No. _____

IN THE

Supreme Court of the United States

DESMOND S. GAINES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An anonymous tip must either be reliable on its own or be adequately corroborated before it can provide reasonable suspicion to seize a person. This Court has analyzed a range of tips from a "bare report" that "surely" fell on the no-reasonable-suspicion side of the line, *Florida v. J.L.*, 529 U.S. 266, 271 (2000), to tips that, under the totality of circumstances, provided reasonable suspicion in "close" or "borderline" cases, *Navarette v. California*, 572 U.S. 393, 404 (2014); *Alabama v. White*, 496 U.S. 325, 332 (1990). Despite these guideposts, courts continue to struggle with the reasonable-suspicion spectrum when it comes to anonymous tips. Meanwhile, law enforcement is increasingly encouraging and using anonymous tips—including via 911. The question presented here is:

If an anonymous 911 tipster implies that he saw a person sell drugs in a bustling public area, may officers seize the person without first corroborating the tipster's claim of illegality?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Desmond Gaines respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's 2021 order and judgment (the subject of this petition) is unpublished and is included as Appendix A. The Tenth Circuit's 2019 decision is published at 918 F.3d 793 and is included as Appendix B. The district court order denying Mr. Gaines's motion to suppress on remand from the Tenth Circuit's 2019 decision is included as Appendix C. The original district court order denying Mr. Gaines's motion to suppress is included as Appendix D.

JURISDICTION

The Tenth Circuit's judgment was entered on May 25, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

Anonymous tips are vital to law enforcement. Victims and witnesses are more likely to report crimes if they can do so without fear of retaliation, embarrassment, scrutiny of their own conduct, and other unwanted attention. At the same time, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Alabama v. White*, 496 U.S. 325, 329 (1990). Something more is usually needed to protect people accused by anonymous pranksters, bullies, misguided vigilantes, and nosey but mistaken neighbors. *Id*. Under this Court's precedents, an anonymous tip must either be sufficiently reliable on its own ("an exception to the general rule," *id*.) or else adequately corroborated by additional evidence to satisfy the Fourth Amendment's requirement of reasonable suspicion. *Id*. After all, reasonable suspicion is the only thing that stands between any of us and a police seizure of our person based on a nameless and unaccountable tipster's accusation.

This Court last analyzed anonymous tips and reasonable suspicion in *Navarette v. California*, 572 U.S. 393 (2014) (analyzing a tip made in 2008). Since then, law enforcement has increasingly invited and relied on anonymous tips—including anonymous 911 tips. Anonymous tips can now be made not only by telephone but also via websites and mobile apps. Given the extraordinarily high number of anonymous tips reported, and the risk that such tips may be mistaken or false, this Court's renewed guidance with respect to such tips and reasonable suspicion is crucial.

In Petitioner Gaines's case, the Tenth Circuit failed to hold the government to its burden of proving either that the anonymous tip in this case was reliable on its own

or that it was sufficiently corroborated to support law enforcement's seizure of Mr. Gaines. Other courts are more faithful to this Court's precedents. This case is an ideal vehicle for examining anonymous tips: it involves a number of factors common to anonymous-tip cases, and the reasonable-suspicion question was squarely presented and decided. This Court should grant this petition.

1. Legal Background

The Fourth Amendment prohibits unreasonable seizures of "persons, houses, papers, and effects." U.S. Const. Amend. IV. Once the defendant in a criminal case has established a seizure, it is the government's burden to establish that the seizure was based on reasonable suspicion. *Florida v. Royer*, 460 U.S. 491, 500 (1983). Reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (citations omitted). Courts must consider the "totality of the circumstances—the whole picture" in deciding whether an anonymous tip provides reasonable suspicion. *White*, 496 U.S. at 330. "Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id*.

This Court analyzed anonymous tips and reasonable suspicion in *White* (1990); *Florida v. J.L.*, 529 U.S. 266 (2000); and *Navarette* (2014). In *White*, an anonymous tipster called the police to report that a drug transaction was imminent. The police proceeded to corroborate both the physical aspects of the tipster's report (the locations involved and the description of the alleged seller's car) and the activities that the

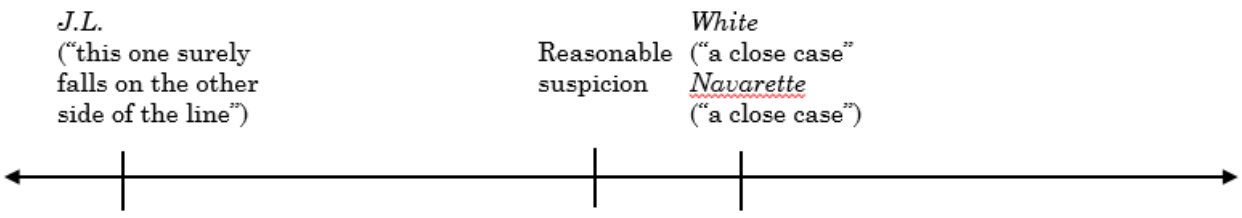
tipster predicted (a woman traveled from an identified apartment complex toward an identified motel within the identified time frame). This corroboration of the tipster's predictive information was sufficient to establish reasonable suspicion. While anyone could have described the car, "[w]hat was important was the caller's ability to predict respondent's *future behavior*, because it demonstrated inside information—a special familiarity with respondent's affairs." *Id.* at 332 (emphasis in original). Nonetheless, this Court described *White* as "a close case." *Id.*

In *J.L.*, this Court held that an anonymous tip did *not* provide responding officers with reasonable suspicion to detain the defendant. 529 U.S. at 270-71. The *J.L.* tipster had reported that a young person was "carrying a gun"—a crime in Florida for under-21-year-olds. *Id.* at 268, 273 n.*. And the tipster had described the person in detail ("a young black male standing at a particular bus stop and wearing a plaid shirt"). *Id.* at 268. This Court held that this tip did not provide reasonable suspicion for two reasons. First, the tipster "neither explained how he knew about the [crime] nor supplied any basis for believing he had inside information about [the alleged suspect]." *Id.* at 271. And second, the tipster "provided no predictive information" that would allow the police "to test the informant's knowledge or credibility." *Id.*

Finally, in *Navarette*, this Court held that an anonymous 911 tipster's report of a dangerous driver rose to the level of reasonable suspicion. 572 U.S. at 395. This Court relied on three factors. First, the *Navarette* tipster knew that the driver was dangerous because he had run her off the road. *Id.* In other words, the tipster was not just an eyewitness to the driver's crime; she was a *victim* of the driver's crime.

Her basis of knowledge was clear. Second, law-enforcement was able to corroborate the driver's direction and location. Third, the tipster's use of the 911 system justified reliance on the call. *Id.* at 398-401. But this Court called *Navarette* a "close case." *Id.* at 404. This Court emphasized that "[n]one of this is to suggest that tips in 911 calls are *per se* reliable." *Id.* at 401. And it cautioned that "[a]n anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity." *Id.* at 404, 397 (emphasis original to *Navarette*; citing *White*). This is because "an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable." *Id.* at 397 (internal quotation marks and citation omitted).

Reading these cases together: the tipster in *J.L.* did not provide law enforcement with his basis of knowledge, nor did he provide predictive information for law enforcement to corroborate. Absent either of these important factors, the case was not even close; rather, it "surely" fell on the no-reasonable-suspicion side of the line. 529 U.S. at 271. The tips in *White* and *Navarette* just barely landed on the other side—in *White* because the tipster provided predictive information, and in *Navarette* because of the tipster's clear basis of knowledge. But again this Court labeled these "close" or "borderline" cases. *Navarette*, 572 U.S. at 399, 404; *J.L.*, 529 U.S. at 271; *White*, 496 U.S. at 332. And so if there is much daylight between *J.L.* and *White/Navarette*, it falls mostly on the no-reasonable-suspicion side of the line:



2. Factual Background

Downtown Kansas City, Kansas is home to a number of social services, including the Wilhelmina Gill Center (which houses a food kitchen) and, catty-corner across an intersection, the Frank Williams Center (a resource center for homeless people). Pet. App. 2a. Two parking lots sit at this intersection; one is next to the food kitchen, and the other is across the street next to the resource center. R1.85; R1.101.[1] The corner is "a very high-trafficked area for pedestrians." R1.85. It sits less than two blocks west of the Robert J. Dole Federal Courthouse, and about a block away from a United States Post Office.

On the morning of August 24, 2015, an anonymous tipster dialed 911 and claimed that "we have a suspect in all red clothing selling juice" or "wet"[2] "down here." Pet. App. 2a, 25a; R1.89; Exh. 1 (audio of 911 call). The tipster described the "suspect" as a "light skinned black" man, and said that the man "just made about 20 dollars." Pet. App. 3a. The tipster did not say where exactly this claimed sale had taken place or how the tipster knew about it. The tipster told the dispatcher that the officers should go "to the parking lot," but he did not know what kind of car the man was driving. Pet. App. 3a. At the beginning of the call, the tipster did not even know where the man was; he reported later during the call that he was watching the man walking up the street and then standing on a corner. Pet. App. 3a, 14a. Nothing that the tipster reported witnessing in real time during the call suggested illegal activity.

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[1] Unless otherwise noted, record citations for facts not included in the Appendix are to the record on appeal in Tenth Circuit Appeal No. 19-3177.

[2] Slang for phencyclidine (PCP). R1.90.

A security guard for the Frank Williams Center heard about the tipster's report on his police radio. Pet. App. 56a, 56c.; R1.133-34. He had earlier seen Mr. Gaines, who was dressed in red, wiping down a white Cadillac in the food-kitchen lot, but he had not witnessed Mr. Gaines selling any drugs. Pet. App. 4a, 56a. When the guard saw two patrol cars driving up the street, he radioed them that Mr. Gaines was in the white Cadillac. Pet. App. 4a.

The responding officers did not ask the guard what else he knew about Mr. Gaines. And they made no attempt to find the anonymous tipster. Nor did they talk with any of the many other people milling about the area. They did not run the plates of the white Cadillac. They did not surveil the white Cadillac or approach it in a low-key conversational style. Instead, they pulled directly up to Mr. Gaines with their patrol lights flashing, ordered Mr. Gaines out of the white Cadillac, and seized him:

Pet. App. 32a-33a (image from parking-lot pole-camera video included in first Tenth Circuit decision concluding that encounter was a seizure). This seizure led to Mr. Gaines's arrest and the discovery of the drugs and the gun that were the subject of the prosecution underlying this petition. Pet. App. 5a.

