

**SUPREME COURT OF THE UNITED STATES**

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BEKIM FISEKU,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether in concluding that, where a suspect presented no discernable threat of physical violence and police had nothing beyond mere speculation that criminal activity was afoot, the case nevertheless presented “unusual circumstances” under which police could handcuff a suspect without transforming an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968) into an arrest, the United States Court of Appeals for the Second Circuit disregarded its prior decisions and created precedent that effectively undermines the rule that officers may not handcuff a suspect during a Terry stop and the core Fourth Amendment tenet that no arrest take place without probable cause.

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### **CITATION OF OPINION**

The amended decision of the United States Court of Appeals for the Second Circuit, affirming the judgment of the district court, may be found at United States v. Fiseku, 2018 U.S. App. LEXIS 35281 (2d Cir. 2018) and appears in the attached appendix. (A. 1-18).

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 18 U.S.C. section 3231 and entered judgment on April 12, 2017. The Second Circuit had jurisdiction under 28 U.S.C section 1291, and on October 4, 2018 affirmed the district court's decision not to suppress physical evidence recovered during the search of a vehicle. After Bekim Fiseku filed a petition for panel rehearing or rehearing *en banc*, the Second Circuit issued an amended decision on December 17, 2018. On December 27, 2018, the Second Circuit denied Fiseku's petition for panel rehearing or rehearing *en banc*. (A. 19).<sup>1</sup> This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. section 1254(1).

### **RELEVANT STATUTORY PROVISIONS**

The Fourth Amendment to the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

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<sup>1</sup> References in the form "A. \_\_" are to pages in the appendix attached to this petition.

## **STATEMENT OF THE CASE**

This case concerns whether, under the Fourth Amendment to the United States Constitution, police exceeded the scope of a reasonable stop under Terry v. Ohio, 392 U.S. 1 (1968), and the detention became a de facto arrest. The Second Circuit held that the “unusual circumstances of [the defendant’s] apprehension justified the brief use of handcuffs . . . .” In concluding that this case presented “unusual circumstances” under which an officer could handcuff a suspect without transforming a Terry stop into an arrest, the Second Circuit erroneously placed this case in the same category as unusual Terry stop cases within its jurisprudence, where the circumstances presented exceptional and verifiably dangerous situations for the officers conducting the stop. This case involved no discernable threat of physical violence and nothing beyond mere speculation that criminal activity was afoot. In expanding the definition of “unusual circumstances” so broadly as to encompass this case, the Second Circuit’s decision effectively undermines the rule that officers may not handcuff a suspect during a Terry stop. In so doing, the Second Circuit’s decision jeopardizes the core Fourth Amendment tenet that no arrest take place without probable cause.

## **STATEMENT OF FACTS**

### **Fiseku’s Conviction and Motion to Suppress**

On November 18, 2016, Bekim Fiseku (“Fiseku”) entered a conditional guilty plea to Count One of an indictment charging him with conspiracy to commit Hobbs Act robbery after the Hon. Paul A. Engelmayer, United States District Judge for the

Southern District of New York, denied his motion under the Fourth Amendment to suppress evidence recovered during an investigatory stop. (A. 20-58). On appeal to the Second Circuit, Fiseku challenged that denial.

The evidence at the suppression hearing established that at about 1:15 am on September 20, 2014, Detective Sergeant Vincent Gruppuso of the Bedford Police Department saw a Nissan Pathfinder parked in the dirt off a road in rural Bedford, New York. Gruppuso asked the driver, Sefedin Jajaga (“Jajaga”), who appeared to be alone, if he was okay. Jajaga responded that he was having transmission trouble and was waiting for a friend coming from Brooklyn with a tow truck. Jajaga said he was from Staten Island and was in Bedford visiting a friend. Gruppuso left, but was “suspicious” because Jajaga was not from the area, a tow truck was coming from Brooklyn, and nearby a vacant house was for sale, making it “a prime target for . . . burglary . . .” Based on his suspicions, Gruppuso decided to return to the area. Two to four minutes later, he encountered the Pathfinder driving nearby, and was suspicious that the car was “up and running that quickly.” (CA. 122-30<sup>2</sup>).

Gruppuso followed the Pathfinder to a “park-n-ride” near the highway. Gruppuso saw the Pathfinder parked in a far corner of the parking lot, which was surrounded by trees. Jajaga was the driver, a male sat in the passenger seat, and Fiseku was walking from the passenger side around the rear of the vehicle. (CA. 131-

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<sup>2</sup> References in the form “CA \_\_” are to the Appendix filed by Fiseku in the Second Circuit, in conjunction with his appellate brief.

33, 193). Gruppuso entered the park-n-ride “pretty much immediately behind” the Pathfinder. (CA. 158).

Grupposo did not pull out his weapon, stating that it was not necessary. At 1:25 am, he radioed for another unit to respond, and two officers arrived in two separate police vehicles. (CA. 135-36, 147-48). The officers separated the three individuals, with Fiseku staying on the outside, while Jajaga and the other passenger were eventually placed separately in each of the two police vehicles. (CA. 137). Gruppuso examined Fiseku’s driver’s license, patted him down for weapons or contraband and found nothing, and then placed him in handcuffs. (CA. 166-67). All three men were frisked “for officer safety” just before being handcuffed, but nothing suspicious or dangerous was found in conducting the frisk. (CA. 139). The officers did not take their guns out of their holsters “because there was no threat of deadly force at that time.” (CA.139, 169-70). Gruppuso did not tell the three individuals in handcuffs that they were under arrest, but “[i]t was explained that they were being detained while we investigated.” (CA. 138-39).

The officers questioned the three men separately without issuing Miranda warnings. Jajaga and the passenger were seated in separate police vehicles, while Fiseku remained outside. (CA. 137). Jajaga told Gruppuso he was in the area because he was cheating on his wife, but he did not know the name or location of the person he was meeting. (CA. 140). The passenger stated that the three were on their way in separate vehicles to a party in Connecticut and had stopped at the park-n-ride

to stretch their legs and smoke a cigarette, but became lost and separated. (CA. 140-41). Fiseku stated that the three were in one car together, and stopped talking when Gruppuso asked why the passenger was stating that they came separately. (CA. 142).

When Gruppuso asked the driver “if there was anything in the vehicle that shouldn’t be there, the driver said “no, you can look.” (CA. 142). The officers searched the vehicle and found “numerous clothing items and hats with NYPD logo,” “a gold shield on a neck chain, flashlights, gloves, a stun gun, [and] two replica firearms.” (CA. 143, 195-205). The search ended at around 1:35 am, about ten minutes after Gruppuso arrived in the parking lot. A canvass of the area revealed no criminal activity. (CA. 150-52).

### **Procedural History**

An indictment charged that Fiseku and Jajaga conspired to commit Hobbs Act robbery, in violation of 18 U.S.C. section 1951(b)(1). Fiseku and Jajaga moved to suppress evidence, claiming their Fourth and Fifth Amendment rights were violated when the officers detained and questioned them and then searched the car. Following a suppression hearing, the district court issued an opinion denying the defendants’ motion to suppress to the extent it was based on the Fourth Amendment. (A. 20-58).

The district court found that the issue whether the Terry stop ripened into a de facto arrest presented “a close question,” noting that the handcuffing of Fiseku and Jajaga during the Terry stop was “a fact that, ordinarily, would signify an arrest, not

a Terry stop.” (A. 34). However, the district court “narrowly” concluded that “viewing in totality the circumstances of the defendants’ detention, and considering the use of handcuffs in the context of the challenges presented to the three officers by the wee-hours remote encounter with the three suspects,” the stop was not a de facto arrest, but was “reasonable in its manner and duration and not more intrusive than reasonably necessary.” (A. 34).

The district court noted the similarities between this case and United States v. Bailey, 743 F.3d 322, 339-41 (2d Cir. 2014), describing the defense claim of a de facto arrest as both “colorable” and “substantial.” (A. 37). However, the court distinguished Bailey because the stop here took place at night in an isolated rural spot not of the officers’ choosing, the park-n-ride was surrounded by trees, and a reasonable officer would have been concerned that the suspects had confederates in the area whom they were going to meet, and/or that there were weapons hidden nearby. (A. 38). The court also noted that in Bailey the officers stopped the suspects in order to identify the men who had left the apartment about to be searched, while here the officers had good reason to believe that a crime was in progress. (A. 39).

On November 18, 2016, Fiseku entered a conditional guilty plea to the single count of conspiracy to commit Hobbs Act robbery. He agreed not to appeal or collaterally attack a sentence within or below the stipulated guidelines range of 151-188 months, but reserved an appeal of the district court’s decision not to suppress the physical evidence recovered from the vehicle. (CA. 408-40). On April 12, 2017, the

district court adopted the guidelines calculation in the plea agreement, including Fiseku's designation as a career offender, and sentenced him to 108 months. (CA. 553-98).

**The Second Circuit's Decision And Denial of Petition For Panel Rehearing Or Rehearing *En Banc***

On October 4, 2018, the Second Circuit affirmed the district court's decision declining to suppress the evidence recovered from the vehicle. Citing its previous decision in Grice v. McVeigh, 873 F.3d 162, 168 (2d Cir. 2017), the Second Circuit concluded that "this case presents 'unusual circumstances' under which an officer may handcuff a suspect without 'transform[ing] a Terry stop into an arrest.'" (A. 12)<sup>3</sup>. The Second Circuit also relied on its previous decisions in United States v. Newton, 369 F.3d 659 (2d Cir. 2004) and United States v. Vargas, 369 F.3d 98 (2d Cir. 2004). (A. 14). Like the district court, the Second Circuit distinguished Bailey because the detectives there selected when and where to conduct the stop, and conducted the stop for the limited purpose of confirming whether either Bailey or his companion was a resident of the apartment under surveillance. (A. 13-14).<sup>4</sup>

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<sup>3</sup> Citations here are to the Second Circuit's attached amended decision filed on December 17, 2018, which slightly revised the factual rendition in its October 4, 2018 decision, apparently in response to an error raised in Fiseku's Petition for Panel Rehearing or Rehearing *En Banc*. The error in the October 4, 2018 decision and the subsequent revision are not relevant to this Petition for a Writ of Certiorari.

<sup>4</sup> The Second Circuit declined to review as unripe Fiseku's claim of ineffective assistance of counsel based on his counsel's failure to challenge his classification as a career offender under section 4B1.1 of the sentencing guidelines because his crime of conviction, conspiracy to commit Hobbs Act robbery, is not a crime of violence under

On November 19, 2018, Fiseku filed a Petition for Panel Rehearing or Rehearing *En Banc*. On December 17, 2018, the Second Circuit issued an amended decision. (A. 1-18). On December 27, 2018, the Second Circuit denied Fiseku's Petition for Panel Rehearing or Rehearing *En Banc*. (A. 19).

### **REASONS FOR GRANTING THE WRIT**

In concluding that this case presented "unusual circumstances" under which an officer could handcuff a suspect without transforming a Terry stop into an arrest, the Second Circuit erroneously placed this case in the same category as unusual Terry stop cases within its jurisprudence, where the circumstances presented exceptional and verifiably dangerous situations for the officers conducting the stop. This case involved no discernable threat of physical violence and nothing beyond mere speculation that criminal activity was afoot. In expanding the definition of "unusual circumstances" so broadly as to encompass this case, the Second Circuit effectively created an exception that swallows the rule that officers may not handcuff a suspect during a Terry stop. In so doing, the Second Circuit's decision jeopardizes the core Fourth Amendment tenet that no arrest take place without probable cause.

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section 4B1.2.<sup>4</sup> (A. 15-16). Fiseku does not base his Petition for a Writ of Certiorari on this issue.

## ARGUMENT

The Second Circuit rested its decision to affirm the district court’s denial of Fiseku’s suppression motion on its recent decision in Grice v. McVeigh, 873 F.3d 162 (2d Cir. 2017), erroneously concluding that, like Grice, this case “present[ed] ‘unusual circumstances’ under which an officer may handcuff a suspect without ‘transform[ing] a Terry stop into an arrest.’” Id. at 168. In so doing, the Second Circuit effectively created an exception that undermines the rule that officers may not handcuff a suspect during a Terry stop. The result is a decision that jeopardizes the core Fourth Amendment tenet that no arrest take place without probable cause.

In Grice, the Second Circuit recently emphasized that only in “certain unusual circumstances” did handcuffing a suspect to investigate a reasonable suspicion not transform a Terry stop into an arrest. The Second Circuit held that the facts in Grice rose to the level of “unusual circumstances,” and gave two additional examples that also satisfied that standard. All three cases stand in stark comparison to Fiseku’s case, which involved no discernable threat of physical violence and nothing beyond mere speculation that criminal activity was afoot. In placing Fiseku’s case in the category of “unusual circumstances,” the Second Circuit failed to follow its precedent in Grice, and in United States v. Newton, 369 F.3d 659 (2d Cir. 2004) and United States v. Vargas, 369 F.3d 98 (2d Cir. 2004), the two cases cited in Grice as additional examples of “unusual circumstances.” The Second Circuit thus effectively expanded the definition of “unusual circumstances” so broadly as to undermine the core Fourth Amendment tenet that no arrest take place without probable cause.

In Grice, the police were on the lookout for railroad sabotage and received a radio report of an individual matching Grice's description bending down by railroad tracks with a remote control device in his hands, and had reason to fear that Grice might use an electronic device to set off an explosive on the tracks. When the police officer confronted Grice at the tracks, he advised Grice that what he was doing was "very unusual," and that Grice was "the first guy in [his] career that's ever been sitting next to a train with a radio looking at trains, and taking pictures." 873 F.3d at 166. The investigation turned up nothing, and Grice was given a summons for trespass that was ultimately dropped. The Second Circuit concluded that "[t]hese circumstances [could] easily be classified as unusual," and that it was reasonable for a lone officer to handcuff Grice in order to ensure that he did not press a detonator button on any device until an investigation could be conducted and the tracks could be searched. Id.

In Grice, the Second Circuit gave two additional examples of "unusual circumstances" where handcuffing did not transform a Terry stop into an arrest. First, in United States v. Newton, 369 F.3d 659, 675 (2d Cir. 2004), a state parole officer received a call from a social worker advising him that Newton's mother, with whom Newton resided, reported that Newton had threatened to kill her and her husband and that her son kept a gun in a shoe box by the door of her home. When a parole officer went to Newton's home to conduct a safety search, he handcuffed Newton while he investigated, explaining that he was not under arrest, but was

restrained for his own safety and that of the officers. The Second Circuit concluded that handcuffing Newton did not amount to a de facto arrest under the Fourth Amendment, finding that it was reasonable for the officers to do so for the safety of everyone on the premises. 369 F.3d at 673-75.

Second, in United States v. Vargas, 369 F.3d 98, 102 (2d Cir. 2004), a reliable confidential informant advised the police that the defendant was robbing drug dealers with a firearm in a high crime area and was at a certain location carrying a gun in his waistband. When the police approached the defendant and asked to speak with him, the defendant did not respond, but immediately fled. The police gave chase, and after a brief struggle Vargas was placed on the ground, handcuffed and patted down. The officers found a loaded gun on him. On appeal, Vargas argued that the encounter was not an investigative stop, but rather an arrest requiring probable cause. The Second Circuit held that while “under ordinary circumstances, drawing weapons and using handcuffs are not part of a Terry stop,” given the reliable information that the defendant was carrying a weapon, his flight from the police, and ensuing struggle, the use of handcuffs under the circumstances did not transform the stop into a full arrest until the gun was recovered.

