felony in which a motor vehicle is used. Reckless driving is defined as "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." The Division also has discretion to revoke a license if a driver "[h]as been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways," "has been convicted of three or more moving traffic violations committed on separate occasions within a 12-month period," "is incompetent to drive a motor vehicle," or "has been convicted of a moving traffic violation, committed at a time when the person's driving privileges were restricted, suspended[,] or revoked." Other reasons include violating license restrictions, and being a habitual violator, which Kansas defines as a resident or nonresident who has been convicted three or more times within the past five years of certain enumerated driving offenses. The concerns motivating the State's various grounds for revocation lend further cre-

dence to the inference that a registered owner with a revoked Kansas driver's license might be the one driving the vehicle.

Glover and the dissent respond with two arguments as to why Deputy Mehrer lacked reasonable suspicion. Neither is persuasive.

First, Glover and the dissent argue that Deputy Mehrer's inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite. In *Navarette*, we noted a number of behaviors—including driving in the median, crossing the center line on a highway, and swerving—that as a matter of common sense provide "sound indicia of drunk driving." In *Wardlow*, we made the unremarkable observation that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion" and therefore could factor into a police officer's reasonable suspicion determination. And in *Sokolow*, we recognized that the defendant's method of payment for an airplane ticket contributed to the agents' reasonable suspicion of drug trafficking because we "fe[lt] confident" that "[m]ost business travelers . . . purchase airline tickets by credit card or check" rather than cash. The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis.

The dissent reads our cases differently, contending that they permit an officer to use only the common sense derived from his "experiences in law enforcement." Such a standard defies the "common sense" understanding of common sense, *i.e.*, information that is accessible to people generally, not just some specialized subset of society. More importantly, this standard appears nowhere in our precedent. In fact, we have stated that reasonable suspicion is an "abstract" concept that cannot be reduced to "a neat set of legal rules," and we have repeatedly rejected courts' efforts to impose a rigid structure on the concept of reasonableness. This is precisely what the dissent's rule would do by insisting that officers must be treated as bifurcated persons, completely precluded from drawing factual inferences based on the commonly held knowledge they have acquired in their everyday lives.

The dissent's rule would also impose on police the burden of pointing to specific training materials or field experiences justifying reasonable suspicion for the myriad infractions in municipal criminal codes. And by removing common sense as a source of evidence, the dissent would considerably narrow the daylight between the showing required for probable cause and the "less stringent" showing required for reasonable suspicion. Finally, it would impermissibly tie a traffic stop's validity to the officer's length of service. Such requirements are inconsistent with our Fourth Amendment jurisprudence, and we decline to adopt them here.

In reaching this conclusion, we in no way minimize the significant role that specialized training and experience routinely play in law enforcement investigations. We simply hold that such experience is not *required* in every instance.

Glover and the dissent also contend that adopting Kansas' view would eviscerate the need for officers to base reasonable suspicion on "specific and articulable facts" particularized to the individual, because police could instead rely exclusively on probabilities. Their argument carries little force. As an initial matter, we have previously stated that officers, like jurors, may rely on probabilities in the reasonable suspicion context. Moreover, as explained above, Deputy Mehrer did not rely exclusively on probabilities. He knew that the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. Based on these minimal facts, he used common sense to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity—driving with a revoked license. Traffic stops of this nature do not delegate to officers "broad and unlimited discretion" to stop drivers at random. Nor do they allow officers to stop drivers whose conduct is no different from any other driver's. Accordingly, combining database information and com-

monsense judgments in this context is fully consonant with this Court's Fourth Amendment precedents.

This Court's precedents have repeatedly affirmed that "'the ultimate touchstone of the Fourth Amendment is "reasonableness."'" Under the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked. We emphasize the narrow scope of our holding. Like all seizures, "[t]he officer's action must be 'justified at its inception.'" "The standard takes into account the totality of the circumstances—the whole picture." As a result, the presence of additional facts might dispel reasonable suspicion. For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." Here, Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified.

For the foregoing reasons, we reverse the judgment of the Kansas Supreme Court, and we remand the case for further proceedings not inconsistent with this opinion.
***Kansas v. Glover*, U.S. Supreme Court, No. 18-556, April 6th, 2020.**
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REASONABLE SUSPICION – TRAFFIC STOP & DETENTION.

jury convicted Angela Michelle Williams of possession with intent to distribute crack cocaine and distribution of cocaine. Law enforcement officials discovered crack cocaine on Williams's person during a strip search after she was arrested for traffic violations.

