**NUMBER _____**

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

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**OCTOBER TERM 2020**

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**JAMES LEE HERMAN, JR., a/k/a Herman Lee James, Jr., Petitioner,**

**v.**

**UNITED STATES OF AMERICA, Respondent.**

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**WESLEY P. PAGE**
**FEDERAL PUBLIC DEFENDER**

**JONATHAN D. BYRNE**
**APPELLATE COUNSEL**
Office of the Federal Public Defender, Southern District of West Virginia
Room 3400, Robert C. Byrd Federal Courthouse
300 Virginia Street, East
Charleston, West Virginia 25301
Telephone: 304/347-3350
***Counsel for Petitioner***

## I. QUESTION PRESENTED FOR REVIEW

Whether police officers who violated a driver's Fourth Amendment rights when they searched him during a traffic stop had probable cause to arrest the driver for driving under the influence and would have inevitably searched him pursuant to that arrest, discovering the firearm they recovered from him.

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- *United States v. Herman*, No. 2:19-cr-00107-1, U.S. District Court for the Southern District of West Virginia. Judgment entered October 4, 2019.
- *United States v. Herman*, 828 F. App'x 894 (4th Cir. 2020), U.S. Court of Appeals for the Fourth Circuit. Judgment entered on October 7, 2020.

## V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the denial of the motion to suppress is unpublished and is attached to this Petition as Appendix A. The district court's ruling denying the motion was made orally at the pretrial motions hearing. The relevant portion of that hearing transcript is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

## VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 7, 2020. No petition for rehearing was filed. This Petition is filed within 150 days of the date the court's judgment, pursuant to this Court's order of March 19, 2020. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

## VII. STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of the Fourth Amendment to the United States Constitution, which says:

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

## VIII. STATEMENT OF THE CASE

### A. Federal Jurisdiction

On April 9, 2019, an indictment was filed in the Southern District of West Virginia charging James Lee Herman, Jr., also known as Herman Lee James, Jr. ("James")[1] with possession of a firearm after sustaining a felony conviction, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). J.A. 7-9.[2] Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after James pleaded guilty to the indictment pursuant to a conditional plea agreement. J.A. 225-235. A judgment order was entered on October 4, 2010. J.A. 236-242. James timely filed a notice of appeal on October 11, 2019. J.A. 243. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

### B. Facts Pertinent to the Issue Presented

This Petition arises from a traffic stop that blossomed into an arrest for possession of a firearm by a prohibited person. After making the stop, officers ordered James out of the car and recovered a firearm during what the district court concluded was an illegal search. Whether the officers would have inevitably

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[1] In the district court the parties agreed that the defendant's actual name is Herman James. J.A. 68-69. He will be referred to as "James" throughout this Petition. J.A. 68-69.

[2] "J.A." refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

discovered the firearm, as the district court ultimately held, is the issue in this Petition.

### 1. Officers stop James and recover a firearm from him.

At approximately four in the morning on March 16, 2019, Charleston (West Virginia) Police Department Patrolman Jordan Hilbert was on patrol when he saw a vehicle fail to stop for a stop sign. Hilbert initiated a traffic stop and pulled the vehicle over. J.A. 71-72. Hilbert made contact with James, the driver and only occupant of the car, and smelled the odor of alcohol. J.A. 76. After talking briefly with James, Hilbert returned to his car and spoke with another officer who explained that James had served time in federal prison and been involved previously with guns and drugs. J.A. 78-79.

Hilbert radioed for another officer, Patrolman Ryan Montagu, to come perform field sobriety tests on James. Montagu was a "DRE expert," who had training beyond the usual for dealing with situations involving impaired motorists. J.A. 79. When Montagu arrived, Hilbert told him some of what James had said and that he had been cooperative, but nothing about the information he had learned about James' background. J.A. 80. After the two officers went back to James' car, Montagu ordered James out of the car and began to perform a patdown search. Montagu felt what he believed was a gun. J.A. 82. After a brief struggle, officers recovered a firearm from James. J.A. 114.