The Second Circuit’s application here of the “unusual circumstances” exception in Grice to the rule that handcuffing is ordinarily not incident to a Terry stop, effectively enfeebles the core Fourth Amendment tenet that no arrest may take place without probable cause. Here, the police had no complaints against Fiseku or the

other two men, no reports of criminal activity in the area, no descriptions of perpetrators, and no information that any of the men possessed a weapon, had threatened to kill anyone, or was positioned to detonate an explosive. Pat downs of Fiseku and the other two men had yielded no weapons. Gruppuso had nothing more than an intuition that criminal activity might be afoot based on an apparent lie by Jajaga about whether his car had broken down, and the presence of a nearby empty house. These were hardly “unusual circumstances” sufficient under Second Circuit precedent to justify the use of handcuffs in conducting a Terry stop. In fact, if these benign circumstances are sufficient to justify the use of handcuffs during an investigative stop, and they are not, it is hard to imagine circumstances in which the Second Circuit will hold that the use of handcuffs is not justified during such a stop.

In distinguishing United States v. Bailey, 743 F.3d 322 (2d Cir. 2014), the Second Circuit effectively ignored its own controlling precedent because Bailey is directly on point here. In Bailey, a detective obtained a warrant to search premises for a handgun. Probable cause for the search was based on information provided by an informant who had purchased crack at the premises from “Polo” and had seen a handgun on the kitchen counter along with the drugs. The informant had seen the gun on other occasions over the preceding two months, when he made drug purchases from “Polo” either at the premises or at “Polo’s” prior residence in Bay Shore, New York. When detectives surveilled the premises in anticipation of the search, they saw two males drive away, both fitting the description of Polo. The detectives followed

their car for approximately one mile before pulling it over in the parking lot of a fire station, in order to identify the two men and see what their purpose was in being at the premises. The detectives asked both men to step out of the car and patted them both down, but recovered no weapons. The detectives asked both men their names and where they were coming from. Bailey stated he was coming from “my house” and identified the address of the premises to be searched. When asked for identification, he produced a driver’s license with a Bay Shore address. The detective knew that “Polo” had dealt drugs from a Bay Shore address before moving to the premises to be searched. The second male identified himself and said that the other male lived at the premises to be searched. The detectives then handcuffed both men. Upon learning that a gun and drugs had been found in plain view in the apartment, they arrested both men. Less than ten minutes elapsed between the time the officers first pulled over the men and detained them, and the time of the arrest.

The Second Circuit held that Terry supported the detectives’ initial stop of Bailey, but the handcuffing turned the stop into a de facto arrest, concluding that while it was reasonable under Terry for the detectives to detain Bailey for the few minutes it took to confirm their suspicions, the detectives had “exceeded the permissible scope of a Terry stop when they handcuffed Bailey after a patdown showed that neither he nor his companion … was armed.” 743 F.3d at 332. The Second Circuit emphasized that “[t]he relevant inquiry is whether police have a reasonable basis to think that the person detained poses a present physical threat

and that handcuffing is the least intrusive means to protect against that threat.” Id. at 340 (quoting and citing Newton, 369 F.3d at 674). The Second Circuit concluded that the police did not face a physical threat when they handcuffed Bailey that would justify the use of handcuffs, given that they had already subjected both Bailey and his companion to a patdown and confirmed that neither was armed, and that the officers had both men exit their vehicle, thereby eliminating the risk that they might get a weapon from their car.

Like the police in Bailey, Gruppuso did not have a reasonable basis to believe that Fiseku or his two companions posed a physical threat, first because here the police patted down all three men and recovered no weapons, and second because the police then removed Jajaga and the third male from their car, and kept Fiseku outside the car, thus removing any threat that the three men could reach for a weapon inside the car. There were three police officers at the scene and three persons detained. Handcuffing was neither necessary, nor the minimally intrusive means to achieve investigative results. The evidence that Fiseku and the other two men were engaged in criminal activity was entirely speculative, based on an apparent lie about a broken down car and the presence of a nearby vacant house. This evidence pales in comparison to that in Bailey, which included probable cause to search the premises and the fact that Bailey fit Polo’s description and Bailey and his companion gave information supporting that Bailey was Polo. In contrast, here there were no reports

of criminal activity, no informants, no descriptions of perpetrators, and no reason whatsoever to connect Fiseku or the other men to any criminal activity.

The Second Circuit distinguished Bailey on two grounds, neither of which undermines that Bailey is on point and controlling here. First, the Second Circuit noted that in Bailey, the detectives selected when and where to conduct the investigatory stop, where here Gruppuso stumbled upon the men in the middle of the night in a remote, wooded area where other associates might be present or weapons stashed. Opinion at 14-15. This distinction has no merit. Police rarely choose the location of an investigative stop. Moreover, the notion that confederates and weapons would be secreted in the area in anticipation of the arrival of police, is purely speculative and defies credulity. Taking the Second Circuit's decision to its logical conclusion, whenever police do a Terry stop in a wooded area or indeed a crime ridden area, if it is not a place of their choosing, the police could lawfully turn that stop into a de facto arrest by handcuffing the suspects, based solely on the speculation that confederates or weapons could be nearby. Such a result would undercut the core Fourth Amendment principle that no arrest take place without probable cause. Second, the Second Circuit noted that in Bailey, the detectives apprehended the two men with the limited purpose of confirming whether either might be a resident of the apartment under surveillance, where here Gruppuso was attempting to determine whether his suspicion that the men were about to commit a home invasion or other crime was correct. Opinion at 14-15. To the contrary, the detectives in Bailey

handcuffed the defendant at a point when they had strong evidence that he was an armed drug dealer, evidence of criminal activity that did not exist in Fiseku's case.

In affirming the district court's decision denying Fiseku's motion to suppress the fruits of the search of the vehicle, and in ruling that the case presented "unusual circumstances" sufficient to justify handcuffing Fiseku during an investigative stop, the Second Circuit departed from its own precedent and undermined the core Fourth Amendment principle that no arrest take place without probable cause. This Court should grant the petition, correct this error, and reverse Fiseku's conviction for conspiracy to commit Hobbs Act robbery.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated:       White Plains, New York  
                 March 27, 2019

Respectfully submitted,  
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## **APPENDIX**

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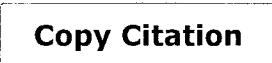
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**United States v. Fiseku, 2018 U.S. App. LEXIS  
35281**

United States Court of Appeals for the Second Circuit

June 7, 2018, Argued; October 4, 2018, Decided

Docket No. 17-1222-cr

**Reporter****2018 U.S. App. LEXIS 35281** \* | \_\_\_ F.3d \_\_\_ | 2018 WL 6605855UNITED STATES OF AMERICA, Appellee, -v.- BEKIM FISEKU, Defendant-Appellant, SEFEDIN JAJAGA, Defendant. **Subsequent History:**  Amended: December 17, 2018

**Prior History:** Defendant-appellant Bekim Fiseku appeals from a judgment entered in the United States District Court for the Southern District of New York ([Engelmayer](#) , J.) convicting him of conspiracy to commit [Hobbs Act](#) robbery. Fiseku entered a conditional guilty plea after the District Court denied in part his motion to suppress physical evidence recovered during an investigatory stop. On appeal, he principally challenges that suppression ruling, arguing that the officers who apprehended him acted unreasonably by restraining Fiseku in handcuffs, thereby effectuating a de facto arrest without probable cause in violation of the [Fourth Amendment](#). We disagree. As the

District Court correctly determined, this case presents unusual circumstances that justify the use of handcuffs during an investigatory stop. Fiseku further argues that defense counsel was constitutionally ineffective in failing to assert a particular argument contesting Fiseku's status as a "career offender" under the United States Sentencing Guidelines. Following our usual practice, we decline to adjudicate Fiseku's ineffective assistance claim in this appeal, without prejudice to its renewal in a collateral proceeding.

**United States v. Fiseku, 906 F.3d 65, 2018 U.S. App. LEXIS 28102 (2d Cir. N.Y., Oct. 4, 2018)**

United States v. Fiseku, 2015 U.S. Dist. LEXIS 162466 (S.D.N.Y., Dec. 3, 2015)

**Disposition:** AFFIRMED. [\*2]

## Core Terms

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suppression, handcuffs, investigatory stop, handcuffed, arrest, parking lot, suspects, circumstances, arrived, weapons, probable cause, sentencing, suspicion, physical evidence, de facto, recovered, minutes, career, commit, ineffective assistance claim, ineffective, apartment, offender, pull-off, restrain, armed, criminal activity, investigative, conversation, questioning

### Case Summary

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#### Overview

HOLDINGS: [1]-Under the Fourth Amendment, the district court did not err in its decision not to suppress physical evidence found in a vehicle; [2]-Although an officer might have chosen to proceed without using physical restraints, he did not act unreasonably when he placed defendant in handcuffs shortly after initiating the investigatory stop; [3]-The continued use of handcuffs did not become unreasonable. The officers did not violate defendant's Fourth Amendment rights by restraining him in handcuffs during the initial ten minutes of the investigatory detention before probable cause was established; [4]-The court declined to review defendant's claim of ineffective assistance of counsel on direct review.

#### Outcome

Judgment affirmed.

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> De Novo Review ▼ > Conclusions of Law ▼

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**HN1**  **De Novo Review, Conclusions of Law**

In appeals from denied suppression motions, the United States Court of Appeals for the Second Circuit reviews factual determinations for clear error, but reviews de novo conclusions of law and mixed questions of law and fact, including the ultimate determination of whether the admitted or established facts satisfy the relevant statutory or constitutional standard.

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**HN2**  **Search & Seizure, Exclusionary Rule**

Under the so-called "exclusionary rule," trial courts must generally exclude evidence obtained by unconstitutional police conduct.  More like this Headnote

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> Triggers of Waivers ▼

**HN3**  **Waiver, Triggers of Waivers**

On appeal, issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.  More like this Headnote

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**HN4**  **Search & Seizure, Scope of Protection**

The Fourth Amendment defines a right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. Courts assess "reasonableness" in this context by balancing the particular need to

search or seize against the privacy interests invaded by such action. 

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### **[HN5](#) [Search & Seizure, Probable Cause](#)**

While an arrest must generally be supported by probable cause, an officer may conduct a brief investigatory detention—also referred to as a "Terry stop"—as long as the officer has reasonable suspicion that the person to be detained is committing or has committed a criminal offense. Even a properly initiated investigatory stop, however, may ripen into a de facto arrest that must be based on probable cause. When a court considers a claim of de facto arrest, the following facts are generally deemed relevant: (1) the length of time involved in the stop; (2) its public or private setting; (3) the number of participating law enforcement officers; (4) the risk of danger presented by the person stopped; and (5) the display or use of physical force against the person stopped, including firearms, handcuffs, and leg irons. No one of these factors is determinative. But to satisfy the reasonableness standard, officers conducting stops on less than probable cause must employ the least intrusive means reasonably available to effect their legitimate investigative purposes.  [More like this Headnote](#)

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### **[HN6](#) [Stop & Frisk, Reasonable Suspicion](#)**

It is the Government's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. The United States Court of Appeals for the Second Circuit applies an objective standard in assessing the Government's asserted justification, asking whether the facts available to the officer at the moment of the seizure or the search warrant a person of reasonable caution in the belief that the action taken was appropriate.  [More like this Headnote](#)

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**HN7 Search & Seizure, Scope of Protection**

The United States Court of Appeals for the Second Circuit generally views handcuff use as a hallmark of a formal arrest. At the same time, the Second Circuit has long recognized that, regardless of whether probable cause to arrest exists, a law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself. Recognizing the tension between these competing principles, the Second Circuit has explained that the Fourth Amendment occasionally will permit handcuff usage during a Terry stop when the police have a reasonable basis to think that the person detained poses a present physical threat and that handcuffing is the least intrusive means to protect against that threat. To that end, the Second Circuit has found that officers acted reasonably in using handcuffs when they acted based on reliable information that a suspect was armed and possibly dangerous.  [More like this Headnote](#)

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**HN8 Search & Seizure, Scope of Protection**

Handcuffing is ordinarily not incident to a Terry stop, and tends to show that a stop has ripened into an arrest.  [More like this Headnote](#)

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 > Warrantless Searches ▼ > Investigative Stops ▼

**HN9 Search & Seizure, Scope of Protection**

The question is not simply whether some other alternative to using

handcuffs at the outset of the investigatory stop was available, but whether the police acted unreasonably in failing to recognize or to pursue it.  [More like this Headnote](#)

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Criminal Law & Procedure > [Counsel](#) ▾ > 

[Effective Assistance of Counsel](#) ▾ > [Reviewability](#) ▾

#### **HN10 Effective Assistance of Counsel, Reviewability**

The United States Court of Appeals for the Second Circuit is generally reluctant to address ineffectiveness claims on direct review, a stage at which the constitutional sufficiency of counsel's performance is usually unripe for seasoned retrospection.  [More like this Headnote](#)

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**Counsel:** ROBERT ALLEN, Assistant United States Attorney (Won S. Shin, Assistant United States Attorney, on the brief), for [Geoffrey S. Berman](#) ▾, United States Attorney for the Southern District of New York, New York, NY, for Appellee.

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**Judges:** Before: [CABRANES](#) ▾, [LYNCH](#) ▾, and [CARNEY](#) ▾, Circuit Judges.

**Opinion by:** [SUSAN L. CARNEY](#) ▾

## Opinion

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[SUSAN L. CARNEY](#) ▾, *Circuit Judge*:

Defendant-appellant Bekim Fiseku entered a conditional plea of guilty to one count of conspiracy to commit [Hobbs Act](#) robbery after the United States District Court for the Southern District of New York ([Engelmayer](#) ▾, J.) denied in part his motion to suppress evidence recovered during an investigatory stop. *See United States v. Fiseku ("Suppression Order"). No. 15 CR 384, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038 (S.D.N.Y. Dec. 3, 2015)*. On appeal, Fiseku challenges that denial, and also asserts that defense counsel was constitutionally ineffective in failing to make a particular argument contesting Fiseku's status as a "career offender" under the United States Sentencing Guidelines (the "Guidelines"). As to the suppression ruling, we agree with the District Court that the officers acted reasonably under the [Fourth Amendment](#)

during the late-night investigatory stop, notwithstanding [\*3] their decision to briefly restrain Fiseku and two other individuals in handcuffs before the officers developed probable cause to arrest. As to Fiseku's ineffective assistance claim, in accordance with our usual practice, we decline to address his argument on direct appeal, without prejudice to his renewal of the claim in a collateral proceeding. Accordingly, for the reasons set forth more fully below, we AFFIRM the District Court's judgment.

## BACKGROUND

### I. The investigatory stop

Fiseku and two other individuals were apprehended in the early hours of September 20, 2014, in Bedford, New York, a rural town in Westchester County. Sergeant Vincent Gruppuso of the Bedford Police Department was on duty that night, patrolling the streets in a marked patrol car. At approximately 1:15 a.m., Gruppuso saw a white Nissan Pathfinder stopped on a dirt pull-off. Gruppuso pulled up to the vehicle and had a short conversation with the driver, later identified as Sefedin Jajaga, who appeared to be the only person in the car. Jajaga told Gruppuso that he lived in Staten Island and was in Bedford that night visiting a friend. He was on the pull-off, he explained, because the Pathfinder was having transmission [\*4] trouble, and he was waiting for a friend who had agreed to bring a tow truck from Brooklyn.

Gruppuso drove on, but as he later testified, the situation "seemed suspicious," particularly because he knew that a nearby house was vacant while awaiting sale, making it a "prime target for . . . burglary." App'x 126-27. He decided to circle back and check on the vehicle. On his way back to the pull-off, Gruppuso encountered the Pathfinder driving on a nearby street, less than five minutes after the driver had complained of transmission trouble. Gruppuso followed the Pathfinder to a "park-n-ride" parking lot near the highway.