Williams appeals her convictions, arguing that the district court erred by denying her first motion to suppress, her motion for reconsideration, and her second motion to suppress. She argues that the evidence of drugs found on her person during her post-arrest strip search should have been suppressed because there was not cause to stop her, detain her, or take her to the jail to be strip searched. She further argues that the evidence does not support her conviction of distribution of cocaine because the government's witnesses were not credible and she cannot be identified in the video evidence, taken by a cooperating witness, of a controlled drug buy.

In this case, Detective Sedillo testified at the suppression hearing that he saw Williams drift between two lanes and change lanes without signaling, and that he relayed those observations to Officers Rodriguez and Gonzalez, who conducted the traffic stop. Accordingly, the initial stop was justified under the doctrine of collective knowledge. This collective knowledge also justifies arresting Williams for the traffic offenses.

Furthermore, testimony and body-camera recordings from the traffic stop demonstrate that Officer Rodriguez observed that Williams had red eyes, asserted multiple times she had not been drinking, and was argumentative and "squirrely" during the pat-down search. Officer Rodriguez could reasonably have suspected that Williams's failure to maintain her lane of travel was related to drug or alcohol use, which justified extending the length of the detention.

Because the traffic stop and arrest did not violate Williams's Fourth Amendment rights, the district court did not err by denying her pretrial motions.

Williams preserved her sufficiency-of-the-evidence argument about her distribution conviction, thereby preserving a de novo standard of review. Therefore, in considering the evidence supporting that conviction, we must determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." A jury is free to choose among any reasonable construction of the evidence, and we will not second-guess the jury's

reasonable determinations of evidentiary weight and witness credibility.

To prove that Williams distributed cocaine, the government had to prove that she "(1) knowingly (2) distributed (3) the controlled substance." The video of the controlled buy, plus testimony from the cooperating witness who filmed it, Detective Sedillo, and a forensic scientist, gave the jury sufficient evidence to find beyond a reasonable doubt that Williams knowingly distributed cocaine.

***U.S. v. Williams*, unpublished, No. 19-5006, 5th Cir. Sept. 28th, 2020.**

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REASONABLE SUSPICION – TRAFFIC STOP – DRUG ARREST.

Sergio Zamora appeals his conviction for possession of marijuana with intent to distribute on the ground that the Border Patrol agent who conducted the traffic stop that led to his arrest lacked reasonable suspicion in violation of the Fourth Amendment. Zamora argues that the district court erred by denying his motion to suppress evidence seized as a result of the stop. Finding no error, we AFFIRM.

The relevant facts are undisputed. Early one morning in August 2018, a few minutes before 5:00 a.m., a sensor deployed by the United States Border Patrol to detect activity along the border went off. The sensor was approximately 10 miles east of the Fort Hancock, Texas, port of entry. At 5:05 a.m., Agent Robert Cardiel responded to the area of the sensor activation and discovered two sets of horse prints heading north from the US/Mexico border. This section of the border and Interstate 10 run roughly parallel, between two and three miles apart. Using his radio, Agent Cardiel alerted other agents in the area.

Agent Oscar Pinon heard the notification about the sensor and the hoof prints. Entering Interstate 10 at mile marker 78, Agent Pinon drove east toward mile marker 81, the point toward which the horses appeared to be traveling. It was pitch dark at that hour of the morning, and there was no lighting in that section of roadway. Agent Pinon saw the brake lights of a vehicle on the shoulder of the interstate parked near mile marker 81, directly north of where Agent Cardiel found the hoof prints and exactly where Agent Cardiel said the horses were headed. As Agent Pinon approached, the vehicle entered Interstate 10, exited almost immediately, turned around on an overpass, and began heading westbound on Interstate 10 toward Fort Hancock. Agent Pinon crossed the median and began following the vehicle, a white Dodge pickup. He activated his emergency lights, called dispatch to request a check on the license plate, and learned the truck was registered to someone in Fort Hancock.

After following the truck for several miles, Agent Pinon pulled the truck over. A strong odor of marijuana wafted from the vehicle, and Agent Pinon asked Zamora for permission to search the truck. Zamora consented to the search and informed Agent Pinon before his search began that there were drugs in the truck. Agent Pinon discovered 73.68 kilograms of marijuana in the bed of the truck and arrested Zamora.