As a result of that incident, James was charged with being a felon in possession of a firearm. J.A. 7-9.

### 2. The district court denies James' motion to suppress the firearm.

James filed a motion to suppress the firearm found during the traffic stop. J.A. 10-15. He argued that the officers lacked the reasonable suspicion needed to perform a patdown and that their actions violated the Fourth Amendment. J.A. 12-15, 53-57. In its response, the Government did not argue that the officers had reasonable suspicion, but rather that they would have inevitably found the gun during a search incident to a lawful arrest for driving under the influence. J.A. 61-64.

Hilbert and Montagu testified at the pretrial motions hearing, providing more details about the stop. Both officers were also wearing body cameras during the incident and the video from those cameras was introduced. J.A. 103, 115, 246-247.[3] They also admitted to working with the Government prior to the hearing to craft the Government's response to the motion to suppress and flesh out the inevitable discovery argument. J.A. 84-86, 116-117.

Hilbert testified that the area where the stop took place was "not a very lit area," although there were "a few street lights." J.A. 75. In addition to smelling alcohol, Hilbert testified that when asked, James said that he was coming from a

[3] The traffic violation itself was captured on the dash camera in Hilbert's cruiser. A copy of that video was attached to James' motion to suppress. J.A. 244-245.

"club" and had had "a few" drinks that night, later quantified as "two or three" beers. J.A. 76, 77, 97. However, Hilbert had no information as to how large those drinks were or when James consumed them. J.A. 98. On cross examination, Hilbert admitted that James stopped within thirty seconds of Hilbert activating his lights, that James had his paperwork ready to hand over when Hilbert approached the car, and that he was compliant and answered all of his questions. J.A. 89-90.

Hilbert also explained that although he can make arrests of impaired drivers, Montagu "likes to do them" and he was also working that night so he called him to perform field sobriety tests. J.A. 79. All he told Montagu when he arrived was that James said "he had a few drinks," that he was coming from the club, and he had been cooperative. J.A. 80, 94. When he approached the passenger side of the car, Hilbert saw James "flip through" some paperwork and address Montagu, who was at the driver's side, as if James had already given him some paperwork, when it was Hilbert to whom he had given it. J.A. 80-82. However, Hilbert also admitted that the headlights of his cruiser, as well as a spotlight, were pointed at James' car – likely at his driver's side mirror – during the stop. J.A. 90-91. In addition, James had a cigar in his mouth up until the time he got out of the car, which Hilbert admitted could have affected his speech. J.A. 91. He also admitted that while he told Montagu about smelling alcohol, he did not mention slurred speech or any other indicators of impairment, such as bloodshot eyes or flushed skin. J.A. 93-94.

When Montagu got James out of the car, Hilbert went to the driver's side to assist and testified that James was "muttering words about standard field sobriety tests and he said it backwards." J.A. 82. He described James' speech as "kind of slurred, kind of mumbling, very confused." J.A. 83. Hilbert explained that he would have patted James down at that point based on what the other officer had told him about James' background, but admitted he did not pass that information on to Montagu. J.A. 83, 88. However, he also testified that it was "standard practice" in the Charleston Police Department to patdown anyone who is going to be subject to field sobriety tests. J.A. 95, 96. Ultimately, no field sobriety tests were given and James was arrested. J.A. 83. Hilbert confirmed that James was not arrested for driving under the influence, nor was he ever charged with that offense. J.A. 47, 84. Furthermore, he admitted that based only on his interactions with James that night he did not believe there was probable cause to arrest him for driving under the influence. J.A. 101-102.

