NO. _____

SUPREME COURT OF THE UNITED STATES OF AMERICA

MARIO GEVON EMANUEL,

Petitioner,

v.

PEOPLE OF THE VIRGIN ISLANDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE VIRGIN ISLANDS

PETITION FOR A WRIT OF CERTIORARI

KELECHUKWU CHIDI ONYEJEKWE*
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Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Within a "very narrow exception" in *Terry v. Ohio*, 392 U.S. 1 (1968), an officer who objectively relies on a be-on-the-look-out- ("BOLO") flyer issued by another officer who had the requisite knowledge may briefly detain a person even though the detaining officer had no personal knowledge. *United States v. Hensley*, 469 U.S. 221 (1985); *Whiteley v. Warden*, 401 U.S. 560 (1971). But if the flyer "has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment." 469 U.S. at 232.

The question presented is:

Does the collective knowledge or fellow officer doctrine eliminate the need for the BOLO-flyer "to articulate facts supporting a reasonable suspicion that the wanted person has committed an offense," with the result that an officer who lacks reasonable suspicion may stop or frisk a citizen at will?

LIST OF PARTIES

All parties to this proceeding are named in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issues to review the judgment below.

OPINIONS BELOW

The BOLO flyer that is subject of this case and appeal is attached at **Appendix A.** The published opinion of the Supreme Court of the Virgin Islands was filed on June 13, 2018. The opinion is attached at **Appendix B**. The Judgment and Commitment of the Superior Court of the Virgin Islands is attached as **Appendix C**. Transcript of the November 14, 2016 Suppression Hearing is attached at **Appendix D**. Petitioner Emanuel joins the Petition for a Writ of Certiorari in *Alwasi Yong v. Pennsylvania*, No. 17-1575 (May 18, 2018), in pertinent part, and it is attached at **Appendix E.**

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1260. The decision of the Virgin Islands Supreme Court was entered on June 13, 2018. The petition is timely because it is filed on September 11, 2018 within ninety (90th) days following the Order below. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1260(1) because this decision of the Virgin Islands Supreme Court is in conflict with the Revised Organic Act, 48 U.S.C. § 1561, a federal statute which extends the Fifth and Fourteenth Amendments to the Constitution to the Virgin Islands and requires that nobody "shall be held to answer for a criminal offense without due process of law."

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the U. S. Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. 4

Fourteenth Amendment to the United States Constitution.

Sec. 1. [Citizens of the United States.]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. 14 § 1

§ 1260. Supreme Court of the Virgin Islands; certiorari

> Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 USCS § 1260

§1561. Rights and Prohibitions

§ 1561. Rights and prohibitions

No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.

In all criminal prosecutions the accused shall enjoy the right to be represented by counsel for his defense, to be informed of the nature and cause of the accusation, to have a copy thereof, to have a speedy and public trial, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal cause to give evidence against himself; nor shall any person sit as judge or magistrate in any case in which he has been engaged as attorney or prosecutor.

The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; article VI, clause 3; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments: Provided, That all offenses against the laws of the United States and the laws of the Virgin Islands which are prosecuted in the district court pursuant to sections 22 (a) and (c) of this Act [48 USCS § 1612(a) and (c)] may be had by indictment by grand jury or by information, and that all offenses against the laws of the

Virgin Islands which are prosecuted in the district court pursuant to section 22(b) of this Act [48 USCS § 1612(b)] or in the courts established by local law shall continue to be prosecuted by information, except such as may be required by local law to be prosecuted by indictment by grand jury.

All laws enacted by Congress with respect to the Virgin Islands and all laws enacted by the territorial legislature of the Virgin Islands which are inconsistent with the provisions of this subsection [section] are repealed to the extent of such inconsistency.

48 U.S.C § 1561

STATEMENT OF THE CASE

The problem of the "collective knowledge doctrine" or the "fellow officer doctrine" is pending before this Court in the Petition for Writ Of Certiorari, *Yong v. Pennsylvania*, No. 17-1575 (filed on May 18, 2018). Emanuel joins Alwashi Yong's Petition in essence. In this case, because the BOLO-flyer did not articulate a crime, this Petition further highlights the danger that this doctrine, if unchecked by this Court, could eviscerate citizens' Fourth Amendment protections under the cover of the collective knowledge doctrine.

The People charged Mario G. Emanuel ("Emanuel") in a two-count information with unauthorized possession of a firearm with altered identification marks in violation of V.I.CODE ANN. tit. 23 § 481(b) and with unauthorized possession of a firearm in violation of V.I.CODE ANN. tit. 14 §2253(a). Emanuel moved to suppress the evidence of the gun and statements that he made because they were obtained in violation of the Fourth Amendment guarantees against unreasonable searches and seizures and a suppression hearing ensued. **APPX. D.**

According to the Superior Court's findings of fact, Officer Darryl Donovan who had been an officer with the Department of Licensing and Consumer Affairs for some eight years was a member of the operation Restore Calm Task Force attended a briefing on that evening and was provided with a flyer known as the

BOLO or be on the lookout flyer for an individual who was identified merely by the name Chris. **Appx. D.**

The BOLO, **Appx. A,** has a photo of an individual, an African American male who had in the photograph a beard and mustache, and it appears to be a closely cut beard, and the information was that it seemed this individual was "armed and dangerous" and the flyer identified a vehicle, an Acura sedan, that the person identified as "Chris" may be operating. The BOLO included the license plate of the car. **Appx. D.**

Officer Donovan explained to his partner that he had observed an individual who resembled the person in the flyer photograph. Officer Donovan observed Mr. Emanuel come out of the club and get into a gray minivan. Officer Donovan approached the minivan, identified himself as an officer and asked Mr. Emanuel to step out of the vehicle, making an indication that Mr. Emanuel should keep his hands visible consistent with Officer Donovan's concern that the individual may be armed and dangerous. **Appx. D.**

In addition to the BOLO, Officer Donovan testified that during the January 22, 2016, "[w]e has a briefing telling us about a threat that was an imminent threat that came to two officers that were involved in a shooting at the Eclipse Night Club and be on the lookout for the individual by the name of Chris." **Appx. D at 75.**

Officer Donovan admitted that the encounter at the nightclub was the first time he saw Emanuel. **Appx. C.** He said Emanuel resembled the BOLO suspect, a person police authorities sought. Emanuel was not the same person depicted in the BOLO photograph. **Appx. C.** Donovan confirmed that Emanuel did not make any threats directed at him and complied with all Donovan's requests. Officer Donovan acknowledged that the suspect identified in the BOLO was supposedly operating an Acura TSX vehicle. **Appx. C.** The Acura had a license plate number—and a reasonable police officer would find the owner of the vehicle with a phone call. But at the time of the encounter, Emanuel operated a minivan. Donovan testified that he did not observe Emanuel commit a crime, and he had no information that Emanuel had committed a crime.

After a jury trial, Emanuel was found guilty on both counts. (*Id.* at 464.) He was sentenced to a term of fifteen (15) years without parole on Count One, and two years and six months (21/2) years on Count Two. (*Id.* at 9-10.) He filed a timely notice of appeal. (*Id.* at 6-7.) The Virgin Islands Supreme Court affirmed. **Appx. C.**

The Court utilized the collective knowledge or fellow officer doctrine to justify Emanuel's conviction even although no fact supports reasonable suspicion.

> Donovan acted on the information received at the Taskforce briefing which was provided by the Virgin Islands Police Department ("V.I.P.D."). Although he lacked independent knowledge of the BOLO

suspect's crimes, he was informed that the suspect had threatened two officers and was presumed armed and dangerous. Additionally, Donovan received a BOLO that provided a photograph of the suspect and stated that he was armed and dangerous. Donovan received the BOLO at the start of his shift on January 22, 2016 and encountered Emanuel in the early morning of January 23, 2016. Lastly, Donovan twice observed Emanuel — once as he entered the nightclub and again as he exited the nightclub.

Appx. C.

The Court continued:

> Donovan testified that Emanuel resembled the BOLO suspect, even though Emanuel failed to make eye contact with Donovan. (J.A. 100-01.) Although Emanuel contends that the BOLO was extremely deficient because it listed no crime for which the suspect was sought, Donovan was informed at the briefing of the threats the suspect allegedly made and directed towards two law enforcement officers. Therefore, because Donovan relied on the information from the briefing which was provided by V.I.P.D. and believed Emanuel resembled the BOLO suspect, Donovan had reasonable suspicion to stop Emanuel.

Appx. C.

The entire record, including joint appendixes, is available at https://efile.visupremecourt.org/public/caseView.do/Emanuel.

REASONS FOR GRANTING THE PETITION

"The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society." *Berger v. New York*, 388 U.S. 41, 53, 87 S. Ct. 1873, 1880 (1967) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).The decision of the Supreme Court of the Virgin Islands permits an officer to stop, frisk, and arrest a citizen without any fact supporting reasonable suspicion. **Appx. B**. It wreaks havoc on the fundamental and cherished principle of the Fourth Amendment. In addition, it is in conflict with the bedrock rule that an "investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez,* 449 U.S. 411, 417 (1981). Additionally, police action must be upheld only upon "the facts known to the officer at the time" of the search or seizure. *Devenpeck v. Alford*, 543 U.S.146, at 152 (2004). This Court's review is urgently warranted.

I. The Decision Below exacerbates the existing split among Circuits.1

1 This section is culled from Petition for a Writ of Certiorari No. 17-1575, Yong v. Pennsylvania, 2018 U.S.S.Ct. Briefs LEXIS 2007 (May 18, 2018). APPX E.pp 12-24.

Circuit courts of Appeal and state courts are divided about whether a valid search and seizure can be based solely on facts not known to the officer who performed the search. For example, the Fourth and Seventh Circuits and the high courts of Delaware and Florida, maintain that probable cause depends on the knowledge of the officer actually conducting the search or seizure. *See, e.g., United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011);*United States v. Ellis*, 499 F.3d 686 (7th Cir. 2007); *Montes-Valeton v. State*, 216 So. 3d 475 (Fla. 2017);*State v. Cooley*, 457 A.2d 352 (Del. 1983); *see also People v. Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992). *See* Petition for a Writ of Certiorari No. 17-1575, *Yong v. Pennsylvania*, 2018 U.S.S.Ct. Briefs LEXIS 2007 (May 18, 2018). APPX E.pp 12-24.

The Fifth and Tenth Circuits and the Supreme Court of Pennsylvania in this case. Those courts hold that probable cause or reasonable suspicion can be based on facts concededly unknown to the acting officer, but known to some other officer present at the scene. *United States v. Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996);*United States v. Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972). This notion is commonly referred to as the "collective knowledge doctrine" or the "fellow officer rule." *See United States v. Ramirez*, 473 F.3d 1026, 1032 n.4 (9th Cir. 2007).

The Opinion Below stretches the collective knowledge doctrine to the point where an officer who has articulated no knowledge of a crime may stop, frisk, and arrest a citizen. This is the vanishing point for the Fourth Amendment. The Supreme Court of the Virgin Islands would base reasonable suspicion on facts unknown to any officer—not just the officer issuing a BOLO, and not the officer effecting the stop.

The split of jurisdictions on collective knowledge is well recognized. *See, e.g., United States v. Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996) (recognizing a split in jurisdictions); *United States v. Massenburg*, 654 F.3d 480, 494 (4th Cir. 2011); *United States v. O'Connell,* 841 F.2d 1408, 1418-1419 (8th Cir. 1998). The highest courts of states have also spoken to the circuits and jurisdictions. *State v. Miller*, 510 N.W.2d 638, 643 (N.D. 1994)*; People v. Mitchell,* 585 N.Y.S.2d 759, 761 (N.Y. App. Div. 1992)). A leading review recognizing this circuit split over the collective knowledge doctrine has appeared. Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. REV. 663, 678, 703 (2014). Therefore, the splits in circuits are well established.

In sum, I. At least four state supreme courts And two Federal Circuits Allow knowledge to be imputed between officers even absent communication. They are: Pennsylvania, Lousiana, Arkansas, Kansas, the Fifth Circuit and the Tenth Circuit.

2. Still other courts require only "some" unspecified "degree of communication" between officers. This category includes the Eight Circuit, the Ninth Circuit, Utah, and Louisiana. 3. At least two Federal Circuits and several state High Courts refuse to allow imputation between officers absent communication of that information or an instruction to act. This group includes the Fourth and Seventh Circuits, Delaware, and New York.

II. The Decision Below is wrong because it undermines core Fourth Amendment guarantees: the BOLO does not articulate any facts supporting a reasonable suspicion that the wanted person committed an offense and the Court below overlooked the real threat doctrine that threats—of unknown content-- to two officers is not a crime.

Officer Donovan (1) did not comply with the BOLO because he overlooked "Chris"'s vehicle-type and failed to check identification for which he stopped Emanuel. (2) Passing threats to two officers without more is not a crime in the Virgin Islands and it is protected (3) Being armed and dangerous is not a crime in the Virgin Islands. *United States v. Ublies*, 224 F.3d 213(3d Cir. 2000). (4) This type of BOLO does not necessarily concern criminal behavior, according to Donovan.

1. The Officer did not comply with the BOLO flyer which would have cleared Emanuel, making the stop unreasonable.

The BOLO stated a specific car in which the person of interest may be, an Acura with its license-plate number on the BOLO. But Officer Donovan arrested a

person in a minivan. He saw a "black rasta male," not known to the BOLO flyer. He is looking for "Chris" and does not check identification, but does not himself know Chris.

2. A threat to officers is not a crime in the Virgin Islands and speech bya distraught member of the public complaining about the government is protected by the first amendment

"We had a briefing telling us about a threat that was an imminent threat that came to two officers that were involved in a shooting at the Eclipse Night Club and be on the lookout for the individual by the name of Chris." This is the sole basis of this claim. This is easily a distraught member of the public complaining about the government. This type of speech is protected by the First Amendment. The license plate number of the Acura Christ was available to the officer issuing the BOLO.

A "threat to officers" is not a crime in the Virgin Islands. When a "threat" is directed at a symbol of the government such as a police officer, it must be a "true threat" to support reasonable suspicion. *Watts v. United States*, 394 U.S. 705, 707 (1969)(establishing the true threats doctrine); *Virginia v. Black*, 538 U.S. 343 (2003)("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). "The presence of a true threat

can be determined only by looking at the challenged statement in context." *Citizen Publ. Co. v. Miller,* 115 P.3d 107, 114 (2005). Officer Donovan's statement provides no context: where the threat was made is unknown, whether "Chris" even saw the two officers is unknown. It does not state whether "Chris" was present at the nightclub.

A few states have enacted threat-to-officer laws. *See, e.g.*, Wis. Stat. Ann. § 940.203 (LexisNexis, Lexis Advance through Act 56 of the 2017 Legislative Session)("Battery or threat to judge, prosecutor, or law enforcement officer."). Other states have enacted laws against terrorist threats. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 2706 (LexisNexis, Lexis Advance through 2017 Regular Session Acts 1-32; P.S. documents are current through 2017 Regular Session Acts 1-32).

Even in those few states criminalizing threats to law enforcement, this BOLO flyer which contains no fact supporting a crime will not qualify as articulating facts of any offense. Far from that, Donovan describes probably protected actions of a distraught citizen whose friend was shot to death by Police in a night-club. "What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 1401 (1969). There is no statute prohibiting what the wanted person said. The actual statements of the wanted person is unknown. Where the statement was made is not known.

3. Being armed and dangerous does not rise to reasonable suspicion justifying the stop

There was no reasonable suspicion based on the flyer's claim that "Chris" was armed and dangerous. The facts of this case as determined by the trial court (J.A. at 119-132), the decisions in *People v. Murrell*, 56 V.I. 796, 813 (VI. 2012), *United States v. Lewis*, 627 F.3d 232, 239 (3d Cir. 2012), and *United States v. Ublies*, 224 F.3d 213(3d Cir. 2000) shows clearly that no facts articulate the likelihood of an offense. There is nothing in the record that indicates that "Chris" or "Emanuel" had no right to carry a gun or that his gun was illegally possessed. Merely carrying a gun, like carrying a wallet, is not a crime in the Virgin Islands.

4. A Virgin Islands BOLO as described by Officer Donovan does not necessarily concern criminal behavior beyond possessing a firearm in the past, according to Donovan. It cannot support a stop.

This BOLO flyer, according to Donovan, "is a flyer telling us to look out for an individual or person of interest who may have a dangerous weapon *not necessarily a criminal suspect.* (J.A. at 75.) At trial, Donovan defined a BOLO again as he understood it.

> **Q.** And I'm gonna stop you there. What is a "BOLO report"?
> **A.** A BOLO Report is a picture ID of someone that the police department have us to be on the lookout for. That BOLO report is either someone who had had a dangerous weapon or someone that at

some point that have—that the police department have interest in connection with a case.

(**Appx D** at 340.) The Vigin Islands BOLO as described by Officer Donovan does not necessarily involve criminal conduct because having a dangerous weapon is not a crime in the Virgin Island. A BOLO does not even mean that the target is dangerous in any way.

5. There is a growing consensus that carrying a gun supported by statute is not a basis for reasonable suspicion.

When *Terry* was decided, handgun possession was illegal in Ohio. *See Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131 (6th Cir. 2015) (Sutton, J.). In Ohio, *Terry v. Ohio* is no longer the law. Times changed. A different legal environment has emerged. Legislatures now authorize greater handgun possession by citizens. *See, e.g.,* W. Va. Code § 61-7-3; *United States v. Perkins,* 363 F.3d 317, 327 (4th Cir. 2004). "As public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt." *United States v. Williams*, 731 F.3d 678, 691 (7th Cir. 2013) (Hamilton, J., concurring).

Advances in Second Amendment jurisprudence empowered citizens' gun-rights. *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). State legislatures, following gun-rights advocates'

political victories, exploded gun-carry laws across the land. *See Williams*, 731 F.3d at 691. Possession of handguns, once the province of criminals, is now commonplace, sanctioned by law and, interestingly, by some in religion. Accordingly, courts are urged to reevaluate what counts as suspicious or dangerous behavior under *Terry* when it comes to public possession of guns. *See Northrup*, 785 F.3d at 1132-33. When a jurisdiction authorizes possession of firearms, public possession of a gun is no longer suspicious in a way that would authorize a *Terry* stop. 707 F.3d at 539-40.

A consensus is emerging that permitting the Police to justify a *Terry* search based on the possession of a firearm would eviscerate Fourth Amendment protections for lawfully armed individuals in the Virgin Islands and elsewhere. *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000); *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1129 (6th Cir. 2015); *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015). *Pulley v. Commonwealth*, 481 S.W.3d 520, 526-27 (Ky. Ct. App. 2016)("In states in which possession of an unconcealed firearm is legal, the mere observation or report of an unconcealed firearm cannot, without more, generate reasonable suspicion for a *Terry* stop and the temporary seizure of that firearm."). *But see United States v. Robinson*, 846 F.3d 694, 697 (4th Cir. 2017)(Unlike here,

"Noticing that they were not wearing seatbelts, Hudson effected a traffic stop."). Even *Robinson* would bar Donovan's stop.