During the evidentiary hearing, Agent Pinon testified that the following facts contributed to his suspicion that criminal activity was afoot. The area Agent Pinon first saw Zamora is in close proximity to the border and is a known corridor for narcotics and alien smuggling. The time of day—5:00 a.m.—meant that it was very dark, and it was close to a shift change. In Agent Pinon's experience, the timing was significant because smugglers often try to take advantage of shift changes because of the increased delay in the agents' response time. Zamora's vehicle was parked directly north of where the hoofprints were headed.1 Agent Pinon explained that smugglers frequently use this section of Interstate 10 to load vehicles with smuggled drugs or people. Typically, smugglers turn around and drive west after loading in order to avoid a Border Patrol checkpoint to the east. Pickup trucks are easy to load, and white is a color commonly used by drug smugglers in that area. Based on

these observations, Agent Pinon stopped the truck. From the foregoing facts, the district court held that Agent Pinon had a reasonable suspicion to stop Zamoraand denied the motion to suppress.

The district court then held a bench trial on stipulated facts. The court found Zamora guilty and sentenced him to five years' probation. During trial, Zamora expressly reserved his right to appeal the denial of his motion to suppress. Zamora now appeals that decision.

"A temporary, warrantless detention of an individual constitutes a seizure for Fourth Amendment purposes and must be justified by reasonable suspicion that criminal activity has taken or is currently taking place . . ." "A border patrol agent conducting a roving patrol may make a temporary investigative stop of a vehicle only if the agent is aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle's occupant is engaged in criminal activity." "Reasonable suspicion requires more than merely an unparticularized hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence."

> When determining whether reasonable suspicion existed, we examine the totality of the circumstances and weigh the factors established in *BrignoniPonce*. Factors that may be considered include: (1) the characteristics of the area in which the vehicle is encountered; (2) the arresting agent's previous experience with criminal activity; (3) the area's proximity to the border, (4) the usual traffic patterns on the road; (5) information about recent illegal trafficking in aliens or narcotics in the area; (6) the appearance of the vehicle; (7) the driver's behavior; and, (8) the passengers' number, appearance, and behavior.

These factors are not exclusive nor is any single factor dispositive. "[E]ach case must be examined based on the totality of the circumstances known to the agents at the time of the stop and their experience in evaluating such circumstances." "Factors that ordinarily constitute innocent behavior may provide a composite picture sufficient to raise reasonable suspicion in the minds of experienced officers."

In the instant case, the district court found that the totality of the circumstances provided Agent Pinon with reasonable suspicion, warranting his stop of Zamora. We agree. Agent Pinon encountered Zamora along a stretch of interstate well known as a drug trafficking corridor and loading zone. Agents Pinon and Cardiel have fifteen and fourteen years of experience, respectively, as Border Patrol agents in the Fort Hancock area. Such experience "inform[s] our assessment of the circumstances likely to arouse suspicion in the area." Drawing upon this experience, Agent Pinon testified that drug smugglers often transport their illicit wares to waiting vehicles on Interstate 10 and then return over the border to avoid detection by the border patrol. The interstate's proximity to the border facilitates this pattern of activity. At mile marker 81, Interstate 10 is three miles or less from the border. *See id*. (holding that "[p]roximity to the border is a paramount factor" (internal quotation marks and citation omitted)). Agent Pinon also explained that smugglers along this stretch of highway frequently turnaround and drive westbound in order to avoid the Border Patrol checkpoint east of Fort Hancock, exactly as Zamora did here. Additionally, the color and type of vehicle Zamora was driving contributed to Agent Pinon's suspicion because drug smugglers commonly used vehicles with those characteristics.

The fifth factor—information about recent illegal trafficking in the area—is especially important in this case. Agent Pinon did not just happenupon Zamora; instead, Agent Pinon was responding to a radio call offering specific information about potential trafficking activity heading for the precise location he encountered Zamora. Zamora counters that there was no evidence of illegal activity, but Agent Pinon testified that horseback riders were uncommon in that area, especially at 5:00 a.m. Moreover, Agent Pinon knew that a sensor had indicated activity along the border at a time of night offering traffickers the advantages of darkness and an impending Border Patrol shift change. In sum, Agent Pinon encountered a vehicle that he had strong reason to suspect of being involved in drug trafficking that he then observed following a pattern of behavior typical of drug traffickers. We therefore agree with the district court that Agent Pinon acted on more than "an unparticularized hunch."