Montagu confirmed that when he arrived on the scene Hilbert told him that James "was coming home from the club and when I asked if he had been cooperative, he said that he had been all right." J.A. 107. When he first approached the car James was "shuffling around paperwork in his lap" and said he "thought he gave me the wrong information, but he hadn't actually given me any information" and was confusing him with Hilbert. *Ibid*. He testified that James' speech was at "a low volume and appeared slurred." J.A. 108. When James stepped out of the car,

Montagu testified that he could smell alcohol and could see part of a liquor bottle "that had contents missing" on the car seat. J.A. 110. However, he admitted that seeing the bottle was not mentioned in his report, nor did he inform Hilbert of it at the time. J.A. 132-134. He also admitted that it appeared that other officers first mentioned the bottle after the gun had already been found. J.A. 137.

In line with Hilbert, Montagu testified that he patted down James due to the "inherent danger of being in such close proximity with regards to the field sobriety tests." J.A. 110. It was a standard practice and Montagu agreed that there was nothing particular to James that suggested he was armed or dangerous. J.A. 117. As he explained, "he didn't pose what I perceived as a threat at the time any more than anybody else does." *Ibid*.

Unlike Hilbert, however, Montagu testified that he believed "probable cause existed to arrest him for driving under the influence of alcohol" regardless of whether field sobriety tests were administered. J.A. 113. When pressed, Montagu said the basis for that conclusion was that James had failed to stop at a stop sign, he was coming from a club in the early morning hours, there was an odor of alcohol along with "slurred speech, clear disorientation on [James'] part with the failure to recognize the difference between Patrolman Hilbert and I," and the liquor bottle in the car. J.A. 118. However, Montague admitted that he did not see James stumble or seem unsteady on his feet and that when he walked up to the car he shined his

flashlight down on James. J.A 127, 128. In addition, James was initially looking down at the paperwork in his lap. J.A. 129.

Montagu went on to discuss a series of additional steps he could have taken and what effect they would have had on his conclusion that probable cause would have justified James' arrest for driving under the influence. Montagu explained that he would have performed field sobriety tests even though he believed he already had probable cause to arrest in order "to perform a thorough investigation of the DUI offense." J.A. 121. That, Montagu agreed, would "lead to a better determination of probable cause." *Ibid*. When asked what would have happened had James passed those tests, Montagu testified that they are not "pass/fail" and just "indicate[] impairment or lack thereof." *Ibid*. Although Montagu testified that a conclusion that James was not impaired if he did well on the tests would be "a tough judgment call to make," he maintained that even if James performed well on the tests "I don't believe" James would have been free to go. *Ibid*. Montagu explained that he would have "had to conduct other measures of investigation." J.A. 122. One such tool would be a breathalyzer test. Montagu explained that even a result below the West Virginia legal limit of 0.08 could still indicate impairment. When asked if he would have let James go if he tested below 0.05, Montagu admitted he would "[p]ossibly" have let him go, but that "the possibility also exists that he's not impaired just by alcohol." *Ibid*.

At the close of evidence, James argued first that there was no reasonable suspicion to support a patdown. J.A. 139-140. Furthermore, the search could not be saved by the inevitable discovery doctrine because there was not probable cause to arrest James for driving under the influence. J.A. 140-143. During the Government's argument regarding inevitable discovery, the district court pointed out that neither officer testified that he would have searched James incident to an arrest for driving under the influence. J.A. 148. The district court adjourned until the next day for preparation of a transcript of Montagu's testimony, since he was the person who performed the patdown on James. J.A. 150-152.

When the hearing resumed the next day, the Government recognized that Montagu did not testify that he would have patted James down after an arrest and, over James' objection, recalled him to testify. J.A. 156-159. He testified that the search incident to arrest doctrine was "incorporated" into department policy, that he "routinely" searches arrestees, and that he would have searched James had he been arrested for driving under the influence. J.A 160.

