

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TAMARAN EDWARD BONTEMPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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United States v. Bontemps

United States Court of Appeals for the Ninth Circuit

May 11, 2020, Argued and Submitted, San Francisco, California; October 13, 2020, Filed
No. 19-10195

Reporter

977 F.3d 909 *; 2020 U.S. App. LEXIS 32227 **; 2020 WL 6040044

UNITED STATES OF AMERICA,
Plaintiff-Appellee, v. TAMARAN
EDWARD BONTEMPS, Defendant-
Appellant.

Subsequent History: Rehearing denied by,
En banc *United States v. Bontemps, 2020*
U.S. App. LEXIS 40366 (9th Cir. Cal., Dec.
24, 2020)

Prior History: **[**1]** Appeal from the
United States District Court for the Eastern
District of California. D.C. No. 2:18-cr-
00099-JAM-1. John A. Mendez, District
Judge, Presiding.

United States v. Bontemps, 2018 U.S. Dist.
LEXIS 185067, 2018 WL 5603615 (E.D.
Cal., Oct. 29, 2018)

Disposition: AFFIRMED.

Core Terms

bulge, firearm, reasonable suspicion,
sweatshirt, district court, concealed firearm,
footage, carrying, weapon, bodycam, gun,
frisks, non-descript, concealed, pocket,
waist, concealed weapon, cases, criminal
activity, left side, suspicion, noticed, arrest,
front, factual findings, visible, walking,
motion to suppress, police report, clothing

Case Summary

Overview

HOLDINGS: [1]-Defendant's motion to suppress was properly denied because the district court did not clearly err in crediting an officer's testimony that he observed on defendant a very large and obvious bulge that suggested a concealed firearm, and thus, the police had reasonable suspicion of illegal conduct sufficient to justify the stop.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Search & Seizure

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

HN1[] Search & Seizure, Scope of Protection

Under an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. the appellate court

reviews determinations of reasonable suspicion *de novo*, but factual findings underlying those determinations are reviewed for clear error, giving due weight to inferences drawn from those facts by resident judges and local law enforcement.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN2[] Warrantless Searches, Investigative Stops

In California, evidence that a person is concealing a firearm provides an adequate basis to suspect illegal activity, and thus grounds to initiate a Terry stop.

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Carrying & Concealed Permits

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

HN3[] Holders, Carrying & Concealed Permits

Where state law makes it generally unlawful to carry a concealed weapon without a permit, a tip that a person is carrying a concealed firearm raises a reasonable suspicion of potential criminal activity under Terry. That is so even if the tip does not state that the person is carrying the firearm illegally or is about to commit a

crime.

Criminal Law &
Procedure > ... > Firearms
Licenses > Holders > Carrying &
Concealed Permits

Criminal Law &
Procedure > ... > Possession of
Weapons > Unregistered
Firearm > Elements

HN4 Holders, Carrying & Concealed Permits

Under California law, it is generally illegal to carry a concealed firearm in public. [Cal. Penal Code § 25400](#).

Criminal Law &
Procedure > ... > Firearms
Licenses > Holders > Carrying &
Concealed Permits

Criminal Law &
Procedure > ... > Warrantless
Searches > Stop & Frisk > Reasonable
Suspicion

HN5 Holders, Carrying & Concealed Permits

The reasonable suspicion analysis is different in a jurisdiction that has different rules for carrying concealed weapons.

Criminal Law &
Procedure > ... > Warrantless
Searches > Stop & Frisk > Reasonable

Suspicion

HN6 Stop & Frisk, Reasonable Suspicion

In assessing the totality of the circumstances for reasonable suspicion, relevant considerations may include observing a visible bulge in a person's clothing that could indicate the presence of a weapon.

Criminal Law &
Procedure > ... > Firearms
Licenses > Holders > Carrying &
Concealed Permits

Criminal Law & Procedure > Search &
Seizure > Warrantless
Searches > Investigative Stops

HN7 Holders, Carrying & Concealed Permits

A bulge that appears to be a concealed firearm can form the basis for a Terry stop in a jurisdiction where carrying a concealed weapon is presumptively unlawful. This holding accords not only with past cases but also with the basic mode of analysis under Terry, in which courts look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.

Criminal Law &
Procedure > ... > Warrantless
Searches > Stop & Frisk > Reasonable
Suspicion

[HN8](#) Stop & Frisk, Reasonable Suspicion

The reasonable suspicion standard is not a particularly high threshold to reach and reflects a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Criminal Law & Procedure > ... > Firearms Licenses > Holders > Carrying & Concealed Permits

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

[HN9](#) Holders, Carrying & Concealed Permits

A reliable 911 tip that a person is carrying a concealed firearm raises a reasonable suspicion of potential criminal activity under. Since that is the case, Terry's reasonable suspicion standard should likewise permit this result based on an officer's own observation, grounded in law enforcement experience, that a person is potentially carrying a concealed weapon under his clothing due to the bulge that a firearm creates.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

[HN10](#) Clearly Erroneous Review, Findings of Fact

To reverse a district court's factual findings as clearly erroneous, the appellate court must determine that the district court's factual findings were illogical, implausible, or without support in the record. Moreover, where testimony is taken, the appellate court gives special deference to the district court's credibility determinations, and generally cannot substitute its own judgment of the credibility of a witness for that of the fact-finder.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

[HN11](#) Search & Seizure, Scope of Protection

There is also no requirement that officers making split-second decisions in the field first verbally memorialize their mutual agreement to stop persons whom they validly believe are violating the law.

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal

[HN12](#) Procedural Matters, Records on Appeal

The appellate court generally considers only the district court record on appeal.

a sweatshirt bulge alone did not give an objectively reasonable and particularized suspicion to stop the defendant.

Summary:

SUMMARY**

Criminal Law

The panel affirmed a criminal judgment in a case in which the district court denied the defendant's motion to suppress evidence, and the defendant entered a conditional guilty plea to being a convicted felon in possession of a firearm.

Police detained the defendant after observing a bulge under his sweatshirt that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. After searching the defendant, a convicted felon with an outstanding felony warrant, police determined he was carrying a loaded gun in a shoulder holster. The panel held that the district court did not clearly err in crediting an officer's testimony that he observed on the defendant a "very large and obvious bulge" that suggested a concealed firearm. The panel further held that reasonable suspicion supported the stop, and that the district court therefore properly denied the defendant's motion to suppress evidence found during the search.

Dissenting, District Judge Gwin wrote that, without other corroborating [**2] evidence,

Counsel: Ann C. McClintock (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Federal Defender's Office, Sacramento, California; for Defendant-Appellant.

David Spencer (argued) and Timothy H. Delgado, Assistant United States Attorney; Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

Judges: Before: Ryan D. Nelson and Daniel A. Bress, Circuit Judges, and James S. Gwin,* District Judge. Dissent by Judge Gwin.

Opinion by: Daniel A. Bress

Opinion

[*911] BRESS, Circuit Judge:

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

Police detained Tamaran Bontemps after observing a bulge under his sweatshirt [*912] that likely indicated a concealed firearm, which is presumptively unlawful to carry in California. After searching Bontemps, a convicted felon with an outstanding felony warrant, police determined he was carrying a loaded gun in a shoulder holster. The question in this case is whether police had reasonable suspicion of illegal conduct sufficient to justify the stop. We hold that the district court did not clearly err in crediting an [**3] officer's testimony that he observed on Bontemps a "very large and obvious bulge" that suggested a concealed firearm. We further hold that reasonable suspicion supported the stop. The district court therefore properly denied Bontemps's motion to suppress evidence found during the search.

I

We describe the events surrounding the stop based on the testimony of Vallejo Police Department Detectives Jarrett Tonn and Kevin Barreto at a hearing on Bontemps's motion to suppress, as well as Tonn's and Barreto's police reports and bodycam footage.

On April 18, 2018, Tonn and Barreto were patrolling Vallejo in a black police SUV. Barreto drove while Tonn sat in the front passenger seat. At around 3:51 p.m., the detectives observed a group of four young African American men walking eastbound on Robles Way, a two-lane road with a center turn lane in a mixed residential/commercial area (at one point Tonn described Robles Way as "a two-lane road on either side of the small concrete

divide," but the road was in fact narrower and had no concrete divide).

As the detectives drove past the group, Barreto noticed that one of the men, Quinton Mills, appeared to be carrying a concealed handgun in the pouch pocket [**4] of his sweatshirt. Barreto made a U-turn so that the officers could get a closer look. At this point, the men were walking eastbound on the south side of the street, and the officers were driving five to seven miles per hour westbound. Detective Barreto slowed the vehicle further as they approached the group. Although Barreto already "wasn't going fast," he "slowed down fairly rapidly" "so [the officers] could look at them."¹

From the passenger seat, Detective Tonn could "very clearly" see the four men on the sidewalk, who were not "very far away" on the other side of the street. Tonn observed that Bontemps, who was walking in front with Mills, also "had obvious indicators of having a firearm." According to Tonn, based on his "training and experience as a police officer," both Bontemps and Mills had "bulges in parts of their body" that were "consistent with carrying a firearm in public."

In particular, Bontemps, who was wearing a light gray sweatshirt that was partially zipped up, "had a very obvious bulge on his left side just above the waist area, kind of halfway maybe between his waist and his

¹ The dissent contends that Tonn and Barreto testified inconsistently. That is not the case. As the district court recognized, Tonn merely began his account once the officers had already made their first U-turn and were driving westbound.

left armpit." Due to this "very large and obvious bulge in Mr. Bontemps' sweatshirt on his [**5] left side above his waist," as well as Detective Tonn's training and his encounters with "numerous people with firearms," Tonn believed Bontemps was carrying a concealed gun.

After the SUV passed by the group, the detectives turned around and pulled up behind the four men, exited the vehicle, and ordered the group to stop and sit on the curb. All four complied. Mills had his hands in his front pocket, where Detective Barreto suspected he was concealing a [*913] firearm. Barreto unholstered his service pistol, held it by his side, and told Mills to remove his hands from the pocket. Barreto then ordered Mills to keep his hands up, reached into Mills's sweatshirt pocket, and removed a 9mm Glock 19 handgun with a live round in the chamber. (A later search uncovered a twenty-two-round magazine with nine live rounds in Mills's pants pocket.)

As Barreto was dealing with Mills, Bontemps became argumentative and began yelling at the officers and cars passing by. As the situation escalated and the officers called for backup, Detective Tonn deployed his Taser on Bontemps to subdue him. Tonn, who also had his gun drawn, ordered the men to lie on their stomachs. The detectives then handcuffed and searched [**6] Bontemps, uncovering a loaded .40 caliber Glock 22 handgun concealed in a shoulder holster on the left side of his body. The handgun's serial number had been drilled off, rendering it unreadable. When officers ran Bontemps's

information, they discovered he was on felony probation for carrying a loaded firearm in public and had an outstanding warrant for a probation violation.

In May 2018, a grand jury returned an indictment charging Bontemps with one count of being a convicted felon in possession of a firearm, in violation of [18 U.S.C. § 922\(g\)\(1\)](#). Bontemps moved to suppress the evidence gathered during the stop, including his concealed firearm, on the ground that officers lacked reasonable suspicion to stop him. The district court held a hearing at which both Detectives Tonn and Barreto testified. Defense counsel cross-examined both officers at the hearing.

The district court denied Bontemps's suppression motion, finding that reasonable suspicion justified the stop. The court determined that the stop began when the detectives exited the SUV and ordered the group to stop and sit on the curb. The court then concluded that "the detectives had an objectively reasonable, articulable suspicion at the stop's inception" [**7] based on the "visible bulge above Bontemps's waist."

In reaching this conclusion, the district court cited Detective Tonn's police report, which stated that he observed "'a bulge on [Bontemps's] left waist/side area,' and 'feared Bontemps was armed.'" The court also credited Detective Tonn's testimony that "he could see the bulge in Bontemps's jacket from the car," and that, "based on his training and experience," Tonn "believed Bontemps was carrying a firearm." Finally, the court pointed to Detective Barreto's bodycam footage that confirmed "there was

a bulge on the left side of Bontemps's jacket, and that the bulge was visible from inside the patrol car."

Bontemps entered a conditional guilty plea that reserved his right to appeal the district court's denial of his motion to suppress. The district court entered judgment and sentenced Bontemps to 57 months' imprisonment. Bontemps timely appealed.

II

A

HN1 [↑] Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), "an officer may, consistent with the *Fourth Amendment*, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). We review determinations of reasonable suspicion de novo, but "factual findings underlying those determinations are [**8] reviewed for clear error, giving 'due weight to inferences drawn from those facts by resident judges and local law enforcement [*914] .'" *United States v. Guzman-Padilla*, 573 F.3d 865, 881 (9th Cir. 2009) (quoting *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

HN2 [↑] In California, evidence that a person is concealing a firearm provides an adequate basis to suspect illegal activity, and thus grounds to initiate a *Terry* stop. Circuit precedent is clear on this point.

HN3 [↑] In *Foster v. City of Indio*, 908 F.3d

1204 (9th Cir. 2018) (per curiam), we held that "[w]here state law makes it generally unlawful to carry a concealed weapon without a permit, a tip that a person is carrying a concealed firearm raises a reasonable suspicion of potential criminal activity" under *Terry*. *Id. at 1215*. That is so "even if the tip does not state that the person is carrying the firearm illegally or is about to commit a crime." *Id.*

HN4 [↑] Under California law, which Bontemps does not challenge here, it is generally illegal to carry a concealed firearm in public. See *Cal. Penal Code § 25400*. In *Foster*, we held that "[g]iven the insignificant number of concealed carry permits issued in California, a reasonable officer could conclude that there is a high probability that a person identified in a 911 call as carrying a concealed handgun is violating California's gun laws." *908 F.3d at 1216*. We concluded the officer in *Foster* could therefore reasonably make [**9] a *Terry* stop based on this information. *Id. at 1217*. We held similarly in another more recent case. See *United States v. Vandergroen*, 964 F.3d 876, 881-82 (9th Cir. 2020) (holding that officers had reasonable suspicion to justify a stop based on a 911 call reporting that the defendant had a gun "on him" because "possessing a concealed weapon" is "presumptively unlawful in California").

HN5 [↑] Under our case law, the reasonable suspicion analysis is different in a jurisdiction that has different rules for carrying concealed weapons. See *United States v. Brown*, 925 F.3d 1150, 1153-54 (9th Cir. 2019) (holding that a tip that an

individual "had a gun" in Washington did not support a reasonable suspicion of wrongdoing because carrying a firearm is "presumptively lawful in Washington"). But Bontemps was carrying a concealed (not to mention loaded) weapon in California, and such conduct is "presumptively a crime" in that State. *Vandergroen*, 964 F.3d at 881.