3. Proceedings Below

A federal grand jury indicted Desmond Gaines for federal drug and gun crimes. Pet. App. 5a. Mr. Gaines moved to suppress the evidence seized on August 24, 2016, arguing that it was the fruit of an unlawful seizure. *Id*. At an evidentiary hearing on Mr. Gaines's motion, the government introduced the 911 call (Exh. 1), as well as footage from a nearby parking-lot pole camera (Exh. 2), and from the dash camera of one responding officer's patrol car (Exh. 3). Pet. App. 68a, 70a. Both responding officers testified that they approached Mr. Gaines based on the information conveyed by the 911 tipster. Pet. App. 68a.

One officer also testified summarily that law enforcement had previously received "complaints of narcotics sales in the area." Pet. App. 22a, 55a. Another officer, when asked about "drug transactions going on at the center," answered without elucidation that "[w]e've had some investigations going on." R1.147. But the government presented no documentary evidence of any reports of narcotics sales in the area or investigations into drug transactions at the center. Rather, it presented evidence that, from March 2015 through August 2015, the Kansas City, Kansas Police Department received eight calls requesting assistance for people in the area near the food kitchen and resource center apparently exhibiting the effects of drugs. Pet. App.

22a, 55a; R1.85-89; R1Supp.Exh. 7. None of those calls involved the *distribution* of drugs at that location. R1Supp.Exh. 7. Neither did the government present any evidence to suggest that, if there was trafficking in the area, it was of an unusually high amount, that is, higher than in any other part of Kansas City. And neither did the government present any evidence that an unusually high percentage of people who frequent the area are involved in drug trafficking as opposed to going about their daily activities at one of the social-service centers, at the nearby post office, or at the federal courthouse.

The district court originally denied the motion to suppress on grounds that the encounter between Mr. Gaines and the officers was consensual. Pet. App. 74a-77a. Mr. Gaines proceeded to trial, where, based on the evidence seized, a jury convicted him of all counts. Pet. App. 5a. The district court thereafter sentenced Mr. Gaines to 180 months of imprisonment followed by 8 years of supervised release. *Id.*

Mr. Gaines appealed to the Tenth Circuit, arguing that the district court erred in finding the encounter consensual. Pet. App. 25a. The Tenth Circuit agreed, vacated the district court's order denying the motion, and remanded the case so that the district court could decide in the first instance whether law enforcement had reasonable suspicion when it seized Mr. Gaines (an issue the district court had not reached in its original order denying suppression). Pet. App. 42a-43a. On remand, the district court found reasonable suspicion, denied Mr. Gaines's motion to suppress, and orally reinstated the original judgment. Pet. App. 60a-65a; R1.229; R1.245.

Mr. Gaines appealed again to the Tenth Circuit, this time challenging the district court's reasonable-suspicion finding. Pet. App. 2a. The Tenth Circuit affirmed in an unpublished order. Pet. App. 1a. The Tenth Circuit found the tipster reliable—in large part because of his use of the 911 system—and held that the evidence of apparent drug overdoses in the area was sufficient to corroborate the call, with a net result of reasonable suspicion to support the officers' detention of Mr. Gaines. Pet. App. 13a-23a.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

1. How to measure the reliability of anonymous tips is an exceptionally important question, as law enforcement increasingly encourages and uses anonymous tips—including anonymous 911 tips.

Want to be an anonymous tipster? There's an app for that. The ReportIt® mobile app is touted by both the Department of Justice and the Bureau of Alcohol, Tobacco, Firearms and Explosives for anonymously reporting crimes under the ATF's jurisdiction.[3] With a different mobile app, P3 Tips, you can submit anonymous tips to Crime Stoppers programs across the nation, from Sacramento[4] to Kansas City[5] to New York City.[6] These days, law enforcement agencies heavily promote anonymous reporting, whether by phone, mobile app, or website. *See, e.g., Task Force Releases Child-Focused Video to Combat Violent Crime*, 2021 WL 1978931 (DOJ News Release May 18, 2021) (promoting anonymous Greater Kansas City Crime Stoppers TIPS Hotline with access via phone, mobile app, or website); *Joint Press Release—Denver Police Department, Colorado Bureau of Investigation, FBI, U.S. Attorney's Office*, 2021 WL 1663958 (DOJ News Release April 26, 2021) (promoting anonymous Safe2Tell reporting program with access via phone, mobile app, or website).[7]

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[3] https://www.justice.gov/actioncenter/report-crime (linking to app on Google Play, the Apple App Store, and https://reportit.com/); https://www.atf.gov/atf-tips.

[4] http://www.crimealert.org/sitemenu.aspx?P=P3App&ID=609#.

[5] http://www.kccrimestoppers.com/sitemenu.aspx?P=P3App&ID=452.

[6] https://www1.nyc.gov/site/nypd/services/see-say-something/crimestoppers.page.

[7] *See also* https://www.phillypolice.com/forms/submit-a-tip/ (Philadelphia); https://www.slmpd.org/anonymous_tips.shtml (St. Louis); https://www.austintexas.gov/page/submit-tips (Austin); https://www.wilmingtonnc.gov/departments/police-department/reporting-crime (Wilmington).

The Department of Justice, for instance, refers users to an anonymous online tip form for reporting human trafficking.[8] And the Federal Bureau of Investigation actively solicits tips via its Facebook and Twitter feeds.[9] Its electronic tip form advises users that "[y]ou are not required to provide your name or other personal information."[10] These solicitations have results: the FBI reported in 2016 that its Tip Line web portal receives on average 1,300 tips a day (though it did not state how many of those tips are anonymous).[11]

The ability to report crimes anonymously is even required by law for some types of crimes. Examples include 10 U.S.C. § 1794(b) ("The Secretary shall ensure that such reports [of suspected child abuse or safety violations at a military child development center or family home day care site] may be made anonymously if so desired by the person making the report."); 14 U.S.C. § 2923(c)(2) ("The Commandant shall ensure that an individual making a report [of suspected child abuse or other deficiencies in a Coast Guard child development center or family home daycare] may do so anonymously if so desired by the individual."); 22 U.S.C. § 2507a(e)(3)(A) (The President shall provide Peace Corps applicants "contact information for a 24-hour sexual assault hotline to be established for the purpose of providing volunteers a mechanism to anonymously . . . report sexual assault[.]"); 38 U.S.C. § 323 (c)(2) ("In carrying out the functions of the Office [of Accountability and Whistleblower

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[8] https://www.justice.gov/actioncenter/report-crime (linking to form at https://humantraffickinghotline.org/report-trafficking).

[9] https://www.facebook.com/pg/FBI/posts/?ref=page_internal; https://twitter.com/fbi?lang=en.

[10] https://tips.fbi.gov/.

[11] https://www.fbi.gov/news/stories/fbi-tip-line-receives-actionable-tips-daily.

Protection], the Assistant Secretary shall ensure that the Office maintains a toll-free telephone number and Internet website to receive anonymous whistleblower disclosures" regarding the Department of Veterans Affairs.); 42 U.S.C. § 9858j(b)(1)(B) (The Secretary of Public Health and Welfare "shall operate . . . a national toll-free hotline and Web site . . . "to allow persons to report (anonymously if desired) suspected child abuse or neglect, or violations of health and safety requirements, by an eligible child care provider that receives assistance under this subchapter or a member of the provider's staff."); Cal. Educ. Code § 67382(b) (legislative finding that certain institutes of higher education "should establish and publicize a policy that allows victims or witnesses to report crimes to the campus police department or to a specified campus security authority, on a voluntary, confidential, or anonymous basis"); Cal. Pub. Res. Code § 4417.5(a) (Department of Forestry and Fire Protection "shall, during the fire season, make a toll-free 800 telephone number available for, and establish, a program to protect the anonymity of persons providing" information about certain arsons); N.Y. Educ. Law § 6446 (ensuring that individuals at state and city colleges and universities are advised of options for confidentially and anonymously disclosing domestic violence, dating violence, stalking, or sexual assault); N.Y. Lab. Law § 27-a(6-a) (mandating dedicated webpage through which public employees may anonymously report "violations of any state law, regulation, rule or guidance related to occupational health and safety involving a communicable disease"); N.Y. Soc. Serv. Law § 492 (mandating hotline for

reports of abuse and other crimes against vulnerable persons; "[t]he hotline shall accept anonymous calls").

Finally—and crucially—some cities even go out of their way to assure the public that they can call 911 anonymously.[12]

Law enforcement's public efforts to encourage anonymous tips, even (and especially) via 911, and the recent proliferation of means by which the public may anonymously report crimes make the reliability of such tips an exceptionally important question for this Court to address.

2. Given law enforcement's modern efforts to encourage anonymous tips, *Navarette*'s confidence in the honesty and accuracy of anonymous 911 tipsters no longer holds.

In *Navarette*, this Court held that a reasonable officer in 2008 "could conclude that a false tipster would think twice" before using 911 to sic the police on an innocent person. 572 U.S. at 395, 401. This Court based this holding on (1) technological and regulatory developments allowing 911 calls to be traced to the originating telephone; and (2) an (apparent) assumption that the general public was aware of those developments. *Id.*

Navarette left several questions unanswered. First, *Navarette* didn't explain why a false tipster who "think[s] twice" wouldn't simply call 911 using a public phone, a borrowed phone, or a burner phone to conceal his or her identity. *See United States v. Velazquez-Fontanez*, 6 F.4th 205, 224-25 (1st Cir. 2021) (noting ATF Agent's

[12] https://www.facebook.com/lapdhq/videos/calling-911-anonymously/2611390979166689/ (Los Angeles); https://www.chicago.gov/content/dam/city/depts/oemc/general/PDF/58-04%20-%20911%20Caller%20Anonymity%20-%20Ald.%20Scott.pdf (Chicago); https://crime.baltimorecity.gov/anonymous-crime-reporting (Baltimore).

testimony that drug traffickers "often carry multiple cell phones and use flip phones as temporary 'burner' phones to evade law enforcement efforts to track and intercept drug-related communications"). Second, *Navarette* didn't account for the fact that an anonymous tipster might be a naive *mistaken* tipster rather than a wily *false* tipster. *See United States v. Hauk*, 412 F.3d 1179, 1188 (10th Cir. 2005) ("If in Mrs. Grundy's fertile imagination, the innocent doings of her neighbors assume the aspect of dire criminality, her [anonymous, uncorroborated] report of her conclusions to the police does not mean that a reasonable basis for suspicion exists"). Third, as the *Navarette* dissent noted, "assuming the Court is right about the ease of identifying 911 callers, it proves absolutely nothing in the present case unless the anonymous caller was *aware* of that fact. It is the tipster's *belief* in anonymity, not its *reality* that will control his behavior." 572 U.S. at 409 (Scalia, J., dissenting, joined by Justices Ginsburg, Sotomayor, and Kagan) (emphases in original; internal marks and citation omitted).