As he turned into the parking lot, Gruppuso saw the Pathfinder parked in the far corner of the lot, which was ringed by trees. He parked nearby and now observed three men in or near the Pathfinder: Jajaga sitting in the driver's seat, a second individual (later identified as a certain Hughes) sitting in the passenger seat, and a third (later identified as Fiseku) walking around the rear of the vehicle. Because Gruppuso drove into the parking lot only moments after the Pathfinder, there was not enough time for anyone to enter that vehicle without Gruppuso noticing, unless [\*5] someone was "stand[ing] there ready to jump in the vehicle when it pulled in and stopped." App'x 158.

Gruppuso radioed from the parking lot at 1:25 a.m., asking for an additional unit to join him, then got out of his car and approached the Pathfinder. Two

officers soon arrived in separate police cruisers. By that time, Gruppuso had already begun interacting with Fiseku: after examining Fiseku's driver's license, Gruppuso patted him down and found no weapons or contraband. Within moments, the officers directed Jajaga to exit the Pathfinder, patted him down and handcuffed him, and handcuffed Fiseku.**3** The officers then directed Hughes to exit the vehicle, then patted him down and handcuffed him as well. Gruppuso testified at the suppression hearing that the three men were handcuffed for officer safety. The officers did not draw their guns, however, because "[t]here was no threat of *deadly* force at that time." App'x 170 (emphasis added).

The officers did not tell the men that they were under arrest, nor did they issue *Miranda* warnings; rather, they explained that the men "were being detained" while the officers investigated their suspicious activity. App'x 139. The men were then separated **[\*6]** for individual questioning, a "common interview tactic," according to Gruppuso. App'x 137. Jajaga and Hughes were each seated, separately, in the back seat of patrol cars, while Fiseku remained standing outside.

Jajaga told Gruppuso that he had been able to get the Pathfinder started shortly after their conversation on the dirt pull-off. He then drove to the parking lot, he explained, to pick up Fiseku and Hughes, who had driven there in a separate car; the three men planned to travel together to a party in Waterbury, Connecticut. When Gruppuso expressed skepticism, Jajaga offered a different reason for being in Bedford at such a late hour: he had arranged a sexual encounter with a woman who lived there. When asked for additional details, however, Jajaga claimed he did not know the woman's name or where she lived.

Hughes, like Jajaga, stated that the three men were en route to a party in Connecticut in two separate cars. His account diverged at that point, however: whereas Jajaga claimed that the three men intended to proceed from Bedford together in one car, Hughes claimed they stopped in Bedford only to stretch their legs and smoke a cigarette, after which the men got back into **separate** **[\*7]** cars. Fiseku, too, mentioned a party in Connecticut, but, contrary to both Jajaga's and Hughes's accounts, he claimed that all three men had arrived in Bedford together in one car. When Gruppuso confronted Fiseku with that inconsistency, Fiseku "stopped talking." App'x 142.

After hearing all three accounts, Gruppuso returned to Jajaga and said he didn't believe Jajaga's story. When asked "if there was anything in the vehicle that shouldn't be there," Jajaga responded, "[N]o, you can look." *Id.* The officers searched the vehicle and found the following items: baseball caps and a sweatshirt bearing New York Police Department insignia, a gold "repo/recovery agent" badge on a lanyard, a stun gun, a BB gun "replicating" a Colt .45 pistol, a blank pistol "replicating" a .25 automatic, flashlights, walkie

talkies, gloves, a screw driver, and duct tape. Suppression Order, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038, at \*4.

The search was complete by 1:35 a.m., approximately ten minutes after Gruppuso first arrived in the parking lot. At that point, concerned about a possible home invasion, Gruppuso called in a request for additional units to help canvass the area. The canvass did not reveal any criminal activity.

## II. Procedural history

On June 18, 2015, the Government [\*8] filed a sealed indictment charging Fiseku and Jajaga with one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951. In September 2015, Fiseku and Jajaga moved to suppress both the physical evidence recovered from the vehicle and certain statements they made to the officers during the stop, asserting arguments under both the Fourth and Fifth Amendments. The District Court held a suppression hearing in October 2015, and then invited supplemental briefing, followed by oral argument.

On December 3, 2015, the District Court entered an order granting in part and denying in part the suppression motion. Suppression Order, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038. The court rejected defendants' argument that the officers effectuated a de facto arrest without probable cause in violation of the Fourth Amendment. See 2015 U.S. Dist. LEXIS 162466, [WL] at \*11. In the District Court's view, the officers' conduct—including their use of handcuffs—was reasonable in light of the circumstances of the late-night investigatory stop in a remote area. See *id.* Turning to defendants' arguments under the Fifth Amendment, the court concluded that defendants' statements must be suppressed because the officers subjected defendants to a custodial interrogation without providing *Miranda* warnings. See 2015 U.S. Dist. LEXIS 162466, [WL] at \*14-15 (finding inapplicable the "public safety" exception [\*9] to *Miranda*'s requirements); see also Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (requiring suppression of statements "stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"). The court declined, however, to suppress the physical evidence recovered from the vehicle, concluding that "Jajaga's consent to search the vehicle was voluntarily and freely given," notwithstanding the lack of *Miranda* warnings. Suppression Order, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038, at \*18.

In November 2016, Fiseku entered a conditional guilty plea to the single count of conspiracy to commit Hobbs Act robbery. At the change-of-plea hearing, he allocuted that he conspired with others to rob a known narcotics trafficker in

Bedford. Fiseku's plea agreement articulated the parties' consensus that, in light of his status as a career offender (as defined in Guidelines section 4B1.1), the applicable offense level would be 29, producing a stipulated advisory Guidelines sentencing range of 151 to 188 months' imprisonment. Fiseku agreed not to appeal or collaterally attack any sentence that fell within or below that stipulated Guidelines range, except that he reserved the right to assert two specific types of challenges: [\*10] (1) a claim of ineffective assistance of counsel, whether on direct appeal or in a habeas proceeding; and (2) an appeal of the District Court's decision not to suppress the physical evidence recovered from the vehicle. The agreement further provided that, should Fiseku successfully appeal the suppression ruling, the Government would not oppose a motion to withdraw his plea.

Fiseku appeared for sentencing on April 12, 2017. The District Court adopted the Guidelines calculation in the plea agreement (including Fiseku's designation as a career offender) and sentenced him, principally, to 108 months' imprisonment. Fiseku timely appealed.

## DISCUSSION

In this appeal, Fiseku argues that the investigatory stop ripened into a de facto arrest when Officer Gruppuso restrained him in handcuffs, and therefore, that the Fourth Amendment compels suppression of the physical evidence recovered from the Pathfinder during that stop. We disagree, and so affirm the District Court's decision declining to suppress that evidence. Fiseku additionally asserts a claim of ineffective assistance of counsel, arguing that defense counsel was ineffective in failing to make certain arguments challenging the Government's proposed Guidelines [\*11] calculation. We decline to reach this argument on direct appeal, without prejudice to its renewal in a future collateral proceeding where the record may be more fully developed.

### I. Fiseku's Fourth Amendment challenge

Fiseku maintains that the officers' use of handcuffs caused the investigatory detention to ripen into a de facto arrest without probable cause in violation of the Fourth Amendment. He contends, therefore, that the District Court erred in declining to suppress the physical evidence recovered during the investigatory stop as fruit of the poisonous tree.<sup>4</sup> See Utah v. Strieff, 136 S. Ct. 2056, 2061, 195 L. Ed. 2d 400 (2016). **HN1** In appeals from denied suppression motions, we review factual determinations for clear error, but we review de novo conclusions of law and "[m]ixed questions of law and fact," including the ultimate determination of "whether the admitted or established facts satisfy

the relevant statutory or constitutional standard." *United States v. Alexander*, 888 F.3d 628, 631 (2d Cir. 2018) (internal quotation marks omitted). We agree with the District Court's conclusion that the unusual circumstances of Fiseku's apprehension justified the brief use of handcuffs in this instance. We accordingly affirm the District Court's decision not to suppress the physical evidence under the Fourth Amendment.5

A. Legal standard: Investigatory stops [\*12] and de facto arrests

**HN4** The Fourth Amendment defines a right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. Courts assess "reasonableness" in this context by "balancing the particular need to search or seize against the privacy interests invaded by such action." *United States v. Bailey*, 743 F.3d 322, 331 (2d Cir. 2014).

**HN5** While an arrest must generally be supported by probable cause, "an officer may conduct a brief investigatory detention"—also referred to as a "Terry stop"—"as long as the officer has *reasonable suspicion* that the person to be detained is committing or has committed a criminal offense." *United States v. Compton*, 830 F.3d 55, 61 (2d Cir. 2016) (emphasis added) (internal quotation marks omitted); *see also Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Even a properly initiated investigatory stop, however, may "ripen into a *de facto* arrest that must be based on probable cause." *Compton*, 830 F.3d at 64. When a court considers a claim of *de facto* arrest, the following facts are "generally deemed relevant":

- (1) the length of time involved in the stop; (2) its public or private setting; (3) the number of participating law enforcement officers; (4) the risk of danger presented by the person stopped; and (5) the display or use of physical force against the person stopped, including firearms, handcuffs, and leg irons.

*United States v. Newton*, 369 F.3d 659, 674 (2d Cir. 2004). As we cautioned in *Newton*, "No one of these factors [\*13] is determinative. But to satisfy the reasonableness standard, officers conducting stops on less than probable cause must employ the least intrusive means reasonably available to effect their legitimate investigative purposes." *Id.* (citation and internal quotation marks omitted).

The Supreme Court has emphasized that **HN6** "[i]t is the [Government's] burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). We apply "an objective standard" in assessing the Government's asserted justification, asking whether "the facts

available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in the belief' that the action taken was appropriate[.]" *Terry*, 392 U.S. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925)).

B. The investigatory stop in this case

On appeal, the parties appear to agree to two propositions: first, that Officer Gruppuso had reasonable suspicion sufficient to justify initiating a *Terry* stop, and second, that he did not have probable cause to arrest Fiseku until he discovered the suspicious equipment inside the Pathfinder. Fiseku urges us to conclude that [\*14] the investigatory stop ripened into a de facto arrest unsupported by probable cause when, shortly after initiating the *Terry* stop and patting him down, Gruppuso handcuffed him. On de novo review, we conclude that this case presents "unusual circumstances" under which an officer may handcuff a suspect without "transform[ing] a *Terry* stop into an arrest." *Grice v. McVeigh*, 873 F.3d 162, 168 (2d Cir. 2017).

When, at approximately 1:25 a.m., Gruppuso followed the white Pathfinder into the dark parking lot surrounded by trees, he had reason to believe that Jajaga had lied about why he was in rural Bedford so late at night. It was highly improbable that Jajaga had managed to get the vehicle started mere moments after telling Gruppuso that he was stranded with a broken transmission and was waiting for a friend to arrive from distant Brooklyn with a tow truck. Gruppuso's suspicions were reasonably heightened when he saw that the Pathfinder now had a passenger (Hughes), and that a third man (Fiseku)—also not earlier present—was walking around the side of the vehicle. During the conversation on the dirt pull-off, Gruppuso had believed that Jajaga was the vehicle's only occupant. Given those observations, and given that Gruppuso arrived in the [\*15] parking lot mere moments after the Pathfinder, Gruppuso might reasonably have inferred either that the additional two men had been hiding in the vehicle during the conversation on the pull-off, or that they had been waiting in the parking lot for Jajaga to arrive. In either event, and in this setting, a reasonably cautious officer in Gruppuso's position would have objective grounds to suspect that the three men were about to commit a crime, or that they had recently done so. Moreover, the officer would recognize how little he knew in this quickly evolving situation, where both the degree of suspicion and the number of suspects had grown substantially in the space of ten minutes.

Gruppuso radioed for assistance, but given the late hour and the remote location, he could not be sure how many units would respond, or how long it would take them to arrive. In fact, two units responded within minutes, but by that time, Gruppuso had already begun interacting with Fiseku. A pat-down did

not reveal any weapons or contraband on Fiseku's person, but the Supreme Court has "expressly recognized" that "suspects may injure police officers and others by virtue of their *access* to weapons, even though [\*16] they may not themselves be armed." *Michigan v. Long*, 463 U.S. 1032, 1048, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (emphasis added). The *Long* Court explained further that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." *Id.* at 1047. When Jajaga and Fiseku were restrained in handcuffs, an additional suspect (Hughes) remained seated in the Pathfinder, where weapons may have lain within reach. Moreover, in the dark, tree-lined parking lot, Gruppuso could not feasibly conduct a protective perimeter sweep to check for secreted weapons or additional associates while monitoring three suspects, whom the District Court described as "muscular men." App'x 185.

**HN7** We generally view handcuff use as a "hallmark of a formal arrest." *Newton*, 369 F.3d at 676. At the same time, we have long recognized that, "regardless of whether probable cause to arrest exists," a "law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself." *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990). Recognizing the tension between these competing principles, we have explained that the Fourth Amendment occasionally will permit handcuff usage during a *Terry* stop when the "police have a reasonable basis to think that the person detained poses a present physical threat *and* that handcuffing [\*17] is the least intrusive means to protect against that threat." **6** *Bailey*, 743 F.3d at 340 (emphasis added). To that end, we have previously found that officers acted reasonably in using handcuffs when they acted based on reliable information that a suspect was armed and possibly dangerous. See, e.g., *Grice*, 873 F.3d at 168 (The officer "received a report . . . of an individual matching [the suspect's] description bending down by the [train] tracks with a remote control device," and so "had reason to believe" that the suspect "might use an electronic device to set off an explosive on the tracks."); *Newton*, 369 F.3d at 675 (Officers visited an apartment "to investigate a report that [the suspect] illegally possessed a firearm and had recently threatened to kill his mother and her husband."); *United States v. Vargas*, 369 F.3d 98, 102 (2d Cir. 2004) ("[T]he officers had reliable information that [the suspect] was carrying a weapon," and he "demonstrated his unwillingness to cooperate . . . by fleeing . . . when originally approached and continuing to struggle . . . following the stop.").

In this case, Fiseku asserts that Gruppuso acted unreasonably and based on suspicion alone: Gruppuso had neither received reports of, nor directly observed, conduct suggesting that the occupants of the Pathfinder [\*18] had engaged in criminal activity, or that any of them carried a weapon or otherwise presented a physical threat or risk of flight. In Fiseku's view, his apprehension closely resembles the investigatory stop in *United States v. Bailey*, 743 F.3d

322 (2d Cir. 2014), in which this Court found the use of handcuffs to be unreasonable. We find this comparison inapt.