Allowing police officers making stops to frisk anyone who is thought to be armed, in a state where the carrying of guns is widely permitted, would "create[] a serious and recurring threat to the privacy of countless individuals," *Arizona v. Gant*, 556 U.S. 332, 345 (2009) (holding that police may not search a car "whenever an individual is caught committing a traffic offense"). It also would "giv[e] police officers unbridled discretion" to decide which of those legally armed citizens to target for frisks.

III. This case presents an ideal vehicle for resolving a matter of great significance

This case demonstrates how the collective knowledge or fellow officer doctrine can swallow the Fourth Amendment. The question presented here involves the continuing viability of the Fourth Amendment itself. It is of exceptional importance to the administration of criminal justice. Imputing knowledge between police officers who actually have knowledge of crimes is one thing. But allowing officers to stop, frisk, or arrest citizens without articulating any fact that supports an office, completely throws the Fourth Amendment out of the window.

First, the issue arises with great frequency, demonstrating its importance. "Federal and state courts have addressed the 'collective knowledge doctrine' (or its cognates) in more than a thousand decisions over the past decade alone. PETITION FOR A WRIT OF CERTIORARI NO. 17-1575, *Yong v. Pennsylvania*, 2018 U.S.S.Ct. Briefs LEXIS 2007 (May 18, 2018). **APPX E**. Secondly, the decisions of the Superior Court and of the Supreme Court of the Virgin Islands rest wholly on federal constitutional law. The factual record is clear. The Opinion of the Supreme Court of the Virgin Islands demonstrates the danger that the collective knowledge doctrine poses to the Fourth Amendment absent direction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tuesday, September 11, 2018

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PROOF OF SERVICE

I, Kelechukwu Chidi Onyejekwe, Appellate Public Defender, do declare under penalty of perjury that I am a member of the bar of this Court and Appellate counsel for petitioner, MARIO GEVON EMANUEL, and I do further declare that on this date, Tuesday, September 11, 2018, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the

above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by deliver to a commercial carrier for delivery within three (3) calendar days.

The names and addresses of those served are as follows:

Pamela R. Tepper, Esq.
Solicitor-General
Office of the Solicitor General
Virgin Islands Department of Justice
48B-50C Kronprindens Gade, 2nd Floor
St. Thomas, Virgin Islands 00802

I declare under penalty of perjury that the following is true and correct.

Executed on Tuesday, September 11, 2018

Kelechukwu Chidi Onyejekwe*
Appellate Public Defender
**Counsel of Record*

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On Petition for Writ of Certiorari to the
Supreme Court of the Virgin Islands.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 of this Court and title 4, section 513 of the Virgin Islands Code, Petitioner asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following courts:

A. The Superior Court of the Virgin Islands

B. The Supreme Court of the Virgin Islands

Petitioner was granted *in forma pauperis* status in both courts pursuant **to title 4, section 513 of the Virgin Islands Code**.

For the foregoing reasons, Petitioner requests this Court to grant leave for him to proceed *in forma pauperis* without payment of costs and fees.

Date: Tuesday, September 11, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 6000 words, excluding the parts of the document that are exempt by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Tuesday, September 11, 2018

Respectfully submitted,

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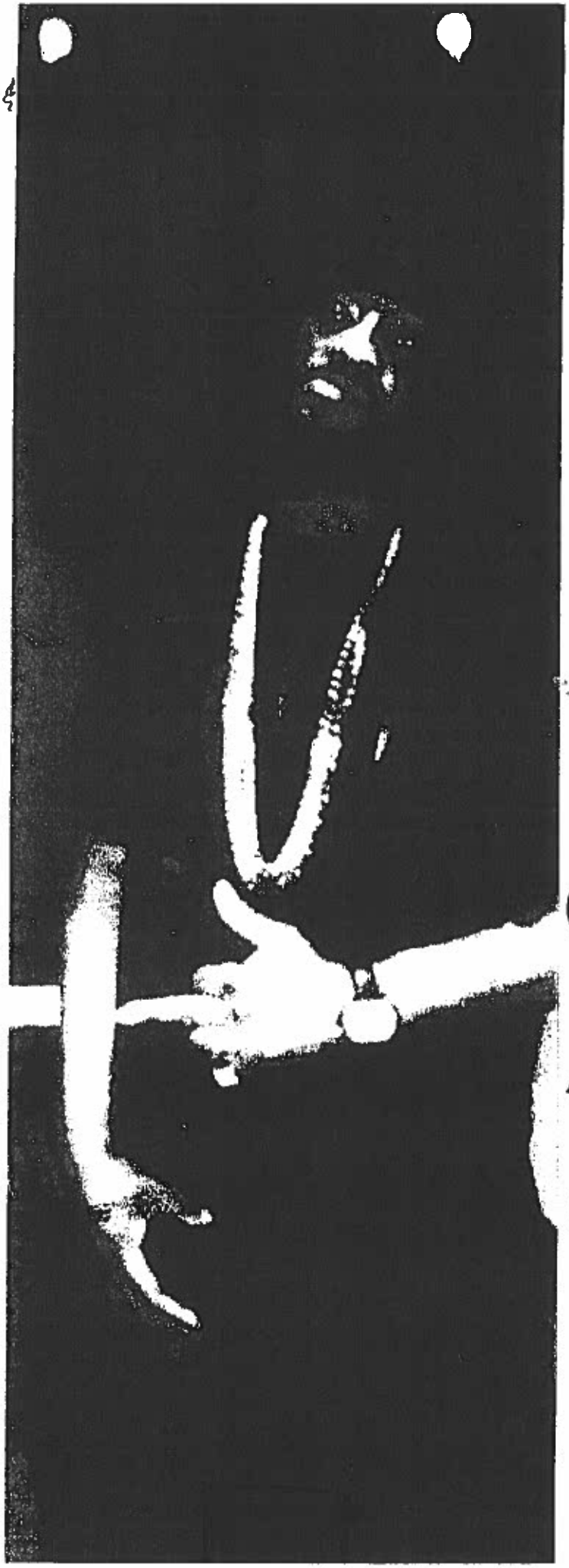
Counsel for Petitioner

APPENDICES

APPENDIX A

e This the of the
BOLO that was shown &
iscuss in briefing.

DEFENDANT'S EXHIBIT



May Be operating

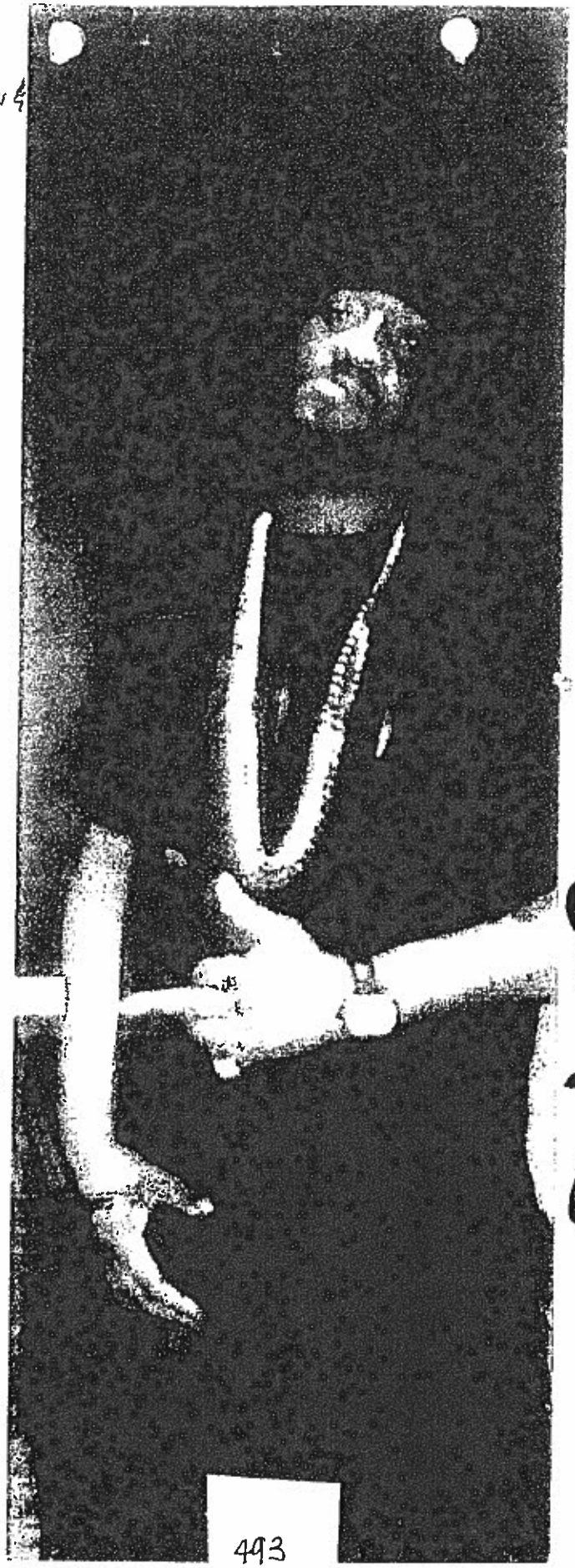
TEW-80
09 Accura
TSX

B.O.L.O.

"CHRIS"

Ef seen
10-48
Armed 3
Dangerous

This pic of the BOLO that was shown & issues in briefing.



MAY BE operating

B.O.L.O.

"CHRIS"

TEW-801

09 Acura TSX

EF seen 10-48 Armed & Dangerous

APPENDIX B

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARIO GEVON EMANUEL, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2017-0035** Re: Super. Ct. Crim. No. 53/2016 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Michael Dunston

Argued: March 13, 2018
Filed: June 13, 2018

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Kelechukwu C. Onyejekwe, Esq.
Appellate Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant,

Dionne G. Sinclair, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

SWAN, Associate Justice

Appellant Mario Emanuel seeks reversal of his convictions on firearms charges based on what he contends was error in the denial by the Superior Court of his motion to suppress an unlicensed firearm with obliterated serial numbers found on his person. He argues that the court

erred when it concluded reasonable suspicion existed for an enforcement officer of the Department of Licensing and Consumer Affairs to detain him, require him to get out of his vehicle, and search his person. He also asserts that the officer violated various local laws because the officer's detention of him lacked both probable cause and a warrant. For the reasons elucidated below, we find no error in the denial of the motion to suppress, and we affirm the judgment of the Superior Court entered upon the convictions for unauthorized possession of a firearm, 14 V.I.C. § 2253(a), and unauthorized possession of a firearm with altered identification marks, 23 V.I.C. § 481(b).

I. FACTS AND PROCEDURAL HISTORY

On January 22, 2016, Officer Darryl Donovan attended a briefing for the Restore Calm Taskforce. Donovan, the Department of Licensing and Consumer Affairs Chief Enforcement Officer, was assigned to the taskforce by the Governor, together with other officers from various local departments, to protect the community from gun violence. During the briefing, taskforce members received a be-on-the-lookout ("BOLO") flyer which contained a photograph of a black male Rastafarian named Chris who was wanted for threatening two officers at a shooting at a nightclub several weeks before. The flyer stated that the suspect was armed and dangerous and possibly operating a 2009 Acura TSX vehicle.

On January 23, 2016 at approximately 4:30 a.m., Officer Donovan and his partner, Officer Nadine Todman-Mike, were patrolling downtown Charlotte Amalie when he entered a nightclub to ask the manager why it was open after the mandated 4 a.m. closing time. Upon entering the establishment, Donovan noticed Emanuel sitting on a stool at the bar. Donovan thought Emanuel acted nervously because he failed to make eye contact with Donovan while twiddling his thumbs. After speaking with the club's manager, who said he had lost track of time and agreed to close the

club immediately, Donovan exited the club. As he departed, Donovan again observed Emanuel and realized Emanuel resembled the BOLO suspect. Upon returning to his vehicle, Donovan informed Officer Todman-Mike of Emanuel's resemblance to the BOLO suspect and proceeded to contact other taskforce members to assist in verifying Emanuel's identification. Donovan and Todman-Mike waited for police assistance, because they were told not to approach the suspect without assistance. After the assisting officers arrived, Donovan and Todman-Mike observed Emanuel exit Blitz and enter his vehicle. Donovan approached Emanuel, identified himself as an officer, asked Emanuel to ensure his hands remained visible, and instructed Emanuel to exit the vehicle. Emanuel complied. Donovan then informed Emanuel that he resembled a person authorities sought. Donovan advised Emanuel he would perform a pat down of his clothing to ensure Emanuel and Donovan's safety. Before conducting the search, Donovan asked Emanuel if he had any weapons or sharp objects. Emanuel replied affirmatively and said he had a gun in his right rear pocket. Donovan discovered the gun in a green sock and asked Emanuel if he had a firearm license. Emanuel responded "no." Donovan then arrested Emanuel for possession of an unlicensed firearm. Emanuel was advised of his rights, transported to the police station, and the gun was simultaneously delivered to a police forensics unit for analysis.

On November 11, 2016, a suppression hearing was conducted to determine the admissibility of the evidence obtained from Emanuel during the January 23, 2016 stop. At the hearing, the People argued that the motion should be denied because Donovan's reasonable suspicion that Emanuel was the BOLO suspect, provided sufficient grounds for the stop and search. Although less than probable cause, the People asserted that an officer could briefly detain a person as long as the officer had reasonable and articulable facts under the totality of the circumstances that a crime had occurred or was about to occur. The People noted Emanuel was

not under arrest when Donovan approached him, and Donovan's search of Emanuel was reasonable to ensure the officer's safety because the BOLO suspect was reportedly armed and dangerous.

Emanuel argued that Donovan and the other taskforce members illegally seized him in violation of his Fourth Amendment rights when they approached him in his car and demanded he show them his hands and exit the vehicle. Emanuel contended that a person is seized under the Fourth Amendment when the person believes he is not free to leave police custody or terminate police questioning. Emanuel said his lack of eye contact and the twiddling of his thumbs was insufficient to provide a basis for reasonable suspicion. He further argued that Donovan's uncertainty about his identity did not suffice to show reasonable suspicion. Lastly, Emanuel asserted that Donovan had no knowledge that he had committed a crime. Thus, Emanuel contended that the gun retrieved by Donovan should be suppressed because there was no legal basis for Donovan's seizure or search of him.

The Superior Court observed that the Fourth Amendment of the United States Constitution protects people against unreasonable searches and seizures. It noted that searches and seizures without probable cause or a warrant are generally unconstitutional unless one of the few narrowly recognized exceptions applies. It concluded there was reasonable suspicion to justify Emanuel's stop and search because of the physical similarities between Emanuel and the photograph of the suspect on the BOLO flyer. The court opined that Donovan did not need specific facts that Emanuel was guilty of a crime or a suspect; rather, Donovan's belief that Emanuel was a person wanted for questioning was a sufficient reason to detain him. Lastly, the court stated it would have been unreasonable for Donovan to approach and question Emanuel without taking the necessary

precautions to ensure Donovan's safety. Accordingly, the court denied Emanuel's motion to suppress the gun seized in the incident.

On January 9, 2017, the one-day jury trial commenced upon a two count information which charged Emanuel with unauthorized possession of a firearm, 14 V.I.C. § 2253(a), and unauthorized possession of a firearm with altered identification marks, 23 V.I.C. § 481(b). Donovan testified for the People. He stated he received the BOLO flyer at the taskforce meeting, and subsequently encountered Emanuel in the nightclub. He thought Emanuel acted nervously and resembled the individual depicted in the BOLO when Donovan observed him upon entering the club and further observed Emanuel when Donovan departed the nightclub. Upon returning to his patrol car, Donovan informed his partner concerning Emanuel's striking resemblance to the BOLO suspect and contacted other taskforce members to verify his identification. Donovan said they waited for assistance and returned to the nightclub once police assistance arrived. At that juncture, Donovan said he observed Emanuel exit the club and enter his car. He approached Emanuel and identified himself as an officer. He asked Emanuel to keep his hands visible and exit the vehicle. Donovan informed Emanuel that he resembled a person authorities sought and would administer a pat down to ensure everyone's safety. Prior to the pat down, Donovan asked Emanuel if he had any weapons on him, and Emanuel said he had a gun in his back pants pocket. Donovan retrieved the gun and asked Emanuel if he had a license for it. Emanuel said "no," and Donovan arrested him. Importantly, the gun had an obliterated serial number.

On cross-examination, Donovan admitted that the encounter at the nightclub was the first time he saw Emanuel. He said Emanuel resembled the BOLO suspect, a person police authorities sought, but Emanuel was subsequently determined not to be same person depicted in the BOLO photograph. Donovan confirmed that Emanuel did not make any threats directed at him and

complied with all Donovan's requests. Donovan acknowledged that the suspect identified in the BOLO was supposedly operating an Acura TSX vehicle, but, at the time of the encounter, Emanuel operated a minivan. Lastly, Donovan testified that he did not observe Emanuel commit a crime, and he had no information that Emanuel had committed a crime.

The jury returned a guilty verdict on both charges. On March 6, 2017, Emanuel was sentenced and a timely appealed ensued on March 16, 2017.

II. JURISDICTION

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a). In a criminal case, a judgment embodying the adjudication of guilt and the sentence imposed based on that adjudication constitutes a final judgment. *Williams v. People*, 58 V.I. 341, 345 (V.I. 2013) (collecting cases). Accordingly, the Superior Court's March 14, 2017 judgment is a final judgment over which we have jurisdiction.

III. STANDARD OF REVIEW

In reviewing the trial court's decision on a motion to suppress, we review its factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (V.I. 2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (V.I. 2010)). The trial court's evidentiary rulings are reviewed for abuse of discretion. *Id.* at 614.

Under the Fourth Amendment of the United States Constitution, people are protected against unreasonable searches and seizures of their persons, houses, papers, and effects.[1]

[1] The Fourth Amendment of the United States Constitution applies to the Virgin Islands through section 3 of the Revised Organic Act of 1954. 48 U.S.C. § 1561.

