
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER M. GATES, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

February 5, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER M. GATES, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
Attorney at Law
975 East Green Street
Pasadena, California 91106

Attorney for the Petitioner

QUESTIONS PRESENTED

A. Whether use of handcuffs is permissible during a mere investigative detention, or "*Terry* stop," where there is a risk to officer safety.

B. Whether use of handcuffs during a mere investigative detention, or "*Terry* stop," must cease as soon as the risk to officer safety is eliminated.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Christopher M. Gates petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit, which was unpublished, is included in the appendix as Appendix 1. Two district court orders, one denying Petitioner's original motions to suppress evidence and one denying motions for reconsideration, are included in the appendix as Appendix 2 and Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 5, 2018. *See* App. A001-06. The

jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent 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 . . . .

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

At about 3:00 a.m. on June 7, 2015, a Lake Forest, Washington police officer named Robert Gross entered the parking lot of a strip club named Déjà Vu while he was on routine patrol. App. A008, A037. Officer Gross saw

several vehicles in the parking lot, including a white Buick. App. A008, A038. Inside the Buick, he saw a man reclining in the driver's seat with his eyes closed. App. A008, A038. The Déjà Vu closes at 2:00 a.m., and Officer Gross knew the business had been robbed at gunpoint six months earlier, so he wanted to know who was in the parking lot at that hour. App. A0038-39. He spoke to "one of the doormen, a security guy," standing at the front of the business and asked him if he knew anything about the man sleeping in the Buick. App. A038; *see also* App. A008. The doorman said that he did not recognize the man and that he had been unable to wake him earlier "by yelling and banging and shouting in the window," so he thought the man might be passed out. App. A039; *see also* App. A008.

After speaking with the doorman, Officer Gross approached the Buick. App. A009, A039. He saw the man in the driver's seat, who was later identified as Petitioner, and "a couple of beer bottles" and an "FN Five Seven pistol" on the passenger seat. App. A009, A039. Thinking it would not be safe to make contact Petitioner alone, Officer Gross returned to his patrol car, got out his patrol rifle, and waited for backup. App. A009, A039.

Another officer, Sergeant Claeys, arrived to assist Officer Gross. App. A009, A039-40. Officer Gross told Sergeant Claeys what he had seen, and the two officers "formulated a plan to make contact." App. A040; *see also* App. A060. Officer Gross went to the passenger side "to provide cover," App. A040, and "covered from the passenger side," App. A060, while Sergeant Claeys went to the driver side and knocked on the window, App. A009, A040, A060. Petitioner did not respond immediately, but did eventually open his eyes. App. A009, A040, A060-61. He appeared confused and began to move

around in the car. App. A009, A040, A060-61. Sergeant Claeys then opened the door, pulled Petitioner out of the car by his arm, "escorted" him to the ground, handcuffed him, and patted him down. App. A009, A023, A061, A077. Officer Gross retrieved the gun from the car and found it was loaded. App. A009, A041.

The officers stood Petitioner up and obtained his driver's license.[1] App. A009, A065-66. Officer Gross returned to his patrol car, ran Petitioner's name through the police department database, and learned Petitioner had a prior felony conviction. App. A010, A042. The officers then placed Petitioner under arrest. App. A010.

Petitioner was initially charged in state court, but was subsequently indicted on federal charges. *See* App. A107, A111. The federal indictment charged Petitioner with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). App. A107. One count was based on the gun taken from Petitioner's car on June 7, 2015, and the second count was based on a gun found in Petitioner's car during a search after a traffic stop, arrest, and purported inventory search on June 22, 2015.[2] *See* App. A107, A111-13.

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[1] Petitioner testified Sergeant Claeys took Petitioner's wallet out of Petitioner's pants pocket, *see* App. A079, but Sergeant Claeys and Officer Gross testified Petitioner voluntarily provided the wallet when Sergeant Claeys asked for identification, *see* App. A054, A062. The district court found in its order that "Sergeant Claeys asked for identification and Gates produced it." App. A024.

[2] Petitioner was out of custody on June 22 because he had posted bond after being charged in state court. *See* App. A111.

Petitioner thereafter filed motions to suppress both firearms. *See* App. A007, A020. He sought to suppress the firearm seized on June 7, 2015 on the grounds that (1) the officers lacked even reasonable suspicion for a mere investigative detention; (2) "covering" Petitioner with a gun, taking him from the car onto the ground, and then handcuffing him was actually an arrest requiring probable cause; and (3) he did not voluntarily consent to the seizure of his driver's license which led to his identification as a felon. *See* App. A117. He sought to suppress the firearms seized on June 22, 2015 on the ground that the purported inventory search did not comply with Fourth Amendment inventory search requirements. *See* App. A015, A025-26.

The district court denied the motions, *see* App. A007-28, found Petitioner guilty in a stipulated facts trial, *see* App. A108, and sentenced Petitioner to time served, *see* App. A108. Petitioner thereafter filed an appeal challenging the June 7, 2015 detention and the June 22, 2015 search. *See* App. A001-06, A094-127. The court of appeals agreed the June 22, 2015 search was not a valid inventory search and ordered that motion to suppress be granted, but it rejected Petitioner's challenge to the June 7, 2015 detention. *See* App. A001-06. It found, first, there was reasonable suspicion for an investigative detention; second, holding Petitioner at gunpoint, taking him to the ground, and handcuffing him did not escalate the detention into an arrest; and, third, Petitioner had not preserved his argument that he did not voluntarily consent to the seizure of his driver's license. *See* App. A002-04. On the second of these issues, which is the subject of this petition, the court reasoned:

> Police may also conduct "a reasonable search for

> weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." [*Terry v. Ohio*, 392 U.S. 1,] 27 [(1968)]. The officers already had reasonable suspicion that Gates was planning to rob the strip club or its employees, and when Gates woke up and began moving around inside the vehicle, the officers developed a reasonable fear for their safety, providing independent justification for an investigatory detention and frisk for weapons.
>
> Second, the fact that Gates was handcuffed immediately after his removal from the car, does not make the encounter an arrest rather than a *Terry* stop. *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996); *see also United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983) (holding that a frisk was still part of an investigatory stop even though the suspect was lying down and handcuffed). Holding a suspect at gunpoint similarly does not necessarily escalate an investigatory stop to an arrest. *See, e.g., United States v. Alvarez*, 899 F.2d 833, 838-39 (9th Cir. 1990) (defendant was not arrested even though officers approached his vehicle with guns drawn and ordered him to step out of his car). The district court therefore did not err in concluding that Gates was merely detained and not arrested.

App. A003.

IV.

ARGUMENT

A. THE COURT SHOULD GRANT THE PETITION TO CLARIFY THE LIMITS ON THE USE OF HANDCUFFS DURING A MERE INVESTIGATIVE DETENTION.

This Court recognized there can be an intermediate seizure of a person known as an investigative detention, or "*Terry* stop," in the case of that name – *Terry v. Ohio*, 392 U.S. 1 (1968). It held a law enforcement officer could

make a "stop" short of an arrest and "frisk" a suspect for weapons. *See id.* at 16-19. It held such limited seizures and searches do not require probable cause, but require only reasonable suspicion of criminal activity and/or danger to the officer. *See id.* at 25-27.

The Court has explained and refined the reasonable suspicion standard in a number of cases since *Terry*. *See, e.g., Navarette v. California*, 572 U.S. 393 (2014); *United States v. Arvizu*, 534 U.S. 266 (2002); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Sokolow*, 490 U.S. 1 (1996); *United States v. Cortez*, 449 U.S. 411 (1981); *Reid v. Georgia*, 448 U.S. 438 (1980); *Adams v. Williams*, 407 U.S. 143 (1972). But it has not addressed the level of force an officer can use to effect such a detention. In particular, it has never addressed whether and when officers may use methods such as those used in Petitioner's case, namely, holding the detainee at gunpoint, taking the detainee to the ground, and/or handcuffing the detainee. *See* 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* 403-11 & nn.124-37 (5th ed. 2012) (discussing only lower federal court opinions and state court opinions); *id.* at 412 (noting "[t]he Supreme Court has not had occasion to speak to this issue [of use of actual physical force to make a stop]").

Lower courts have addressed the question and generally held such force is usually appropriate only for an arrest supported by probable cause, but may be warranted for a mere investigative detention when there are special circumstances. As summarized by Professor LaFave in his search and seizure treatise:

> [I]t cannot be said that whenever police draw weapons the resulting seizure must be deemed an arrest rather than a stop and thus may be upheld only if full probable cause was

> then present. The courts have rather consistently upheld such police conduct when the circumstances (e.g., suspicion that the occupants of a car are the persons who just committed an armed robbery) indicated that it was a reasonable precaution for the protection and safety of the investigating officers. The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the approach of the police are all facts which bear on the issue of reasonableness. Likewise, under certain circumstances grabbing the suspect's arm, taking the suspect to the ground or ordering him to lie on the ground will be permissible, as will the surrounding of a pedestrian-suspect by several officers.
>
> * * *
>
> . . . . Similarly, handcuffing of the suspect is not ordinarily proper, but yet may be resorted to in special circumstances, such as when necessary to thwart the suspect's attempt to frustrate further inquiry. Even then such restraint must be temporary, and thus, absent other threatening circumstances, once the pat-down reveals the absence of weapons the handcuffs should be removed.

4 LaFave, *supra* p. 7, at 403-11 (internal quotations and footnotes omitted).

Whether particular facts justify such greater force to effect a mere investigative detention "requires a fact-specific inquiry," *United States v. Acosta-Colon*, 157 F.3d 9, 15 (1st Cir. 1998), and so may not be a useful focus of this Court's resources. There are three general questions this Court can and should answer, however. First, the Court can and should answer the question of whether officers can ever use guns and handcuffs to effect a mere investigative detention. Second, if the Court concludes such force is sometimes permissible, the Court can and should answer the question of what concerns justify such force – the most obvious possibilities being officer safety and a concern the detainee might flee. Third, the Court can and should answer the question of whether and when the greater force must cease.

On the first two of these questions, there are (1) a multitude of cases (2)

with no significant disagreement (3) with which the court of appeals opinion in the present case is consistent. Specifically, there are a multitude of cases consistently recognizing that the use of guns and handcuffs should not ordinarily be used to effect a mere investigative detention, but can be used in special circumstances and that the circumstances which justify such force are concern for officer safety and concern the detainee might flee or resist. *See* 4 LaFave, *supra* p. 7, at 404-05 & nn. 124-25, 408-11 & nn.134-37. *See also Trott v. State*, 770 A.2d 1045, 1062-63 (Md. App. 2001) (collecting cases and noting "widespread agreement among the federal courts" and "considerable support among the state courts" that handcuffing a suspect during an investigative detention does not necessarily transform detention into an arrest). In addition, while Petitioner disputed the court's ultimate conclusion, the court of appeals opinion here is consistent with these standards, in that it nowhere suggests use of guns and handcuffs is always justified and it points to officer safety concerns to justify the force.

Where there is less case law that is more ambiguous and where guidance from this Court can add something is on the third question – whether and when the greater force must cease. There are some state court and lower federal court opinions addressing this question and holding force must cease once the risk to officer safety has been eliminated. In *Reynolds v. State*, 592 So. 2d 1082 (Fla. 1992), the Florida Supreme Court held that handcuffing during a mere investigative detention, "must be temporary and last no longer than necessary to effectuate the purpose of the stop" and that "once the pat-down reveals the absence of weapons the handcuffs should be removed." *Id.* at 1085. *Compare State v. Sheppard*, 271 S.W.3d 281, 289-90 (Tex. Crim. App.

2008) (holding handcuffing did not convert investigative detention into arrest because deputy uncuffed defendant as soon as deputy completed sweep). *See also State v. Boteo-Flores*, 280 P.3d 1239, 1243 (Ariz. 2012) ("Although the use of handcuffs does not automatically transform a *Terry* stop into an arrest, their continued use when no ongoing threat exists suggests the detainee is under arrest." (Citations omitted.)); *State v. Rudder*, 217 P.3d 1064, 1071 (Or. 2009) (handcuffing defendant "for the limited purpose of carrying out the patdown" would have been permissible but Fourth Amendment violation where deputy chose "more invasive course"). Similarly, the Second Circuit, in *United States v. Bailey*, 743 F.3d 322 (2d Cir. 2014), found it improper to leave handcuffs on after a patdown confirmed the detainees were not armed and they had been removed from their vehicle.

> [H]aving already subjected [the two detainees] to a patdown, the officers had confirmed that neither man was armed. Further, having had both men exit the stopped vehicle, the officers had eliminated the risk that the men might obtain any weapon from therein. . . . Accordingly, we conclude the police here exceeded the reasonable bounds of a *Terry* stop when they handcuffed [the detainee who was eventually charged], ...

Id. at 340.

Other cases are at least suggestive of a much looser view, however. *Chase v. State*, 144 A.3d 630 (Md. App. 2016), distinguished *Reynolds* and reasoned differently than *Bailey* – though not citing the latter case – by holding an officer could keep a detainee handcuffed throughout the stop until contraband was found – even after the detainee had been removed from the car and patted down. *See id.* at 647. *Grice v. McVeigh*, 873 F.3d 162 (2d Cir. 2017), held officers could keep a detainee handcuffed during an entire

investigation exceeding half an hour on a theory he might trigger a detonator, even though the officers could presumably have discovered any detonator in a patdown search. *See id.* at 168 (noting "[the defendant officer] released [the plaintiff detainee] from his handcuffs after the [agency] finished its investigation of the [railroad] tracks; and thirty-three minutes was not an unreasonable interval to keep the handcuffs on while officers and a dog searched the tracks for a potential bomb").

In sum, the lower court authority is not so clear on the last question – whether and when the greater force must cease. It should cease once the detainee is patted down and removed from the vehicle or other place where he might gain access to a weapon. Granting the petition in this case will allow the Court to make that clear and will also allow the Court to decide whether it agrees with the lower courts on the questions on which those courts are in general agreement.

B. THE COURT SHOULD GRANT THE PETITION BECAUSE THE PRESENT CASE IS A GOOD ILLUSTRATION OF CIRCUMSTANCES WHERE HANDCUFFING SHOULD HAVE ENDED EVEN IF IT WAS INITIALLY PERMISSIBLE.

A second reason to grant the petition is that the present case is a good illustration of circumstances where the handcuffing should have ended even if it was initially permissible. The facts here are similar to those in *Bailey*. Legitimate concerns for officer safety were eliminated by (1) the patdown which revealed Petitioner had no gun on his person and (2) the removal of

Petitioner from his vehicle.

Just as the handcuffing should not have continued after the patdown and removal from the vehicle in *Bailey*, it should not have continued after the patdown and removal from the vehicle in the present case. The risk to officer safety was eliminated by the patdown and the removal from the vehicle. It was even further eliminated when the second officer reached into the vehicle and removed the gun the officers saw.

C. THE COURT SHOULD GRANT THE PETITION BECAUSE IT IS IMPORTANT FOR LAW ENFORCEMENT OFFICERS TO KNOW THE LIMITS ON THE USE OF GUNS AND HANDCUFFS DURING A MERE INVESTIGATIVE DETENTION.

The questions presented by this petition are also important ones for the Court to resolve. Investigative detentions, or "*Terry* stops," have become ubiquitous since the Court first approved them in *Terry*. *See United States v. Acosta-Colon*, 157 F.3d at 14 (noting that "[o]ver time, the *Terry* doctrine has developed into an extremely elastic rule with a broad range of application"). Hundreds, if not thousands, of such stops take place daily across the nation, so what officers are allowed to do can affect hundreds of detainees and officers daily.

Officers effecting such detentions need to know what they can and cannot do for two reasons. On the one hand, they need to know how far they can go to protect themselves, what types of force they can use, and when they must forgo or cease the use of force. On the other hand, they need to know

what the Fourth Amendment allows and what it forbids, so they may avoid violating detainee rights.

There are also law enforcement agency policies and practices that may need to be modified and/or reviewed. The term "felony stop" and/or "felony stop procedure" appears regularly in the reported case law and refers to a type of stop in which the use of guns and/or handcuffs is almost standard. *See, e.g., Randall v. Prince George's County*, 302 F.3d 188, 197 & n.11 (4th Cir. 2002); *United States v. Shareef*, 100 F.3d 1491, 1497-98, 1502 (10th Cir. 1996); *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993); *State v. Toothman*, 985 P.2d 701, 704 (Kan. 1999); *State v. Belieu*, 773 P.2d 46, 52 (Wash. 1989). Agencies, as well as individual officers, need to know how these "felony stops" and "felony stop procedures" must be limited. Guidance from this Court will help not just individual officers, but broader law enforcement policies, properly balance detainee rights against officer safety.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: February 5, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

NOT FOR PUBLICATION

FILED

DEC 5 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTOPHER M. GATES, Defendant-Appellant.	No. 17-30028 D.C. No. 2:15-cr-00253-JCC-1 MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted November 6, 2018
Seattle, Washington

Before: McKEOWN and FRIEDLAND, Circuit Judges, and GAITAN,** District Judge.

Defendant Christopher Gates ("Gates") challenges his convictions under 18 U.S.C. § 922(g)(1) for two counts of being a felon in possession of a firearm and two counts of misdemeanor possession of a controlled substance in violation of 21

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, sitting by designation.

U.S.C. § 844(a). Gates's convictions arise out of two separate police encounters: the first in the parking lot of a strip club long after the club had closed for the night, and the second when Gates was arrested following a traffic stop and his vehicle impounded. We affirm in part and reverse in part, holding that the district court properly denied Gates's motion to suppress a firearm seized in the first incident but erred in denying his motion to suppress a firearm and drugs seized in connection with the second incident.

1. Gates raises several challenges to the district court's denial of his motion to suppress the firearm seized from his vehicle after the incident in the strip club parking lot. All of his arguments are meritless.

First, the police officers had reasonable suspicion for the initial investigatory detention that led to the seizure of the gun. Police officers may approach individuals to ask questions—even when they "have no basis for suspecting a particular individual"—without a Fourth Amendment seizure occurring. *Florida v. Bostick*, 501 U.S. 429, 435 (1991). Here, the police were permitted to initiate a consensual encounter with Gates in the parking lot, such as approaching his vehicle to ask him questions about why he was still there after the club had closed.

Having a valid reason to approach the car, one of the officers immediately saw the firearm in plain view on the seat next to Gates. In combination with the surrounding circumstances, this gave the officers reasonable suspicion that Gates

might have been planning to rob the club or its patrons, and thus to conduct an investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Police may also conduct "a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." *Id*. at 27. The officers already had reasonable suspicion that Gates was planning to rob the strip club or its employees, and, when Gates woke up and began moving around inside the vehicle, the officers developed a reasonable fear for their safety, providing independent justification for an investigatory detention and frisk for weapons.