After hearing brief further argument, including James' argument that the Government failed to prove not only that probable cause existed to arrest James for DUI, but that he in fact would have been arrested on that alternative ground, the district court concluded that "all of the searches and seizures were illegal." J.A. 166. Therefore the "only question before the court at this point is whether the inevitable discovery doctrine . . . allows the evidence even after the Fourth Amendment

violation." *Ibid.* The district court noted that "speculation that evidence could be discovered is insufficient" and that "it was not enough here for the government to prove that a search incident to arrest could have occurred or would have occurred." J.A. 169. With the late testimony of Montagu, the district court held, there was no need to speculate. The district court found there was probable cause to arrest James for driving under the influence because of the traffic stop at a late hour, that James "appeared to be confused and impaired," and the testimony about the liquor bottle. J.A. 170. The district court also found that, after reviewing the videos, James' speech "was somewhat slurred, although if that were the only criteria, I don't find that would have been sufficient in this case." J.A 170-171. The district court also credited Montagu's testimony regarding the odor of alcohol and the fact that James "admitted to having a few drinks after just leaving a club." J.A. 171. In addition, based on Montagu's testimony, the district court held that the Government carried its burden "that another search would have occurred" *Ibid.* Therefore, the district court denied James' motion to suppress. *Ibid.*

Following its ruling, the district court continued, "because the officer is still here" that "I want him to know, I want everybody to know, they can't [perform a patdown search] unless they can articulate a suspicious reason to believe that the person is a danger to them." J.A. 172. "He said he does it as a routine matter," the district court continued, and "I want him to know, I want everybody to know, that that cannot be done. It's a violation of the Fourth Amendment." *Ibid.*

Following the denial of his motion to suppress, James entered into a plea agreement with the Government. J.A. 225-235. While James generally waived his right to pursue issues on appeal, the agreement contained a provision allowing him to appeal the denial of his motion to suppress. J.A. 229-231. Pursuant to that agreement, James entered a guilty plea. J.A. 5. He was eventually sentenced to forty months in prison, followed by a three-year term of supervised release. J.A. 237-238.

### 3. The Fourth Circuit affirms the denial of James' motion to suppress.

The Fourth Circuit affirmed the district court's denial of James' motion to suppress in an unpublished opinion. *United States v. Herman*, 828 F. App'x 894 (4th Cir. 2020). The court concluded, after "our review of the record," that the district court "did not err in crediting the arresting officer's testimony and finding that the arresting officer had probable cause to arrest [James] for driving under the influence." *Id*. at 897. The court also concluded that "the district court did not err in finding that, absent the discovery of the firearm, the arresting officer would have arrested [James] for driving under the influence, would have searched him incident to that arrest, and inevitably would have discovered the firearm." *Ibid*.

## IX. REASON FOR GRANTING THE WRIT

**The Petition should be granted so the Court can determine whether police officers who violated a driver's Fourth Amendment rights when they searched him during a traffic stop had probable cause to arrest the driver for driving under the influence and would have inevitably searched him pursuant to that arrest, discovering the firearm they recovered from him.**

In this case, a police officer performed a patdown search of James without a basis under the Fourth Amendment to do so. Nonetheless, the evidence uncovered during that search was admissible against James due to the doctrine of inevitable discovery. As that doctrine only applies when police have already been found to have violated the Fourth Amendment, its contours should be narrowly construed and officers' testimony regarding it viewed with great scrutiny. Whether the facts of a case such as this meets that level of scrutiny is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

### A. To prevail under inevitable discovery, the Government must show that a lawful arrest supported by probable cause would have occurred, as a result of which James would have been searched.

"Generally, the government is prohibited from using evidence discovered in an unlawful search," although "this rule is subject to certain exceptions." *United States v. Seay*, 944 F.3d 220, 223 (4th Cir. 2019). One exception is the inevitable discovery doctrine, under which the Government may present evidence if it "can prove by a preponderance of the evidence that law enforcement would have ultimately or inevitably discovered the evidence by lawful means." *Ibid* (internal

quotation omitted). Such "lawful means" include "searches that fall into an exception to the warrant requirement." *Ibid*. In order to prevail under the doctrine, the Government must prove "first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so." *United States v. Alston*, 941 F.3d 132, 138 (4th Cir. 2019). The district court erred in this case by concluding that a lawful arrest would have led to a search incident to that arrest because the officers lacked probable cause to arrest James for driving under the influence.