Generally, unreasonable searches and seizures arise when the government intrudes into one of the constitutionally protected areas absent probable cause or a warrant. *Thomas*, 63 V.I. at 618; *Simmonds*, 53 V.I. at 574 (Swan, J., dissenting) (citing *Horton v. California*, 496 U.S. 128, 133 (1990)). However, there are delineated exceptions to the probable cause requirement. *People v. Heath*, 63 V.I. 80, 86 (V.I. Super. 2015) (citing *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)). These exceptions are justified because they limit the personal intrusion to detainees and involve substantial law enforcement interests. *Michigan v. Summers*, 452 U.S. 692, 699 (1981). One exception is the long-established doctrine that reasonable suspicion allows an officer to briefly detain a person to determine if a crime has been committed or is about to be committed. *See Gumbs v. People*, 64 V.I. 491, 508 (V.I. 2016) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). To have reasonable suspicion, an officer must have specific and articulable facts under the totality of the circumstances that the person stopped is or was involved in criminal activity. *United States v. Jacobsen*, 391 F.3d 904, 906 (8th Cir. 2004). This is a lesser standard than probable cause but requires more than an officer's mere hunch. *United States v. Monsivais*, 848 F.3d 353, 357 (5th Cir. 2017). To find that reasonable suspicion existed to justify a stop, a court must examine the "totality of the circumstances" in the situation at hand, in light of the individual officers' own training and experience, and should uphold the stop only if it finds that "the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

In evaluating reasonable suspicion, a court may consider various factors such as the officer's awareness of a suspect's nervous and evasive behavior, the crime rate of the area, and flight from police. *United States v. Whitfield*, 634 F.3d 741, 744 (3rd Cir. 2010) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "It is not necessary that the suspect actually have done or is

doing anything illegal; reasonable suspicion may be based on acts capable of innocent explanation." *Id.* "Reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id.*

Once a suspect has been stopped based upon reasonable suspicion, an officer may perform a cursory inspection of the detainee's outer clothing if the officer has knowledge that the detainee is both armed and dangerous, based on the premise that the officer's safety is in jeopardy. *Terry*, 392 U.S. at 27; *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (citing *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009)). In this case, the uncontradicted evidence at the suppression hearing was that—before the pat-down search was even begun—Emanuel informed Officer Donovan that he had a gun in his back pocket. Thus, retrieving that weapon from Emanuel's person was fully justified under well-established Fourth Amendment jurisprudence.

IV. DISCUSSION

Emanuel argues that the Superior Court erred in denying his motion to suppress because Donovan lacked reasonable suspicion to conduct the stop and search. Emanuel also asserts that Donovan violated various local laws because Donovan's detention of Emanuel lacked both probable cause and a warrant.

A. Criminal Nature of Threats to Officers

First, it is prudent to address Emanuel's contention that threats made to officers do not constitute a crime in the Virgin Islands. As he noted in his appellate brief, some states have enacted threat-to-officer laws and laws against terrorist threats (Appellant's Br. 25). Moreover, there are various federal statutes that criminalize threats to United States employees. Namely, 18 U.S.C. §

111 punishes offenders for assaulting, resisting, or impeding certain federal employees.[2] Although these statutes are not controlling in the Virgin Islands, they are indicative of how other jurisdictions and the federal government protect civil servants. Additionally, the Virgin Islands penalizes assault. *See* 14 V.I.C. § 291.[3] While the record fails to state exactly what transpired during the shooting at the nightclub, it does state that the BOLO suspect made threats to officers while they were all at the establishment. Presumably, the threats could have been combined with overt gestures. Also, given his proximity to the officers, the BOLO suspect had the ability to assault and/or batter them. Thus, it is foreseeable that he could have assaulted them and, at minimum, committed an attempted assault which would have certainly warranted the need for authorities to locate him. *See Fahie v. People*, 59 V.I. 505, 518 (V.I. 2013) (noting that the People charged the defendant with attempted assault in the first degree).

B. Collective Knowledge of Officers

It is noteworthy that Donovan received information at the Restore Calm Taskforce briefing concerning the BOLO suspect's ongoing threats to do harm to two police officers who were allegedly involved in the fatal shooting of his friend at the nightclub. Importantly, in *United States v. Braden*, Crim. No. 11-CR-20192 ML/P, 2012 WL 3552854, at *6 (W.D. Tenn. July 6, 2012) (unpublished), the court stated that officers can rely on information received during a briefing with superiors or other law enforcement officers to make a *Terry* stop. In *Braden*, an officer stopped a suspect who was wanted by the Drug Enforcement Administration ("DEA") for drug trafficking.

[2] "Whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in § 1114 of this title while engaged in the or on account of the performance of official duties. . . shall where the acts in violation of this section constitute only simple assault be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both." 18 U.S.C. § 111(a).

[3] "Whoever (1) attempts to commit a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery-commits as assault." 14 V.I.C. § 291.

Id. The deputy lacked independent knowledge of the suspect's crimes and was not provided any details of the crimes by the DEA, but was asked to stop the suspect's vehicle if it was encountered. Although the deputy ultimately had several independent reasons to legally stop the suspect, the court reasoned the DEA's request was sufficient reasonable suspicion to detain the suspect. Citing *United States v. Hensley*, 469 U.S. 221, 232-33 (1985), the district court held that an officer can rely on communications from other law enforcement personnel to make a *Terry* stop as long as the agent providing the information had reasonable suspicion for the stop. *Braden*, 2012 WL 3552852, at *6-8. Similarly, in *United States v. Barnes*, 910 F.2d 1342 (6th Cir. 1990), reasonable suspicion was found where a federal law enforcement officer briefed two Memphis police officers on the suspect, who was thought to be in the area. The officers were advised that the suspect was a convicted felon and armed at all times. Using this information, the officers stopped the suspect. The United States Court of Appeals for the Sixth Circuit held that the federal agent had reasonable suspicion to stop the suspect and the officers' detention of him was justified, although they lacked independent reason to suspect him of any wrongdoing. *Id.* at 1344. *See also, e.g., United States v. Adams*, Crim. No. 09-20224, 2010 WL 3504072, at *8 (E.D. Mich. Mar. 10, 2010) (unpublished) ("[I]n determining whether actions are proper, courts must evaluate the collective information of all officers involved, including cooperating federal and local officers."); *United States v. Jacobsen*, 391 F.3d 904, 906 (8th Cir. 2004) ("[A] police officer can rely on a wanted flyer when making a *Terry* stop, even if the flyer omits specific articulable facts supporting reasonable suspicion. Evidence uncovered during the stop is admissible and admissibility does not require that those acting on the flyer know the specific facts prompting the flyer, if some degree of communication exists between officers.") (citing *Hensley*, 469 U.S. at 232); *United States v. Williams*, 627 F.3d 247, 253 (7th Cir. 2010) ("[T]he collective knowledge doctrine permits an officer to stop, search,

or arrest a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of the facts that amount to the necessary level of suspicion to permit the given action." (citing *Hensley*, 469 U.S. at 232-33)).

In *United States v. Antuna*, 186 F.Supp.2d 138 (D. Conn. 2002), the district court found that an officer lacked reasonable suspicion to stop an individual where the officer asserted that he believed that the individual resembled a suspect in a wanted poster. However, the officer was unable to state whether the suspect in the wanted poster was sought for a felony or another offense; he could not identify which wanted poster triggered his memory; he could not recall whether the wanted poster that triggered his memory was discussed during the briefing before the shift in which he encountered the individual, or which board at the police station displayed the wanted poster that triggered his memory. Additionally, the officer did not have any posters in his car on the day he encountered the individual and could not testify as to what physical attributes made him believe that this individual was the suspect in the poster. The court reasoned that there may be situations in which an officer could not produce the poster that triggered his memory, but could justify his actions if he could "testify what physical attributes about the defendant caught his attention, e.g., specific feature or mark on [the suspect's] face, or a physical description that related to the wanted poster, or could identify where he saw the wanted poster that formed his reasonable suspicion." *Id.* at 143-44.

This case is distinguishable from *Antuna* and consistent with those that hold an officer can rely on information received from other law enforcement agencies. Donovan acted on the information received at the Taskforce briefing which was provided by the Virgin Islands Police Department ("V.I.P.D."). (Appellee's Br. 18). Although he lacked independent knowledge of the BOLO suspect's crimes, he was informed that the suspect had threatened two officers and was

presumed armed and dangerous. Additionally, Donovan received a BOLO that provided a photograph of the suspect and stated that he was armed and dangerous. Donovan received the BOLO at the start of his shift on January 22, 2016 and encountered Emanuel in the early morning of January 23, 2016. Lastly, Donovan twice observed Emanuel—once as he entered the nightclub and again as he exited the nightclub. Donovan testified that Emanuel resembled the BOLO suspect, even though Emanuel failed to make eye contact with Donovan. (J.A. 100-01). Although Emanuel contends that the BOLO was extremely deficient because it listed no crime for which the suspect was sought, Donovan was informed at the briefing of the threats the suspect allegedly made and directed towards two law enforcement officers. Therefore, because Donovan relied on the information from the briefing which was provided by V.I.P.D. and believed Emanuel resembled the BOLO suspect, Donovan had reasonable suspicion to stop Emanuel.

C. Reasonable Suspicion Based on the BOLO Bulletin

On appeal, Emanuel argues that Donovan's seizure of him was unconstitutional because it was not completely based on the BOLO or any reasonable suspicion supported by the BOLO or other information. (Appellant's Br. 13). The court in *United States v. Lawes*, 292 F.3d 123, 127 (2d Cir. 2002), opined that dissimilarities between the suspect and defendant did not undermine the finding of reasonable suspicion. The suspect in *Lawes* was a 5'9", 160 pound, twenty-year old black male while defendant in that case was a 6'1", 200 pound, thirty-four year old black male. Moreover, the suspect had a scar on his arm but the defendant had a scar on his face under his eye. Regardless, the Second Circuit held that the trial court did not err because there were similarities between the two men when the mugshots that officers carried with them on the night they arrested the defendant were compared to a photograph of the defendant, justifying a finding of reasonable suspicion. *See also United States v. Jackson*, 652 F.2d 244, 248 (2nd Cir. 1981) (finding reasonable

suspicion existed when an officer stopped the defendant who resembled the suspect in race, age, hairstyle, and coat color although further observation revealed the defendant's coat was different in color than the suspect's coat because the officer reasonably believed defendant fit the description of the suspect.); *United States v. Barnes*, 910 F.2d 1342, 1344-45 (6th Cir. 1990) (reasonable suspicion based on resemblance to mugshot and the defendant's presence in an area the suspect was known to frequent); *United States v. Hudson*, 405 F.3d 425, 433-34 (6th Cir. 2005) ("Of course, had the officers positively or, at least, reasonably identified [the defendant] as a passenger before approaching the car . . . for example, by reference to a photograph of Hudson or a composite drawing, they would have had reasonable suspicion to seize the car and its occupants."); *United States v. Taylor*, Crim. No. 01 CR 0576(LTS), 2002 WL 193573, at *3 (S.D.N.Y. February 7, 2002) (unpublished) (Officers had photo of a suspect while they were on patrol and stopped the defendant based on his resemblance to the photo. Although the defendant was not the suspect, officers recovered a firearm that violated federal laws. "The central factual assertion supporting reasonable suspicion [is] that the officers had concluded [the defendant's] appearance matched that of the shooting suspect. Based on the resemblance, they had reasonable suspicion to believe that [he] was the shooting suspect for whom they were looking."); *c.f. United States v. Springs* 17 F.3d 192, 194 (7th Cir. 1994) (noting that recognition of suspect based on surveillance photos alone may be sufficient to establish probable cause).

Here, Donovan encountered Emanuel inside a nightclub at approximately 4 a.m. Although Donovan saw him under what were presumably poor lighting conditions, Donovan twice observed Emanuel: "As I was entering . . . I noticed Mr. Emanuel sitting on a stool to the right and I glanced at him and he looked like the individual we were looking for in the BOLO." (J.A. 80). As he left the establishment, Donovan again observed Emanuel, but more intensely: "[A]s I exited the club,

I looked at him even more closer to see if he was the individual we were looking for in the BOLO and he resembled him very much." (J.A. 81). Therefore, Donovan did not just have a fleeting glance of Emanuel like the officer in *Antuna*. Rather, he closely examined Emanuel's features on both entering and exiting the nightclub in order to reasonably conclude that Emanuel was the man that authorities sought. Moreover, during the suppression hearing, even the court noted the similarities between Emanuel and the BOLO suspect depicted in the flyer. (J.A. 126). Thus, as in *Lawes*, the distinctions between Emanuel and the BOLO suspect do not eviscerate the reasonableness of Donovan's reasonable suspicion that Emanuel was the individual described in the BOLO.

Although Emanuel suggests that Donovan did not follow the BOLO because it stated that the subject in that case operated an Acura vehicle whereas at the time of the stop Emanuel operated a minivan, this argument is specious. It is unreasonable to believe that a suspect or person of interest could not change vehicles and operate different vehicles at different times. Donovan also testified that he was not informed that the Acura was registered to the BOLO suspect. (J.A. 101). Accordingly, Donovan certainly could have thought that the BOLO suspect operated another model vehicle which would not have been detrimental to or diminish a finding of reasonable suspicion under the standard of the totality of the circumstances.

D. Reasonable Suspicion Based on Observations of Suspect's Apparent Nervousness

Emanuel asserts that twiddling thumbs and evading eye contact is insufficient to satisfy reasonable suspicion. Yet, as stated in *Whitfeld*, reasonable suspicion may be based on facts that can be innocently explained. 634 F.3d at 744 (citing *Wardlow*, 528 U.S. at 123). Donovan, a twenty-year police veteran, was a taskforce officer whose mission was to eradicate pervasive gun violence in St. Thomas. If he entered an establishment at approximately 4 a.m. and observed an

individual, the sole patron, who failed to make eye contact with him and appeared nervous, it is not illogical that he thought that person's behavior suspicious. Moreover, Donovan believed Emanuel resembled the BOLO suspect. He testified his basis for stopping Emanuel was Emanuel's resemblance to that suspect. (J.A. 368). Although the identification was subsequently determined to be incorrect, a reasonable mistake of fact does not negate reasonable suspicion. As noted in *United States v. Harmon*, 724 F.3d 451, 456 (10th Cir. 2014), "[a]n officer's reasonable mistake of fact may support the finding of reasonable suspicion . . . ." *United States v. Fleetwood*, 235 Fed. Appx. 892, 895-96 (3rd Cir. 2007) ("A reasonable mistake of fact does not violate the Fourth Amendment.") (quoting *United States v. Chanthasouxat*, 342 F.3d 1271, 1276 (11th Cir. 2003)). Therefore, Donovan's observations, combined with the BOLO and the information received at the taskforce briefing, provided more than a sufficient basis for finding that the officer had a reasonable suspicion under a totality of the circumstances.

E. Evidence of Recent or Ongoing Crime

Emanuel contends that past crimes cannot be the basis for reasonable suspicion. In *Hensley*, the court noted that a *Terry* stop could be used to investigate a crime that has occurred or one that is ongoing. 469 U.S. at 232-33. Here, the person sought in the BOLO was suspected of threatening two police officers in connection with a shooting at a nightclub in which his friend was allegedly killed by police. Presumably, police officers would not issue a BOLO for a suspect who threatened them with mere physical bodily contact. The BOLO explicitly states that the subject sought was armed and dangerous. Therefore, the threat to police probably involved a firearm and, since the threat was not executed when it was made, it could present an ongoing or continuous matter and not a past crime as Emanuel alleges. Significantly, there is no evidence that the threat by the BOLO suspect was ever recanted or disavowed subsequent to the shooting incident that led to the issuance

of the BOLO. In light of this context, Donovan had reasonable suspicion to stop Emanuel because the BOLO suspect, at any time, could have executed the threat against any officer.

F. Pat-down Frisk for Weapons

To reiterate, once a suspect has been stopped based upon reasonable suspicion, an officer may perform a cursory inspection of the detainee's outer clothing if the officer has reasonable suspicion that the detainee is both armed and dangerous, based on the premise the officer's safety is in jeopardy. *Terry*, 392 U.S. at 27; *Robinson*, 846 F.3d at 698-701 (citing *Johnson*, 555 U.S. at 326-27)). "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is presently armed and dangerous to the officer and others . . . it would . . . be clearly unreasonable to deny the officer to take the necessary measures to determine whether the person is in fact carrying a weapon and neutralize the threat of physical harm." *Gumbs*, 64 V.I. at 508.

Here, Donovan received a BOLO that stated the suspect who was sought was potentially armed and dangerous. Also, he was told not to approach the BOLO suspect because he was presumed armed. (J.A. 82). More importantly, before the pat-down search began, Emanuel told Donovan that he had a gun in his right back pants pocket. (J.A. 84). Thus, there was legitimate cause for Donovan to believe Emanuel was presently armed and dangerous and to take the necessary precautions to ensure everyone's safety by performing a pat-down of him.

G. No Violation of Local Statutes

Emanuel argues that Donovan violated 5 V.I.C. §§ 3561,[4]-3562[5] and 23 V.I.C. § 488[6] when he stopped him. As mentioned above, the BOLO, the information obtained at the taskforce briefing, and Donovan's observations provided reasonable suspicion for the stop and Donovan's knowledge that the BOLO suspect was potentially armed authorized the frisk. When Emanuel informed Donovan that he possessed an unlicensed firearm, Donovan had probable cause to arrest him. Thus, Emanuel's contention that Donovan violated local law when he stopped him is meritless.

H. Threats Not Protected Speech Under the First Amendment

Following oral arguments, Emanuel filed an April 3, 2018 supplemental brief in which he argues that, although the government may regulate true threats, without the ability of the Court to review the contents of the threat, this Court must conclude that the threat is protected speech under the First Amendment. Therefore, he argues the threat cannot constitute criminal activity that

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[4] "A peace officer is . . . an enforcement officer of the Department of Licensing and Consumer Affairs . . . A warrant to arrest shall be directed to and executed by such officers." 5 V.I.C. § 3561.

[5] "A peace officer may make an arrest in obedience with a warrant delivered to him, or may, without a warrant, arrest a person- (1) for a public offense committed or attempted in his presence; (2) when a person has committed a felony, although not in his presence; (3) when a felony has in fact been committed and he has reasonable cause for believing the person to have committed it; (4) on a charge made, upon reasonable cause, of the commission of a felony by the party; or (5) at night, when there is a reasonable cause to believe he has committed a felony." 5 V.I.C. § 3562.

[6] "Any law enforcement officer who . . . has a reasonable belief that (i) a person may be wearing, carrying, or transporting a firearm in violation of section 452 of this title, (ii) by virtue of his possession of a firearm, such person is or may be presently dangerous to the officer or others, (iii) it is impractical, under the circumstances, to obtain a search warrant; and (iv) it is necessary for the officer's protection or the protection of others to take swift measures to discover whether such a person is, in fact, wearing, carrying, or transporting a firearm, such officer may: (1) approach the person and identify himself as a law enforcement officer; (2) request the person's name and address, and, if the person is in a vehicle, his license to operate the vehicle, and the vehicle's registration; and (3) ask such questions and request such explanations as may be reasonably calculated to determine whether the person is, in fact, unlawfully wearing, carrying, or transporting a firearm . . . ; and (4) if the person does not give an explanation which dispels the reasonable belief which he had, he may conduct a search of the person, limited to a patting or frisking of the person's clothing in search of a firearm . . . ." 23 V.I.C. § 488.

justifies a *Terry* stop. However, this argument is specious. The First Amendment free speech clause is implicated when speech is regulated. *See Watts v. United States*, 394 U.S. 705, 707 (1969) ("[A] statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind."). Yet, in this case, there is no charge or suggestion that the threatening statement itself constituted a crime, and nothing in our decision on the Fourth Amendment question presented in this case requires this Court to make such a conclusion. Instead, the statement is only relevant here insofar as it constitutes an articulable fact supporting the police officer's reasonable suspicion that criminal activity—future harm to the threatened officers—was likely to occur, which in turn, justified the *Terry* stop leading to Emanuel's arrest. Thus, in the context of this case, we need not determine whether the threatening statement itself falls under the protection of the First Amendment, because the suspected criminal activity for which Emanuel was stopped was not merely the past act of making a threatening statement, but rather the future act of executing the threat and committing violence against an officer. Unquestionably, violence against police officers—whether in the form of assault, battery, or some other crime—is not treated as protected speech under the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."). Accordingly, the First Amendment is not implicated by the *Terry* stop Donovan executed.