Second, the fact that Gates was handcuffed immediately after his removal from the car, does not make the encounter an arrest rather than a *Terry* stop. *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996); *see also United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983) (holding that a frisk was still part of an investigatory stop even though the suspect was lying down and handcuffed). Holding a suspect at gunpoint similarly does not necessarily escalate an investigatory stop to an arrest. *See, e.g., United States v. Alvarez,* 899 F.2d 833, 838–39 (9th Cir. 1990) (defendant was not arrested even though officers approached his vehicle with guns drawn and ordered him to step out of his car). The district court therefore did not err in concluding that Gates was merely detained and not arrested. And, having detained Gates, the officers were justified

in conducting a protective frisk of the passenger compartment of the car to secure the gun in the front seat. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

Third, we decline to consider Gates's argument that the circumstances made his production of his driver's license involuntary because the issue was not properly raised in the district court. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018) ("The usual rule is that arguments raised for the first time on appeal . . . are deemed forfeited.").[1] And, once the police officers identified Gates as a felon, they had probable cause to arrest him for possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[2]

2. The trial court did err, however, in denying the motion to suppress evidence discovered following the traffic stop. As part of the "community caretaking function," law enforcement officers are permitted under the Fourth Amendment to impound a vehicle and conduct an inventory search of that vehicle. *See South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976). But federal law requires that, when a police officer decides to impound a vehicle and conduct an

[1] Even if we were to review for plain error, neither the testimony about Gates's provision of his identification nor the law surrounding consent in such circumstances would support the conclusion that any error here was plain. *See United States v. Olano*, 507 U.S. 725, 734 (1993) ("'Plain' is synonymous with 'clear,' or, equivalently, 'obvious'. . . . under current law").

[2] Because we conclude that the district court's reasons for denying the motion to suppress the firearm seized in the first incident were appropriate, we need not reach the Government's alternative argument that the gun would have inevitably been seized in a search incident to arrest.

inventory search, the officer must comply with state law governing impoundments as well. *United States v. Wanless*, 882 F.2d 1459, 1464 (9th Cir. 1989).

Washington law imposes two requirements for a vehicle to be impounded: first, it must be necessary for "the vehicle [to] be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft" and, second, "the defendant, the defendant's spouse, or friends are not available to move the vehicle." *State v. Tyler*, 302 P.3d 165, 170 (Wash. 2013). Police officers need not exhaust all possible alternatives, but they must at least *consider* reasonable alternatives, *id.* at 170, and show that they "attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from [their] deliberation that impoundment was in order," *State v. Hardman*, 567 P.2d 238, 241 (Wash. Ct. App. 1977).

Here, the impoundment and subsequent inventory search of Gates's car after the traffic stop violated Washington law. The officer on the scene did not consider reasonable alternatives to impoundment by asking whether Gates had friends or family who could move the vehicle, rendering his conduct deficient under the second prong of the *Tyler* test. Because the impoundment was improper, the subsequent inventory search was invalid as well. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The firearm and cocaine found in the car should therefore

have been suppressed.[3]

AFFIRMED in part and **REVERSED** in part.

[3] The Alprazolam pills found in the car should also have been suppressed, but Gates conceded at oral argument that his conviction for possession of Alprazolam may still stand based on the Alprazolam properly found on his person when he was searched incident to his arrest. Because we hold that the evidence found in the car after it was impounded must be suppressed, we need not reach Gate's alternative argument that trial counsel was ineffective for failing to challenge other aspects of the search of the car.

A P P E N D I X 2

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CHRISTOPHER MILES GATES, Defendant.	CASE NO. CR15-0253-JCC ORDER ON MOTIONS TO SUPPRESS

This matter comes before the Court on Defendant Christopher Gates's motions to suppress (Dkt. Nos. 27, 28). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

Defendant Christopher Gates is charged with two counts of Felon in Possession of a Firearm and two counts of Possession of a Controlled Substance. (Dkt. No. 13 at 1-3.) His first firearm charge arises from a vehicle search conducted on June 7, 2015; his other three charges arise from a vehicle search conducted on June 22, 2015. (Dkt. No. 13 at 1-3.) Gates moves to suppress all evidence seized during these searches, arguing that both searches were invalid. (*See* Dkt. No. 27 at 7; Dkt. No. 28 at 9.) The Court discusses the facts underlying each search in the individual analysis sections below.

II. DISCUSSION

A. Vehicle Searches

The Fourth Amendment protects against unreasonable searches and seizures. U.S. CONST. amend. IV. Searches made without a warrant are presumptively unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the "automobile" exception. *United States v. Bagley*, 772 F.2d 482, 490 (9th Cir. 1985). Under this exception, "the existence of probable cause alone justifies the warrantless search or seizure of a vehicle lawfully parked in a public place." *Id.* at 491. An officer has probable cause to search if, based on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Cervantes*, 703 F.3d 1135, 1139 (9th Cir. 2012).

B. June 7 Vehicle Search

1. Facts

On June 7, 2015, at 3:03 a.m., Officer Robert Gross of the Lake Forest Police Department pulled into the parking lot of the Déjà Vu adult cabaret at 14558 Bothell Way NE. (Dkt. No. 27-1 at 1, 4.) Déjà Vu closes at 2:00 a.m. (Dkt. No. 27-1 at 1.) Officer Gross observed about five vehicles still in the lot. (Dkt. No. 27-1 at 1.) One of the vehicles was a white Buick Century displaying only a year license tab, no month tab, on the back plate. (Dkt. No. 27-1 at 1.) The Buick was in the center of the parking lot facing Déjà Vu's main entry. (Dkt. No. 27-1 at 1.) Officer Gross observed a male, ultimately identified as Defendant Christopher Gates, reclining in the driver's seat with his eyes closed. (Dkt. No. 27-1 at 1.)

A man whom Officer Gross recognized as Déjà Vu's doorman was standing outside the club's door using a cell phone. (Dkt. No. 27-1 at 1.) Officer Gross asked the doorman if he knew who the man in the Buick was. (Dkt. No. 27-1 at 1.) The doorman said that he did not know the man, but that he had tried to contact the man earlier and could not rouse him by shouting or banging on the window. (Dkt. No. 27-1 at 1.)

Officer Gross parked his patrol car behind the Buick and approached the Buick from the passenger side. (Dkt. No. 27-1 at 1.) He observed that Gates was the only person in the car and that Gates's eyes were closed and his seat was reclined. (Dkt. No. 27-1 at 1.) On the passenger seat, in open view, Officer Gross saw a black FN Five-Seven pistol with an extended capacity magazine and a slide-mounted red-dot sight. (Dkt. No. 27-1 at 1.) Officer Gross knew this type of gun to be "notorious because its high-velocity ammunition penetrates police body armor." (Dkt. No. 27-1 at 1.) Officer Gross also observed two beer bottles in the front passenger area. (Dkt. No. 27-1 at 1.)

Officer Gross knew that Déjà Vu is a business that deals primarily in cash and that, at the end of the night, its female employees often leave with hundreds of dollars on their person. (Dkt. No. 27-1 at 1.) Because Officer Gross discovered Gates waiting outside of the recently closed business with a pistol ready to use, he suspected that Gates passed out while waiting to rob Déjà Vu's female employees as they left with their cash earnings. (Dkt. No. 27-1 at 1.)

Officer Gross took cover behind his patrol car and radioed for assistance. (Dkt. No. 27-1 at 1, 4.) Sergeant David Claeys arrived to assist him. (Dkt. No. 27-1 at 1, 4.) Sergeant Claeys attempted to contact Gates by knocking on the driver's side window and identifying himself as a police officer. (Dkt. No. 27-1 at 1, 4.) Gates was initially unresponsive. (Dkt. No. 27-1 at 1.) After a minute, Gates stirred and looked around. (Dkt. No. 27-1 at 1.) Sergeant Claeys told Gates to keep his hands where he could see them. (Dkt. No. 27-1 at 4.) Gates appeared confused and began to move around in the vehicle. (Dkt. No. 27-1 at 4.) Sergeant Claeys opened the driver's door and escorted Gates out. (Dkt. No. 27-1 at 1.) Gates tried to turn towards Sergeant Claeys, and Officer Gross warned Sergeant Claeys to watch for any other weapons Gates could be carrying. (Dkt. No. 27-1 at 1.) Sergeant Claeys slowly escorted Gates to the ground, secured him in handcuffs, and checked him for weapons. (Dkt. No. 27-1 at 1, 4.) Sergeant Claeys then returned Gates to his feet. (Dkt. No. 27-1 at 4.)

Officer Gross retrieved the pistol from the passenger seat and found it to be fully loaded.

(Dkt. No. 27-1 at 1.) He informed Gates that he needed a concealed pistol license to carry a firearm with him in a vehicle and asked if Gates had such a license. (Dkt. No. 27-1 at 2.) Gates ignored Officer Gross. (Dkt. No. 27-1 at 2.)

The Department of Licensing database was down at the time, so the officers were unable to run the Buick's plates. (Dkt. No. 27-1 at 1.) Gates gave his driver's license to Sergeant Claeys, who had dispatch check his name. (Dkt. No. 27-1 at 2.) Dispatch reported that Gates was a convicted felon and prohibited from possessing any firearms. (*See* Dkt. No. 27-1 at 1, 2.) Officer Gross advised Gates that he was under arrest and escorted Gates to the backseat of his patrol car. (Dkt. No. 27-1 at 2.) Officer Gross attempted contact at the Déjà Vu main door and dispatch called the club, but there was no answer. (Dkt. No. 27-1 at 2.) Officer Gross transported Gates to the police station and booked him for unlawful possession of a firearm. (Dkt. No. 27-1 at 3.)

2. Analysis

Gates argues that officers did not have probable cause to search his car on June 7. (Dkt. No. 27 at 5.) He maintains that the officers' only bases to search were his missing month tab on his license plate and the fact that he was sleeping in a parked car after hours, neither of which equates probable cause that a crime was being committed. (Dkt. No. 27 at 5-6.) The Government responds that the officers were justified in approaching Gates as a citizen contact, a community caretaking function, or an investigatory stop. (Dkt. No. 29 at 4-7.) The Government argues that, once the officers approached Gates, his reaction formed a valid basis for removing him from the vehicle and seizing his firearm. (Dkt. No. 29 at 8.)

The Court agrees that the officers had a valid basis to contact Gates under the citizen contact and community caretaking doctrines. Police officers may approach an individual and ask questions without triggering Fourth Amendment scrutiny, so long as the encounter is consensual. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Likewise, local police officers often approach vehicles not to investigate a crime, but as part of their community caretaking duties. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Here, Gates was parked in the lot of a closed business at

3:00 a.m., potentially unconscious, and unresponsive to the doorman's attempt to rouse him by yelling and banging on his windows. This formed a valid basis for officers to approach him and determine his well-being. Though Gates argues that this was not the officers' true intentions, (*see* Dkt. No. 32 at 1-2), the officers' subjective intentions are not relevant. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Snipe*, 515 F.3d 947, 951 (9th Cir. 2008) (recognizing that an officer's subjective motivation is irrelevant in the community caretaking context).

Regardless, the officers also conducted a proper investigatory stop. A police officer may seize a citizen for a brief investigatory stop if the officer has a reasonable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Crapser*, 472 F.3d 1141, 1147 (9th Cir. 2007). Reasonable suspicion means a particularized and objective basis for suspecting criminal activity. *Crapser*, 472 F.3d at 1147. Here, Gates was sitting in his car with a loaded, unsecured pistol. He faced the doors of a cash-based establishment. He was there after hours, when employees would be leaving with their day's earnings. Officer Gross knew at least one employee was still at the club when he arrived.[1] Given these facts, Officer Gross had a reasonable suspicion that Gates intended to commit a robbery and the officers were entitled to conduct a brief, investigatory stop.

This investigatory stop included removing Gates from his car and temporarily restraining him.[2] During a *Terry* stop, police officers may employ reasonable measures to protect

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[1] Officer Gross did not know for sure whether other employees remained in the club. However, Officer Gross did not need to be absolutely certain that potential victims were still inside to have a reasonable suspicion that criminal conduct "may be afoot." *See United States v. Sokolow*, 490 U.S. 1, 7 (1989).

[2] The citizen contact and community caretaking doctrines likely do not extend to the officers' removal of Gates from his car. However, once Gates began to move around in the car, with a pistol easily accessible next to him, in violation of Sergeant Claeys's directive to keep his hands visible, the officers had a valid basis to remove him from the car as part of a *Terry* stop for their safety. *See Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995) ("[A] police officer may seize a citizen for a brief investigatory stop if the officer has reason to believe that he is

themselves and others in potentially dangerous situations. *Allen v. City of Portland*, 73 F.3d 232, 235 (9th Cir. 1995). Officers must have probable cause to conduct a full-scale arrest. *Id.* To determine whether a seizure has become a full-scale arrest, the Court considers the totality of the circumstances. *Id.* Here, Sergeant Claeys escorted Gates out of his car after Gates ignored his directive to keep his hands visible.[3] Gates turned towards Sergeant Claeys, causing Officer Gross to fear that Gates had another weapon. Sergeant Claeys escorted Gates to the ground and handcuffed him, then returned him to his feet for questioning.

The fact that Gates was placed in handcuffs does not automatically mean that he was under arrest. *See United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982). "A brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest." *Id.* For example, the use of handcuffs was reasonably necessary where a suspect repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated warnings not to. *United States v. Thompson*, 597 F.2d 187, 190 (9th Cir. 1979). Likewise, when the defendant—who was suspected of robbery—kept pacing back and forth, turning his head as if he was thinking about running, the use of handcuffs eliminated the possibility of an assault or escape attempt during the questioning. *Bautista*, 684 F.2d at 1289-90. Though the facts here present a closer case than *Thompson* or *Bautista*, the Court finds that the use of handcuffs was reasonable considering the circumstances. Specifically, the officers knew that Gates possessed a particularly dangerous weapon, ignored Sergeant Claeys' command to keep his hands visible, and moved towards Sergeant Claeys upon removal from the car. The detainment was brief: Gates was only asked whether he had a concealed

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dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

[3] Gates argues that Sergeant Claeys's report states only that Gates moved around, not that he defied a directive to keep his hands in view. (Dkt. No. 32 at 5.) While the report could be read as Gates asserts, at this stage the Court views the evidence in the light most favorable to the Government. *See Bautista*, 684 F.2d at 1290.

weapons permit and to produce identification before officers determined there was probable cause to arrest him for unlawful possession of a firearm. At that point, he was explicitly placed under arrest. Prior to that point, the officers' actions constituted a valid *Terry* stop.

Regarding the seizure of the firearm, the Government argues that it was justified because of the apparent danger Gates posed when he was approached and removed from the car. (Dkt. No. 29 at 8.) In the alternative, the Government asserts that the inevitable discovery doctrine applies, because the officers would have been able to search Gates's car after his arrest. (Dkt. No. 29 at 9.)

Officer Gross's report does not indicate the precise timing of retrieving the pistol. On the one hand, it is possible that Officer Gross removed the pistol from the car simultaneous with Sergeant Claeys removing Gates. If so, this was likely a proper *Terry* pat-down of the vehicle. *See Michigan v. Long*, 463 U.S. 1032, 1049 ("[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts [that] reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."). However, if Officer Gross's report is read chronologically, he did not retrieve the pistol until Gates was handcuffed and secured. In that scenario, the seizure of the gun was not justified by Gates's access to the weapon.

However, regardless of whether officer safety justified the seizure, the Court finds that the gun is admissible under the inevitable discovery doctrine. This doctrine permits introduction of illegally obtained evidence if the Government can show by a preponderance of the evidence that the tainted evidence would have been inevitably discovered through lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984). For the doctrine to apply, "the fact or likelihood that makes the discovery inevitable [must] arise from circumstances other than those disclosed by the illegal search itself." *United States v. Boatwright*, 882 F.2d 862, 864-65 (9th Cir. 1987).

Here, even if Officer Gross had not previously seized the gun, the officers could have

lawfully seized it incident to Gates's arrest. The police may search a motor vehicle incident to lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant*, 556 U.S. 332, 343 (2009). Officer Gross initially observed the pistol in plain view on Gates's seat. The officers subsequently discovered that Gates was a felon who was prohibited from possessing a weapon. Because Officer Gross saw that Gates had a pistol in his car, the officers arrested him for unlawful possession of a firearm. The pistol was evidence of that crime and it was reasonable to believe that it would still be in the car. The seizure of the firearm was valid and the evidence is admissible.

Gates's motion to suppress the evidence seized on June 7 (Dkt. No. 27) is DENIED.

C. June 22 Vehicle Search

1. Facts

On June 22, 2015, at about 12:20 a.m., Deputy Steven Shalloway of the King County Sheriff's Department was on patrol in Shoreline. (Dkt. No. 28-1 at 2.) As he traveled northbound on Aurora Avenue, he saw a vehicle drive south past him with no front license plate. (Dkt. No. 28-1 at 2.) Gates was the vehicle's driver. (Dkt. No. 28-1 at 2.) Deputy Shalloway pulled Gates over in the 15400 block of Westminster Way N. (Dkt. No. 30-1 at 1.)

Gates gave his driver's license to Deputy Shalloway. (Dkt. No. 28-1 at 2.) Deputy Shalloway's records check showed that Gates had an active felony warrant for the June 7 offense. (Dkt. No. 28-1 at 2.) Although Gates had posted bail for that offense, the warrant mistakenly remained in the court system. (*See* Dkt. No. 28-1 at 22.) Deputy Shalloway arrested Gates. (Dkt. No. 28-1 at 2.)

During the search incident to arrest, Deputy Shalloway discovered a prescription pill bottle in Gates's front pants pocket. (Dkt. No. 28-1 at 2.) The pill bottle was unmarked and contained eight yellow rectangular pills marked "R039." (Dkt. No. 28-1 at 2.) Deputy Shalloway recognized the pills to be Alprazolam. (Dkt. No. 28-1 at 2.) Deputy Shalloway asked Gates what the pills were and whether he had a prescription for them. (Dkt. No. 28-1 at 2.) Gates declined to

answer. (Dkt. No. 28-1 at 2.) Deputy Shalloway placed Gates in the back of his patrol car. (Dkt. No. 28-1 at 2.)