Zamora offers two counterarguments. First, he contends that the vast majority of the traffic along Interstate 10 is for innocent purposes. Second, he asserts that nothing specific about his behavior or the vehicle could supply reasonable suspicion. The first argument disregards the fact that the reasonable suspicion analysis considers the combination of factors leading to an investigatory stop. We have previously opined that "the possibility that [a defendant] could have been an innocent traveler" does not negate other factors supporting reasonable suspicion. Here, Agent Pinon had ample reason to suspect that Zamora was not merely an innocent traveler. The second argument likewise fails because Agent Pinon testified to specific reasons that a white pickup truck and Zamora's pattern of behavior were significant to him.

Under the totality of the circumstances, considered in connection with the *Brignoni–Ponce* factors, we conclude that Agent Pinon had reasonable suspicion to stop Zamora's truck.

***U.S. v. Zamora*, unpublished, No. 19-50668, 5th Cir. July 23rd, 2020.**

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REASONABLE SUSPICION – STOP & FRISK

Raymond McKinney entered a conditional guilty plea to the charge ofbeing a felon in possession of a firearm. He reserved the right to challenge on appeal the denial of his motion to suppress evidence of the discovery of the firearm by an officer patting him down prior to questioning. McKinney was detained for questioning while standing on a sidewalk with others near a business that in recent days had been the location of multiple gang-related shootings. We conclude that the evidence before the district court did not support that officers had reasonable suspicion to detain McKinney for questioning. We REVERSE the judgment of conviction and the sentence, which were based on the conditional guilty plea, and REMAND for further proceedings.

In mid-September 2017, at about 9:00 p.m., McKinney and three other individuals were on a sidewalk near a gas station in San Antonio, Texas. That station had in recent days been the location of drive-by shootings, one as recent as 4:00 a.m. that day. Two officers approached, frisked the three men in the group, and discovered a gun on McKinney. He was charged with being a felon in possession of a firearm.

In a motion to suppress evidence of the gun, McKinney argued that the officers lacked reasonable suspicion both for the initial stop and for the later frisk. McKinney used the officers' body-camera videos and the police report as his supporting evidence. The Government filed a response in opposition, attaching still shots of the video as well as news articles reporting the recent shootings in the area. Without holding a hearing, the district court denied the motion in summary fashion. It later issued a second order explaining its reasoning for the denial.

Without an evidentiary hearing, we do not have the benefit of testimony from the officers. Neither party submitted any affidavits. Instead, the body-camera videos, videos from the police SUV cameras, and the police report constitute the evidence. Around ten o'clock on the night of the arrest, San Antonio officers Holland and Carmona were on patrol in an unmarked police SUV near the gas station that had been the location of recent drive-by shootings. The officers turned out of the gas station and, within seconds, pulled up to McKinney and three others standing on the sidewalk. The group consisted of McKinney, two men, and a woman. Officer Holland jumped out of the passenger seat and said, "What's up gentlemen? What's going on today?"

As he approached the group, he shined his light on the woman, who appeared to be slowly walking away from the group, then ordered her to come back. She complied. Officer Holland immediately frisked the two other men.

At this point, Officer Carmona exited the SUV and focused his attention on McKinney, who was standing with his illuminated phone in one hand, a bottle of Minute Maid in the other, and a backpack on his back.

Officer Carmona asked if he lived nearby, and McKinney responded, "No, Sir." Officer Carmona asked if he had any guns on him, and McKinney said that he did not. Officer Carmona asked to "pat [McKinney] down real quick [to make sure he did not have] any guns." McKinney declined to consent to a search. Officer Carmona said that he was not "searching" him, just "patting [him] down." By now, Officer Carmona was holding McKinney.

He patted McKinney down and found a gun in his waistband. McKinney was then handcuffed. In the minutes that followed, the officers made several statements explaining their reasons for initiating the investigatory detention and conducting the pat-downs. When McKinney asked why he was "searched," Officer Holland responded that it was because McKinney was "out here with a gun," near "a place that [was] shot up the other day," and that he was "hanging out over here in a jacket in the middle of the summer." Officer Carmona later told McKinney he was frisked because he was in an area known for shootings even though he did not live there. Officer Carmona added: "You want to know what my reasonable suspicion is? That there's been three or four shootings here in the last day and a half." Later, Officer Holland warned the others in the group: "[If] [y]ou are hanging out over here, you are going to get stopped, you are going to get checked. Especially if you are gang members."