V. CONCLUSION

This case pivoted on the credibility of the witnesses. However, we note the trial judge decided the motion to suppress in the People's favor principally based on his belief of Donovan's factual recitation over Emanuel's. Emanuel testified at trial only; therefore, the trial court received no testimony from him when deciding the motion to suppress. We conclude that the trial judge

accurately ascertained the situation as it was on the day of the incident and, for the reasons elucidated above, its denial of the motion to suppress was not error. Therefore, we affirm the defendant's convictions on both firearm offenses.

Dated this 13th **day of** June **2018**

BY THE COURT:

IVE ARLINGTON SWAN
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Date: June 13, 2018

APPENDIX C

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	**CASE NO. ST-16-CR-53**
	)	
vs.	)	
	)	
MARIO G. EMANUEL,	)	
	)	
Defendant.	)	
	)	

JUDGMENT AND COMMITMENT

THIS MATTER came on for Sentencing on Monday, March 6, 2017, before the Honorable Michael C. Dunston. The People appeared through Assistant Attorney General Eugene J. Connor, Jr., Esq., and the Defendant appeared personally with counsel Territorial Public Defender Kwame Motilewa, Esq.

The Court inquired as to the accuracy of the presentence investigation report and both defense counsel and counsel for the People concurred in its accuracy. The Court then heard allocution and recommendations from both defense counsel and counsel for the People, as well as a statement from Defendant's wife. The Defendant was then given an opportunity to make a statement on his behalf, and he did.

There being no legal cause shown or appearing to the Court why sentence should not be pronounced, it is

ORDERED, ADJUDGED, and DECREED that the jury having found the Defendant MARIO G. EMANUEL, GUILTY of Unauthorized Possession of a Firearm With Altered Identification Marks, in violation of Title 23 V.I.C. § 481(b), Count One, and Unauthorized Possession of a Firearm, in violation of Title 14 V.I.C. § 2253(a), Count Two of the Information, the Court enters judgment of conviction thereon; and it is

ORDERED that with regard to Count One, Unauthorized Possession of a Firearm With Altered Identification Marks, Defendant is sentenced to a term of imprisonment in the Bureau of Corrections for fifteen (15) years, without parole; and it is

ORDERED that Count Two, Unauthorized Possession of a Firearm is deemed merged with the offense charged in Count One and the imposition of sentence on Count Two is stayed, but were the Court to impose a separate sentence thereon the Court would sentence Defendant to a term of imprisonment in the Bureau of Corrections for two (2) years and six (6) months, with said sentence to run concurrent with the sentence imposed on Count One; and it is

ORDERED that Defendant is assessed Seventy-five dollars ($75.00) for court costs which **shall be paid to the Superior Court of the Virgin Islands, Cashier's Division;** and it is

ORDERED that the record reflect that the Defendant was advised of his right to file a Notice of Appeal within thirty (30) days of written Judgment being entered; and it is

ORDERED that copies of this Judgment and Commitment shall be directed to Defendant; counsel of record; the Bureau of Corrections; and the Virgin Islands Police Department, Records Division, and the Bureau of Corrections.

DATED: March 13, 2017

MICHAEL C. DUNSTON
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESSTRELLA GEORGE
Clerk of the Court

By: _____
Lori Boynes-Tyson
Court Clerk Supervisor 3/14/2017

P10

CERTIFIED TRUE COPY
Date: 3/14/2017
ESTRELLA H. GEORGE
Clerk of the Court
By: _____
Title: Court Clerk II

APPENDIX D

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS Plaintiff, vs. MARIO GEVON EMANUEL Defendant.	Case No. ST-16-CR-0053

Transcript

Suppression Hearing

November 14, 2016

BEFORE: HONORABLE MICHAEL C. DUNSTON
Judge Presiding

APPEARANCES: DWAYNE BENTLEY, ESQ.
Assistant Attorney General

NATASHA BAKER, ESQ.
Assistant Attorney General
(For the People)

KWAME MOTILEWA, ESQ.
Assistant Territorial Public Defender
(For the Defendant)

I N D E X

(Thereupon, the following proceedings were held in open court)

THE CLERK: Good morning jury trial calendar. Number one on the docket. People of the Virgin Islands vs. Mario Gevon Emanuel.

ATTORNEY BENTLEY: Good morning, Your Honor. Dwayne Bentley Assistant Attorney General for the People of the Virgin Islands along with Natasha Baker, Assistant Attorney General.

ATTORNEY BAKER: And also at counsel's table is Officer Darryl Donovan.

THE COURT: Good morning.

ATTORNEY MOTILEWA: Good morning, Your Honor Attorney Motilewa for the defendant, Mr. Emanuel who's present and seated to my right.

THE COURT: Good morning. This matter comes on for a suppression hearing. It's my understanding and I take it there's no dispute that the activity involved here took place without a warrant. Is that the parties' agreement?

ATTORNEY MOTILEWA: Yes, Your Honor.

ATTORNEY BENTLEY: Yes, Your Honor.

THE COURT: All right then I'll hear from the people.

ATTORNEY BENTLEY: Yes, Your Honor. The People would like to call Officer Donovan.

THE COURT: You may proceed, Counsel.

DARRYL DONOVAN,

after having been first duly sworn by the clerk, testified as follows:

DIRECT EXAMINATION

BY ATTORNEY BENTLEY:

Q Good morning, Mr. Donovan.

A Good morning.

Q Please state your full name?

A Darryl A. Donovan, Sr.

Q Where are you employed?

A I'm employed at Licensing and Consumer Affairs and just promoted to Chief of Enforcement.

Q And how long have you served in that

position?

A In law enforcement eight years.

Q As chief, how long have you served?

A Couple months.

Q What kind of training did you have as an law enforcement officer?

A I was trained at the police academy in St. Thomas for six months graduated in 2008. I have trained in new Mexico with bomb training, building entry training with the tactical units. Trained in last vague for hazmat.

Q And over the course of your career how many arrest also have you made?

A Several about six to eight.

Q As an enforcement officer do you have morning briefings?

A Yes, we do.

Q Did you have a morning briefing on January 22, 2016?

A We had a briefing yes in the evening.

Q And what was the briefing about?

A This briefing was about the task force that was out. It was called Operation

Restore Calm with the different agencies with law enforcement. It was the police department, Waste Management, DPNR and other law enforcement officers. We had a briefing telling us about a threat that was an imminent threat that came to two officers that were involved in a shooting at Eclipse Night Club and be on the lookout for the individual by the name of Chris.

Q And was this threat related to a certain BOLO alert flyer?

A Yes, the BOLO alert flyer was to be other lookout.

Q What exactly is a BOLO alert flyer?

A It's a flyer telling us to look out for the individual or person of interest.

Q And once again, who was the BOLO alert flyer for?

A Chris.

ATTORNEY BENTLEY: At this time, I would like to be marked as People's Exhibit 1.

(People's Exhibit 1 marked for identification and tendered to the witness)

BY ATTORNEY BENTLEY:

Q Officer Donovan, handing you what's been marked for identification as People's Exhibit 1 for identification, do you recognize it?

A Yes.

Q What is it?

A This is a BOLO that was handed out to us in the briefing for the individual named Chris.

Q Is Exhibit 1 a fair and accurate representation of the defendant BOLO Alert that you saw on January 22, 2016?

A Yes.

ATTORNEY BENTLEY: Your Honor, I move that People's Exhibit 1 be admitted in evidence.

THE COURT: Any objection?

ATTORNEY MOTILEWA: Objection. That flyer does not pertain to the defendant. It pertains to some other individual by the name of Chris and therefore the characterization as an accurate representation of this defendant is untrue and therefore we object to its admission for the truth that the

defendant is shown in that photograph.

THE COURT: You wish to respond, Counsel?

ATTORNEY BENTLEY: Yes, Your Honor. We're asking that the exhibit be exhibited as far as an accurate representation of what the officer believed to be the person in the BOLO flyer as far as his recollection.

THE COURT: The testimony indicates that this is the copy of the flyer that was presented at the January 22nd briefing and it's not -- as I understand, it's not being offered to prove that the individual in the photograph is the defendant and so, I believe that it's admissible.

ATTORNEY BENTLEY: Thank you.

THE COURT: So, Plaintiffs 1 or People's 1 is admitted.

BY ATTORNEY BENTLEY:

Q And Officer Donovan, in your mind, does the person on the BOLO flyer represent --

ATTORNEY MOTILEWA: Objection. Calls for conclusion, speculation. Your Honor.

THE COURT: Rephrase, please.

BY ATTORNEY BENTLEY:

Q What does this BOLO flyer represent to you?

A It represents to me of a person of interest that we're looking for who is armed and dangerous and made threats to an officer.

Q And is this person in the room today?

A That resembles the individual, yes.

ATTORNEY MOTILEWA: Objection, Your Honor. This photograph does not pertain to this defendant. It pertains to someone who goes by the name of Chris and we object to the reference to the defendant. This is to a totally different person who I believe the task force is still looking for.

ATTORNEY BENTLEY: Your Honor, this goes to the state of mind of the officer at the time of seeing the BOLO alert and what he we believed to be true.

ATTORNEY MOTILEWA: Again, Your Honor, it calls for speculation and a conclusion without adequate foundation.

THE COURT: I understand your objection, Counsel. The officer is stating a lay opinion. It appears to the Court that the

photograph resembles the defendant. I believe that lay testimony, a lay opinion testimony is admissible in that regard and I'll overrule the objection.

BY ATTORNEY BENTLEY:

Q Turning to January 23, 2016 at 4:30 a.m., what were you doing?

A We were patrolling the downtown area.

Q When you say we, who did you include?

A I had a partner from Waste Management by the name of Officer Mikes from Waste Management. She was my partner that evening.

Q And what were you doing on patrol?

A We were just patrolling the downtown area, like I said.

Q And where did you go on your patrol?

A All over. Although we were looking for the individuals and showing a presence of police in the area. At the same time I was making sure that all the bars and nightclubs were closed when they were suppose to be closed.

Q Did you go to a particular nightclub?

A Yes.

Q What nightclub was that?

A It was Blitz on backstreet.

Q Why did you to go to Blitz nightclub?

A Because it was open after 4:00 a.m.

Q And what happened after you went to this nightclub?

A As I went in, I went to speak to the manager or the owner of the club to ask why they were open.

Q What did he say to you?

A He said he didn't look at the time. So, he was getting ready to close.

Q What did you notice upon entering the Blitz Nightclub?

A As I was entering the nightclub on my right-hand side I noticed Mr. Emanuel sitting on a stool and I glanced at him and he looked like the individual that we were looking for in the BOLO. So, I basically ignored him and went to speak to the manager.

Q What was your perception of the

defendant upon seeing him in the nightclub?

A Well, I guess when he saw me, to me he was looking nervous.

ATTORNEY MOTILEWA: Objection to the when he saw me. He doesn't know that Mr. Emanuel saw him. It calls for conclusion without foundation.

ATTORNEY BENTLEY: Your Honor, we're going to go into Mr. Donovan's -- what happened. This is his perception upon entering the club and what he felt. He could speak to that because it's his own perception, Your Honor.

THE COURT: He may continue. Overruled.

THE WITNESS: When Mr. Emanuel saw me, he put his face down like he didn't want to look at me and he was twiddling his thumb like he was nervous, that nervous look. So, I proceeded to speak to the manager, and as I exited the club I looked at him even more closer to see if he was the individual that we were looking for in the BOLO and he resembled him very much.

BY ATTORNEY BENTLEY:

Q And based on your years of experience, what was your perception of Mr. Emanuel's actions?

A He was nervous. Anybody in a club and they see law enforcement --

ATTORNEY MOTILEWA: Objection, Your Honor, speculation.

THE COURT: Sustained.

BY ATTORNEY BENTLEY:

Q So, after you saw him in the club, what did you do?

A I exited the club, and when I got back into my unit I told my partner that I believe the individual who's on the BOLO poster is in the club. So, we circled around the area and made contacts with the other units in the task force because we were told the that individual might be armed and dangerous and make contact with the other units if you make contact with the individual.

Q So, what happened after you made contact with the other units?

A We approached the club and as we were approaching the club, Mr. Emanuel came out and was walking towards a gray van and then

that's when we stopped, and by the time I got to him and as I approached him he had already sat down in the front seat of the vehicle.

Q And what did you do after seeing the defendant enter the van?

A I walked up to him, introduced myself as Officer Donovan and asked him if he could step out of the vehicle and if I could see his hands and I tell him I would let him know what's going on as I could presume the area safe for his safety and my safety.

Q Okay, did you say that he was under arrest at that time?

A No, he was not under arrest. I told him so.

Q And you went there and you approached him by yourself?

A Yes, with the other units standing by.

Q And why did you decide to approach the defendant and request to see his hands?

A For our safety to make sure that he was not armed for his safety and my safety, and like I said, he resembled the individual that was on the BOLO. So, I wanted to make sure --

ATTORNEY MOTILEWA: Objection, Your Honor to the narrative.

THE COURT: He may complete his answer.

THE WITNESS: I wanted to make sure that we all were safe especially him, also.

BY ATTORNEY BENTLEY:

Q And what did the defendant then say to you?

A He said no problem. He then came out of the vehicle. He listened to the commands, and I told him I'm going to do a pat down search for my safety and his safety. He's not under arrest, and after he was facing me directly face to face and that's when I told him if he had any pointed objects that can stick me or if he has any dangerous weapons on him and that's when he replied yes.

Q And when he said yes, what did he say to you.

A He said yes and I asked him a question and I asked what do you have? And he told me a gun in my right back pocket.

Q And did you find that gun?

A Yes.

Q Was it in any particular -- was it by itself, the gun?

A No, it was in a sack.

Q And what did you do then after finding the gun?

A Before that what I was I told him to put his hands on the vehicle and I took the gun out and I handed the gun to officer Aaron and I then proceeded to go ahead and do a search and then I asked him does he possess a license. I asked him does he possess a Virgin Islands license to carry the firearm.

Q What Did he say?

A He said no. I told him he's going to be arrested for having a firearm that's unlicensed on himself.

Q And after you arrested him, what happened next?

A After I arrested him Aaron prior read him his rights and he was transported to Adam Command and when I came here I read him his rights and he refused to sign the rights signature notice, and he was booked and carried

up to the corrections facility.

Q Did you give the gun to the forensic department?

A Excuse me.

Q Did you give the gun to the forensic department?

A Yes, forensics came and collected and recovered the weapon.

Q What did Forensic find out about this weapon?

A That it was an obliterated serial number and the gun does fire.

Q And with regard to the BOLO alert, did you ever speak to any of your partners about this BOLO alert?

A Yes, when the other officers were on the scene when I first approached him, everyone was saying that he looked exactly like the individual on the poster.

ATTORNEY MOTILEWA: Objection, Your Honor, to what other people were saying.

THE COURT: Sustained.

ATTORNEY BENTLEY: That's all the questions I have.

THE COURT: Attorney Motilewa?

ATTORNEY MOTILEWA: Yes, Your Honor.

CROSS-EXAMINATION

BY ATTORNEY MOTILEWA:

Q Officer Donovan, you testified that you work at Department of Licensing and Consumer Affairs?

A Yes.

Q And on January 23rd, you arrested Mr. Emanuel; is that correct?

A Yes, sir.

Q And at the time that you arrested Mr. Emanuel, you didn't have a warrant for his arrest, isn't that correct?

A Correct.

Q In fact, no warrant had been issued for him, isn't that correct?

A Correct, sir.

Q And at that time when you encountered Mr. Emanuel, Mr. Emanuel was not involved in any criminal act, isn't that correct?

A That's correct.

Q In fact, you didn't see Mr. Emanuel do anything unlawful, isn't that correct?

A Correct.

Q When you encountered Mr. Emanuel initially, you didn't know his name, isn't that correct?

A Yes, sir.

Q In fact his name is not Chris isn't that correct?

A Correct sir.

Q And, in fact, he never went by the name of Chris, isn't that correct?

A Yes, sir.

Q Now, you are -- in your briefing, you mentioned you had a briefing with the task force is that correct?

A Yes, sir.

Q The task force members never said they had a warrant for Mr. Emanuel, isn't that correct?

A Correct sir.

Q In fact, they never mentioned anything about Mr. Emanuel, isn't that will correct?

A Yes, sir.

Q Now, you said that the defendant sat in a gray mini van, correct?

A Yes, sir.

Q Now, the information that was given out at your briefing said that Chris may be driving an '09 Acura, isn't that correct?

A I don't recall that.

ATTORNEY BENTLEY:

May the witness be shown People's Exhibit number one, please.

THE COURT: May I have it?

(Exhibit tendered to witness)

BY ATTORNEY MOTILEWA:

Q Please take a look at the flyer?

A Yes, sir.

Q You see the right hand column of the page?

A Yes.

Q The right side of the page?

A Yes.

Q It says there, may be operating TEW-806 '09 Acura. Is that correct, sir?

A Correct, sir.

Q So, Chris was operating a '09 Acura, isn't that correct?

A Yes, sir.

Q Now you didn't have any information

that Mr. Emanuel drives a '09 Acura, isn't that correct?

A Correct.

Q Now, you stated that you called the officers of the task force to tell them of your find, isn't that correct?

A Yes, sir.

Q And you told your partner you believe that you saw the person in the flyer, isn't that correct?

A That resembled the person in the flyer, yes.

Q And in fact, you didn't know whether it was Mr. Emanuel was the individual you were looking for, isn't that correct?

A Correct.

Q And so you were unsure of what Chris looked like, isn't that correct?

ATTORNEY BENTLEY: Objection, hearsay.

ATTORNEY MOTILEWA: Your Honor, the defendant testified that he called his officers in the task force to come to the scene to verify if the person was Chris.

THE WITNESS: That is correct.

ATTORNEY BENTLEY: But Your Honor that doesn't go to his confirming.

ATTORNEY MOTILEWA: Well, he can answer, Your Honor.

THE COURT: He may respond.

THE WITNESS: I called them so that we can investigate if he was the individual.

BY ATTORNEY MOTILEWA:

Q And that is because you were unsure, isn't that correct?

A To investigate to make sure if that was the individual.

Q So, you were unsure, isn't that correct?

A No, I was not unsure. The reason why I was investigating was --

Q Hold on a minute. Let's see if you can answer my question. You were calling them to make sure, isn't that correct?

ATTORNEY BENTLEY: Objection. Asked and answered.

THE COURT: Overruled.

BY ATTORNEY MOTILEWA:

Q You were making sure -- you wanted

to be sure that the person that you had stopped was, in fact, Chris the person that you were suppose to be looking for, isn't that true?

A At the time we didn't stop. Are you talking about when I called the other officers or are you asking me when I stopped him?

Q All right, when you called the other officers, you were seeking a verification to know if, in fact, the person that you saw was Chris, isn't that will true?

