

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ANTONEZ TERRIL JOHNSON**  
**Petitioner**

**v.**

**UNITED STATES OF AMERICA**  
**Respondent**

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**PETITION FOR A WRIT OF CERTIORARI**

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**APPENDIX**

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## **APPENDIX A**

2018 WL 4846324

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Antonez Terril JOHNSON, Defendant-Appellant.

No. 17-13726

|

(October 4, 2018)

#### Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:16-cr-00224-WS-MU-1

Before WILLIAM PRYOR, MARTIN, Circuit Judges, and VRATIL,\* District Judge.

#### Opinion

VRATIL, District Judge:

\*1 Defendant appeals his conviction for possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). Defendant was a pedestrian walking near the middle of a road when a police officer stopped and questioned him. During the stop, the officer searched defendant's backpack and found a firearm. Defendant filed a motion to suppress the firearm on the ground that before searching the backpack, the officer unlawfully extended the scope of the pedestrian stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968). The District Court overruled defendant's motion to suppress, and he appeals. For reasons stated below, we affirm.

#### I. BACKGROUND

Johnny Duval, a police officer in Mobile, Alabama, testified at the hearing on defendant's motion to suppress. Officer Duval was the only witness, and he testified substantially as follows:

At approximately 1:00 a.m. on November 2, 2015, Officer Duval responded to a call from a nursing home about a suspicious person looking through windows in parked cars. Defendant-Appellant Antonez Terril Johnson's Appellate Appendix filed November 14, 2017, Tab 40, Transcript Of Evidentiary Hearing at 5-6, 13. The caller described the suspicious person as a black male. Id. at 13. While en route to the nursing home, Officer Duval saw defendant (a black male) and a female companion walking on Springdale Boulevard.<sup>1</sup> Id. at 6-7. Officer Duval then watched as a car had to swerve to avoid one of the two individuals in the street. Id. at 7, 26.

Officer Duval activated his emergency lights and stopped his car in the center turn lane, near defendant and his companion. Id. at 7-8. Officer Duval testified that he stopped them because they posed a "safety risk." Id. at 14. For safety reasons, Officer Duval had defendant and his companion step to the back of the police car. Id. at 8. They did so. Officer Duval asked them where they had been. The individuals stated that they were walking from a nearby Walmart, which was open 24 hours per day, to their motel room. Id. at 17. Although they did not have Walmart bags, Officer Duval acknowledged that their purchases could have been in their pockets or in the backpack which defendant was wearing.

In response to questioning, defendant and his companion gave Officer Duval their names and dates of birth. Id. at 21-22. Officer Duval handcuffed them until he could verify their identities and a backup officer arrived. Id. at 8, 21-22. When asked why he handcuffed them, Officer Duval testified, "I put them in handcuffs for my safety and their safety. It's, you know, two against one. The numbers are against me." Id. at 8.

After Officer Duval handcuffed them, he asked defendant, “Do you have a problem with me searching you [before you go] in the back of my police car?” *Id.* at 23. Defendant responded, “[N]o, I do not.” *Id.* Officer Duval then searched defendant. *Id.* Officer Duval testified that he did so to ensure that defendant did not put anything in the back of his patrol car. *Id.* As Officer Duval searched defendant, he asked him, “[I]s there anything in this bag that I need to be concerned about, anything illegal?” *Id.* Defendant replied, “[N]o. My homeboy told me to get it, and you can search it.” *Id.* at 24.

\*2 After a second officer arrived, defendant and his companion remained handcuffed. *Id.* at 21-22. The officers locked them inside the back of separate patrol cars, and they were not free to leave. *Id.* Officer Duval searched defendant’s backpack and found a .357 revolver and two unfired shell casings. *Id.* at 9, 24. The warrant check revealed that defendant had no warrants. *Id.* at 22-23, 25. A check of the serial number revealed, however, that the gun was stolen. Officer Duval contacted his supervisor, who told him to take defendant to jail. *Id.* at 25.

The District Court found that Officer Duval’s unrefuted testimony was credible and accepted it as true. *Id.* at 35. The District Court ruled that based on Officer Duval’s observations, he had probable cause to believe that defendant had violated Alabama’s disorderly conduct statute, [Ala. Code § 13A-11-7\(a\)\(5\) \(1975\)](#), and that because he had probable cause to arrest, he had not only the right but the obligation to handcuff defendant for safety. *Id.* at 35-36. Finally, the District Court concluded that defendant had voluntarily consented to the search of his backpack. *Id.*

## II. STANDARD OF REVIEW

Rulings on motions to suppress involve mixed questions of fact and law. [United States v. Bervaldi](#), 226 F.3d 1256, 1262 (11th Cir. 2000). We review the district court’s factual findings for clear error and its application of the law to the facts *de novo*. *Id.* All facts are construed in the light most favorable to the government, as the prevailing party below. *Id.*

## III. DISCUSSION

The parties present two issues on appeal. First, the parties dispute whether the search of defendant’s backpack can be upheld as a search incident to arrest. Second, the parties dispute whether the search can be upheld on the alternative ground that after Officer Duval handcuffed defendant as part of a [Terry](#) stop, defendant consented to the search of his backpack. For reasons stated below, we need not directly address these two issues. Instead, we find that the search of defendant’s backpack must be upheld because (1) when Officer Duval initially stopped defendant, he had probable cause to believe that defendant had violated Alabama’s disorderly conduct statute and (2) after Officer Duval arrested defendant by handcuffing him, defendant consented to the search of his backpack.

### A. Probable Cause To Arrest

The District Court found that based on Officer Duval’s observations, he had probable cause to arrest defendant for disorderly conduct. Under Alabama law, “[a] person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he or she ... [o]bstructs vehicular or pedestrian traffic, or a transportation facility.” [Ala. Code § 13A-11-7\(a\)\(5\)](#). Defendant argues that absent further information, Officer Duval could not determine that defendant or his companion had the intent to cause public inconvenience, annoyance or alarm.

This argument is easily rejected. Intent to cause public inconvenience, annoyance or alarm is not a necessary element of Alabama’s disorderly conduct statute: reckless creation of such a risk is sufficient to sustain a conviction. Officer Duval described Springdale Boulevard as a five-lane road with a number of businesses including a 24-hour Walmart, hotels and restaurants; he noted that a car had to swerve to avoid defendant and his companion; and he saw defendant and his companion walking in both the turn lane and one lane of traffic. Viewing these facts in a light most favorable to the government, the District Court did not err in finding that Officer Duval had probable cause to believe that (at a minimum), defendant and his companion had violated the disorderly conduct statute by recklessly creating a risk of public inconvenience, annoyance or alarm.