Two of the Government's arguments are that the clothing worn by McKinney and others supports a reasonable suspicion of criminal gang activity. The body-camera videos show that McKinney was wearing a black Nike windbreaker, a black bucket hat accented with the colors of the Jamaican flag, and red shorts. He also had a light-colored backpack. The woman wore a pink shirt with a pink bow in her hair.1 One of the men wore a white shirt, white hat, and khaki pants. The other wore a white shirt and dark pants, but it is unclear whether the pants were red or another color. The police report, created by Officer Holland, states that the officers observed "gang members hanging out" near the gas station. It asserts that "[t]he group was wearing red colors," though in fact only McKinney had red clothing, and that McKinney was wearing a jacket and hat even though "[i]t was quite warm and humid out." The report also states that when one of the men saw the officers, he "turned and appeared to drop something very small." Finally, it claims that the officers approached the group and frisked the men "due to the area being a [B]loods gang location and all of [the] [recent] shooting[s] at this location."

McKinney moved to suppress the evidence of the firearm. The district court entered a summary denial in September 2018. In April 2019, the court entered a second, detailed order on the motion. The court held that the officers' actions were justified. To conclude there was reasonable suspicion for the stop, the court relied on the following: (1) recent gang violence in the area; (2) the red, gang-related clothing; (3) McKinney's wearing a jacket and backpack on a hot summer night; (4) the woman's exhibiting evasive behavior by trying to "distance herself"; and (5) Officer Holland's observation that "one of the individuals drop[ped] something very small" in a "quick hand motion indicative of someone getting rid of evidence, usually narcotics." The court "infer[red]" that the officers were "seasoned" and "trained."

The district court also concluded that the officers had reasonable suspicion to frisk McKinney, *i.e.*, that he was armed and dangerous. For support, the court pointed out, again, his wearing a jacket and backpack on a hot night. The court also noted that the red shorts were a "gang color." The court also contended that McKinney's refusal to consent to a pat-down supported reasonable suspicion to do so without consent. Second, the court found that the ultimate discovery of the gun possessed by someone wearing gang colors supported a reasonable suspicion to conduct the frisk.

Based on these findings, the district court denied the motion to suppress. McKinney entered a conditional guilty plea but reserved the right to challenge the denial of his motion to suppress. This appeal followed.

Warrantless searches and seizures are presumptively unreasonable, subject to certain exceptions. One exception provides that "officers may briefly detain individuals on the street, even though there is no probable cause to arrest them, if they have a reasonable suspicion that criminal activity is afoot." Similarly, reasonable, individualized suspicion that someone being stopped for brief questioning is armed and dangerous must exist before the officer may conduct a pat-down.= A seizure must be "justified at its inception." Reasonable suspicion must exist *before* the initiation of an investigatory detention. Reasonable suspicion exists if the officer can "point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime." It cannot be unparticularized or founded on a mere hunch. Instead, "a minimal level of objective justification" is required. Observations capable of innocent explanation when considered alone might rise to the level of reasonable suspicion in the aggregate. Likewise, an officer can have a reasonable suspicion without ruling out every innocent explanation. We account for the totality of the circumstances in determining whether there was a "'particularized and objective basis' for suspecting legal wrongdoing."

When reviewing the denial of a motion to suppress, we review questions of law *de novo* and findings of fact for clear error. For factual findings, we give the district court heightened deference when the judge had the "opportunity to judge the credibility of those witnesses," a benefit that appellate courts do not have. There was no evidentiary hearing in this case, though, so there is no heighteneddeference to the district court's findings of fact.

Demonstrating reasonable suspicion is the Government's burden. On this issue, we view the evidence in the light most favorable to the party that prevailed in district court. Here, that is the Government. We will uphold the district court's decision if there is any reasonable view of] the evidence to support doing so.

The parties do not appear to dispute when McKinney and the others were seized. "It must be recognized that whenever a police officer accosts] an individual and restrains his freedom to walk away, he has 'seized' that] person." When Officer Holland jumped out of the] police SUV and approached the group, he shined his flashlight on the woman]who appeared to be walking away and ordered that she return. No reasonable person would have felt free to walk away. As a result, each person in the group was seized at that moment.