That is not the end of the matter, however, because there is still the question whether officers had reasonable suspicion that Bontemps was concealing a firearm. The district court found they did, based on Detective Tonn's testimony that Bontemps had a "very large and obvious bulge" on his sweatshirt that likely indicated a concealed firearm. Our existing case law in this area supports the district court's decision [**10] below. **HN6**[¹⁵] That is because our prior cases "have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon." *United States v. Flatter*, 456 F.3d 1154, 1157-58 (9th Cir. 2006) (citing *United States v. Alvarez*, 899 F.2d 833, 835, 839 (9th Cir. 1990); *United States v. Allen*, 675 F.2d 1373, 1383 (9th Cir. 1980); and *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976)). We have also noted that "[i]n assessing the totality of the circumstances" for reasonable suspicion, "relevant considerations may include: observing a visible bulge in a person's clothing that could indicate the presence of a weapon." *Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir. 2016) (citing *Flatter*, 456 F.3d at 1157).

Bontemps points out that none of our prior cases found reasonable suspicion based

solely on a bulge suggestive of a firearm. But none of these cases presented that question, either. And none suggested that a bulge indicative of a firearm would [*915] be insufficient to justify a *Terry* stop in a jurisdiction like California.

Bontemps initially argued on appeal that a bulge alone is necessarily unreliable because the bulge could be anything (his examples: candy, a gift, or a "post-mastectomy prosthetic"). But Bontemps ultimately acknowledged at oral argument what is, of course, true: that in some circumstances a bulge could be an obvious indicator of a concealed firearm—for example, a bulge underneath a tight-fitting shirt that clearly reflects [**11] the distinct outline of a large gun.

HN7[¹⁶] Precedent suggests—and common sense confirms—what we now hold here: a bulge that appears to be a concealed firearm can form the basis for a *Terry* stop in a jurisdiction where carrying a concealed weapon is presumptively unlawful. This holding accords not only with our past cases discussed above but also with the basic mode of analysis under *Terry*, in which courts "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)).

By contrast, Bontemps's suggestion that a bulge could never provide reasonable

suspicion for a *Terry* stop to investigate a potential concealed weapon is not justified under *Terry*. [HN8](#)[] The reasonable suspicion standard "is not a particularly high threshold to reach" and reflects a "commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."¹³ [United States v. Valdes-Vega](#), 738 F.3d 1074, 1078 (9th Cir. 2013) (en banc) (alterations omitted) (quoting [Ornelas](#), 517 U.S. at 695). One can easily imagine bulges that are likely indicative of concealed firearms, especially to a police officer's [\[**12\]](#) trained eye. An ironclad rule precluding *Terry* stops in those circumstances absent further indicia of wrongdoing would improperly hamstring officers in their investigation of patently unlawful activity.

Such a rule would also run counter to our precedent involving *Terry* stops for concealed weapons. [HN9](#)[] We have previously held, as explained above, that a reliable 911 tip "that a person is carrying a concealed firearm raises a reasonable suspicion of potential criminal activity" under *Terry*. [Foster](#), 908 F.3d at 1215. Since that is the case, *Terry*'s reasonable suspicion standard should likewise permit this result based on an officer's own observation, grounded in law enforcement experience, that a person is potentially carrying a concealed weapon under his clothing due to the bulge that a firearm creates. *See Arvizu*, 534 U.S. at 273.

Finally, that a bulge can give rise to reasonable suspicion of a concealed firearm

inheres in how illicit weapons are typically held on the person. A concealed weapon is necessarily obscured by something, typically clothing. A rule that always required more than a suggestive bulge, or that required the concealed weapon to be revealed, would run counter to *Terry*'s fact-based standard and pose obvious safety concerns. [\[**13\]](#) *See also Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (per curiam) (upholding under *Terry* a pat-down after a vehicle stop because "[t]he bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer").

B

Even if a bulge indicating a concealed weapon can be sufficient to justify a [\[*916\]](#) *Terry* stop, there remains the issue whether the officers in this case had reasonable suspicion to detain Bontemps based on the particular bulge that Detective Tonn observed on Bontemps's sweatshirt. *See United States v. Elsoffer*, 671 F.2d 1294, 1299 n.10 (11th Cir. 1982) (holding that a bulge provided a basis for arrest, but noting "[w]e do not hold that any bulge on a person would give probable cause for an arrest"). Here we return to the thrust of Bontemps's argument on appeal, which is that a bulge can be indicative of many things, and that officers could use perceived bulges as a pretext for making unjustified *Terry* stops.

On this point, Bontemps argues that the bulge in his sweatshirt was not suggestive of a firearm, citing cases involving searches

premised on bulges perceived to be drugs. In those cases, courts held that the bulges in question did not create either reasonable suspicion to search or probable cause to arrest. *See [**14] United States v. Jones, 254 F.3d 692 (8th Cir. 2001); United States v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999)*. Similarly, in *United States v. Job, 871 F.3d 852, 861 (9th Cir. 2017)*, and where a *Terry* frisk uncovered drug paraphernalia, we held that police lacked reasonable suspicion to perform the search. That the defendant's "pants appeared to be 'full of items' and he appeared nervous d[id] not support the conclusion that he was engaged in criminal activity." *Id.*

Cases involving "drug bulges," however, present somewhat different considerations than "gun bulges" under the fact-based *Terry* inquiry. While guns are made of rigid materials (such as metal or hard plastics) and possess a relatively distinctive shape, drugs or packages of drugs come in different shapes and sizes, some quite small, soft, and nondescript. *See Eustaquio, 198 F.3d at 1071* (explaining that a bulge perceived to be drugs could indicate "any number of non-contraband items").

Job, for instance, did not even appear to involve a distinctive bulge at all. *See 871 F.3d at 861*. In that case, we expressly contrasted an observation that the defendant's pants appeared to be "full of items" with "an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon." *Id.* (quoting *Flatter, 456 F.3d at 1157*). Even so, some bulges have been held to create not only reasonable suspicion but

even probable [**15] cause to arrest for drug possession. *See Elsoffer, 671 F.2d at 1299* ("In this case the unusual size and shape of the bulge and, given its unusual size and shape, its abnormal position on Elsoffer's person alone provided not only reasonable suspicion but also probable cause for Elsoffer's arrest.").

While "drug" bulge cases involve some different considerations owing to the physical differences between pocketed drugs and concealed guns, Bontemps's overall concern with indiscriminate stops based on bulges alone remains a valid one in the concealed firearm context. And it is a concern of which we are mindful. In this case, however, we conclude that the district court's basis for finding reasonable suspicion was soundly supported in the record based on factual findings that were not clearly erroneous. *Guzman-Padilla, 573 F.3d at 881*. And those facts, taken together, created reasonable suspicion of criminal activity.

Detective Tonn testified that he saw a "very large and obvious bulge in Mr. Bontemps' sweatshirt" that appeared, based on his training and experience, to be a concealed firearm. After a hearing in which the district court was actively engaged and observed Tonn (and Barreto) testify, including after cross-examination, the district court [**16] credited Tonn's account based [**917] on Tonn's firsthand description of what he saw and his base of knowledge as a law enforcement officer.

Our fine colleague in dissent maintains that Tonn only testified to seeing a "non-descript

bulge." That is not correct. Far from regarding the bulge as "non-descript," Tonn testified that Bontemps had a bulge on his "body consistent with my training and experience as a police officer, consistent with carrying a firearm in public." Tonn thus believed Bontemps was "carrying a firearm" based on the "obvious bulge in Mr. Bontemps' sweatshirt on his left side about his waist." Tonn repeatedly described the bulge as a "very obvious bulge," a "very large and obvious protrusion coming from his left side," and "fairly obvious." The bulge was "obvious" to Tonn for one reason: it was an "obvious indicator[] of having a firearm."

The dissent is thus mistaken in claiming there was "no evidence to suggest that the bulge Detective Tonn saw in this case was anything special." And the dissent is equally mistaken in asserting that "Detective Tonn never described the bulge as obviously a firearm." That was the central point Tonn repeatedly made throughout his testimony. While [**17] our cases "have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon," *Flatter*, 456 F.3d at 1157-58, the dissent gives Tonn's observations no weight.

HN10 "[T]o reverse a district court's factual findings as clearly erroneous, we must determine that the district court's factual findings were illogical, implausible, or without support in the record." *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010) (citing *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). Moreover, "[w]here testimony is

taken, we give special deference to the district court's credibility determinations," *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008), and generally "cannot substitute [our] own judgment of the credibility of a witness for that of the fact-finder." *United States v. Durham*, 464 F.3d 976, 983 n.11 (9th Cir. 2006).

Nothing about the district court's central factual finding was "illogical" or "implausible." *Spangle*, 626 F.3d at 497. On the contrary, it enjoys ample support in the record. From his vantage point in a slowly moving SUV that had decelerated further to get a good look, Tonn could "very clearly" see Bontemps, who was not "very far away" on the opposite side of a residential street in broad daylight. Bontemps was also carrying a gun in a shoulder holster, and thus on a part of his body where other items would be less likely to be held (this was not the [**18] pants "full of items" that we considered in *Job*). Tonn also immediately recognized the bulge as a gun based on his training and "all the numerous people I've stopped."

While the fact-driven nature of a *Terry* analysis does not mean any one of these factors is necessary to justify an investigatory stop such as this, they were sufficient in this case when considered together. See *Arvizu*, 534 U.S. at 273; *Thomas*, 818 F.3d at 877. The dissent is thus incorrect in implying that our holding allows any bulge of any kind to justify a *Terry* stop. Our holding is instead that a bulge suggestive of a firearm can be sufficient to create reasonable suspicion, and that in this case there was ample

evidence from which to conclude that Bontemps's "obvious" bulge was likely a concealed firearm.

In arguing for a contrary result, the dissent ignores the district court's role as factfinder, *Spangle*, 626 F.3d at 497, the record in this case, and the more modest [*918] reasonable suspicion standard, which is less than probable cause and "considerably short" of a "preponderance of the evidence," *Arvizu*, 534 U.S. at 274. The dissent labors to manufacture supposed inconsistencies between the officers' testimony and their police reports. But the officers' accounts were consistent on the core points, and there [**19] is no requirement that the initial police reports and later testimony of two different officers all be mirror images in every picayune respect, especially when the officers were focused on multiple suspects at the same time. Tellingly, Bontemps does not raise any of the dissent's claimed "inconsistencies" in his briefing in this court. Moreover, none of the minute inconsistencies the dissent seizes upon undermines Tonn's central and well-supported testimony that Tonn observed on Bontemps a bulge that was "obviously" suggestive of a concealed firearm. The dissent's related contention that we rely on "facts not found in the record" is unfortunate and completely inaccurate. Everything we have set forth comes from the record below.²

² Other points the dissent advances confirm its departure from governing legal standards. For example, the dissent finds it "peculiar that Detectives Barreto and Tonn did not say anything to each other about their suspicions" before initiating the stop. But there is no record on this point one way or the other (the bodycam footage starts after the officers decide to initiate the stop and the officers were not

The officers' bodycam footage also clearly supports Tonn's testimony. This footage is not necessary to our holding, but we note it as corroborative. The district court found, and the parties do not dispute, that the seizure began when the officers ordered the men to stop. The bodycam footage for the most part depicts events after the seizure had already occurred. But we agree with the district court that this footage plainly supports Tonn's testimony because [**20] it shows an obvious bulge on Bontemps's sweatshirt that distinctly resembles the shape of a firearm. And contrary to the dissent, the bodycam footage shows a gun-shaped bulge both when Bontemps's hands were raised and when they were down. In short, this was simply not a case where Bontemps was stopped for a nondescript bulge, with officers lucking upon a gun. Cf. *Job*, 871 F.3d at 861.

Bontemps seeks to avoid this conclusion by citing statistics concerning frisks in other jurisdictions. See David Rudovsky & David A. Harris, *Terry Stops-and-Fisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 Ohio State L.J. 501, 541-42 (2018). For example, he cites a study of 2.3 million frisks for weapons in New York City between 2004 and 2012, in which weapons were reportedly uncovered in 1.5% of the searches. *Id. at 541*; *Floyd v. New York City*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013). Bontemps also cites data

asked about their discussions with each other). In any event, the police reports and testimony clearly show that both officers independently believed a stop was justified. *HN11*[↑] There is also no requirement that officers making split-second decisions in the field first verbally memorialize their mutual agreement to stop persons whom they validly believe are violating the law.

from New York City in the years 2014 to 2016, reportedly showing that "of 220 frisks based on a 'bulge,' only one weapon was seized, a hit rate of less than 0.5%." *Rudovsky & Harris, supra, at 542.*

These statistics do not undermine the district court's factual findings here. *HN12*[
 ↑] The statistics were not introduced below, and we generally "consider only the district court record on appeal." *Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003)*.

Regardless, they do not change the outcome of [**21] this case. Even taking the data at [*919] face value, statistics on the percentage of weapons recovered during *Terry* stops generally (and in a different jurisdiction) say nothing about whether the officers in this case had reasonable suspicion to detain Bontemps based on the "very large and obvious bulge in Mr. Bontemps' sweatshirt" that a trained detective observed. And Bontemps nowhere explains whether the data he cites concerning "220 frisks based on a bulge" involved bulges as distinctive as the one here.

Permitting aggregate data to dictate the result in this case would risk abrogating our duty to examine "each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu, 534 U.S. at 273* (quoting *Cortez, 449 U.S. at 417*). We can acknowledge that the studies Bontemps cites raise valid questions, while at the same time holding that the district court in this case—based on the officer testimony it permissibly credited—did not err in denying Bontemps's motion to suppress.

For the foregoing reasons, the judgment is **AFFIRMED.**

Dissent by: James S. Gwin

Dissent

GWIN, District Judge, dissenting:

The *Terry* reasonable suspicion standard requires Detective Tonn have had an objective and particularized [**22] basis to believe that Bontemps had committed or was about to commit a crime.

The district court found a reasonable suspicion for the stop based on only one detective's testimony that he saw a non-descript sweatshirt bulge as Bontemps walked on the opposite side of the street. The detective said that he believed the bulge suggested a concealed firearm.

The detective said he could see the bulge from a vehicle passenger seat travelling in the opposite direction. The detective testified that he did not see any exposed weapon barrel or other firearm part. Instead, he testified that he only saw a non-descript sweatshirt bulge.

The detective stopped Bontemps even though the officers had received no background reports of any criminal activity. The detective stopped Bontemps mid-afternoon and in a general mixed commercial-residential area.

Without other corroborating evidence, a

sweatshirt bulge alone did not give an objectively reasonable and particularized suspicion to stop Bontemps. I respectfully dissent.

I

On April 18, 2018, near 4:00 pm, Vallejo Detectives Barreto and Tonn patrolled a mixed commercial-residential area in a police SUV. Detective Barreto drove. Detective Tonn rode in the passenger [**23] seat.

The majority and the district court find the detectives gave consistent travel path descriptions before the stop and arrest location. The majority finds "Tonn merely began his account once the officers had already made their first U-turn and were driving westbound"¹ However, the detectives' accounts are not consistent.²

¹ Maj. Op. 4 n.1.