Gates's vehicle was stopped in the right hand turn lane, blocking that lane's travel portion of the roadway. (Dkt. No. 28-1 at 2.) Because there was no other licensed driver available to move the vehicle, Deputy Shalloway determined that it needed to be impounded. (Dkt. No. 28-1 at 2.) He then conducted an inventory of the vehicle. (Dkt. No. 28-1 at 2.) In the glove compartment, he found a semi-automatic handgun magazine with no ammunition. (Dkt. No. 28-1 at 2.) Because possession of an empty magazine is not a crime, he continued his inventory. (Dkt. No. 28-1 at 2.) In the center console, he saw a small clear bottle with a small clear baggie containing a white rocky substance that he recognized as crack cocaine. (Dkt. No. 28-1 at 2.) He stopped his inventory and had the vehicle impounded from the scene to secured storage pending a search warrant. (Dkt. No. 28-1 at 2.)

On July 2, 2015, Detective George Alvarez applied for and obtained a warrant to search Gates's impounded vehicle. (Dkt. No. 28-1 at 4, 6, 10.) In his application, Detective Alvarez relied on the items discovered by Deputy Shalloway to support his belief that evidence of a controlled substances violation would be found in the vehicle. (Dkt. No. 28-1 at 7.) During his search, Detective Alvarez found a shotgun, 2.6 grams of cocaine, and 68 Alprazolam pills. (Dkt. No. 28-1 at 10.)

2. Analysis

Gates acknowledges that his stop and arrest were legitimate. (*See* Dkt. No. 28 at 2.) However, he alleges that that Deputy Shalloway's search of his car was invalid. (Dkt. No. 28 at 2.) Gates asserts that, rather than explore an alternative to impoundment as required by Washington law, Deputy Shalloway improperly searched the vehicle under the guise of an inventory search. (Dkt. No. 28 at 2.) Gates argues that the fruits of this improper search formed the basis for Detective Alvarez's warrant application, rendering the fruits of that search also inadmissible. (Dkt. No. 28 at 9.) The Government responds that Deputy Shalloway properly

impounded the car under the community caretaking doctrine and followed standard department procedure by conducting an inventory search. (Dkt. No. 30 at 3-4.)

As part of their community caretaking role, police officers may impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic. *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005). Washington law imposes an additional requirement for impounding a vehicle under the community caretaking doctrine: if "neither the defendant nor his spouse or friends are available to move the vehicle." *State v. Williams*, 689 F.2d 1065, 1070-71 (Wash. 1984). Whether an impoundment is warranted under the community caretaking doctrine depends on the vehicle's location and the police officers' duty to prevent the vehicle from creating a hazard to other drivers or becoming a target for vandalism and theft. *Id.* It is unreasonable to impound a vehicle following an arrest if there is no probable cause to seize the car and where a reasonable alternative to impoundment exists. *State v. Houser*, 622 P.2d 1218, 1225 (Wash. 1980). An officer need not exhaust all possibilities, but must at least consider alternatives to impoundment. *State v. Coss*, 943 p.2d 1126, 1130 (Wash. Ct. App. 1997). The reasonableness of an impoundment depends on the particular facts of each case. *Id.* at 1129. In *Coss*, for example, the court concluded that the impoundment was unreasonable because the officer did not inquire whether the defendant's passengers could drive her car after her arrest. *Id.* at 1130. Likewise, in *State v. Hardman*, the impoundment was unreasonable because the officer knew that the defendant's family lived nearby, but did not inquire of the defendant whether someone was available to come pick up the car. 567 P.2d 238, 241 (Wash. Ct. App. 1977).

Here, Deputy Shalloway determined that impoundment was necessary, because the car was completely blocking the right turn lane where it was parked. Although Gates argues that there is insufficient evidence that his car blocked traffic, the Court finds that a car stopped in a right hand turn lane for through traffic would reasonably impede traffic. The Court further finds that the officer was reasonable in determining that no alternatives to impoundment were available. Unlike in *Coss*, there were no passengers in Gates's vehicle. Nor did the officer ignore

a known proximity to other potential drivers, as in *Hardman*. Gates argues that "Deputy Shalloway was under an obligation to at least explore the issue of whether someone could come move Mr. Gates's car." (Dkt. No. 28 at 7.) In support, Gates cites *State v. Tyler*, 302 P.3d 165, 170 (Wash. 2013), where an officer sufficiently explored alternatives to impoundment by asking the defendant to loan his cell phone to a passenger to try to find another driver. But, contrary to Gates's characterization, *Tyler* does not establish a requirement for the officer to proactively seek out another driver. Rather, *Tyler* is an example of an officer utilizing passengers as a resource rather than immediately impounding the vehicle. That was not an option for Deputy Shalloway. Gates had no passengers. Gates was arrested and thus unable to operate the vehicle himself. It was the middle of the night. Gates's car sat in a lane for through traffic. It was reasonable for Deputy Shalloway to decide to impound the vehicle.

Once a vehicle has been lawfully impounded, the police may conduct an inventory search. *United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989). Warrantless inventory searches of vehicles are lawful only if conducted pursuant to standard police procedures aimed at protecting the owner's property and shielding the police from liability for stolen, lost, or damaged property. *United States v. Caseres*, 533 F.3d 1064, 1074 (9th Cir. 2008). An inventory search must not be a ruse for general rummaging to discover incriminating evidence. *Cervantes*, 703 F.3d at 1141.

Gates argues that the inventory search here was a mere ruse, demonstrated by Deputy Shalloway's failure to create an inventory sheet. (Dkt. No. 28 at 8.) But, as the Government notes, the inventory search quickly ceased when Deputy Shalloway discovered what he believed was a controlled substance. At that time, Deputy Shalloway had probable cause to seize the vehicle and arranged for it to be towed to a secured lot. That security negated the rationales underlying inventory searches and, by the same token, negated the need for an inventory log. Detective Alvarez then properly obtained a warrant to further search Gates's car.

Gates's motion to suppress the evidence seized on June 22 (Dkt. No. 28) is DENIED.

D. Evidentiary Hearing

Gates requests an evidentiary hearing prior to the Court's resolution of these motions. (*See* Dkt. No. 27 at 1; Dkt. No. 28 at 1.) "An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." *U.S. v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000.) Gates fails to meet this standard.

First, Gates states simply that the relevant facts "will be developed at an evidentiary hearing." (Dkt. No. 27 at 2 n.2.) But, he does not identify which facts must still be developed.

Gates does suggest that there are certain disputed facts. For example, Gates states that "Officer Gross provided no explanation for how he 'recognized' the individual he contacted outside the club [as the Déjà Vu] doorman." (Dkt. No. 27 at 3 n.3.) But, Gates identifies no reason to doubt this identification. A defendant's distrust of a police officer's word does not alone create a disputed issue of fact.[4]

Gates also states that "a later notation in [Officer Gross's] report indicates that knocking on the main door and calling the club yielded no result, suggesting that no club employees were still at work at the time of the incident." (Dkt. No. 27 at 3 n.3.) But, the fact that no one answered later that night—after Officer Gross called for backup and arrested Gates—is not inconsistent with the report that earlier, when Officer Gross first arrived in the Déjà Vu parking lot, he encountered the doorman standing outside of the club. (*See* Dkt. No. 27-1 at 1.) Moreover, the Court's resolution of Gates's motion did not require determination of whether employees in fact remained in the club at the time.

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[4] Gates also argues that, because the Government cannot identify the doorman, Officer Gross should not be permitted to testify about the doorman or his statements. (Dkt. No. 27 at 3.) The Court interprets this as a hearsay objection. A court may rely on hearsay evidence, otherwise inadmissible at trial, in ruling on a motion to suppress. *United States v. Raddatz*, 447 U.S. 667, 679 (1980). Whether the doorman's statements can be used at trial is a matter to be decided at a later date.

Finally, Gates states that "there is little to no evidence that the car stopped in the right-hand turn lane from a four-lane road into a shopping center at 12:20 a.m. was actually impeding traffic or threatened public safety." (Dkt. No. 28 at 6.) But, as discussed above, the Court does not require additional information to determine that the location was an inappropriate place for the vehicle to remain parked.

Gates's request for an evidentiary hearing is DENIED.

III. CONCLUSION

For the foregoing reasons, Defendant's motions to suppress (Dkt. Nos. 27, 28) are DENIED.

DATED this 16th day of February 2016.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

A P P E N D I X 3

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CHRISTOPHER MILES GATES, Defendant.	CASE NO. CR15-0253-JCC ORDER DENYING MOTIONS TO SUPPRESS

This matter comes before the Court on Defendant Christopher Gates's motions to suppress (Dkt. Nos. 27, 28, 73, 77). The Court previously denied Gates's initial suppression motions (Dkt. Nos. 27, 28), but subsequently granted his request to reopen the motions, hold an evidentiary hearing, and raise new arguments. (*See* Dkt. No. 72.) Having considered the parties' briefing, the documentary evidence, and the testimony presented at the hearings on October 11, 2016 and October 27, 2016, the Court hereby AFFIRMS its denial of Gates's initial motions to suppress (Dkt. Nos. 27, 28) and DENIES Gates's newly filed motions to suppress (Dkt. No. 73, 77) for the reasons explained herein.

I. BACKGROUND

Gates is charged with two counts of Felon in Possession of a Firearm and two counts of Possession of a Controlled Substance. (Dkt. No. 13 at 1-3.) His first firearm charge arises from a vehicle search conducted on June 7, 2015; his other three charges arise from a vehicle search

conducted on June 22, 2015. (Dkt. No. 13 at 1-3.) Gates seeks to suppress the evidence obtained as a result of both searches.

The Court's initial suppression order (Dkt. No. 37) sets forth the facts as established by the documentary evidence presented at that time. The evidence submitted at the hearings is largely consistent with the previous evidence. To the extent that Gates put forth contradictory evidence at the hearings, the Court will address it in the analysis below.

II. DISCUSSION

A. June 7 Vehicle Search

1. The Court's Previous Ruling

In its initial suppression order, the Court concluded that Officer Gross properly contacted Gates under the citizen contact and community caretaking doctrines, as Gates was reclined and unresponsive in his car. (Dkt. No. 37 at 4-5.) The Court also found that Officer Gross and Sergeant Claeys conducted a proper *Terry*[1] stop, given that the circumstances created reasonable suspicion that Gates intended to commit a robbery. (*Id.* at 5.) The Court further concluded that the interactions following the initial contact justified Gates's arrest, because the officers soon discovered that Gates was a felon in possession of a firearm, and his brief detainment in the interim did not constitute an arrest. (*Id.* at 6-7.)

2. Gates's Challenges

Lawful Presence: Gates first argues that Officer Gross lacked the legal authority to be in the Déjà Vu parking lot that night. (Dkt. No. 73 at 2.)

The Ninth Circuit has held that "a police officer, who is in a place where he has a right to be, is not conducting a search when he looks through car windows." *United States v. Head*, 783 F.2d 1422, 1426 (9th Cir. 1986). For example, in *United States v. Orozco*, the court reasoned that "[t]he deputies' looking through the windows of a vehicle parked on a public street did not

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

violate appellant's reasonable expectations of privacy; anyone walking past the vehicle could have easily observed the packages of cocaine and heroin." 590 F.2d 789, 792 (9th Cir. 1979). The Supreme Court has affirmed this principle: "There is no legitimate expectation of privacy . . . shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." *Texas v. Brown*, 460 U.S. 730, 740 (1983).

Here, Gates argues that he had a reasonable expectation of privacy as to the inside of his vehicle because the Déjà Vu parking lot was not open to the general public. (Dkt. No. 73 at 3.) He notes that the "lot displayed signage which limited usage to those who had authorization to be there and use [of] the parking lot was intended only for adult paying customers of the club." (*Id.*)

However, the evidence also shows there was nothing preventing any member of the public from entering the lot, such as a gate or locked entry. Officer Gross further testified that he had been there before to remove people at Déjà Vu's request. There is no evidence that Officer Gross was asked to leave that night; to the contrary, the doorman relayed information to Officer Gross about his inability to rouse Gates. Moreover, under Gates's lawful presence theory, he was also trespassing, as he was not a patron of the club. The Court thus concludes that Gates did not have a reasonable expectation of privacy as to the inside of his car as he sat in the Déjà Vu parking lot.

Doorman's Credibility: Gates argues that the Court should reject the doorman's statements, because the doorman did not testify. (*See* Dkt. No. 39 at 5.) The Court finds this argument unpersuasive for two reasons.

First, Officer Gross stated both in his police report and at the hearing that he spoke to the doorman, and the Court finds this testimony credible. The only arguable counterevidence came from an investigator from the Federal Public Defender's Office, who testified that he was unable to track down the doorman. But, this was because he was unable to reach club employees—not because he found evidence to negate the doorman's presence.

Second, the Court may rely on hearsay when ruling on a motion to suppress. *See* Fed. Evid. R. 104(a) ("In making its determination [on the admissibility of evidence, the Court] is not bound by the rules of evidence except those with respect to privilege."); *United States v. Torres*, 504 F. Supp. 864, 866 (E.D. Cal. 1980) ("[R]ulings on objections to hearsay in a suppression hearing are not issues of admissibility since hearsay in this context is a matter of the weight to be given such evidence."). Thus, although the doorman did not testify, Officer Gross's testimony was sufficient to determine that the community caretaking doctrine applied.

Circumstances of Approach: Gates contends that the officers were not justified in conducting a *Terry* stop, because they had no suspicion of criminal activity when they approached the car. But, as discussed above, Officer Gross properly approached the car pursuant to his community caretaking role. As part of that appropriate action, he observed a pistol in plain view on Gates's front seat.[2] This observation, along with the fact that Gates was facing the club entrance after hours when employees would be leaving with cash, gave the officers reasonable suspicion that Gates intended to commit a robbery. The fact that Gates had clothing and personal items in his car does not negate this reasonable suspicion. The Court thus affirms its finding that the officers conducted a proper *Terry* stop.

Circumstances of Removal and Detainment: Gates also contests the Court's finding that his removal from the car and detainment did not amount to an arrest prior to the discovery that he was a felon in possession. (*See* Dkt. No. 39 at 5.) However, the hearing testimony on the sequence of events was overall consistent with the police reports, upon which the Court previously relied: Sergeant Claeys knocked on the window and identified himself; Gates did not immediately respond; Gates moved around in the car; the pistol was on the front seat within

[2] Gates testified that he "do[es]n't believe" there was a firearm on his front seat. Given the witness's demeanor, especially in light of the other evidence that squarely contradicts this assertion, the Court does not find this testimony credible.

Gates's reach[3]; Sergeant Claeys pulled Gates out of his car by his arm; Sergeant Claeys escorted Gates to the ground and handcuffed him; Sergeant Claeys returned Gates to his feet; Sergeant Claeys asked for identification and Gates produced it; and dispatch reported that Gates was a felon. Gates presented no evidence that materially alters the Court's understanding of the facts. Thus, the Court affirms its prior conclusion that the officers conducted a valid *Terry* stop up until the time they determined there was probable cause to arrest Gates for unlawful possession of a firearm.

Vehicle as Residence: Gates further argues that he was using his car as a residence and thus had an enhanced expectation of privacy. (Dkt. No. 73 at 2.)

The Fourth Amendment provides protection beyond traditionally constructed homes. *United States v. Barajas-Avalos*, 377 F.3d 1040, 1055 (9th Cir. 2004). In determining whether a structure qualifies as a home, the Court asks whether it "harbors those intimate activities associated with domestic life and the privacies of the home." *United States v. Dunn*, 480 U.S. 294, 301 n.4 (1987).

When it comes to cars, though, the analysis is distinct. The automobile exception to the warrant requirement has "historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." *California v. Carney*, 471 U.S. 386, 394 (1985). The exception "has never turned on the other uses to which a vehicle might be put." *Id.* Accordingly, although the Supreme Court recognized that vehicles "can be and are being used not only for transportation but for shelter," it concluded that the automobile exception applied to a motor home. *Id.* at 393. The Court reasoned that "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is

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[3] Gates testified that he kept his hands in view, which contradicts Sergeant Claeys's testimony that he started to move around inside the vehicle. Having observed the witnesses testify, and taking into consideration Gates's admitted groggy state, the Court credits Sergeant Claeys's account.

found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception [ready mobility and the reduced expectation of privacy stemming from public exposure and heavy regulation] come into play." *Id.* at 392-93. Ultimately, the Court "declined to distinguish between 'worthy' and 'unworthy' vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence." *Id.* at 394.

According to Gates, he had no access to a traditional residence that night and was sleeping in his car on a regular basis. He testified that his work clothes, street clothes, and other personal items were in his vehicle and easily visible to anyone looking in. However, he does not contest that his car was readily mobile and situated in a parking lot, *i.e.*, a place not regularly used for residential purposes. Accordingly, Gates's argument is insufficient to overcome the clear mandate in *Carney* that citizens have a lesser expectation of privacy in their vehicles.

Gates's motions to suppress the evidence seized on June 7 are DENIED.

B. June 22 Vehicle Search

1. The Court's Previous Ruling

In its initial suppression order, the Court found that, based on the circumstances that night, it was reasonable for Deputy Shalloway to impound Gates's vehicle. (Dkt. No. 37 at 10-11.) The Court further concluded that Deputy Shalloway properly initiated an inventory search that he ceased upon finding a suspected controlled substance. (*Id.* at 11.)

2. Gates's Challenges

Alternatives to Impoundment: Gates argues that Deputy Shalloway failed to explore reasonable alternatives to impoundment of his vehicle, as required by Washington law. (Dkt. No. 90 at 3.) In support of this argument, Gates offers other possible options that Deputy Shalloway could have pursued. For example, Gates testified that his friend and family members were able and willing to come get his car, but that Deputy Shalloway did not inquire about this possibility. Gates also suggested that someone—such as Deputy Shalloway or Gates himself—could have

moved the car into a nearby shopping center parking lot.

This argument misapplies the requirements imposed on Washington officers when determining whether to impound a vehicle. While officers must at least consider alternatives to impoundment, they are "not required to exhaust all possibilities." *State v. Coss*, 943 P.2d 1126, 1130 (Wash. Ct. App. 1997). And, the reasonableness of an impoundment depends on the particular facts of each case. *Id.* at 1129.

Here, Gates's car was completely blocking a right turn lane on an arterial, impeding through traffic.[4] Unlike the cases Gates cited, there is no evidence that Deputy Shalloway ignored the availability of another person who could drive the car. Although Gates's later testimony shows that such persons existed, there is no affirmative requirement that an officer inquire on this point. Further, Deputy Shalloway testified that, while he has previously assumed responsibility for driving someone's car, it was inappropriate to do so in this case. Under the particular facts of this case, it was reasonable to impound Gates's vehicle.