Because the initial detention must be justified at its inception, the issue in this case is whether the officers had reasonable suspicion based on their observations at the time they ordered the woman to stop. If reasonable suspicion is lacking at this point, there is no need to analyze whether the subsequent pat-down was supported by a reasonable suspicion that McKinney was armed and dangerous. In contrast, if the initial detention is justified by a reasonable suspicion, facts supporting a pat-down can develop after the suspect has been detained.

To determine whether reasonable suspicion existed at the initiation of the investigatory detention, we evaluate each fact identified by the district court as supporting a reasonable suspicion to initiate the investigatory detention. Our conclusion, though, depends on the combination of facts.

The district court found that the officers were "aware of recent gang violence" in the area, *i.e.*, the drive-by shootings at the nearby gas station. The officers, according to the court, were "closely patrolling" this area in response to the shootings. On appeal, McKinney argues his presence in a high-crime area is not evidence to support reasonable suspicion. Certainly, "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." Still, a person's "presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." The officers were patrolling the area in response to recent shootings, but those shootings do not justify stopping anyone absent an articulable suspicion about a connection between the person and those crimes. In one case,

held that an officer lacked reasonable suspicion to stop a red vehicle just fifteen minutes after receiving a dispatch that a red vehicle was involved in gun fire in the same area. In another, we held that reasonable suspicion did exist when officers heard gunshots "around the corner," and within one minute pulled over a vehicle being driven "relatively fast" from the direction of the shooting.

From the evidence introduced by the Government, this was a mixed residential and commercial area, containing a few stores and restaurants to which the local residents could walk. A small group being on a sidewalk was not itself evidence of anything suspicious. Later, officers learned that none of those in the group lived in the immediate area, but there was no evidence officers knew that when the stop was made. Nothing observed by the officers connected McKinney or anyone else standing on the sidewalk to the recent and nearby shootings that had been made from passing vehicles. The officers hardly even alleged a suspicious connection. Officer Holland told the group that "if [y]ou are hanging out over here [near the location of the recent shootings], you are going to get stopped, you are going to get checked. Especially if you are gang members."

The district court relied on the finding that McKinney and others were wearing some red clothing. The court characterized the clothing as evidence of gang involvement. The police report remarked that "[t]he group was wearing red colors" and that the area was a "[B]loods gang location." According to the report, this was one principal reason for making the investigatory stop. Our review of the videos indicates that the only person wearing red clothing was McKinney, whose shorts were red.2 The district court found that the woman was wearing a "big red sparkly bow," described as "more evidence of the red gang color." Her bow, though, was pink, and matched her pink shirt. There is no evidence that officers reasonably believed that a color somewhat close to red was also what gang members wore.

Our concern with these first two factors — high-crime area and gang colors — is that as far as the record demonstrates, this high-crime area was residential and, presumably, people other than gang members lived there. We cannot accept that there is reasonable suspicion for questioning everyone in a crime-ridden neighborhood wearing one article of clothing that is not an unusual color but happens also to be the color of choice for a gang. Additional evidence, such as showing that police were aware that residents of the area who are not gang members avoided wearing those colors to prevent trouble with gang members or with police, would allow the clothing of only one person in a group to be considered more significant. The Government urges us to consider one of our nonprecedential opinions which held there was reasonable suspicion in part because the suspect was "wearing gang colors." *See United States v. Miranda*, 393 F. App'x 243, 246 (5th Cir. 2010). There, though, the officer already knew the suspect because the same officer had arrested him on a prior occasion. *Id.* At 244. The reasonable suspicion was supported by the officer's knowledge that the suspect was a felon and member of a violent gang, and also the officer's observations that the suspect was wearing gang colors and trespassing in an area known for gang-related crime.

Unlike *Miranda*, there is no evidence either officer knew McKinney or anyone in the group. We consider the red shorts at most to be a start towards suspicion but not enough. It might well have been suspicious if in fact the *group* had been wearing red, suggesting reason and not randomness to the wearing of that color. That they were in a high-crime residential area does not add to suspicion absent some evidence that it was reasonable to suspect that those willing to be outside at that location at that time of night were gang members.

The record strongly supports a finding that the comments we have already quoted from the officers were the actual and insufficient reasons for the stop. Officer Carmona said his "reasonable suspicion" was that there had been multiple shootings. Officer Holland believed it was enough to stop people who "are hanging out over here," especially if the people are members of a gang presumably meaning anyone wearing red. Even though the articulated reasons fail, the test to be applied is objective, meaning it does not depend on what the officers claimed as reasons.