² Detective Barreto's police report statements conflict with Barreto's suppression hearing testimony. In his report, he wrote that the detectives were *driving on Robles Way, approaching Glen Cove Parkway*. At the suppression hearing, he testified that the detectives *waited at a red light on Glen Cove Parkway and made a left turn onto Robles Way*. Similarly, in his police report, he wrote that the detectives drove past the group once, making a single U-turn to approach the group from behind. But at the hearing, Barreto testified that the detectives drove past the group twice, making two U-turns before pulling over to stop the group.

Moreover, some of Detective Tonn's testimony simply cannot square with Detective Barreto's testimony. For example, Detective Tonn testified that when he noticed the group the detectives "were driving slow" because "[they] had just pulled out of a parking lot," not that they had just made a U-turn. Likewise, Detective Tonn testified that "Detective Barreto slowed down fairly rapidly, even though he wasn't going fast, so we could look at [the group]." But Detective Barreto never mentions anything about slowing down the SUV to get a closer look. Instead, Barreto testified that after initially observing the group, that "[a]t that time I turned the car around, came back at the individuals and circled back for [sic] around behind them."

To me, it does not seem that the detectives began their accounts at different points in time. Rather, it seems that the detectives have

[*920] The detective testimony differences do not end with the path to the stop. The detectives also relied on different observations to justify the stop.

Before the stop, Detective Barreto did not notice anything suspicious regarding Appellant Bontemps. Instead, Barreto testified that he first passed Bontemps's group from behind. Detective Barreto testified that as the detectives passed the group from behind, he looked right from the driver's seat, past Detective Tonn, out the window, and noticed that Quinton Mills—and only Quinton Mills—had something weighing down the front waist area of his sweatshirt.

Only Detective Tonn testified to noticing anything suspicious about Bontemps. And Tonn testified that Detective [**24] Barreto had already driven down the street, made a U-turn to drive back facing the Bontemps's group before he observed anything suspicious regarding Bontemps.

After making the U-turn to face Bontemps from across the road, Detective Tonn testified that he looked left from the passenger's seat, past Barreto, out the front window, across the road, and noticed that two men in the group had sweatshirt bulges—Quinton Mills and Appellant Tamaran Bontemps.

It is peculiar that Detective Tonn saw a bulge in Bontemps's sweatshirt when Detective Barreto did not. Detective Barreto noticed Mills as the SUV passed the group from behind and on the same side of the

different accounts.

road; Detective Tonn noticed Mills and Bontemps as the SUV passed the group on the opposite side.

It is even more peculiar that Detectives Barreto and Tonn did not say anything to each other about their suspicions. Neither detective testified that the other detective said anything about firearm concerns before initiating the stop. Indeed, Detective Barreto states in his report that the first time he noticed and alerted Detective Tonn of Bontemps's firearm was well after Bontemps had complied with the detectives' order to sit on the curb.

The [**25] detectives did give similar accounts of how the stop and arrest unfolded.

Detective Barreto testified that he turned the SUV after he suspected Mills, but not Appellant Bontemps, had a concealed firearm. Detective Tonn agreed that Barreto made a U-turn at one point. The detectives then approached the Mills-Bontemps group from behind. The detectives agree that Barreto exited the car first and called out for the men to stop. And they agree that the men complied with the detectives' orders and sat on the curb.

Barreto and Tonn searched Mills and Bontemps and discovered firearms on both men. The detectives arrested both men.

On July 17, 2018, Bontemps moved to suppress the evidence as the product of an illegal search. After a suppression hearing, [*921] the district court denied the suppression motion. Bontemps appeals this denial.

In denying the suppression motion, the district court found sufficient evidence to create a reasonable suspicion that Bontemps was carrying a concealed firearm. Because California allows so few concealed-carry permits, weapon possession becomes presumptively illegal in California.³

In addition to Tonn's statements, the district court relied upon Detective Barreto's bodycam [**26] footage.⁴ However, the bodycam footage did not show Bontemps as Detective Tonn would have seen Bontemps before the stop—across the road and while Bontemps walked opposite Tonn's direction.

Instead, the district court relied upon on footage where Bontemps's arms are raised from his side. The district court found that the footage "confirms that there was a bulge on the left side of Bontemps's jacket, and that the bulge was visible from inside the patrol car."

The majority concludes that the district court did not clearly err when it found, and based upon Tonn's testimony alone, that Bontemps's sweatshirt's nondescript bulge created reasonable suspicion to stop Bontemps.⁵

I disagree that sufficient evidence supported a reasonable suspicion for the *Terry* stop.

II

³ See *Foster v. City of Indio*, 908 F.3d 1204, 1216 (9th Cir. 2018).

⁴ "Detective Barreto testified that he turned on his bodycam shortly before exiting the patrol vehicle." *United States v. Bontemps*, No. 18-099, at 5, 2018 U.S. Dist. LEXIS 185067 (E.D. Cal. Oct. 29, 2018) (order denying motion to suppress).

⁵ Maj. Op. 13-14.

The majority's reasonable suspicion analysis is mistaken.

Today, the majority holds that "a bulge suggestive of a firearm can be sufficient to create reasonable suspicion, and that in this case there was ample evidence from which to conclude that Bontemps's 'obvious bulge' was likely a concealed firearm."⁶ This "ample evidence" is "Detective Tonn's testimony that Bontemps had a 'very large and obvious bulge' on [**27] his sweatshirt that likely indicated a concealed firearm."⁷

A sweatshirt bulge alone, especially one as non-descript as here, and without any associated suspicious conduct or circumstances cannot create a reasonable suspicion of criminal activity.

Detective Tonn provides limited support for his conclusion that *Bontemps's* bulge was a concealed firearm.

In his police report, Tonn wrote: "[Co-Defendant] *Mills* had something very heavy sagging in his front sweater pocket. The weight appeared greater than a cell phone and was *consistent with a firearm*. Bontemps had a bulge on his left waist/side area." Detective Tonn's report says that *Mills's* bulge was consistent with a firearm, but not Bontemps's.

At the suppression hearing, Tonn testified that "[t]wo of the persons in the group had bulges in parts of their body consistent with my training and experience as a police officer, consistent with carrying a firearm in

public[.]" He testified, "I saw Mr. Bontemps, he had a very obvious bulge on his left side just above the waist area, kind of halfway maybe between his [*922] waist and his left armpit." Later in the hearing, Tonn reiterated that there was a "very large and obvious bulge in Mr. Bontemps's [**28] sweatshirt on his left side above his waist[.]"

Detective Tonn concluded that Bontemps's sweatshirt bulge was a firearm bulge, not because it was distinctly shaped or plainly appeared to be a firearm, but because the bulge was located in a position that Tonn believed consistent with carrying a firearm in public.

The detectives found Bontemps cradled a firearm in a shoulder holster. In the broad majority of firearm cases, shoulder holsters seldom see use. Bulges in the side-chest area could be various innocuous items.

The majority takes issue with my characterizing Bontemps's bulge as non-descript. But the record supports the characterization.

Compare Detective Barreto's description of *Mills's* bulge with Detective Tonn's description of Bontemps's bulge.

In the police report filed on arrest day, Detective Barreto wrote about *Mills*, "I saw that there was a noticeable bulge in this pocket and *it was in the shape that appeared to be a firearm*." Likewise, Barreto testified about *Mills*, "[a]s we passed by, I looked to my right and saw a subject wearing a sweater with a front pocket. In the front pocket, *it appeared*

⁶ Maj. Op. 15.

⁷ Maj. Op. 8-9.

*there was the shape of like a handgun sort of pressing down on the pocket from [**29] the inside.*" Barreto states that Mill's bulge was firearm shaped.

Contrastingly, Tonn never describes Bontemps's bulge as firearm shaped.

The majority emphasizes Tonn described Bontemps's bulge as obvious.⁸ But Detective Tonn never described the bulge as obviously a firearm. The majority also relies on the detectives' bodycam footage. The majority states " [the] footage plainly supports Tonn's testimony because it shows an obvious bulge on Bontemps's sweatshirt that *distinctly resembles the shape of a firearm.*"⁹

But the bodycam footage is not what Detective Tonn saw before the stop. Every day we see individuals walking down sidewalks. Almost never do we see people strolling down sidewalks with their arms raised in a surrender position.

As the majority acknowledges, "[t]he bodycam footage for the most part depicts events after the seizure had already occurred," and after the point at which the *Fourth Amendment* requires reasonable suspicion for a stop.¹⁰

Moreover, the bodycam footage does not show Bontemps's position when Tonn made his observations. Rather, it shows Bontemps walking towards the detectives, within one car lane width and within 12 feet, and with

his hands out at his side.

Further, the bodycam footage [**30] was not taken from the passenger seat of the patrol car, through the front window, past Officer Barreto, and across the road. Instead, it shows the perspective from a standing and nearby officer.

Contrary to the majority's insistence, this is a case where an individual was stopped for a non-descript bulge with officers lucking upon a gun.¹¹

In this *Terry* stop, context is crucial. The stop occurred at 4:00 pm on a sunny day near a commercial area. Detectives [*923] Barreto and Tonn had received no earlier reports of nearby criminal activity.¹² The four detained individuals simply walked down a street in an otherwise non-threatening manner. No other identified activity supported suspicion that criminal activity was afoot.

In my view, seeing a non-descript bulge without more should not allow police officers to stop and frisk citizens. And the majority's holding gives license to stop and frisk any citizen based upon nothing more than officer testimony that the officer had seen a bulge.

⁸ Maj. Op. 13-15.

⁹ Maj. Op. 16 (emphasis added).

¹⁰ Maj. Op. 16.

¹¹ Maj. Op. 16.

¹² The majority states that "our prior cases 'have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon.'" Maj. Op. 9. In all the cases the majority cites, there was nearby criminal activity in addition to the suspect's bulge. See *United States v. Flatter*, 456 F.3d 1154, 1155-1156 (9th Cir. 2006) (mail theft); *United States v. Alvarez*, 899 F.2d 833, 835 (9th Cir. 1990) (bank robbery); *United States v. Allen*, 675 F.2d 1373, 1377-1379 (9th Cir. 1980) (drug trafficking); *United States v. Hill*, 545 F.2d 1191, 1192-1193 (9th Cir. 1976) (bank robbery).

The majority brushes aside studies suggesting that officers are generally bad at predicting whether a suspect is armed and studies suggesting that reliance upon a bulge poorly predicts whether that suspect is actually **[**31]** armed.

One study looked at 2.3 million 2004-2012 New York City weapons frisks. There, officers discovered weapons in only 1.5% of frisks.¹³

Another study analyzed 220 2014-2016 Philadelphia weapons frisks based on visible bulges; In the 220 frisks, police seized only one weapon.¹⁴ The Philadelphia study suggests that bulges alone poorly associate with firearm possession¹⁵

The majority questions the study relevance by arguing that "Bontemps nowhere explains whether the data he cites concerning '200 frisks based on a bulge' involved bulges as distinctive as the one here."¹⁶ But as discussed above, if the majority disregarded the bodycam footage, as it should, then there would be no evidence to suggest that the bulge Detective Tonn saw in this case was anything special.

Ultimately, the majority concludes that "[t]hese statistics do not undermine the district court's factual findings here."¹⁷

¹³ [Floyd v. New York City, 959 F. Supp. 2d 540, 558-559 \(S.D.N.Y. 2013\)](#).

¹⁴ David Rudovsky & David A. Harris, Terry Stops-and-Fisks: The Troubling Use of Common Sense in a World of Empirical Data, [29 Ohio. St. L.J. 501, 541-42 \(2018\)](#).

¹⁵ *Id.*

¹⁶ Maj. Op. 17.

¹⁷ Maj. Op. 17.

Maybe so. But they do undermine the *legal sufficiency* of those factual findings. It is imprudent to sanction a rule that allows a mere bulge to supply reasonable suspicion. Especially when the bulge does not accompany other suspicious factors.

In deciding this case, the majority misses an appropriate *de novo* **[**32]** reasonable suspicion review. It improperly relies on irrelevant bodycam footage and crafts a rule based on facts not found in the record.

I respectfully dissent.

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FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 24 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TAMARAN EDWARD BONTEMPS,

Defendant-Appellant.

No. 19-10195

D.C. No.
2:18-cr-00099-JAM-1

Eastern District of California,
Sacramento

ORDER

Before: R. NELSON and BRESS, Circuit Judges, and GWIN,* District Judge.

Judge Nelson and Judge Bress voted to deny the petition for rehearing en banc. Judge Gwin recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

United States of America,
Plaintiff,
v.
Tamaran Edward Bontemps,
Defendant.

No. 2:18-cr-00099-JAM

**ORDER DENYING DEFENDANT'S MOTION
TO SUPPRESS**

This matter is before the Court on Defendant Tamaran Edward Bontemps's ("Defendant" or "Bontemps") Motion to Suppress. Mot. to Suppress, ECF No. 16. The Court held an evidentiary hearing on the Motion on October 23, 2018. For the reasons set forth below, the Defendant's motion is denied.

I. FACTUAL BACKGROUND¹

In the late afternoon on April 18, 2018, Bontemps and three

¹ The facts presented are taken from Defendant's Motion papers, the United States' opposition thereto, the exhibits attached to the Motion papers, and the exhibits admitted at the Motion hearing. The detectives' police reports are also supplemented by footage from the detectives' body cameras which the Court had reviewed.

of his friends were walking down the sidewalk in Vallejo, California. Vallejo Police Detectives Kevin Barreto and Jarrett are part of Vallejo Police Department's Crime Reduction Team. Barreto Report. Detective Barreto's crime report indicates that he was driving westbound on Robles Way when he observed a bulge in the front pocket of the young man walking in the front of the group, Quinton Mills. Both detectives' reports indicate that the object inside Mr. Mills' pocket appeared to be very heavy, causing the pocket to sag. The reports noted the detectives' beliefs that the object in Mills' pocket was a firearm. Tonn also reported that he saw a bulge on Bontemps's left waist/side area.

The detectives stopped the group, and the four men sat on the sidewalk or curb, as instructed. The young men were quiet, except Bontemps, who verbally challenged the reason for the stop. Early in the encounter, Tonn tased Bontemps. After being tased, Bontemps rolled onto his stomach as instructed, as did two of the other young men. Mills stayed still with his hands up as Barreto removed a gun from the front pocket of Mills' hoodie.

Barreto's report stated that, while Bontemps was sitting on the curb next to Mills, Barreto saw a black object, which he believed to be a gun, inside the left side of Bontemps's sweatshirt. Barreto and Tonn ask Bontemps if he had a gun on him, which Bontemps denied. Barreto cuffed Bontemps and removed a gun from a holster inside Bontemps's sweatshirt. The serial number on Bontemps's gun had been drilled off. Bontemps continued to verbally protest the stop.