## B. Search Of Defendant's Backpack

\*3 The Fourth Amendment of the United States Constitution protects persons and their houses, papers and effects against unreasonable searches and seizures. See [U.S. Const. amend. IV](#). We have defined three categories of police/citizen encounters: (1) voluntary exchanges which involve no coercion or detention; (2) investigatory detentions or [Terry](#) stops; and (3) full-scale arrests. [United States v. Perez](#), 443 F.3d 772, 777 (11th Cir. 2006); see [Terry v. Ohio](#), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The initial encounter between Officer Duval and defendant falls into the second category – an investigatory detention or [Terry](#) stop. Defendant does not challenge this initial encounter. Instead, he argues that Officer Duval exceeded the limited scope of a [Terry](#) stop when he handcuffed him and searched his backpack.

A stop constitutes a seizure for purposes of the Fourth Amendment “even though the purpose of the stop is limited and the resulting detention quite brief.” [Brendlin v. California](#), 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (quoting [Delaware v. Prouse](#), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) ). Under [Terry](#), in addition to being justified at its inception, defendant’s continued detention must be “reasonably related in scope to the circumstances which justified the interference in the first place.” [Terry](#), 392 U.S. at 20, 88 S.Ct. 1868; see [United States v. Hardy](#), 855 F.2d 753, 759 (11th Cir. 1988) ([Terry](#) stop not basis for full search that normally requires “probable cause, consent, or a valid arrest”). A detention that is so intrusive as to exceed the outer boundaries of an investigatory [Terry](#) stop may become a *de facto* arrest which must be supported by probable cause. [United States v. Dunn](#), 345 F.3d 1285, 1289-90 (11th Cir. 2003); see [Hayes v. Florida](#), 470 U.S. 811, 815-16, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (at some point in investigative process, police procedures can be so intrusive as to trigger full protection of Fourth and Fourteenth Amendments);

## Footnotes

\* Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

1 One was walking in the center turn lane while the other was walking in a lane of traffic. Springdale Boulevard is a four-lane road with a turn lane in the middle. Defendant and his companion were walking on a portion of the road which is near a service road off Interstate 65, near several stores, restaurants and hotels. Springdale Boulevard has no sidewalks.

[United States v. Diaz-Lizaraza](#), 981 F.2d 1216, 1221 (11th Cir. 1993) (character of seizure as arrest or [Terry](#) stop depends on nature and degree of intrusion, not on whether officer pronounces detainee “under arrest”) (citation omitted). If police have probable cause to arrest a suspect, however, [Terry](#) and the ordinary limits of investigatory detentions do not apply. See [Dunn](#), 345 F.3d at 1290 (if detention ripens into *de facto* arrest, [Terry](#)’s reasonable suspicion standard supplanted by probable cause requirement that attends making of arrest).

Here, we need not address the precise limits of when the investigatory stop of defendant became an arrest. See [id.](#) (unnecessary to engage in analysis whether detention permissible under [Terry](#) because even assuming police effected *de facto* arrest, officers had probable cause to arrest). For purposes of this appeal, we assume that putting defendant in handcuffs transformed the stop into an arrest which had to be supported by probable cause. As explained above, however, the District Court did not err in finding that before Officer Duval handcuffed defendant, he had probable cause to believe that defendant had violated Alabama’s disorderly conduct statute.<sup>2</sup> Therefore Officer Duval had authority to arrest and handcuff defendant.

\*4 Defendant argues that his unlawful detention tainted his consent to the search of his backpack, but he has not established that any unlawful detention preceded his consent. Furthermore, he presented no evidence or argument which suggested that his consent was coerced or involuntary. For these reasons, we affirm the District Court ruling that overruled defendant’s motion to suppress.

Defendant’s conviction is **AFFIRMED**.

## All Citations

--- Fed.Appx. ----, 2018 WL 4846324

2 An officer's state of mind as to the reason for an arrest is not ordinarily relevant to the probable cause inquiry. See [Devenpeck v. Alford](#), 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (subjective reason for making arrest need not be criminal offense as to which known facts provide probable cause); [Scott v. United States](#), 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) (fact that officer does not have state of mind hypothesized by reasons which provide legal justification for his action does not invalidate action taken if circumstances, viewed objectively, justify that action).

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## **APPENDIX B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA, \*  
Plaintiff, \* 16-cr-224-WS-MU-1  
\* April 13, 2017  
vs. \* Mobile, Alabama  
\* 2:03 p.m.  
ANTONEZ TERRIL JOHNSON, \*  
Defendant. \*  
\*\*\*\*\*

TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE WILLIAM H. STEELE  
UNITED STATES DISTRICT JUDGE

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COURTROOM DEPUTY: MS. MELANIE PAULK

COURT REPORTER: CHERYL K. POWELL, CCR, RPR, FCRR

24 Proceedings recorded by OFFICIAL COURT REPORTER, Qualified  
pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies  
25 and Procedures Vol. VI, Chapter III, D.2. Transcript  
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## PROCEEDINGS

(In open court. Defendant present.)

THE COURT: Good afternoon.

COURTROOM DEPUTY: Case set for evidentiary hearing,  
Criminal Action 16-224, United States of America versus  
Antonez Johnson.

What says the United States?

MS. O'BRIEN: United States is ready.

COURTROOM DEPUTY: What says the defendant?

MR. TIEMANN: Ready, Your Honor.

11 THE COURT: All right. Set today for suppression  
12 hearing.

I have received the briefs of the parties and considered those. And after considering them, we did set it for an evidentiary hearing today.

16 Ms. O'Brien, I assume you have witnesses you will call  
17 today?

MS. O'BRIEN: Yes, Your Honor.

THE COURT: You may do so.

MS. O'BRIEN: Thank you, Judge.

We call Officer Johnny Duval.

22 THE COURT: Let me get you to step right around  
23 here, raise your right hand, and take an oath.

(Witness sworn.)

**DIRECT EXAMINATION****BY MS. O'BRIEN:**

Q Can you state your name for the court, please?

A Officer Johnny Duval.

Q And how you employed?

A City of Mobile Police Department.

Q How long have you been with the Mobile Police Department?

A Going on seven years.

Q Did you have any law enforcement experience prior to  
joining the Mobile Police Department?

A No, I have not.

Q And what is your current assignment and rank within the  
Mobile Police Department?

A Officer, third precinct, patrol unit.

Q And how long have you been at the third precinct?

A Going on seven years.

Q So that's been your assignment since you've came out of  
the academy?

A Yes, ma'am.

Q And I'm going to direct your attention to the early  
morning hours of November 2nd of 2015.

Were you working that morning?

A I was.

Q And what area were you patrolling when you were working?

A That's called Beat 32, which is the Midtown area.

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1       **Q**   And were you familiar with that area?

2       **A**   I have been.

3       **Q**   And did you have any special assignments in or around  
4       that area?