In *Bailey*, two detectives were surveilling an apartment in which, according to a reliable informant, a man armed with a handgun was selling drugs. Two men, each of whom matched the drug dealer's general description, emerged from the apartment and got into a car. The detectives followed the car for approximately one mile, then directed the men to pull over in a fire station parking lot and exit the vehicle. A pat-down revealed no weapons. In response to the detectives' questions, one of the men claimed to live at the surveilled apartment. The detectives handcuffed the men and detained them while the police searched the apartment pursuant to a warrant that had been issued earlier that same day. On appeal, we found a Fourth Amendment violation in the handcuffing, concluding that the record evinced no "physical threat" or other factor that would justify handcuffing the two men. *Id.* at 340. We cautioned, however, [\*19] that in a future case, "the government may be able to point to circumstances supporting a reasonable basis to think that even an unarmed person poses a present physical threat or flight risk warranting handcuffing." *Id.*

We find persuasive the District Court's thorough discussion here of material differences between the circumstances of Fiseku's apprehension and the stop in *Bailey*. See Suppression Order, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038, at \*9-10. In *Bailey*, the detectives selected when and where to conduct the investigatory stop, and apprehended the two men with the legitimate, limited purpose of confirming whether either of the car's occupants might be a resident of the apartment under surveillance. The detectives might have suspected that one or both men had committed a crime at some point in the past, but the record did not suggest any *ongoing or imminent* criminal activity. Here, by contrast, Gruppuso stumbled upon a suspicious scenario in the middle of the night in a remote, wooded location where three suspects had, it appeared, arranged to meet. His goal was not simply to identify the men, but to confirm or rebut his suspicion that they had committed, or were poised to commit, a home invasion or some other crime. The likelihood of ongoing [\*20] or imminent criminal activity heightened the risk that one or more suspects might be armed and that they might attempt to fight or flee. Gruppuso made quick decisions about how best to protect both himself and the public, acting in the face of uncertainty about how many associates might be present, what sort of criminal activity they might be involved in, or whether any of them might have access to a weapon. 7

Gruppuso made the cautious choice to restrain Jajaga and Fiseku in handcuffs at the outset of the investigatory stop so he could safely turn his attention to the suspect remaining in the vehicle and the two newly arrived police cruisers. Under these circumstances, "handcuffing was a less intimidating—and less

dangerous—means of ensuring [officer] safety . . . than holding [Jajaga and Fiseku] at gunpoint." Newton, 369 F.3d at 675. Given the "swiftly developing situation" in which Gruppuso found himself, we heed the Supreme Court's warning not to "indulge in unrealistic second-guessing." United States v. Sharpe, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985). As the Sharpe Court explained, "**HN9**" The question is not simply whether some other alternative was available, but whether the police acted *unreasonably* in failing to recognize or to pursue it." *Id.* at 687 (emphasis added). Here, [\*21] although Gruppuso might have chosen to proceed without using physical restraints, we conclude that he did not act *unreasonably* when he placed Fiseku in handcuffs shortly after initiating the investigatory stop.

Having concluded that the initial application of handcuffs was reasonable, we next consider whether the continued use of handcuffs became unreasonable at some point thereafter. We conclude that it did not. In the space of ten minutes, the three officers patted down and handcuffed the three suspects, separated them, questioned each of them at least once, then searched the Pathfinder and discovered highly suspicious equipment inside, at which point (as Fiseku concedes) they had probable cause to effectuate an arrest. As the District Court explained, the record does not suggest "that the officers were at all dilatory in questioning the three men." Suppression Order, 2015 U.S. Dist. LEXIS 162466, 2015 WL 7871038, at \*11; see also, e.g., Grice, 873 F.3d at 168 ("[T]hirty-three minutes was not an unreasonable interval to keep the handcuffs on while officers and a dog searched the tracks for a potential bomb."). Further, if handcuffs were reasonable when three officers were questioning three suspects in this remote area late at night, then handcuffs remained reasonable when [\*22] one or more of those officers turned his attention away from the suspects in order to briefly search a vehicle. See, e.g., United States v. Hurst, 228 F.3d 751, 758 n.3 (6th Cir. 2000) ("[W]here defendant was reasonably suspected of having just burglarized a home and might reasonably have been deemed armed and dangerous, the officers' attempt to use handcuffs as a precautionary measure to secure their safety during the vehicle search was not unreasonable or otherwise improper.").

For the reasons set forth above, we conclude that Officer Gruppuso and his colleagues did not violate Fiseku's Fourth Amendment rights by restraining him in handcuffs during the initial ten minutes of the investigatory detention before probable cause was established. We accordingly affirm the District Court's decision not to suppress the physical evidence recovered during the officers' search of the Pathfinder.

## **II. Fiseku's claim of ineffective assistance of counsel**

Fiseku's second argument on appeal is that he received ineffective assistance of counsel in connection with his sentencing. He contends in particular that defense counsel should have challenged his classification as a "career offender" under section 4B1.1 of the Sentencing Guidelines on the grounds that his crime of conviction (conspiracy to commit Hobbs Act robbery) [\*23] does not meet the definition of a "crime of violence" set forth in Guidelines section 4B1.2.

**HN10** We are "generally reluctant to address ineffectiveness claims on direct review," a stage at which "the constitutional sufficiency of counsel's performance is usually unripe for seasoned retrospection." United States v. Rivernider, 828 F.3d 91, 106 (2d Cir. 2016) (internal quotation marks omitted). That reluctance is particularly appropriate in this instance. We note, first, that the legal issue underlying Fiseku's ineffective assistance claim presents an interpretive question about the Guidelines that this Circuit has yet to address. **8** Moreover, the record on appeal is silent as to defense counsel's conversations with Fiseku and strategic calculations regarding Fiseku's plea agreement (in which the parties stipulated to Fiseku's status as a career offender) and sentencing submissions (in connection with which defense counsel did, in fact, argue against a "career offender" designation, albeit on different grounds than those Fiseku describes in his ineffectiveness claim). Given these legal and factual uncertainties, "we decline to review defendant's claim of ineffective assistance of counsel on the record now before us." United States v. Morris, 350 F.3d 32, 39 (2d Cir. 2003). Our decision here does not foreclose Fiseku from asserting [\*24] an identical claim of ineffective assistance of counsel in a future motion under 28 U.S.C. § 2255, should he so desire.

## CONCLUSION

Given the unusual circumstances of this case, we are unable to conclude that the officers acted unreasonably in restraining Fiseku and his associates in handcuffs as they did. Accordingly, we **AFFIRM** the judgment of the District Court.

### Footnotes



The Clerk of Court is directed to amend the case caption to conform to the above.



The account provided here is drawn from the documentary evidence and testimony adduced before the District Court in connection with Fiseku's motion to suppress. Where the evidence was contested or ambiguous, we defer to the District Court's findings of fact as set forth in its suppression ruling, except with regard to the precise order in which Fiseku and Jajaga were handcuffed in the moments following Officer Gruppuso's arrival in the parking lot, as described below.

**3**

The District Court found that Gruppuso first handcuffed Fiseku, and then directed Jajaga to exit the vehicle, at which point Jajaga was handcuffed in the presence of all three officers. Gruppuso's testimony, however, conflicts with that account: as pointed out on Fiseku's petition for panel rehearing, Gruppuso testified that Jajaga was handcuffed "first." App'x 170. We issued this amended opinion to correct this error.

**4**

**HN2** Under the so-called "exclusionary rule," trial courts must generally "exclude evidence obtained by unconstitutional police conduct." *Utah v. Strieff*, 136 S. Ct. 2056, 2059, 195 L. Ed. 2d 400 (2016). The Supreme Court has recognized "several exceptions" to that rule, see *id.* at 2061, but the Government has not argued that any exception applies in this instance. Rather, the Government contends that the officers acted reasonably under the Fourth Amendment during the investigatory stop such that the exclusionary rule does not come into play.

**5**

Fiseku also purports to challenge the District Court's conclusion that Jajaga's consent to search the Pathfinder was voluntarily given. But because Fiseku's argument amounts to a single paragraph bereft of any citation to applicable legal authority, we deem the point abandoned. See *United States v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013) ("It is a settled appellate rule that **HN3** issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

**6**

Officer Gruppuso testified at the suppression hearing that it is not "unusual" for him to use handcuffs during investigatory stops. App'x 138. In determining whether police conduct is consistent with the Fourth Amendment, we assess the circumstances objectively, and not according to the subjective motivations of police officers, see *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), let alone what an officer's practice might be in other

circumstances. Accordingly, the only question before us is whether Gruppuso acted reasonably under the circumstances of Fiseku's apprehension. We have emphasized that **HN8** "[h]andcuffing is ordinarily not incident to a *Terry* stop, and tends to show that a stop has ripened into an arrest." *Grice*, 873 F.3d at 167. Several of our sister circuits have similarly cautioned that the use of handcuffs in *Terry* stops is not "a matter of routine." *United States v. Acosta-Colon*, 157 F.3d 9, 18 (1st Cir. 1998); *see also Ramos v. City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013).

**7**

We have previously cautioned that "suspecting a person of having committed a burglary cannot, in and of itself, provide police with grounds to subject that person to an extremely intrusive *Terry* stop." *Oliveira v. Mayer*, 23 F.3d 642, 647 n.1 (2d Cir. 1994). Here, however, our review of "the facts available to [Gruppuso] at the moment of the seizure or the search," *Terry*, 392 U.S. at 21-22, confirms that he acted on the basis of more than mere suspicion of wrongdoing.

**8**

In a recent decision, we determined that conspiracy to commit Hobbs Act robbery meets the definition of a "crime of violence" in the Armed Career Criminal Act, 18 U.S.C. § 924(c)(3)(A). *United States v. Barrett*, 903 F.3d 166, 2018 WL 4288566, at \*1 (2d Cir. 2018). That provision is worded identically to the "force clause" provision in section 4B1.2(a)(1) of the Guidelines, and so *Barrett* offers persuasive authority that Fiseku's crime of conviction similarly meets the Guidelines definition of a "crime of violence." *United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010). We have not officially so held, however, and we need not do so in this appeal.



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UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27<sup>th</sup> day of December, two thousand eighteen.

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United States of America,

Appellee,

v.

**ORDER**

Bekim Fiseku,

Docket No: 17-1222

Defendant - Appellant,

Sefedin Jajaga,

Defendant.

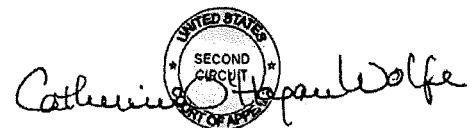
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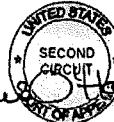
Appellant, Bekim Fiseku, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe



A.19

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 12/3/15

UNITED STATES

15 Cr. 384 (PAE)

-v-

BEKIM FISEKU and SEFEDIN JAJAGA,

OPINION & ORDER

Defendants.

PAUL A. ENGELMAYER, District Judge:

This decision resolves a motion to suppress evidence obtained by police officers during an early-hours stop on September 20, 2014, in Bedford, New York. Defendants Bekim Fiseku and Sefedin Jajaga claim that their Fourth and Fifth Amendment rights were violated when the officers, suspecting a potential burglary or home invasion, detained and questioned them and then searched a car driven by Jajaga, finding, *inter alia*, police apparel, fake guns, and a stun gun.

For the reasons that follow, the Court denies the defendants' suppression motion to the extent based on the Fourth Amendment. But, the Court holds, the defendants' Fifth Amendment rights were violated when the officers engaged in custodial questioning of them without having given *Miranda* warnings. This holding requires the suppression of some statements made by the defendants, but it does not require the suppression of physical evidence.

#### I. Overview and Procedural History

On June 18, 2015, Fiseku and Jajaga were indicted on one count of conspiracy to commit Hobbs Act robbery, in violation of § 18 U.S.C. 1951. Dkt. 2. As developed below, these charges arose out of a police investigation initiated in the early hours of September 20, 2014, when Detective Sergeant Vincent Gruppuso of the Bedford Police Department encountered the

A.20

defendants and an apparent confederate under circumstances that suggested an ongoing or just completed plot to burglarize or rob a home in the rural Bedford community. Gruppuso stopped the three men and separately questioned them, obtaining inconsistent explanations for their presence and activities in Bedford. Eventually, with Jajaga's consent, Gruppuso searched the car he had been driving, and uncovered physical evidence indicative of a robbery plot.

On September 3, 2015, following Rule 16 discovery, Fiseku moved to suppress the items found in the car and his statements to Gruppuso, Dkt. 21,<sup>1</sup> submitting, in support, an affidavit, Dkt. 26 ("Fiseku Aff."), and a memorandum of law, Dkt. 27 ("Def. Br."). Fiseku specifically claimed that his Fourth Amendment rights had been violated, and in a brief footnote, claimed in the alternative that his statements could also be suppressed on Fifth Amendment grounds. On September 8, 2010, Jajaga filed a letter requesting to join in Fiseku's motion, which the Court granted the next day. Dkts. 23, 24. On September 17, 2015, the Government submitted a memorandum of law in opposition. Dkt. 27 ("Gov't Opp. Br.").

On October 21, 2015, the Court held a suppression hearing, at which Gruppuso testified and the Court received documentary and photographic evidence. In a post-hearing colloquy, the Court raised, and counsel addressed, whether the absence of a *Miranda* warning during the stop gave rise to a suppression claim under the Fifth Amendment. The Court invited post-hearing memoranda, including on that issue.

On October 28, 2015, Fiseku, Jajaga, and the Government submitted post-hearing memoranda. Dkts. 37 ("Fiseku Ltr. Br."), 35 ("Jajaga Ltr. Br."), 36 ("Gov't Ltr. Br."). On

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<sup>1</sup> As a result of a docketing error, the motion was re-filed on September 10, 2015. Dkt. 25. The docket entries for the affidavit and memorandum of law are those that correspond to the motion filed on September 10, 2015.

November 2, 2015, the Court issued an order seeking additional briefing, including further briefing on Fifth Amendment issues, Dkt. 38, which the parties filed on November 5, 2015, Dkts. 43 (“Fiseku Second Ltr. Br.”), 42 (“Jajaga Second Ltr. Br.”), 40 (“Gov’t Second Ltr. Br.”).

On November 10, 2015, the Court heard argument. At the hearing, the Court invited the parties to reopen the factual record if they believed that it was inadequate to address the Fifth Amendment claims that had crystallized late. Arg. Tr. 46–57.<sup>2</sup> Fiseku and Jajaga stated that they were not seeking additional testimony, Arg. Tr. at 46–51, and on November 11, 2015, the Government submitted a letter to the same effect, Dkt. 44.

## II. Factual Findings

### A. Evidence Considered

The facts found by the Court are based on the evidence adduced at the suppression hearing, which consisted of the testimony of Gruppuso, a 16-year veteran of the Bedford Police Department, who, as of September 20, 2014, held the position of Sergeant. Tr. 6–8. The Court also received maps and photographs of the area where the stop of the defendants took place, GX1–3; photos of the physical evidence obtained during the search of the car driven by Jajaga, GX4A–K; and a log of Gruppuso’s relevant radio runs (or transmissions) that night, GX5, which were automatically and contemporaneously recorded, Tr. 32–33. The defendants also offered, and the Court received, Gruppuso’s Incident Report, Def. Ex. A (“Incident Report”), which was prepared the day of the stop, Tr. 40–41.<sup>3</sup> Although Fiseku did not testify, the Court also received and considered his affidavit, recounting the events in question.

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<sup>2</sup> “Tr.” refers to the transcript of the October 21, 2015 suppression hearing; “Arg. Tr.” refers to the transcript of the November 10, 2015 argument.

<sup>3</sup> Although the Incident Report contains hearsay, it was offered and received without limitations on its use. Tr. 41. In any event, “the rules of evidence normally applicable in criminal trials do

**B. Facts Established<sup>4</sup>**

**1. Initial Encounter with Jajaga**

On September 20, 2014, at approximately 1:15 a.m., Detective Sergeant Gruppuso was on duty, patrolling alone in his marked patrol car when he saw a white Nissan Pathfinder stopped on a dirt pull-off near the intersection of Guard Hill Road and Christopher Road in rural Bedford. Tr. 7-9. Gruppuso pulled up to the car and spoke briefly with the driver, later identified as Jajaga, to ask if he needed assistance. Tr. 9, 38. Jajaga was alone in the car at that time. Tr. 12.

During the brief conversation, Jajaga told Gruppuso that he was from Staten Island and was going to visit a friend on Guard Hill Road; he said he was having transmission trouble but that he did not need assistance because he had another friend coming with a tow truck from Brooklyn. Tr. 11-12. The interaction with Jajaga lasted approximately two to three minutes, after which Gruppuso left. Tr. 12. At some point during or after the interaction, Gruppuso conducted a registration check. It revealed that there was a valid registration for the car, which was registered to a Kujtime Fiseku. Tr. 43; Incident Report at 1.