Eventually, additional officers arrived at the scene. Tonn

moved Bontemps into the backseat of a police vehicle, taking him to the hospital for medical clearance. A review of Bontemps's information through the system came back with an outstanding felony warrant for his arrest in Sacramento County. Bontemps was also on felony probation at the time of the stop.

II. OPINION

A. Legal Standard

Bontemps moves to suppress evidence obtained resulting from the seizure and subsequent search, on the grounds that the police did not have reasonable suspicion to seize him. Mot. at 4. The Government argues that reasonable, articulable suspicion supported the investigatory stop and protective searches. Opp'n at 2.

The Fourth Amendment to the Constitution prohibits "unreasonable searches and seizures" by the Government. United States v. Arvizu, 534 U.S. 266, 273 (2002). Those protections extend to brief investigatory stops that fall short of arrest. Id. An officer need not have probable cause to justify an investigatory stop; instead, the Fourth Amendment is satisfied where there is "reasonable suspicion to believe that criminal activity may be afoot." Id. (internal quotation marks omitted). Whether an officer has reasonable suspicion is based on a totality of the circumstances approach where the detaining officer must have had a "particularized and objective basis" for suspecting legal wrongdoing. Id. "Even in high crime areas, where the possibility that any given individual is armed is significant, Terry requires reasonable, individualized suspicion

before a frisk for weapons can be conducted." Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990).

Relevant considerations in assessing the totality of the circumstances include whether the officer observes "a visible bulge in a person's clothing that could indicate the presence of a weapon"; "sudden movements" suggesting a potential assault or "attempts to reach for an object that was not immediately visible"; "evasive and deceptive responses" to an officer's questions; unnatural hand postures that suggest an effort to conceal a firearm; and whether the officer observes anything during an encounter with the suspect that would dispel any suspicion regarding the suspect's potential involvement in a crime or likelihood of being armed. Thomas v. Dillard, 818 F.3d 864, 877 (9th Cir. 2016), as amended (May 5, 2016); see also United States v. Flatter, 456 F.3d 1154, 1157 (9th Cir. 2006) ("[W]e have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon."). Contra United States v. Job, 871 F.3d 852, 861 (9th Cir. 2017) ("But the facts that Job's pants appeared to be 'full of items' and he appeared nervous do not support the conclusion that he was engaged in criminal activity.").

B. Analysis

The United States argues that the detectives had "objectively reasonable[e], articulable suspicion" to stop Bontemps, based on his "erratic behavior" and "the suspicious object [Detective Tonn] saw in [Bontemps's] sweatshirt." Opp'n at 6. The Court finds that Bontemps's behavior alone did not

justify the detectives' initial seizure. Here, the stop occurred once the young men began complying with Tonn and Barreto's commands to "stop" and "sit down" on the curb. See Terry v. Ohio, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). At this point, Bontemps's hands were raised, and he was quietly complying with the detectives' requests. Mot. at 2.

The visible bulge above Bontemps's waist, however, does support this Court's finding that the detectives had an objectively reasonable, articulable suspicion at the stop's inception. Detective Tonn's report says that he saw "a bulge on [Bontemps's] left waist/side area," and "feared Bontemps was armed." Tonn Report. At a hearing on October 23, Detective Tonn testified that, as the detectives were going westbound on Robles Drive, he could see the bulge in Bontemps's jacket from the car. Tonn explained that, based on his training and experience, he believed Bontemps was carrying a firearm. Detective Barreto testified that he turned on his bodycam shortly before exiting the patrol vehicle. The video from his bodycam confirms that there was a bulge on the left side of Bontemps's jacket, and that the bulge was visible from inside the patrol car.

In California, it is a crime to "carr[y] a loaded firearm on the person or in a vehicle while in any public place or on any public street." Cal. Penal Code § 25850. Because Detective Tonn believed the bulge in Bontemps's jacket was a firearm, he had "reasonable suspicion to believe that criminal activity may

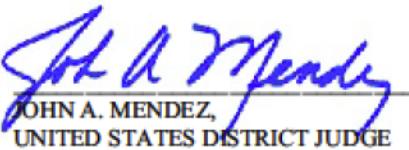
be afoot." See Arvizu, 534 U.S. at 273. Accordingly, the Court finds that the detectives' investigatory stop of Mr. Bontemps was constitutional.

III. ORDER

For the reasons set forth above, the Court DENIES Plaintiff's Motion to Suppress.

IT IS SO ORDERED.

Dated: October 29, 2018


JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 2:18-cr-00099 JAM
)
TAMARAN BONTEMPS,)
) Sacramento, CA
Defendant.) 1:15 P.M.
)
)

REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS

TUESDAY, OCTOBER 23, 2018

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KELLY O'HALLORAN, OFFICIAL COURT REPORTER, USDC -- (916) 448-2712

1 SACRAMENTO, CALIFORNIA

2 TUESDAY, OCTOBER 23, 2018, 1:15 P.M.

3 ---oo---

4 THE CLERK: Calling criminal 18-99; United States
5 versus Tamara Edward Bontemps.

6 THE COURT: All right. The parties may state their
7 appearances.

8 MR. DELGADO: Good afternoon, your Honor. Timothy
9 Delgado for the United States. Also with me at counsel table
10 is supervising paralegal Donna Castruita.

11 MR. PETRIK: Good afternoon, your Honor. Michael
12 Petrik, Office of the Federal Defender, for Mr. Bontemps who
13 is present before the Court. He's in custody.

14 THE COURT: All right. The Court's scheduled this
15 afternoon for a hearing on the motion to suppress filed by
16 Mr. Petrik on behalf of his client.

17 Mr. Petrik, you may call your first witness. Is that
18 why we're having this hearing?

19 MR. PETRIK: We're not presenting any witnesses, your
20 Honor. I think that's clear from the moving papers.

21 THE COURT: My impression was you wanted a hearing,
22 and you wanted to cross-examine the two police officers. You
23 don't now?

24 MR. PETRIK: Your Honor, if I remember the hearing
25 the last time we were in court correctly, you said that you

1 needed the police officers here to establish a timeline
2 regarding the exhibits that the parties submitted, the body
3 cam. I think it's clear from my papers that Mr. Bontemps was
4 seized under Supreme Court and Ninth Circuit law, and there
5 was no reasonable suspicion or probable cause to do that at
6 the time he was seized.

7 And if you recall in the government's moving papers,
8 they have a photograph of Mr. Bontemps just before he was sat
9 down on the curb with his arms in the air at gunpoint, and
10 there's nothing visible in his jacket. So I think that -- I
11 agreed to come to an evidentiary hearing because I thought
12 that was what the Court wanted, not because I requested. I
13 submitted papers and evidence that --

14 THE COURT: You and I have two completely different
15 views of why we're here today. I don't have the transcript
16 from the proceeding, but it seemed clear to me. I had seen
17 the videos, and that you, I asked you specifically, I seem to
18 recall, whether you wanted a hearing and whether you wanted to
19 question the police officers. I think you said yes. If you
20 don't want to, that's fine. I'll hear your further arguments,
21 and I'll rule on the motion without. I just wanted to give
22 you an opportunity to cross-examine the police officers. I've
23 seen the video. I know what the timeline is. If you want to
24 just base it on the video, that's fine. But I thought, again,
25 I was clearly left with the impression that you needed the

1 officers here and you wanted to cross-examine them. But if
2 you don't, that's fine. We'll argue the motion without a
3 hearing, unless the government has some reasons to -- did you
4 bring the officers here?

5 MR. DELGADO: They are here, your Honor. We are
6 prepared to argue or to take witness testimony. I'll defer to
7 the defense on that.

8 THE COURT: If we don't need witness testimony and
9 you just want to argue the motion, you've already written the
10 motion, I've read the motion, I've looked at the videos, then
11 we'll do that. You don't have to put on testimony. It's up
12 to you. I was just giving you an opportunity to cross-examine
13 the police officers. So let me know what you want to do.

14 MR. PETRIK: Well, I guess I'm just a little
15 surprised, but I --

16 THE COURT: Use the microphone. I don't care if
17 you're surprised. You shouldn't be surprised. We obviously
18 miscommunicated. Let's move forward. Do you want the
19 officers to testify or not? Just yes or no.

20 MR. PETRIK: No.

21 THE COURT: Okay. You can release the officers, and
22 I'll hear argument.

23 MR. DELGADO: Your Honor, may they stand by at least
24 until we've completed argument?

25 THE COURT: Sure.

1 MR. DELGADO: Just in case there are any surprises
2 during the argument, I think it would be helpful to have them
3 on standby.

4 THE COURT: That's fine. I don't know what else you
5 two want to argue, but I've got the briefs.

6 Mr. Petrik, it's your motion. What else would you
7 like to argue, if anything?

8 MR. PETRIK: Well, your Honor, I think that -- I
9 think that, first of all, I've got to get closer to the
10 microphone, as my client has advised me. But I think that our
11 position is clearly outlined in the papers that I filed. And
12 I think that -- I recall this from the last hearing we had in
13 this case, too, was that you had said it was apparent there
14 was a seizure in the case. And I think that is substantiated
15 by the videos and by the reports that the government filed in
16 their responsive papers and that Mr. Bontemps was seized. And
17 I think the reason Mr. Bontemps was seized in this case is
18 because the officers thought that the guy in the blue hoodie,
19 Mr. Mills, was carrying a firearm. And there was no
20 reasonable suspicion and there was no probable cause to seize
21 Mr. Bontemps. But they seized all four of the individuals
22 that were walking down the street that day, and they searched
23 them all. And after they tased Mr. Bontemps, they found a
24 firearm on his person. But the timing of the matter I think
25 is the crucial element in this case because the seizure is

1 well before there is any suspicion or cause to stop and hold
2 Mr. Bontemps. And so I think that that's where the Court
3 should direct its focus.

4 And as far as the inevitable discovery argument goes
5 that the government set forth at the end, I think that is
6 taken care of by *Ybarra v. Illinois*, which is also cited in my
7 papers. You just can't search everybody who are in the
8 vicinity or in close proximity to somebody that you think
9 maybe or has committed a crime. Despite what the officers say
10 their protocol is apparently, it's illegal. So I would urge
11 the Court to disregard that argument by the government.

12 THE COURT: Okay. Mr. Delgado.

13 MR. DELGADO: Your Honor, turning first I think to
14 the sequence of events that occurred --

15 THE COURT: I'm sorry to interrupt. First, you're
16 not arguing that there was not a seizure in this case. I
17 didn't get that from your papers.

18 MR. DELGADO: Oh, no.

19 THE COURT: You're arguing there was probable cause.

20 MR. DELGADO: Reasonable suspicion, your Honor.

21 THE COURT: Reasonable suspicion. Sorry.

22 MR. DELGADO: Yes, your Honor. Yeah, I think the
23 defense motion, it's not predicated. I mean, it is entirely
24 focused on whether there was a seizure. I don't think the
25 government disputes that there was, in fact, a seizure here.

1 Our claim throughout has been that this was supported by
2 reasonable suspicion for the officers at least to investigate
3 further.

4 I think in terms of analyzing the motion as well as
5 the officers' conduct here, if we take this sort of frame by
6 frame from what the officers knew or at least believed at
7 certain points in time, it might assist in the propriety of
8 their conduct here.

9 We know from the police reports that the officers
10 were driving westbound on Robles Way. They see a group of
11 four young men walking eastbound towards them. As they are
12 nearing, the officers see what clearly appears to be a gun
13 shaped, some sort of device in the lead defendant, or I'm
14 sorry, in Mr. Quinton Mills' --

15 THE COURT: Mr. Mills. Right.

16 MR. DELGADO: Yes, in his hoodie. Mr. Mills also has
17 his hands in his pockets at the time. So based upon that,
18 which both officers in their report, they are consistent in
19 stating that they both believe that Mr. Mills was carrying a
20 firearm. At that point that's reasonable suspicion to
21 investigate a little bit further.

22 THE COURT: All four or just Mr. Mills?

23 MR. DELGADO: Well, Mr. Mills, your Honor. And I
24 think at that point then, the officers make a U-turn, they
25 park their car, and at the moment they do so, they see

1 Mr. Mills -- they have reasonable suspicion to investigate
2 Mr. Mills further. They've made the U-turn and they park the
3 car, and as they're getting out of their car, I think at that
4 point their reasonable suspicion incorporates Mr. Bontemps'
5 conduct.

6 THE COURT: Why?

7 MR. DELGADO: Because, your Honor, at the point at
8 which the four young men have now turned around -- I know the
9 Court has reviewed probably both sets of the body camera
10 videos in detail.

11 THE COURT: I have.

12 MR. DELGADO: At that Mr. Bontemps then begins moving
13 towards them, his hands are raised, he's beginning to argue,
14 and he distinctly has what's some sort of what may be a
15 firearm, but some sort of suspicious object in his jacket.

16 THE COURT: Okay. Stop there. Where is that
17 reported in the police reports?

18 MR. DELGADO: Your Honor, I'd invite the Court's
19 attention in that case to Detective Tonn's police report.
20 That's at Docket Number 17-2, page 4.

21 THE COURT: Your Exhibit --

22 MR. DELGADO: It's Exhibit A to Detective Tonn's
23 declaration. And in the last sentence of the first full
24 paragraph there, Detective Tonn is describing the sequence of
25 events that occurred, and here he explains that both

1 Mr. Bontemps and Mr. Mills had firearms on their person. He
2 notes that before he had even made contact with any of the
3 defendants. And I think in the body camera videos, both
4 from --

5 THE COURT: Slow down. I'm looking at this report.

6 MR. DELGADO: I'm sorry. I'll wait until you're
7 finished, your Honor.

8 THE COURT: It says, "I told the group to stop and
9 walk back to me and have a seat on the curb." That means all
10 four of them. That's the point at which the seizure occurs.

11 MR. DELGADO: I'm sorry, sir. I'm sorry, your Honor.
12 Are we in Detective Tonn's?

13 THE COURT: I was looking at Barreto.

14 MR. DELGADO: So I'd refer to Detective Tonn's police
15 report.

16 THE COURT: Okay. Here it is. Hang on. "We
17 conducted a pedestrian stop on four black males who were
18 walking east on Robles Drive just east of Glen Cove Parkway.
19 Subject Tamaran Bontemps and subject Quinton Mills were in
20 that group. It appeared that Bontemps and Mills had firearms
21 on their persons." Then he refers back to Barreto's report
22 for stop details.

23 He doesn't tell me when it appeared that Mills had a
24 firearm. And, again, he simply incorporates Barreto's report.
25 That's why I went back to Barreto's report.

1 MR. DELGADO: That's right, your Honor. I think he
2 talks about both Mr. Bontemps and Mr. Mills having -- noticing
3 that they had firearms on their persons before he goes on and
4 describes any additional contact with them after the officers
5 spoke with them. And, in fact, if I could -- I think there
6 will probably be an appeal however the Court rules in this
7 case, so I'd just like to populate the record with some facts
8 and exhibits.