14:05:59 5       **A**   I have been on special assignment there. I just  
6       basically answered calls and just maintained in that area. I  
7       was not allowed to go out of that area to answer other calls.

8       **Q**   And was that directed at any type of locations,  
9       businesses or residences or --

14:06:16 10      **A**   Everywhere in my beat is where I had to patrol.

11      **Q**   And what type of structures or what type of area is right  
12     around there where your Beat 32 is?

13      **A**   Businesses and residential and also hotels.

14      **Q**   And I'm going to show you what's been marked for  
15     identification as Government's Exhibit 1. And I'm going to  
16     do my best to -- well, not zoom out -- zoom in a little and  
17     on -- can you tell me what's in that photograph?

18      **A**   It is the area which I patrol.

19      **Q**   And that's the area you were in those early morning hours  
20     of November 2nd?

21      **A**   Yes, ma'am.

22      **Q**   And after 1:00 o'clock that morning, were you responding  
23     to a call?

24      **A**   I was. I was dispatched to a suspicious --

14:07:33 25           THE COURT: Would you pull that microphone down just

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1 a little bit? Little bit closer to it. Thank you.

2 **Q** And you were responding to a call?

3 **A** Yes, ma'am. I was responding to a call over off of  
4 Dauphin Square Connector.

14:07:48 5 **Q** And can you show on the map -- and when you touch the  
6 screen, it will show up -- where you were when you got the  
7 call and started your response?

8 **A** I was at the intersection of Springdale and Imogene.

9 **Q** And you were headed where on the map?

14:08:05 10 **A** I was heading northbound to go towards Dauphin Street.

11 **Q** And when you turned from Imogene on to Springdale  
12 Boulevard, what, if anything, happened?

13 **A** I noticed two subjects. One was walking in the turning  
14 lane, and one was walking in the lane of traffic.

14:08:24 15 **Q** And approximately, on this map, where was that?

16 **A** Right about here.

17 THE DEFENDANT: Can you repeat that again? I didn't  
18 hear what he said.

19 THE COURT: What's the problem?

14:08:45 20 MR. TIEMANN: We're asking the witness to repeat his  
21 response to the last question.

22 MS. O'BRIEN: I asked him where he saw the subjects  
23 when he turned on to Springdale Boulevard, and he marked it  
24 with the arrow.

14:08:58 25 I'm not sure there is a response other than the arrow on

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***JOHNNY DUVAL Direct by Ms. O'Brien***

1 the screen.

2 THE COURT: All right.

3 **BY MS. O'BRIEN:**

4 Q And sorry. You indicated that one individual was walking  
14:09:10 5 in the turn lane and the other was walking in a lane of  
6 traffic; is that right?

7 A That is correct.

8 Q And when you saw the individuals out there in the middle  
9 of the road, did you see any other vehicles on Springdale  
14:09:20 10 Boulevard?

11 A I did. I saw one vehicle having to go around one of the  
12 occupants or one of the subjects in the middle of the road,  
13 go around them.

14 Q And to your knowledge, is it a violation of the  
15 disorderly conduct statute for individuals to be walking in  
16 the road and obstructing traffic?

17 A That is correct.

18 Q And once you saw the individuals, what, if anything, did  
19 you do?

14:09:44 20 A I then activated my emergency lights and got out of my  
21 patrol car and approached the two.

22 Q And so, for clarity, you turned off Imogene on to  
23 Springdale Boulevard and were headed toward Dauphin Street?

24 A Correct.

14:10:00 25 Q And so where did you end up on Springdale Boulevard after

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1 you activated your emergency lights?

2 **A** In the turning lane or what we call the emergency lane  
3 also.

4 **Q** So that's the center lane?

14:10:13 5 **A** Correct.

6 **Q** And what did you do after you stopped your patrol car?

7 **A** I then had the two subjects come to me. They came to me.  
8 I had them, for their safety and my safety -- that way  
9 they're not blinded by other vehicles -- I had them step to  
14:10:29 10 the rear of my vehicle.

11 **Q** And how were the two acting at that time?

12 **A** They were just asking me what was going on and  
13 questioning why I was stopping them.

14 **Q** And I believe you indicated where you had everyone stand  
14:10:45 15 for safety, but were you also concerned about your safety and  
16 theirs, apart from where you were standing?

17 **A** That is correct.

18 **Q** And after the three of you were behind the patrol car,  
19 what happened at that point?

14:10:56 20 **A** I then placed them both -- I didn't place them. I  
21 detained them. I put them in handcuffs for my safety and  
22 their safety. It's, you know, two against one. The numbers  
23 are against me.

24 **Q** And this was the defendant, Mr. Johnson, and a female  
14:11:12 25 subject; is that correct?

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1       **A**    That is correct.

2       **Q**    And was Mr. Johnson wearing a backpack at that time?

3       **A**    He was.

4       **Q**    And did you ask the two where they were headed or where  
14:11:26 5       they were coming from?

6       **A**    I did.

7       **Q**    And what was the response to that?

8       **A**    The response was that they were coming from the Walmart,  
9       going back to the room.

14:11:32 10      **Q**    And did you note anything? Were they carrying any items  
11       from Walmart that were apparent to you?

12      **A**    They did not have any plastic bags, saying that they came  
13       from Walmart.

14      **Q**    And what did you do next?

14:11:48 15      **A**    The way Mr. -- the male subject was acting, for my  
16       safety -- and I always do it to everybody, ask them if I can  
17       search them, you know, for my safety. And he granted  
18       permission. I said, is there anything in the bag that I need  
19       to be concerned about. He said, my homeboy told me to grab  
14:12:10 20       the bag.

21      **Q**    And did you look in the backpack?

22      **A**    I did.

23      **Q**    And what did you find?

24      **A**    I noticed some shell casings that were unfired and also a  
14:12:21 25       .357 revolver.

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1       **Q**    And are you familiar with the area on Springdale  
2       Boulevard, what type of businesses or offices are in that  
3       area?

4       **A**    Yes. We've had a lot of burglaries over in the Midtown  
14:12:40 5       Park area. Also the Beltline -- the Cracker Barrel, the  
6       hotels and stuff like that has had numerous incidents where  
7       they had burglaries or drug transactions and so forth.

8       **Q**    And when you recovered the firearm from the backpack that  
9       the defendant was wearing, what did you do at that point?

14:13:06 10      **A**    I then ran the serial number through our PD main, which  
11     is our main channel operator, to verify the serial number,  
12     make sure it was not stolen.

13      **Q**    And what result did you receive?

14      **A**    Shortly after that, after running the serial number, I  
15     was advised by my channel operator on Channel 3 -- she  
16     advised me that the revolver had been reported stolen out of  
17     Hoover Police Department.

18      **Q**    When you were checking the backpack, did you find  
19     anything else in the backpack?