Justice Scalia's point is even stronger today given law enforcement's modern efforts to promote anonymous reporting. With cities from Los Angeles to Chicago to Baltimore assuring the public that they can report crimes anonymously—*even via 911*—it is no longer reasonable (even if it was in 2008) for an officer to "conclude that a false tipster would think twice" before using 911. 572 U.S. at 401. In fact the opposite is true: the public has now been primed to believe that a person's anonymity will be protected if the person chooses not to identify himself or herself when reporting a crime. In this environment, the government cannot bear its

burden of establishing reliability by simply noting that the tipster used 911 and citing *Navarette*. This Court should grant this petition in order to revisit the government's reliance on 911 calls in-and-of themselves to bear its burden of establishing reasonable suspicion.

3. Getting the reasonable-suspicion analysis right in anonymous-tip cases is crucial given the number of tips reported, and the risk that such tips may be mistaken or deliberately false.

We cannot know what percentage of anonymous tips are mistaken or deliberately false. But available statistics suggests that only a small percentage of anonymous tips are sufficiently corroborated to support arrests. WeTip, for instance, has maintained an anonymous-tip hotline since 1972.[13] In 2018, WeTip boasted "over 1,336,138 crimes reported," 75% of which were drug related, "and NOT ONE informant ever revealed."[14] And yet over a million anonymous reports resulted in only 16,391 arrests (1.23%) and 8,396 convictions (0.63%). *Id*. That leaves 1,319,747 anonymous reports that did *not* result in arrests (much less convictions).

Greater Kansas City Crime Stoppers reports a higher percentage success rate, with 159,250 anonymous tips resulting in 11,450 arrests.[15] But that number still only amounts to 7.19%, leaving an overwhelming majority of tips (147,800) not resulting in arrests. That may be for a variety of reasons. Some people commit crimes and flee; others die or get caught for different crimes. Some crimes may generate multiple tips.

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[13] https://www.wetip.com/about-wetip/

[14] https://www.wetip.com/anonymous-tips/10-reasons-why-you-should-support-wetip-the-crime-stopping-anonymous-tip-service-this-holiday-season/ (capitalization in original)

[15] http://www.kccrimestoppers.com/sitemenu.aspx?ID=452&

But surely these statistics also suggest that a large number percentage—surely far more than half—of anonymous tips simply prove to be unreliable.

In *Glover*, this Court held that, absent specific cause to believe otherwise, it is reasonable for a police officer to infer that a person with a revoked driver's license may continue driving. 140 S.Ct. at 1188-89. This Court relied in part on statistical evidence that 75% of drivers with suspended or revoked licenses continue to drive. *Id*. at 1188. No comparable evidence supports a presumption that anonymous tips are reliable—to the contrary, the available evidence suggests that this Court was right in *White* when it observed that anonymous tips alone seldom provide reasonable suspicion. 496 U.S. at 329. And yet law enforcement continues to promote a culture of anonymous reporting. This may well be a desirable culture—so long as law enforcement does the work required to corroborate the reports it generates. This Court should grant this petition to refine the reasonable-suspicion spectrum when it comes to anonymous tips.

4. The Tenth Circuit failed to hold the government to its burden of establishing reasonable suspicion in Mr. Gaines's case.

In its decision affirming the district court, the Tenth Circuit did not mention that the government bore the burden of establishing reasonable suspicion. Pet. App. 1a-23a. Neither did the court acknowledge that the cases it relied on from this Court (*Navarette* and *White*) were "close" or "borderline" cases. *Navarette*, 572 U.S. at 399, 404; *J.L.*, 529 U.S. at 271; *White*, 496 U.S. at 332. Consequently, in considering the totality of circumstances, the Tenth Circuit read the facts in a light unduly favorable to law enforcement, and found reasonable suspicion despite the absence of factors

that were crucial in *Navarette* (basis of knowledge, 572 U.S. at 399) and *White* (predictive information, 496 U.S. at 332).[16] Along the spectrum of reasonable suspicion, Mr. Gaines's case is closer to *J.L.* (no reasonable suspicion) than to *Navarette* and *White* (reasonable suspicion, but "close"), and the Tenth Circuit erred in concluding otherwise. To explain, we will walk briefly through the eight factors that the Tenth Circuit held contributed to reasonable suspicion and then touch on one factor that the Tenth Circuit disregarded.

First, the Tenth Circuit misapplied *Navarette* when it concluded that the anonymous tipster's mere *implication* that he witnessed the man in red selling drugs lent meaningful credibility to the tipster's veracity. Pet. App. 13a. The *Navarette* tipster was run off the road by the driver she reported; her basis of knowledge (as the victim of a crime) was clear and lent "significant support to the tip's reliability," ultimately supporting reasonable suspicion. 572 U.S. at 395, 399, 404. That basis of knowledge was missing in Mr. Gaines's case.

The government admitted in the district court that "the caller never explicitly says how he knows of the illegal conduct," and that "we ultimately cannot be sure the

[16] The Tenth Circuit didn't come out and say so here, but it has often said that it reviews the ultimate question of reasonable suspicion in the light most favorable to the government when the government prevailed in the district court. *See, e.g., United States v. Sauzameda-Mendoza*, 595 Fed. Appx. 769, 774 (10th Cir. 2014) (holding on undisputed facts "that the facts surrounding the traffic stop, when viewed in their entirety *and in the light most favorable to the government*, gave Officer Alvarez reasonable suspicion to extend the traffic stop for a canine sniff") (emphasis added); *United States v. McHugh*, 639 F.3d 1250, 1257–58 (10th Cir. 2011) (holding on undisputed facts "that the facts, viewed in their entirety *and in the light most favorable to the government*, establish that reasonable suspicion existed to justify the stop") (emphasis added); and *United States v. Santio*, 351 Fed. Appx. 324, 330 (10th Cir. 2009) (unpublished) (holding on undisputed facts that, "based on the totality of the circumstances *and in viewing the evidence in the light most favorable to the government*, we conclude the district court did not err in finding a reasonable suspicion existed that Mr. Santio was involved in criminal activity sufficient to justify the initial stop") (emphasis added).

tipster was in a similar position to the caller in *Navarette*." R1.174. And the district court found only that the tipster "*implie[d]* that he personally observed Defendant's drug sale." Pet. App. 61a (emphasis added). But this was not a finding (nor did the evidence support a finding) that the tipster *in fact* personally observed any drug sale.

Mr. Gaines's case is more like *J.L.* than *Navarette*. In *J.L.* the tipster likewise implied that he had personal knowledge when he said that a young man standing at a bus stop was carrying a gun. 529 U.S. at 268. But the tipster there did not explain how he knew about the gun, *id*. at 271, just as the tipster here did not explain how he knew about the claimed drug sale. Absent any evidence of the tipster's basis of knowledge, *J.L.* fell on the no-reasonable-suspicion side of the line. *Id*. at 271. The point of the basis-of-knowledge analysis is to separate unreliable tips from reliable tips. The closer the tipster claims to be to the action, the more reliable the tip is presumed to be. A tipster who artfully "implies" personal observation of criminal conduct is not as trustworthy as a caller who directly states: "This crime happened to me," or "I watched this crime take place." The tipster here did not provide a basis for his claimed knowledge. This factor weighed against a finding that the tipster was reliable enough to provide reasonable suspicion for Mr. Gaines's detention.

Second, the Tenth Circuit misapplied *Navarette* again when it found that the tipster "undoubtedly made a 'contemporaneous report' of Mr. Gaines's activities, both non-criminal and criminal alike," thereby negating the likelihood that his statements were false. Pet. App. 14a. In *Navarette*, this Court noted a "substantial contemporaneity" between the 911 call and the driver's criminal activity (running the

caller off the road). 572 U.S. at 399-400 (citing Fed. R. Evid. 803(1) and (2)). This Court found that this contemporaneity weighed in favor of the tipster's veracity for the same reason that present sense impressions and excited utterances are deemed sufficiently reliable to admit through hearsay—their temporal proximity to the reported event is presumed to negate the likelihood of (or opportunity for) misrepresentation. *Id*. But the analogy to present sense impressions doesn't work absent personal observation of the thing allegedly impressed upon the speaker's senses—a crucial factor that, as noted above, distinguishes Mr. Gaines's case from *Navarette*. The present-sense-impression rule requires that the statement be made "while the declarant *was perceiving* the event or condition, or immediately thereafter." Fed. R. Evid. 803(1) (emphasis added). The tipster's mere implication that he witnessed a drug sale did not establish that he in fact witnessed a drug sale; his report of criminal activity was not a present sense impression and did not negate any likelihood that he was either mistaken or lying.

The Tenth Circuit emphasized that the tipster made contemporaneous observations when he described watching the man in red walking up the hill "right now." Pet. App. 14a. True enough. But the credibility of that part of the call was not in question. What *was* in question was the tipster's report that the man at some point before the call engaged in criminal activity. In *Navarette*, the tipster's "present sense impression" was of the very criminal activity she called to report. 572 U.S. at 399–400. In Mr. Gaines's case, in contrast, even the government conceded in the district court that "the caller here does not describe any criminal activity contemporaneously

with his observations." R1.175. The government recognized that this fact "*weakens* the reliability of the criminal allegations." *Id.* (emphasis added). The Tenth Circuit erred in reaching the opposite conclusion.