9 May I approach, your Honor?

10 THE COURT: What do you have?

11 MR. DELGADO: I'm just going to offer into evidence a
12 marked photo of the picture that was included in the
13 government's opposition.

14 THE COURT: That's fine. Does Mr. Petrik have a copy
15 of this?

16 MR. DELGADO: I'll hand one to him, your Honor.

17 THE COURT: Thank you. So this is the same picture
18 that was in your brief?

19 MR. DELGADO: It is, your Honor.

20 THE COURT: Okay. And you've marked it as
21 Government's Exhibit 3?

22 MR. DELGADO: It is, your Honor.

23 THE COURT: What's 1 and 2?

24 MR. DELGADO: 1 will be the body camera video from
25 Detective Barreto. Government's Exhibit 2 will be the body

1 camera video from Detective Tonn.

2 THE COURT: Okay. And then 3 is the picture itself,
3 which is from a frame taken --

4 MR. DELGADO: It is, your Honor.

5 THE COURT: -- in Exhibit 1?

6 MR. DELGADO: Yes, your Honor.

7 THE COURT: Okay.

8 MR. DELGADO: I will note, and I think the Court will
9 have the chance to review -- may have before or after this
10 hearing in Government's Exhibit 2, which is Detective Tonn's
11 body camera video, from his vantage point on the sidewalk,
12 there is a clear outline of something suspicious in
13 Mr. Bontemps' hoodie kind of near his left waistband.

14 THE COURT: Okay. And that's the issue in this case.
15 Because if you go to Barreto's report, he says that he saw the
16 four males, and he says the male in front of the group --
17 Mills is at the back of the group at this point, but he says
18 the individual in the front of the group, referring to Mills,
19 was wearing a blue sweater with a front pouch pocket, and he
20 saw that there was a noticeable bulge in his pocket, and it
21 could be a firearm. So he went past the group and came back
22 around, and they get out of the car, and they approach the
23 group on foot. There's no mention in those paragraphs from
24 Barreto of anything regarding Mr. Bontemps. Nothing.

25 And the problem I have is, as I refer back to

1 Mr. Tonn's narrative, is that he incorporates or he makes
2 reference to Barreto, so that's why I'm coming back to
3 Barreto. Although Tonn says he saw weapons both on Mills and
4 Bontemps, he doesn't say when. And the argument that
5 Mr. Petrik is making is that everybody was focused on Mills.
6 It's only after they yell "stop" and then Bontemps starts
7 popping off that suddenly the focus turns to him. But by that
8 point, Bontemps is seized. And that was the timing issue that
9 I raised or mentioned last time, is if these officers only
10 realized that Bontemps had a weapon after they yell "stop, sit
11 down," then the argument is they had no reason to stop him in
12 the first place because they weren't focused on him. They
13 weren't focused on the other two guys. They were focused on
14 Mills.

15 Now, once Bontemps starts popping off and causing a
16 scene, then yeah, everything focused on him, and you obviously
17 can see that there looks like a weapon in his sweatshirt. So
18 looking at Exhibit 3, the question is is he already seized at
19 that point, and they only saw it after they seized him?
20 That's the issue in this case.

21 MR. DELGADO: Well, your Honor, I think in terms of
22 the reports -- I understand the Court's concern with respect
23 to the reports, and the reports are only a partial account of
24 what happened on that day. I think we have the best evidence
25 available of what actually occurred in the form of the body

1 camera videos. And we have those officers who were the
2 arresting officers. They're present and they are ready to
3 testify. If the Court has any concerns or is on the line, I
4 would like the opportunity to call those witnesses and have
5 them add some context.

6 THE COURT: I obviously have concerns. I don't know
7 when Mr. Tonn alleged he saw this bulge that appears in
8 Exhibit 3, when he saw that.

9 MR. DELGADO: If that's the case, your Honor, I would
10 like the opportunity to call both of the witnesses and have
11 them explain what was going through their mind and what they
12 saw at certain points.

13 THE COURT: I think you should then for purposes of
14 completing the record.

15 MR. DELGADO: May I have a moment, your Honor?

16 THE COURT: Sure.

17 MR. DELGADO: Your Honor, Mr. Beckwith has called my
18 attention to -- I think before we call the witnesses, there's
19 one issue I would like to take up with the Court. And that's
20 in preparing for this hearing, the government's located at
21 least one persuasive authority from the Eleventh Circuit in
22 2012 which involved contact with two different men who were
23 both in possession of firearms. And there the Eleventh
24 Circuit had held that for safety reasons, officers may in some
25 circumstances briefly detain individuals about who they have

1 no individualized suspicion of criminal activity in the course
2 of conducting a valid Terry stop with respect to related
3 individuals.

4 THE COURT: What's the name of the case?

5 MR. DELGADO: The name of the case, your Honor, is
6 United States v. Lewis. The citation is 674 F.3d 1298, and
7 the pincite is at 1306. Again, that's from the Eleventh
8 Circuit in 2012. And I can file a short letter brief
9 describing that case.

10 THE COURT: I can look at the case, but it's from the
11 Eleventh Circuit, so it's not going to help me.

12 MR. DELGADO: It is, your Honor. It's persuasive
13 authority.

14 THE COURT: Persuasive to you. It's not necessarily
15 persuasive or binding to me.

16 MR. DELGADO: That will be for the Court to
17 determine. I am citing that case right now simply for the
18 proposition that officers, when they have individualized
19 suspicion for one defendant that is among a group, the
20 officers are not obligated to discharge all of the other
21 people that are in that group on the spot. I think where --

22 THE COURT: Well, I mean, the Ninth Circuit has never
23 held that; right?

24 MR. DELGADO: Not to my knowledge, your Honor.

25 THE COURT: Okay.

1 MR. DELGADO: And I think that for officer safety
2 purposes, officers would be within their discretion in briefly
3 detaining a group of individuals where they have
4 individualized suspicion that at least one of them has a
5 firearm until the officers have secured the scene and assessed
6 that it is safe, in fact, to release the other individuals.

7 THE COURT: Okay. I don't want to spend a lot of
8 time on your inevitable discovery theory. I don't find much
9 merit to that argument. And again, I don't want to spend a
10 lot of time on it. I'm really focused again on this initial
11 stop.

12 MR. DELGADO: Certainly, your Honor. In that case I
13 would call the first of two witnesses, Detective Kevin
14 Barreto. And as I question him, I think the fastest way might
15 be to just simply discuss his initial contact with the
16 defendants, and then I would like the opportunity to go
17 through and have him add some context to the body camera video
18 because I think that will explain the bases, this
19 individualized suspicion which began with Mr. Quentin Mills
20 but then matured into Mr. Mills and Mr. Bontemps.

21 THE COURT: That's fine. But again, we don't have to
22 go through the whole video because the whole issue is what did
23 they know at the time they yelled "stop, stop, stop." It's
24 really only the first portion of the video that we need to go
25 through or that you may need to go through.

1 Mr. Petrik, did you want to say something?

2 MR. PETRIK: Yes, your Honor.

3 THE COURT: Go ahead.

4 MR. PETRIK: When we started this hearing, you asked
5 me if I had any witnesses to call, and I said no, and now the
6 government wants to call witnesses. I think there is
7 sufficient evidence before this Court under the submissions of
8 the parties. You have the police officers' reports, and you
9 have the body cams from both of them. It clearly shows in the
10 body cam that the officers stop the four individuals at
11 gunpoint and sat them down. That's the seizure. And that's
12 where this case should stop. After that when they tase
13 Mr. Bontemps and they search him --

14 THE COURT: We're not getting into that.

15 MR. PETRIK: Okay. All right. I'm sorry to
16 interrupt, but that's where it should stop. I don't see the
17 point of the government calling witnesses. I think the
18 Court --

19 THE COURT: Because I have a question as to what they
20 saw as they're driving down the street. Their reports may not
21 be complete. I want a complete record. I want to hear what
22 they're going to say. I want to get their testimony as to
23 what they saw, who they were focused on, and, in particular,
24 what they saw with respect to Mr. Bontemps before they yelled
25 "stop, stop, stop." That's the issue in this case, and these

1 police reports don't help me much. I don't think you can
2 prevent the government in opposing a motion to suppress from
3 calling them as witnesses so I have a more complete record.
4 And I don't think you know the answer to that question, what
5 did they see. And you have an opportunity to cross-examine
6 them if you think they're not being credible or not telling
7 the truth. So if you're objecting to the government being
8 allowed to call witnesses, I'm overruling your objection.

9 MR. PETRIK: Thank you.

10 THE COURT: Okay.

11 MR. DELGADO: Your Honor, the government calls
12 Detective Jarrett Tonn.

13 THE COURT: Are you calling Barreto or Tonn first?

14 MR. DELGADO: I think I'll call Detective Tonn first,
15 your Honor.

16 JARRETT TONN, Government witness, having been sworn,
17 testified as follows:

18 THE WITNESS: I do.

19 THE CLERK: State your full name and spell your names
20 for us, please.

21 THE WITNESS: Jarrett Tonn. J-A-R-R-E-T-T. Last
22 name's T-O-N-N.

23 DIRECT EXAMINATION

24 BY MR. DELGADO:

25 Q. Good afternoon, Detective Tonn.

1 A. Good afternoon.

2 Q. Can you tell the Court where you work?

3 A. I work for the Vallejo Police Department in Solano County.

4 Q. And what do you do with the Vallejo PD?

5 A. Currently a detective assigned to the Crime Reduction
6 Team.

7 Q. What does the Crime Reduction Team do?

8 A. We are a mostly plain clothes but a multifaceted unit
9 designed to deal with violent crime in the City of Vallejo.

10 Q. Let's go ahead and turn to April 18th of this year, 2018.
11 Were you on duty that day?

12 A. I was.

13 Q. We're here today because the defense has filed a motion
14 regarding a vehicle stop that you made on Robles Way. Do you
15 know generally what I'm referring to?

16 THE COURT: It wasn't a vehicle stop. It was a stop.

17 MR. DELGADO: I'm sorry, your Honor.

18 THE COURT: Go ahead.

19 BY MR. DELGADO:

20 Q. A stop of four gentlemen on Robles Way in Vallejo. Does
21 that sound familiar?

22 A. It does.

23 Q. And do you recognize the gentleman sitting in the orange
24 jumpsuit at defense counsel table as one of the young men that
25 you stopped on that day?

1 A. I do.

2 Q. All right. If you could, can you just tell the Court,
3 beginning I guess from the first moment that's relevant in
4 this case, what happened as you recall?

5 MR. PETRIK: Objection. Vague.

6 THE COURT: Overruled. Go ahead.

7 THE WITNESS: Detective Barreto and I --

8 THE COURT: Get close to that microphone, please, so
9 we can hear you.

10 THE WITNESS: Detective Barreto and I were working a
11 two man patrol car, which was an all black Ford SUV police
12 vehicle marked with red and blue lights, and we were working
13 in the area of Glen Cove Parkway and Robles Road, which is in
14 south Vallejo. We were driving west on Robles Road when we
15 saw a group of individuals walking eastbound on the opposite
16 side of the roadway from which we were driving.

17 BY MR. DELGADO:

18 Q. Can you recall -- you mentioned there were a group of
19 young men. Can you recall about how many there were?

20 A. There were four.

21 Q. Did anything jump out to you as suspicious or unusual
22 about this group of young men?

23 A. Yes.

24 Q. What was that?

25 A. Two of the persons in the group had bulges in parts of

1 their body consistent with my training and experience as a
2 police officer, consistent with carrying a firearm in public,
3 and then we also -- I also recognized another person in the
4 group from prior dealings.

5 Q. All right. And you say that --

6 THE COURT: Were you driving?

7 THE WITNESS: I was not. I was the passenger.

8 THE COURT: You were the passenger. Okay.

9 BY MR. DELGADO:

10 Q. I think we'll refer to your body camera video in just a
11 second, but let's start out. You mentioned that there was a
12 third young man that you had recognized from prior, I guess,
13 prior police work; is that right?

14 A. Correct.

15 Q. Can you tell us a little bit about him?

16 A. Yes. The subject was named Dayton Sanderson.

17 MR. PETRIK: Objection. Relevance.

18 THE COURT: Overruled. Go ahead.

19 THE WITNESS: We had conducted surveillance on him
20 and his brother several months earlier in relationship to a
21 homicide investigation with multiple homicide victims.

22 BY MR. DELGADO:

23 Q. So setting aside Mr. Sanderson, you say that two of the
24 young men in this group appeared to have firearm-shaped bulges
25 in their clothing. Let's start with the first young man that

1 you laid eyes on. Can you recall his name by chance?

2 A. Yes.

3 THE COURT: Hang on for a second. I want to
4 understand. You're driving westbound, and they're on the
5 other side of the street walking toward you?

6 THE WITNESS: Correct.

7 THE COURT: Single file?

8 THE WITNESS: No, not single file.

9 THE COURT: Are they on the sidewalk?

10 THE WITNESS: They were on the sidewalk and probably
11 two in front of the other, double stacked columns, if that
12 makes sense, roughly.

13 THE COURT: Okay. So you're looking at them out of
14 the front window?

15 THE WITNESS: Correct.

16 THE COURT: Kind of across the street?

17 THE WITNESS: Correct. It wasn't very far away
18 either. It was a two-lane road on either side of the small
19 concrete divide. We could see them very clearly.

20 THE COURT: How fast was the other officer driving?

21 THE WITNESS: I'd say at that point we were driving
22 five, seven miles an hour. We were driving slow. We had just
23 pulled out of a parking lot.

24 THE COURT: Okay. Go ahead.

25 BY MR. DELGADO:

1 Q. So when you laid eyes on, you say there was at least one
2 gentleman that you thought or may have thought had something
3 suspicious, a firearm shaped bulge in his clothing; correct?

4 A. Correct.

5 Q. And what did you do -- I guess can you recall what he was
6 wearing generally?

7 A. He was wearing a hooded sweatshirt, and there was a very
8 heavy, something very heavy pulling down the weight of the
9 sweatshirt in that center -- whatever you want to -- hand
10 warmer area between the right and the left side, a
11 pass-through type pocket, if this makes sense.

12 Q. All right. Now, in your training and experience, what did
13 that lead you to believe?

14 A. It's very common for persons to carry firearms in their
15 sweaters. And due to the heavy nature of a firearm, it often
16 pulls the sweater down, and it makes it fairly obvious.

17 Q. So this first gentleman, this was, in fact, Mr. Quinton
18 Mills; correct?

19 A. That's correct.

20 Q. And you had mentioned that you -- at some point you began
21 to think that Mr. Bontemps, the defendant here today, he also
22 had a firearm within his clothing; correct?

23 A. Correct.

24 Q. Tell us about that.

25 A. Detective Barreto slowed down fairly rapidly, even though

1 he wasn't going fast, so we could look at them, and I saw
2 Mr. Bontemps, he had a very obvious bulge on his left side
3 just above the waist area, kind of halfway maybe between his
4 waist and his left armpit.