14:13:32 20      **A**    I believe there were personal items.

21      **Q**    And did you -- were you the one that transported the  
22     defendant to the police department?

23      **A**    Yes. I was -- I contacted my supervisor to advise him  
24     what I had going on. He immediately called the detective.  
14:13:51 25     The detective said, bring him to the third precinct. That's

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**JOHNNY DUVAL Direct by Ms. O'Brien**

1 what I done.

2 **Q** Did the defendant say anything to you while you were  
3 transporting him?

4 **A** I did. He stated to me that he was recording the  
14:14:03 5 conversations that we were having. And this was back right  
6 before or right during the Trayvon Martin, all that,  
7 incidences started occurring.

8 **Q** And did you search him once you got him to the  
9 headquarters?

14:14:16 10 **A** I did.

11 **Q** And what did you find --

12 **A** We did locate a white phone on him. We took it off of  
13 him and put it up on the counter, gave it back to him or not  
14 back to him, but we transported it with him to Mobile Metro  
14:14:31 15 Jail after the meeting with the detective.

16 **Q** And at the time that you had the encounter with the  
17 defendant and the female subject there on Springdale  
18 Boulevard, what was the defendant's demeanor? How was he  
19 acting?

14:14:44 20 **A** Real nervous and just wanting to hurry up and get away  
21 with the conversations. He was trying to interrupt me as I  
22 was trying to ask questions.

23 MS. O'BRIEN: Your Honor, we pass the witness.

24 THE COURT: Mr. Tiemann?

14:14:55 25

**CHERYL K. POWELL, CCR, RPR, FCRR**

Federal Official Court Reporter

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**CROSS-EXAMINATION****BY MR. TIEMANN:**

Q Good afternoon.

A Good afternoon.

14:15:05 Q Looking at the map that we have on display here, could  
6 you point out to the Court where the nursing home is that you  
7 referenced in your testimony?

8 A I'm sorry. I didn't mean to hit that. It's going to be  
9 right back here in the back. This is the Cogburn Nursing  
10 Home.

11 Q So you would have had to travel down Springdale  
12 Boulevard, heading north, correct?

13 A That's correct.

14 Q Take a right on Dauphin Street?

14:15:46 15 A That's correct.

16 Q And behind the row of stores is the nursing home?

17 A Correct.

18 Q So you would have had to take one of those through  
19 streets in order get behind those -- that line of  
20 storefronts, correct?

21 A Negative. We can actually go through the parking lot of  
22 Chick-Fi-La to get behind there.

23 Q So if you had continued along your way, you would have  
24 taken a left through those stores?

14:16:11 25 A I would have took a right on to Dauphin Street and turned

***JOHNNY DUVAL Cross by Mr. Tiemann***

1 left into where Chick-Fi-La is.

2 **Q** Now, you said you were coming from Imogene, correct?

3 **A** Correct.

4 **Q** And that would have been heading westbound?

14:16:24 5 **A** Yes.

6 **Q** Towards Springdale?

7 **A** Yes.

8 **Q** And could you explain to the Court the nature of the call  
9 that you received? What was the nature of the call that came  
14:16:40 10 across your radio?

11 **A** The call that came through my radio was a suspicious  
12 subject looking through windows and vehicles of the Cogburn  
13 employees.

14 **Q** And did the call that you received give you a description  
14:16:55 15 of this individual?

16 **A** I do recall there was a description, but I can't think of  
17 it off the top of my head.

18 **Q** Do you recall whether the individual that was reported as  
19 being suspicious -- as being black or white?

14:17:07 20 **A** It was a black male.

21 **Q** Black male. And could you tell us the clothing that --  
22 the description of the clothing?

23 **A** I cannot remember that.

24 **Q** And what was the timing of the call? When did this  
14:17:21 25 suspicious person -- when was this suspicious person observed

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1 looking into car windows?

2 **A** That I can't answer. They just issued the call. We just  
3 go to it. I didn't look at the times.

4 **Q** So instead of proceeding on to that nursing home, you  
14:17:36 5 decided to stop these two individuals who were walking down  
6 the street?

7 **A** That is correct. Because at that point, it poses a  
8 safety risk.

9 **Q** Now, you did testify, I believe, that you observed a car  
14:17:50 10 ahead of you?

11 **A** Not ahead of me. It was coming towards me. It was going  
12 southbound from north while I was traveling northbound.

13 **Q** And this Springdale Boulevard is a five-lane road,  
14 correct?

14:18:01 15 **A** That is correct.

16 **Q** And could you repeat for clarification purposes where my  
17 client, Antonez Johnson, was when you first observed him?

18 **A** I cannot recall if he was in the center lane or if it was  
19 the female that was in the lane itself.

14:18:17 20 **Q** One of the two was in the center lane?

21 **A** Correct.

22 **Q** And that was adjacent to the Walmart parking lot,  
23 correct?

24 **A** No. They were a little bit further away from the Walmart  
14:18:28 25 parking lot. They were near the Cracker Barrel entrance.

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1     **Q**    Which is I-65 service road, correct?

2     **A**    That is correct. But there's also a cut-through off of  
3       Springdale Boulevard. And I'll try to mark it as best I can.  
4       Right there.

14:18:48 5     **Q**    So one of the two individuals was in the center lane.

6       Where was the other individual when you first observed  
7       them?

8     **A**    They were walking in the lane of traffic.

9     **Q**    Which lane?

14:18:59 10    **A**    The -- one of the two lanes that were -- where a car had  
11      to go around them, going west or going southbound.

12    **Q**    Were they walking in the southbound lane, or was this  
13      individual walking in the northbound lane?

14    **A**    They were walking northbound in the southbound lane.

14:19:21 15    **Q**    And so did you turn your car around?

16    **A**    I did not.

17    **Q**    So you just pulled into the center lane --

18    **A**    I pulled around them and activated my lights.

14:19:34 19    **Q**    And when you activate your lights -- this is your squad  
20      car, correct?

21    **A**    That is correct.

22    **Q**    The recording -- the recording device in the car is  
23      automatically activated, correct?

24    **A**    We do not have recording devices in our vehicle.

14:19:44 25    **Q**    You have no camera in your vehicle?

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1      **A**    No, sir.

2      **Q**    So there is no recording of this stop?

3      **A**    No, sir. This is before we got our body cameras also.

4      **Q**    So were these individuals walking toward you when you  
14:19:56 5      pulled into the center lane, heading northbound?

6      **A**    They were walking -- I was going northbound; they were  
7      going northbound also.

8      **Q**    They're heading northbound?

9      **A**    Correct.

10     **Q**    With Walmart behind them?

11     **A**    Correct.

12     **Q**    And there are two hotels there, correct?