The lawful arrest doctrine "provides that when law enforcement officers have probable cause to make a lawful custodial arrest, they may – incident to that arrest and without a warrant – search the arrestee's person and the area 'within his immediate control.'" *United States v. Currence*, 446 F.3d 554, 556 (4th Cir. 2006) (internal quotation omitted). Because the "fact of a lawful arrest, standing alone, authorizes a search," *Michigan v. DeFillippo*, 442 U.S. 31, 35 (1979), it is axiomatic that such a search cannot be performed if the arrest itself is unlawful. *See, e.g.*, *United States v. Reed*, 572 F.2d 412, 425 (2d Cir. 1978)(where arrest was unlawful, searches conducted pursuant to it were as well); *Rodgers v. United States*, 421 F.2d 1132, 1133 (D.C. Cir. 1969)("there is no question that the fruit of a search incident to an unlawful arrest is not admissible evidence"). Therefore, if the police in this case did not have probable cause to arrest James, the firearm recovered during the search of him was not admissible.

The offense identified as the possible basis for James' lawful arrest was driving under the influence. West Virginia law makes it a crime to drive in an "impaired state," which is then defined as driving "under the influence" of alcohol, drugs, or some combination thereof. W. Va. Code § 17C-5-2. To be under the influence means to be "deprived of clearness of mind and self-control because of drugs or alcohol." *Under the Influence*, Black's Law Dictionary (11th ed. 2019). There was insufficient evidence for the district court to conclude that James met that definition the night he was pulled over by Hilbert.

The district court summarized the factors the Government and Montagu put forward as a basis for arresting James for driving under the influence before he was administered any field sobriety tests. The district court pointed to the traffic stop at a late hour, that James "appeared to be confused and impaired," and the testimony about the liquor bottle. J.A. 170. The district court also found that, after reviewing the videos, James' "speech was somewhat slurred, although if that were the only criteria, I don't find that would have been sufficient in this case." J.A 170-171. The district court also credited Montagu's testimony regarding the odor of alcohol and the fact that James "admitted to having a few drinks after just leaving a club." J.A. 171.

### B. Montagu lacked probable cause to arrest James for driving under the influence.

It is well settled that, when evaluating a police officer's interaction with a citizen under the Fourth Amendment, courts must consider the totality of the

relevant circumstances. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018)(reversing lower court determination of probable cause because it "viewed each fact in isolation, rather than as a factor in the totality of the circumstances") (internal quotation omitted). However, that does not mean a careful examination of each factor is unnecessary.

In *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018), the court examined a traffic stop that extended into a drug investigation, complete with the appearance of a drug sniffing dog. Bowman moved to suppress the drugs found during a search of the vehicle, but the district court denied the motion. *Id.* at 205-209. It did so after examining the "totality of the circumstances." *Id.* at 208. The court reversed, ultimately concluding that the totality of the circumstances did not support the conclusion that the police officer had reasonable suspicion to extend the traffic stop. *Id.* at 218-219. Before it did so, however, the court engaged in a lengthy examination of each of the particular factors the district court had found the officer relied upon to generate reasonable suspicion. *Id.* at 213-218. That was because "in considering whether the factors articulated by a police officer amount to reasonable suspicion, this court 'will separately address each of these factors before evaluating them together with the other circumstances of the traffic stop.'" *Id.* at 214, quoting *United States v. Powell*, 666 F.3d 180, 187–88 (4th Cir. 2011). Closer examination of the factors set forth by the district court shows they do not provide sufficient evidence of impairment to justify an arrest.