5 Q. At some point did, I guess Detective Barreto who was
6 driving, did he make a U-turn?

7 A. He did. We went down to the intersection which was not
8 very far, maybe 40, 50 feet, and made a U-turn and pulled up
9 behind the subjects.

10 Q. Now, at that time you got out of your patrol vehicle;
11 correct?

12 A. That's correct.

13 Q. And Detective Barreto did as well?

14 A. Correct.

15 Q. Can you walk us through, in fact, what you saw when you
16 got out of your patrol vehicle?

17 A. Yes. Again, I was on the right side, obviously the
18 passenger's side of the patrol vehicle. And as I exited, my
19 attention was drawn to Mr. Bontemps. Again, I saw a very
20 large and obvious protrusion coming from his left side.

21 THE COURT: Wasn't his back to you at that point?
22 Aren't you coming up behind them now?

23 THE WITNESS: Yes. They saw us and had turned around
24 at that point.

25 THE COURT: You're saying they turned around?

1 THE WITNESS: Yes. It had been fairly obvious. We
2 had looked at them and looked at them several seconds before
3 proceeding to make our U-turn. And also Detective Barreto, I
4 believe, called out to them. He exited his car first. He
5 called out to one of them to stop, and everyone turned around
6 and faced us.

7 So after he turned around, so I could see that side
8 of him fairly quickly within, again, this is all happening in
9 a matter of seconds, I was able to see again that bulge. I
10 several seconds into it bypassed Mr. Sanderson and the fourth
11 subject whose name I can't recall at the moment. I did not
12 see any obvious signs of weapons, and I felt for my safety I
13 had to reposition myself so that I was closer to Mr. Bontemps
14 and Mr. Mills as they had to me obvious indicators of having a
15 firearm.

16 BY MR. DELGADO:

17 Q. Now, after, in fact, you positioned yourself by
18 Mr. Bontemps and Mr. Mills -- and we'll see the body cam video
19 here in a second -- did Detective Barreto, did he actually --
20 was he attending to Mr. Mills at that time?

21 A. Yes. I could see Detective Barreto go up to Mr. Mills and
22 begin to search his front pocket area where we both had seen
23 that bulge, sweater pocket, and did Detective Barreto informed
24 me that he had located a firearm, at which point --

25 THE COURT: Okay. We're past the point of seizure

1 now, so it's really not the issue that I'm concerned with. At
2 this point they've already been seized because the video
3 clearly has the officers yelling at them "stop." I actually
4 have a transcript of the video. The officers yell "stop" as
5 soon as they exit the police car, and Detective Tonn yells
6 "stop, stop, stop, everyone stop," he points at the curb and
7 says "sit down." And then in your picture, Exhibit 3, that's
8 at the point where the individual in the red pants sits down,
9 and you've got Bontemps with his hands up.

10 THE WITNESS: Yes, your Honor.

11 MR. DELGADO: And Exhibit 3 is taken from Detective
12 Barreto's body cam video. So I think if we could now, I'd
13 like to publish Government's Exhibit 2, which is Detective
14 Tonn's body camera video, and we can have him explain sort of
15 the significant --

16 THE COURT: You can go through the first portion of
17 it, and then we'll just stop it once we hit the seizure.

18 MR. DELGADO: Please play Government's Exhibit 2.

19 THE COURT: You can stop it along the way and have
20 him comment if you want.

21 MR. DELGADO: Yes, your Honor.

22 (Video played.)

23 THE COURT: So this is your body cam, right,
24 Detective Tonn?

25 THE WITNESS: That's correct.

1 THE COURT: Okay.

2 BY MR. DELGADO:

3 Q. I know we're just about two seconds into this. Can you
4 explain who at least the three individuals in this vantage
5 are? If you could identify them for the Court.

6 A. Yes. The subject with the red pants, I can't recall his
7 name. He was the fourth subject I described a minute ago.
8 The taller person with the headband just beyond him away from
9 me is Mr. Sanderson, and then you can barely see Mr. Bontemps
10 in the background.

11 Q. So there is a gentleman wearing, I guess, a gray hooded
12 sweatshirt in between these two subjects on this screen?

13 A. That's correct.

14 Q. I'm going to stop this in a second, but go ahead and play.
15 (Video played.)

16 Q. All right. Now, we might replay this a few times or the
17 Court can do so in chambers, but at least for right now, can
18 you identify -- we'll watch this a few times if we have to,
19 but can you identify what you were looking at and what you saw
20 on Mr. Bontemps' clothing that sort of signaled to you
21 something was amiss?

22 A. Yes. You can see there's a white patch or something near
23 his waistband or on his pants. Go up maybe six inches above
24 that, and you can see a very large bulge in his gray
25 sweatshirt above the waistband area right there.

1 (Video played.)

2 THE COURT: That's good. We're now at the seizure
3 point.

4 BY MR. DELGADO:

5 Q. All right. So at the time at which I guess you -- when
6 you were making this stop and, I guess, assessing the
7 situation, you believed that Mr. Mills, who isn't shown on
8 this body camera footage, you believed he had a firearm at the
9 time; correct?

10 A. Correct.

11 Q. So in the sense that you are, I guess, assessing the
12 situation and having all four men at least stop right now,
13 what was the basis for that, I guess, up to this point in
14 time?

15 A. So I felt that --

16 MR. PETRIK: Objection. Irrelevant.

17 THE COURT: Not what you felt. What did you observe?

18 THE WITNESS: Based on my observations, I believed
19 there was -- the specific observations of the bulge and the
20 weightiness in Mr. Mills' sweatshirt as well as the very large
21 and obvious bulge in Mr. Bontemps' sweatshirt on his left side
22 above his waist, I believed that there was in my mind
23 reasonable suspicion based on that that they were carrying a
24 firearm based on all the numerous people I've stopped and the
25 training --

1 MR. PETRIK: Your Honor, I object to the narrative
2 and legal conclusion by the witness. That should all be
3 stricken.

6 THE WITNESS: I've dealt with numerous people with
7 firearms and with trainings, and based on what I saw, what I
8 just mentioned, I believed that there was reasonable suspicion
9 that they were both carrying firearms.

10 THE COURT: Okay.

11 MR. DELGADO: Nothing further, your Honor.

12 THE COURT: Do you want to cross-examine him?

CROSS-EXAMINATION

14 BY MR. PETRIK:

15 Q. Detective, you wrote a report in this case.

16 THE COURT: Use the microphone, please. You can come
17 forward to the podium.

18 MR. PETRIK: All right.

19 | BY MR. PETRIK:

20 Q. You wrote a report in this case, right, Detective?

21 A. That's correct.

22 Q. You've reviewed that report in preparation for your
23 testimony today?

24 A. I did.

25 Q. And you refer to details of the stop of Bontemps and Mills

1 to Detective Barreto's report; right?

2 A. I referred to some of the initial details of the stop he
3 detailed in his report, if that makes sense.

4 Q. Well, he wrote a much longer report than you did, didn't
5 he?

6 A. I don't recall the length of his report.

7 Q. Do you want me to get it for you so you can look at it?

8 A. Sure.

9 MR. PETRIK: Thanks. Your Honor, may I approach the
10 witness so I can hand him Defendant's A?

11 THE COURT: You may. Defendant's Exhibit A will be
12 the report from --

13 MR. PETRIK: Detective Barreto.

14 THE WITNESS: Do you want to restate the question?

15 THE COURT: He just asked if that report's longer
16 than yours.

17 THE WITNESS: Yes, it seems to be maybe a paragraph
18 or a few more than my report.

19 BY MR. PETRIK:

20 Q. How many pages is Detective Barreto's report?

21 A. Are you talking about the narrative portion?

22 Q. The whole thing.

23 A. Including all the cover sheets, it's five pages, I
24 believe.

25 MR. PETRIK: Right. May I approach again?

1 THE COURT: You may.

2 MR. PETRIK: Your Honor, I've marked as Defendant's B
3 Detective Tonn's report, and I'm giving it to him.

4 THE COURT: B as in boy is Detective Tonn's report;
5 right?

6 MR. PETRIK: Yes.

7 THE COURT: Is there something on the cover sheets
8 that is relevant? Because the reports that I have submitted
9 along with the briefs, I have about three-quarters of a page
10 for Detective Tonn's report, and I have basically a full page
11 and about a quarter of a page for Detective Barreto's report.

12 MR. PETRIK: Yes.

13 THE COURT: Okay. I don't need the cover pages, I
14 assume.

15 MR. PETRIK: Well, I think you do, your Honor.

16 BY MR. PETRIK:

17 Q. Detective, you've had a chance now to look at Detective
18 Barreto's report; right?

19 A. I have it here, yes.

20 Q. And at the very top, it says "Vallejo Police Department
21 Crime Report"; right?

22 A. Yes.

23 Q. And your report, Detective, says "Vallejo Police
24 Department Supplement 2"; right?

25 A. Correct.

1 Q. And that's why you referred to Detective Barreto's report
2 for the main facts of this case; isn't that right?

3 A. I think maybe you're misunderstanding, though, the way the
4 report is put together.

5 Q. I'm not asking for an understanding. I'm asking you to
6 answer my question. So you wrote a supplemental report to the
7 main police report; right?

8 A. I wrote a narrative to this police report. I might take
9 issue with the word "supplement." Supplement is not my word.
10 That's the way the program works.

11 Q. That's what it says on top of your report?

12 A. I'm trying to explain that to you.

13 Q. Right? It says supplement?

14 A. It's part of the same report. And whoever generates the
15 report under whatever case number, it automatically titles it
16 narrative, and everyone else automatically gets supplement.
17 It doesn't necessarily mean one person has something more in
18 their report. It just means that report was generated under
19 that person's badge number, if that makes sense.

20 Q. It doesn't. It says supplement. Anyways, you claim in
21 your supplemental report that you thought subject Bontemps had
22 a firearm in his possession; right?

23 A. That's correct.

24 Q. And you saw that because you were driving across the
25 street from them; right?

1 A. Yes.

2 Q. In the passenger side?

3 A. Yes.

4 Q. On the opposite side of where all the men were walking;
5 right?

6 A. Can you reword that, please?

7 Q. Yes. You were sitting on the far opposite side of where
8 all the men were walking that you and Detective Barreto
9 observed; right?

10 A. I was in the passenger side of the vehicle. Correct.

11 Q. Yes. On the other side. Now, you got out of the patrol
12 vehicle, and you had your hand on your weapon; right?

13 A. Yes.

14 Q. And you ordered everybody to stop; right?

15 A. Correct.

16 Q. And at this point you suspected that, according to your
17 testimony, you suspected that Mr. Bontemps had a firearm in
18 his possession; right?

19 A. Correct.

20 Q. And you let him sit down; right?

21 A. Correct.

22 Q. And no one approached him in close proximity to search him
23 for a weapon; is that right?

24 A. At what point?

25 Q. At the point that he sat down.

1 A. Correct.

2 Q. And then through the video on your body cam, you're
3 standing in front of Mr. Bontemps; right?

4 A. Correct.

5 Q. And you're paying attention to him because he's yelling at
6 cars; right?

7 A. Correct.

8 Q. And he's yelling at passersby to help; right?

9 A. Are you asking me if that's why I'm paying attention to
10 him, or are you just asking me if he was doing those things?

11 Q. I'm asking if that's why you were paying attention to him
12 at that point. You were directly in front of him; right?

13 A. Yeah. I was paying attention to him because I believed he
14 had a firearm on him. He was also yelling at cars and doing
15 those things. So I'm not sure if you're asking me
16 specifically for the nature of why I was paying attention to
17 him, or if it was in addition doing those things at the time.

18 Q. I think, Detective, I guess the point I'm trying to make,
19 Detective, is that you did not search Mr. Bontemps immediately
20 like Detective Barreto searched Mr. Mills?

21 A. That's correct.

22 Q. Right?

23 A. That's correct.

24 Q. And you thought Mr. Mills had a weapon; right?

25 A. We thought they both had weapons, yes.

1 Q. But you didn't search Mr. Bontemps?

2 A. That's correct.

3 THE COURT: You treated them differently; right?

4 THE WITNESS: Yes. I'd be happy to explain why, but
5 yes, we did.

6 THE COURT: Okay.

7 MR. PETRIK: Nothing further. Can I get my exhibits?

8 THE COURT: No. They're now my exhibits.

9 MR. PETRIK: Pardon?

10 THE COURT: They're my exhibits.

11 MR. PETRIK: Very well.

12 THE COURT: Redirect?

13 MR. DELGADO: Yes, your Honor.

14 REDIRECT EXAMINATION

15 BY MR. DELGADO:

16 Q. So, Detective Tonn, you just testified that you thought
17 that both Mr. Mills and Mr. Bontemps had firearms on them at
18 the time that you and Detective Barreto approached them;
19 correct?

20 A. That's correct.

21 Q. Can you tell us in the sequence of events why things
22 unfolded as they did with respect to the way you approached
23 Mr. Bontemps?

24 A. Yes. Neither one of them were, you know, prone out or
25 ordered face down at the time. Detective Barreto made the

1 first move towards Mr. Mills. Being that he did that, my role
2 now is a cover officer. And being that we're outnumbered two
3 to four, it's best tactically and safest for me to take things
4 one step at a time. I had my firearm out. I gave him
5 directions not to put his hands up. But again, also
6 reasonable suspicion that we have a firearm on someone and
7 enough to in my mind search them and detain them doesn't
8 automatically necessarily mean that they're going to get put
9 facedown or more extreme measures are going to be used.
10 Again, we're trying to be reasonable in our efforts. And I
11 felt safe enough with the way they were both handled, which
12 they both were treated the same, just in a different --

13 MR. PETRIK: Objection. Narrative.

14 THE COURT: Overruled.

15 THE WITNESS: They were both treated the same, just
16 in a different order. And it was so that we could get from
17 one to the other. And I felt safe with my firearm out and
18 having it at the ready that neither one of them were prone
19 out or, you know, a felony stop was done, however you might
20 want to term that. So the manner in which they were treated
21 was the same. The timing was different. And that mainly
22 was -- my reaction was based off of who Detective Barreto
23 moved to first and trying to be the cover officer, which is
24 the proper technique that we get trained to do.

25 THE COURT: On the video, you're heard saying to

1 Bontemps: "Do you have a gun? Do you have a gun?"

2 THE WITNESS: Yes.

3 THE COURT: If you're certain he has a gun, why do
4 you need to ask that question? If you know before you stop
5 him, according to your testimony, that he has a gun, why
6 that -- and again, I heard your answer, but I'm still not
7 certain I understand why if one officer has an individual
8 under control and is searching that individual, Mr. Mills, and
9 is searching him and getting that gun, why you're not doing
10 the same thing. Because you're telling me before you even
11 stopped these guys, you knew that Mr. Bontemps had gun, yet I
12 hear you on the video saying: "Do you have a gun? I think he
13 has a gun. I see a gun," eventually.