A When I called --

Q Let me repeat the question if you don't understand. I don't want you to interpret my question. Just answer it. At the time when you saw the individual, you called the other members of the task force after you exited the club the first time, isn't that correct?

A Yes.

Q And your testimony was you wanted to know to verify that the person that you saw in the club was the person Chris that you were looking for, isn't that true?

A Yes.

Q In fact, you told your partner that

you believed that you saw the individual that was in the flyer that was handed out, isn't that the truth?

A Yes.

Q So, you were unsure? Isn't it true you were unsure of who you had seen in the club?

A You need to define unsure because I was verifying.

Q All right. Let's call it verifying. You were not able to verify that the person you saw was, in fact, Chris; isn't that true?

A Yes.

Q And so, you circled the market area?

A Yes.

Q That's the Rothschild Francis Square area, correct?

A Yes.

Q And when you came back around to the area of the club, you were waiting for the other officers from the task force to arrive, isn't that true?

A I was waiting for them at the market square.

Q At the market square?

A Yes.

Q And did they come to the market square when you were at the market square?

A Yes.

Q And you went back to the club, isn't at that true?

A We were approaching the club, yes.

Q Now, you said you saw the defendant came out of the club, isn't that true?

A Yes.

Q At the time the defendant had not committed any criminal act that you were aware of, isn't that true?

A That is correct.

Q And, in fact, no criminal act was committed in your presence by the club, isn't that true?

A That is correct.

Q And you had no knowledge of any plan on the part of this defendant to engage in any criminal activity, isn't that the truth?

A Repeat the question.

Q You didn't have any knowledge of any plan by the defendant to engage in any criminal activity, isn't that the truth?

A Correct.

Q Now, you said you saw the defendant in a gray mini van, correct?

A Yes.

Q And you approached him and said, "show me your hands and exit the vehicle", isn't that true?

A No.

Q You didn't ask him to exit the vehicle?

A I asked him, but I identified myself first.

Q You identified yourself and then you asked him to show his hands and exit the vehicle, isn't that correct?

A Yes.

Q And you identified yourself because you wanted him to know that you were a police officer, isn't that true.

A Yes.

Q And the defendant in this instance did not run away, did he?

A No.

Q In fact he never made any attempt to run away, isn't that true?

A That is correct.

Q In fact he answered all of the questions that you put to him, isn't that true?

A Correct.

Q And when Mr. Emanuel came out of the club you had already called the task force members, and it was your testimony, I believe, that they had met up by the market square; isn't that true?

A Yes.

Q And the market square is right down the street from this nightclub; isn't that true?

A Yes, sir.

Q Now, when you contacted the defendant outside the club in his van, you had no knowledge of any criminal activity in progress, did you?

ATTORNEY BENTLEY: Objection. Asked and answered.

THE COURT: Sustained.

BY ATTORNEY MOTILEWA:

Q Now, you said you called the members of the task force and when you did that your intention was to -- strike that. Let me

rephrase that question. You called the members of the task force and then you waited for them by the market square, correct?

A Yes.

Q And then you approached the area where the defendant was, isn't that correct?

A Yes.

Q And were the members of the task force, they were with you at that time, is that correct?

A Yes.

Q Now, when you met Mr. Emanuel or you made contact with Mr. Emanuel. Let me be clear, the members of the task force were present on the scene, is that correct?

A They were present in the area, yes.

Q In the area. What do you mean by in the area?

A Some of them were taking cover behind their vehicles.

Q Some were taking cover behind their vehicles and others were?

A In front of their vehicle. Not his vehicle. Their vehicles.

Q So that it was clear that you

intended to detain Mr. Emanuel?

A No, it was not clear.

ATTORNEY BENTLEY: Objection, Your Honor.

ATTORNEY MOTILEWA: Your Honor, he can answer. He was there. He was there. He did the action. He can answer.

THE COURT: He may respond.

BY ATTORNEY MOTILEWA:

Q You intended to detain Mr. Emanuel, is that correct?

A We would detain him if he was the individual we were looking for.

Q But he wasn't the individual you were looking for?

A That is correct.

Q Now, you said this was in front of the Chris nightclub, I mean the, what it is, Blitz Nightclub. I'm not sure what the name of the nightclub is, but the nightclub you went to close down. What was the name of the nightclub?

A Blitz Nightclub.

Q Now, when you were in the area of the Blitz Nightclub, you didn't have any

knowledge of any criminal activity in that area, is that correct?

ATTORNEY BENTLEY: Objection. Asked and answered.

ATTORNEY MOTILEWA: Your Honor it's a different question.

THE WITNESS: Repeat the question.

BY ATTORNEY MOTILEWA:

Q Yes, when you were in the area of the Blitz Nightclub, you did not have any knowledge of any criminal activity in that area, isn't that true?

A Correct.

ATTORNEY MOTILEWA: May I have a moment, Your Honor.

THE COURT: You may.

(Peruses documents)

BY ATTORNEY MOTILEWA:

Q Now, you said that the task force was looking for someone named Chris, correct?

A Yes, sir.

Q And you said that they were, in fact investigating threats against other police officers. Is that correct?

A He made threats against two other officers, yes.

Q And that was all the information that you got in your briefing, isn't that true?

A He made threats against two officers that were involved in a shooting at Eclipse Nightclub.

Q Right. And you didn't receive any information s to when the shooting occurred, is that correct?

A Yes, we did.

Q Oh, you did. Now, the person that you were told to be on the lookout for was a/HA black male rasta, correct?

A Yes.

Q Now, when you questioned the defendant your testimony was he told you he had a gun, correct?

A Yes.

Q And he told you where the gun was, correct?

A Yes.

ATTORNEY MOTILEWA: Okay. I have nothing further at this time, Your Honor.

ATTORNEY BENTLEY: Your Honor,

may I redirect?

THE COURT: You may.

REDIRECT EXAMINATION

BY ATTORNEY BENTLEY:

Q Mr. Donovan, I just have a couple questions for you. With regard to People's Exhibit 1, the BOLO alert. I know defense counsel pointed to that Chris may be operating an Acura '09. What is your understanding when they said may be operating?

A That he may be operating that type of vehicle. That doesn't mean he is operating that type of vehicle.

Q And besides that they said that this is at car that was registered to Chris?

A No, it wasn't registered to him.

Q And why did you approach the defendant while he was in his minivan?

ATTORNEY MOTILEWA: Asked and answered, Your Honor.

ATTORNEY BENTLEY: We didn't get it. You answered for him.

THE COURT: Overruled. He may respond.

THE WITNESS: We had approached

him because he resembled the individual in the BOLO.

BY ATTORNEY BENTLEY:

Q Was there any other reason that you approached him?

A No.

Q Based on your years of experience and upon seeping him enter the club, what did you see in him that made you want to approach him.

A He was acting --

ATTORNEY MOTILEWA: Objection, Your Honor. This is beyond the scope of cross examination.

THE COURT: Overruled.

ATTORNEY BENTLEY: You can answer.

THE WITNESS: He was acting very nervous not making eye to eye contact or not looking in direction where I was or anything like that.

ATTORNEY BENTLEY: Thank you, Your Honor. Those are all the questions I have.

THE COURT: Any additional

cross?

ATTORNEY MOTILEWA: May I have a moment, Your Honor.

THE COURT: You may.

(Perusing documents)

RECROSS EXAMINATION

BY ATTORNEY MOTILEWA:

Q You didn't receive -- just one quick question. You didn't receive any information that Chris may be driving a gray minivan, isn't that true?

A True.

ATTORNEY MOTILEWA: No further questions, Your Honor.

THE COURT: Any additional questions for the witness?

ATTORNEY BENTLEY: No, Your Honor.

THE COURT: All right. Officer Donovan, you may step down. Thank you.

THE WITNESS: Thank you.

(Witness excused from stand)

Any additional evidence from the People?

ATTORNEY BENTLEY: No, Your Honor. No additional witnesses.

THE COURT: Any evidence from the defense?

ATTORNEY MOTILEWA: No, Your Honor.

THE COURT: All right, I'll hear arguments. By.

ATTORNEY BAKER: Good morning again, Your Honor.

THE COURT: Good morning.

ATTORNEY BAKER: The standard established by Terry v. Ohio where there's a warrantless search simply states that an officer may stop and willfully detain a person when the officer has reasonable or articulable suspicion that the person has or is about to be engaged in criminal activity. Several Supreme Court cases support that provision including Terry v. Ohio.

The standard of reasonable suspicion only requires who has a little more than a hunch but is considered less on proof of grounds weighed on the preponderance of the evidence, and that can be found in United States v. Hensley which is 469 U.S. 221.

Officer Donovan testified that

the officers of the Operation Restore Calm task force was told to be on the lookout for a person known as Chris who was a person of interest who had made a threat to police officers regarding a shooting at Blitz nightclub. In addition to that information concerning this individual, they were briefed that this individual they were briefed that they needed to proceed with caution because this individual is likely to be armed and dangerous.

All of this in a briefing was memorialized in a BOLO flyer which was admitted into evidence and the BOLO flyer specifically states that the defendant is deemed armed and dangerous. Courts have held that be on the lookout flyer may provide the reasonable suspicion necessary to justify an investigative stop.

Officer Donovan testified that the individual that he saw in the club on that day looked like the person who was on the BOLO flyer. In addition to that he testified that when he walked into the club that individual acted nervous by exhibiting behavior that in

his experience as an officer exhibits nervousness. That put together with the BOLO flyer led the officer to believe that the person that he saw on that day in the club was, in fact, the person who was identified as Chris in the BOLO flyer. Courts, when examining whether a stop and search was reasonable, the court looks at the totality of the circumstances when you look at the totality of the circumstances for which Officer Donovan testified, there is more than enough evidence that the stop and the detention, and the search was reasonable.

It's important to note that when the defendant was approached, he was not under arrest. And we're not operating on the basis of probable cause. It's a lower standard of reasonable suspicion which emanated from the BOLO flyer.

Officer Donovan specifically told Mr. Emanuel after introducing himself that he was not under arrest and the reason for which he was stopped. Court's have held that it would be reasonable for an officer to see someone that is a person of interest and it

would be unreasonable, I'm sorry, for an officer to see someone that's a person of interest and not detain that person for questioning.

The reason being if Officer Donovan did not detain Mr. Emanuel, what would be the results. He would let him go and the person that would be identified as the person in the flyer would leave and what other opportunity would the officers have for detaining this person particularly since looking for some of these individuals that they were on the lookout for was part of the reason they were investigating the downtown area.

So, it would be completely unreasonable for Officer Donovan to not approach Mr. Emanuel as the person who he thought was on the flyer and letting him go. Now, having established that the stop was reasonable the next inquiry would be the search. Case law specifically states that in connection with the Terry stop an officer may conduct a pat down search if he has reason to believe his safety and the safety of others are at risk.

Based on the testimony of Officer Donovan who took several measures to ensure not only his safety, but the safety of the defendant which includes obtaining backup. In addition to that, the BOLO flyer specifically states as stated before that the defendant was armed and dangerous and in addition to that, he was known for making threats to officers and Officer Donovan is an officer.

So, it was reasonable for Officer Donovan upon seeing Mr. Emanuel to conduct a pat down search for officer safety. Nothing that was done with the pat down search was unreasonable. The officer stated that he was patted down for his safety. He asked the individual if there were any sharp objects or dangerous weapons.

The defendant did indicate that he had a dangerous weapon, and only at that time after the recovery of the dangerous weapon after Officer Donovan verified that this weapon was not licensed, and verified that it had an obliterated serial number, that this defendant was under arrest.

Prior to that, the defendant was just detained for questioning based on the BOLO alert. The information that it was of mistaken identity was of no moment. Here it does not negate the validity of the Terry stop. Specifically Hill v. California. The citation being 401 U.S. 797 states that a valid search is upheld when there's mistaken identify where the officer is acting in reasonable belief that the person seized is the correct person.

There's overwhelming testimony that Officer Donovan reasonably believed that Mr. Emanuel was the person who was seized. And based on the picture on the flyer and the appearance of Mr. Emanuel, I think it reasonable to believe that he could have been the person in the flyer, and I think it's unreasonable for Chief Officer Donovan to let this person go with that reasonable belief.

There has been cases where police officers with similar facts to where the officers have received a BOLO alert which is less specific than the one here where we have a picture of the individual. There have been BOLO reports sent over the radio identifying a

car, a specific car and being in that car. And I'm specifically thinking about the case of Gonzales v. United States.

After the officers engaged in a search on the highway in that particular case, they stopped a particular car that was said to be on the BOLO alert. It turned out after the fact that the car was not the correct car for the BOLO alert. By that time the officers had already recovered a significant amount of drugs in the car. The court upheld -- did not suppress the drugs that were found finding that the officers acted with reasonable belief that the car that was identified was the car that was sent under the BOLO alert.

There are other cases that address even where there's probable cause that an officer is detained going to an apartment. Detained the wrong person and the material found in that apartment was upheld and not suppressed because the Court found that the officers acted reasonable under the BOLO alert. Likewise, here Your Honor, under the facts of this case and considering the totality of the circumstances, Officer Donovan acted prudently

his action is not violative by the standards set by the Fourth Amendment and interpreted by Terry v. Ohio. Thank you.

ATTORNEY MOTILEWA: If I may, Your Honor.

THE COURT: You may proceed.

ATTORNEY MOTILEWA: Your Honor. The defendant contends in this matter that the police acted in violation of the Fourth Amendment, that they seized the defendant unlawfully in violation of his rights under the Fourth Amendment.

Your Honor, a seizure for purposes of the Fourth Amendment occurs when a person feels that he is not free to leave or otherwise not free to terminate or decline the officer's request. In this case, Officer Donovan testified that he called the members of the task force, met them in the market square area, and then proceeded to the area of the nightclub.

When he got there, the other officers were behind the cars and some were in the front of the cars. And he approached the defendant. So, it's clear that there was a

definite show of police authority. And under the Fourth Amendment that constitutes a seizure and we contend an unlawful seizure of the defendant. The seizure occurs at the point of contact at the inception where the police encounter Mr. Donovan -- I'm sorry, Mr. Emanuel.

Officer Donovan testified that the defendant saw him in the club and he was acting nervous, but he mentioned no facts that would support a belief that the defendant was engaged in any criminal activity, that there was any criminal activity in the area, or that in fact, he had any knowledge of any plans of any criminal activity.

He testified that the defendant bowed his head and twiddled his thumb. Those are not facts that give rise to a reasonable belief that the defendant was operating in a reasonable, suspicious, or under a reasonable suspicion that the defendant was involved in criminal activity. The police in question did not know the person they were looking for.

They did not know who Mr. Emanuel was. The only things they can

point to is he was a black rasta, and they were looking for at black rasta, but no characteristic mentioned that would identify Mr. Emanuel or otherwise single him out by his characteristics or form a reasonable belief that he was involved or he was the person that they were looking for.

The officer testified that he had no knowledge that the defendant had committed any crime. No knowledge that any crime was in progress, and he did not observe the defendant doing anything that could be considered or classified as illegal or unlawful. Further, he testified that he had no knowledge of any criminal activity in the area of the club.

The police produced no objective facts to establish reasonable suspicion of crime or criminal activity at the time that the defendant was seized. Seizure in this instance, Your Honor was not consensual because the defendant was not free to leave or refused to answer the questions that were put to him.

In fact, if he had run away or

otherwise tried to avoid the officers, there would be no seizure unless there would be an attempted seizure, but under the circumstances he submitted to the officers' directives.

Show me your hands and come out of the vehicle is not a polite, gentle invitation when you have the area covered with other police officers, Some hiding behind their cars. Some in front of their cars. That's not a consensual compliance with a simple request by another human being. That is a show of police authority.

And at that point the seizure of the Defendant's person was completed and in violation of his Fourth Amendment right. The seizure should be based on objective facts. Not on the officer's opinion, and it was the opinion or hunch of Officer Donovan that this was the person that they might be looking for. He was unsure.

He was unsure. He didn't know. And so he called for verification and the task force didn't know. They came to see who was being detained. The officer when seizing an individual especially without a warrant or

without any crime being committed in their presence and without any knowledge of any planned criminal activity must show articulable facts that show individualized action on the part of the defendant that suggest criminal activity.

Here we have none. We have a mere hunch, but no articulable facts. We would point out that articulable facts would be such as those that we saw in Terry. The police officer observed three guys casing a store. They went back and forth several times taking turns and looking at the store. They met with a third person and again cased the store and discussed -- articulable facts, and subsequently were arrested and the arrest upheld, and the evidence for that was used in the trial.

Here, Your Honor, we only have Officer Donovan's hunch based on defendant looking down or twiddling his thumb as he said. Nothing to indicate criminal activity afoot.

Your Honor, we ask that the evidence seized in this matter be suppressed as fruits of an unlawful search which is in

violation of the Defendant's Fourth Amendment Rights. Reasonable suspicion cannot be based on the officer's unparticularized suspicions or hunch. Here there is no objective or reasonable facts that support the activity or the appearance of criminal activity.

And therefore the seizure made by the police must fail as arbitrary and capricious. The observation that Officer Donovan said he saw in the club does not in any way support the contention that there were any criminal activity afoot.

None to observe or suggest that that was the case, and we ask, Your Honor, that the evidence in this matter be suppressed as fruits of an unlawful seizure and that it be suppressed in its entirety. The reason being is that it violates the Defendant's Fourth Amendment rights.

THE COURT: Thank you.

ATTORNEY BAKER: Your Honor, may I briefly.

THE COURT: You may.

ATTORNEY BENHAM: Your Honor, in this particular case the defendant is

inflating the standard necessary for the determination on the suppression hearing. We're not looking at probable cause. The standard is merely reasonable suspicion. As testified by Officer Donovan, the person identified in the BOLO flyer was a person of interest or questioning. This is nothing common. When crimes are committed the police go through an investigative process and through this investigative process, they question individuals to gather information to assist with whatever investigation is occurring.

The Defendant's contention that, you know, the officer did not see a crime occurring at that time is inconsequential. The BOLO alert itself raised a reasonable suspicion. In the briefing the officer was told that he was wanted -- not wanted but that they were to be on the lookout for him as a person of interest?

ATTORNEY MOTILEWA: Your Honor, I would object to the repetition of the arguments put forth previously.

THE COURT: Your objection is noted. You may continue.

ATTORNEY BAKER: Thank you. Noted as a person of interest that the officers needed to question and the defendant was approached as such. The BOLO alert did not state an incorrect person. It stated who the person they thought that person of interest was. Officer Donovan testified that he thought that the person he saw was the same as the BOLO alert and therefore he proceeded based on that suspicion.

He even testified that when he approached the defendant there was still room to verify whether or not the defendant was, in fact, the person on the BOLO alert. However, prior to doing that, he had to take the necessary precautions needed for the safety of himself and those around. Particularly given the fact that the flyers said he was armed and dangerous.

Officers do pat down searches without even that information not knowing what they're getting into. So, when you have a situation that where there's specific information that this person is armed and dangerous even more so that you have to be

particularly careful. And so the long and short of it is the officer did not need probable cause that a crime was committed.