To begin, James' traffic offense was a garden variety one, failing to properly stop at a stop sign. As is evident from the video attached to James' motion to suppress, James began to roll through the intersection then abruptly stopped – most likely because he saw Hilbert's marked patrol car coming the other direction. J.A. 245 at 04:08:17-20. If nothing else, that suggests that James was clear of mind and in control enough to recognize he just committed a traffic violation in front of a police officer and belatedly tried to stop. It was not a case where the violation itself suggested impairment, such as weaving or crossing the center line.

Next, the district court incorrectly concluded that James was "confused or impaired" during his interactions with the officer. J.A. 170. That conclusion is based entirely on the fact that when Montagu approached James' side of the car, James spoke to him as if he was Hilbert, whom James had spoken to moments before. A review of the video, however, shows that this is not a situation where James looked at Montagu and failed to notice he was a different person from Hilbert. Instead, James was looking down, trying to find correct paperwork, when Montagu walked up, shining his flashlight at James. J.A. 247 at 04:17:05-12. There is no reason for James to know that a second officer had arrived on the scene – Hilbert does not mention calling Montagu until he returns to his cruiser after the initial interaction with James. James, confronted by a bright light and a police officer, assumed – without looking up – that it was the same officer he spoke with a few moments

before. That mistake does not demonstrate the kind of confusion that is evidence of intoxication.

Furthermore, both Montagu and Hilbert conceded that the fact James had a cigar in his mouth when he was in the car could cause some difficulties with his speech. J.A. 91, 129. Thus, the factor that James' speech was somewhat slurred, which the district court recognized was not a strong one, does not further support a conclusion that James was impaired. J.A. 170-171.

Finally, the district court credited Montagu's testimony that he saw a liquor bottle in the car when James got out. That conclusion is clearly erroneous, in that "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). While "a factual finding based on a determination that a witness is credible 'can virtually never be clear error,'" where other types of evidence "contradict the witness' story; or the story itself [is] so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it . . . the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.'" *United States v. Prokupek*, 632 F.3d 460, 462 (8th Cir. 2011), quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Seeing the bottle before Montagu began the patdown was not mentioned in his report. J.A. 132. Nor did he mention it to Hilbert during the stop. J.A. 133. To the contrary, it appears that the bottle only

came to Montagu's attention when another officer saw it ***after*** the gun had been found. J.A. 137. In this case, all the evidence aside from Montagu's testimony suggests he did not see the bottle before the gun was found. It thus could not provide probable cause to support an arrest for driving under the influence that would inevitably lead to a lawful search.

The remaining factors – that James admitted having had drinks that night and the smell of alcohol – are not sufficient to support probable cause. *Donegan v. Livingston*, 877 F. Supp. 2d 212, 220 (M.D. Pa. 2012)(the "smell of alcohol alone is not enough" to provide probable cause to arrest). *See also State v. Kliphouse*, 771 So. 2d 16, 23 (Fla. Dist. Ct. App. 2000)("the presence of an odor of alcohol alone is generally not considered an accurate and reliable measure of impairment"). Hilbert conceded that he did not know how large the drinks James consumed were or when he consumed them, both facts important to determining whether he was still under the influence. J.A. 98. Perhaps that is why Hilbert disagreed with Montagu and did not think probable cause existed to arrest James for driving under the influence. J.A. 101-102.

The facts here fall far short of even the facts in *Ross v. Myers*, 883 F.2d 486 (6th Cir. 1989), where the court found there was no probable cause. Ross had been arrested and charged with driving under the influence after a minor traffic accident. In a decision upholding a jury's verdict that Ross' Fourth Amendment rights had been violated, the court reviewed the "undisputed facts" that included the accident