We look at the remainder of the relevant evidence to determine whether other facts known to these officers objectively justified the stop. The court relied on its finding that McKinney, unlike the others, "was wearing a jacket and had a backpack on a hot September night." The police report notes that McKinney was wearing a jacket. Our understanding from the briefing and from our review of the video is that the jacket was something like a "windbreaker," which might not be suspicious if, as McKinney claimed, it had been lightly raining earlier. The Government insists McKinney was "dressed oddly, given the warm night," in clothes that could potentially conceal a weapon. In the body-camera footage, Officer Holland explained to McKinney that he was searched because he was "out here with a gun," near a place that "just got shot up" while he was wearing "a jacket in the middle of the summer." Although the officers might have been able to see that McKinney was wearing some sort of outerwear, we cannot discern on this record whether officers could have known before approaching the group how out-of-season McKinney's jacket was. We start with the obvious. The fact that McKinney did have a gun in his waistband is irrelevant to a determination of whether reasonable suspicion existed in order to initiate an investigatory detention.

As to the backpack, a panel of the court once stated that "the very common occurrence of having a backpack in a vehicle and the multitude of innocent uses for a backpack in a vehicle render[ed] the presence of a backpack in [the suspect's] vehicle of little persuasive value." We agree with that assessment. There is no indication from the body-camera videos that the officers even saw the backpack before stopping the group. In the police report, the officers mentioned the weather and McKinney's "floppy hat" but did not mention a backpack.

We consider the jacket, and how it appeared to the officers, to be the one piece of evidence that, when added to the rest of what we have discussed, might have created just enough suspicion to move beyond a mere hunch. Generally speaking, the concealing nature of a suspect's clothing may support a stop or a search. In a traffic-stop case, we held that an officer had reasonable suspicion to prolong the stop based on extreme nervousness exhibited by the driver and passengers, inconsistent answers to his questions, the inability of the driver to provide basic information, and also that the driver was wearing baggy clothing. In another case, we held that an officer acted reasonably in immediately drawing his weapon when he confronted the suspect, in part because the suspect wore a long tan jacket that could hide a weapon. The officer was responding to a call that a suspicious man was on a grocery store premises in a neighborhood known for violence and weapons.

We have much less in the present case. The officers initiated the investigatory detention before observing nervousness or hearing any statements, much less inconsistent ones. There also was no report of a justcommitted offense for which individuals in the immediate area might be seen as more likely involved. We see some similarities to the facts that caused the Eighth Circuit to hold that officers did not have reasonable suspicion to stop and frisk an individual. That person was "wearing a long-sleeved hooded sweatshirt and clutching the front area of his hoodie pocket with his right hand." The Government argued that reasonable suspicion existed based on the suspect's: (1) holding his hand against his body, indicative of carrying a firearm; (2) walking in a high-crime neighborhood; (3) wearing a sweatshirt when it was 68 degrees and sunny, suggesting that he was "hiding something"; and (4) watching the officers in a concerned manner. *Id.* at 966.

The suspect "did not panic or flee," and the officers detained him "before he said anything suspicious or incriminating." The court held that the suspect's behavior was innocent; walking in a high-crime area in a sweatshirt and watching a police vehicle pass were not reasonably suspicious. Similarly, McKinney did not panic or flee; there were no suspicious statements; and there were no suspicious, concerned looks emanating from those whom the police ended up stopping.

Thus, we are back to the jacket. Could police reasonably believe it was so out-of-season in appearance, with whatever lighting existed as the stop was occurring, to be suspicious? Or did it instead appear to be a light jacket useful for nothing more than keeping off rain. and such rain had been occurring?

The current record does not allow us to determine. The district court also relied on its finding that the woman attempted to distance herself when the officers arrived. In the body-camera video, she appears to slowly walk away from the group, but she immediately complied with the officer's order to return. Her apparently evasive behavior is not mentioned in the police report. The Supreme Court has held officers had reasonable suspicion when, in a high-crime area, the suspect noticed the police and immediately engaged in "unprovoked flight." There, the suspect ran from police in a "headlong" manner." We recently allowed lesser speed to create suspicion where "flight" was a quick walk away from police. As officers arrived at a house to serve an arrest warrant, they noticed a car parked in the driveway. The suspect immediately exited the vehicle and began walking toward the house, ignoring commands from officers to stop while increasing his pace. The suspect eventually complied and walked back to the officers. The *Darrell* court held that this constituted "flight from police in a high-crime area," which was "a prototypical case of suspicious activity."