Gruppuso testified that Jajaga's presence at that early morning hour, coupled with his explanation for why he was there, raised his suspicions: Jajaga was not from the area, the tow truck was improbably coming to Bedford from Brooklyn, and Gruppuso knew that there was a vacant house for sale in the area that would be a prime target for burglary. Tr. 12-13. Gruppuso therefore resolved to return to the dirt pull-off where he first encountered the car to check on it. Tr. 13-15. At 1:19 a.m., Gruppuso radioed to fellow officers that there was "a DV [disabled

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not operate with full force at hearings before the judge to determine admissibility of evidence." *United States v. Matlock*, 415 U.S. 164, 172-73 (1974).

<sup>4</sup> On a suppression motion, the Government bears the burden of proof by a preponderance of the evidence. *United States v. Echevarria*, 692 F. Supp. 2d 322, 332 (S.D.N.Y. 2010).

vehicle] [on] Guard Hill [Road] by Christopher [Road]," that it was a white Pathfinder "waiting on a tow truck from the city," and that Gruppuso would "check back on him in a little while."

GX5; Tr. 33.

**2. Stop at the Park-n-Ride**

*a. Before the search of the car*

Approximately two to four minutes later, while on his way to return to the spot of the disabled vehicle to check on it, Gruppuso spotted the same white Nissan Pathfinder turning onto South Bedford Road. Tr. 15-16. This heightened his suspicions, Gruppuso testified, because a vehicle that had purportedly been broken down and awaiting assistance was operational and in a new location minutes later, and even if roadside assistance had arrived shortly after he had left, transmission trouble is not typically remedied on the spot. Tr. 16-17. Upon seeing the car, Gruppuso, who was travelling in the opposite direction, turned around and began to follow it. *Id.*

While following the car, Gruppuso saw it turn into a park-n-ride just east of Interstate 684. Tr. 17. The car parked in a spot in the back-right part of the park-n-ride (relative to the entrance); Gruppuso parked his vehicle diagonally off the driver's side rear corner of the car. Tr. 18-19. When he arrived, Gruppuso saw that the driver (Jajaga) whom he had previously encountered was seated in the driver's seat. In addition, there was now a male passenger in the passenger side, later identified as a Mr. Hughes, and a third man, later identified as Fiseku, who was walking outside around the rear of the car from the passenger side towards the driver's side. It was not clear whether Fiseku had come from the car or elsewhere. Tr. 20, 27.

Upon entering the park-n-ride, Gruppuso, at 1:25 a.m., radioed for another unit to respond. Tr. 21, 33-34; GX5. Two other units responded; an Officer Moylan arrived quickly because he had been nearby, and an Officer Henderson arrived within minutes. Tr. 21-22.

Henderson parked his patrol vehicle behind and to the left of Gruppuso's; Moylan parked his behind and to the right. Tr. 23.

A disputed issue of fact is whether the positioning of the police cars blocked the car from leaving. The Court credits Gruppuso's testimony that the police vehicles, parked behind and to the left of Jajaga's car, did not block in Jajaga's car: As he explained, the park-n-ride was deserted, with only a few parked cars present, and Jajaga's car had room to maneuver out to the right. Tr. 50-52. Relatedly, the parties dispute whether the officers pulled their guns. Fiseku attests in his affidavit that all three officers surrounded the car with guns drawn and ordered the occupants of the car to get out. Fiseku Aff. ¶¶ 2-3. The Court again credits Gruppuso, whose testimony was measured and believable throughout, that he did not draw his weapon or see the other officers draw theirs. Tr. 21, 25. Gruppuso credibly explained that he "didn't feel [he] needed to pull [his] gun. There was no threat of deadly force at the time." Tr. 56; *see also* Tr. 21 (explaining that he would draw his firearm in situations where he "perceived a threat to [his] safety," but "didn't feel it was necessary [here]. I didn't see those elements."). Cross-examination did not disturb this testimony. In contrast, Fiseku's contrary claim that guns were drawn, made in his affidavit, was not subject to adversarial testing. *See United States v. Medina*, 19 F. Supp. 3d 518, 535 n.13 (S.D.N.Y. 2014) (court may give defendant's claim in an affidavit less weight where he did not testify) (collecting cases).

By the time Moylan and Henderson arrived, Gruppuso had begun to interact with Fiseku, who was standing outside the car. Tr. 22. Gruppuso identified Fiseku by looking at his driver's license, and then conducted a pat-down of Fiseku, finding no weapons or contraband; Gruppuso placed Fiseku in handcuffs. Tr. 23-25, 52-53. Gruppuso and the other two officers then directed Jajaga to exit the car, which he did. The officers reviewed his driver's license, and

conducted a pat-down, which revealed no weapons or contraband; the officers also placed Jajaga in handcuffs. Tr. 23–25, 53–54. Finally, Moylan directed Hughes to exit the car. Hughes had no identification but identified himself by name; Moylan frisked Hughes, who had no weapons or contraband on his person, and placed him, too, in handcuffs. Tr. 23–25, 54. Grappuso testified that three men had been handcuffed for officer safety, which, he testified, was not an unusual practice for him during investigative detentions. Tr. 24, 56. Grappuso acknowledged that, while handcuffed, the three men were not free to leave. Tr. 53–54.

Fiseku, Jajaga, and Hughes were then separated for individual questioning; Fiseku remained outside the car; Jajaga and Hughes were placed in Henderson's and Moylan's patrol cars, respectively. Tr. 23–24. Grappuso explained to all three individuals that they were being detained while the officers were investigating; he did not tell them that they were under arrest. Tr. 24–25, 57–58. The officers did not give any of the three men *Miranda* warnings prior to or during the questioning. Tr. 55.

Jajaga was interviewed first, then Fiseku and Hughes. Incident Report at 2.<sup>5</sup> The questioning focused on why the three men were present in Bedford at that hour. Grappuso told Jajaga that he did not believe Jajaga's earlier story, and asked Jajaga why he had previously claimed that his car was disabled, and when the other passengers had gotten into the car with him. Tr. 26; Incident Report at 2. Jajaga initially said that the three men were on their way to his cousin's bachelor party in Waterbury, Connecticut, and that he had met up with the other two men at the park-n-ride. Incident Report at 2. Grappuso confronted Jajaga about the brief time that had passed between when Jajaga and Grappuso arrived at the park-n-ride; Jajaga "had no

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<sup>5</sup> There is a small discrepancy between the Incident Report and Grappuso's testimony, Tr. 26–27, about the order of the interviews. The distinction is irrelevant to the disposition of the motions, and does not, in the Court's view, reflect on Grappuso's credibility.

response." *Id.* Changing his story, Jajaga then stated that he was on Guard Hill Road to cheat on his wife, but when asked, said he did not know the name or address of the woman he was to meet, that they had met on the Internet, and that the woman had told him to meet her on Guard Hill Road near Darlington Road. *Id.*; Tr. 26.

During Gruppuso's interview of Fiseku, Fiseku stated that the three men "were traveling to Waterbury when they stopped at the park and ride to stretch their legs and smoke a cigarette." Incident Report at 2. Fiseku "had no explanation as to why [Jajaga had been] on Guard Hill Rd. and stated he had just left them there." Incident Report at 2.

Moylan interviewed Hughes. Hughes stated that the other two men had called him to go to a party in Waterbury; he stated that they stopped in the park-n-ride to stretch, and that the three had just gotten back into the car. *Id.* Hughes stated that they had been travelling in separate vehicles, but got separated and reconvened at the park-n-ride. Tr. 27.

Gruppuso then returned to speak again with Jajaga. He told Jajaga that he did not believe the men's stories, and asked Jajaga whether there was anything in the car that should not be there. Jajaga responded, "no, you can look." Tr. 28; Incident Report at 2. Gruppuso did not ask any of the other individuals for consent to search the vehicle. Tr. 28.

*b. The vehicle search and its aftermath*

The officers then searched the vehicle. In the rear seat, Gruppuso found a bag containing two flashlights, a walkie talkie, two NYPD baseball caps, a hooded NYPD sweatshirt, a pair of gloves, a stun gun, a bb gun replicating a Colt .45, and a blank pistol replicating a .25 automatic, a screwdriver, and a gold badge of a repo/recovery agent on a neck lanyard. Under the driver's seat, Henderson found a screw driver, a single glove, and a walkie talkie; on the middle console

was a roll of duct tape. Incident Report at 2–3; Tr. 29; GX4A–K. The search lasted five to 10 minutes. Tr. 37.

Gruppuso then began walking back towards Jajaga. Before Gruppuso spoke, Jajaga volunteered: “[T]he stuff in the bag is mine, its [sic] all mine.” Incident Report at 3; Tr. 29–30. Gruppuso then asked where Jajaga had gotten the stun gun; Jajaga responded that he got it in Pennsylvania. Incident Report at 3. Gruppuso asked if that was because stun guns are illegal in New York; Jajaga responded, “yes.” *Id.*

Shortly thereafter, Gruppuso told Jajaga that he was under arrest. Tr. 37; *see also* Tr. 30. Jajaga was not, however, given *Miranda* warnings at any point on the scene. Nor were such warnings given to Fiseku or, it appears, Hughes. *See* Tr. 55.

Following the vehicle search, Gruppuso, concerned about the possibility of a home invasion, directed two patrol officers to canvass the immediate area. Tr. 30. The canvass did not reveal any criminal activity. Incident Report at 3.

The record of Gruppuso’s radio runs reflects that the search of the car was concluded by 1:35 a.m., some 10 minutes after the initial stop. That is because it was on the basis of the search that Gruppuso determined that a canvass would be necessary, Tr. 36, 59–61, and at 1:35 a.m., Gruppuso radioed headquarters stating that he would be “detaining three [individuals] until we can figure out what’s going on,” and that “3-7 [another officer] is going to canvass some of those homes.” GX5; Tr. 34.<sup>6</sup> At 1:37 a.m., Gruppuso radioed to have another unit call his cell phone,

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<sup>6</sup> Gruppuso’s testimony during the suppression hearing varied in pinpointing the time by which the search was completed, starting with the latest time by which it would have occurred and then, upon questioning by the Court, narrowing the timeframe between the initial stop and the search. *See* Tr. 59–61. The Court finds that the progression of the testimony at the hearing reflects favorably on Gruppuso’s credibility, rather than the opposite, because it was clear that Gruppuso was trying to be cautious and not overstate matters.

during which call he explained what they had discovered and provided instructions for which areas to canvass. GX5; Tr. 35. At 1:40 a.m., Gruppuso radioed other units to have them "meet up" because "We have to canvass." GX5. At 1:54 a.m., Gruppuso called for a detective to come to the scene. GX5, Tr. 31. The detective, Michael Roche, arrived less than an hour later. Tr. 31.

While the canvass of the area was conducted, Jajaga, Fiseku, and Hughes remained detained on the scene, and in handcuffs. *See* Tr. 31. During that time, Gruppuso interviewed Hughes, asking "how they ended up at the park and ride." Incident Report at 3. Hughes stated that he and Fiseku had been trying to find Jajaga, but they had made a wrong turn and gotten lost, and then met up at the park-n-ride to stretch their legs. *Id.* Gruppuso also interviewed Fiseku anew, and "asked how he had gotten to the park-n-ride." Fiseku "stated they had all come together in the Pathfinder," which, he said, was registered to his mother. *Id.* Gruppuso asked Fiseku if he knew why Hughes had stated that the men had come in separate cars, but Fiseku did not answer. *Id.* Gruppuso also asked Hughes what other vehicles they had with them. Hughes indicated a BMW that was parked next to the Pathfinder. *Id.* A registration check revealed it was registered to Jajaga's father. *Id.* Gruppuso asked Fiseku if he knew whose car it was; Fiseku responded that he did not know; when asked if one of the three men had driven it to the park-n-ride, Fiseku did not respond. *Id.* Gruppuso then asked Jajaga to whom the BMW belonged; Jajaga responded that it was his father's. *Id.* Henderson then "checked the hood of the BMW and stated it was cold to the touch." *Id.*

When Detective Roche arrived, he briefly re-interviewed all three men on the scene. *Id.*; Tr. 31. All three defendants remained in handcuffs at all times on the scene.

Jajaga, being under arrest, was brought to police headquarters; Hughes was also detained and brought to headquarters for fingerprinting, because he could not produce identification, but

he was not placed under arrest. Incident Report at 3; Tr. 37–38. Fiseku was not placed under arrest, but followed the officers back to headquarters voluntarily. Tr. 38–39. All three men were re-interviewed at police headquarters. Incident Report at 4.<sup>7</sup>

### III. Discussion

#### A. Overview

Defendants' motions to suppress implicate multiple issues under the Fourth and Fifth Amendments. A threshold issue, under the Fourth Amendment, is whether the detention of Fiseku and Jajaga at the park-n-ride was justified. This issue turns on whether the detention is properly classified as a "Terry stop," requiring justification in the form of reasonable suspicion of criminal activity, or a *de facto* arrest, requiring justification in the form of probable cause. *See United States v. Tehrani*, 49 F.3d 54, 58 (2d Cir. 1995). The Court has no difficulty holding—and defendants do not seriously dispute—that the officers reasonably suspected criminal activity on the part of the men they detained at the park-n-ride. But if the stop became a *de facto* arrest, then the stop was unlawful—as all agree that probable cause to arrest the defendants was lacking until the search of the vehicle yielded evidence of a robbery plot—and its fruits, including the defendants' statements and the physical evidence seized from the vehicle, must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484–86 (1963); *Brown v. Illinois*, 422 U.S. 590, 601–04 (1975).

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<sup>7</sup> The record is unclear whether, or at what point, *Miranda* warnings were given to any of the three men back at police headquarters. There is no need to resolve that factual issue, however, because the Government has stated that it does not intend to offer any statements made by Fiseku or Jajaga after the search of the vehicle, including those made at police headquarters, with the exception of Jajaga's statement immediately after the search that the contents of the bag were his. Arg. Tr. 38–39.

Assuming that the stop complied with the Fourth Amendment, the Court must address other issues to determine whether the defendants' statements or the evidence seized from the vehicle must be suppressed.

As to the statements, the Second Circuit has held that even where an investigative detention falls short of a *de facto* arrest, a suspect may nevertheless be in custody, requiring, under the Fifth Amendment, that *Miranda* warnings be given prior to interrogation, unless excused by a *Miranda* exception such as that for public safety. *See United States v. Newton*, 369 F.3d 659, 673, 677 (2d Cir. 2004). The Government has conceded that for purposes of *Miranda*, Fiseku and Jajaga were in custody once handcuffed at the start of the detention at the park-n-ride, and that they were not given *Miranda* warnings.<sup>8</sup> Therefore, the defendants' statements must be suppressed as the product of a *Miranda* violation, unless either (1) the interrogation in response to which they were made is covered by the public safety exception to *Miranda*, *see New York v. Quarles*, 467 U.S. 649 (1984), or (2) a statement was not the product of interrogation (*i.e.*, it was volunteered), so as to fall outside the *Miranda* framework.

As to the physical evidence seized from the vehicle following Jajaga's consent to search, two issues are presented. The first is whether Jajaga's consent was voluntary, or whether the overall circumstances surrounding that consent, including the lack of a *Miranda* warning, rendered it involuntary. *See United States v. Patane*, 542 U.S. 630 (2004) (physical evidence deriving from un-*Mirandized* statement may be admitted); *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995) (standards for consent to search under Fourth Amendment). The second is whether Jajaga had actual or apparent authority to consent to the search of the car. *See United States v. McGee*, 564 F.3d 136, 139 (2d Cir. 2009).

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<sup>8</sup> *See* Gov't Second Ltr. Br. 1-2; Tr. 55.