Third, the Tenth Circuit held that the tipster's use of 911 was an "important" factor under *Navarette*. Pet. App. 14a-15a. But the Tenth Circuit overread *Navarette* on this point. *Navarette* held only that a tipster's use of the 911 system is a "relevant circumstance[ ]," 572 U.S. at 401—not that it is "important." Additionally, the government presented no evidence in Mr. Gaines's case that the tipster's use of the 911 system in fact put his identity at risk (nor was there any evidence that he believed it would). It was the government's burden to establish the tipster's reliability; it cannot satisfy that burden merely by invoking the tipster's use of 911 and citing *Navarette*.

Fourth, the Tenth Circuit held that the tipster was not "truly anonymous" because he used the 911 system, told the dispatcher where he was calling from, and stayed on the line for over two minutes. Pet. App. 15a. The Tenth Circuit concluded that, taken together, these facts gave the police "quite possibly (if not likely) . . . sufficient details to render the tipster readily identifiable." *Id.* (internal marks and citation omitted). But calling this tipster anything other than anonymous requires pure imagination because the government (which, again, bore the burden here) presented no evidence that he was "readily identifiable."

The tipster did not give the dispatcher either his name or a call-back number. The government presented no evidence that Mr. Gaines or anyone else knew the tipster

or would have been able to identify his recorded voice. The government presented no evidence that the call was *in fact* traceable, or in fact traced, or for that matter whether the tipster was using his own, traceable phone, as opposed to a third party's phone, a phone belonging to the Wilhelmina Gill Center, a pay phone, a "burner" phone, or a smart phone with a caller-ID spoof app.

In addition to overlapping with the third (use of 911) factor, this not-truly-anonymous "factor" finds no support in this Court's cases. In *Navarette*, this Court treated the tip at issue as anonymous despite the fact that the caller used 911, told the dispatcher where she was on the highway, and even, apparently, identified herself by name. 572 U.S. at 398 & 398 n.1. And anyway, the tipster here was, in fact, truly anonymous. We have no idea who he was. The tipster reported calling from a food kitchen on an urban corner that a security guard testified was "a very high-trafficked area for pedestrians." R1.85. Video footage from a pole camera confirms the busy nature of the area. Exh. 2. If the tipster was still on the scene when the officers arrived, he certainly didn't volunteer his presence to them, and they made no effort to find him there before seizing Mr. Gaines. The government never provided any discovery of his identity. The Tenth Circuit's strained law-enforcement-friendly reading of the record to call this tipster "not truly anonymous" failed to hold the government to its burden on this "factor."

Fifth, the Tenth Circuit held that an additional indicia of reliability was the fact that "the tipster never declined to give his name," but rather, "the 911 operator did not ask for it." Pet. App. 16a. The fact that a 911 dispatcher doesn't ask an anonymous

tipster for his name cannot possibly add to the tipster's reliability. Indeed, it would be odd for law enforcement's *failure* to check the reliability of an anonymous tipster to weigh in the government's favor. Such a rule would create an affirmative disincentive for law enforcement to ask *any* 911 callers to identify themselves—a result directly contrary to the effect the exclusionary rule is meant to have. *See United States v. Calandra*, 414 U.S. 338, 347 (1974) ("the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures"). Law enforcement may accommodate a caller's wish for anonymity so long as it does the legwork to corroborate that caller's story. But it may not earn reliability credit when it neither asks for a tipster's identity nor bothers to corroborate his story before acting on the tipster's report.

Sixth, the Tenth Circuit concluded that the tipster's manner was "measured and circumspect," suggesting "good faith" or at least the absence of a "malicious motive." Pet. App. 16a-17a. The tipster's tone may well be in the ear of the beholder, but to our ears the tipster a little too much enjoyed calling the law on the man in red and using police-speak to accuse him of a crime ("we have . . . a suspect"). Ex. 1. His manner was suspiciously gleeful. *Id*. This is another example of the Tenth Circuit presuming the tipster reliable instead of holding the government to its burden.

Seventh, the Tenth Circuit found that the tipster's credibility was enhanced by the fact that he "identified the suspect's physical appearance and location with a fairly high degree of specificity." Pet. App. 17a. Well of course he did. He wanted the

police to arrest the "suspect." Mr. Gaines's case is no different from *J.L.* in this regard. And as this Court cautioned in *J.L.*: "An accurate description of a subject's readily observable location and appearance . . . will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." 529 U.S. at 272. The Tenth Circuit's reliance, for reasonable-suspicion purposes, on the tipster's description of his target's readily observable location and appearance contravenes *J.L.*, and was error.

Eighth, the Tenth Circuit held that the anonymous tip was bolstered by the responding officers' knowledge of drug activity around the Wilhelmina Gill Center. Pet. App. 21a-23a. But evidence that drug activity had previously been reported in the area did nothing to corroborate the tipster's claim that *the man in red* was involved in such activity. The officers were required to have more than a reasonable suspicion that *someone* might be selling drugs; they were required to have "a particularized and objective basis for suspecting *the particular person stopped* of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (emphasis added).

Additionally, the officers approached Mr. Gaines in the middle of a weekday in a public parking lot in a high-trafficked area where people frequently come and go while pursuing legitimate daily activities at, for instance, the food kitchen, the resource center, the post office, and the federal courthouse. In other words, this case

did not involve an actual "high crime" area frequented for no purpose other than crime. *See, e.g., United States v. Davis*, 94 F.3d 1465, 1468 (10th Cir. 1996) (fact that defendant was approaching a known criminal establishment did not give rise to reasonable suspicion, "especially since the record shows that the establishment also offered legitimate activities to its patrons"); *United States v. Santio*, 351 Fed. Appx. 324, 330–31 (10th Cir. 2009) (unpublished) (contrasting defendant's suspicious behavior while wearing gang apparel at 3:30 a.m. in "high crime area" near stolen vehicle with *Davis* defendant's presence at 10:00 p.m. near "a business offering both illegal and legitimate activities"); *United States v. Montero-Camargo*, 208 F.3d 1122, 1139 n.32 (9th Cir. 2000) (contrasting value of "high crime area" designation in case involving barren area at side of highway "which apparently served no purpose other than as a site for criminal activity" with same designation "[w]ith respect to populated areas, or areas in which people typically carry on legitimate activities").

Finally, the government made no effort to establish that, if there was drug trafficking (as opposed to mere use) in the area, it was of an unusually high amount, that is, higher than in any other part of Kansas City. And neither did the government present any evidence that an unusually high percentage of people who frequent the area are involved in drug trafficking as opposed to going about their daily activities. Basing reasonable suspicion to seize a person on evidence that drug activity has been reported in an area where poor people go for social services (including drug-recovery services)—without any basis for comparison—exposes an already vulnerable population to unnecessarily intrusive police action. As one jurist has observed,

"labeling an area 'high-crime' raises special concerns of racial, ethnic, and socioeconomic profiling." *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006); *accord United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) ("[T]he demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention . . . is to accept carte blanche the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people."); *United States v. Griffin*, 730 F.3d 1252, 1254–55 (11th Cir. 2013) ("because neighborhoods described as 'high-crime' are almost always poor communities of color, excessively-broad police discretion to frisk suspects in such neighborhoods facilitates the disproportionate targeting of poor people of color by law enforcement, contributing to unjustifiable levels of racial and socioeconomic disparities in the criminal justice system") (Barkett, J., dissenting from denial of rehearing en banc).

The officers' knowledge of drug activity in the area did not corroborate the anonymous tipster's claim that the man in red was selling drugs there, and did not—even when added to the 911 call—provide reasonable suspicion for the officers to seize Mr. Gaines.

Lastly, the Tenth Circuit unduly downplayed the fact that the tipster failed to offer predictive information regarding either innocent or criminal activity. Pet. App. 17a-20a. The tipster had no idea what kind of car the man was driving and was

unable to predict so much as where the man in red was headed as he walked up the hill. Pet. App. 3a., 14a, Exh. 1. As this Court cautioned in *J.L.*, the absence of predictive information leaves the police "without means to test the informant's knowledge or credibility." 529 U.S. at 271. The absence of predictive information here weighed against a finding of reasonable suspicion, and the Tenth Circuit failed to give this absence its proper weight.

In the end, the Tenth Circuit cobbled together weak and problematic factors—some of which this Court rejected as meaningful in *J.L.*—to find reasonable suspicion, and ignored the absence of factors that were critical in *White* and *Navarette*. The totality of circumstances did not support law enforcement's seizure of Mr. Gaines. The officers lacked reasonable suspicion for the seizure, and the Tenth Circuit erred in concluding otherwise.

Review is necessary to correct the Tenth Circuit's reasonable-suspicion analysis, or, at the very least, because it is not clear that the Tenth Circuit properly held the government to its burden of establishing reasonable suspicion. *See Lombardo v. City of St. Louis*, 141 S.Ct. 2239, 2241-42 (2021) (granting petition for certiorari and remanding excessive-force case where circuit court either failed to analyze relevant evidence or characterized it as insignificant, thereby suggesting that court had contravened "the careful, context-specific analysis required by this Court's excessive force precedent").

5. Other courts more faithfully apply this Court's precedents when analyzing anonymous tips.

"[E]ach case is to be decided on its own facts and circumstances." *Glover*, 140 S.Ct. at 1191 (citations omitted). That said, other circuit and state courts are less willing than the Tenth Circuit was in Mr. Gaines's case to conclude that the police may detain a person based on an anonymous tip without first corroborating the tipster's claim of illegality.

In *United States v. Lowe*, for instance, the Third Circuit emphasized that "the Government bears the burden at a suppression hearing where, as here, the search or seizure was conducted without a warrant." 791 F.3d 424, 432 n.4 (3d Cir. 2015). The Third Circuit consequently declined the government's invitation to "indulge in hypotheticals and interpret alleged ambiguity in the District Court's findings in favor of the party with the burden of proof—the Government." *Id.* In *Lowe*, officers responding to an anonymous tip about a "black male wearing a gray hoodie with a gun in his waistband" in a high-crime area precipitously seized the defendant without reasonable suspicion. *Id.* at 434–35. As the Third Circuit observed, the officers had "many tools at their disposal to gather additional evidence" before the seizure, including "investigation, surveillance, and even approaching the suspect without a show of authority to pose questions and to make observations about the suspect's conduct and demeanor." *Id.* at 436. Because they failed to use available tools to develop reasonable suspicion before the seizure, the fruit of the seizure should have been suppressed. *Id.*

Lowe relied in part on an earlier Third Circuit case, *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996), which is factually similar to Mr. Gaines's case. In *Roberson*, an anonymous 911 caller described a "heavy-set, black male wearing dark green pants, a white hooded sweatshirt, and a brown leather jacket" at a drug "hot spot," and alleged he was selling drugs. *Id.* at 75. The police stopped and frisked a man at the location fitting the caller's description, despite seeing no drug activity. Even though "the caller could have been looking out his window . . . at the time of his 911 call," the Third Circuit held that the call did not provide reasonable suspicion *of drug activity* absent independent corroboration of *that* claim. *Id.* at 79–80.