Inventory Search as a Ruse: Gates further argues that Deputy Shalloway used the inventory search as a mere ruse, as demonstrated by his failure to create an inventory sheet. (Dkt. No. 28 at 8.) But, as the Court previously noted, the failure to do so is easily explained by Deputy Shalloway's quick discovery of a controlled substance. (*See* Dkt. No. 37 at 11.) Upon that discovery, Deputy Shalloway ceased his inventory search and had the vehicle impounded while officers secured a search warrant. (*Id.*) No evidence presented negates this finding.

Constitutionality of Policy: Finally, Gates challenges the constitutionality of the King County Sheriff Department's policy for post-impound inventory searches, arguing that it fails to provide sufficient directions and safeguards to law enforcement to limit their discretion in conducting such searches. (Dkt. No. 77 at 1.)

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[4] Gates testified that he was parked in a shoulder, not in a through lane of traffic. This is contradictory to the photographic evidence and the officer testimony. The Court does not find his statement credible.

In the context of inventory searches, police discretion is permissible "so long as that discretion is exercised according to standard criteria and on the basis of something other than the suspicion of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1990). "The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment." *Florida v. Wells*, 495 U.S. 1, 4 (1990). "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Id.*

The policy that Gates challenges is Section 9.04.065, which provides:

1. If the vehicle is impounded, an inventory search shall be conducted to find, list and secure from loss property in the vehicle.
2. The inventory search is conducted to protect the vehicle owner's property, to protect law enforcement from false claims of theft, and to protect law enforcement from potential danger.
3. An inventory search is not a general exploratory search for the purpose of finding evidence of a crime. Deputies:
    a. Shall not open the trunk, even if it is accessible through a latch in the driver's compartment, [unless] a manifest necessarily exists, such as an indication of dangerous contents.
    b. May open an unlocked glove compartment.
    c. Shall not open personal luggage, whether locked or not, during an inventory search of an impounded vehicle unless the owner consents to the search or there is reason to believe that its contents could be dangerous when stored.

Contrary to Gates's assertion, this policy offers quite a bit of direction and safeguards to limit the scope of inventory searches. Indeed, aside from his blanket statement that the policy gives officers too much discretion, Gates fails to explain the flaws in this policy. Instead, he merely re-argues that Deputy Shalloway used the inventory search as a ruse. (*See* Dkt. No. 77 at 2-5.) While an unlawful secondary purpose will invalidate an otherwise proper inventory search, *see United States v. Bulacan*, 156 F.3d 963, 969 (9th Cir. 1998), that question is distinct from the policy's underlying constitutionality.

Gates's motions to suppress the evidence seized on June 22 are DENIED.

III. CONCLUSION

For the foregoing reasons, Defendant's motions to suppress (Dkt. Nos. 27, 28, 73, 77) are DENIED.

DATED this 1st day of November 2016.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

A P P E N D I X 4

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff,	CR15-00253-JCC
v.	SEATTLE, WASHINGTON
CHRISTOPHER GATES, Defendant.	October 11, 2016
	Evidentiary Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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EXAMINATION INDEX

EXHIBIT INDEX

THE CLERK: Please be seated and come to order.

We're on the record in CR15-253, United States of America versus Christopher Gates.

Counsel, please make your appearances.

MR. HOBBS: Good morning, Your Honor. Stephen Hobbs for the United States.

THE COURT: Mr. Hobbs.

MR. KELLOGG: Good morning, Your Honor. Terry Kellogg appearing with Christopher Gates.

THE COURT: Mr. Kellogg.

MR. HOBBS: Your Honor, just before we begin, as you know, we have two different incidents here, the June 7th and the June 22nd incident. I was prepared to move forward on both of them.

Late Thursday, the primary witness, really our only witness on the second incident, Deputy Shallowway, told me he had been appointed to the SWAT team and had training this morning. I asked him to contact me, and frankly, I told him I felt he needed to be here regardless of that training. Unfortunately, I was out on Friday because my mother was having surgery.

He's unable to make it. I would respectfully request we continue that portion of the hearing. I apologize. It's obviously not my intent to delay this matter any further. The government certainly has been ready to go since last January.

If the Court is not willing to do that, then we're prepared

to moved forward on the first matter alone with two witnesses, Officer Gross and now-retired Sergeant Claeys.

THE COURT: Where is this -- the fellow that's doing the training, what agency is he with?

MR. HOBBS: King County Sheriff's.

THE COURT: Okay. Well, you might convey to him that my first inclination is to send the marshals out to get him. This is not an invitation.

MR. HOBBS: I do understand that, Your Honor.

THE COURT: Why don't we -- what about just putting the whole thing over to tomorrow? Does that work for you, Mr. Kellogg?

MR. KELLOGG: I could make it work, Your Honor.

MR. HOBBS: I don't know his availability tomorrow. The training may be all week, although I can --

THE COURT: Well, I'm not asking.

MR. HOBBS: Right.

THE COURT: I'm telling.

MR. HOBBS: I do understand that.

I have two witnesses who are here today for the first matter, and I guess I would prefer to move forward on that.

THE COURT: How long will they -- how long will they take?

MR. HOBBS: Probably about less than a half an hour, from the government's perspective, maybe a little more with

cross.

I should also mention, not to forget, that I have trial before Judge Robart starting tomorrow.

THE COURT: All right. Let's do the two witnesses and then maybe do the rest of it the first part of next week.

MR. HOBBS: That would be fine by me, Your Honor.

THE CLERK: We have a civil jury trial starting, seven days, and we have got a busy Tuesday morning.

THE COURT: How long will that one witness take?

MR. HOBBS: Less than half an hour for the government. Probably less than 20 minutes. Probably less than 15 minutes.

MR. KELLOGG: Your Honor, I'm sorry to interrupt.

THE COURT: Go ahead.

MR. KELLOGG: Mr. Gates very seriously wants to testify, and we were planning on calling him as a witness. I expect him to be lengthy. He would be talking about both, the two different arrests, and it would be our request that he testify a single time after this other witness.

THE COURT: Let's put the whole thing over to tomorrow morning.

MR. HOBBS: I will be in trial before Judge Robart, Your Honor.

THE COURT: Oh.

MR. HOBBS: I apologize. My trial goes tomorrow and Thursday, and then restarts Tuesday afternoon.

THE COURT: Tomorrow is Wednesday, right?

MR. HOBBS: Yes.

THE COURT: Yeah.

You know, I'm inclined to tell you to call this guy and tell him to get here, and if he has a problem with it, let's send the marshals out there to get him.

MR. HOBBS: Well, Your Honor, just to be clear, he told me he was available. I took him at his word, as I do normally. He's not under subpoena.

So, you know, if the Court has a problem with it, I understand if the Court is going to dismiss those charges. I apologize. There's nothing I can do about his not being here right now.

My preference, at a minimum, would be to move forward with the officers I have on the first charge, as I think that's sort of the primary focus, from my perspective, of the evidentiary hearing.

MR. KELLOGG: But if we're going to come back, we might as well just come back and do it all at once.

THE COURT: That's what I think too.

MR. KELLOGG: And I'm open all of next week.

THE COURT: Well, I'm not. That's the problem. I have got a seven-day jury trial starting on Monday.

What's the trial date of this thing?

MR. KELLOGG: Today.

MR. HOBBS: Right. But, obviously, time has been tolled for months and months.

MR. KELLOGG: And Mr. Gates has, for months, always expressed through me to counsel that we anticipated a stipulated-facts trial, not a live-testimony trial.

MR. HOBBS: If I may suggest, Your Honor? I would like to put these two witnesses on, set a follow-up date, with the Court's indulgence, at a time that works for everybody for the second witness. And the fact -- we have literally months of waived time here, so if it rolls out two weeks, I don't think anybody is being prejudiced, and we can take it at the Court's schedule after that.

THE COURT: All right. Let's get these two witnesses out of the way.

And then give me another date after this trial next week, Paul.

THE CLERK: Can you do it like on the 28th, like on a Friday? Because that seven-day will roll over to at least the 25th, with deliberations possibly.

THE COURT: Well, deliberations won't be a problem.

THE CLERK: We have got the 27th or the 28th.

THE COURT: How about the 27th of October?

MR. HOBBS: I will make that work, Your Honor.

THE COURT: Mr. Kellogg, does that work for you?

MR. KELLOGG: I have a conflict on the 27th, Your Honor.

I could probably make that go away.

THE COURT: Let's try to do it on the 27th, okay?

THE CLERK: At 9:00, 9:30?

THE COURT: At 9:00 a.m.

MR. HOBBS: Nine o'clock.

THE COURT: All right. Let's get your witnesses on.

MR. HOBBS: Thank you, Your Honor.

The government calls Officer Gross.

MR. KELLOGG: Your Honor, we would move to exclude witnesses prior to their having testified.

THE COURT: Motion is granted.

THE CLERK: Please come this way to be sworn. If you will just stand right there and raise your right hand.

ROBERT GROSS,

having been sworn under oath, testified as follows:

THE CLERK: Thank you. Please be seated.

Please state your full name, spell your last name for the record.

OFFICER GROSS: Robert Gross, G-r-o-s-s.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. HOBBS:

Q Good morning, sir.

How are you employed?

A I am a sergeant for the City of Lake Forest Park Police.

Q How long have you been in law enforcement?
A Eighteen years.
Q Back on June 7th of 2015, were you a sergeant, or an officer at that time?
A An officer.
Q So we're talking about an incident that happened on June 7th of 2015, at about 0300 hours, that led to the arrest of Mr. Christopher Gates. Do you recall that incident?
A Yes, sir.
Q Why don't you tell the Judge how that began, from your perspective?
A Well, I was on -- I was on routine patrol, and I entered the parking lot of the Déjà Vu adult cabaret.
THE COURT: I'm not familiar with it.
THE WITNESS: Well --
THE COURT: That was a joke.
THE WITNESS: Oh.
A So it's a strip club in the city. It's located at 145th and Lake City Way -- 145th and Bothell Way, and --
THE COURT: Actually, I am familiar with it. Was that owned by the Colicurcio brothers at one time?
THE WITNESS: I believe it was.
THE COURT: Yeah.
THE WITNESS: Yeah.
A And so that business -- that was Sunday night. That business

closes at two in the morning, and so by three in the morning, the only people that are usually there --

MR. KELLOGG: I'm going to object to the narrative, Your Honor.

THE COURT: No. Go ahead.

A The only people that are typically there are just a few of the female dancers and the manager, at that hour.

Q What did you see when you drove into the parking lot?

A There was about five vehicles parked, one of which was a white Buick, and that vehicle was located at approximately the center of the parking lot, and it was facing the main entrance.

Q What were you thinking? What was going through your mind at that point?

A Well, when I saw the vehicle, I could just see that a male was reclining in the front driver's seat with his eyes closed, and I didn't know who the person was at that point, but they appeared to be asleep. And so the only other person in sight was a man standing at the front of the business that I recognized as one of the doormen, a security guy. And so I drove up to the security guy, and I asked him, "Do you know anything about this guy that's sleeping out here?"

And one of the things on my mind at that point was that --

MR. KELLOGG: Objection. Non-responsive narrative.

THE COURT: Go ahead. Overruled.

A -- that business had been robbed at gunpoint maybe six months

earlier, and I just wanted to know who was in the parking lot at that hour.

And so the doorman had told me at that time that he didn't recognize the man as an employer or associate of any of his employees, and earlier the doorman himself had checked on the guy and found him asleep, or passed out, and had been unable to wake him up by yelling and banging and shouting in the window. So the doorman thought that he might be passed out.

Q What did you do at that point?

A At that point, I had circled around, back in my vehicle, and I parked behind the Buick. I got out, and I approached the Buick on its passenger side, so that I could look inside and see the driver and see the contents of the vehicle.

Q What did you observe?

A I observed the driver, later identified as Mr. Gates, was reclining in the driver's seat with his eyes closed. He appeared to be asleep or passed out. And I could see on the passenger's seat next to him a couple of beer bottles. And then I also saw, on the passenger's seat next to him, right within his reach, was an FN Five Seven pistol.

Q What did you decide to do at that point?

A Well, I decided it would not be safe to try and make contact by myself, so I returned to my patrol vehicle, and I got out my patrol rifle, and I waited behind my vehicle for my backup to arrive.

Q And who was that?
A That was Sergeant Dave Claeys.
Q What happened after that?
A I explained what I had seen and what the doorman had said, to Sergeant Claeys, and that I had concerns about the situation. And we formulated a plan to make contact.
Q And what was that plan?
A So I re-approached the vehicle on the passenger's side, just to provide cover, and Sergeant Claeys approached on the driver's side, to make contact.
Q What happened then?
A Sergeant Claeys, he was knocking on the window, and he identified himself as a police officer. He was trying to get Mr. Gates' attention. And it didn't immediately work. Mr. Gates didn't wake up right away. But after about a minute, he started kind of coming to, stirring around a little bit.
Q What did you see then?
A Well, Sergeant Claeys, he opened the driver's door -- it was unlocked -- and he started to escort Mr. Gates out.
Q What happened after that?
A Well, the sergeant, he lowered Mr. Gates to the ground. Mr. Gates was saying something. I couldn't really tell what he was saying at that point. But Sergeant Claeys lowered him to the ground and secured him in handcuffs.
Q During that initial sort of contact, Mr. Gates is in the

driver's seat; is that correct?
A Yes.
Q Was the handgun within his reach? Could he have accessed the gun, if he wanted to?
A Absolutely.
Q All right. So it wasn't hidden, or buried, or under anything?
A No.
Q What happened after that?
A Once Mr. Gates was secured in handcuffs, I opened the door, and I secured the pistol. I found it to be loaded.
Q At the time you contacted him, were you aware whether there were regulations concerning carrying an unsecured pistol in a car?
A Well, yes. In order to carry a loaded pistol in the cab of a car, you have to have a concealed pistol license. And if you are not, if you don't have the pistol license, you would be committing a crime.
And then, further, if you don't have control of the pistol, as in, it's not on you, then -- and you're not able to take care of it, it needs to be out of view.
Q We may have skipped over some things, so let me just ask you about this. Were you able to run the license plate of the Buick?
A No. Unfortunately, that was Sunday night, and the Department of Licensing had shut down their computer to update records.

Q So you had no information about, at that time, when you approached, who the registered owner of the car was?
A No.
Q After that, were you able to obtain that information? Or let me ask you a different question. After you detained Mr. Gates, were you able to obtain his personal information and who he was?
A Yeah. He provided his driver's license, and then we were able to run the name.
Q And at that point did you learn that Mr. Gates had a felony history?
A Yes.
Q So you didn't know that when you first contacted him, only after he was detained?
A That's right.
Q Was the vehicle, that Buick, subsequently impounded?
A Yes.
Q I'm going to show you what's been marked as Exhibit 2. This is in the binder that's in front of you, but I will also put it up on the screen. I think you have had a chance to look at these before the hearing. That's kind of a poor screenshot there. I don't know if I can make that lighter here or not.
Is that the Buick we are talking about?
A Yes.
Q The second photograph of Exhibit 2, is that the front seat?
A That's after I collected the gun.

Q After the gun.

So those are beer bottles. And can you just point to -- you can mark on the screen -- if you recall, where the firearm was?

A I touched the screen. Can you see it?

THE CLERK: You can use the back of your fingernail to draw on it.

THE WITNESS: Oh, okay.

Q Right in that area?

A Yeah.

Q Kind of in the middle of the seat?

A Yes.

Q And, finally, the third page of Exhibit 2, is that the firearm you saw?

A Yes, sir.

Q It was loaded when you retrieved it?

A Yes.

Q Also, I'm going to show you what's been marked as Exhibit 3. These are photographs which you did not take. But have you had an opportunity to briefly look at them?

A Yes.

Q And do they depict the exterior of the Déjà Vu?

MR. HOBBS: My screen is very bad. I hope yours is better, Your Honor.

THE COURT: It's all right.

Q So I will flip through these.

A Yeah, that's the north and the west side.
Q Just stop me when we get to the point of where you could see Mr. Gates' vehicle, if we have a photograph of that here.
A In that picture right there, it might be possible to see where the parking spot was just on the edge, the right edge of the building. But it would be in that back lot there.
Q In the back lot. So it was facing the back side of the building, on this photograph?
A Well, the eastside of the building is actually the main entrance. So from this perspective, the backside of the building, that main entrance that you can't see, that's where -- that's how it was facing.
Q All right. Stop me if there's a better photograph.
A From that vantage point, where you can see that SUV -- or pickup with the canopy, that is approximately the location where the vehicle was.
Q All right. Thank you.
I'm just going to flip through here. Is this a little more close up of the vehicle with the canopy there?
A Yeah.
Q That's about where the Buick was?
A Yes.
Q Does the -- the Déjà Vu parking lot, there's no gates that block entrance, right? Anybody can drive off the street into that parking lot; is that correct?

A That's right.
Q Are there signs posted, like "Trespassers will be prosecuted," or anything like that, do you recall?
A No.
Q The parking lot is clearly owned by the Déjà Vu; is that right?
A That's right.
Q Have you had to go there before to remove people at Dèjá Vu's request?
A Yes.

MR. HOBBS: Your Honor, I would offer Exhibit 2 and 3 for the purposes of this hearing.

MR. KELLOGG: No objection.

THE COURT: Admitted.

(Exhibit No. 2 and 3 admitted.)

MR. HOBBS: No further questions.

THE COURT: All right.

Mr. Kellogg.

CROSS-EXAMINATION

BY MR. KELLOGG:
Q I take it from your answers that you're pretty familiar with this parking lot; is that correct, sir?
A Yeah.
Q And a portion of the boundary to the south, between Bothell Way and the back part of the lot, the front portion of that has a

chain-link fence with slats in it, does it not, sir?
A It's either a fence or some kind of vertical barrier.
Q All right. And the other sides have more landscaping, as far as the boundaries of the parking lot; is that correct, sir?
A I'm not sure I understand "landscaping."
Q Well, trees, shrubbery, poplars.
A There's -- there are some bushes there along the north side, yeah, I believe so.
Q And the eastside boundary is kind of up an embankment and also has fencing at the top of the embankment, but it's just a regular, normal -- it's not a chain-link fence, but a more typical fence; is that correct, sir?
A Right now, I think it's chain-link fence.
Q To the rear?
A That's right.
Q And do you know how long it has been chain-link fence?
A Well, there's a housing development that's nearing completion back there, and it's been -- they have been working on it for about a year. At some point, they changed the fence. So it might have been towards the start of that project.
Q Directing your attention to what's been introduced as Exhibit No. 2 of the first photographs showing the car there, that also shows the main entrance in close proximity to the car; is that correct, sir?
A Can you show me that photo?