14 THE WITNESS: And that's a very reasonable question
15 and what I think is a reasonable answer for that, which is I
16 never said I 100 percent know these gentlemen have guns. I'm
17 saying in my mind I believe that there's enough facts and
18 articulable reasonable suspicion that says that I believe that
19 they have a firearm.

20 Now, do I want to take some sort of -- especially, to
21 be honest with you, in this day and age, do I want to take
22 some sort of drastic measures when there is always a chance
23 that we could be wrong? And I'm never saying that I was a
24 hundred percent. And I ask people all the time: Do you have
25 a gun on you? And that's for multiple reasons too. We're

1 also living in the age of body cam. Maybe I want them to make
2 an admission on camera. May I want them to tell me. I don't
3 know what's going to happen next. So if someone tells me I
4 have a firearm on them and then I shoot them next, at least I
5 can say he told me had a -- not only was he making a furtive
6 movement, but he said he had a firearm. And so I think that's
7 a completely reasonable thing to do.

8 And to your second question, which is why did I not
9 jump in and start searching, in my training and experience,
10 that would be an unsafe thing to do. We're not going to have
11 two officers with four people go hands on with people. I feel
12 much safer keeping a couple feet distance, holding them at
13 gunpoint, and should they do something, I can react. But if
14 we both get tied up in a fight and now there's two guns or one
15 or two guns loose, that's a terrible situation, and that's how
16 officers get killed, and I'm not trying to get killed. Yeah,
17 I will ask somebody. It's just like I might see a drug deal
18 and see drugs, and I might still go up and say: Do you have
19 dope on you? I think it's just we live in a day and age
20 where -- and I think our actions show on this body cam we're
21 trying to be reasonable. We're not trying to slam people and
22 throw them on the ground or shoot people. To that point, if I
23 really 100 percent thought he had a gun, the way he acted,
24 lethal force might have been authorized. But I'm not saying I
25 hundred percent knew he had a gun. I believe that he did, and

1 I acted, I believe, appropriately. But there's always that
2 chance I'm wrong.

3 THE COURT: Okay. Go ahead.

4 MR. DELGADO: Nothing further, your Honor.

5 THE COURT: Anything further?

6 MR. PETRIK: No.

7 THE COURT: Okay. You may step down.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Do you want to call any other witnesses?

10 MR. DELGADO: Yes, your Honor.

11 THE COURT: Go ahead.

12 MR. DELGADO: The government calls Detective Kevin
13 Barreto.

14 KEVIN BARRETO, Government witness, having been sworn,
15 testified as follows:

16 THE WITNESS: I do.

17 THE CLERK: State your full name and spell your names
18 for us.

19 THE WITNESS: Kevin Barreto, K-E-V-I-N B-A-R-R-E-T-O.

20 DIRECT EXAMINATION

21 BY MR. DELGADO:

22 Q. Good afternoon, Detective Barreto.

23 A. Good afternoon.

24 Q. Can you tell the Court where you work?

25 A. Police officer for the City of Vallejo.

1 Q. How long have you been with Vallejo PD?

2 A. I've been there about four and a half years. Prior to
3 that, I was with the Solano County Sheriff's Office and
4 Benicia Police Department.

5 Q. Let's go ahead and turn to April of this year, April of
6 2018. You were working with the Crime Reduction Team on that
7 date?

8 A. Yes.

9 THE COURT: You're a detective also?

10 THE WITNESS: Yes, sir.

11 THE COURT: Okay. Go ahead.

12 BY MR. DELGADO:

13 Q. What does the Crime Reduction Team do generally?

14 A. We go after wanted felons, narcotic cases, gang cases,
15 assist with murder investigations.

16 Q. Let's focus on April 18th of this year. Okay?

17 A. Yes.

18 Q. Were you on duty on that day?

19 A. Yes.

20 Q. Did you have a partner, or were you working solo?

21 A. Detective Tonn was in the car with me. I was driving.

22 Q. So on April 18th of this year, did you, in fact -- I guess
23 I'm going to refer to an incident that happened on Robles Way
24 where you made contact with four young men. Does that ring a
25 bell?

1 A. Yes.

2 Q. The gentleman sitting at defense counsel table in the
3 orange jumpsuit, do you recall him as one of the men you
4 actually arrested on that day?

5 A. Yes.

6 Q. And he is, in fact, Mr. Tamaran Bontemps?

7 A. Yes.

8 Q. Let's go ahead and start with, I guess just -- this is
9 going to be succinct, and I just want to know what's going
10 through your mind -- we'll take it frame by frame -- at sort
11 of the outset of this contact. Can you take us from the point
12 at which you turn onto Robles Way, what do you see?

13 A. As we made our left-hand turn starting to go up the hill
14 on Robles, we saw four individuals walking eastbound on Robles
15 up the hill. As we passed by, I looked to my right and saw a
16 subject wearing a sweater with a front pocket. In the front
17 pocket, it appeared there was the shape of like a handgun sort
18 of pressing down on the pocket from the inside.

19 THE COURT: You said you looked to your right?

20 THE WITNESS: Yes, sir.

21 THE COURT: I thought they were on the opposite side
22 of the street from you.

23 THE WITNESS: Eventually. We made a U-turn.

24 THE COURT: So if you're going westbound and they're
25 walking eastbound and you're driving, why would you be looking

1 right?

2 THE WITNESS: So we were both going in the same
3 direction up the hill eastbound.

4 THE COURT: So they're walking the same direction as
5 you?

6 THE WITNESS: Correct.

7 THE COURT: Are you sure?

8 MR. DELGADO: Okay. If you need a chance to review
9 your report, I can hand you a copy. I think we're all working
10 off of the same sheet of music here. I'd like at least --

11 THE COURT: This isn't a trial, so I'm not trying to
12 trick you. I just want accurate information. So if you're
13 driving westbound and they're going eastbound, I'm still
14 trying to figure out why you're looking right.

15 MR. DELGADO: Actually, before looking at any items,
16 nothing's been handed up. Your Honor, may I approach?

17 THE COURT: Sure. Refresh his recollection.

18 MR. DELGADO: I'm handing up a copy of Detective
19 Barreto's report which I believe has been marked as
20 Government's Exhibit A.

21 THE COURT: Exhibit A.

22 MR. DELGADO: A.

23 THE COURT: Read your narrative to yourself, and then
24 we'll ask some questions.

25 BY MR. DELGADO:

1 Q. Have you had a chance to review your report?

2 A. Yes.

3 Q. And could you just clarify for the judge the sequence of
4 events?

5 A. Yes. So as we were on Columbus Parkway, we're stopped at
6 a red light, I made a left-hand turn onto Robles. As we were
7 going up Robles, the group of the individuals were on my
8 right-hand side on the south curb to our passenger side of the
9 vehicle. So we both were going in the same direction. I
10 believe my "I was driving westbound on Robles" should be "I
11 was driving eastbound on Robles."

12 THE COURT: So they were walking towards you.

13 THE WITNESS: No. I'm sorry. They were going up the
14 hill as we were coming up the hill.

15 THE COURT: So their backs were to you?

16 THE WITNESS: Correct.

17 THE COURT: Okay. Go ahead.

18 BY MR. DELGADO:

19 Q. All right. So at that point I guess -- what did you
20 notice among this group of young men?

21 A. So when we were passing them, I looked to my right and saw
22 the individual in the sweater had his hands inside his front
23 pocket right here, and it appeared to be a firearm inside his
24 pocket.

25 Q. What color sweater was this young man wearing?

1 A. It was dark color, either dark blue or black.

2 Q. So based upon that determination, what did you think or
3 what did you believe might be present there?

4 A. It appeared there was a firearm inside his front sweater
5 pocket.

6 Q. So what did you do next?

7 A. At that time I turned the car around, came back at the
8 individuals and circled back for around behind them.

9 Q. Once you had circled behind them, did you, in fact, make
10 contact with this group of men?

11 A. Yes.

12 Q. And walk us through what happened next.

13 A. I got out of the driver's seat, Detective Tonn got out of
14 the front right passenger's seat, we made contact with them,
15 told them to keep their hands up and out of their pockets and
16 to have a seat.

17 Q. All right. If we could publish Government's Exhibit 1,
18 which is Detective Barreto's body camera video.

19 THE COURT: Well, you were focused on Mills; right?

20 THE WITNESS: Initially, yes.

21 THE COURT: Were you focused on Mr. Bontemps at all
22 as you were driving by?

23 THE WITNESS: The initial was Mr. Mills.

24 THE COURT: Okay. Did you notice anything about
25 Mr. Bontemps?

1 THE WITNESS: Not until we turned around and made
2 contact with the group.

3 THE COURT: And that's the point you yell "stop."

4 THE WITNESS: Correct.

5 THE COURT: They turn and face you.

6 THE WITNESS: Correct.

7 THE COURT: Is that the first time that you focused
8 on Bontemps as well?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 THE WITNESS: He was -- I'm sorry.

12 THE COURT: Go ahead.

13 THE WITNESS: From Mills' and my position, he was
14 actually in the middle between us.

15 THE COURT: You had already yelled "stop" at that
16 point.

17 THE WITNESS: Yes, as we were getting out.

18 THE COURT: Okay. Then his video isn't relevant to
19 me.

20 MR. DELGADO: And it's consistent I think with
21 Government's Exhibit 3, your Honor. I'll refer to that.

22 THE COURT: You have a real inconsistency here that
23 we'll discuss, but I'll see if you can explain it.

24 MR. DELGADO: Well, I think I would like to
25 discuss --

1 THE COURT: He's not going to help you. It's
2 Detective Tonn. He doesn't focus on Bontemps until he's out
3 of the car and they've already yelled "stop."

4 MR. DELGADO: Well, I think at the point where -- I'm
5 sorry, your Honor.

6 THE COURT: Go ahead.

7 BY MR. DELGADO:

8 Q. At the point at which you call out to this group "stop,"
9 why did you do -- why did you call out for this group to stop?

10 A. Because we believed Mills was armed with a firearm inside
11 his sweater, and he was with the group, and it's my experience
12 when we stop groups and people are armed, usually multiple
13 people are armed.

14 Q. Okay. But at the moment you yelled out "stop," these
15 young men, they've turned around; correct?

16 A. Correct.

17 Q. What did you see I guess with respect to Mr. Mills?
18 Whereabouts was he?

19 A. He was in front of me to my left and Mr. Bontemps was in
20 between us.

21 Q. All right. Now, did you have a chance to see
22 Mr. Bontemps?

23 A. Yes.

24 Q. What was he wearing?

25 A. He was wearing a half zip-up sweater, and it was partially

1 open, and he had a large bulge on the --

2 THE COURT: Did you say Bontemps was wearing a hat?

3 THE WITNESS: No. A half zip-up sweater.

4 THE COURT: Okay. All right.

5 BY MR. DELGADO:

6 Q. Now, did you see anything? I guess you say there was a
7 bulge on the left side of his body, on his torso?

8 A. Yes. It was concealed by the left portion of his open
9 sweater.

10 THE COURT: And you had already yelled stop at that
11 point though; right?

12 THE WITNESS: Yes.

13 THE COURT: And they turned around and stopped.

14 THE WITNESS: They turned around and started coming
15 towards us.

16 THE COURT: As soon as they heard the car in back of
17 them.

18 THE WITNESS: Yes.

19 THE COURT: Okay.

20 BY MR. DELGADO:

21 Q. So were these young men, actually were they approaching
22 you before you yelled "stop"?

23 A. No.

24 Q. At the point at which you yelled "stop," the men have
25 turned, they're looking at you, and you see Mr. Bontemps with

1 this bulge, what did you think or at least what did you
2 believe might be present inside of that jacket?

3 MR. PETRIK: Objection. Irrelevant.

4 THE COURT: Sustained. He's already stopped.

5 MR. DELGADO: Your Honor, this is not something where
6 the moment they yell "stop," the seizure -- this is a fluid
7 event that's taking place, and I think it is relevant what the
8 officers had in mind in this developing situation.

9 MR. PETRIK: Your Honor.

10 THE COURT: You can argue that. Go ahead and play
11 his video, and I'll let you get that on the record.

12 MR. DELGADO: Certainly, your Honor. If we can
13 publish Government's Exhibit 1.

14 (Video played.)

15 THE COURT: Where are we at at this point? Stop it.

16 BY MR. DELGADO:

17 Q. What's happening here?

18 A. So this is after I'd circled around and came back behind
19 them, and that's when I activated my camera.

20 Q. The audio on this doesn't become live until some moments
21 in; is that correct?

22 A. It's a 30-second buffer.

23 Q. And why is that?

24 A. That's how they have it set up from our department.

25 THE COURT: Okay. And it looks like you can see one

1 individual in this frame; correct?

2 THE WITNESS: Yes.

3 THE COURT: Okay. So he's facing you at this point.

4 THE WITNESS: Yeah. It appears he turned around and
5 looked at us.

6 THE COURT: Okay. Keep going.

7 (Video played.)

8 THE COURT: Now I see two individuals; right?

9 THE WITNESS: Correct.

10 THE COURT: Stop. Go back. Let's go back just a
11 little. Stop it there. Now keep going. Stop. Okay. You're
12 still in your car. We can't see Mr. Bontemps or Mr. Mills in
13 this frame; right?

14 THE WITNESS: Correct. He's sort of positioned where
15 that bump under my steering wheel is.

16 THE COURT: Okay. Keep going. So now you're getting
17 out. Stop. At that point you've already yelled "stop";
18 right?

19 THE WITNESS: Yes.

20 THE COURT: Okay. And yelled "sit down." Actually,
21 as I said, we have a transcript. You yell "stop" as you exit
22 the car, Detective Tonn yells "stop, stop, stop, everyone
23 stop." He points at the curb and says "sit down."

24 THE WITNESS: Yes.

25 THE COURT: Okay.

1 BY MR. DELGADO:

2 Q. Now, was it at this point right here or seconds afterwards
3 that -- this was the first time that at least you had seen
4 something suspicious in Mr. Bontemps' jacket; is that correct?

5 A. Yes.

6 Q. All right. Continue, please.

7 (Video played.)

8 All right. Stop.

9 All right. And can you see that suspicious object
10 identified here?

11 A. Yes.

12 Q. Let's go ahead and continue, please.

13 (Video played.)

14 Now, at this point you're moving towards Mr. Mills and
15 you --

16 THE COURT: Stop it for a second. Okay. And
17 Detective Tonn has just come out of the passenger side;
18 correct?

19 THE WITNESS: Yes, sir.

20 THE COURT: Okay. Go ahead.

21 BY MR. DELGADO:

22 Q. So at this point why did you choose to move towards
23 Mr. Mills?

24 A. At that time I believed he was the one that was armed, and
25 he had the unsecured weapon in his front pocket of his

1 sweater. That's why I was directing him that keep his hands
2 above his waist and away from his pocket.

3 Q. Now, with respect to your decision at least to ask all
4 four of these young men to stop and sit down on the curb, why
5 did you do that?