13     **A**    Correct. There is the Jameson Suites. On the service  
14     road, you have the Red Roof Inn, and also Extended Inn  
14:20:21 15     Suites.

16     **Q**    Is it the Holiday Express?

17     **A**    There's one right there, yes, sir.

18     **Q**    So how many hotels?

19     **A**    Total of four.

14:20:27 20     **Q**    So at the point of first contact with these two  
21     individuals, they're walking away from Walmart?

22     **A**    Correct.

23     **Q**    Toward the hotels that are located between that spot and  
24     Dauphin on their left?

14:20:43 25     **A**    They would be walking toward the hotels, yes, sir.

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## **JOHNNY DUVAL** Cross by Mr. Tiemann

1 Q And they explained to you they were walking back to their  
2 hotel, correct?

3 A Yes, sir.

4 Q And that Walmart is open 24 hours a day, is it not?

14:20:57 5 **A** It is.

6 Q And it was 1:22 in the morning?

7 **A** That's correct.

8   **Q**   So it is entirely possible they had, in fact, shopped at  
9   that store, given where they were coming from, where they  
0   were going, and the fact that the store was open at that  
1   time?

12 **A** They possibly could have.

13   **Q**   Now, you indicated that they didn't have any Walmart  
14   bags?

14:21:14 15 **A** That is correct.

16 Q Is it possible that they purchased something that they  
17 put in their pockets or in the backpack?

18     **A**    Possibly, but I did not locate a receipt, either, from  
19    Walmart.

14:21:28 20 Now, the Government has cited an ordinance violation.

21 Are you familiar with that ordinance?

22      **A**    13A-11-10, I do believe, or it might be 11 -- or 10-11  
23      for disorderly conduct.

24 Q And that requires an individual to walk as close as  
14:21:56 25 possible to the side of the road, correct?

***JOHNNY DUVAL Cross by Mr. Tiemann***

1       **A**    Correct.

2                   MS. O'BRIEN: Your Honor, I'm going to object. I  
3                   think that Mr. Tiemann is asking about an ordinance as  
4                   opposed to a state statute. I guess that's not an objection,  
14:22:09 5           but I don't think the question is clear.

6                   THE COURT: Which are you asking about? You used  
7                   the term, "ordinance," which generally means municipal  
8                   ordinance. And then the officer responded to Section 13A,  
9                   which is a state law. Which is it that you're --

14:22:23 10           MR. TIEMANN: I'm referring to the municipal  
11                   ordinance the Government cited in its briefs.

12                   THE COURT: Go ahead.

13                   **BY MR. TIEMANN:**

14                   **Q**    Are you familiar with the ordinance?

14:22:31 15           **A**    No, I am not.

16                   **Q**    So when you saw these individuals in the road, you were  
17                   just concerned for their safety?

18                   **A**    That is correct.

19                   **Q**    You didn't have any reason -- you concede that you didn't  
14:22:42 20           have any reason to believe that they had committed any crime?

21                   **A**    Technically, they did commit a crime by walking in the  
22                   lane of traffic where a car had to go around them.

23                   **Q**    That was the extent of your concern for these two  
24                   individuals?

14:22:54 25           **A**    That is correct.

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***JOHNNY DUVAL Cross by Mr. Tiemann***

1       **Q**    Although you don't recall now, you know, what the  
2        description of this suspicious person was back in November,  
3        2015, is it fair to say that my client, Antonez Johnson, did  
4        not match that description?

14:23:10    **A**    Like I said, I cannot recall what the description was of  
5        the subject that was called about at Cogburn.

7       **Q**    You didn't ask him about being at the nursing home, did  
8        you?

9       **A**    Not that I can recall.

14:23:21    **Q**    He was actually walking -- wasn't walking away from the  
10       area of the nursing home; he was walking toward the area of  
11       the nursing home; is that correct?

13       **A**    That is correct.

14       **Q**    I wanted to show you what I will mark as Defendant's  
15       Exhibit 1.

16            Is this your report, your narrative?

17       **A**    That is correct.

18            THE COURT: Can we cancel the marks on the screen?

19            Mr. Tiemann, you can do it by touching the bottom  
20       left-hand corner. There you go. Thank you.

21       **BY MR. TIEMANN:**

22       **Q**    So that's your report?

23       **A**    That is correct.

24       **Q**    Is there another report that you prepared with regard to  
25       this incident?

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1      **A** I'm sorry.

2      **Q** Is there any other report?

3      **A** No.

4      **Q** So when you witnessed this car drive around these  
14:24:06 5      individuals who were walking in the road, your concern was  
6      for their safety, correct?

7      **A** Correct. And the safety of others on the roadway.

8      **Q** You wanted to avoid a possible car accident?

9      **A** Correct. Because I'd worked one two weeks prior to where  
14:24:18 10     a subject was hit.

11     **Q** When you activated your lights and stopped your car, did  
12     you exit your car at that point?

13     **A** I did.

14     **Q** And did you call the two individuals over?

14:24:29 15     **A** I did.

16     **Q** Did they comply with your requests?

17     **A** They complied.

18     **Q** And did you further instruct them to step to the back of  
19     your car?

14:24:36 20     **A** I did.

21     **Q** And they complied with that request?

22     **A** They did.

23     **Q** And you mentioned that Mr. Johnson was a little nervous.  
24     He was not aggressive with you, based on your testimony;  
14:24:50 25     is that correct?

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1       **A**    No. He just kept on interrupting my questionings.

2       **Q**    In fact, they asked you why you asked to stop them; they  
3       asked you why they were being stopped?

4       **A**    Correct. And I explained to them prior to me -- before I  
14:25:03 5       started asking them questions where they were coming from why  
6       I was stopping them.

7       **Q**    Okay. And he appeared to be concerned -- he wanted to  
8       continue on his way, correct?

9       **A**    Correct.

10      **Q**    But you didn't allow him to continue on his way?

11      **A**    Not at this time, no.

12      **Q**    In fact, you handcuffed him, correct?

13      **A**    I detained them, yes.

14      **Q**    Okay. At the point in time -- you handcuffed him as soon  
14:25:28 15     as you reached the back of the car, correct?

16      **A**    No.

17      **Q**    How much time elapsed before you handcuffed him?

18      **A**    When I got their names and informations, that's when I  
19     detained them until I can verify and my backup unit could get  
14:25:42 20     to me.

21      **Q**    Until you could verify?

22      **A**    Their names and their date of births and until my backup  
23     unit got to me.

24      **Q**    Who was this other individual? Who was the other  
14:25:50 25     individual?

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***JOHNNY DUVAL Cross by Mr. Tiemann***

1       **A**    With him? I cannot recall. I did not write her name  
2        down on my report.

3       **Q**    It's not in your report?

4       **A**    Not that I'm -- unless she's on the subject tabs of my  
14:26:00 5       report.