He didn't need any specific facts that this person is guilty or a suspect in a particular crime. The fact that he was a person of interest needed for questioning is sufficient enough for him to be stopped by the officer. Any other conclusion would be completely unreasonable, and it would likewise be unreasonable for the officer to simply approach someone, question them without taking the necessary precautions to ensure their safety. And for those reasons we ask that the evidence of the firearm not be suppressed.

THE COURT: The defense has challenged the seizure of the weapon from Mr. Emanuel on the basis of the Fourth Amendment of the Constitution of the United States. That Fourth Amendment protects a defendant from unreasonable search and seizures. The general rule is that a search in order to be reasonable must be supported by probable cause and administered pursuant to a valid warrant.

There are, however, a few narrowly defined and specifically identified exceptions to the warrant requirement. One of those as both counsel has indicated is a brief investigative detention of a person that was defined in Terry vs. Ohio. Under those circumstances an investigative stop may be based upon reasonable suspicion.

And in the circumstances of a Terry case a pat down search after a temporary detention to question a suspect was found to be even though not justified through a warrant and made on less than probable cause was found to be acceptable given the brief nature of the investigative stop and the brief scope of the path down search involved.

The facts of this case are as I find by a preponderance of the evidence that on the 22nd of January 2016, Officer Darryl Donovan who had been an officer with the Department of Licensing and Consumer Affairs for some eight years was a member of the operation Restore Calm Task Force attended a briefing on that evening and was provided with a flyer known as the BOLO or be on the lookout

flyer for an individual who was identified merely by the name Chris.

The BOLO which has been admitted into evidence as Plaintiff's Exhibit 1 has a photo of an individual, an African American male who had in the photograph a beard and mustache, and it appears to be a closely cut beard, and the information was that it seemed this individual was armed and dangerous or should be presumed to be armed and dangerous and the flyer identified a vehicle that the person identified as Chris may be operating.

I find that on the upper left hand corner of Plaintiffs Exhibit 1 there is a handwritten statement saying that this is the BOLO that was discussed at the briefing. I do not accept that hearsay portion of the photograph for that purpose, but I do rely on the testimony of officer Donovan that this is the BOLO that he received.

That BOLO -- excuse me, in that briefing it was also mentioned to Officer Donovan that they should consider, he should consider the individual an imminent threat to officers and had threatened two officers who

were involved in a shooting at the Eclipse Nightclub. Based on that information, the very next morning at 4:30 in the morning which would appear to the Court to be the very same shift at the beginning of which Officer Donovan received that information, he was going through nightclubs in the -- going to nightclubs in the St. Thomas downtown area to determine that those clubs complied with the 4:00 a.m. closing law.

I take judicial notice that January 23, 2016 was a Saturday and therefore January 22nd would have been a Friday night and that clubs are depending upon their licensure often open until 4:00 a.m. on Friday and Saturday mornings. In this instance upon seeing that the Blitz Nightclub was open, Mr. Donovan, Officer Donovan went into the club to inquire why the club was still open at approximately 4:30 in the morning.

Upon entering, it was the testimony of Officer Donovan that he observed an individual seated on a stool near the door who he thought resembled the person about whom he had been briefed. The previous evening his

photograph was depicted on the be on the lookout flyer. Officer Donovan went about his business in asking the owner or the manager of the club why was he still open after hours and was informed that the manager had lost track of time and was closing and Officer Donovan proceeded to head out of the club.

He testified that he observed the individual who ultimately turned out to be Mr. Emanuel still seated at the door. That at that point he determined that in his words Mr. Emanuel resembled the photo very much. He also testified, that's Officer Donovan that Mr. Emanuel appeared nervous, did not make eye contact with him and while that is certainly a subjective observation on the part of the officer. It is the kind of information that a trained officer can rely on to some extent to determine whether there's a heightened level of suspicion in certain circumstances.

Officer Donovan the evidence shows then left the club, explained to his partner that he had observed an individual who resembled the person in the flyer photograph. Contact was made with other officers who were

members of the task force because the briefing had indicated that the person that they were looking for should be considered armed and dangerous, and at that point once backup arrived, Officer Donovan observed Mr. Emanuel come out of the club and get into a gray minivan.

Officer Donovan approached the minivan, identified himself as an officer and asked Mr. Emanuel to step out of the vehicle making an indication that Mr. Emanuel should keep his hands visible consistent with Officer Donovan's concern that the individual may be armed and dangerous.

Officer Donovan testified that he told Mr. Emanuel that Mr. Emanuel was not under arrest, but that for Officer Donovan's safety and for the safety of others including Mr. Emanuel, he approached Mr. Emanuel and was going to pat him down. Before doing so, the testimony is that, Officer Donovan asked Mr. Emanuel if he had any pointed objects or dangerous weapons on his person at which point, Mr. Emanuel indicated yes, he did.

Officer Donovan asked what.

The testimony is that Mr. Emanuel replied I have a gun in my right back pocket. And at that point, Officer Donovan had Mr. Emanuel place his hands on the vehicle. Officer Donovan removed the weapon from Mr. Emanuel's pocket. He testified that he searched Mr. Emanuel at that point and then asked him if he had a valid Virgin Islands license for the weapon and at which point Mr. Emanuel replied that he did not have one, and Officer Donovan then informed Mr. Emanuel that he would be arrested for possession of an unlicensed firearm.

As it turned out the firearm had an obliterated serial number. The testimony was then that Officer Aaron Pryor read Mr. Emanuel his rights and he was taken to the police command where Officer Donovan again read him his rights under Miranda v. Arizona, and that Mr. Emanuel then refused to sign the waiver.

The forensics unit came and took the firearm and then later determined that the firearm was operable.

I am troubled by the

testimony -- let me say this first. I have viewed the photograph contained in Plaintiff's Exhibit No. 1 and have observed Mr. Emanuel in the courtroom today and on other occasions.

The photograph contained in the flyer is a black and white photograph with a dark background and although the face is clearly visible, that the head of the person in the photograph is tilted to the side and apparently back and is roughly an inch by an inch in the photo.

It is a photograph of an African American male whose features include a moustache and beard. As I've indicated, it appears to be closely cropped and a fairly broad nose. Upon first viewing of the photograph and comparison to Mr. Emanuel, it appeared to me that there was a resemblance with his features.

Mr. Emanuel's face upon substantial observation appears to the Court to be thinner than the photo of the person in the photograph. He appears in court today without a long beard or mustache although it appears that he has a growth of some facial hair, and I

have to find that given the circumstances that he had been briefed only the previous evening about the individual and had apparently only this photograph in his possession with which to compare the identification of the individual with Mr. Emanuel, I find that Officer Donovan had a reasonable and articulable suspicion that Mr. Emanuel was the person in the photograph.

It appears that subsequent investigation determined that Mr. Emanuel was not that person. And I suspect that had events on the occasion on the 23rd of January not un folded as they had, that upon additional investigation, Mr. Emanuel would have been determined not to be that person and would have been released after a brief detention.

In this instance, however, I have to find that there was at least a reasonable and articulable suspicion based upon the flyer and the apparent observation of nervousness on the part of Mr. Emanuel for Officer Donovan to conduct a pat down search given that he had been advised that the individual in the photograph was to be considered armed and dangerous and a threat to

officers.

The testimony concerning the other members of the task force being present doesn't persuade me that the encounter was merely an acquiescence on the part of Mr. Emanuel to show police authority. There was no testimony in the record as to the number of task force officer who were present.

Obviously, it had to be at least four, Mr. Donovan or Officer Donovan and his partner, and there was testimony that some task force members were in front of their vehicles and some were behind their vehicles. I suspect that there were six or more but there's also no testimony with regard to the distance at which those individuals observed the encounter with Officer Donovan.

There's no testimony that any of those officers had weapons drawn although there's testimony that they took cover behind their vehicles. There's no testimony that any of those officers were visible to the defendant. And there's no testimony of any activity on the part of those officers other than being present.

That demonstrates that Mr. Emanuel was merely responding to a show of police authority in acting in the manner in which he did. I find that there was at that point a reasonable articulable suspicion on the part of Officer Donovan that justify a brief investigatory stop of Mr. Emanuel to determine if he was the individual in the photograph.

I also find that it was reasonable for the officer to ensure his safety and the safety of others by conducting a brief pat down search of Mr. Emanuel particularly in light of the fact that Officer Donovan had been informed that the individual in the photograph may be armed and dangerous.

I also find that it was reasonable for Officer Donovan to ask if Mr. Emanuel had any pointed objects or weapons on his person and that when Mr. Emanuel replied replace that he had, it was reasonable for Officer Donovan to inquire further to try to locate that weapon and asked Mr. Emanuel further about it to which Mr. Emanuel identified the location of the weapon. I find that the actions of Officer Donovan were

reasonable in having Mr. Emanuel place his hands on the vehicle and in removing the weapon from Mr. Emanuel's person.

I am as I started to say earlier troubled by the testimony from Officer Donovan that he at that point, quote searched, unquote, Mr. Emanuel. Although given that he had discovered a weapon on Mr. Emanuel at that point, all be it based on Mr. Emanuel's statement that he possessed a weapon, it does not appear unreasonable to the Court that Officer Donovan would then expand the scope of his pat down search to other portions of Mr. Emanuel's person.

However, prior to doing so, the officer had not inquired whether Mr. Emanuel had a license for the firearm. I find that based upon the lack of knowledge as to whether the firearm was licensed that the subsequent search of Mr. Emanuel's person was not based on probable cause. However, that does not appear to be dispositive of the circumstances before the Court because there's no indication that additional evidence was found on Mr. Emanuel's person or that the search in any way effected

the pat down and the seizure of the weapon prior to the search. I find that the seizure of the weapon was part of the pat down process and the indication by Mr. Emanuel that he did, in fact, have a firearm on his person. Had probable cause been required in these circumstances, I would find as I indicated that at the point the quote, search, the expanded search of Mr. Emanuel's person had taken place, that it was done so without probable cause, but Probable cause is not required under these circumstances, and I do find that given the totality of the circumstances, that Officer Donovan had a reasonable and articulable suspicion at the point that he stopped and questioned Mr. Emanuel briefly and for the pat down search and at that point, once the weapon was discovered that the firearm was not subject to suppression based upon the Fourth Amendment principles as I understand it.

So, based upon those findings, the Court rules that the motion to suppress should be denied and I incorporate into the ruling findings of fact that I've made based upon the evidence here.

It appears that I've rescheduled this matter such that the next scheduled event in this case is a pretrial conference. It's scheduled for December 12th at 9:00 a.m. Jury selection is currently scheduled for January 9, 2017 also at 9:00 a.m., and so I'll prepare a brief written ruling incorporating my oral findings of fact and conclusions of law.

ATTORNEY BAKER: I'm sorry, Your Honor, can you repeat that jury selection date.

THE COURT: January 9th. Does Mr. Emanuel need a reminder card with regard to the 12th of December?

ATTORNEY MOTILEWA: Yes, Your Honor.

THE COURT: Okay. All right, Mr. Emanuel, the clerk has prepared a reminder card for your signature acknowledging your obligation to return here on December 12th here at 9:00 a.m. for a pretrial conference. Once you sign that card, you'll be permitted to be released on the same conditions that would currently effect your release. Anything more

we can accomplish today?

ATTORNEY MOTILEWA: Nothing from the defense, Your Honor.

ATTORNEY BENTLEY: Nothing further, Your Honor.

THE COURT: All right. Thank you. We'll stand adjourned.

(Thereupon, the proceedings were adjourned)

* * *

CERTIFICATE OF REPORTER

I, DEREK A. PEETS, a Registered Professional Reporter, do hereby certify that the foregoing pages, 1 - 65 inclusive, comprise a full, true, and accurate transcription of the proceedings in People of the Virgin Islands vs. Mario Gevon Emanuel, Case No. ST-16-CR-53 as taken from my machine shorthand notes on November 14, 2016.

IN WITNESS WHEREOF, I affix my signature this 16th day of June, 2017.

/s/ Derek A. Peets

Derek A. Peets,
Official Court Reporter

APPENDIX E

No.

ALWASI YONG, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Courts examine "the facts known to the arresting officer at the time of the arrest" in assessing probable cause or reasonable suspicion under the Fourth Amendment. *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004). Nonetheless, an officer may lawfully act in reliance on an order issued by another officer who had the requisite personal knowledge. *United States* v. *Hensley*, 469 U.S. 221 (1985); *Whiteley* v. *Warden*, 401 U.S. 560 (1971).

The question presented is:

Whether, in the absence of such an order, an officer who lacks probable cause or reasonable suspicion may conduct an arrest, search, or frisk, so long as a court later determines that another officer who happened to be present at the scene had the requisite personal knowledge, even if that officer did not communicate it to the acting officer.

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OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, App., *infra*, 1a-35a, is reported at 177 A.3d 876. The opinion of the Superior Court of Pennsylvania, App., *infra*, 36a-60a, is reported at 120 A.3d 299.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 18, 2018. On April 9, 2018, Justice Alito extended the time in which to file a petition for writ of certiorari to and including May 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

INTRODUCTION

"[A] search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979). Police may also perform an investigatory stop and frisk based on reasonable suspicion that a weapon is present. See *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). In making such determinations, police may rely on "the facts known to the arresting officer at the time of the arrest," *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004), or on information and instructions communicated by other officers. See *Whiteley* v. *Warden*, 401 U.S. 560,

568 (1971); *Carroll* v. *United States*, 267 U.S. 132, 161 (1925).

However, state and federal courts are deeply divided about whether a valid search and seizure can be based on facts *not* known to the officer who performed the search—but rather, on facts known only by some other officer on the scene. Some courts, including the Fourth and Seventh Circuits and the high courts of Delaware and Florida, maintain that probable cause depends on the knowledge of the officer actually conducting the search or seizure. See, *e.g.*, *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States* v. *Ellis*, 499 F.3d 686 (7th Cir. 2007); *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017); *State* v. *Cooley*, 457 A.2d 352 (Del. 1983); see also *People* v. *Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992). Other courts disagree, including the Fifth and Tenth Circuits and the Supreme Court of Pennsylvania in this case. Those courts hold that probable cause or reasonable suspicion can be based on facts concededly *unknown* to the acting officer, but known to some other officer present at the scene. See App., *infra*, 29a-30a; *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996); *United States* v. *Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972). This notion is commonly referred to as the "collective knowledge doctrine" or the "fellow officer rule." See *United States* v. *Ramirez*, 473 F.3d 1026, 1032 n.4 (9th Cir. 2007).

The decision of the Supreme Court of Pennsylvania cannot stand. It conflicts with the bedrock rule that police action must be upheld based on "the facts known to the * * * officer at the time" of the search or seizure. *Devenpeck*, 543 U.S. at 152. The decision here would

"encourag[e] police without the requisite level of suspicion" to take actions known to be invalid, "in the hopes that his or her fellow officers possess such level of suspicion." App., *infra*, 34a (Donohue, J., dissenting). By converting search and seizure determinations from a weighing of known facts into a game of chance about what a court might later conclude other officers knew (but never bothered to communicate), the decision invites "arbitrary invasions by government officials"—the very evil the Fourth Amendment is intended to prevent. See *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). The decision raises the real risk that imputed knowledge "could swallow" conventional Fourth Amendment analysis. App., *infra*, 34a (Donohue, J., dissenting). This Court's review is urgently warranted.

STATEMENT

1. Under the Fourth Amendment, police officers ordinarily cannot conduct an arrest or search without probable cause to believe that the subject committed a crime (or, in the case of a search, that evidence of a crime will be found). *United States* v. *Watson*, 423 U.S. 411, 417 (1976); *Brinegar* v. *United States*, 338 U.S. 160, 174 (1949). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck*, 543 U.S. at 152 (citing *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003)). An arresting officer may also rely "on facts communicated to him by others." *Carroll*, 267 U.S. at 161.

This Court has also condoned certain limited kinds of searches and seizures based on a lesser showing.

For example, an investigatory stop and frisk can be based on reasonable suspicion that an individual may be carrying a weapon that could threaten the officer's safety. *Terry*, 392 U.S. at 20. But such a search must be "narrowly drawn" to the purpose of finding weapons and performed only if the officer "*has reason to believe* that he is dealing with an armed and dangerous individual." *Id.* at 27 (emphasis added). The belief must be "particularized and objective." *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981).

Whiteley v. *Warden*, 401 U.S. 560 (1971), addressed when police may rely on orders from other officers in making an arrest. There, one officer arrested a suspect in reliance on information contained in a police bulletin broadcast by officers in another jurisdiction. This Court acknowledged that "police officers called upon to aid other officers in executing search warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." But the Court also emphasized that if the requesting officer did not himself have probable cause, "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568-569. Because the police bulletin in *Whiteley* relied on a complaint that did not establish probable cause—and because the arresting officer himself lacked any "factual data tending to corroborate" probable cause—this Court held that the arrest was unconstitutional and evidence recovered therein should have been suppressed. *Ibid.*

United States v. *Hensley*, 469 U.S. 221 (1985), applied *Whiteley* in the context of investigatory stops. In

Hensley, officers stopped a suspect "in reliance on a flyer issued by another [police] department indicating that the [defendant] [wa]s wanted for investigation of a felony." The flyer did not communicate, however, "the specific and articulable facts which led the first department to suspect [his] involvement in a completed crime." *Hensley*, 469 U.S. at 229-230. This Court explained that under *Whiteley*, the admissibility of evidence gained during an investigatory stop turns "on whether the officers who *issued* the flyer possessed [reasonable suspicion]," not "whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance." *Id.* at 231.

Lower courts have consistently applied *Whiteley* and *Hensley* to situations where one officer directs another to make an arrest or investigatory stop. The focus of such inquiries is whether the officer who issued the directive had information sufficient to justify it. See, *e.g.*, *United States* v. *McCarthy*, 77 F.3d 522, 533 (1st Cir. 1996); *Commonwealth* v. *Kenney*, 297 A.2d 794, 796 (Pa. 1972). Courts have sharply divided, however, about how *Whiteley* and *Hensley* apply in the absence of communication between officers.

2. In September 2011, police officer Joseph McCook conducted surveillance of suspected drug activity along a block in Philadelphia's Fairhill neighborhood. App., *infra*, 2a. McCook saw a confidential informant hand money to petitioner, Alwasi Yong. *Ibid.* Petitioner handed the money to another man, who went inside a nearby house, returned with a small object (later determined to be marijuana), and handed it to the informant. *Ibid.* Police returned and conducted surveillance again the next day. Officer McCook did

not join them, and no officers saw petitioner there that day. *Id.* at 3a. McCook returned for the third day of surveillance, during which an undercover officer purchased an item later confirmed to be marijuana. *Ibid.* Although another officer saw petitioner in the area, petitioner did not take part in the transaction. *Ibid.*

Officers finished their surveillance around 1:15 pm on the third day. App., *infra*, 3a-4a. McCook then "met up with the other officers to get ready to execute [and] to brief them on the execution of the search warrant" issued for the house. *Id.* at 4a. The suppression record contains no testimony or other evidence about what McCook said to the other officers at this briefing, or which officers were present. Ten minutes later, at approximately 1:25 pm, officers returned to the house to execute the search warrant. *Ibid.*

A group of "approximately six to eight" officers entered the house, with McCook toward the rear. App., *infra*, 4a. Officer Gerald Gibson entered the living room area, where he found petitioner. *Ibid.* Just as McCook was entering the living room, Gibson arrested and handcuffed petitioner. *Ibid.*; see also *id.* at 67a, 72a-73a (suppression hearing). Gibson searched petitioner and found a .38 caliber revolver in his waistband. *Id.* at 4a.