**B. Fourth Amendment and the Reasonableness of the Stop**

**1. Applicable Legal Principles**

Under *Terry v. Ohio*, 392 U.S. 1 (1968), an officer may conduct an investigative stop consistent with the Fourth Amendment when the officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity,” *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (internal quotation marks and citations omitted), and the stop is “reasonable,” *see United States v. Sharpe*, 470 U.S. 675, 682 (1985). A stop’s reasonableness is determined by “whether the officer’s action was [1] justified at its inception, and [2] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* (quoting *Terry*, 392 U.S. at 20) (internal quotation marks omitted).

As to the first prong of the test, a stop is justified at its inception when the officer has a “reasonable, articulable suspicion” of criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *see Sharpe*, 470 U.S. at 682.

As to the second prong, a *Terry* stop may ripen into an arrest, which to be valid must be supported by probable cause, if “the officers unreasonably used means of detention that were more intrusive than necessary.” *United States v. Perea*, 986 F.2d 633, 645 (2d Cir. 1993).

In determining whether an investigatory stop is sufficiently intrusive to ripen into a *de facto* arrest, the Second Circuit considers the “amount of force used by the police, the need for such force, and the extent to which an individual’s freedom of movement was restrained, and in particular such factors as the number of agents involved, whether the target of the stop was suspected of being armed, the duration of the stop, and the physical treatment of the suspect, including whether or not handcuffs were used.”

*United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) (quoting *Perea*, 986 F.2d at 645). “No one of these factors is determinative,” *Newton*, 369 F.3d at 674, and “the reasonableness of the level of intrusion [depends on] the totality of the circumstances.” *Posr v. Doherty*, 944 F.2d 91,

98 (2d Cir. 1991). The circumstances and actions taken must be considered from the perspective of a reasonable officer. *Newton*, 369 F.3d at 673-74 (“A Fourth Amendment reasonableness inquiry asks ‘would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?’” (quoting *Terry*, 392 U.S. at 21) (internal quotation marks omitted)). The Supreme Court has admonished lower courts, in conducting this inquiry, “not [to] indulge in unrealistic second guessing.” *Sharpe*, 470 U.S. at 686.

## 2. Discussion

The first prong of the inquiry is easily met here, as various specific and objective facts known to Gruppuso supplied reasonable suspicion that Fiseku and Jajaga were engaged in criminal activity, justifying their investigative detention at the park-n-ride. Most significant, Gruppuso’s observation of the driver of the car (Jajaga) in a new location revealed that Jajaga had clearly lied to him in their conversation minutes earlier, when Jajaga had claimed that the car was disabled by transmission trouble and that he was awaiting assistance from Brooklyn. Jajaga’s presence late at night in a neighborhood where he did not live and in the vicinity of a particular vacant house for sale in the rural Bedford area, which was an inviting target for burglary, added to Gruppuso’s reasonable suspicion. Finally, upon entering the park-n-ride, Gruppuso observed additional individuals in (Hughes) or around (Fiseku) the car who had not been present when he first spoke with Jajaga at the dirt pull-off. The meeting up of these people in the wee hours of the morning reinforced Gruppuso’s reasonable suspicion that the men were engaged in some form of criminal conduct, potentially, a burglary or home robbery. Tellingly, defendants do not seriously contest that these facts, viewed in combination, justified

investigative detention. *See* Def. Br. 9 (not addressing reasonable suspicion); Fiseku Ltr. Br. 1–2 (briefly raising the issue).

Defendants' principal challenge to the stop is, therefore, based on the second prong. They argue that the stop was unreasonable in the manner of its execution and its duration, and thereby ripened into a full arrest before the officers' search of the vehicle developed probable cause to support an arrest. This issue presents a close question. In particular, Gruppuso's handcuffing of Fiseku and Jajaga during his brief questioning of them is a fact that, ordinarily, would signify an arrest, not a *Terry* stop. However, viewing in totality the circumstances of the defendants' detention, and considering the use of handcuffs in the context of the challenges presented to the three officers by the wee-hours remote encounter with the three suspects, the Court, narrowly, finds that the detention was reasonable in its manner and duration and not more intrusive than reasonably necessary.

To begin with, the officers did not use or display force in initiating the stop. They did not draw their weapons. Nor did they block the car from leaving. Such measures have sometimes contributed to a finding of a *de facto* arrest, *see Oliveira v. Mayer*, 23 F.3d 642, 646 (2d Cir. 1994); *United States v. Ceballos*, 654 F.2d 177, 181–84 (2d Cir. 1981), although by no means always, *see Newton*, 369 F.3d at 674 (collecting cases regarding the use of firearms in investigative stops); *Parea*, 986 F.2d at 644 (indicating that a stop in which patrol cars blocked a vehicle and officers approached with weapons drawn was not an arrest) (collecting cases). The size of the police presence on the scene also does not support the finding of a *de facto* arrest. Initially, only one officer (Gruppuso) was present; eventually, there were three; but at no point did the number of officers exceed the number (three) of detained suspects. The police presence, far from conveying intimidation, was arguably the minimum necessary to realistically maintain

control of the situation. *See Vargas*, 369 F.3d at 100, 102 (four officers detaining single suspect did not convert stop into an arrest); *Newton*, 369 F.3d at 675 (six officers detaining single suspect was not unreasonable).

The officers were also well within the bounds of reasonableness in conducting pat-downs of Fiseku and Jajaga. At its core, *Terry* permits a pat-down based on a reasonable suspicion of criminal activity—in *Terry*, as here, of a burglary or robbery—and that the suspects “may be armed and presently dangerous.” 392 U.S. at 30; *see also United States v. Oates*, 560 F.2d 45, 62–63 (2d Cir. 1977) (explaining that inference that a suspect was armed and dangerous may derive from nature of the crime suspected, and that “the standard of suspicion necessary to allow a frisk for weapons is not a difficult one to satisfy,” *id.* at 63). Having encountered the three suspects in the middle of the night, under circumstances that suggested that a burglary or robbery plot might be underway, the officers had every reason to fear that the suspects were armed, and to pat them down to assure their own safety during the stop.

The handcuffing of the suspects from early in the detention through the search of the vehicle, however, is of a different nature. It effectively prevented Jajaga and Fiseku from leaving the scene (and thereby made virtually irrelevant the fact that the car was not blocked in). “Under ordinary circumstances,” the Second Circuit has explained, “drawing weapons and using handcuffs are not part of a *Terry* stop”; instead, for such “intrusive and aggressive police conduct” to be justified in the course of a *Terry* stop, they must be “a reasonable response to legitimate safety concerns on the part of the investigating officers.” *Vargas*, 369 F.3d at 102 (quoting *United States v. Miles*, 247 F.3d 1009, 1012 (9th Cir. 2001)) (internal quotation marks omitted) (finding use of handcuffs in that case reasonable). The Second Circuit put the point this way in its 2004 decision in *Newton*, in which it found the use of handcuffs reasonable during the

course of a *Terry* stop: “[W]here an officer has a reasonable basis to think that the person stopped poses a present physical threat to the officer or others, the Fourth Amendment permits the officer to take ‘necessary measures . . . to neutralize the threat’ without converting a reasonable stop into a *de facto* arrest.” 369 F.3d at 674 (quoting *Terry*, 392 U.S. at 24); *see also id.* at 674–75 (collecting cases from other circuits approving use of handcuffs in *Terry* stops).

Last year, the Second Circuit again had occasion to consider this practice in *United States v. Bailey*, where it found that the use of handcuffs during a stop of two men suspected of narcotics trafficking and unlawful firearm possession was unreasonable. 743 F.3d 322, 339–41 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 705 (2014). In *Bailey*, the police had obtained a search warrant for a basement apartment, based on an affidavit from a confidential informant who had purchased narcotics in that apartment and reported seeing a handgun inside. *Id.* at 226–27. Just before the warrant was to be executed, two officers saw two men (one matching the description of the suspected narcotics trafficker) leaving the basement apartment and driving away in a car. *Id.* at 327. The officers followed the car and pulled the men over into the parking lot of a fire station about a mile away from the apartment, so as to identify the men and ascertain why they had been in the apartment. *Id.* The officers ordered the men out of the car, patted them down, and after identifying them, placed them in handcuffs, explaining that they were being detained while the search warrant at the apartment was executed. *Id.* The men were then driven back to the apartment, where the officers learned that the search had uncovered a firearm and drugs, and formally arrested the men. *Id.* at 328.

The Second Circuit held the use of handcuffs unreasonable under the circumstances. Reviewing the case law, it recognized that “not every use of handcuffs automatically renders a stop an arrest requiring probable cause,” and that the “relevant inquiry is whether police have a

reasonable basis to think that the person detained poses a present physical threat and that handcuffing is the least intrusive means to protect against that threat.” *Id.* at 340. However, the Circuit held, no such threat was present, because the pat-downs had “confirmed that neither man was armed,” and by having “both men exit the stopped vehicle, the officers had eliminated the risk that the men might obtain any weapon from therein.” *Id.* Although recognizing that “drug trafficking and unlawful firearm possession [are] crimes frequently associated with violence,” the Circuit stated, a reasonable suspicion of such offenses will not invariably justify the use of handcuffs on grounds of officer safety. *Id.* Rather, “just as the law does not categorically assume that handcuffing transforms every stop into an arrest, so the law does not categorically assume that every investigatory stop related to particular crimes requires handcuffing, particularly when a pat-down outside a vehicle reveals the detainee to be unarmed.” *Id.* The Circuit, however, pointedly did not “foreclose the possibility that, in other cases, the government may be able to point to circumstances supporting a reasonable basis to think that even an unarmed person poses a present physical threat or flight risk warranting handcuffing.” *Id.*

A number of features of this case parallel *Bailey*: Like the two suspects in *Bailey*, Fiseku and Jajaga were suspected of an offense associated with violence, ordered out (Jajaga) or kept out (Fiseku) of their vehicle, and patted down and shown to have no arms on their persons before being placed in handcuffs. These similarities make the claim of a *de facto* arrest colorable and defendants’ suppression claim on this ground substantial. But, on a close comparison, there are also a number of features of the stop here that were not present in *Bailey* that, in the Court’s view, made it reasonable, in context, for the officers to handcuff the suspects during their interrogation at the park-n-ride.

To begin with, the stop in this case took place in an isolated rural spot in the middle of a deserted area of the suspects', not the officers', choosing. In *Bailey*, the officers initiated the stop at the officers' chosen location, following the suspects as they traveled more than a mile away from the location of the suspected criminal activity. Under those circumstances, once the suspects had been patted down, there was no realistic scenario presented that they might have access to weapons or confederates. By contrast, here, it was Jajaga who chose to pull into the park-n-ride, in an act of apparent pre-arrangement: Gruppuso, following Jajaga into the park-n-ride, saw two other individuals, one (Hughes) in the passenger seat of the car and another (Fiseku) outside the car. Neither had been present when Gruppuso first encountered Jajaga several minutes earlier; and it was not clear whether Fiseku had been in the car or had joined Jajaga at the park-n-ride. A reasonable officer encountering the suspects at this site could therefore reasonably have been concerned that other confederates were in the vicinity with whom Jajaga, Hughes, and Fiseku were intending to rendezvous at the park-n-ride, and/or that weapons were stashed somewhere nearby.

Furthermore, the park-n-ride, as shown in the aerial photographs entered into evidence, GX2-3, is surrounded by trees, far from any evident residences, and in an isolated rural area. During the early morning hours when the stop took place (beginning around 1:15 a.m.), the area was presumably dark (there is no street lighting apparent from the aerial photographs) and difficult if not impossible to protectively sweep. The officers therefore lacked effective control over their surroundings, in pointed contrast to the officers in *Bailey*. In these circumstances, handcuffing Jajaga, Hughes, and Fiseku during their questioning and the ensuing consented search of the vehicle mitigated the risk of harm to the officers that would be presented if

confederates emerged. It also eliminated the risk that one of the three men could make a break for a secreted weapon.

That there were more suspects here (three) known to be present than in *Bailey* (two) also magnified the risk that any one suspect would fight back or break away, or otherwise act to unsettle what, without handcuffs, was the officers' less-than-secure control over the situation. Notably, based on the information known to Gruppuso, the suspects appeared likely to have been suddenly intercepted in the act of carrying out a crime—Gruppuso suspected a home robbery or burglary. An officer, under the circumstances known to him, could reasonably fear that a suspect would defy the officers' authority and try to elude capture.

Finally, the purpose of the stop, and manner in which it would need to be conducted to be effective, differed from the stop in *Bailey*. There, the officers' goal in connection with the stop was primarily to identify the men who had left the apartment that other officers were about to search and to confirm if either of them was the drug trafficker whom the confidential informant had described. Handcuffing was not reasonably necessary for this purpose.

Here, in contrast, Gruppuso and his fellow officers had good reason to believe that they had happened upon a crime in progress. Jajaga had just been revealed to have blatantly lied to Gruppuso about his car trouble and his purpose for being in Bedford in the early morning hours; now he was joined by two men in a suspicious rendezvous. Under these circumstances, the officers' paramount investigative goal had to be to determine whether a crime was afoot and whether a danger was presented to the community. Perhaps a robbery or burglary had just been carried out, with unknown consequences for the occupants. Or perhaps the three men (maybe with confederates) were poised to commit such an offense. To determine whether the men were engaged in a crime or whether there was a benign explanation for their presence, the three

officers needed to separate the three men while they were questioned. Yet doing so left each officer vulnerable, insofar as either one or more suspects would have to be left unaccompanied or each officer would have to be situated, one-on-one, with each subject. *See United States v. Critterdon*, 883 F.2d 326, 329 (4th Cir. 1989) (officer reasonably handcuffed burglary suspect where officer “could reasonably anticipate that he might be required to go to the aid of his fellow officers”). This situation created a risk that one or more subjects might attempt to take an officer by surprise, including by attempting to overpower them or access a weapon (whether a hidden weapon or an officer’s).

Under these circumstances, the Court’s judgment is that the Bedford police officers here made a reasonable, on-the-spot judgment that handcuffing was necessary to protect themselves and to effectuate the valid investigative purposes of the detention. This was, thus, a far cry from a situation in which the officers, with a flimsy basis for suspicion, used unjustifiable, unreasonable, intrusive, and forceful tactics. *Compare Oliveira*, 23 F.3d at 644, 646 (stop unreasonable where officers used “felony stop” procedures, involving issuing orders to suspects using a loud speaker and with guns drawn from behind their patrol cars, and then searched and handcuffed suspects, based on no more than a report of dark-skinned males seen in a run-down car with an expensive video camera); *with* Tr. 24 (Gruppuso’s testimony that felony stop procedures were not employed). As in *Newton*, here “handcuffing was a less intimidating—and less dangerous—means of ensuring the safety of everyone . . . than holding [the individuals] at gunpoint.” 369 F.3d at 675.

For similar reasons, the officers’ use of police cruisers here during questioning was reasonable. The officers placed Jajaga and Hughes, but not Fiseku, in police cruisers. This separation was reasonable to effectively question the suspects and get to the truth behind Jajaga’s

apparent lie to Gruppuso about his car trouble and his presence in the neighborhood. While placement in police cruisers may contribute to a finding that a detention ripened into an arrest, *see Oliveira*, 23 F.3d at 646, the decision to place some, but not all, of the suspects in the cruisers, without violence or excessive force, after informing them that they were being “detained” while the officers investigated, was a reasonable measure tailored to the needs of this particular stop. *See Cardona v. Connolly*, 361 F. Supp. 2d 25, 31–32 (D. Conn. 2005) (officer’s placing suspect in handcuffs and leading her to police cruiser after she fled did not turn *Terry* stop into an arrest); *cf. United States v. McCargo*, 464 F.3d 192, 197–202 (2d Cir. 2006) (*Terry* permitted officers to pat down burglary suspect and place him in police cruiser to be transported to scene of crime for identification).