6       **Q**    Your objective in requesting their identification was to  
7        determine what?

8       **A**    Who they are and if they are wanted for any kind of  
9        warrants.

14:26:10 10      **Q**    So you ran their names for a warrant check?

11      **A**    That is correct.

12      **Q**    At what point in time did you handcuff them?

13      **A**    After I got their names and date of births.

14      **Q**    Did they remain at the back of your car when you  
14:26:26 15       reentered your vehicle to run their names?

16      **A**    No. About that time, my backup unit arrived. And I had  
17       the male subject sit in my patrol car and hers -- or my  
18       backup officer's vehicle.

19      **Q**    So after you got their names and their IDs, you cuffed  
14:26:44 20       them. Your backup unit arrived. One went in one car; the  
21       other went in the other car?

22      **A**    That's correct.

23      **Q**    They were not free to leave at that point?

24      **A**    No.

14:26:53 25      **Q**    And you actually ran his name once he was in the car?

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1      **A**    Yes.

2      **Q**    At what point in time did you decide to ask him to search  
3            his person?

4      **A**    When I put handcuffs on him. And the way he was acting  
14:27:15    5            very nervous. I also search somebody before they go in the  
6            back of my patrol car, because I've had stuff get put in the  
7            back of my patrol car.

8      **Q**    So you wanted to make sure nothing was introduced into  
9            your car?

14:27:27 10     **A**    That is correct.

11     **Q**    So you asked -- what were your exact words to him?

12     **A**    Do you have a problem with me searching you with you  
13            going in the back of my police car.

14     **Q**    And what was his response?

14:27:35 15     **A**    He said, no, I do not.

16     **Q**    Did you remove the backpack from his person?

17     **A**    I did. I removed one off -- one strap off this shoulder  
18            by removing the handcuff while I was holding the other  
19            handcuff. And then I placed that cuff back on him. And then  
14:27:51 20            I did the same thing for the other arm.

21     **Q**    And at that point, you put him in your car?

22     **A**    That is correct.

23     **Q**    When did you search the backpack, then?

24     **A**    When I searched him, I asked him, is there anything in  
14:28:06 25            this bag that I need to be concerned about, anything illegal.

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**JOHNNY DUVAL Cross by Mr. Tiemann**

1 He said, no. My homeboy told me to get it, and you can  
2 search it.

3 **Q** And you can search it?

4 **A** That's correct.

14:28:15 5 **Q** Now, that's not in your report, is it?

6 **A** No.

7 **Q** And you haven't advised the representative here for the  
8 Government of that fact prior to this testimony, have you?

9 **A** I'm sorry?

14:28:28 10 **Q** That allegation that you asked for permission to search  
11 his backpack is not in the Government's pleadings.

12 Have you prior to this moment when you're testifying here  
13 today -- have you ever told anybody that you also asked him  
14 for consent to search the backpack?

14:28:44 15 **A** When we talked about it and asked me what happened that  
16 night, I explained to them everything.

17 **Q** When did this conversation take place?

18 **A** Almost a month ago, I believe.

19 **Q** Month ago?

14:28:53 20 **A** Yes.

21 **Q** And at that point in time, Mr. Johnson was handcuffed?

22 **A** That is correct.

23 **Q** And you found a gun and two casings in the backpack?

24 **A** That is correct.

14:29:09 25 MR. TIEMANN: If I could have a minute, Your Honor.

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***JOHNNY DUVAL Cross by Mr. Tiemann***

1                   THE COURT: Sure.

2                   (Discussion off the record.)

3                   **BY MR. TIEMANN:**

4                   **Q** I forgot to ask you when you ran a warrants check on  
14:29:49 5                   Mr. Johnson, did anything pop up? Were there any warrants on  
6                   him?

7                   **A** Not that I can remember. If there was, I would put that  
8                   in my report; that he had active warrants.

9                   **Q** When you discovered this gun, what did you do at that  
14:30:01 10                   point?

11                   **A** I then notified my supervisor. After I ran the serial  
12                   number, after discovering the weapon, I ran the serial  
13                   number. And that's when I was confirmed that it was a stolen  
14                   revolver. I notified my supervisor.

14:30:16 15                   **Q** And at that point, you transported Mr. Johnson to the  
16                   Mobile Police Department?

17                   **A** I was instructed by my lieutenant to transfer him, per  
18                   the detective.

19                   **Q** And what was he charged with at that point?

14:30:30 20                   **A** At that point, he was under further investigation and  
21                   also the receiving stolen property.

22                   **Q** I think you earlier on Cross and also on Direct  
23                   referenced this statute disorderly conduct. Correct?

24                   **A** I'm sorry?

14:30:46 25                   **Q** Have you testified that you were -- you believed that my

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**JOHNNY DUVAL Redirect by Ms. O'Brien**

1 client was committing the act of disorderly conduct by  
2 walking down the street?

3 **A** That's correct.

4 **Q** Are you familiar with that statute?

14:30:58 5 **A** I am.

6 **Q** And let me read this to you. If, with intent to cause  
7 public inconvenience, annoyance, or alarm, recklessly creates  
8 a risk, does any of the following, obstructs vehicular or  
9 pedestrian traffic.

10 Can you please articulate for the Court what basis you  
11 had for concluding that my client was attempting; that is,  
12 with intent to cause public inconvenience, annoyance, or  
13 alarm by walking down the street at that hour?

14 **A** By the vehicle having to swerve, which is impeding the  
15 flow of traffic.

16 **Q** Did you ask him why he was walking down the street?

17 **A** No.

18 MR. TIEMANN: I think that's all I have, Your Honor.

19 THE COURT: Ms. O'Brien?

14:32:05 20 MS. O'BRIEN: Just briefly, Your Honor.

21 **REDIRECT EXAMINATION**

22 **BY MS. O'BRIEN:**

23 **Q** The event type code that would be the suspicious call at  
24 the Cogburn Nursing Home, what would that be?

14:32:19 25 **A** That would be 63.

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**JOHNNY DUVAL Redirect by Ms. O'Brien**

1       **Q**   And during the course of your encounter with Mr. Johnson  
2       and his companion, was the event type changed as a result of  
3       your contact with them?

4       **A**   That is correct.

14:32:32 5       **Q**   And it was changed to a type -- Event Type 42?

6       **A**   Correct.

7       **Q**   And what is that?

8       **A**   Disorderly conduct.

9                    MS. O'BRIEN: That's all I have.

14:32:41 10                    THE COURT: You can step down. Thank you.

11                    (Witness steps down.)

12                    MS. O'BRIEN: Your Honor, we would offer  
13                    Government's Exhibit 1.

14                    MR. TIEMANN: No objection to the Government's  
15                    exhibit. And I would offer Defendant's Exhibit Number 1, the  
16                    balance of his report.