3. Petitioner moved to suppress the evidence collected from Gibson's search, arguing that no officer on the scene had probable cause to search him, including Gibson. App., *infra*, 5a-6a, 74a-78a. Petitioner argued that the fact that McCook witnessed him accepting money once (before immediately turning it over to someone else) two days earlier was insufficient to raise concern that Yong could be armed or dangerous. *Id.* at

74a-75a. Petitioner also noted that no officer had testified to seeing a bulge or anything else to raise suspicion that petitioner might be armed. *Ibid.* Moreover, petitioner argued that Gibson was not present during any of the surveillance that could have suggested petitioner's involvement with *any* criminal activity, *id.* at 78a, and there was no evidence anyone had communicated such information to Gibson, *id.* at 5a-6a.

The trial court denied petitioner's motion to suppress. App., *infra*, 79a-80a. The court acknowledged that the Commonwealth had not actually introduced the warrant into evidence. Nonetheless, the court "assume[d] that [the warrant] noted that there were people who were involved on [the three surveillance days] [and that petitioner was] there on [the first and third days]." *Id.* at 76a. The court then held that the search warrant, which was issued based on McCook's surveillance, established probable cause for *McCook* to search petitioner incident to its execution. *Id.* at 79a. The trial court further held that "the knowledge of one [officer] is imputed to all on that scene that day, all the ones who are executing the search warrant." *Id.* at 76a. The fact that Gibson was not present during the surveillance was irrelevant, in the trial court's view, because "what is in the mind of the [officer who observed the earlier transaction involving petitioner] is imputed to that of all those who served the warrant." *Id.* at 79a.

A jury convicted petitioner of carrying a firearm without a license and conspiracy to commit possession of a controlled substance with intent to distribute. In a separate proceeding, the trial court found petitioner guilty of persons not to possess a firearm. Petitioner

was sentenced to an aggregate term of 5-10 years' imprisonment. App., *infra*, 7a & n.9.

4. The Superior Court unanimously reversed. App., *infra*, 36a-60a. As relevant here, and in a lengthy opinion written by then-Judge David Wecht, the court held that Gibson's search violated the Fourth Amendment and the resulting evidence should have been suppressed. *Id.* at 36a; see also *id.* at 40a-41a (Yong argued on appeal that arresting officer Gibson lacked probable cause or reasonable suspicion, but did not dispute that McCook had probable cause). Looking only to the evidence introduced during the suppression hearing, as state law requires, see *id.* at 42a (citing *In re L.J.*, 79 A.3d 1073, 1085 (Pa. 2013)), the court concluded that:

> there is nothing in the suppression record to suggest that: (1) Officer McCook ordered or directed Officer Gibson to arrest [petitioner]; or (2) Officer Gibson received information justifying [petitioner]'s arrest; or (3) Officer Gibson received information, which, coupled with facts that he personally observed, provided probable cause to arrest [petitioner].

Id. at 48a. The Superior Court emphasized the absence of communication between McCook and Gibson: "Officer McCook did not testify that he informed Officer Gibson of [petitioner]'s role in the narcotics transaction on [the first day of surveillance], nor did Officer McCook testify that he instructed Officer Gibson to arrest and/or search [petitioner]." *Id.* at 39a. For that reason, the court concluded that Gibson, "acting of his

own accord," made a warrantless arrest that was not supported by probable cause. *Id.* at 48a.[1]

The court concluded that *Whiteley* and its progeny did not validate the search. When an officer "instructs or requests another officer to make an arrest," the court reasoned, the arresting officer "shares in" the other officer's knowledge. App., *infra*, 46a. The court declined to "[e]xtend[]" the collective knowledge doctrine in the "absence of a directive or instruction to arrest issued by an officer" who possessed probable cause. Doing so, the court concluded, would ill serve the legitimate law enforcement interests underlying the collective knowledge doctrine—namely, enabling officers in different jurisdictions to rely on information provided by other officers to make arrests. *Id.* at 50a-51a.

Judge Anne Lazarus filed a concurring opinion to emphasize that, because no officer requested or authorized Gibson to arrest petitioner, the collective knowledge doctrine was wholly inapplicable. App., *infra*, 59a-60a. Finding nothing in the record to suggest that Gibson himself had probable cause, Judge Lazarus agreed that the evidence should have been suppressed. *Id.* at 60a.

5. The Supreme Court of Pennsylvania granted discretionary review and reversed by a four-to-two

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[1] The Superior Court noted, but did not find, that testimony presented for the first time at trial might have indicated that McCook communicated with Gibson regarding petitioner. But the Superior Court emphasized that evidence was not relevant to the determination because, as a matter of Pennsylvania law, its "scope of review in suppression matters is limited to the suppression hearing record, and excludes any evidence elicited at trial." App., *infra*, 54a-55a (citing *In re L.J.*, 79 A.3d at 1085).

margin.[2] The majority began by noting the "circuit split[] in [the] adoption" of the collective knowledge doctrine outside the narrow context of one officer directing another to make an arrest. App., *infra*, 21a. The court recognized widespread disagreement about

> whether the knowledge of a single officer with probable cause may be imputed to another officer where there is undisputed evidence that they were acting as a team, but there is no evidence the knowledge-holding officer gave a command to the officer who lacked probable cause or conveyed the information which gave rise to probable cause.

Id. at 24a-25a. The majority recognized that "under any approach that permits aggregation of unspoken information * * *, there remain serious concerns for protecting citizens from unconstitutional intrusions." *Id.* at 25a. Such a rule, the majority acknowledged, "would create an incentive for officers to conduct searches and seizures they believe are likely illegal" by immunizing searches even when an officer "know[s] that she lacks cause" because of the happenstance that a court later concludes that "her fellow officers h[e]ld enough uncommunicated information to justify the search." *Id.* at 26a-27a (quoting *United States* v. *Massenburg*, 654 F.3d 480, 494 (4th Cir. 2011)).

The majority nevertheless upheld the search. While conceding that "the arresting officer d[id] not have the requisite knowledge," App., *infra*, 30a, the

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[2] Justice Wecht, who authored the Superior Court opinion directing suppression, joined the Supreme Court of Pennsylvania in 2016. See Unified Judicial System of Pennsylvania, "Justice David N. Wecht," https://goo.gl/kzMGvS. He recused himself from that Court's consideration of this case.

majority found it sufficient that "Officer McCook had probable cause to arrest [petitioner]." *Id.* at 27a. According to the majority, "it would be hyper-technical to insist on bifurcating the knowledge of Officers McCook and Gibson * * * where the officers were working together and it is apparent the challenged conduct would have inevitably been undertaken if Officer Gibson had not acted too swiftly." *Id.* at 29a (citing *United States* v. *Ragsdale*, 470 F.2d 24, 30 (5th Cir. 1972)).

Justice Donohue, joined by Justice Todd, dissented. The dissent echoed the intermediate appellate court's concern that the majority's approach unjustifiably expanded an "exception to the traditional requirement that the arresting officer have probable cause to arrest an individual." App., *infra*, 31a. The dissent found this expansion particularly troubling in a situation (as here) involving "no communication whatsoever" (*id.* at 34a) and which "serves none of the legitimate law enforcement purposes" behind the doctrine, *id.* at 33a (quoting *Hensley*, 469 U.S. at 231). The dissent emphasized that the decision "threatens citizens" with the very "unconstitutional intrusions" the majority opinion warned about, because under it, "an arrest made by an officer without the requisite knowledge passes constitutional muster simply because * * * a hindsight evaluation reveals that [an] officer with knowledge was in some respects 'available' to direct" the arrest or search. *Id.* at 33a-34a. Because "[t]he exception announced by the Majority could swallow probable cause requirements," the dissenters "would [have] affirm[ed] on the basis of the rationale expressed in the opinion authored by then-judge, now-Justice Wecht." *Id.* at 34a-35a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Entrenched Circuit Split

In holding that knowledge can be imputed from one officer to an arresting officer who concededly "does not have the requisite knowledge and was not directed to so act," the Supreme Court of Pennsylvania deepened an acknowledged split among the federal circuits and state high courts. App., *infra*, 30a. Indeed, that court expressly recognized that disagreement and confusion about the issue "has led to circuit splits." *Id.* at 21a.

Courts and commentators alike have noted this division of authority. As the Tenth Circuit observed, some federal courts of appeals "have allowed the knowledge of officers working closely together on a scene to be mutually imputed without requiring proof of actual communication," while others "reject the idea of imputing knowledge, even among officers working closely together." *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). Similarly, the Fourth Circuit recently noted its disagreement with other circuits on this issue, explaining that while "[s]ome of our sister courts have authorized 'horizontal' aggregation of uncommunicated information[,]" it would not adopt such an "expansive aggregation rule." *United States* v. *Massenburg*, 654 F.3d 480, 494 (4th Cir. 2011); accord *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994) ("[s]ome courts have imputed knowledge between officers in the absence of a directive where the officers were working closely together[,]" while others refuse to impute knowledge without "communication of either the information itself or a direction to arrest") (citing *United States* v. *O'Connell*, 841 F.2d 1408, 1418-1419

(8th Cir. 1998) and quoting *People* v. *Mitchell*, 585 N.Y.S.2d 759, 761 (N.Y. App. Div. 1992)).

Similarly, one leading academic article recognized a "circuit split over the expanded scope of the [collective knowledge] doctrine." Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. REV. 663, 678, 703 (2014). As that article reports, some circuits "aggregate information from several officers to establish probable cause or reasonable suspicion and impute that knowledge to the officer who effectuates the search or seizure, sometimes without any communication between the officers," while others allow imputation only in "cases where an officer with probable cause or reasonable suspicion * * * directs another officer to take action." *Id.* at 666. The article concludes that while "the Supreme Court has not settled the ongoing split," "its intervention is needed." *Id.* at 678.

A. At Least Four State Supreme Courts And Two Federal Circuits Allow Knowledge To Be Imputed Between Officers Even Absent Communication

The Supreme Court of Pennsylvania rejected a requirement of actual communication between officers, and held that an arresting officer need not have *any information* supporting a stop or search so long as a court later concludes that another officer on the scene—perhaps unknown to anyone else—possessed the requisite knowledge.

The court's approach is hardly unique. Louisiana's Supreme Court similarly holds that knowledge can be imputed between officers "even in the absence of any affirmative evidence the actual communication took

place." *State* v. *Weber*, 139 So.3d 519, 522 (La. 2014) (per curiam). In *Weber*, an officer without probable cause authorized a blood draw from an unconscious individual suspected of driving while intoxicated and causing an accident. *Id.* at 520-521. The searching officer's colleague knew that the defendant owned and drove the truck that caused the accident, and therefore had knowledge that would have furnished probable cause to support the blood draw. *Id.* at 521. But there was no evidence the officer with probable cause communicated that information to the searching officer. *Ibid.* Despite the lack of communication, the Louisiana Supreme Court upheld the search simply because the two officers were working as a team. *Id.* at 521-522.

Similarly, when an arresting officer lacks probable cause, courts in Arkansas and Kansas aggregate information "within law enforcement's knowledge" in determining whether an arrest is justified, rather than requiring that the arresting officer individually have probable cause. *State* v. *Bell*, 948 S.W.2d 557, 561 (Ark. 1997); *State* v. *Peterson*, 696 P.2d 387, 393 (Kan. 1985). In *Bell*, an arresting officer interviewed a suspect as part of a murder investigation. *Id.* at 559. Despite doubts about whether the arresting officer had probable cause, the Arkansas Supreme Court held that courts should look not only to the arresting officer's knowledge, but also to "[t]he essential facts that were available to law enforcement[.]" *Id.* at 561. The *Bell* decision prompted a sharp dissent arguing that the majority had departed from existing precedent, under which "an arrest made by an officer who personally lacks probable cause to arrest is invalid unless the ar-

resting officer is specifically instructed to make an arrest by officers who possess probable cause to arrest." *Id.* at 567 (Newbern, J., dissenting) (emphasis omitted).

Similarly, Kansas courts hold that "the knowledge of one officer is the knowledge of all in determining the probable cause for an arrest[.]" *Peterson*, 696 P.2d at 392-393. Kansas courts look to officers' aggregate knowledge, treating as irrelevant which officers had probable cause, and what information each officer specifically possessed. "The correct test[,]" in the Kansas Supreme Court's view, "is whether a warrant if sought could have been obtained by the arresting officer." *Id.* at 393. That court reasoned that an arresting officer would have relied on his colleagues' knowledge if he had sought to obtain a warrant. *Ibid.*

The Pennsylvania decision here drew heavily on *United States* v. *Ragsdale*, where the Fifth Circuit upheld a search despite the searching officer's lack of probable cause. The Fifth Circuit held that "it would be hypertechnical to insist on bifurcating the knowledge of the" searching officer and his colleague. 470 F.2d 24, 30 (5th Cir. 1972). Instead, the panel effectively "h[e]ld that, when a police officer who is a member of a team conducts a warrantless search * * * with no personal knowledge capable of generating probable cause, his search is reasonable if his partner did possess sufficient knowledge[,]" even when "that knowledge was never communicated to the searcher." *Id.* at 32 (Rives, J., specially concurring). In *Ragsdale*, Officers Jones and Mullens stopped Ragsdale for a speeding offense. *Id.* at 25 (Clark, J., for the panel). The officers asked Ragsdale to exit the vehicle, and Jones (but not Mullens) saw a pistol on the floor of the

car. *Id.* at 26. While walking Ragsdale back to the police cruiser, Jones passed Mullens, and whispered that there was a gun in the car. *Ibid.* Mullens concededly did not hear Jones's whisper. *Id.* at 26, 33. Officer Mullens nevertheless proceeded to search Ragsdale's car. *Id.* at 26.

The Fifth Circuit found it "wholly improbable" that Mullens heard Jones, and thus did "not base [its] holding in anywise on the supposition that Mullens may have heard Jones'[s] whisper." 470 F.2d at 27. The Fifth Circuit also acknowledged that Mullens did not have probable cause "individually." *Ibid.* But the court upheld the search, reasoning that if Mullens had not acted, Officer Jones "would surely have commanded it," or would have conducted the search himself. *Id.* at 30. One member of the panel wrote separately, expressing concern that the Fifth Circuit's rule would allow warrantless searches without any communication from the officer possessing probable cause, creating an "unnecessary deviation from the exclusionary rule." *Id.* at 32 (Rives, J., specially concurring). Judge Rives explained that "[t]he mandate of the exclusionary rule is not directed to the collective intellect of an amorphous government entity, but to the individual searching officer." *Ibid.*

The Tenth Circuit takes a similar position, phrased in terms of a rebuttable presumption of communication. In that circuit, even without any evidence of communication, courts will presume any officer who had probable cause communicated it to the searching or arresting officer. *United States* v. *Shareef*, 100 F.3d 1491, 1504 (10th Cir. 1996). On the facts of *Shareef*, the Tenth Circuit held its presumption to be rebutted, because "the district court [there] found that in fact the

information had not been shared." *Ibid.* The Tenth Circuit nonetheless concluded that communication is not a requirement. "Even in the absence of communication among officers," the Tenth Circuit indicated willingness to uphold a search where "officers are working closely together at the scene[.]" *Ibid.*

B. Still Other Courts Require Only "Some" Unspecified "Degree Of Communication" Between Officers

Contributing to the disarray in the lower courts, several jurisdictions permit imputation of knowledge so long as there is some minimal degree of communication. In *United States* v. *Gillette*, 245 F.3d 1032 (8th Cir. 2001), for example, two officers went to a house where drug activity was allegedly occurring. *Id.* at 1033. The officers obtained consent to enter the house, where they saw items associated with methamphetamine manufacturing. *Ibid.* One officer then asked for consent to search the defendant's truck. *Ibid.* The homeowners did not own the truck, but they consented without disclaiming ownership. *Ibid.* A third officer arrived on the scene and, without conferring with the others, immediately searched the defendant's truck and found components of a methamphetamine lab. *Id.* at 1033-1034. There was no evidence that the homeowners' consent to search the truck had been communicated to the searching officer. *Id.* at 1034. Despite the absence of any evidence that the key information had been transmitted to the searching officer, the Eighth Circuit upheld the search because there was "some degree of communication between" the officers. *Ibid.* In the Eighth Circuit's view, "[t]he requirement that there be a degree of communication serves to distinguish between officers functioning as a 'search

team' and officers acting as independent actors who merely happen to be investigating the same subject." *Ibid.* (citations omitted).

As a practical matter, courts requiring "some degree of communication" do not explain how much communication is required, and have upheld searches based on effectively de minimis communication of facts unrelated to probable cause. See Fettig, 82 UMKC L. REV. at 677. Such courts "include[] no requirement regarding the *content* of the communication[.]" *United States* v. *Ramirez*, 473 F.3d 1026, 1037 (9th Cir. 2007). While some courts do not explain the reason for requiring 'some degree of communication,' see, *e.g.*, *United States* v. *Lee*, 962 F.2d 430, 435-436 (5th Cir. 1992), others make clear that the standard is undemanding. As the Eighth and Ninth Circuits, as well as the high courts in Utah and Louisiana have explained, a degree of communication simply shows that officers were working together as a team, which, in their view, is sufficient to warrant imputation. *Ramirez*, 473 F.3d at 1032-1033 (9th Cir.); *Gillette*, 245 F.3d at 1034 (8th Cir.); *Weber*, 139 So.3d at 522 (La.); *Utah* v. *Talbot*, 246 P.3d 112, 117 (Ut. 2010). Thus, "[t]he communication requirement adopted by the Ninth and other circuits is minimal in every sense of the word." Fettig, 82 UMKC L. REV. at 677. As a result, the "some degree of communication" test produces the same practical outcome as courts that do not require communication at all.

C. At Least Two Federal Circuits And Several State High Courts Refuse To Allow Imputation Between Officers Absent Communication Of That Information Or An Instruction To Act

In sharp contrast, at least two federal circuits and several state high courts have rejected imputation of uncommunicated information in the specific context of officers working together in close proximity. *E.g.*, *United States* v. *Massenburg*, 654 F.3d 480 (4th Cir. 2011); *United States* v. *Ellis*, 499 F.3d 686 (7th Cir. 2007); *Montes-Valeton* v. *State*, 216 So. 3d 475 (Fla. 2017); *State* v. *Cooley*, 457 A.2d 352 (Del. 1983); see also *People* v. *Mitchell*, 585 N.Y.S.2d 759 (N.Y. App. Div. 1992).