Q I believe you have it in front of you. I can show it to you.

THE COURT: So what's your question again?

Q (By Mr. Kellogg:) The portion here is the main entrance to the club, is it not, sir?

A That's right.

Q So the car was in close proximity, approximately a parking space or two from the front door of the club; is that correct?

A Yes.

Q When you first approached the vehicle, was it before or after you had contacted the doorman?

A I drove a loop through the lot. So I drove past the vehicle before I contacted the doorman.

Q When you contacted the doorman, you had not observed the handgun in the passenger seat at that point; is that correct, sir?

A Correct.

Q The doorman did not give you any indication that he had observed a handgun in the vehicle; is that correct?

A No, he didn't mention that.

Q All right. And you testified that you recognized the doorman. Do you know this individual's name?

A No.

Q How many prior times had you spoken with this particular doorman?

A Maybe a dozen.

Q A thousand?
A A dozen.
Q A dozen times.
Over what period of time?
A Over months.
Q Years?
A I couldn't say that for sure.
Q You referenced that the Déjà Vu had been robbed on a previous occasion several months before; is that correct, sir?
A That's right.
Q And what time of day was that prior robbery?
A I don't remember right now.
Q Do you recall whether or not anyone was apprehended as a result?
A No.
Q Do you recall whether the club was open or closed in the prior robbery?
A No.
Q I take it you had no involvement with that; is that correct?
A I didn't respond to that call.
Q When you first observed the firearm on the seat, were you in your vehicle, or on foot?
A On foot.
Q And you had parked your vehicle behind the Buick that was found to contain Mr. Gates; is that correct?

A Correct.
Q You approached the car and looked in the windows and saw Mr. Gates sleeping, correct?
A Correct.
Q At that time, you had no indication of any particular criminal offense --
A No.
Q -- that was being committed, or that Mr. Gates was committing, other than sleeping in a parking lot; is that correct, sir?
A That's correct.
Q You yourself at that point made no effort to contact Mr. Gates?
A That's correct.
Q You were unable to run the plates to find out any information because your ability to do so was down, right?
A That's right.
Q So is it at that point that you called for backup?
A Yes.
Q Claeys came, right?
A Yes.
Q You had not approached the car since seeing the weapon after you -- until after you talked with Sergeant Claeys, correct?
A Correct.
Q When Claeys opened the driver's door, at the point that the

door was open, was Gates awake or asleep?
A He was awake and groggy. He was moving a little bit.
Q His hands were on the steering wheel?
A I don't remember where his hands were.
Q When Sergeant Claeys opened the door, he pulled Mr. Gates from the driver's side, did he not?
A Yes.
Q So that's sudden movement on Sergeant Claey's part?
A No.
Q Was there -- there was no resistance by Gates; he was, like, waking up, right?
A He didn't actively resist, but he wasn't exactly cooperating either.
Q Well -- but Claeys takes him to the ground, correct?
A He escorted him. He pulled him.
Q Pulled him to the ground, right?
A Yes.
Q Was Mr. Gates face up, or facedown?
A Well, by the time I got there, he was facedown.
Q All right. And prior to you getting to the other side of the car, had you removed the handgun from the passenger's seat?
A No.
Q When you get to the other side of the car, do you assist Claeys in containing Gates?
A I didn't have to. He was doing a good job by himself.

Q Was he already in cuffs by the time you got there?
A No.
Q Who put the cuffs on him, you or Claeys?
A Claeys.
Q At that point, did you retrieve the firearm?
A Yes.
Q As soon as Mr. Gates was in handcuffs?
A Yes.
Q What did you do with the firearm?
A I cleared it and secured it in my car.
Q At the time that you secured the weapon in your vehicle, you still had not gotten any additional information concerning Mr. Gates, as far as his identity or prior record; is that correct?
A That's correct.
Q You, or Sergeant Claeys, in your presence, did not ask Mr. Gates any questions about whether or not he had a concealed weapons permit at that time, correct?
A No. That's exactly what I started asking him.
Q You started asking him that prior to removing the weapon and securing it in your vehicle?
A No. After that.
Q All right. And was that before or after Mr. Gates' identification had been determined?
A That was before.

Q There was no response to your question?
A There was a response, and I believe it was -- I will quote him. It was something very similar to, "This is bullshit."
Q All right. So as far as being responsive to the question as to whether or not he had a concealed weapons permit, he didn't provide information one way or the other, correct?
A Correct.
Q At that time, did you ask him any questions concerning his welfare, whether or not he was in medical distress?
A No.
Q Did you ask him any questions as to whether or not he had been drinking or was intoxicated?
A I don't think so.
Q How long was it from the time that you and Claeys approached the car until the time that Gates' identification was produced?
A Several minutes.
Q Where was Gates prior to the production of the identification?
A He was standing with Sergeant Claeys on the side of the car.
Q Where were you, sir?
A Standing next to both of them.
Q What were you doing?
A I was talking to Mr. Gates.
Q So both you and Claeys were taking to Mr. Gates?
A I think I was doing most of the talking.

Q You were doing most of the talking?
A That's right.
Q Did you ask Gates for his wallet?
A I don't remember.
Q Did you receive Mr. Gates' wallet?
A No. I received his Washington ID.
Q Did you get that from Gates, or from Claeys?
A That, I can't remember. Actually, I would like to refer to my narrative.
Q I have no objection to that.
THE COURT: Go ahead.
MR. HOBBS: And, Your Honor, the narrative is in Government's Exhibit 1. It begins on, it states, "24," the 24th page, the number on the bottom.
A Okay. I see, right here in paragraph 4. So Mr. Gates pulls out --
Q Sir, you can refresh your recollection by reading it, but don't read the report itself, please.
A That's not what I'm doing.
Q Thank you.
Was it you, or Claeys, that obtained the wallet from Mr. Gates?
A Neither.
Q Was it you, or Claeys, that obtained the Washington State ID card from Mr. Gates?

A That was Mr. Claeys.
Q Pardon me?
A That was Sergeant Claeys.
Q Where were you when that happened?
A I was standing right next to him.
Q Is it your testimony that that was voluntarily produced by Mr. Gates and given to Sergeant Claeys?
A Yes.
Q But this is after several minutes of questioning by both you and Claeys?
MR. HOBBS: Objection. That misstates the testimony.
Q Didn't you say it was several minutes after your initial contact with Gates before you obtained his Washington State ID card?
A Yes.
Q And by "several minutes," you mean five minutes?
A If I could have said five minutes and be that specific, I would have. I said "several" because I didn't time it.
Q Were you able to run Mr. Gates' identification at the time that you obtained the card?
A Yes. We were able to get the WASIC and NCIC response.
Q Do you recall how Gates was dressed at this time?
A I think he had shorts and a T-shirt on.
Q It's true, is it not, that you found no other items associated with robberies, indicia of robbery: ropes or any sort

of things, masks, disguises, things of that nature? You found none of that in the car, correct?

A Correct.

Q Did you decide that Gates' car was to be impounded?

A Yes.

Q Did you have any conversation with Claeys at the time that he was taking Gates to the ground?

A Yeah, I did.

Q But you were on the other side of the car at that time?

A Yes.

Q You saw Claeys put his knee on Gates' back to hold him down?

A No.

Q You never saw that?

A No.

Q That didn't happen?

A That might have happened, but I didn't say that I saw that.

Q You never saw Claeys controlling Gates in any fashion?

A I certainly did see him.

Q And how was that, sir?

A He was using his arm.

Q Claeys was using Gates' arm?

A That's right.

Q Had it behind his back --

A Yes.

Q -- when he was facedown?

A Yes.
Q And you were seeing this from the passenger's side?
A Yes.
Q Did you have physical contact with Gates yourself, hands-on?
A Not during the time when he was being handcuffed.
Q Or prior to that time?
A No.
Q As I understand your testimony, at the time that you and Claeys approached Gates' car, you were aware that there was this firearm on the seat, and it may or may not be in the possession of somebody who had a concealed weapons permit; is that correct, sir?
A Yes.
Q And other than the offense of not having a concealed weapons permit, if the person did not, you said that the other offense that you were investigating, other than the possibility of a robbery, because there had been one before, was that you can't have a weapon visible in a car; is that correct?
A Well, if you leave your -- even if you have your concealed pistol license, you can't just leave your pistol laying on the seat.
Q Okay. And is that state law?
A I think so.
Q Do you know what reference it is?
A No.

Q But when you are at home, you can have your pistol laying out?

MR. HOBBS: Objection, Your Honor. Relevance.

THE COURT: Sustained. Let's move on, Mr. Kellogg.

MR. KELLOGG: No further questions.

REDIRECT EXAMINATION

BY MR. HOBBS:

Q Officer Gross, after Mr. Gates was taken into custody, did you ask him to sign an impound form -- or, I'm sorry, did you ask him to sign a waiver allowing you to leave the vehicle in the lot?

A Yes.

Q Did he agree to sign that?

A He refused.

Q So at that point you had to impound the vehicle, pursuant to your policies?

A Yes.

Q Why did you remove the firearm from the front seat after Mr. Gates was taken into -- detained?

A Well, at that point, I had no idea what we were going to be doing with Mr. Gates, and he was not being very friendly with us, and I didn't want him or anybody else to get access to that pistol.

Q As part of whatever investigation you were going to do at the scene, would you be likely to go back to your patrol vehicle?

A Yeah.
Q Were you just going to leave the firearm in the front seat while you did that?
A No.
Q And why is that?
A It's not safe. It's not secure. It's a liability.
Q The last question: Have you been working all tonight? Are you in the middle of your shift?
A I'm in the middle of my shift.
MR. HOBBS: No further questions. Thank you.

RECROSS-EXAMINATION

BY MR. KELLOGG:
Q But at the time you took the pistol from the car, Gates was in handcuffs on the other side, in control of Officer Claeys -- Sergeant Claeys, right?
A That's right.
MR. KELLOGG: No further questions.
THE COURT: Okay. You may step down.
MR. HOBBS: The government will call Sergeant Claeys.
THE CLERK: Please come this way to be sworn. If you will just stand right there and raise your right hand.

DAVID M. CLAEYS,

having been sworn under oath, testified as follows:

THE CLERK: Thank you. Please be seated.
Please state your full name and spell your last name for the

record.

SERGEANT CLAEYS: My name is David Michael Claeys. It's C-l-a-e-y-s.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. HOBBS:

Q Good morning, sir.

A Good morning.

Q Are you currently employed?

A Yes.

Q As a law enforcement officer?

A No. I'm a --

Q Are you retired from law enforcement?

A Yes, I am.

Q And what department were you with when you retired?

A Lake Forest Park.

Q How long were you in law enforcement?

A Thirty-four years.

Q So we're talking about an incident that happened back on June 7th, 2015, that resulted in the arrest of Mr. Christopher Gates. Do you recall that incident?

A Yes, I do.

Q Have you had a chance to review your report concerning that incident?

A Yes, I have.

Q All right. And why don't you tell the Judge how you became involved in contacting Mr. Gates?
A I believe it was about just after three in the morning. Officer Gross advised that he was on a suspicious vehicle at the Déjà Vu, which is adult cabaret. He advised that there was one male in the driver's seat that seemed to be passed out and there was a handgun that he could clearly see on the passenger's seat, and he asked for assistance.
Q Did you arrive? Were you nearby and arrived, is that what happened?
A Correct.
Q What happened after that?
A Officer Gross advised me that he also saw beer bottles in the passenger area, that Mr. Gates had not made any movements, appeared to either be passed out or incapacitated somehow. He advised me where the handgun was, and told me that he wanted me to contact Mr. Gates while he covered from the passenger's side.
Q Is that what you guys did?
A Yes.
Q And then if you can tell the Court how things transpired as you contacted Mr. Gates.
A I knocked on the window several times, and I identified myself, tried to get him to stir, which after some time he finally did. He opened his eyes. I, again, identified myself, when he looked at me, and he appeared that he wasn't quite

understanding what was going on. I told him to keep his hands in clear sight, where I could see them, and he started moving around inside of the vehicle. So I opened the door and escorted him out of the vehicle, put him on the ground next to the driver's door, and handcuffed him.

Q From where you were, could you see the handgun?

A Yes.

Q It would have been a simple matter for Mr. Gates to reach that firearm?

A Absolutely.

Q So why did you remove him from the vehicle?

A For our safety. I didn't want him to reach over and grab it, especially him being unresponsive for the amount of time he was and seeming to be confused and not recognizing who I was.

Q When you say you escorted him to the ground, how did you control him? Did he willingly come out of the car? Did you have to pull him out of the car?

A A little of both. He moved his feet out of the car, and I told him to get on the ground, and he started to stand up, so I put him on the ground, or escorted him to the ground. It seemed at that point he understood what I wanted.

Q Was he handcuffed after that?

A Yes.

Q Did Officer Gross come around and join you after you had secured Mr. Gates, if you recall?

A You know, I don't really recall if he came over or he retrieved the handgun from the passenger's side.
Q At some point did you ask Mr. Gates to provide you with identification?
A Yes, I did.
Q Was he able to do that?
A Yes, he did.
Q So did Mr. Gates get his wallet --
A Yes.
Q -- or identification out of his pocket?
A Correct. Out of his back pocket.
Q How would you describe Mr. Gates' demeanor when you contacted him?
A Belligerent. Not necessarily aggressive, but belligerent, I guess, is the best way I can put it.

MR. HOBBS: Thank you. I have no further questions.

CROSS-EXAMINATION

BY MR. KELLOGG:

Q Sergeant, as part of the investigation, in preparation for this case, we have received a report that you had been subjected to an internal affairs investigation.

MR. HOBBS: Objection, Your Honor, to relevance. We provided a *Henthorn* report. That were no matters that related in any way to honesty or -- dishonesty or untruthfulness.

THE COURT: Overruled.

Go ahead.
Q What was that about? What was the subject of the internal affairs investigation on you?
A That I didn't respond to a disabled vehicle in a timely manner.
Q And --
THE COURT: Did this involve this incident at all?
THE WITNESS: No, sir.
THE COURT: Move on, Mr. Kellogg.
MR. KELLOGG: All right.
Q (By Mr. Kellogg:) So before there's any contact with Gates in the vehicle, you and Officer Gross kind of confer behind Gross's vehicle; is that correct?
A Correct.
Q And you devise a plan of action, right?
A Correct.
Q That plan of action has Officer Gross retrieving the firearm from the passenger's side while you simultaneously are contacting Gates, removing him from the vehicle, from the driver's side; is that correct?
A As I said, I don't recall if Officer Gross did that from the passenger side or if he came over -- met me over on the driver's side.
Q Well, I'm asking you if you recall what the plan of action was that the two of you had in effect before contacting Gates in

the vehicle?
A Was that I would contact Gates at the driver's side, and Officer Gross would cover from the passenger's side.
Q Okay. Well, when you say, "cover from the passenger's side," obviously, the firearm was of paramount concern to both you and Officer Gross, correct?
A Correct.
Q And the firearm was retrieved and removed from the vehicle by Officer Gross, right?
A I believe so.
Q I believe you testified that you could see the firearm when you were removing Gates from the car; you could see it on the passenger's seat?
A Well, even prior to that, when I was trying to arouse him.
Q Well, what was Officer Gross doing when you were trying to arouse Mr. Gates and the firearm is there on the passenger's seat? Is he opening the passenger door?
A No. He was covering to make sure that -- well, he was looking out for my safety, I guess, is the best way to put it.
Q Well, wouldn't part of that be getting that firearm out of that car if it's within the reach of Mr. Gates?
MR. HOBBS: Objection, Your Honor. It's asked and answered.
THE COURT: Sustained.
Q This was happening pretty fast, was it not, sir?

A No.
Q Well, are you talking about expending minutes, trying to awaken Mr. Gates?
A I would say up to a minute.
Q And do you recall what Officer Gross was doing up to that minute?
A Again, as I said, he was covering and ensuring my protection.
Q Well, what specifically was he doing, that you recall?
A He was standing just behind the front passenger's seat door pillar and had his weapon trained on Mr. Gates.
Q Did he make any movement to open the door that you saw in that minute?
A I don't recall.
Q You said that Gates was a combination of both, a little belligerent, but not aggressive, and cooperating, in exiting the vehicle, correct?
A He wasn't following my commands to a T, no.
Q So you put him on the ground and you handcuff him, right?
A Correct.
Q Then you stand him up?
A I don't recall if I did or Officer Gross did.
Q Do you recall whether you or Officer Gross removed his wallet?
A From what I remember, Mr. Gates did.
Q And at what point in time did Mr. Gates retrieve his wallet?

A When I asked him if he had some ID.
Q Do you recall what Gates said in response to that?
A No, I do not.
Q Had you, or Officer Gross in your presence, prior to this time, asked Mr. Gates why he was there?
A Could you ask that again?
Q Prior to obtaining Gates' identification, had you, or Officer Gross in your presence, asked Gates why he was there?
A I don't recall.
Q Had you, or Officer Gross, asked Gates if he worked at the club?
A I know I didn't. I don't recall, or I didn't hear, if Officer Gross did or not.
Q Did you, or Officer Gross in your presence, ask Gates if he knew anybody who worked at the club?
MR. HOBBS: Your Honor, I'm just going to object to relevance. I don't think it has any bearing, after he's removed, what questions are asked of him.
THE COURT: Overruled.
If you recall.
A I believe -- I don't recall.
Q Had you asked Mr. Gates whether or not he was in medical distress and needed assistance?
A No, sir.
Q Did you ask him whether or not he had been drinking or was

under the influence of intoxicants?
A I believe it was pretty clear he was under the influence of something.
Q Did you ask Gates at any time during your encounter with him whether or not he had a concealed weapons permit?
A I don't recall, no.
Q Well -- and it's something you would remember, don't you think?
MR. HOBBS: Objection, Your Honor.
THE COURT: Sustained.
Q You don't remember one way or the other, is that correct, sir?
MR. HOBBS: Objection. Asked and answered.
THE COURT: Sustained.
Q You have described Gates' demeanor in the car, before he was out of the car, as being somewhat disoriented, groggy, like somebody who was just awakened, correct?
A Correct.
Q So you didn't recognize any aggressive movements on his part, as far as flailing around or reaching for the gun or anything of that nature?
A What I recall is him moving around in the car, which, with the gun being that close to him, was a concern.
Q Obviously, when you say, "moving around in the car," you are talking about in the passenger's -- in the driver 's seat,

correct, sir?
A Correct. Correct.
Q All right. Gates has his hands on the steering wheel?
A Not that I recall.
Q Did you tell him to have his hands on the steering wheel?
A I asked him to put his hands up where I could see them.
Q And he did?
A I don't recall.
Q You don't recall?
A No.
Q Was Gross yelling at Gates at this time, before Gates is removed from the vehicle?
A No, I don't believe so.
Q Was Gross saying anything?
A I don't believe so.
MR. KELLOGG: No further questions.
MR. HOBBS: I have no questions.
THE COURT: All right. You may step down.
SERGEANT CLAEYS: Thank you.
THE COURT: All right. Then we will resume on the date we have scheduled.
MR. HOBBS: Thank you, Your Honor.
THE COURT: Okay. We will be in recess.
(Proceedings adjourned.)