itself, that Ross, who admitted "drinking one glass of beer on the evening," had "a moderate odor of alcohol about him, had a flushed face, and mumbled as he spoke," that he "staggered when he walked, that his eyes were bloodshot," and that he was "having difficulty speaking and understanding directions." *Id.* at 488. These "do not conclusively support a finding of probable cause," the court concluded, noting that Ross' bloodshot eyes may have been caused by lack of sleep and his staggering by "wet and mud-caked shoes." *Id.* at 488-489. Ross also provided "an explanation for his lack of coordination and confusion." *Id.* at 489; *see also United States v. Brown*, 401 F.3d 588, 597 (4th Cir. 2005)(no probable cause to arrest even though defendant had "glassy bloodshot eyes and the strong smell of alcohol"). Rather, Montagu's observations sound like the kind of post-hoc rationalizations that this Court has recognized before do not provide a basis to stop or search someone. *See, e.g.*, *United States v. Foster*, 634 F.3d 243, 249 (4th Cir. 2011)("the Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband").

### C. Even if probable cause existed, the Government failed to prove that James would have inevitably been arrested.

The district court's conclusion that James would have been inevitably searched pursuant to a lawful arrest was based on the conclusion that James would have been arrested for driving under the influence. However, no arrest for that offense was ever made and, in fact, James was never even charged with that offense in state court. J.A. 47. The arrest that would have given rise to the search incident

to that arrest is, thus, completely hypothetical. The inevitable discovery doctrine requires more. *See United States v. Thomas*, 955 F.2d 207, 209 (4th Cir. 1992) (rejecting Government's reliance on "a string of conjecture" to apply the doctrine); *United States v. Allen*, 159 F.2d 832, 840 (4th Cir. 1998)(application of the doctrine rests on facts that never occurred, but "these facts must have been likely, indeed inevitable, absent the government's misconduct")(internal quotation omitted).

Montagu was the only one of the two officers who believed there was probable cause to arrest James for driving under the influence at the time the search was conducted. J.A. 101-102, 113. Yet even Montague conceded that had the stop played out in certain ways, James would possibly have been left to go on his way. Montagu explained that if there had been no illegal patdown search he would have gone on to perform field sobriety tests and perhaps give James a breathalyzer test to produce a "better determination of probable cause." J.A. 121. However, if James had performed well on those tests, Montagu admitted he would "[p]ossibly" not have arrested him. Therefore, it was not inevitable that, had the traffic stop played out without the initial illegal search, it would have resulted in James' arrest.

The inevitable discovery doctrine is an exception to the exclusionary rule that, by definition, only applies when the police have violated the Fourth Amendment. In this case, that violation was part of a policy of patting down every person suspected of driving under the influence, which the district court correctly called out as "illegal." J.A. 166. This Court should carefully scrutinize the rationale

provided by the Government, crafted in concert with the officers who violated the Fourth Amendment, that would allow the evidence recovered as a result of that illegal search to nonetheless be admissible. It is entirely made up of the kind of post-hoc rationalizations this Court rightfully frowns upon. Closely inspected, those rationalizations do not add up to probable cause to believe that James was driving under the influence or that James inevitably would have been arrested had the illegal search not occurred. Here, any arrest for driving under the influence is both purely speculative and lacking in probable cause. Without such probable cause any hypothetical arrest would have also been illegal and the inevitable discovery doctrine inapplicable. The district court erred by concluding otherwise.

## X. CONCLUSION

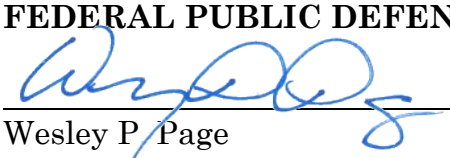
For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

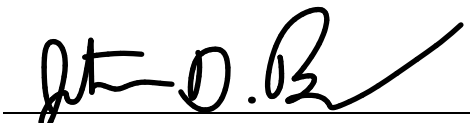
**JAMES HERMAN, JR.**

By Counsel

**WESLEY P. PAGE**
**FEDERAL PUBLIC DEFENDER**



Wesley P. Page
Federal Public Defender



Jonathan D. Byrne
Appellate Counsel
*Counsel of Record*