17                    THE COURT: Any objection?

18                    MS. O'BRIEN: No.

19                    THE COURT: Government's 1 is admitted. Defendant's  
20                    1 is admitted.

21                    Ms. O'Brien, do you have any additional testimony?

22                    MS. O'BRIEN: No, Your Honor.

23                    THE COURT: Mr. Tiemann, do you have any evidence or  
24                    testimony you're going to present?

25                    MR. TIEMANN: No testimony. Just argument.

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1 THE COURT: I'll hear argument, then, Ms. O'Brien.

2 MS. O'BRIEN: Well, Your Honor, as we stated in our  
3 briefs and responses, it would be our position that on one  
4 avenue, the officer had reasonable suspicion to stop the two  
14:33:36 5 individuals that were walking in the middle of the street;  
6 that I believe the caselaw supports the fact that he was  
7 allowed to detain them with handcuffs for his safety, for  
8 their safety; that that's all part and parcel of what he's  
9 permitted to do under these circumstances.

14:33:53 10 Reasonable suspicion existed by the fact that these two  
11 individuals, in the middle of the night, were walking down  
12 the middle of a street. They caused a vehicle to have to go  
13 around them because of how they were walking.

14 And alternatively, it would be our position that that  
15 does violate the state statute that we cited in our most  
16 recent brief, 13A-11-7 and that the officer's witnessing of  
17 that gave him probable cause to stop them, to detain them, to  
18 arrest them, and perform a search incident to arrest.

19 Your Honor, alternatively, once again, on the reasonable  
14:34:33 20 suspicion and the allowance of him being able to detain and  
21 handcuff them, it would be our position that the defendant  
22 consented to the search of his person, and the search of his  
23 person included the backpack.

24 But Your Honor, as we stated, it would be our position  
14:34:54 25 that the defendant -- the officer had probable cause to make

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1 an arrest and, based on the probable cause, the search was  
2 permitted because he had grounds to arrest at that point.

3 THE COURT: All right. Mr. Tiemann?

4 MR. TIEMANN: I believe that's a new argument that  
14:35:11 5 hasn't been briefed; that this was a search incident to  
6 arrest. I don't think that has appeared in any of the  
7 Government's pleadings, but we would oppose it.

8 I will just address the merits of the case.

9 Your Honor, the statute -- first of all, the officer  
14:35:30 10 testified that he was concerned about the safety of those two  
11 individuals and he was concerned for the safety of anybody  
12 driving along that road and wanted to avoid the possibility  
13 of a car accident. So he pulled up to these two individuals,  
14 called them over to his car, instructed them to go to the  
14:35:48 15 back of the car, and they not only complied with his request  
16 but they also were answering his questions. So they were  
17 completely compliant.

18 So everything the officer asked them to do, they did.  
19 They were not making furtive gestures; they were not being  
14:36:06 20 aggressive. They were asking questions, I think, which is  
21 completely reasonable but does not create a reasonable fear  
22 on the officer's part for his safety to justify the  
23 handcuffing of those two individuals.

24 One of the cases the Government cited is *Hastomorir*, and  
14:36:23 25 that is an 11th Circuit case from 1989. And in addition to

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1 discussing how there's no bright-line rule when you can  
2 handcuff somebody, when that transforms a *Terry* stop into an  
3 arrest, and in addition to discussing the fact that the Court  
4 is to use a totality of the circumstances test, 11th Circuit  
14:36:49 5 articulated that they have identified two considerations that  
6 circumscribed the limits of a seizure.

7 First, a balancing test, weighing the Government's  
8 interest involved against intrusion on an individual and,  
9 second, consideration of whether the scope of the search is  
14:37:02 10 strictly tied to and justified by the circumstances which  
11 rendered its initiation permissible.

12 I think the Government is glossing over those  
13 requirements by asserting in a generalized way that the  
14 officer -- any time the officer wants to handcuff somebody  
14:37:19 15 for his safety, he's entitled to. That's certainly not the  
16 law in this circuit.

17 The Court has to assess whether the officer articulated  
18 reasonable -- a reasonable -- objectively reasonable basis  
19 for his assertion that he was -- he felt threatened by the  
14:37:45 20 presence of these two individuals. I would submit to the  
21 Court that he has not articulated a reasonable basis for his  
22 fear for his safety in order to justify the handcuffing of  
23 these individuals.

24 If you consider -- the Court considers the Government's  
14:38:07 25 interests involved against the intrusion on the individual,

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1 we're talking about a situation where he witnesses somebody  
2 in the road; he's concerned for their safety; and he  
3 approaches them in order to instruct them to get off the  
4 road, and they're completely compliant. I don't believe that  
14:38:20 5 the Government's interest in that situation justifies the  
6 intrusion upon Mr. Johnson in handcuffing him.

7 Secondly, when you look at the scope of the search being  
8 strictly tied to and justified by consideration of the --  
9 justified by the circumstances, I don't believe there are --  
14:38:43 10 any circumstances have been articulated that would justify  
11 the officer believing that it was necessary to handcuff that  
12 person. It's not strictly tied to the nature of this -- of  
13 the case, the nature of the situation.

14 The Government relies on a case -- this same case for the  
15 proposition that -- in this case, *Hastomorir*, the -- involved  
16 32 kilograms of cocaine that were seized from several  
17 individuals leaving a mall. They had the mall under  
18 surveillance. Less than -- approximately an hour later,  
19 other individuals came out. And the Court ruled that the  
14:39:23 20 district court did not clearly err in concluding that these  
21 individuals were involved in that criminal offense of 32  
22 kilograms.

23 That's a much more serious case, a much more serious --  
24 they had reasonable suspicion and probable cause involving a  
14:39:41 25 much more serious offense. So the Court has to assess the

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1 nature of the situation -- the nature of this situation in  
2 judging the scope of how far the officer could go in  
3 resolving that issue.

4 And we would argue to -- we would submit to the Court  
14:39:56 5 that the only conduct that the officer was concerned with, by  
6 his own testimony, was the safety of these individuals  
7 walking down a street. Prolonging the stop after resolving  
8 that concern requires reasonable suspicion. And the officer  
9 simply has not articulated reasonable suspicion of criminal  
14:40:27 10 activity to justify further investigation. He recognized  
11 what had occurred. He addressed it. And to detain them  
12 further beyond that point has not been justified by  
13 reasonable suspicion of criminal behavior.

14 And I believe that the Court is being asked to refer to  
14:40:43 15 the statute instead of the ordinance, which the Government  
16 initially relied, because an ordinance is not criminal  
17 conduct. And they have to articulate reasonable suspicion of  
18 other criminal activity or of criminal activity. So they  
19 resort now to the statute for the first time, which the  
14:41:00 20 officer was not -- did not cross the officer's mind at the  
21 time. He said he was only concerned for their safety.