Other jurisdictions have similarly emphasized the need to corroborate claims of illegality made by anonymous (or identified but untested) tipsters. *See, e.g., United States v. Massenburg*, 654 F.3d 480, 487 (4th Cir. 2011) ("even a 'nearly contemporaneous report' of a drug transaction the tipster reportedly saw was unreliable in the absence of '[s]ome corroboration,' since 'a fraudulent tipster can fabricate her basis of knowledge'") (citations omitted); *United States v. Lopez*, 907 F.3d 472, 481, 483 (7th Cir. 2018) (absent corroboration, tip did not provide reasonable suspicion; "[i]nstead of doing the police work required to substantiate the tip, the officers pounced as soon as they saw Lopez leave his garage"); *State v. Z.U.E.*, 315 P.3d 1158, 1168 (Wash App. Div. 2 2014) (where officers "did not corroborate the presence of actual or potential criminal activity," "observations of innocuous facts were insufficient to support an investigatory stop"); *Stinson v. State*, 117 So. 3d 859, 864 (Fla. App. Dist. 4 2013) (where the "sole basis for the officer's stop and detention

of the defendant was the anonymous tip, which the officer was unable to corroborate," "the totality of the facts and circumstances did not provide reasonable suspicion to stop and detain the defendant"); *State v. Hneidy*, 510 S.W.3d 458 (Tex. App. San Antonio 2013) (observations of identifying information insufficient to corroborate tipster's claim of illegality; where officer testified "that he did not corroborate any of the information that was relayed to him by dispatch," and absent any other sufficient basis, traffic stop not supported by reasonable suspicion).

The question of when an anonymous tip provides reasonable suspicion will continue to arise with frequency in both state and federal courts. This Court's guidance is necessary to ensure that anonymous tips are analyzed for reliability and corroboration with consistency across jurisdictions.

6. This case is an excellent vehicle for analyzing anonymous tips.

This case is an excellent vehicle for analyzing anonymous tips. It involves a number of factors that are common in anonymous-tip cases: a 911 call; questions of reliability and corroboration; and an alleged "high crime" area, to name a few. The question presented was fully preserved below, and there is no procedural impediment to this Court's consideration.

The fact that the Tenth Circuit's decision is unpublished does not weigh against granting this petition. Publication is not a prerequisite to review or a reliable measure of a decision's importance. *See, e.g., Carter v. United States*, 530 U.S. 255 (2000) (reviewing unpublished circuit court decision); *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007) (same); *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (same); *Cooper Industries, Inc. v. Leatherman*

Tool Group, Inc., 532 U.S. 424 (2001) (same); *Eastern Assoc. Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000) (same); *Wisconsin Right to Life, Inc. v. F.E.C.*, 546 U.S. 410 (2006) (reviewing unpublished three-judge district court decision); *Kaupp v. Texas*, 538 U.S. 626 (2003) (reviewing unpublished Texas Court of Appeals decision); *Ewing v. California*, 538 U.S. 11 (2003) (reviewing unpublished California Court of Appeal decision).

Here, the government thought that the Tenth Circuit's decision was important enough to move for its publication. Gov't Mot. to Publish filed 06/10/2021. In its motion, the government described the decision as "synthesiz[ing] the vast and sometimes unwieldy body of caselaw relating to the reliability of anonymous tips in the reasonable suspicion analysis, referring to cases from the Supreme Court, [the Tenth Circuit], and other federal circuit courts of appeal, in a thorough and insightful opinion." *Id*. at 2-3. The government further predicted that "[f]uture defendants, prosecutors, district courts, and litigants before this Court will undoubtedly devote considerable time, energy, and resources responding to similar issues decided by the panel in this case and interpreting the cases interpreted by the panel in this case." *Id*. at 3.

While the Tenth Circuit denied the government's motion, its rules permit the citation of unpublished decisions "for their persuasive value." 10th Cir. R. 32.1(A). Indeed, the Tenth Circuit itself "generally follows that principle, looking in appropriate circumstances to an unpublished opinion if its rationale is persuasive and apposite to the issue presented." *Noreja v. Commissioner, SSA*, 952 F.3d 1172,

1176 (10th Cir. 2020) (citing examples). The government will undoubtedly rely on *Gaines* as persuasive authority in future cases, and district courts will undoubtedly endeavor to harmonize their decisions with *Gaines*. This latter prediction has already come to pass. *See United States v. Dye*, No. 18-20094-01-DDC, 2021 WL 2515029 (D. Kan. June 18, 2021) ("*Gaines* is unpublished and not controlling, but it extensively analyzed a set of facts that resemble certain elements of Mr. Dye's case. The court thus finds the case useful.").

Finally, Mr. Gaines would not have been convicted had his motion to suppress been granted. At trial, the government relied almost entirely on the evidence discovered as a result of law enforcement's August 24, 2015 seizure of Mr. Gaines to prove the drug and gun charges against Mr. Gaines. *See, e.g.,* Appeal No. 17-3270, R2.144 at 77-81 (officer describing drugs found in black bag thrown on roof); *id*. at 144-47 (officer describing drugs found in Cadillac); *id*. at 189-91 (officer describing gun found in Cadillac); Appeal No. 17-3270, R2.145 at 40-66 (forensic scientist identifying weight and types of drugs found in black bag and Cadillac); Appeal No. 17-3270, R2.146 at 122-154 (expert opining that quantity of drugs found in black bag and Cadillac indicated distribution as opposed to personal use, and discussing relationship of guns to drug distribution). The government did not, for instance, present any witnesses who claimed to have either bought drugs from Mr. Gaines or seen Mr. Gaines handle the gun, or any confession from Mr. Gaines. Instead, the main factual dispute at trial was whether the Cadillac and the items in it belonged to Mr. Gaines. *See, e.g.,* Appeal No. 17-3270, R2.146 at 5-19 (registered owner of car

testifying to Mr. Gaines's use of the Cadillac and denying ownership of items seized on August 24, 2015). In other words, the government would not have had a case without the items seized by law enforcement on August 24, 2015. If this Court grants certiorari and reverses the Tenth Circuit, Mr. Gaines's conviction will be vacated and he will be released.

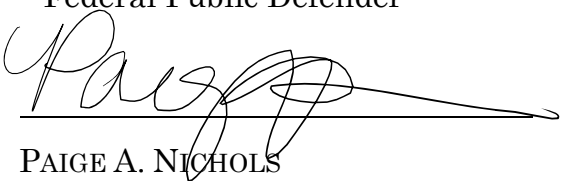
No future case will be better positioned for this Court to revisit anonymous tips. This Court should grant this petition.

CONCLUSION

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

Respectfully submitted,

MELODY BRANNON
Federal Public Defender



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FILED
United States Court of Appeals
Tenth Circuit

May 25, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DESMOND S. GAINES,

Defendant - Appellant.

No. 19-3177
(D.C. No. 2:15-CR-20078-JAR)
(D. Kan.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **HOLMES**, Circuit Judges.

In September 2017, a jury convicted Desmond S. Gaines of five federal offenses involving illegal drugs and a firearm. Before his trial began, Mr. Gaines moved to suppress certain evidence as the fruit of an unlawful seizure. The district court denied the motion. It concluded that Mr. Gaines's initial encounter with police—which led to the discovery of the illegal drugs and firearm—was consensual and not a seizure. The encounter itself was precipitated by an anonymous 911 tip.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

In a prior appeal, we reversed. We held that Mr. Gaines's initial encounter with police was a Fourth Amendment seizure and not consensual. As a result, we vacated Mr. Gaines's conviction and remanded so the district court could determine whether the seizure was justified by reasonable suspicion. On remand, the district court concluded the police officers had a reasonable suspicion to seize Mr. Gaines. It again denied his motion to suppress evidence and reinstated the original judgment.

The issue now before us is whether the district court erred in concluding that reasonable suspicion existed to seize Mr. Gaines. We hold that the court did not err. Therefore, exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I

One morning in August 2015, an anonymous tipster called 911 to report that a man was selling phencyclidine, or PCP, near the Wilhelmina Gill Center and the Frank Williams Center in downtown Kansas City, Kansas. The Wilhelmina Gill Center houses a food kitchen; the Frank Williams Center offers resources to the homeless. The 911 call lasted nearly two-and-a-half minutes. At the beginning of the call, the tipster indicated that he was in downtown Kansas City near the two centers.[1] Then he said, "we have a suspect in all red clothing selling juice," i.e., PCP. Gov't Ex. 1 at 0:10–0:14 (911 Call).

[1] The district court refers to the tipster using the pronouns for the male gender (e.g., "he"), even though it does not appear to have explicitly found that the tipster was male. We follow suit. Insofar as the court's use of male-gender pronouns amounts to a tacit finding that the tipster was male—based on our review of the audio recording of the tipster's 911 call—this finding would not be clearly erroneous.

The 911 operator asked about the alleged suspect's race and the tipster replied, "light skinned black." *Id.* at 0:21–0:23. The tipster continued: "I don't know what kind of car he's driving today, but he's down here at the Gill Center, and he has on all red, red hat, red shirt, big red shorts." *Id.* at 0:25–0:34. According to the tipster, the man in red "just made about 20 dollars." *Id.* at 0:46–0:49.