The Fourth Circuit holds that the Fourth Amendment forbids imputation of knowledge between officers at a scene absent communication of that information. See *Massenburg*, 654 F.3d at 493 ("[T]he collective-knowledge doctrine * * * does not permit us to aggregate bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions."). In *Massenburg*, the court reversed the district court's denial of a motion to suppress evidence obtained during a *Terry* frisk. *Id.* at 484-485, 496. Officers Gaines and Fries had stopped Massenburg and three other men in a high-crime area near where an anonymous tipster had reported hearing shots fired. *Id.* at 482-483. Fries conducted a consensual pat-down of one man while Gaines asked Massenburg if he would consent to a pat-down. *Id.* at 483. When Massenburg refused to consent but displayed "mild nervousness," Gaines frisked him. *Id.* at 483, 491. Before the frisk, the other officer (Fries)

had observed a small bulge in Massenburg's pocket but did not communicate that information to Gaines. *Id.* at 483.

The Fourth Circuit refused to impute Fries' knowledge of a bulge to Gaines, instead considering only what was known to the arresting officer when he conducted the frisk. The court explained that the collective knowledge doctrine developed in the context of police directives to arrest or stop a suspect to further the narrow and commonsensical goal of "minimiz[ing] the volume of information concerning suspects that must be transmitted to other jurisdictions [or officers] and enabl[ing] police . . . to act promptly in reliance on information from another jurisdiction [or officer]." *Id.* at 494 (quoting *United States* v. *Hensley*, 469 U.S. 221, 231 (1985)). Allowing imputation of uncommunicated information between officers at a scene was a "far more expansive rule" that would "serve[] no such ends." *Id.* at 493, 494.

Though the court had "studied [its] sister circuits' cases adopting [such] an aggregation rule, [it could] find no convincing defense of it." *Massenburg*, 654 F.3d at 494-495. Noting that "the exclusionary rule's 'sole purpose * * * is to deter future Fourth Amendment violations,'" *id.* at 494 (quoting *Davis* v. *United States*, 564 U.S. 229, 236-237 (2011)), the Fourth Circuit concluded that deterrence requires "look[ing] to each individual officer's decision-making process as she considers executing a search or effecting a seizure." *Id.* at 495. The more expansive rule adopted by other courts, the Fourth Circuit concluded, "would perversely reward officers acting in *bad faith*" and "would only create an incentive for officers to conduct searches and seizures they believe are likely illegal,"

making such a rule "directly contrary to the purposes of longstanding Fourth Amendment jurisprudence." *Id.* at 494 (emphasis in original). The Fourth Circuit also noted the troubling implications of allowing imputation absent communication: "If the Fourth Amendment is satisfied when, unbeknownst to the officer conducting a search, a fellow officer on the scene has the information necessary to justify it, why should the analysis change when the other officer is not on the scene?" *Id.* at 495.

The Seventh Circuit has likewise refused to impute uncommunicated information among officers working together at a scene. See *United States* v. *Ellis*, 499 F.3d 686, 690 (7th Cir. 2007) ("[T]he error in the district court was imputing the knowledge of the officers at the front door to [the arresting officer] at the side door."). In *Ellis*, the court considered officer Lopez's warrantless entry into the side door of a home tied to suspected drug activity, at a time when two other officers (McNeil and Chu) were conducting a "knock and talk" at the front door. *Id.* 687-688. Lopez stood at the side door, and could hear McNeil and Chu talking but could not understand what was being said. *Id.* at 690. The defendant spoke to McNeil and Chu through the front door and denied them entry in a manner those officers deemed suspicious. Lopez, at the side door, heard someone running up and down the stairs inside the home. *Id.* at 688. Lopez then decided to break down the side door. *Ibid.*

Even though Chu came to help Lopez break down the door, the Seventh Circuit refused to impute Chu and McNeil's knowledge to Lopez, since "[t]here [was] no evidence that [they] communicated [their knowledge] to Lopez before Lopez entered the home."

Id. at 690. The Seventh Circuit instead limited the Fourth Amendment analysis to what Lopez himself knew when he decided to break down the side door. *Ibid.* The court held that Lopez did not have probable cause, nor was the entry justified by exigent circumstances. Therefore, the court reversed the denial of the suppression motion. *Id.* at 692. The Seventh Circuit acknowledged this Court's precedents allowing officers to rely on the personal knowledge of other officers, but concluded that these cases were limited to situations where "an officer who is aware of such facts relay[s] them to the other officer." *Id.* at 690 (citing *United States* v. *Hensley*, 469 U.S. 221, 232-233 (1985)).

Several state high courts have also held that the Fourth Amendment forbids imputation of uncommunicated knowledge between officers at a scene. In *Montes-Valeton* v. *State*, the Florida Supreme Court held that "the fellow officer rule does not allow an officer to assume probable cause for an arrest or a search and seizure from uncommunicated information known solely by other officers." 216 So. 3d 475, 479 (Fla. 2017). That case involved an officer (Tejera) who arrived at the scene of a car accident and found the driver was disoriented and had alcohol on his breath. *Id.* at 477. Tejera "delegated the role of lead traffic crash investigator to Trooper Molina and thereby engaged in general communications with" Molina, but there was no evidence Tejera communicated his knowledge about the driver's intoxication to Molina. *Ibid.* Molina then ordered the driver's blood drawn. The Florida Supreme Court held that because Molina personally lacked probable cause (because he did not smell alcohol on the driver's breath or observe intoxication), the blood draw was invalid. *Id.* at 477, 479.

The court specifically rejected the government's argument that "general communications" between Tejera and Molina were sufficient to impute knowledge between the officers, holding that imputation requires communication of the presence of probable cause or specific facts supporting probable cause. *Id.* at 479.

The Supreme Court of Delaware similarly refuses to impute uncommunicated knowledge between officers at a scene. In *Cooley*, one officer (Shamany) arrived at the scene of a car accident and found the defendant incoherent and observed alcohol on his breath. 457 A.2d at 353. Another officer (McDerby) later arrived and directed a third officer (Thompson) to arrest Cooley. *Ibid.* The Court held that "[i]n light of the absence of communication between Shamany and McDerby, it follows that McDerby acted without probable cause[.]" *Id.* at 356. While under *Whiteley*, Thompson could permissibly "act in the belief that [McDerby's] judgment" was correct, McDerby himself still needed to have probable cause for the arrest to be valid. *Id.* at 355 (citing *Whiteley* v. *Warden*, 401 U.S. 560 (1971)). The court squarely rejected the government's suggestion that "what all of the officers on the scene knew as a group was enough to establish probable cause." *Ibid.* Because there was "no finding that Shamany directed McDerby to order Cooley's arrest" or otherwise communicated his knowledge, the Court held that "McDerby acted without probable cause in ordering Cooley's arrest." *Id.* at 355, 356. The Court affirmed the suppression of evidence obtained as a result. *Id.* at 357.

Likewise, New York courts have disallowed imputation of uncommunicated knowledge. In *Mitchell*, two

officers (Kokeas and Higgins) approached the defendant and saw him toss something to the ground. One (Kokeas) recovered the object and recognized that it contained drugs; the other (Higgins) pursued and arrested the defendant. The court held that one officer's discovery of drugs could not be imputed to the other: "[I]nasmuch as Higgins not only testified that he did not know what Kokeas had picked up from the ground, but never testified that he relied on, or even heard, Kokeas' request that defendant stop, Kokeas' knowledge of what defendant had discarded cannot be imputed to Higgins." 585 N.Y.S.2d at 760-761. The court thus held that Higgins lacked reasonable suspicion and that evidence derived from the defendant's arrest must be suppressed. *Id.* at 761-762. Numerous other courts take the same approach.[3] *E.g.*, *State* v. *Iven*, 335 P.3d 264, 269 (Okla. 2014) ("[the] collective knowledge doctrine requires a court to determine whether the individual officers communicated the information that they possessed individually"); *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994) ("[I]nformation held by other officers but not communicated to the acting officer is not imputed to the acting officer."); *Haywood* v. *United States*, 584 A.2d 552, 557 (D.C. 1990) ("[W]here probable cause for arrest is predicated in part on the personal observations of the arresting officer, the court may not rely on facts which were available to other officers at the scene unless that information was *communicated to the arresting officer*.").

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[3] Other jurisdictions frequently cite *Mitchell* as a leading statement of the principles prohibiting imputation of uncommunicated information. *E.g.*, *State* v. *Miller*, 510 N.W.2d 638, 643 (N.D. 1994); *State* v. *Tywayne H.*, 933 P.2d 251, 257 (N.M. Ct. App. 1997).

II. The Decision Below Is Wrong

Under a faithful application of this Court's precedent, the Fourth Amendment prohibits imputing knowledge absent communication between officers. That conclusion follows from this Court's decisions, the broader purposes of the Fourth Amendment and the exclusionary rule, and the perverse incentives a contrary rule would create for police officers.

The general rule governing probable cause is clear and longstanding: "Whether probable cause exists depends upon the reasonable conclusion to be drawn *from the facts known to the arresting officer at the time of the arrest*." *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) (emphasis added) (citing *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003)). Accord *Adams* v. *Williams*, 407 U.S. 143, 148 (1972). Similarly, "[r]easonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law." *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014).

In dicta, *Whiteley* recognized a limited exception to this rule that allowed an arresting officer to assume that officers "requesting aid" in arresting a suspect "offered the magistrate the information requisite to support an independent judicial assessment of probable cause." 401 U.S. at 568. At the same time, however, this Court emphasized that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Ibid.* And because the requesting officers in *Whiteley* in fact lacked probable cause, this Court had no occasion to authorize the imputation of information. *Ibid.*

Hensley subsequently held that an officer could rely on a flyer issued by another police department requesting that a suspect be stopped. "[I]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on the flyer [by another officer] justifies a stop." 469 U.S. at 232. This approach, the Court explained, would "minimiz[e] the volume of information concerning suspects that must be transmitted to other jurisdictions and enabl[e] police in one jurisdiction to act promptly in reliance on information from another jurisdiction." *Id.* at 231.[1]

In the 30 years since *Hensley*, however, this Court has never applied the collective knowledge doctrine beyond the narrow contours of that case. And the courts that have expanded the doctrine have offered "no convincing defense of [its expansion]." *Massenburg*, 654

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[1] In dicta, this Court has stated in a footnote that "[w]here law enforcement authorities are cooperating in an investigation * * * the knowledge of one is presumed shared by all." *Illinois* v. *Andreas*, 463 U.S. 765, 771-772 n.5 (1983) (citations omitted). But in *Andreas*, "[t]here would be no question that Drug Enforcement Agents, posing as delivery men, knew that the container they brought to respondent's residence (a container which they had previously lawfully entered at the airport) contained a controlled substance." *Haywood* v. *United States*, 584 A.2d 552, 557 n.8 (D.C. 1990). Indeed, the searching officer there likely had personal knowledge that the container held drugs, because during a previous lawful search of the container, he conducted a field test and identified the substance as marijuana. *Andreas*, 463 U.S. at 767. At minimum, the officer had "hearsay" "kn[o]w[ledge] of its contents." *Id.* at 768. In other words, in *Andreas*, "the 'presumption of knowledge' * * * was so obvious as to be a fact," well within the bounds allowed by *Carroll* and *Whiteley*. *Haywood*, 584 A.2d at 557 n.8. This Court in *Hensley* did not cite or discuss *Andreas*.

F.3d at 495. *Hensley* and *Whiteley* are best understood as a limited exception to the general rule requiring that the arresting officer have personal knowledge of the facts supporting a search or seizure.

Nothing in *Whiteley* or *Hensley* supports expanding the collective knowledge doctrine in the manner the Pennsylvania court contemplated here, which allows a broad range of after-the-fact imputation, absent communication. *Whiteley*'s single paragraph addressing collective knowledge spoke only to situations (unlike here) where one officer is "called upon to aid" in an arrest. 401 U.S. at 568.

Hensley's rationale of facilitating interdepartmental cooperation is inapplicable where two officers are on a single team or physically present at the same scene. In those situations, there is no inherent difficulty in communicating. And even if there were, *Whiteley* itself contemplates communication as a critical predicate for imputation: there must be at least a "call[] * * * to aid" in an arrest, 401 U.S. at 568, or some equivalent communication. To allow imputation without *any* communication, as the Pennsylvania court did here, is a radical expansion of this Court's precedent, far afield from the narrow applications of collective knowledge at issue in *Whiteley* and *Hensley*.

Interpreting the collective knowledge doctrine to require a communication also properly serves the Fourth Amendment's purpose of deterring police misconduct. This Court has "said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis* v. *United States*, 564 U.S. 229, 246 (2011). Where an officer conducts an arrest while knowing that he lacks knowledge

amounting to probable cause, and is *not* relying on an order or information communicated by another officer, that is culpable misconduct. See *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963) (admitting evidence obtained by officer "act[ing] in his own, unchecked discretion upon information too vague * * * to [constitute] probable cause" would be contrary to "fundamental [Fourth Amendment] policy"); *Byrd* v. *United States*, No. 16-1371 (May 14, 2018), slip op. 6 (this Court "view[s] with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects'" (quoting *Arizona* v. *Gant*, 556 U.S. 332, 345 (2009)). An arrest made without probable cause is also "sufficiently deliberate that exclusion can meaningfully deter it." *Herring* v. *United States*, 555 U.S. 135, 144 (2009). For these reasons, this Court has long suppressed evidence obtained in searches incident to such arrests. *E.g.*, *Beck* v. *Ohio*, 379 U.S. 89 (1964). These reasons dictate the same result in cases where (as here) probable cause existed but the arresting officer did not know this and, as such, "should have believed [the arrest was] illegal." *Massenburg*, 654 F.3d at 493.[5]

Allowing imputation in the limited situations discussed in *Whiteley* and *Hensley* likewise accords with

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[5] The Pennsylvania court's reliance on what Officer McCook "would have inevitably and imminently ordered." App., *infra*, 30a, bears superficial resemblance to the doctrine of inevitable discovery. See *Nix* v. *Williams*, 467 U.S. 431, 441 (1984). But the two are entirely distinct. The inevitable discovery doctrine is an exception to the exclusionary rule where evidence was collected in violation of the Fourth Amendment. The Pennsylvania decision, by contrast, bears on the predicate question of whether a search was lawful.

Fourth Amendment purposes because it would serve no deterrent function to suppress evidence in those situations.[6] If an officer relies on an order or information communicated by another officer to arrest a suspect, there is no deliberate, culpable misconduct because such reliance is objectively reasonable. Cf. *Herring*, 555 U.S. at 146 (exclusion is not justified where police conduct is "objectively reasonable").

Further, a categorical rule against imputing uncommunicated knowledge advances the Fourth Amendment's goal of providing clear guidance to officers and citizens. See *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."); *New York* v. *Belton*, 453 U.S. 454, 459-460 (1981) (abrogated on other grounds by *Gant*, 556 U.S. 332) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."). It is much simpler for individual officers to consider only what they know or have been told, without speculating about what others might have known. From the perspective of law enforcement agencies, a simpler rule is easier to teach. And for the public, a categorical rule rejecting imputation of uncommunicated knowledge between officers

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[6] *Whiteley* assumed that the officers requesting aid would possess probable cause. 401 U.S. at 568. Requesting aid to arrest a suspect without probable cause is itself deterrable police misconduct, so *Whiteley*'s holding requiring exclusion is also consistent with Fourth Amendment purposes.

demystifies the Fourth Amendment by creating clear, easily understandable ground rules.

By contrast, the decision below frustrates the underlying purposes of the Fourth Amendment and exclusionary rule by *encouraging*, rather than deterring, police misconduct. The requirement that a court limit its analysis to the facts known to the arresting officer is necessary because "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry* v. *Ohio*, 392 U.S. 1, 22 (1968). "Where officers working closely together have *not communicated* pertinent information, the acting officer weighs the costs and benefits of performing the search in total ignorance of the existence of that information—it is not known to her, so it cannot enter into the calculus." *Massenburg*, 654 F.3d at 495. As such, the rule adopted here invites officers to arrest a suspect in bad faith without probable cause, in the hope that another officer's uncommunicated knowledge might retroactively cure their misconduct. See *id.* at 494 ("[An] aggregation rule would perversely reward officers acting in bad faith according to the result of an after-the-fact aggregation inquiry * * *.") (emphasis added). It would shield from Fourth Amendment scrutiny those circumstances where "no officer believed any other officer had pertinent information," and thus where "the acting officer undertook a search or seizure she should have believed to be illegal." *Id.* at 493.

III. This Case Presents an Ideal Vehicle for Resolving an Issue of Unquestionable Importance

1. The question presented here is of exceptional importance to the administration of criminal justice nationwide. In imputing knowledge between police officers even in the absence of communication, the rule adopted by the Supreme Court of Pennsylvania encourages officers to make arrests *known to be unlawful at the time*, on the hope that facts might exist that could later redeem their unconstitutional action. The issue merits this Court's attention for numerous reasons.

First, the issue arises with great frequency. Federal and state courts have addressed the "collective knowledge doctrine" (or its cognates) in more than a thousand decisions over the past decade alone. Cases explicitly addressing Fourth Amendment claims and the exclusionary rule, moreover, represent only a tiny fraction of actual interactions between police and criminal suspects, where police conduct is governed and shaped by Fourth Amendment doctrines. Cf. *Elkins* v. *United States*, 364 U.S. 206, 217-218 (1960) (noting that cases applying the exclusionary rule are minority of searches by police, and that the exclusionary rule is the only means of protecting against unlawful but fruitless searches which do not generally result in litigation).

Further, for the exclusionary rule to function as a meaningful deterrent, police officers must be able to determine at the time they choose to perform a search or seizure whether their action is lawful. Where a po-

lice officer would otherwise gain nothing from searching without cause, Pennsylvania's rule introduces the possibility that a baseless search might later be validated. This possibility encourages searching first and justifying later—the very incentive the exclusionary rule is meant to eliminate. See *Elkins*, 364 U.S. at 217 ("[The exclusionary rule's] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."). Worse still, this incentive may be disproportionately strong when suspicions against a particular suspect are weak: when the suppression of evidence is not likely to hamper an existing investigation, police stand only to gain by taking their chances. It also risks immunizing *all* police conduct. If the reasonableness of police action were gauged not just by facts known to the officers who acted, but by all information known to everyone present, it would tend to excuse all police action.

2. This case presents an ideal vehicle to resolve these issues. The imputation issue is the only question presented, and it is dispositive. The decision of the Supreme Court of Pennsylvania rests wholly on federal constitutional law, and there is no clear statement of an adequate and independent state-law ground to support the judgment below. The issue was properly preserved at every stage. The Superior Court and Supreme Court's opinions discuss the issue fully, and the latter has a well-developed dissent. Finally, the factual record is concise and (for present purposes) undisputed, and crisply tees up the legal issue. Both the Superior Court and the Supreme Court agree that while Officer McCook would have had probable cause to arrest Mr. Yong, Officer Gibson did not, and that

there is no relevant evidence that Officer McCook communicated his knowledge to Officer Gibson or ordered Gibson to arrest petitioner. App., *infra*, 2a, 24a-25a, 42a, 48a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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