C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/s/ Nickoline Drury

Nickoline Drury
OFFICIAL COURT REPORTER

A P P E N D I X 5

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff,	CR15-00253-JCC
v.	SEATTLE, WASHINGTON
CHRISTOPHER GATES, Defendant.	October 27, 2016
	Continuation of Evidentiary Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
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You may be excused. Oh, I'm sorry.

MR. HOBBS: I have no question.

MR. LOVE: Oh. No questions? Okay. Thank you.

THE COURT: Call your next witness.

MR. KELLOGG: We would call Christopher Gates. Mr. Gates, do you want to come forward and be sworn and have a seat on the witness stand?

THE CLERK: Just stand right there and raise your right hand.

CHRISTOPHER GATES,

having been sworn under oath, testified as follows:

THE DEFENDANT: I do.

THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

BY MR. KELLOGG:

Q Would you state your full name, spelling your last name for the record, please, sir?

A Christopher Miles Gates. Gates, G-a-t-e-s.

Q You are the defendant in this case, are you not?

A Correct.

MR. KELLOGG: Your Honor, if I might have just a second? I'm glad I found that. Thank you, Your Honor.

Q Mr. Gates, you were present in the parking lot of the Déjà Vu on the late evening hours of June 6th, or the early morning hours of June 7th; is that correct, sir?

A Correct.
Q What time did you arrive at that parking lot?
A I can't be exact. I assume sometime around 1 a.m.
Q So that would be the early morning hours of June 7th?
A Right.
Q What was your point in going there?
A My intention was to -- for a place to sleep, sleeping in my vehicle. I've known several people who have worked there before and knew somebody who was currently working there at the time as well.
Q What did you do when you got there?
A Parked my car and began relaxing.
Q Were you employed at this time?
A I was.
Q Where were you working, sir?
A At Aurora Rents, an equipment rental store that was, I would say, approximately 10 to 12 blocks southbound on Bothell Way, which turns into Lake City Way.
Q It was your expectation to be able to sleep that night in that parking lot?
A Correct. Right.
Q Why did you choose that parking lot, to the extent you haven't already answered?
A Well, like I said, because I knew somebody that worked there, and also, due to my familiarity with the lot and the business, I

knew that it's a private lot, and I expected that it would be a safe place for me to sleep without being disturbed.

Q What was your intention as far as reporting -- did you have to go to work at Aurora Rents the next morning?

A Right. Yes, I did.

Q Were you going to go anyplace before you went to report for work?

A I did not have any plans to.

Q Did you have your work clothes with you?

A Yes.

Q Were you, essentially, living in your car at that time?

A Essentially, due to not having any access at nighttime to the traditional residential location, I guess you would call it, a house, a building.

Q What were you wearing that evening?

A A T-shirt and jeans, I believe.

Q Did you have any other clothing in your car?

A I had multiple changes of clothing in the backseat of my car, as well as my work clothes, work equipment, such as boots, gloves, things like that.

Q Were the jeans shorts, or full-length pants?

A They were full-length pants.

Q What did you do in the parking lot and why?

A After I pulled into the parking lot, I believe I drank one of the -- there was two beer containers that were in my car. One of

them was full. One was empty. I drank one of them, or part of one of them, the part that I didn't spill on myself, and then proceeded to recline and start to go to sleep.

Q Prior to being contacted by Officer Gross, did anything unusual happen earlier that evening?

A I assume around two o'clock is my guess. I had been already soundly sleeping by the time a uniformed police officer knocked on my window, awoke me, and asked me about why I was at the club, told me that I looked suspicious, and was continually asking me if I had dropped anybody off, who I had dropped off. I wasn't told why I was being asked these questions, but I assumed it had to do with some investigation that he was -- or suspicion that he had of whatever. I was not told.

Q Do you know this officer's name?

A I do not.

Q Do you know what department he was assigned to?

A I do not. I assume that it was Shoreline, Lake Forest Park, just because it's my understanding that Seattle Police doesn't have jurisdiction past 145th and Lake City.

Q Was that a brief encounter or a lengthy encounter that you had with this individual?

A I would qualify it as brief. It was maybe five minutes.

Q And then what happened at the conclusion of that five minutes?

A The officer left.

Q Did you have any contact with the doorman prior to being contacted by Officer Gross?
A No.
Q Did anybody else approach you, contact you, engage you before Officer Gross, other than this other incident you just described?
A No.
Q How long after that first incident was it that you were contacted by Officers Gross and Claeys?
A I want to say in between half hour and an hour. I was, again, soundly asleep by the time Gross -- Officers Gross and Claeys woke me up.
Q What first brought your attention to the presence of Officers Gross and Claeys?
A Knocking on my driver's side window.
Q Describe the knock. Was it just general rapping or loud knocking?
A It was a -- maybe a little lighter than you would tap or knock on a door, because it was a window. It was {indicating}, you know, "Wake up, hello, Seattle" -- or "police, wake up."
Q And you did, in fact, wake up?
A Right.
Q What happened when you woke up?
A During the knocking and telling me to wake up, I was told to keep my hands in view, and I heard that it was the -- they identified themselves as police officers, so I knew it was the

police that was contacting me. I wasn't sure why. I started to come to, and kept my hands in view, as I was instructed, open. Maybe one second later, my door was opened and I was pulled from my vehicle and forced to the ground. My hand was restrained behind my back in, I think they call it a hammer-lock position. I was forced to the ground, and a knee was placed in my neck and back to hold me on the ground while I was handcuffed.

Q I notice you are holding your glasses. Are they broken?

A They are.

Q Do you have to hold them to keep them on your face?

A They are, pretty much. They start sliding off.

Q So you say that it was about a second from the time that you were awakened until you were removed from your car, right?

A Right.

Q Describe for us how you were taken out of the car. I mean, was it -- were you pulled out of the car, or did you get out of the car yourself, or --

MR. HOBBS: Asked and answered, Your Honor.

MR. KELLOGG: I will move on.

THE COURT: Overruled. Go ahead.

A My door was opened, my left arm was grabbed and my left shoulder, and I was pulled out of the car.

Q Were you pulled to a standing position or to the ground?

A I was pulled straight to the ground.

Q And then what happened?

A And then I was restrained on the ground, pinned to the ground by, I believe, it was Officer Claeys.
Q Face up or facedown?
A Facedown.
Q Do you know where Officer Gross was?
A I believe he was on the passenger's side, rear passenger of my car, coming around, as I was being restrained on the ground.
Q Had either officer said anything to you prior to this time, other than to show your hands or put your hands somewhere?
A No. I was only told to "Wake up, police, keep your hands in view."
Q All right. You said that you were pinned to the ground. How were you pinned to the ground?
THE COURT: He's answered that, counsel.
MR. HOBBS: Asked and answered.
MR. KELLOGG: All right.
Q What happened next?
A I was briefly patted down while I was on the ground, told to stand up, which I responded that I couldn't. I had injured my knee during my extraction from the car. I have a history of knee injuries, more severe in my right knee. The officer who had restrained me helped lift me up to my feet and faced me towards my vehicle, near the rear of my vehicle.
Q You're in cuffs at this time?
A Correct. I was placed in cuffs before I was lifted to my

feet.
Q All right.
A I was then, again, patted down more thoroughly while the second officer came around -- fully around the rear of my car and entered through the driver's side of my car.
Q Now, while all of this is going on, were either officer saying anything to you, other than as you have already testified to?
A No. They were speaking to each other, but not saying anything to me. I was asking them questions, but I wasn't being answered.
Q What were you asking them?
A Why I was -- why I was being pulled over, what the probable cause was, what was going on.
Q Did you receive any response to those questions?
A I did not.
Q Were you asked to produce any identification?
A I was asked if I had a driver's license.
Q Which officer asked you that and when?
A Officer Claeys.
Prior to Officer Gross entering and exiting my vehicle, he went off to my right-hand side. I'm not sure if he entered his car or if he just walked away from where -- exactly where me and Officer Claeys were in my vehicle, and at that time, Officer Claeys asked me if I had a driver's license.

Q What was your response?
A That I did and it was in my pocket.
Q Did you then retrieve your wallet and hand it to Officer Claeys?
A I did not. I was unable to. I was in handcuffs.
Q Did you tell Officer Claeys that?
A No. He just asked me if I had a license. I said, "Yes. It's in my pocket."
Q And Officer Claeys obtained your license, did he not?
A Correct.
Q How did that happen?
A He reached into my pocket and removed my wallet, then removed my identification from my wallet.
Q What, if anything, did he then do with your identification?
A When Officer Gross returned to our immediate vicinity, he handed the ID to Officer Gross, who then again walked a little ways away from where we were exactly standing.
Q At this time were you told what you were being investigated or detained for?
A I was not. I was continually asking, but I was not told.
Q During that evening were you read your rights?
A I was, eventually.
Q At what time during the encounter was it that you were advised of your rights?
A After what I believe was Officer Gross checking my ID, he

came back to the vehicle, told me that I was under arrest, and read me my rights.

Q And how long was that after the initial contact with you by the officers?

A I would guess in between 10 to 15 minutes.

Q Where were you during that 10 to 15 minutes?

A Standing, facing my car at the rear, with Officer Claeys directly behind me.

Q What was going on during that five or ten minutes?

A Officers Gross and Claeys were talking to each other, moving in close to each other, speaking. I wasn't able to discern exactly what they were saying. Gross was repeatedly making contact with dispatch, or another officer on his radio, and I guess running my identification, I would imagine.

Q How long did you remain at the scene after being told you were under arrest, before you were removed from the scene?

A I believe I was removed from the scene around 4 a.m. So the entire encounter or the entire -- me remaining at the scene after the initial contact lasted about an hour.

Q So it was 10 or 15 minutes before you were advised you were under arrest and an hour before you were removed from the scene, where did you spend that time after being advised of your rights?

A In one of the officers', I'm not sure whose, squad car.

Q What happened to your car?

A It was impounded.

Q How long was it before you were able to get your car back?
A I believe I was released from King County Jail on the 9th, due to bail, and I believe I retrieved my car on the 10th, possibly the 11th.
Q Prior to retrieving your car, did you know that it had been impounded?
A I did, because upon my release from King County Jail, I was provided an inventory tow sheet that was filled out.

MR. KELLOGG: Your Honor, I would like to direct the Court's attention to Defendant's Proposed Exhibit 211 for identification, which I provided a court copy to the clerk this morning. I can put it up on the screen. I would ask the Court to take judicial notice of RCW 9.41.050. That's what the exhibit is. It's that state statute.

THE COURT: Any objection?

MR. HOBBS: No.

THE COURT: I will take notice.

Q Mr. Gates, I want to direct your attention to the events of June 22 of last year. Did there come a time where you once again were encountered by police?
A Yes.
Q When and where?
A I was driving southbound on Aurora Avenue, getting ready to turn, or merge -- it's kind of a slight right-hand turn onto Westminster -- when I noticed police lights behind me signaling

me to pull over.
Q Where were you coming from?
A I was coming from a friend's house that I believe was either on 162nd or 167th and Aurora.
Q So about ten blocks up the street?
A Correct.
Q And where were you going?
A I was going to my father's house that was located on 134th and Greenwood.
Q How far is Greenwood from Aurora?
A It is, at the location where my father lives, approximately five blocks -- five, six blocks up a hill.
Q We heard testimony earlier this afternoon as to an address on 8th Avenue Northeast. Is that address on your driver's license?
A It is.
Q And is that a former address of yours?
A It is my mother and grandmother's address. I use it as a mailing address.
Q From where you were pulled over on the 154-hundred block of Westminster, how far was it to your friend's house that you had been coming from?
A Like you said earlier, it was approximately ten blocks. I have Google-mapped the distance, and it says it's approximately 1.2 miles away, I believe.
Q Do you know how far it is from where you were stopped to your

father's house?
A I believe the Google-map distance was .6 miles.
Q Say again?
A .6 miles.
As a matter of fact, I believe that I have the distances switched around. I believe from my friend's house to where I was pulled over was 1.2 miles --.6 miles, and from where I was pulled over to my father's house was 1.2 miles.
Q What did you do when you realized you were being pulled over?
A I looked for the safest spot to pull over, which wasn't very easy due to the fact that it was on a highway. There weren't many -- there weren't any shoulders on the majority of the road. After passing the intersection of 155th, due to a green light, there was a -- the entrance to the shopping complex that has been testified to earlier, there is a shoulder to the road that provides an entrance to that shopping complex.
Q You will find a folder in front of you, what's been marked for identification. In fact, I think it's been admitted. Well, maybe it hasn't been admitted. Exhibit 205. Would you find that?
THE COURT: It's in already.
MR. KELLOGG: Pardon me?
THE COURT: It's in.
MR. KELLOGG: Thank you.
Q Directing your attention to what has been admitted as

Exhibit 205, do you recognize the three pictures that are displayed there?

A I do. I believe I do. Let me check all of them.

Yes.

Q Directing your attention to either the photographs or the screen, page 1, what does that show?

A It shows Westminster Avenue, and the picture is looking south -- southwest, I believe, at the intersection of 155th.

Q All right. Were you -- and you see a sign there, it looks like Central Market Family Store, Sears; is that the shopping mall lot that we're talking about?

A Correct.

Q Does -- this photograph, are you able to point on the picture where it was that you actually stopped your car?

A I am. It was --

Q Looking at all three pictures, which one is the best picture to pinpoint where it was that you had pulled over?

A I would say the last one that has the blue van and the two red hatchback SUVs, because it's closer to where I was actually pulled over.

Q That would be the picture that's now presently displayed on the screen?

A Right.

Q So this would be like the next intersection after the one that was on page 1, the first page; is that correct?

A I believe it's the same intersection, just closer to it.
Q All right. Show us on the screen where it was -- and you can touch the screen -- where it was that you actually pulled over?
A I was pulled over in this area. I'm sorry. I think the touch is a little bit off. Right in this area.
Q So we have got arrows showing that you were just -- would that be west of that intersection or south of that intersection?
A Southwest.
Q Southwest?
A Uh-huh.
Q How far was it from where you were pulled over to the next closest entrance to that shopping mall?
A Feet. There is entrances right in the shoulder that I was pulled over to. Right along here are entrances to the shopping mall. I apologize for the --
Q Can you give us an estimate in distance?
A Maybe 10 feet, 15 feet. Not far. I was pulled over in the shoulder that has those entrances to the complex.
Q During your encounter with the officers, Shalloway and Meyers, was there any discussion about them moving your car?
A No, not that I heard.
Q Was -- so there was no discussion with you about giving them permission to just pull your car around?
A Correct.
Q Was there any question from either officer as to whether or

not you would have somebody available that would assist in moving the car so that it didn't have to be impounded?

A No. I was not informed that my car was going to be impounded at all.

Q You didn't even know that?

A I didn't know that my car had been impounded until after my release from King County Jail, when the -- the warrant that I was arrested for was a mistake. It shouldn't have been filed, because I was on bail for the offense that the warrant was filed for, and I hadn't had any court dates. My court date was actually on the 24th.

Upon my booking into King County Jail, they cleared the warrant, and I was released later on that day.

Q Let me ask you a couple of questions, if I could, please.

A Yeah.

Q Would either the friend that you had been visiting or your father have been available to come and get your car?

A Yes, both of them. Either one of them.

Q Would there have been other individuals that you could have suggested would be close by and able to retrieve your car?

A Yes. I have multiple friends that live in that area, as well as my mother, who was staying with my grandmother, at the address that was on my ID is where they live, and I know she would have been more than willing to remove the car.

Q How far did your mother reside from this stop?

A I believe the Google Maps distance was 4.5, approximately 4.5 miles.
Q When did you first learn that your car had been impounded?
MR. HOBBS: Asked and answered.
THE COURT: Sustained.
Q What did you do after finding out that your car had been impounded?
A Well, in order to find out it was impounded, I had to call -- I went to the scene and my car was not there, after my court date. I began calling different tow agencies, several of which, obviously, were no help.
Q This is the next day?
A This is the twenty -- correct, the 24th, the next day.
Q All right.
MR. HOBBS: And, Your Honor, just again, I would object to relevance, about what happened after the incident.
THE COURT: Sustained.
MR. KELLOGG: Well, I can move on and make it more relevant.
Q So there came a time when you got your car back, right?
A Right.
Q Where did you get your car?
A From a tow yard. I believe it was on 185th and Aurora.
Q Was the car secure when you obtained it?
A In what way?

Q Well, was it sealed? Did it have any sealed evidence tape or anything of that nature on it?
A It had the remnants of the tape that was -- the seals were already broken.
Q Was the lot that you retrieved it from a secure lot?
MR. HOBBS: Objection. Relevance.
THE COURT: Sustained.
MR. KELLOGG: Well, Your Honor, the relevance is -- well, let me ask a question. Maybe I can show you the --
THE COURT: I sustained the objection, Mr. Kellogg.
Q Were items missing from your car when you got it back?
A Yes.
Q What?
A Two computers, a ring, and a cell phone.
Q Were you ever given a property list of the items that were in your car that were missing?
A I was only given a property list of the criminal evidence that was removed from the car.
Q That would be what was previously admitted as the evidence master list?
A Master evidence sheet, correct.
Q Did you ever see a list of -- well, I'm sorry. That's been asked and answered.
Have you been able to get that property back?
A Which property?

Q The property that wasn't in your car when you got your car back?
A No.
MR. KELLOGG: No further questions.
CROSS-EXAMINATION
BY MR. HOBBS:
Q Sir, there's a binder in front of you marked "Government's Exhibits. If you could just go ahead and take a look at Exhibit 2, the second page of the photograph.
A Yes, sir. One second, please.
You said Exhibit 2?
Q Yes.
A All right.
Q Is that your car, the car you were in outside the Déjà Vu?
A It is.
Q And on the next page, is that an interior photograph of the front seat?
A It is.
Q And you said you had drank at least part of one beer; is that correct?
A Correct.
Q If the doorman had tried to wake you up and had been unable to do so, you wouldn't know that, would you?
A If he had tried to wake me up and been unable to?
Q Yes.