6 A. One, we were already dealing with an unsecured possibly
7 armed suspect and possibly there was a second, and there was
8 only two of us at the time, and so I was not going to let two
9 other unsearched possibly armed people walk down the street
10 behind us while we're dealing with these guys.

11 Q. So you focused on Mr. Mills in the moments after this --
12 and we'll play this in just a second -- correct?

13 A. Yes.

14 Q. What did your partner do?

15 A. He stood on that side and sort of covered that way and
16 engaged Mr. Bontemps.

17 Q. Why did he, in fact, cover -- is it normal for officers, I
18 guess, to cover when one officer is engaging with a believed
19 suspected armed subject?

20 A. Yeah, to make sure no one else was gaining access to any
21 kind of weapons or trying to run away or doing anything to get
22 the drop on us.

23 THE COURT: Did you call for backup at this point?

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay.

1 MR. DELGADO: Continue.

2 (Video played.)

3 BY MR. DELGADO:

4 Q. All right. So right here in this photo, is that your left
5 hand?

6 A. Yes.

7 Q. And did you confirm at this point that Mr. Mills did, in
8 fact, have a firearm in his hoodie?

9 A. Yes.

10 Q. And so based upon that, what was your next course of
11 action?

12 A. At that time we also believed Mr. Bontemps was armed now
13 because we could see the bulge and you could sort of see under
14 his sweater that something was sticking out, which we believed
15 was a firearm. Detective Tonn was trying to control him and
16 tell him to put his hands up and roll on his stomach so he
17 could be secured in handcuffs, and at that time Mr. Bontemps
18 just continued to argue and yell and get loud.

19 Q. And at this point you had confirmed that Mr. Mills did, in
20 fact, have a firearm on his person; correct?

21 A. Yes.

22 Q. Was Mr. Mills, was he calm and compliant throughout?

23 A. Yes.

24 Q. So after you seized the firearm from Mr. Mills, at that
25 point where did you focus?

1 A. I took the firearm out, put it behind me, Mr. Mills was
2 placed on his stomach. At that time Detective Tonn had tased
3 Mr. Bontemps, and he was on his stomach, and we were giving
4 orders for him to put his hands at his back.

5 MR. DELGADO: And so eventually I think the Court has
6 reviewed the body cam video.

7 THE COURT: I've seen that.

8 MR. DELGADO: No further questions, your Honor.

9 THE COURT: Mr. Petrik.

10 CROSS-EXAMINATION

11 BY MR. PETRIK:

12 Q. Detective, you testified just a minute ago that you saw
13 nothing about Mr. Bontemps that made you suspicious until you
14 yelled "stop"; right?

15 A. Yes, until he turned around and faced me.

16 Q. Right. And at that time when you're getting out of your
17 patrol car, you had drawn your weapon; right?

18 A. To my side, yes.

19 Q. But it was visible; right?

20 A. Yes. It was out of the holster. It was out of my
21 holster, to the side.

22 Q. In your hand?

23 A. Correct.

24 Q. Your report and your testimony confuses me a little. You
25 were originally driving behind the four individuals?

1 A. Yes.

2 Q. And they were walking up the hill; right?

3 A. Correct.

4 Q. And you were coming up behind them?

5 A. Yes.

6 Q. You could only see their backs; right?

7 A. Not until I got alongside of them, then I could see their
8 fronts.

9 Q. When you saw their fronts, you focused on Mills; right?

10 A. Correct. He was in the front of the group.

11 Q. Not Bontemps?

12 A. Correct.

13 MR. PETRIK: I have nothing further. Thank you.

14 THE COURT: Okay. Anything further, Mr. Delgado?

15 REDIRECT EXAMINATION

16 BY MR. DELGADO:

17 Q. I'd just like to clarify, I guess, the sequence of events
18 as you were driving. I think we're all a little bit confused
19 about the reports.

20 THE COURT: I'm not. I'm not confused. They've
21 testified the way they've testified. It's inconsistent, and
22 you can try to explain it, but his recollection is
23 inconsistent from his partner's. He can't change that. He
24 was driving on the same side of the road as the four
25 individuals. That's not what the other detective said. And

1 we'll talk about it outside his presence.

2 MR. DELGADO: Understood, your Honor.

3 THE COURT: I don't need to rehear his testimony.

4 MR. DELGADO: I just want to make sure that he did,
5 in fact, make two loops, two U-turns, I guess. One after he
6 had passed the group initially and then another one as he was
7 turning around.

8 THE COURT: Sure. He came back up behind them. I
9 understand that.

10 MR. DELGADO: All right. Then I have no further
11 questions.

12 THE COURT: Okay. Thank you. You may step down.

13 THE WITNESS: Thank you.

14 THE COURT: Mr. Delgado, here's your issue.
15 Detective Tonn tells me that these guys were actually walking
16 on the other side of the street walking towards him, and he
17 can clearly see the front of Mr. Bontemps' sweatshirt. That's
18 not true. That's not credible. The only thing that --
19 because he clearly said "I looked through the front window, I
20 looked to the left there on the other side of the street."
21 This officer, who seems to be more credible to me, said
22 exactly what happened. He said we're behind these guys.

23 Now, the issue is what did they see when they got out
24 of the car? They clearly can then see the front of his
25 sweatshirt, and they can clearly see that there's a bulge.

1 But they didn't see it going by. And I have issues with
2 Detective Tonn's testimony today that he actually saw a weapon
3 in Mr. Bontemps' sweatshirt as he's driving by. That doesn't
4 seem to be credible to me, and there's obviously an
5 instruction that says to juries that if you don't believe some
6 of the testimony, you don't have to believe any of the
7 testimony, or you can believe some of the testimony and not
8 believe other parts of the testimony.

9 I don't believe your witness that he saw a weapon on
10 Mr. Bontemps as they were driving by. I have a real problem
11 with that because he's completely confused or at least didn't
12 recall accurately that they weren't really facing them as they
13 were driving by. They had their backs to them.

14 So then the issue is does your Eleventh Circuit case
15 apply that there obviously was a suspicion that one of them
16 had a gun, and therefore they had a right to stop all of them,
17 or was there an opportunity to observe Mr. Bontemps sort of at
18 the same time that they were stopping the entire group?
19 Because you clearly can see a gun right around the same time
20 they're asking the four individuals to stop. And does that
21 then allow them to order the stop and then proceed as they did
22 ultimately finding the weapon? That's the issue in this case
23 both of you can address.

24 MR. DELGADO: Well, your Honor, I'd like to take a
25 chance at harmonizing, I guess, the testimony, because I don't

1 see that it is inconsistent. We heard --

2 THE COURT: Honestly?

3 MR. DELGADO: No, your Honor. I think it can be.

4 I'll take my best shot at harmonizing that testimony right
5 now.

6 THE COURT: You don't see any inconsistency? That's
7 your statement. You don't see any inconsistency between those
8 two detectives' testimony?

9 MR. DELGADO: No, because I think they're both --
10 their memories of what was relevant and when they both saw
11 suspicious conduct here began at different times. We heard
12 that from the two witnesses. Detective -- let's start with
13 Detective Barreto who was driving the vehicle. He explained
14 it is -- I acknowledge the report that he wrote describes
15 seeing them coming up on westbound Robles Way. Here on the
16 stand, Detective Barreto, who was driving this SUV, says that
17 the first time he saw something suspicious, there are four
18 young who were walking eastbound on Robles Way. He explains
19 driving behind them, coming up behind them also driving
20 eastbound. He turns to his right, which is consistent, and he
21 sees one of the young men in this group with something
22 suspicious. So he says he does a U-turn, he comes back the
23 other way, and then he does a U-turn and he doubles back and
24 he pulls up behind them, and that's when he makes contact. It
25 seems that Detective Tonn's memory of this starts after

1 Detective Barreto become already done the first U-turn, not
2 the second one but the first one, and where's he's doubling
3 back and coming towards the group westbound on Robles Way.

4 THE COURT: No. If you read this transcript --
5 remember I clearly asked him: "As you were driving, so you
6 were looking out the front window?"

7 "Yes."

8 "You looked to your left because they were across the
9 street?"

10 MR. DELGADO: Yes.

11 THE COURT: Right.

12 MR. DELGADO: I'm sorry, your Honor.

13 THE COURT: Okay.

14 MR. DELGADO: Yes. And I think there's nothing
15 inconsistent with that. Detective Barreto was just driving
16 going eastbound, seeing something suspicious, looking to his
17 right, so he doubles back, and now he's coming westbound, and
18 Detective Barreto describes -- or I'm sorry, Detective Tonn,
19 who was sitting in the passenger seat, said he looked at his
20 left --

21 (Reporter interruption.)

22 MR. DELGADO: I'm sorry. After the SUV had doubled
23 back and was now coming westbound towards the group of men, at
24 that point Detective Tonn said that he looks to his left from
25 the passenger seat, they're going at about five to seven miles

1 an hour, they are in the, I guess in the opposite direction
2 from where the young men were walking, and at that point he
3 looks to his left. That's the first time he sees something
4 suspicious.

5 So there's nothing inconsistent about the sequence of
6 events here. Yes, the timing at which the two detectives saw
7 something that flagged their attention, it occurred at
8 different times, but in terms of the sequence of events,
9 there's nothing here inconsistent about what actually
10 transpired with the vehicle.

11 THE COURT: Okay.

12 MR. DELGADO: Both detectives, their interest was
13 piqued at different times, and they testified consistently
14 with that.

15 So with respect, your Honor, I don't think that --
16 there's no claim that both men, both detectives
17 instantaneously noticed something amiss or had that reasonable
18 suspicion. I think it was at different times. It was at a
19 time about probably 30 seconds before Detective Tonn saw
20 something suspicious.

21 THE COURT: Okay. I agree with you. I understand
22 now.

23 MR. DELGADO: Thank you, your Honor. And I think I
24 can provide further argument or I'll defer to Mr. Petrik and
25 wait for him to address this point.

1 THE COURT: Mr. Petrik, go ahead. Anything further
2 you want to add?

3 MR. PETRIK: Yes, your Honor.

4 THE COURT: Go ahead.

5 MR. PETRIK: I think the Court is correct in its
6 original assessment that the testimony by the two detectives
7 is inconsistent, and I think that the Court, despite the
8 government's argument, should focus on Detective Barreto's
9 testimony. He clearly stated that he was driving behind the
10 four individuals, then he made a U-turn on the narrow street
11 that Detective Tonn described, and then he made another U-turn
12 and drove up behind them and then got out of the car and
13 ordered them to stop. He had his gun out, it was visible, it
14 was in his hand. And you could see from the dash cam or the
15 body cam videos and the Government's Exhibit 3 the four
16 individuals were ordered back with their hands in the air at
17 gunpoint. And that's the point where the seizure occurred.

18 At that point, there's nothing in Detective Barreto's
19 testimony or his report that says he suspected Mr. Bontemps of
20 carrying a weapon. And that is why the officers didn't focus
21 on him at first. They focused on Mr. Mills. Both of them
22 thought that Mr. Mills had a weapon, but no one until today
23 came and said, oh, I thought Mr. Bontemps had a weapon too.
24 And that's Detective Tonn.

25 I think that the Court should take notice about the

1 reports, and despite all the explanations that Detective Tonn
2 made about who writes the report and supplements and
3 everything else, it's very clear that he refers to Detective
4 Barreto's narrative of the facts of this stop.

5 And I think you should take the testimony of
6 Detective Barreto at fair value, and that even if he is making
7 all these U-turns on this street, coming up behind people,
8 that there was no reason to stop Mr. Bontemps. For that
9 reason, we're asking that you suppress the firearm.

10 THE COURT: Okay. Mr. Delgado, go ahead.

11 MR. DELGADO: And, your Honor, turning then, I guess,
12 to the merits, I think I am relying on the Eleventh Circuit
13 case as persuasive precedent that officers do not --

14 THE COURT: It's not precedent. It's persuasive
15 authority.

16 MR. DELGADO: Persuasive authority, your Honor.

17 THE COURT: Go ahead.

18 MR. DELGADO: And the officers here, this was a
19 dynamic situation in which your Honor has seen the body camera
20 videos. Everything is unfolding here literally in a matter of
21 seconds. And I think at the time that Mr. Bontemps was, in
22 fact, seized, it's clear from the body camera videos, and both
23 officers testified consistently with this, that
24 Mr. Bontemps -- Mr. Mills, both officers knew or believed that
25 he had a firearm at that time. And at the time that they

1 called out "stop" and then Mr. Bontemps starts walking back,
2 they believe that he has a firearm as well.

3 And I think this can't be something that -- the
4 Court's analysis should not be where at the moment the
5 officers yell "stop" and the seizure is effected, everything
6 else after that fact is disregarded. This is a fluid
7 situation where the officers are explaining that for officer
8 safety reasons, they have to assess kind of what's going on
9 before they release anybody else. I don't think there's any
10 question in this case the officers had reasonable suspicion to
11 at least make contact with these young men based on their
12 belief that Quinton Mills had a firearm in his possession at
13 that time. And I think at the time that they got out of the
14 car, you heard Detective Tonn testify that he believed that
15 Mr. Bontemps did as well.

16 Now, simply because Detective Barreto, his reasonable
17 suspicion as to Bontemps, it didn't mature until several
18 seconds later, but one of these two officers has testified
19 credibly, consistent with both the reports as well as his body
20 camera video, that he believed Mr. Bontemps might be carrying
21 a firearm in his possession as well, and that was why he
22 investigated further.

23 Probable cause is not required here to detain.
24 Merely reasonable suspicion. And I think based upon the
25 constellation of facts that are before the Court, at the time

1 these young men were seized, there was reasonable suspicion to
2 detain Mr. Bontemps.

3 THE COURT: Okay. I'll take the matter under
4 submission. I'll issue a written opinion on the motion to
5 suppress. We should set another date -- I don't think we have
6 another date yet -- within a month. I'll try to get an
7 opinion out as soon as possible.

8 THE CLERK: How far down the road do you want to set
9 it?

10 THE COURT: Sometime in November. About four weeks.

11 THE CLERK: Either the 20th or 27th.

12 THE COURT: 20th. Is that agreeable to both sides?

13 MR. DELGADO: Yes, your Honor.

14 THE COURT: Mr. Petrik, 20th or 27th for further
15 status?

16 MR. PETRIK: Can we go to the 13th?

17 THE COURT: Okay. Let's do it. November 13, 2018,
18 at 9:15. Time is excluded as long as the motion is under
19 submission to the Court.

20 Okay. See everybody on the 13th at 9:15.

21 MR. DELGADO: Thank you, your Honor.

22 THE COURT: Thank you.

23 **(Proceedings concluded at 2:39 p.m.)**

24
25

1 I certify that the foregoing is a correct transcript
2 from the record of proceedings in the above-entitled matter.
3
4

5 /s/ Kelly O'Halloran

6 KELLY O'HALLORAN, CSR #6660
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