The 911 operator asked for the exact address where the tipster and man in red were located. "I don't even know," the tipster replied. *Id.* at 0:53–0:54. But then he said, "let me go inside and ask." *Id.* at 0:59–1:01. It is not clear where the tipster went, but he subsequently confirmed that his location was "645 Nebraska." *Id.* at 1:10–1:17. The 911 operator then asked where the officers should go when they arrived. The tipster said, "to the parking lot." *Id.* at 1:22–1:23. The operator asked what kind of car the man in red was driving. The tipster again said "I don't know," but volunteered to try to find out. *Id.* at 1:34–1:39. The tipster then stated, "I'm watching him right now," *id.* at 1:40–1:41, and said that the man in red was "still not going to his car yet," *id.* at 2:02–2:05, but was instead "just standing on the corner," *id.* at 2:07–2:10. Near the end of the call the tipster commented, "after this guy we have only one more supplier, and that's it." *Id.* at 1:55–2:00.

Shortly before 10:00 a.m., two Kansas City police officers—one male and one female—responded to the call. While approaching the Wilhelmina Gill Center, the male officer saw a man in the parking lot who matched the description provided by the tipster.

The man was Mr. Gaines. As Mr. Gaines entered a white Cadillac, the officers received a call over their police radio from an off-duty police officer who had been working at the Frank Williams Center that morning. The off-duty officer had kept his police radio on and heard the officers dispatched in response to the 911 call. Earlier that morning, he had noticed a man dressed in all red in the Frank Williams Center parking lot. The off-duty officer radioed to the responding officers, "that's him in that white Cadillac." R., Vol. I, at 137 (Test. of Mark Wilcox, dated Mar. 8, 2017).

The officers parked close to the Cadillac that Mr. Gaines occupied and turned on their emergency lights. Both officers exited their vehicles. Mr. Gaines did the same and shut his door. Mr. Gaines asked the male officer what he was doing. The officer replied that he had received a call that a person matching Mr. Gaines's description was selling drugs in the parking lot. Mr. Gaines said it was not him. The male officer then asked Mr. Gaines for identification. Mr. Gaines said it was in his car trunk and reopened the Cadillac's driver's side door to open the trunk. With the door and trunk open, the male officer smelled a strong chemical odor coming from the vehicle. The officer believed it was PCP. He also noticed an open alcohol container in the front console—an arrestable offense.

The male officer informed Mr. Gaines that he would have to handcuff and detain him for the open container. As the officer tried to handcuff Mr. Gaines, he quickly pulled away, grabbed a black bag from the driver's side floorboard, shoved the officer, and ran

away. The responding officers chased Mr. Gaines on foot and eventually apprehended him. They also recovered the black bag. It contained PCP, cocaine, and marijuana. Later, police discovered a black handgun and more cocaine in Mr. Gaines's Cadillac .

A federal grand jury indicted Mr. Gaines on five counts involving illegal drugs and a firearm.[1] Mr. Gaines moved to suppress the drugs and firearm evidence, arguing it was the fruit of an unlawful seizure. The district court denied the motion. It held Mr. Gaines's initial encounter with police officers—from the time the officers first approached his car to when one officer saw the open alcohol container—was consensual. The case proceeded to trial and a jury convicted Mr. Gaines on all five counts. The district court sentenced Mr. Gaines to 180 months' imprisonment and eight years of supervised release.

Mr. Gaines appealed. We reversed and held that the initial encounter between Mr. Gaines and the police—before the officer spotted the open alcohol container—was a Fourth Amendment seizure. We noted that the seizure "would have been permissible if the police had a reasonable ground to suspect Mr. Gaines of a crime," but the district

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[1] The five counts listed in the indictment were (1) possession with intent to distribute twenty-eight grams or more of crack cocaine, in violation of 28 U.S.C. § 841(a)(1) and (b)(1)(B)(iii); (2) possession with intent to distribute marijuana, in violation of 28 U.S.C. § 841(a)(1) and (b)(1)(D); (3) possession with intent to distribute PCP, in violation of 28 U.S.C. § 841(a)(1) and (b)(1)(C); (4) possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c); and (5) possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). R., Vol. I, at 26–28 (Indictment, filed Sept. 2, 2015).

court did not address "the reasonableness of the police's suspicion." *United States v. Gaines*, 918 F.3d 793, 802 (10th Cir. 2019). We declined to opine on this matter in the first instance. Instead, we reversed the district court's order denying Mr. Gaines's suppression motion and remanded so the district court could consider whether the officers had a reasonable suspicion to justify the seizure. *Id.* at 803.

On remand, the district court found reasonable suspicion existed to seize Mr. Gaines. The court's conclusion rested in part on factors similar to those highlighted in *Navarette v. California*, 572 U.S. 393, 399–400 (2014), where the Supreme Court upheld an investigatory stop based on an anonymous tip. Specifically, the district court noted that "the caller told the operator where he was, [ ] stayed on the phone for over two minutes, and [ ] answered every question that was put to him, including answering the operator honestly that he did not know what type of car [the] [d]efendant was driving." R., Vol. I, at 238 (Mem. and Order, dated Aug. 9, 2019). Additionally, the court credited the responding officers' first-hand knowledge of drug-related activity around the Wilhelmina Gill Center, and the off-duty officer's observations. Taken together, the court held these facts provided responding officers with reasonable suspicion to conduct an investigatory stop. The court, therefore, denied Mr. Gaines's motion to suppress and reinstated its original judgment. This appeal followed.

II

The Fourth Amendment protects against "unreasonable searches and seizures."

U.S. CONST. amend. IV. However, this mandate does not prevent police officers from making a brief investigatory stop of a person when they have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981); *see also United States v. McHugh*, 639 F.3d 1250, 1255 (10th Cir. 2011) (noting that an investigatory stop is justified "if the specific and articulable facts and rational inferences drawn from those facts give rise to a reasonable suspicion a person has or is committing a crime" (quoting *United States v. DeJear*, 552 F.3d 1196, 1200 (10th Cir. 2009))). The "reasonable suspicion" needed to justify a stop depends "upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). We look to "the totality of the circumstances—the whole picture" to determine whether police have a reasonable suspicion. *Cortez*, 449 U.S. at 417; *see also United States v. Sanchez*, 519 F.3d 1208, 1213 (10th Cir. 2008) (explaining that we assess the "reasonableness of the officer's suspicions . . . by an objective standard taking the totality of the circumstances and information available to the officers into account" (quoting *United States v. Johnson*, 364 F.3d 1185, 1189 (10th Cir. 2004))).

A mere hunch is not enough; nevertheless, a reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than the proof needed for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also United States v. Chavez*, 660 F.3d 1215, 1221 (10th Cir. 2011)

("Although 'reasonable suspicion requires [an] officer to act on something more than an inchoate and unparticularized suspicion or hunch, the level of suspicion required . . . is considerably less than proof by a preponderance of the evidence or that required for probable cause.'" (quoting *McHugh*, 639 F.3d at 1255–56)).

"These principles apply with full force to investigative stops based on information from anonymous tips." *Navarette*, 572 U.S. at 397. The Supreme Court has struck a delicate balance on when an anonymous tip can provide a reasonable suspicion for an investigatory stop. The Court has noted that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and therefore seldom supplies reasonable suspicion. *White*, 496 U.S. at 329. Yet, the Court nonetheless has acknowledged that "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" *Navarette*, 572 U.S. at 397 (quoting *White*, 496 U.S. at 327); *see also United States v. Madrid*, 713 F.3d 1251, 1258 (10th Cir. 2013) ("A confidential tip may justify an investigatory stop if under the totality of the circumstances the tip furnishes both sufficient indicia of reliability and sufficient information to provide reasonable suspicion that criminal conduct is, has, or is about to occur." (quoting *United States v. Leos-Quijada*, 107 F.3d 786, 792 (10th Cir.1997))).

The Supreme Court has identified several key indicia of reliability when it comes to anonymous tips. In *Alabama v. White*, a tipster told police that a woman would drive

from a specific apartment building to a specific motel in a specific kind of car, while transporting cocaine. The police corroborated the benign details—the apartment, the motel, and the car type—before making a stop. The Supreme Court held that the corroboration of these details made the tip sufficiently reliable to justify a stop. The Court emphasized, however, that the corroborated details related "not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *White*, 496 U.S. at 332 (quoting *Illinois v. Gates*, 462 U.S. 213, 245 (1983)). If a tipster can accurately predict an individual's future behavior, it implies that the tipster has "a special familiarity with [the individual's] affairs" and, in particular, "access to reliable information about that individual's illegal activity." *Id.*

But if a tip "provide[s] no predictive information and therefore le[aves] the police without means to test the informant's knowledge or credibility," it will often not justify an investigatory stop. *Florida v. J.L.*, 529 U.S. 266, 271 (2000). This was true of the tip in *Florida v. J.L.* In that case, the tipster merely said that a young Black man who was wearing a plaid shirt and standing at a particular bus stop was carrying a gun. All the police had was "the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id.* In holding that the police lacked reasonable suspicion to stop and frisk the defendant—who was wearing a plaid shirt—the Court noted that an

"accurate description of a subject's readily observable location and appearance" is reliable only in a "limited sense": it will "help the police correctly identify the person whom the tipster means to accuse." *Id.* at 272. However, such a tip "does not show that the tipster has knowledge of concealed criminal activity." *Id.* To help establish reasonable suspicion, a tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.*

But, corroborated predictive information—of the kind present in *White*, but not in *J.L.*—is not necessarily required for an anonymous tip to support a reasonable-suspicion finding. In the case that the district court here relied on, *Navarette*, a tipster called 911 to report that a truck had just run her off the road. The tipster supplied no predictive information. Yet, she provided the truck's make, model, color, and license plate number. In holding that the tip had sufficient indicia of reliability, and thus supplied a reasonable suspicion for an investigatory stop, the Court focused on three factors. First, the caller "necessarily claimed eyewitness knowledge of the alleged dangerous driving," precisely because the caller was run off of the road by the dangerous driver. *Navarette*, 572 U.S. at 399. Second, "the caller reported the incident soon after she was run off the road." *Id.* As to this point, the Court explained that this sort of "contemporaneous report has long been treated as especially reliable." *Id.* This is so because, under the law of evidence, "statements about an event and made soon after perceiving that event are especially trustworthy because 'substantial contemporaneity of event and statement negate the

likelihood of deliberate or conscious misrepresentation.'" *Id.* at 400 (quoting FED. R. EVID. 803(1) advisory committee's note). Third, the caller used the 911 system. Because a 911 call "has some features that allow for identifying and tracing callers" it provides "some safeguards against making false reports with immunity." *Id.*

Furthermore, without reference to predictive information, we, too, have identified certain factors that often suggest the reliability of an anonymous tip. In *United States v. Chavez*, we succinctly summarized the most important factors we usually consider:

> Although no single factor is dispositive, relevant factors include: (1) whether the informant lacked "true anonymity" (i.e., whether the police knew some details about the informant or had means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant.