22 But if you look at the statute and what the statute  
23 requires, it has an intent requirement. These individuals  
24 have to be intentionally causing a disturbance and annoyance  
14:41:17 25 by blocking traffic, which does not appear from the facts, as

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1 testified by the officer.

2 So I believe if you look at the facts of this case and  
3 what was necessary for the officer to resolve his concerns or  
4 resolve his suspicions, the steps the officer took beyond  
14:41:37 5 initially stopping them cannot and have not been justified by  
6 an articulation of an objective basis for reasonable  
7 suspicion of criminal activity. There was no further  
8 investigation required based on these facts.

9 That's all I have, Your Honor.

10 THE COURT: Ms. O'Brien, any response?

11 MS. O'BRIEN: Just briefly, Your Honor.

12 Mr. Tiemann referenced that there had never been any  
13 briefing or reference by me to search incident to arrest, and  
14 I would state that under the last filing of the United States  
14:42:13 15 that that was referenced on Page 4.

16 And I would submit to the Court that what the officer  
17 testified to is exactly what's covered by the disorderly  
18 conduct statute; that the chronology of the events that was  
19 attached to the last briefing of the United States  
14:42:34 20 references -- and that's why I asked the officer about the  
21 change of codes and it was changed to disorderly conduct.

22 And that I think the defendant and his companion's intent  
23 can be inferred from the fact that they were walking down the  
24 middle of the street; that a car was coming toward them which  
14:42:56 25 covers and -- what's included in the statute, obstructs

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1        vehicular or pedestrian traffic, and that this officer  
2        witnessed their conduct and that gave him the probable cause  
3        to arrest them and this is a criminal offense.

4                   So Your Honor, it would be our position that under both  
14:43:15 5        avenues of travel that this was an appropriate action on the  
6        basis -- on the part of the officer and that, Your Honor,  
7        probable cause existed for the search that revealed the  
8        firearm -- the stolen firearm in the backpack that the  
9        defendant was wearing.

14:43:34 10                    MR. TIEMANN: May I have a moment to approach the  
11        Government?

12                    THE COURT: Sure.

13                    MR. TIEMANN: I have one thing to ask.

14                    (Discussion off the record.)

14:44:00 15                    MR. TIEMANN: Your Honor, in response to the  
16        Government's argument --

17                    THE COURT: I didn't hear you.

18                    MR. TIEMANN: Sure. The Government's arguing this  
19        is a search incident to arrest.

14:44:10 20                    It is our position that the officer did not have  
21        reasonable suspicion or probable cause to effect an arrest  
22        for disorderly conduct based on the conduct he observed.

23                    THE COURT: All right.

24                    (Discussion off the record.)

14:47:49 25                    THE COURT: All right. Having heard the evidence in

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1 this case and, of course, the evidence as presented by one  
2 witness, I will start with credibility determination.

3 Having heard the testimony, observed the demeanor of the  
4 witness, and that witness having been subjected to direct and  
14:48:12 5 cross-examination, it's the determination and the findings of  
6 the Court that the witness' testimony is credible. I have no  
7 evidence to the contrary and have no reason to doubt the  
8 credibility of the witness. I will accept that testimony as  
9 true.

14:48:27 10 And when I do, what I find here -- of course, based on  
11 the argument of counsel is -- and specifically, the  
12 Government's argument is they're asking the Court to consider  
13 two different tracks, a reasonable suspicion track and a  
14 probable cause track.

14:48:44 15 It seems to me that the testimony of the officer is more  
16 aligned with a finding of probable cause. And the Court can  
17 find probable cause, if, again, believing the testimony of  
18 the officer, the defendant committed an offense or the  
19 officer had reason to believe an offense was being committed.

14:49:06 20 And of course, the offense that we are dealing with,  
21 according to the testimony here today, is a violation of  
22 Title 13A-11-7, specifically Subsection (a) (5). And it  
23 occurs to me that, given the circumstances as observed by the  
24 officer at one 2:00 a.m. in the morning on Springdale Avenue,  
14:49:34 25 and that evidence being that he observed these individuals

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1 walking in the street, center lane and in the lane of travel  
2 in a way that caused an oncoming vehicle to have to change  
3 lanes or swerve around them -- I think it's appropriate to  
4 infer the intent that's required by this statute to violate  
14:50:01 5 that statute by obstructing traffic. So I think the probable  
6 cause is there.

7 And once the Court finds that there was probable cause to  
8 find a violation of this particular act, then -- I don't have  
9 to deal with reasonable suspicion, the nervousness of the  
14:50:27 10 defendant, the lack of the Walmart bags, those kinds of  
11 things that kind of lend themselves to the reasonable  
12 suspicion track. Once there's probable cause to arrest, then  
13 of course, the officer has not only his right but the  
14 obligation to handcuff for safety. And he did that.

14:50:54 15 The only other question is was there consent to search.  
16 And based on the totality of the evidence that I see here,  
17 there's no reason to believe that the search was coerced in  
18 any way or that it was involuntary in any way. It seems to  
19 me that Mr. Johnson gave his consent to search and that that  
14:51:14 20 search includes the backpack that he was wearing. It would  
21 not make sense, I think otherwise, to just search his person  
22 and not the backpack.

23 And once the search was conducted -- and I think it was a  
24 lawful search -- then the contraband, the weapon and the  
14:51:35 25 ammunition, which was recovered was recovered lawfully and

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1 not in violation of the defendant's constitutional rights.

2 Accordingly, and having made those findings, both factual  
3 and legal, it is the determination of the Court that the  
4 defendant's motion to suppress is denied.

14:51:57 5 Anything further from the United States at this time?

6 MS. O'BRIEN: No, Your Honor.

7 THE COURT: Mr. Tiemann, anything further?

8 MR. TIEMANN: I object to the Court's conclusions.

9 THE COURT: All right. I'll note that for the  
10 record.

11 We will refer this case to the magistrate judge for  
12 further scheduling. I assume it will be set for a pretrial  
13 conference sometime in the next --

14 MS. O'BRIEN: We have one set next week, Your Honor.

14:52:20 15 THE COURT: All right. Very good.

16 If there's nothing further, we stand adjourned. Thank  
17 you.

18 (The Proceedings were concluded at approximately  
19 2:52 p.m. on April 13, 2017.)

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## C E R T I F I C A T E

I, the undersigned, hereby certify that the foregoing pages contain a true and correct transcript of the aforementioned proceedings as is hereinabove set out, as the same was taken down by me in stenotype and later transcribed utilizing computer-aided transcription.

This is the 2nd day of May of 2017.

Cherry K Powell

Cheryl K. Powell, CCR, RPR, FCRR

## Federal Certified Realtime Reporter

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