Accordingly, considering the totality of the circumstances, the degree of force used, the restraints imposed on the suspects’ liberty, and the officers’ treatment of the suspects, the Court finds that the restraints used were reasonable and not more intrusive than necessary.

The second prong of the *Terry* analysis also requires the Court to evaluate the duration of the detention, including “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.” *Sharpe*, 470 U.S. at 686. The relevant time span here is between the initial stop and the vehicle search that revealed an array of robbery tools, at which point probable cause justifying an arrest undisputedly existed.

As helpfully demonstrated by the Bedford police’s radio runs, which supply the best evidence of when the various events occurred, the vehicle search took place within 10 minutes of the initial stop. During that period, all three suspects were serially interviewed as to what they were doing in Bedford. There is no basis to believe that the officers were at all dilatory in questioning the three men and attempting thereby to gauge whether Gruppuso’s suspicions were

warranted (as they proved to be). As Gruppuso explained in response to questions put by the Court, the 10-minute window was necessary in order to question each suspect separately, and, once Jajaga had given consent, to search the vehicle. Tr. 58. The search of the vehicle followed shortly upon the officers' having received initial, inconsistent, and implausible answers to the officers' inquiries, responses which "enhanced [the] suspicion" rather than dispelled it. *Bailey*, 743 F.3d at 332. The Court finds the 10-minute detention reasonable here under the circumstances, as it enabled the officers to efficiently investigate whether a crime was in progress. *See Sharpe*, 470 U.S. at 686–87 (finding a 20-minute stop reasonable). An alternative holding would require the Court to second-guess a reasonable decision made in the field by officers under the pressure of trying to determine whether the subjects presented an imminent risk of a potentially dangerous crime such as a robbery of a home. Notably, although irrelevant to the Fourth Amendment analysis, the consented search of the vehicle ultimately confirmed Gruppuso's instinct that a robbery scheme might be afoot.

Therefore, considering the stop in totality, including its scope and duration and the restraints to which the defendants were subjected, and considering the officers' reasonable suspicion that criminal activity was afoot, the Court finds that the stop was reasonable, and did not ripen into a *de facto* arrest before the point at which probable cause to arrest was secured. The Court therefore denies defendants' suppression motion to the extent based on a claim that the stop breached their Fourth Amendment rights.

#### C. Fifth Amendment and the Defendants' Statements

Where a *Terry* stop is justified as reasonable in nature and duration so as to comport with the Fourth Amendment, the subject of the stop may nevertheless be in custody for the purposes of the Fifth Amendment and afforded the protections of the *Miranda* doctrine. *Newton*, 369 F.3d

at 673, 676-77. Here, the Government has appropriately conceded that Fiseku and Jajaga were each in custody for *Miranda* purposes once the officers placed them in handcuffs at the park-and-ride. *See* Gov't Second Ltr. Br. 1; *Newton*, 369 F.3d at 676 ("Handcuffs are generally recognized as a hallmark of a formal arrest," notwithstanding that suspect was told he was not being placed under arrest). The Government argues that the defendants' statements made before the search of the car, and Jajaga's statements immediately afterwards, are nonetheless admissible. As to the statements before the search, the Government argues that these fall within the public safety exception to the *Miranda* requirement recognized in *Quarles*. As to Jajaga's statement immediately afterwards, the Government argues that it is admissible because it was made voluntarily, and not as the result of custodial interrogation. The Court addresses these issues in turn.

### 1. The Public Safety Exception to *Miranda*

#### a. Second Circuit case law

The public safety exception to the *Miranda* rule is a "narrow exception," *Newton*, 369 F.3d at 677, designed "to allow officers 'to follow their legitimate instincts when confronting situations presenting a danger to the public safety.'" *United States v. Reyes*, 353 F.3d 148, 152 (2d Cir. 2003) (quoting *Quarles*, 467 U.S. at 659). The Second Circuit has articulated three "principles" for determining when the exception applies:

First, we have observed that "Miranda warnings need not precede questions reasonably prompted by a concern for the public safety or for the safety of the arresting officers," "so long as the questioning relate[s] to an objectively reasonable need to protect the police or the public from any immediate danger." . . . Second, the exception is limited by the fact that pre-*Miranda* questions, while "framed spontaneously in dangerous situations," may not be investigatory in nature or "designed solely to elicit testimonial evidence from a suspect." As we acknowledged in *Newton*, however, a question need not be posed as narrowly as possible, because "[p]recision crafting cannot be expected" in the circumstances of a tense and dangerous arrest. Thus, a question that plainly encompasses safety

concerns, but is broad enough to elicit other information, does not necessarily prevent application of the public safety exception when safety is at issue and context makes clear that the question primarily involves safety. Third, we expressly have not condoned the pre-*Miranda* questioning of suspects as a routine matter. Rather, recognizing the need for “flexibility in situations where the safety of the public and the officers are at risk,” we have described the public safety exception as “a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case.”

*United States v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005) (alterations in brackets in original) (internal quotation marks and citations omitted); *see also United States v. Ferguson*, 702 F.3d 89, 94 (2d Cir. 2012) (citing the three “factors”), *cert. denied*, 134 S. Ct. 56 (2013). As the above discussion reveals, whether the public safety exception applies is determined by the objective reasonableness of the inquiry, not by the subjective intentions of the officers involved. *Quarles*, 467 U.S. at 656 (“[T]he availability of [the public safety] exception does not depend upon the motivation of the individual officers involved.”).

Several cases, beginning with *Quarles*, helpfully illustrate the nature, and narrow scope, of the exception. In *Quarles*, a man suspected of raping a woman at gunpoint was pursued into a supermarket. *Id.* at 651–52. The police officer, with weapon drawn, ordered the suspect to stop and frisked him, revealing an empty gun holster; he then handcuffed the suspect and asked where the gun was. *Id.* at 652. The suspect responded, “the gun is over there,” nodding towards empty cartons, where the police recovered the gun. *Id.* In recognizing a public safety exception to *Miranda* and finding it applicable, the Supreme Court emphasized that the officers “were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket.” *Id.* at 657. “So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown,” the Supreme Court noted, “it obviously posed more than

one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.” *Id.*

The Second Circuit has found the public safety exception applicable in situations where the presence of a missing weapon created a safety risk, whether the weapon was believed to be in public or not. In *Ferguson*, the Circuit applied the public safety exception to officers’ questioning a suspect about the location of a firearm even though the questioning occurred an hour or more after the suspect’s arrest. 702 F.3d at 90. The Circuit held that there was “an immediate and objectively reasonable need to protect the public from a realistic threat” because there had been reports of shots fired, the reported events took place outside, suggesting the gun may have been left in a public place, and the officers had corroborating information that the suspect possessed a firearm. *Id.* at 90, 94–95. In *Newton*, the Circuit held the public safety exception applied where the officers asked a suspect, who was handcuffed, in his underwear, and in his apartment, whether he had any “contraband” in the apartment, to which the suspect responded, “only what is in the box,” referring to a .22 caliber automatic firearm. 369 F.3d at 663–64. The Circuit held that the public safety exception applied to this query because the officers had “an objectively reasonable belief that Newton was dangerous, that he and his family were involved in a volatile domestic dispute [based on a report from Newton’s mother that he possessed a firearm in their home and had threatened to kill her and her husband], and that, until the gun was found, there was a serious and immediate risk of harm to anyone in the apartment.” *Id.* at 678.

The public safety exception is not limited to colloquy about a specific missing weapon. The Second Circuit has applied the exception to more general questions and answers about the existence of weapons or other dangerous items during the course of an arrest. *See Reyes*, 353

F.3d at 150, 153–55 (exception covered statements made by suspect, whom a confidential informant reported sold narcotics and carried a firearm, in response to a question by officers whether he had “anything on him that [could] hurt [the officer] or anyone on [the] field team,” *id.* at 150 (internal quotation mark omitted)); *Estrada*, 430 F.3d at 609, 612–13 (exception covered suspect’s statement in response to officers’ questions during his arrest about whether he had any weapons in the apartment); *see also United States v. Jones*, 154 F. Supp. 2d 617, 626–27 (S.D.N.Y. 2001) (Lynch, J.) (collecting cases outside the Second Circuit beyond the “loose weapon” paradigm).

Questions and statements, finally, may fall within the public safety exception even where the safety issue is not presented by accessible weapons. In *United States v. Simmons*, 661 F.3d 151 (2d Cir. 2011), the Second Circuit held that the exception covered more general questions. There, a suspect’s roommate reported to police that the suspect had displayed a firearm during a dispute several days earlier. After officers ordered the suspect out of his bedroom, with guns drawn, they questioned him about the dispute, the presence of the firearm, its location, and whether he had a license. *Id.* at 153–54. The suspect answered these questions, and the officers recovered the firearm. *Id.* The court held that the officers’ more general questions about the dispute “had the potential to shed light on the volatility of the situation and the extent to which Simmons harbored potentially violent resentment toward [the roommate],” and thus, in addition to the specific questions directed to the location of the weapon, were based on “objectively reasonable safety concerns” under the circumstances. *Id.* at 156.

*b. Application to pre-search questions about why the suspects were in the park-n-ride and how they got there*

After the officers frisked and handcuffed Jajaga and Fiseku, they questioned the men separately about their purpose for being at the park-n-ride and how they had gotten there.<sup>9</sup> These questions were tailored to the officers' reasonable suspicions. They were intended to shed light on whether Jajaga's earlier claim of transmission trouble had been untrue (as strongly appeared to be the case) and, more broadly, whether the three men had committed or were in the processing of committing a crime, such as a robbery or burglary. Insofar as the officers' queries were aimed at determining whether criminal activity was afoot, they resembled the questions the officers in *Simmons* had posed as to the nature of the dispute between the roommates, in that they were aimed at sizing up a dynamic situation involving a potential crime in progress, and were not "a subterfuge for collecting testimonial evidence." *Simmons*, 661 F.3d at 156 (citing *Estrada*, 430 F.3d at 612-13).

The custodial questioning at the park-n-ride, however, was conducted in the absence of a feature present in all the above cases in which the public safety exception was held to apply. In those cases, there was an objectively reasonable basis for believing not merely that criminal activity was afoot, but that there was a "need to protect the police or the public from any immediate danger." *Estrada*, 430 F.3d at 612 (emphasis added) (quoting *Newton*, 369 F.3d at 677) (internal quotation marks omitted); *see also Ferguson*, 702 F.3d at 90 (finding the "officers had an immediate and objectively reasonable need to protect the public from a realistic threat"); *United States v. Gonzalez*, 864 F. Supp. 375, 382 (S.D.N.Y. 1994) (questioning impermissible

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<sup>9</sup> The discussion that follows does not apply to the officers' pre-search questions about Jajaga's and Fiseku's identities, as "routine questions" posed to a suspect aimed at collecting information about his "identity and background" do not fall within the concerns of *Miranda*. *See United States v. Gotchis*, 803 F.2d 74, 78-79 (2d Cir. 1986).

under public safety exception once it became clear that further questions would not "assist in the immediate apprehension" of another known, armed suspect). To be sure, Gruppuso had ample reason to believe that criminal activity of some sort was afoot—Jajaga's false statement and the attendant circumstances gave the officers every reason for suspicion. Their inference that a burglary or robbery, specifically, might have occurred or be in progress was reasonable (indeed, prescient). And individuals, not just loose weapons, can pose imminent threats to public or officer safety. *See Estrada*, 430 F.3d at 613. But the information known to Gruppuso and his colleagues fell short of showing an *immediate* danger to the public or to them. The officers did not have any information, before the search, to the effect that any of the defendants possessed a weapon. They had no specific information on which to conclude that they had committed, or were poised to commit, a burglary or robbery or other crime of violence. The defendants could easily have been present for another unlawful purpose—for example, to buy drugs or commercial contraband—which, though unlawful, would not, by its nature, pose an immediate threat to public safety.

Revealingly, the Government has not pointed the Court to any case in which the public safety exception has been held to cover non-*Mirandized* investigative questioning in which the basis to perceive a threat to the public safety was attenuated to the extent here. That there was reasonable suspicion to believe that some crime was afoot, under the case law, is not tantamount to a finding that the public safety was endangered so as to justify non-*Mirandized* custodial interrogation. To permit the defendants' answers to these questions to be admitted in the absence of more concrete proof of a threat to safety would come unacceptably close to permitting such interrogation of potential criminality as a "routine matter," *Estrada*, 430 F.3d at 612, whereas

*Quarles* teaches that the questioning must be “circumscribed by the exigency which justifies it,” *Quarles*, 467 U.S. at 658.

The Court, therefore, holds that *Miranda*’s narrow public safety exception does not cover Gruppuso’s questions, well-intentioned as they were and effective as his police work was on the night in question. Had Jajaga and Fiseku not been handcuffed, their interrogation during the stop likely would not have been custodial, so as to trigger *Miranda*; had their questioning been preceded by *Miranda* warnings, there would be no basis to suppress the defendants’ responses. But on the circumstances here, where the defendants were interrogated while in handcuffs, under *Newton*, the defendants were unavoidably in custody, requiring the suppression of non-*Mirandized* statements absent a public safety exigency commensurate with those recognized in *Quarles* and its progeny. The facts known to the officers at the park-n-ride before their search of the vehicle did not establish such an exigency.

c. *Gruppuso’s question about the contents of the vehicle*

After initially questioning Jajaga, Fiseku, and Hughes, Gruppuso returned to speak with Jajaga, and asked him if there was anything in the vehicle that should not be. Jajaga responded, “no, you can look.”

The application of the public safety exception to this exchange presents a closer question than the balance of Gruppuso’s questioning, in that his query to Jajaga more closely resembles the questions addressing the existence of dangerous weapons approved in such cases as *Quarles*, *Ferguson*, and *Newton*. To be sure, Gruppuso’s question about the vehicle, as worded, was not tailored to addressing the existence of weapons or other sources of danger in the car. But this imprecision would not be disqualifying if there were otherwise a genuine public safety exigency. As the Second Circuit has explained, “[p]recision crafting cannot be expected” in the

circumstances of a tense and dangerous" encounter, *Estrada*, 430 F.3d at 612 (alteration in original) (quoting *Newton*, 369 F.3d at 678), and on this basis the courts have declined to suppress statements whose literal bounds exceeded issues of public safety. *See Reyes*, 353 F.3d at 152–53 (citing with approval *United States v. Williams*, 181 F.3d 945, 953–54 (8th Cir. 1999) (admitting statement in response to question, "is there anything we need to be aware of?") (internal quotation marks omitted)); *Newton*, 369 F.3d at 678–79 (officer's question about existence of "contraband" was not too broad in scope).

Nonetheless, notwithstanding that Gruppuso's question about the car was more targeted to the possible presence of physical tools or fruits of a crime than his other questions, Jajaga's response denying that there was anything there that should not be and inviting Gruppuso to look for himself, must be suppressed. As with the balance of Gruppuso's custodial questioning of Jajaga, there was no objectively reasonable basis for the officers' belief of an immediate danger to themselves or the public. And crucially, there was no specific indication of the existence of a weapon that would pose such a danger. *See Jones*, 154 F. Supp. 2d at 629 ("In the context of searches for weapons, [the public safety] doctrine requires, at a minimum, that the authorities have some real basis to believe that weapons are present, and some specific reason to believe that the weapon's undetected presence poses a danger to the police or to the public."). At the time Gruppuso posed that question, his suspicions that some crime was afoot had been heightened by the suspects' inconsistent and implausible answers, but Gruppuso had no more particular information pointing to any exigency or threat to safety. And the three suspects, far from evincing dangerous behavior, had been peaceable throughout.

The Court is, therefore, constrained to hold that Gruppuso's questions about the car's contents fell outside the scope of the public safety exception. *See United States v. Wilson*, 914 F.