Chavez, 660 F.3d at 1222. Though we place a premium on information related "to future actions of third parties [which are] ordinarily not easily predicted," such details are not necessarily required to render an anonymous tip reliable. *United States v. Hauk*, 412 F.3d 1179, 1189 (10th Cir. 2005) (quoting *Gates*, 462 U.S. at 245).

A tipster is not truly anonymous if he "provides sufficient details regarding his identity to render him readily identifiable by police," such as where he works or lives. *United States v. Brown*, 496 F.3d 1070, 1076 (10th Cir. 2007). Contemporaneous, firsthand knowledge also differs from that which is acquired "through the report of a third party or reported sometime later than the described events." *Madrid*, 713 F.3d at

1260–61; *see also Brown*, 496 F.3d at 1076 ("We consider it another important indicium of reliability that the caller claimed firsthand knowledge of the alleged conduct."). We likewise credit "detailed information about the events [a tipster] witnessed." *Chavez*, 660 F.3d at 1222. Additionally, motivations bolster reliability when they "bespeak an ordinary citizen acting in good faith," particularly to protect others. *United States v. Copening*, 506 F.3d 1241, 1247 (10th Cir. 2007). Lastly, police corroboration of any information provided by a tipster is also potentially relevant. *See Brown*, 496 F.3d at 1078–79 (deeming even "limited police corroboration of facts provided by the caller" relevant to the determination that "the 911 caller [ ] bore sufficient indicia of reliability to generate a reasonable suspicion").

III

We "review de novo the ultimate question of reasonableness under the Fourth Amendment." *United States v. McNeal*, 862 F.3d 1057, 1061 (10th Cir. 2017). In doing so here, we conclude the officers had a reasonable suspicion to seize Mr. Gaines for an investigatory stop. We first consider the relevant indicia of reliability displayed by the anonymous tipster's 911 call. Then, after acknowledging the absence of predictive information in the tip, we explain why it supported the district court's finding of a reasonable suspicion. We then distinguish the tip in this case from the one in *Florida v. J.L.* Finally, we address why the drug-related activity near the area of Mr. Gaines's arrest is relevant to our reasonable-suspicion inquiry.

A

We begin with the three indicia of reliability highlighted in *Navarette*: that is, (1) "claimed eyewitness knowledge of" the illegal activity, (2) a contemporaneous report—"soon after"—the occurrence of the activity, and (3) the "use [of] the 911 emergency system." *Navarette*, 572 U.S. at 399–400.

As to the first factor, the district court found that the anonymous tipster "implie[d] that he personally observed [Mr. Gaines's] drug sale." R., Vol. I, at 236. This finding is not clearly erroneous. When the 911 call began, the tipster identified his location and then stated, "we have a suspect in all red clothing selling juice." Gov't Ex. 1 at 0:10–0:14. And, significantly supportive of the district court's finding, the tipster also reported that the man in red "*just* made about 20 dollars," *id.* at 0:46–0:49 (emphasis added), implying that the tipster possessed eyewitness knowledge of an illegal drug sale.[2]

[2] We recognize that, in some of our other cases, the tipster seemingly communicated in more explicit terms eyewitness knowledge of unlawful activity. *See, e.g.*, *Brown*, 496 F.3d at 1076 ("The caller in this case specifically told the 911 operator that he was present when an armed man entered [a woman's] apartment and that he saw the man's gun."); *Copening*, 506 F.3d at 1247 (noting that "the caller told dispatch he saw the . . . weapons incident"). But we conclude that the district court's finding that the tipster "implie[d] that he personally observed [Mr. Gaines's] drug sale," R., Vol. I, at 236, means the first *Navarette* factor "weigh[s] in favor of the caller's veracity," *Navarette*, 572 U.S. at 400—even if it does not do so strongly. *Cf. Brown*, 496 F.3d at 1078–79 (noting that even though there was "limited police corroboration of facts provided by the caller" it was relevant to the determination that "the 911 caller here bore sufficient indicia of reliability to generate a reasonable suspicion"). Furthermore, we underscore that the reasonable-suspicion determination is grounded on the totality of the circumstances and no one factor—including those highlighted in *Navarette*—is determinative.

Furthermore, the other two *Navarette* factors are both clearly satisfied here. The tipster undoubtedly made a "contemporaneous report" of Mr. Gaines's activities, both non-criminal and criminal alike. Indeed, most of the tipster's statements appeared to provide a real-time report of Mr. Gaines's activities: "I'm watching him right now," the tipster said. *Id.* at 1:40–1:41. "Yeah, he's still walking up the hill." *Id.* at 1:49–1:50. "He's just standing on the corner." *Id.* at 2:07–2:10. And, as noted, the tipster reported that "[h]e just made about 20 dollars," implying that it was from a drug sale. *Id.* at 0:46–0:49. We have ample reason, then, to conclude that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Navarette*, 572 U.S. at 400 (quoting FED. R. EVID. 803(1) advisory committee's note); *see also United States v. Conner*, 699 F.3d 1225, 1229 (10th Cir 2012) ("[T]he caller's immediate, firsthand knowledge added to the reliability of his statements."). We thus conclude that the second *Navarette* factor here "weigh[s] in favor of the caller's veracity." *Navarette*, 572 U.S. at 400

Finally, the tipster called 911 to report his observations. Again, this factor is important because a 911 call "has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Navarette*, 572 U.S. at 400. The Supreme Court noted two such safeguards in *Navarette*: a recorded call "provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution," and callers cannot "block call recipients from obtaining

their identifying information." *Id.* at 400–01. We do not suggest that "tips in 911 calls are per se reliable." *Navarette*, 572 U.S. at 401. But the tipster's use of the 911 system is "one of the relevant circumstances that, taken together, justified the officer[s'] reliance on the information." *Navarette*, 572 U.S. at 401.

On the whole, then, the three indicia of reliability highlighted in *Navarette* favor concluding that the anonymous tip provided reasonable suspicion justifying the stop. Looking beyond *Navarette*, other factors here also demonstrate the tipster's reliability.

First, as we have framed the matter, the tipster was not truly anonymous. As previously mentioned, he used the 911 system. But that is not all. He confirmed the precise address of his physical location. *See Madrid*, 713 F.3d at 1260 (observing that "giving the address [of where the crime took place and of the caller's own location] was at least an 'indicium of reliability'" (quoting *Robinson v. Howes*, 663 F.3d 819, 829 (6th Cir. 2011))); *cf. United States v. Williams*, 403 F.3d 1188, 1194 n.5 (10th Cir. 2005) (noting that an anonymous restaurant patron who reported seeing another patron with a firearm was not truly anonymous because the tip placed the tipster at the particular restaurant at a particular time). Furthermore, the tipster here spoke for over two minutes in a known location, making it likelier that police could unearth witnesses who might help identify him. Taken together, the police quite possibly (if not likely) had "sufficient details" to "render [the tipster] readily identifiable." *Brown*, 496 F.3d at 1076.

Moreover, throughout the call, the tipster answered every question asked by the

operator. For example, he took time to retrieve the exact address of his location when asked. The tipster also did not obviously withhold any information. Indeed, he appeared to answer honestly that he did not know what type of car Mr. Gaines was driving. And, importantly, the tipster never declined to give his name. Instead, the 911 operator did not ask for it. This, too, is an indicium of reliability. *See Madrid*, 713 F.3d at 1260 (deeming it significant that "the 911 operator never asked the caller for his name or other identifying information and there [was] no reason to believe he would not have provided this information if requested"); *United States v. Torres*, 534 F.3d 207, 212 (3d Cir. 2008) (noting that although the tipster never gave his name, "he was not asked to do so").

We also have often inquired into a tipster's motivations, and here "the 911 transcripts provide no indication that the caller had iniquitous intentions." *Copening*, 506 F.3d at 1247. In particular, it strikes us as improbable that an individual intending to falsely attribute criminal conduct to another would speak to a 911 operator in the kind of measured and circumspect manner displayed by the tipster here—who, for example, freely admitted when he did not know the answer to the 911 operator's questions. The length of the call is also relevant: the tipster did not rush to lodge a hasty false allegation and dash off unidentified. *See Johnson*, 364 F.3d at 1191 (crediting the length of an anonymous tipster's call as an indicium of reliability). If anything, the 911 call suggests that the tipster possibly acted with an commendable motive—seeking to rid the area around the Wilhelmina Gill Center of drug-related activity. Specifically, near the end of

the call the tipster said, "And after this guy, we only have one more supplier, and that's it." Gov't Ex. 1 at 1:55–2:00. This comment would appear to "bespeak an ordinary citizen acting in good faith." *Copening*, 506 F.3d at 1247. At the very least, nothing in the call suggests that the tipster had a malicious motive.

Moreover, throughout the call, the tipster provided detailed information about Mr. Gaines's appearance, location, and movements. We have said that when a tipster "provide[s] detailed information about the events he [is] observing," it is "another indicium of reliability." *Madrid*, 713 F.3d at 1261; *see also Conner*, 699 F.3d at 1230 ("The number and precision of [a tipster's] details added to the tip's reliability."). We value detailed tips because "[o]verly generic tips, even if made in good faith, could give police excessive discretion to stop and search large numbers of citizens." *Johnson*, 364 F.3d at 1191. The anonymous tip in this case "did not provide the officers with excessive discretion to stop and search a large number of citizens." *Sanchez*, 519 F.3d at 1214. Instead, the tipster identified the suspect's physical appearance and location with a fairly high degree of specificity. In that way, because "the description's considerable detail significantly circumscribed the number of people police could have stopped in reliance on it," we deem the tip's details another indicium of reliability. *Johnson*, 364 F.3d at 1191.