We have also held that a defendant's girlfriend's brisk walk from a car after noticing police did not create reasonable suspicion as to the defendant, who was still sitting in the car. As to the defendant, the court explained that "the girlfriend's quick movements might reflect to some extent on [the defendant] too, since she just exited the car in which they both sat, but the persuasive value of her movements vis-à-vis reasonable suspicion of him is relatively diminished."

Here, we do not see that the woman engaged in something equivalent to flight from the scene. The suspect in *Wardlow* ran down an alley to avoid capture. In *Darrell*, the suspect walked away from the officers but also ignored initial commands to stop, thereby creating a fear in the officers that he would draw a concealed weapon. The woman here certainly did not engage in flight such as what occurred in *Wardlow*. Unlike *Darrell*, when Officer Holland ordered the woman to come back, she immediately complied. Further, there is no indication that her conduct caused the officers to fear for their safety.

Most importantly, McKinney is not the person who engaged in the arguably suspicious departure from the scene. As we held in *Hill*, the woman's attempt to distance herself is of "relatively diminished" persuasive value as to someone else. It does not give rise to reasonable suspicion here. Additionally, wrapped up in our reasonable-suspicion inquiry is the presence or absence of *nervous* behavior. Nervous behavior is indeed supportive of a reasonable suspicion. Here, though, there is no evidence that McKinney or anyone exhibited any nervous behavior.

The final piece of evidence relied upon by the district court was Officer Holland's apparent observation that "one of the individuals drop[ped] something very small." The police report states: "The males saw us and one turned and appeared to drop something very small." The bodycamera video does not show any suspect dropping something or record an officer's reference to seeing that before initiating the stop. Certainly, the district court could credit assertions of an officer about what happened that a camera would have missed. After making the arrest, the video shows Officer Holland searching the ground where the group was standing. He later found a plastic bag and stated that one of the individuals must have consumed its contents. Attempts to hide or discard contraband can also contribute to suspicion or probable cause. The record before us is thin on this apparent observation. The first reference is in the police report, stating that one individual "appeared to drop something very small." Perhaps this action, one that the subsequent search suggests may have just been littering, could be evidence supporting reasonable suspicion of a more substantial crime. Being able to evaluate the credibility of the officer making that statement would be useful.

No hearing was held on the suppression motion, but apparently none was requested. Such a hearing could have allowed officers to explain further what they observed or knew. Because there was no testimony, no credibility determinations were made by the district court.

On the record before us, we conclude that the Government failed to show that the officers had reasonable suspicion that McKinney was engaged in criminal activity. If anything, the record supports that officers stopped McKinney solely because he was with a group near the location of recent shootings and was wearing something red. Perhaps the jacket he was wearing was suspicious, and perhaps the officers did see the suspicious discarding of something as they approached, but the record before us does not support a reasonable suspicion based on those grounds. Therefore, the Government failed to meet its burden of showing that the initial detention was justified at its inception.

Because we remand for further proceedings, we will discuss the legality of the frisk as well. Even if the officers had reasonable suspicion to initiate the stop, the pat-down needs its own justification. The Supreme Court has explained that in *Terry v. Ohio*, "the Court considered whether an investigatory stop (temporary detention) and frisk (patdown for weapons) may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures." Certainly, the investigatory stop itself must be lawful. We have discussed the uncertainties in the record on that issue and have remanded. Next, even if an officer is justified in making a brief investigatory stop, "to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." We have described the standard for justifying a pat-down as being "more onerous" than that for the initial stop.

The district court concluded that the officers had reasonable suspicion that McKinney was armed and dangerous, based on the facts that McKinney was wearing a jacket, backpack, and hat on that night, and that his clothes were red. That evidence was insufficient to provide reasonable suspicion for the stop and, consequently, could not support the more onerous requirements for a frisk. If additional evidence is introduced on remand that more fully explains what officers saw, that evidence can be considered as to the suspicions both for the initial stop and for the frisk.

The district court also held that reasonable suspicion to frisk was supported by McKinney's refusal to consent to a pat-down and by the discovery of the gun. These facts, though, are irrelevant. For one, a mere discovery of the gun cannot support the frisk because "[t]he reasonableness of official suspicion must be measured by what the officers knew *before* theyconducted their search."

***U.S. v. McKinney*, No. 19-50801, 5th Cir. Nov. 16th, 2020**