A Correct.
Q Do you have a concealed weapons permit?
A I do not.
Q Do you recall being asked whether you had a concealed weapons permit by either Officer Gross or Officer Claeys?
A I do not.
Q You're not saying they didn't ask; you just don't recall?
A They did not ask me.
Q So your testimony is that they did not ask you that?
A Correct, that I was not asked if I had a concealed weapons permit.
Q There was a firearm on the front seat as well; isn't that correct?
A That is what the officers' testimony states.
Q Was there a firearm on the front seat?
A I'm not sure if I should answer that question.
Q I'm asking you. There's no objection. Was there a firearm on the front seat?
A I don't believe so.
Q So you don't think there was a gun there?
A No.
Q In the second incident, you parked -- you didn't pull off the road, wherever you were -- I think you indicated you were past the stoplight on Exhibit 205. You were still in the road; is that correct? You didn't pull into the parking lot?

A I was not in the parking lot. I was pulled over onto the shoulder of the road.
Q There's not much of a shoulder on 205; is that correct?
A I mean, there's as much of a shoulder on 205 as there is on any shoulder of a road.
Q You were blocking the lane of traffic?
A I was blocking the shoulder. I was not in a lane of traffic. This -- if you want to put the picture up, I will explain.
Q No. That's fine.
THE COURT: There's no question pending.
A All right.
Q Is it your testimony that there were computers in the car that were not there when you retrieved your car?
A Yes.
MR. HOBBS: No more questions.

REDIRECT EXAMINATION

BY MR. KELLOGG:
Q You were -- were you in a turn lane or on the shoulder?
A I was on the shoulder. I do not believe that the picture where I was -- where I indicated I was pulled over is a turn lane. I believe it's a shoulder.
If you look at the picture, when you continue on into that shoulder, it obviously ends. So it is not -- it's not a lane of traffic, it's a shoulder, is how I would classify it.
MR. KELLOGG: No further questions.

THE COURT: All right. You may step down.

MR. KELLOGG: We will rest, Your Honor.

THE COURT: Anything further?

MR. HOBBS: No, Your Honor.

THE COURT: Okay. You will hear from us shortly. We will be in recess.

MR. KELLOGG: Your Honor, I thought we were going to have argument.

THE COURT: If you want to argue, file something in writing by the close of business tomorrow.

MR. KELLOGG: Thank you, Your Honor.

THE COURT: All right. We will be in recess.

(Proceedings adjourned.)

C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

/s/ Nickoline Drury

Nickoline Drury
OFFICIAL COURT REPORTER

A P P E N D I X 6

CA No. 17-30028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTOPHER M. GATES, Defendant-Appellant.	)	(D.Ct. 15-cr-00253-JCC)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE JOHN C. COUGHENOUR
United States District Judge

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CA No. 17-30028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRISTOPHER M. GATES, Defendant-Appellant.	)	(D.Ct. 15-cr-00253-JCC)

I.

STATEMENT OF ISSUES PRESENTED

A. DID THE DISTRICT COURT ERR IN DENYING A MOTION TO SUPPRESS A GUN SEIZED ON JUNE 7, 2015?

1. Did the District Court Err in Concluding the Detention that Led to Seizure of the Gun Was Supported by a Reasonable Suspicion Mr. Gates Was Waiting to Rob Someone in a Club Parking Lot Simply Because Mr. Gates Had a Gun on the Front Seat of His Car and the Court Believed the Club Was a Cash Business, When Mr. Gates Was Sleeping So Soundly He Had Not Woken Up When a Security Guard Knocked Loudly on the Car Window?

2. Was the Detention an Arrest Rather than a Mere Investigative Detention When an Officer Pulled Mr. Gates from the Car, Took Him to the

Ground, and Handcuffed Him, While Another Officer "Covered" Mr. Gates with a Patrol Rifle, Merely Because Mr. Gates Had the Gun on the Seat and Appeared Confused and Moved Around Inside the Car When the First Officer Woke Him?

3. Did the Way in Which the Officer Detained Mr. Gates, Combined with a Failure to Advise Him of Any Rights, Make Any Subsequent Consent by Mr. Gates to Provide His Identification Involuntary?

4. Did the District Court Err in Finding the Inevitable Discovery Doctrine Made the Gun Admissible Despite an Unlawful Seizure of the Gun Because the Search Incident to Arrest the Court Assumed the Officers Would Have Conducted Is Prohibited by the Washington State Constitution and the Court Could Not Assume the Officers Would Violate Their Own State Constitution?

B. DID THE DISTRICT COURT ERR IN DENYING A MOTION TO SUPPRESS A GUN AND DRUGS SEIZED AS A RESULT OF THE JUNE 22, 2015 TRAFFIC STOP?

1. Did an Impoundment and Inventory Search of Mr. Gates's Car Fail to Comply with Sheriff's Department and Washington State Law Requirements that the Officer Explore Reasonable Alternatives Such as Moving the Vehicle to a Place It Can Be Legally Parked or Asking the Driver if Someone Else Can Pick Up the Vehicle?

2. Does the Sheriff's Department Inventory Policy Fail to Sufficiently Guide the Discretion of Officers Conducting Inventory Searches by Providing the Officer Simply "May" Search an Unlocked Glove Compartment and Providing No Guidance At All About Other Areas of the Vehicle?

C. MUST MR. GATES'S CONVICTION OF BEING A FELON IN POSSESSION OF A FIREARM ON JUNE 22, 2015 BE VACATED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MR. GATES'S ATTORNEYS FAILED TO CHALLENGE A SEARCH WARRANT BASED ON AN EXPERT OPINION ABOUT "DRUG DEALERS" AND "NARCOTICS TRAFFICKERS" WITH NO EXPLANATION OF HOW SMALL QUANTITIES OF DRUGS AND AN UNLOADED GUN MAGAZINE FOUND IN MR. GATES'S CAR SHOWED HE WAS A "DRUG DEALER" OR "NARCOTICS TRAFFICKER"?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from convictions of two counts of felon in possession of a firearm, in violation of 18 U.S.C. § 921(g)(1); one count of possession of cocaine, in violation of 18 U.S.C. § 844(a); and one count of possession of Alprazolam, also in violation of 18 U.S.C. § 844(a). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Judgment was entered on February 14, 2017, ER 26-32, and a timely notice of appeal was filed on February 23, 2017, ER 24-25.

B. COURSE OF PROCEEDINGS.

On July 29, 2015, a four-count indictment was filed against Mr. Gates. ER 214-16. Count 1 charged him with being a felon in possession of a firearm on June 7, 2015. ER 214. Count 2 charged him with being a felon in possession of a different firearm on June 22, 2015. ER 215. Counts 3 and 4 charged him with misdemeanor possession of two different types of controlled substances – cocaine and Alprazolam – on June 22, 2015. ER 215-16.

Mr. Gates was arraigned on the indictment on August 6, 2015 and entered pleas of not guilty. CR 17. On January 15, 2016, his attorney filed motions to suppress the firearms and controlled substances he was charged with possessing. CR 27, 28. On January 22, 2016, the government filed oppositions to both motions. CR 29, 30. The defense filed replies to the government's oppositions on January 29, 2016. CR 32, 33.

On February 16, 2016, the district court issued an order denying the motions without an evidentiary hearing. ER 11-23. On February 26, 2016, the defense filed a motion for reconsideration arguing the court should hold an evidentiary hearing. CR 39. The district court ordered the government to file a response, CR 40, which the government did on March 3, 2016, CR 43.

Mr. Gates thereafter wrote the district court a letter asking for a new attorney, CR 46, and his attorney filed a motion supporting that request, CR 49. The court granted the motion and appointed a new attorney. CR 53. On September 8, 2016, the new attorney filed a motion to supplement the previously filed motions to suppress. CR 70. On September 14, 2016, the district court

granted the motion to supplement the previously filed motions and scheduled an evidentiary hearing. CR 72. Five days later, the court requested supplemental briefing on an inventory search issue. CR 75.

In response to these orders, the new attorney filed supplemental briefing – on September 14, 2016 and September 22, 2016. CR 73, 76. The government filed responses on September 21, 2016 and October 3, 2016. CR 76, 81. The defense attorney filed replies to the government's responses on September 22, 2016 and October 6, 2016. CR 78, 82.

On October 11, 2016 and October 27, 2016, the district court held an evidentiary hearing at which it heard testimony from Mr. Gates, a defense investigator, and the officers who discovered and seized the firearms. ER 33-86, 87-127. On November 1, 2016, the court issued an order denying the motions. ER 2-10. On November 15, 2016, the defense filed a motion for reconsideration, CR 92, which the court denied on November 16, 2016, ER 1.

On November 29, 2016, Mr. Gates waived his right to a jury trial and submitted the matter to the district court on stipulated facts. CR 96. The court found him guilty. CR 96. On February 14, 2017, the court sentenced Mr. Gates. ER 26-32.

C. CUSTODY STATUS OF DEFENDANT.

Mr. Gates was sentenced to time served followed by a three-year term of supervised release. ER 26-32. He is presently serving the term of supervised release.

III.

STATEMENT OF FACTS

A. THE JUNE 7, 2015 GUN SEIZURE.

At about 3:00 a.m. on June 7, 2015, a Lake Forest, Washington police officer named Robert Gross entered the parking lot of a strip club named Déjà Vu while he was on routine patrol. ER 12, 95. Officer Gross saw several vehicles in the parking lot, including a white Buick. ER 12, 96. Inside the Buick, he saw a man reclining in the driver's seat with his eyes closed. ER 12, 96. The Déjà Vu closes at 2:00 a.m., and Officer Gross knew the business had been robbed at gunpoint six months earlier, so he wanted to know who was in the parking lot at that hour. ER 96-97. He spoke to "one of the doormen, a security guy," standing at the front of the business and asked him if he knew anything about the man sleeping in the Buick. ER 96; *see also* ER 12. The doorman said that he did not recognize the man and that he had been unable to wake him earlier "by yelling and banging and shouting in the window," so he thought the man might be passed out. ER 97; *see also* ER 12.

Officer Gross then approached the Buick to look inside. ER 13, 97. He saw the man in the driver's seat, who was later identified as Mr. Gates, and a couple of beer bottles and an "FN Five Seven pistol" on the passenger seat. ER 13, 97. Thinking it would not be safe to contact Mr. Gates alone, Officer Gross returned to his patrol car, got out his patrol rifle, and waited for backup. ER 13, 97.

Another officer, Sergeant Claeys, arrived to assist Officer Gross. ER 13,

97-98. Officer Gross told Sergeant Claeys what he had seen, and the two officers "formulated a plan to make contact." ER 98; *see also* ER 118. Officer Gross went to the passenger side "to provide cover," ER 98, and "covered from the passenger side," ER 118, while Sergeant Claeys went to the driver side and knocked on the window, ER 13, 98, 118. Mr. Gates did not respond immediately, but did eventually open his eyes. ER 13, 98, 118-19. He appeared confused and began to move around in the car. ER 5, 13, 118-19. Sergeant Claeys then opened the door, pulled Mr. Gates out of the car by his arm, "escorted" him to the ground, handcuffed him, and patted him down. ER 5, 13, 70, 119. Officer Gross then retrieved the gun from the car and found it to be loaded. ER 13, 99. He asked Mr. Gates if Mr. Gates had a concealed weapons permit authorizing him to carry the gun in the vehicle, and Mr. Gates responded by saying, "This is bullshit." ER 109-10; *see also* ER 14.

The officers stood Mr. Gates up and obtained his driver's license after he was handcuffed.[1] ER 13, 123-24. Officer Gross returned to his patrol car, ran Mr. Gates's name through the police department database, and learned Mr. Gates had a prior felony conviction. ER 14, 100. The officers then placed Mr. Gates under arrest. ER 14.

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[1] Mr. Gates testified Sergeant Claeys took Mr. Gates's wallet out of Mr. Gates's pants pocket, *see* ER 72, but Sergeant Claeys and Officer Gross testified Mr. Gates voluntarily provided the wallet when Sergeant Claeys asked for identification, *see* ER 112, 120. The district court found in its order that "Sergeant Claeys asked for identification and Gates produced it." ER 6.

B. THE JUNE 22, 2015 SEARCH.

Mr. Gates was released on bail after the June 7, 2015 arrest. ER 74, 145. Two weeks later – on June 22, 2015 – a King County deputy sheriff named Steven Shalloway pulled Mr. Gates over in Shoreline, just north of Seattle, for driving without a front license plate. ER 36-37. When Deputy Shalloway ran Mr. Gates's name, the computer showed Mr. Gates had a warrant for the prior firearms charge. ER 36. Mr. Gates explained he had posted bail on the charge, but Deputy Shalloway told Mr. Gates he would have to arrest him anyway. ER 145. Deputy Shalloway searched Mr. Gates incident to the arrest and found a pill bottle with no prescription label that contained eight Xanax, or Alprazolam, pills. ER 37, 176.

Mr. Gates had pulled over in a location – a lane for turning right into a shopping mall – where Deputy Shalloway believed his car was blocking the road, so Deputy Shalloway decided to have the car impounded. ER 38-39. Deputy Shalloway could not recall if he told Mr. Gates he was going to impound the car, *see* ER 50, and Mr. Gates testified he did not, *see* ER 79. Deputy Shalloway did not consider moving the car into the mall parking lot and leaving it there, ER 49, despite an express directive in the Sheriff's Department impound and inventory policy that deputies "should offer" drivers the option of signing an impound waiver and having the vehicle moved to a place where it can be legally parked, ER 160.[2] Deputy Shalloway also did not ask Mr. Gates if there was anyone who might come to get the car, ER 39, despite another directive in the impound and

[2] The provisions of the Sheriff's Department impound and inventory policy are discussed in more detail in the argument section of this brief.

inventory policy that deputies consider reasonable alternatives before ordering an impound, ER 158. Had the deputy asked Mr. Gates about someone else who might pick up the car, Mr. Gates could have suggested (1) a friend who lived less than a mile away, (2) his father who lived just a little more than a mile away, and/or (3) his mother who lived approximately 4½ miles away. ER 75-76, 79-80. Mr. Gates had given the deputy his father's and friend's addresses when he told the officer where he was coming from and where he was going, ER 145, and his mother's address was the address on the driver's license Mr. Gates had given the deputy, ER 75.

What the deputy did do was begin the process of impounding Mr. Gates's car. As required by Sheriff's Department policy when there is an impound, *see* ER 162, the deputy began an inventory search of Mr. Gates's car, *see* ER 176. When he looked inside the glove compartment, he found an unloaded semiautomatic handgun magazine. ER 176. When he opened the center console, he found a "small" clear bottle with a "small" clear baggy containing crack cocaine. ER 176. Upon finding the cocaine, he "documented what [he] saw, and then [he] stopped there, and then the vehicle was sealed." ER 43. He did not complete the "Standard Tow/Impound and Inventory Record" used by Washington law enforcement officers or make any notes of what he was finding in the car, ER 40, though he did list what he found in a subsequent report, ER 51. He testified it is Department policy to stop the inventory if contraband or other incriminating evidence is found during an inventory. *See* ER 52.

After stopping the inventory, Deputy Shalloway left Mr. Gates's car with another deputy and took Mr. Gates to the police station. ER 43-44. A week and a

half after the car been impounded, a detective applied for a search warrant. ER 173-78. In the affidavit for the warrant, the detective described the deputy's discovery of the pills on Mr. Gates's person and the semiautomatic handgun magazine and cocaine found in the car. *See* ER 176. The detective then went on to describe, "based upon [his] training and experience," various items "drug dealers" and/or "narcotics traffickers" keep in their vehicles and/or other locations, such as drugs and drug paraphernalia, records related to drug trafficking, and weapons. *See* ER 176-77. The detective said nothing about why the small amounts of drugs Mr. Gates possessed and/or the gun magazine suggested Mr. Gates was a "drug dealer" or "narcotics trafficker" rather than a mere drug user. *See* ER 176-78.

A state court judge issued the requested search warrant, *see* ER 173-74, and Mr. Gates's car was then searched, ER 19. During the search, the detective found a shotgun, 2.6 grams of cocaine, and 68 more Alprazolam pills. ER 19.

IV.

SUMMARY OF ARGUMENT

The district court erred in denying the motion to suppress the gun seized on June 7, 2015 for four reasons, any one of which is sufficient to require reversal. First, the court erred in concluding there was reasonable suspicion to support an investigative detention. Second, the court erred in concluding the detention was a mere investigative detention rather than an arrest. Third, the way in which the officers detained Mr. Gates made Mr. Gates's consent to provide the identification

that enabled the officers to identify him as a felon involuntary. Fourth, the court erred in concluding the inevitable discovery doctrine made the gun admissible despite an unlawful seizure of the gun.

The conclusion there was reasonable suspicion to support an investigative detention was erroneous because the totality of the circumstances did not establish a reasonable suspicion of the possible criminal conduct suspected – robbery of a dancer who might be leaving the club. The two factors to which the district court pointed – the gun on the seat of Mr. Gates's car and the court's belief the club was a cash business – did not establish reasonable suspicion, even when combined with the prior robbery at the club which the officer considered. The prior robbery added little, if anything, to the reasonable suspicion calculus, because it had taken place six months earlier and was of the business, not an individual dancer. The remaining factors were offset by the fact Mr. Gates was not watching for potential victims like a robber would but was sleeping so soundly that even the security guard's pounding on the window did not wake him up.

The conclusion the detention was a mere investigative detention rather than an arrest was also erroneous. Pulling someone out of his car, taking him to the ground, and handcuffing him while the person is "covered" with a rifle is ordinarily an arrest, not an investigative detention. While such extraordinary measures may be permissible when the person being detained has acted in an uncooperative and/or dangerous manner, Mr. Gates acted neither uncooperative nor dangerous. His apparent confusion and moving around in the car when the officer woke him was the natural behavior of someone who had been woken from a deep sleep.

The officers' aggressive conduct also made Mr. Gates's subsequent consent to provide the identification which enabled the officers to identify him as a felon involuntary. This Court has identified five factors to consider in determining whether a consent is voluntary, including (1) whether the defendant was in custody; (2) whether the officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified he had a right not to consent; and (5) whether the defendant was told a search warrant could be obtained. These factors suggest involuntariness here because Mr. Gates was not told he had a right not to provide his identification; he was not given Miranda warnings; at least one officer had a patrol rifle out; and Mr. Gates was in custody, either in the form of an investigative detention or in the form of an arrest. However the detention is categorized, it was accomplished by significant force, including pulling Mr. Gates from the car, taking him to the ground, and then handcuffing him.