Supp. 2d 550, 558 (S.D.N.Y. 2012) (exception did not apply to questioning of suspect, who was frisked, handcuffed, and placed in a police vehicle, after officers learned that the gun he recently brandished was located in his locked bedroom to which only he had access, because “the officers no longer had a reasonable basis to believe they faced a dangerous or volatile situation” (internal quotation marks and citations omitted)); *see also Reyes*, 353 F.3d at 153 (distinguishing *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir. 1989), involving questions about the location of a weapon in suspect’s vehicle, because “the suspect and the surrounding area had been secured and any threat to the officer or to the public effectively eliminated prior to the unwarned questioning”). The question to Jajaga, and the content of his response, therefore must be suppressed.<sup>10</sup>

## 2. Statement Made Outside of Custodial Interrogation

Immediately after the search, as Gruppuso was walking towards him, Jajaga volunteered that all of the items found inside the car were his. There is no basis under *Miranda* to suppress this statement, because *Miranda*’s protections apply only to statements made under custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Although Jajaga was still in custody at the time he made this statement, he was not being subjected to interrogation. Time had passed since he had answered Gruppuso’s prior question—whether there was anything in the

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<sup>10</sup> After the search was complete, supplying probable cause for an arrest, Gruppuso, and later a detective, continued to question Jajaga and the other suspects, still without having given them *Miranda* warnings. The Government has stated that, save for the one statement addressed in the immediately following section, it does not intend to offer at trial Jajaga’s and Fiseku’s responses to such questions. Nor could it properly: Upon the search of the car and Jajaga’s arrest, any threat to the public safety that may previously have been said to have existed before the search had realistically been neutralized. *See Newton*, 369 F.3d at 679 (government conceded, “as it must,” that officer’s question as to why the suspect possessed the gun recovered by the police was outside the public safety exception).

vehicle—and, in between, Gruppuso had searched the car and had not put further questions to Jajaga. Such a spontaneous or volunteered utterance by a suspect, even though in custody and having been subjected to prior questioning, is not the product of custodial interrogation, and is thus not subject to suppression under *Miranda*. See *United States v. Colon*, 835 F.2d 27, 28, 30 (2d Cir. 1987) (“*Miranda* is [not] applicable when . . . the inculpatory statement is spontaneous and did not result from interrogation or its functional equivalent.” *Id.* at 28.); *United States v. Gonzalez*, No. 14 Cr. 705 (PAE), 2015 WL 2452405, at \*14 n.16 (S.D.N.Y. May 22, 2015); *United States v. Gonzalez*, 864 F. Supp. 375, 381 (S.D.N.Y. 1994). Jajaga’s admission that the materials found during the search of the car were his is, therefore, properly admitted.

**D. The Physical Evidence Gathered From the Search of the Car Need Not Be Suppressed**

Defendants also seek to suppress the physical evidence collected by the officers as a result of the search of the car. Gruppuso conducted the search after asking Jajaga whether there was anything in the car that should not be, and Jajaga responded, “no, you can look.”

Two issues are presented by the suppression motion. First, because the Court has held that Jajaga’s statement, “no, you can look,” must be suppressed as a violation of *Miranda*, the Court must inquire whether the physical fruits of that statement must also be suppressed. Second, assuming that suppression is not required on that ground, the Court must determine whether Jajaga’s consent to search was valid. These inquiries each turn on whether Jajaga’s statement inviting the search was voluntarily given. For the reasons that follow, the Court finds that it was. Accordingly, the Court then evaluates whether Jajaga was authorized to consent to the search of the vehicle.

**1. Legal Standards Governing Admissibility of Physical Evidence Collected as a Result of a Non-Mirandized Statement**

Although Jajaga's statement consenting to a search of the car, "no, you can look," is inadmissible, under settled doctrine, the physical evidence that was obtained as a result of that consent nonetheless may be received at trial. The "failure to give *Miranda* warnings does not require suppression of physical evidence discovered as a consequence of unwarned statements that are voluntary and uncoerced." *United States v. McCoy*, 407 F. App'x 514, 516 (2d Cir. 2010) (summary order) (citing *Patane*, 542 U.S. at 637–44). In *Patane*, a plurality of the Supreme Court explained that, while "the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause[,] [the] Clause . . . is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context." 542 U.S. at 636 (plurality opinion); *see also id.* at 644–45 (Kennedy, J., concurring) (physical evidence collected as a result of an unwarned statement is admissible). In *United States v. McCoy*, following *Patane*, the Second Circuit reversed a decision to suppress physical evidence obtained as a result of defendant's consent to search made before *Miranda* warnings were given. 407 F. App'x at 515–16.

Accordingly, under *Patane*, the physical evidence gathered as a result of Jajaga's statement that the officers could search the vehicle may be received in evidence provided that the statement was made voluntarily.

**2. Legal Standards Governing Consent to a Search**

Because the officers lacked probable cause to search the vehicle, consent to the search was necessary to render the search permissible under the Fourth Amendment. *See Garcia*, 56 F.3d at 422 ("[W]hile a warrantless search . . . is generally unreasonable and therefore violates

the Fourth Amendment, which proscribes unreasonable searches, an individual may consent to a search, thereby rendering it reasonable.” (internal quotation marks and citations omitted)).

“To ascertain whether consent is valid, courts examine the ‘totality of all the circumstances’ to determine whether the consent was ‘a product of that individual’s free and unconstrained choice, rather than a mere acquiescence in a show of authority.’” *Id.* (quoting *United States v. Wilson*, 11 F.3d 346, 351 (2d Cir. 1993)) (internal quotation marks omitted). Courts consider a number of factors to determine voluntariness, including “age, education, intelligence, length of detention, use of physical punishments or deprivations, and whether the alleged consenting person was advised of his constitutional rights.” *United States v. Puglisi*, 790 F.2d 240, 243 (2d Cir. 1986) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Whether an individual is in custody is also relevant, but not determinative; in that context, the Second Circuit has also found relevant but not determinative “whether guns were drawn or the consenting individual was frisked, or whether the consenting individual was threatened, was in a public area, or was informed that he had the option of refusing consent to the search.” *Id.* at 243–44 (citations omitted).

### **3. Jajaga’s Statement Consenting to the Search Was Voluntary**

Upon careful consideration of the totality of the circumstances, the Court finds that Jajaga’s consent to search was voluntarily and freely given.

To be sure, there are factors pointing in both directions. In support of Jajaga’s position that the consent was involuntary, the police restrained him in handcuffs and placed him in a police cruiser. He was also not informed by the police of his *Miranda* rights before he consented to the search. See *United States v. Yu-Leung*, 910 F.2d 33, 41 (2d Cir. 1990) (fact that suspect was given *Miranda* warnings favored finding of voluntariness). The absence of *Miranda*

warning suggests that Jajaga may not have been aware of his right not to speak to the officers. “*Miranda* warnings, however, are not a prerequisite to obtaining a valid consent to search.” *United States v. Moreno*, 701 F.3d 64, 77 (2d Cir. 2012) (citing *United States v. Faruolo*, 506 F.2d 490, 495 (2d Cir. 1974)). Jajaga was also not notified of his right to refuse to give consent to a search. Of course, notification of a right to refuse is not in itself determinative, *Garcia*, 56 F.3d at 422 (“[K]nowledge of the right to refuse consent is not a requirement to a finding of voluntariness” (citing *Schneckloth*, 412 U.S. at 231–33)), and the lack of such notification is a less significant concern here, because the police never explicitly requested or sought consent to search the vehicle.

Nonetheless, considered in totality, the circumstances here favor a finding that Jajaga’s consent was voluntary and uncoerced.<sup>11</sup> The most compelling evidence of the voluntariness of the consent is the manner in which it was given. The police at no point asked Jajaga for consent to search the vehicle; rather, Gruppuso asked whether there was anything in the vehicle that should not have been there. Jajaga first responded directly to the question, answering, falsely as it later turned out, “no.” In answering no, Jajaga demonstrated that he was fully able to resist telling the police about the existence of items about which he did not want them to know. Moreover, Jajaga went beyond the scope of the actual question asked, and offered, of his own accord, the police the opportunity to have a look for themselves.

Tellingly, Jajaga does not allege that the police made any direct attempt to get his consent to search the vehicle, much less coerce or pressure him into doing so. (Jajaga did not submit an

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<sup>11</sup> Testimony at the suppression hearing did not reveal information about Jajaga’s age, education, and intelligence, and therefore the Court does not place weight on these factors. Nevertheless, it bears noting that Jajaga appeared to be in his late twenties or thirties, and Gruppuso’s account of his interactions with Jajaga at the dirt pull-off and the park-n-ride did not suggest that there was any difficulty in communicating and understanding each other.

affidavit in connection with the suppression motion.) Nor did the evidence at the suppression hearing supply any basis to find such coercion or pressure. The steps the police had taken toward Jajaga up to that point of the encounter—frisking him, handcuffing him, and placing him in a police cruiser during questioning, but never drawing a weapon—entailed less use of force and a significantly less dramatic show of authority than in other cases in which the Second Circuit has held consent to have been validly given. *See, e.g., Yu-Leung*, 910 F.2d at 41 (“Nor does a finding of coercion follow from the fact that [the individual] was handcuffed.”); *United States v. Ansaldi*, 372 F.3d 118, 129 (2d Cir. 2014) (consent voluntary even though consenting individual was handcuffed and arrested by five or six officers with their weapons drawn). Furthermore, Gruppuso never indicated that Jajaga was being placed under arrest, but rather explained to him that he was being detained while the officers investigated. Tr. 24–25. And Jajaga had only been briefly detained, up to 10 minutes, prior to giving his consent.

Therefore, the Court finds that Jajaga’s consent to search the vehicle was voluntarily and freely given.

#### 4. Actual or Apparent Authority

Finally, defendants challenge Jajaga’s authority to consent to the search of the car. Consent can validate a search if the consenting individual had actual or apparent authority to consent. *McGee*, 564 F.3d at 139. Apparent authority is assessed by whether “the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.” *Id.* (alteration in original) (quoting *Illinois v. Rodriguez*, 497 US. 177, 188–89 (1990)).

Jajaga had at least apparent authority to consent to the search of the car. On the night in question, Jajaga was sitting in the driver’s seat of the car at both times Gruppuso encountered it.

On the first occasion, Jajaga was the sole person in the car at the dirt pull-off. On the second occasion, at the park-n-ride, Hughes, in the front passenger seat, sat alongside Jajaga. Based on these observations, Gruppuso could reasonably—indeed, he could only—infer that Jajaga had driven the car into the park-n-ride. While defendants are correct that Jajaga never affirmatively stated that he was the owner of the car, his control over it in each instance in which Gruppuso encountered it makes it reasonable for Gruppuso to have believed that Jajaga had authority to consent to a search, and to search the vehicle on that basis. *See United States v. Sparks*, 287 F. App'x 918, 920 (2d Cir. 2008) (summary order) (driver of car had apparent authority to consent to search of bag inside the car).

The fact that Gruppuso knew that the car was registered to another person, Kujtime Fiseku, who shared a last name with another individual at the park-n-ride, Bekim Fiseku, does not undermine Jajaga's apparent authority over the car at that moment. Multiple individuals may have authority to consent to a search. *See McGee*, 564 F.3d at 138–41. The possibility that others could also consent does not detract from Gruppuso's reasonable basis for believing that Jajaga, who possessed and operated the car throughout the events at issue, had authority to consent to the search.<sup>12</sup>

Accordingly, the physical evidence obtained as a result of Jajaga's non-*Mirandized* statement may be admitted without violating the Fifth Amendment, and his voluntary consent as a person with apparent authority to provide such consent made the search reasonable under the Fourth Amendment. The physical evidence collected by the officers during their search of the vehicle is, therefore, admissible.

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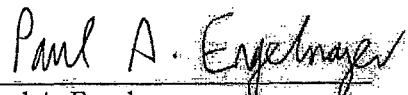
<sup>12</sup> Because the Court finds that Jajaga had apparent authority to consent to the search, the Court has no occasion to consider whether Fiseku has standing to challenge the search of the vehicle, which was registered to his mother. The Court assumes so *arguendo*.

**CONCLUSION**

For the foregoing reasons, the Court denies (1) the motion of defendants Fiseku and Jajaga to suppress the physical evidence obtained during the search of the car driven by Jajaga, and (2) the motion by Jajaga to suppress his post-search statement to the effect that the items found in the car were his. The Court, however, grants the defendants' motions to suppress the statements each made in response to custodial interrogation prior to the search. The Clerk of Court is directed to close the motions pending at dockets 25, 37, and 43.

The Court hereby schedules the next conference in this matter for Monday, December 7, 2015, at 9:30 a.m.

SO ORDERED.

  
\_\_\_\_\_  
Paul A. Engelmayer  
United States District Judge

Dated: December 3, 2015  
New York, New York

## UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

BEKIM FISEKU

) JUDGMENT IN A CRIMINAL CASE  
 )  
 ) Case Number: 15 Cr. 384-1  
 )  
 ) USM Number: 59080-053  
 )  
 ) James Froccaro, Jr.  
 ) Defendant's Attorney

## THE DEFENDANT:

 pleaded guilty to count(s) Count One pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court. was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951	Conspiracy to Commit Robbery	6/22/2015	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) \_\_\_\_\_ Count(s) All open counts  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/12/2017  
 Date of Imposition of Judgment

*Paul A. Engelmayer*  
 Signature of Judge

Paul A. Engelmayer, United States District Judge  
 Name and Title of Judge

Date

*4/12/2017*

*A.59*

USDC SDNY
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DOC #:
DATE FILED: 4/12/2017

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AO 245B (Rev. 11/16) Judgment in Criminal Case  
Sheet 2 — Imprisonment

Judgment — Page 2 of 7

DEFENDANT: BEKIM FISEKU  
CASE NUMBER: 15 Cr. 384-1

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred eight (108) months.

The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to FCI Otisville, or a facility as close to the New York City area as possible.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_  
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on \_\_\_\_\_  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

a \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

A.60

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AO 245B (Rev. 11/16) Judgment in a Criminal Case  
Sheet 3 - Supervised Release

Judgment - Page 3 of 7

DEFENDANT: BEKIM FISEKU  
CASE NUMBER: 15 Cr. 384-1**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) years.

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.  
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4.  You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6.  You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

A.61

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AO 245B (Rev. 11/16) Judgment in a Criminal Case  
Sheet 3A — Supervised Release

Judgment Page 4 of 7

DEFENDANT: BEKIM FISEKU  
CASE NUMBER: 15 Cr. 384-1**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature

Date

A.62

DEFENDANT: BEKIM FISEKU

CASE NUMBER: 15 Cr. 384-1

**ADDITIONAL SUPERVISED RELEASE TERMS**

1. The defendant will participate in an outpatient treatment program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The defendant shall contribute to the cost of services rendered based on the defendant's ability to pay and the availability of third-party payments. The Court authorizes the release of available drug treatment evaluations and reports, including the presentence investigation report, to the substance abuse treatment provider.
2. The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.
3. The defendant is to report to the nearest Probation office within 72 hours of release from custody.
4. The defendant shall be supervised by the district of residence.

A.63

DEFENDANT: BEKIM FISEKU  
CASE NUMBER: 15 Cr. 384-1

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

**TOTALS**      \$ Assessment      \$ JVTA Assessment\*      \$ Fine      \$ Restitution

The determination of restitution is deferred until \_\_\_\_\_ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority, order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(j), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

**TOTALS** 66 0.00 66 0.00

- Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22. \*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

A.64.

DEFENDANT: BEKIM FISEKU  
CASE NUMBER: 15 Cr. 384-1

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A  Lump sum payment of \$ 100.00 due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C,  D,  E, or  F below; or

B  Payment to begin immediately (may be combined with  C,  D, or  F below); or

C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

A.65