Finally, the district court's conclusion the inevitable discovery doctrine made the gun admissible was erroneous. Both the court's reasoning, which was that the officers would have seized the gun in a subsequent search incident to arrest of the car, and the government's reasoning, which was that the officers would have seized the gun in a subsequent warrantless probable cause search based on the Fourth Amendment automobile exception, overlook the Washington state constitution's prohibition of such warrantless searches. This prohibition makes it unlikely the officers would have conducted a warrantless search, since Washington law enforcement officers presumably comply with what their state constitution requires.

The district court also erred in denying the motion to suppress the gun seized after the traffic stop on June 22, 2015. First, the impound did not comply with King County Sheriff's Department policy and Washington law requirements; specifically, it did not comply with the requirement that officers consider reasonable alternatives, such as having someone else come to the scene to pick up the car and/or moving the car to a place where it can be legally parked. Second, the Sheriff's Department inventory search policy is facially invalid, because it does not provide the guidance required by the Fourth Amendment. The policy provides officers "may" open unlocked glove compartments with no guidance whatsoever about when they should exercise that discretion and says nothing at all regarding other closed portions of the passenger compartment, such as consoles.

There is then an additional reason the conviction based on the gun possessed on June 22, 2015 must be vacated. The defense attorneys provided ineffective assistance of counsel by failing to challenge the sufficiency of the probable cause showing for the search warrant. This Court's decision in *United States v. Underwood*, 725 F.3d 1076 (9th Cir. 2013), recognizes (1) an expert opinion about items "drug traffickers" may keep in their residences is irrelevant without an additional showing the defendant is a "drug trafficker" and (2) possession of small amounts of drugs does not establish a person is a "drug trafficker." This precedent is almost directly applicable to the search warrant for Mr. Gates's car. Failing to cite and apply it was ineffective assistance of counsel because (1) it fell below an objective standard of reasonableness to not use such closely on point precedent and (2) the precedent would have compelled a conclusion the warrant was invalid.

V.

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE GUN SEIZED ON JUNE 7, 2015.

1. Reviewability and Standard of Review.

In the motion to suppress the gun seized on June 7, 2015, the defense argued there had been no reasonable suspicion justifying an investigative detention and there had been an arrest requiring more than reasonable suspicion in any event. *See* CR 27, at 5-7; CR 32, at 4-5; CR 73, at 5-10. The defense also presented a declaration and testimony from Mr. Gates that he had not provided his driver's license but the officers had taken it, *see* ER 71-72, 153, and argued in the motion for reconsideration that if Mr. Gates did provide the license, he did so "under circumstances arguably constituting, coerced/involuntary consent," CR 92, at 3.

The district court ruled the officers had reasonable suspicion for an investigative detention, ER 5, 15; ruled the detention was not an arrest, ER 6, 16-17; found Mr. Gates had "produced," ER 6, or "gave," ER 14, his driver's license; and denied the motion for reconsideration, ER 1. The court also ruled, after finding the seizure of the gun might still be unlawful depending on its timing, that the inevitable discovery doctrine would apply. ER 17-18.

Whether there was reasonable suspicion to support an investigative

detention is reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Whether a detention was an arrest or a mere investigative detention is also reviewed de novo. *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). Whether a consent is voluntary is reviewed for clear error. *United States v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007). Finally, whether the inevitable discovery doctrine applies is reviewed for clear error. *United States v. Ruckes*, 586 F.3d 713, 716 (9th Cir. 2009).

2. The District Court Erred in Concluding the Detention Was Supported by Reasonable Suspicion.

The district court ruled the officers were justified in detaining Mr. Gates because they had reasonable suspicion he might be waiting to commit a robbery.[3]

[3] The government and the court both recognized the officers needed reasonable suspicion to justify removing Mr. Gates from his car. The government did make an argument about law enforcement officers' "community caretaking" responsibility, but emphasized it was making that argument only as a justification for the officers contacting Mr. Gates, not as a justification for the officers' entering the car. *See* ER 188. *See also* ER 15 (court recognizing community caretaking doctrine "likely do[es] not extend to the officers' removal of Gates from his car"). While the community caretaking exception, which is also labeled the "emergency exception," can allow actual entry into premises, it requires much more evidence of a medical or other emergency than was present here. *See, e.g., Hopkins v. Bonvicino*, 573 F.3d 752, 764-65 (9th Cir. 2009) (finding defendant officers' claim they were concerned plaintiff was in diabetic coma based on smell resembling alcohol on his breath and appearance he was slightly intoxicated was unjustified). The manner of entry must also be consistent with a caretaking role. *See id.* at 765 n.7 (noting officers' entry with guns drawn "hardly seems consistent with a response to a medical emergency"). Here, there was no evidence of anything approaching a medical emergency, and the officers' conduct in pulling

See ER 5, 15. In its first order, the district court described the facts it believed established reasonable suspicion as (1) the fact Mr. Gates "was sitting in his car with a loaded, unsecured pistol"; (2) the fact Mr. Gates was "fac[ing] the doors of a cash-based establishment"; (3) the fact Mr. Gates was there "after hours, when employees would be leaving with their day's earnings"; and (4) the fact at least one employee, the doorman/security guard, was still at the club. ER 15. In its second order, the district court described the facts it believed established reasonable suspicion as (1) the fact there was "a pistol in plain view" on the front seat of Mr. Gates's car, without saying whether the pistol was loaded, and (2) the fact Mr. Gates was "facing the club entrance after hours when employees would be leaving with cash." ER 5.

The district court erred in these rulings in two respects. Initially, it partially overstated the facts. First, the suggestion in the first order that the officers knew the gun was loaded at the time they detained Mr. Gates was contradicted by the testimony at the later evidentiary hearing. Officer Gross testified he found the gun to be loaded only when he retrieved it from the car, and that was *after* Mr. Gates was pulled out of the vehicle, taken to the ground, and handcuffed. All the officers knew at the time they detained Mr. Gates was there was a gun on the passenger seat which could have been loaded or unloaded. Second, the district court went further than the testimony at the evidentiary hearing when it characterized the strip club as a "cash-based establishment" where "employees would be leaving with cash." While the police reports attached to the first defense

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Mr. Gates out of the car, taking him to the ground, and handcuffing him was entirely inconsistent with a caretaking role.

motion and first government opposition included such characterizations, there was no testimony to this effect at the evidentiary hearing – from either Officer Gross or Sergeant Claeys.

The district court also erred, regardless of whether it overstated the facts, in its application of the law to the facts. The question is whether a man sleeping in a car with a gun on the seat beside him, possibly loaded and possibly unloaded, in the parking lot of a previously robbed[4] strip club, where people might or might not have cash, an hour after the club had closed, creates reasonable suspicion the man intended to rob the club or some person who might be leaving it.[5] The answer to that question is no.

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[4] The district court did not include the fact of the prior robbery in its recitation of the facts it believed established reasonable suspicion, but this was a fact articulated by Officer Gross at the evidentiary hearing and relied upon by the government. *See* ER 96-97, 190.

[5] The district court properly declined to adopt an alternative argument made by the government that the officers had reason to suspect Mr. Gates was violating a Washington statute regulating the carrying or placing of guns in vehicles, *see* ER 190-91. The statute in question bars carrying or placing a gun in a vehicle only when (1) the gun is loaded and (2) the person carrying or placing the gun in the vehicle does not have a license to carry a concealed weapon. *See* RCW 9.41.050. At the time the officers detained Mr. Gates, they knew neither whether or not the gun was loaded nor whether or not Mr. Gates had a concealed weapons license. The Washington concealed weapons license statute, unlike those in some other jurisdictions, does not allow officials to strictly limit the issuance of concealed weapons licenses; to the contrary, it provides that "[t]he applicant's constitutional right to bear arms shall not be denied" unless one of several narrow exceptions applies. RCW 9.41.070. *See also* 1983 Op. Atty. Gen. Wash. No. 21, at 5 (noting that statute is "basically, . . . mandatory" and "[t]he permit shall be issued unless the applicant is ineligible for one or more of the several reasons now enumerated in . . . subsection (1)").

While reasonable suspicion does not require certainty, it does require "more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). It requires "a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). The court must consider the totality of circumstances, *Arvizu*, 534 U.S. at 274, which makes the inquiry in any particular case necessarily fact-specific, *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014); *United States v. Hernandez*, 313 F.3d 1206, 1210 (9th Cir. 2002).

The totality of circumstances here did not establish reasonable suspicion. To begin, the prior robbery of the club six months earlier added little, if any, basis for suspicion, as the district court implicitly recognized in not including this fact in the factors it listed in support of its reasonable suspicion conclusion, *see supra* pp. 16, 17 n.5. Even being in a generally high crime area is not enough in itself to establish reasonable suspicion. *Montero-Camargo*, 208 F.3d at 1138. And this was not a generally high crime area, but the parking lot of a business serving members of the general public at which a robbery had taken place on one prior occasion six months earlier. Further, the business was not open, had been closed for an hour, and had a doorman/security guard at the door. Even assuming there were one or more dancers with cash tips who had not yet gone home – which is a debatable assumption – the testimony was about "that business" having been robbed six months earlier, ER 96, not about robberies of individual dancers in the parking lot as they were leaving.

Mr. Gates's behavior was completely inconsistent with someone intending

to commit robbery, moreover. A "corollary" of the rule that police may rely on the totality of circumstances is that the totality includes the facts which detract from suspicion in addition to the facts which add to it. *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988), *quoted with approval in United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005). Such a fact here was that Mr. Gates was not doing what a robber would be expected to do. He was not watching for potential robbery victims but was sleeping. In fact, he was sleeping so soundly that the doorman's yelling, shouting, and banging on the car window had had absolutely no effect.

What this suggested, especially taken together with the beer bottles in the car, was a strip club customer who had had some drinks and was "sleeping it off."[6] It did not establish reasonable suspicion Mr. Gates was lying in wait to rob a late-departing dancer of whatever cash tips she might be taking home with her.

3. The Detention Was an Arrest Rather than a Mere Investigative Detention.

While this Court need not reach the question if it agrees the officers did not have reasonable suspicion, the district court also erred in ruling there was just an investigative detention. This was an arrest requiring probable cause, which neither the district court nor the government claimed the officers had.

The officers did have a right to ask Mr. Gates to get out of the car if they

[6] While reasonable suspicion does not require an officer to eliminate every possible innocent explanation of the facts, *Arvizu*, 534 U.S. at 277, it does require the officer's suspicion to be an objectively reasonable suspicion.

had reasonable suspicion. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam). But that is not all the officers did. Sergeant Claeys opened the door himself, took Mr. Gates out of the car, pushed Mr. Gates to the ground, and then handcuffed him. *See* ER 119. And he did all this while Officer Gross, who had taken out his patrol rifle, "covered from the passenger's side." ER 118.

This goes far beyond what is permitted for the typical investigative detention. As this Court explained in *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996):

> In this nation, all people have a right to be free from the terrifying and humiliating experience of being pulled from their cars at gunpoint, handcuffed, or made to lie face down on the pavement when insufficient reason for such intrusive police conduct exists. The police may not employ such tactics *every time* they have an "articulable basis" for thinking that someone may be a suspect in a crime. The infringement on personal liberty resulting from so intrusive a type of investigatory stop is simply too great. Under ordinary circumstances, when the police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs and other restraints will violate the Fourth Amendment.

Id. at 1187 (emphasis in original).

Washington did recognize "special circumstances" may justify handcuffing and/or other types of restraint during a mere investigative detention and cited several cases illustrating this. *See id.* at 1189 & nn.12-16. One of those cases – *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982) – as well as another, similar case – *United States v. Thompson*, 597 F.2d 187 (9th Cir. 1979) – were cited by the district court in its first order. *See* ER 16. In *Bautista*, the use of handcuffs during a mere investigative detention was held to be reasonable where the defendant appeared "extremely nervous" and "kept pacing back and forth and looking, turning his head back and forth as if he was thinking about running." *Id.*,

684 F.2d at 1289. In *Thompson*, the defendant "repeatedly attempted to reach for his inside coat pocket, despite the officers' repeated warnings not to." *Id.*, 597 F.2d at 190.

Other cases illustrating such special circumstances were also cited in *Washington*. In *United States v. Taylor*, 716 F.2d 701 (9th Cir. 1983), guns and handcuffing were held permissible because the defendant twice refused to raise his hands and "made furtive movements inside the truck where his hands could not be seen." *Id.* at 709, *cited in Washington*, 98 F.3d at 1189 n.12. In *United States v. Greene*, 783 F.2d 1364 (9th Cir. 1986), the suspects were known to be armed and one of them failed to comply with an initial police command to put his hands up. *Id.* at 1366, 1367-68, *cited in Washington*, 98 F.3d at 1189 nn.12, 13, 16. In *United States v. Jacobs*, 715 F.2d 1343 (9th Cir. 1983), a bank had been robbed just 20 minutes earlier, the robber was possibly armed and under the influence of PCP, and the officer who confronted the suspects was all by himself. *Id.* at 1346, *cited in Washington*, 98 F.3d at 1189 n.14. *See also United States v. Rousseau*, 257 F.3d 925, 930 (9th Cir. 2001) (armed man had invaded home with gun just shortly before officer acting alone initially confronted defendant based on reasonable suspicion). In *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995), there had been an armed robbery in which shots had been fired and the victim had been physically assaulted just 45 minutes earlier. *Id.* at 1317-18, *cited in Washington*, 98 F.3d at 1189 n.14. *See also United States v. Edwards*, 761 F.3d 977, 980 (9th Cir. 2014) (gun had not only been possessed but actually fired); *United States v. Miles*, 247 F.3d 1009, 1010-11 (9th Cir. 2001) (same). Finally, in *United States v. Buffington*, 815 F.2d 1292 (9th Cir. 1987), there were three men

outside the bank an informant had said they were planning to rob and police recognized one of them as a man who had previously been charged with, among other things, the ambush slaying of a police officer. *Id.* at 1300, *cited in Washington*, 98 F.3d at 1189 n.15.

The circumstances here fell well short of the facts in these cases. This is most readily illustrated by comparing Sergeant Claeys's complete explanation of why he handcuffed Mr. Gates, which was relatively brief. His full explanation, given in testimony during the suppression hearing, was as follows:

> A I knocked on the window several times, and I identified myself, tried to get him to stir, which after some time he finally did. He opened his eyes. I, again, identified myself, when he looked at me, and he appeared that he was not quite understanding what was going on. I told him to keep his hands in clear sight, where I could see them, and he started moving around inside of the vehicle. So I opened the door and escorted him out of the vehicle, put him on the ground next to the driver's door, and handcuffed him.
> Q From where you are, could you see the handgun?
> A Yes.
> Q It would have been a simple matter for Mr. Gates to reach that firearm?
> A Absolutely.
> Q So why did you remove him from the vehicle?
> A For our safety. I did not want him to reach over and grab it, especially him being unresponsive for the amount of time he was and seeming to be confused and not recognizing who I was.
> Q When you say you escorted him to the ground, how did you control him? Did he willingly come out of the car? Did you have to pull him out of the car?
> A A little of both. He moved his feet out of the car, and I told him to get on the ground, and he started to stand up, so I put him on the ground, or escorted him to the ground. It seemed at that point he understood what I wanted.
> Q Was he handcuffed after that?
> A Yes.

ER 118-19.[7]

What this describes is a man in a deep sleep being woken up, the man moving around and appearing confused and groggy as most people woken out of a deep sleep would be, and the man starting to get out of the car by putting his feet out and starting to stand up as is necessary to get out of a car. There was not the sort of nervous pacing back and forth suggesting a possible intent to flee like there was in *Bautista*. There was not a deliberate, blatant, and/or repeated refusal to comply with police commands like there was in *Thompson*, *Taylor*, and *Greene*. There was not prior violence against police officers like there was in *Buffington* or the actual use of firearms in a crime just minutes earlier, like there was in *Jacobs*, *Alexander*, *Edwards*, *Miles*, and *Rousseau*.

Also relevant here is another consideration noted in *Washington*.

> Further, in a case like the one before us, we consider the specificity of the information that leads the officers to suspect that the individuals they intend to question are the actual suspects being sought (citation omitted), as well as the specificity of the information that the persons actually being sought are likely to forcibly resist police interrogation. The more specific the information in both these regards, the more reasonable the decision to take extraordinary measures to ensure the officers' safety.

Id., 98 F.3d at 1189-90. If the officers did have reasonable suspicion here, they

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[7] In its first order, filed prior to the evidentiary hearing, the district court seemed to make a finding Mr. Gates did not keep his hands in view, *see* ER 16 (stating Mr. Gates "ignored Sergeant Claeys' command to keep his hands visible"), but in its second order, filed after the evidentiary hearing, it stated simply that Mr. Gates "moved around in the car," ER 5. This is presumably because the testimony at the evidentiary hearing provided no basis for a finding Mr. Gates did not keep his hands in view. Mr. Gates testified he did keep his hands in view, *see* ER 69, and Sergeant Claeys testified he did not remember, *see* ER 126.

barely had it, and it was hardly the sort of specific information like that in some of the cases cited above in which crimes had already been committed and/or guns had already been fired or otherwise used. Specific information suggesting Mr. Gates might resist was also lacking; there was just a sleeping man who was naturally confused and groggy when he was woken, naturally moved around when he was woken, naturally put his feet out the door and tried to stand up when he was told to get out of the car, and made no motion toward the gun on the passenger seat.

In sum, the circumstances here fall far short of the "special circumstances" which *Washington* held could justify restraint like pulling a suspect out of his car, pushing him to the ground, and handcuffing him while he was "covered" with a rifle by another officer. What happened here was not a mere investigative detention, but an arrest.

4. The Way in Which the Officer Detained Mr. Gates, Combined with the Failure to Advise Him of Any Rights, Made Any Subsequent Consent by Mr. Gates to Provide His Identification Involuntary.

If the aggressive way in which the officers detained Mr. Gates did not make the detention an arrest, it did make his production of the driver's license that enabled the officers to identify him as a felon involuntary. That also is by itself sufficient to require suppression, because there was no probable cause to arrest Mr. Gates and seize the gun until he was identified as a felon.

This Court has identified five factors to consider in determining whether a consent is voluntary. They are "(1) whether the defendant was in custody; (2)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER M. GATES, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 5th day of February, 2019, a copy of Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

February 5, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law