B

We acknowledge the tipster did not provide the kind of predictive information that often renders an anonymous tip reliable. In particular, we cannot say that the information

provided here described "future actions of third parties ordinarily not easily predicted." *White*, 496 U.S. at 332 (quoting *Gates*, 462 U.S. at 245). Relatedly, at first blush, the tip here might seem similar to the tip in *Florida v. J.L.*—the one the Supreme Court held did not supply reasonable suspicion for a stop. In this case and in *J.L.*, the tipster communicated to law enforcement that a person of a certain description, wearing certain clothing, was at a particular location doing something illegal. However, we nevertheless conclude that the tip here significantly supports a reasonable-suspicion finding and that *J.L.* is distinguishable.

First, the Supreme Court has never indicated that an anonymous tipster *must* provide corroborated predictive information to support a finding of reasonable suspicion. *See Parker v. Chard*, 777 F.3d 977, 980 (8th Cir. 2015) (noting that in *J.L.* and *White* the Supreme Court "did not hold that corroboration of predictive elements is the exclusive measure of a tip's reliability"). After all, this inquiry must take into account the totality of the circumstances, and not solely whether a tipster supplies predictive information that police corroborate.

Second, since *Florida v. J.L.*, we have repeatedly suggested that police corroboration of even non-predictive information provided by a tipster—especially in conjunction with other relevant factors—can be indicative of reliability. *See, e.g.*, *Hauk*, 412 F.3d at 1189 ("Corroboration of information other than predictive facts, such as the basis of the informant's knowledge, the circumstances under which it was obtained, and

the amount of detail about the alleged criminal activity, can also justify reliance on an anonymous tip in appropriate circumstances."); *Conner*, 699 F.3d at 1230 (finding an anonymous tipster reliable when police "discovered the black SUV in the precise location provided by the caller" and "spotted a light-skinned black male in a fuzzy hunting hat, just as the caller had described"); *Chavez*, 660 F.3d at 1222 (crediting as an indicium of reliability the fact that officers verified "that there was a black pickup truck and a white Cadillac in the parking lot" specifically identified by the tipster); *Johnson*, 364 F.3d at 1191 (emphasizing that the tipster's "descriptions of [the defendants'] appearance and location" were confirmed by an officer's observations). This does not mean that, *standing alone*, law enforcement corroboration of such non-predictive information can "be used to confirm the reliability of an anonymous informant for the purpose of establishing . . . reasonable suspicion." *United States v. Tuter*, 240 F.3d 1292, 1297 (10th Cir. 2001). But, in light of the totality of the circumstances, it is still significant that the police corroborated non-predictive information provided by the tipster—namely, that a light-skinned Black man in all red clothing was located at a particular parking lot.[3]

[3] On this point, we also find it worth mentioning—though it is admittedly a factor of modest weight—that the off-duty officer radioed to the responding officers when they arrived on the scene, "that's him in that white Cadillac." R., Vol. I, at 137. The off-duty officer had seen a man fitting Mr. Gaines's description at the Frank Williams Center parking lot that morning. Of course, the off-duty officer corroborated neither predictive information nor criminal activity. But his statement nonetheless helped corroborate the identity of "the person whom the tipster mean[t] to accuse." *J.L.*, 529 U.S. at 272.

Furthermore, we conclude that the tip at issue in *Florida v. J.L.*—upon close inspection—is significantly different from the one here. Our prior discussion highlights why. The tipster in this case used the 911 system and was not truly anonymous. *Cf. J.L.*, 529 U.S. at 268 (recounting as to *J.L.*'s tip, that "[s]o far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant"). Moreover, the tipster here contemporaneously reported his first-hand observations. *Cf. id.* (noting, as to *J.L.*'s tip, that "[s]ometime after the police received the tip—the record does *not say how long*—two officers were instructed to respond" (emphasis added)). Furthermore, the tipster in this case made the tip from a known location. *Cf. id.* at 270 (noting that the tip in *J.L.* came from "an unknown location"). Also, adding to his credibility, the tipster in this case withheld no information, appeared to have a benign motive, and answered all the questions put to him (if he could) over a somewhat lengthy call. These factors were not available to support the tipster's credibility in *J.L.*; indeed, "nothing [was] known about the [tipster]." *Id.* at 269. Accordingly, *J.L.* is distinguishable and does not lead us to alter our conclusion regarding the reliability of the tip here.

Our reasonable-suspicion inquiry is a holistic one—which takes account of the totality of the circumstances. No single consideration is determinative. Viewed through this all-encompassing lens, the relevant factors in the anonymous-tipster inquiry here weigh in favor of a determination that the 911 call was sufficiently reliable to support an investigatory stop. This is so despite the absence of predictive information.

C

Importantly, the district court's reasonable-suspicion determination did not solely rest on evidence of the anonymous tip. In addition to the tipster's call, evidence of drug-related activity in the area of the Wilhelmina Gill Center was a legitimate contributing factor in creating a reasonable suspicion for the investigatory stop.

Mr. Gaines's mere "presence in a high-crime area is not, 'standing alone,' enough to provide reasonable suspicion." *United States v. Dennison*, 410 F.3d 1203, 1208 (10th Cir. 2005) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)). However, "the fact that conduct occurs in an area known for criminal activity [is an] appropriate factor[] to consider in determining whether reasonable suspicion exists." *DeJear*, 552 F.3d at 1201; *see also United States v. Pena-Montes*, 589 F.3d 1048, 1055 (10th Cir. 2009) (noting that whether a stop occurs "in a high-crime area is a relevant consideration" for a reasonable-suspicion analysis); *Dennison*, 410 F.3d at 1208 (acknowledging that a defendant's "presence in a high crime area . . . may be a 'relevant contextual consideration'" (quoting *Wardlow*, 528 U.S. at 124)). After all, "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Wardlow*, 528 U.S. at 124.

In reaching its reasonable-suspicion determination, the district court partially relied on significant evidence of drug-related activity near the Wilhelmina Gill Center. Both

arresting officers testified about this activity. The female officer testified she knew about "a lot of medical-type calls [for] individuals on PCP, along with complaints of narcotics sales in the area." R., Vol. I, at 126 (Trial Test. of Shenee Davis, dated Mar. 8, 2017). The other (male) officer testified that he has responded to "a lot of narcotics complaints" around the Wilhelmina Gill Center. *Id.* at 86 (Trial Test. of Carl Rowland, dated Mar. 8, 2017). He told the court that in the period leading up to the arrest of Mr. Gaines, "[w]e had [ ] increased contact with individuals under the influence of PCP." *Id.* He also recalled that police sometimes received "multiple [calls] within a few minutes in that general area [concerning] individuals exhibiting behavior that [suggested] they were under the influence of PCP." *Id.* at 86–87. Furthermore, other evidence presented at trial confirmed that, in the two months prior to Mr. Gaines's arrest, police had been called to the area three times for drug overdoses.

In short, the area around the Wilhelmina Gill Center attracted drug-related activity. Consequently, a reasonable officer in the shoes of the arresting officers here would have almost certainly taken this fact into consideration in determining whether Mr. Gaines's conduct was sufficiently suspicious to justify an investigatory stop. And we conclude that the district court properly determined that this evidence of drug-related activity provided support for the reasonableness of the officers' stop.

Of course, standing alone, this evidence of drug-related activity would not have given the officers reasonable suspicion to conduct an investigatory stop of an individual

in the vicinity of the Wilhelmina Gill Center. *See, e.g.*, *Dennison*, 410 F.3d at 1208. But, this evidence did not stand alone. In conjunction with the anonymous tipster's call, the area's reputation for drug-related activity was a "relevant contextual consideration" that helped create a reasonable suspicion to stop a particular individual—Mr. Gaines. *Id.*

IV

Based on "the totality of the circumstances and information available to the officers," *Johnson*, 364 F.3d at 1189 (quoting *United States v. Lang*, 81 F.3d 955, 965 (10th Cir. 1996)), we conclude there was reasonable suspicion justifying an investigatory stop of Mr. Gaines. We therefore **AFFIRM** the judgment of the district court.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

March 12, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DESMOND S. GAINES,

Defendant - Appellant.

No. 17-3270

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:15-CR-20078-JAR-1)

Paige A. Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with her on the briefs), Kansas Federal Public Defender, Topeka, Kansas, for the Defendant-Appellant.

Stephen A. McAllister, United States Attorney (Carrie N. Capwell, Assistant United States Attorney, with him on the brief), Office of the United States Attorney, Kansas City, Kansas, for the Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **BACHARACH**, and **McHUGH**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal stems from a search, which took place after the police spoke with the defendant, Mr. Desmond Gaines. After a brief exchange,

Mr. Gaines fled but was soon captured. The police then found cocaine, marijuana, PCP, drug paraphernalia, over $640, and a handgun. Mr. Gaines unsuccessfully moved to suppress this evidence. He now appeals,[1] and we focus on two issues:

1. *The existence of a seizure*. Two uniformed police officers approached Mr. Gaines with flashing roof lights and confronted him about a report that he was selling PCP. Did this confrontation entail a seizure? The answer turns on whether a reasonable person would have felt free to leave or terminate the encounter. We answer "no" and characterize the encounter as a seizure.

2. *The attenuation of a possible Fourth Amendment violation*. After effecting a seizure, the police allegedly acquired probable cause and learned of an outstanding arrest warrant. Did the development of probable cause or the subsequent discovery of the arrest warrant attenuate the connection between the seizure and the evidence? We answer "no," so introduction of the evidence can't be supported by attenuation of a Fourth Amendment violation.

Given our conclusions on these two issues, we vacate the denial of Mr. Gaines's motion to suppress.

I. The Kansas City police approach Mr. Gaines in marked police cars and question him about a report that he is selling PCP.

One morning, the police in Kansas City, Kansas, received a 911 call reporting that a man dressed in red had just sold drugs in a parking lot.

[1] After a trial, Mr. Gaines was convicted of (1) possessing cocaine base, PCP, and marijuana with intent to distribute, (2) possessing a firearm in furtherance of a drug-trafficking crime, and (3) possessing a firearm after a felony conviction. But the appeal involves only the ruling on Mr. Gaines's motion to suppress.

Based on this information, police officers Carl Rowland and Shenee Davis responded.

The police officers pulled into the parking lot in two separate police cars and turned on their roof lights.[2] They parked behind a car in which a man in red clothing (Mr. Gaines) was seated. Officer Rowland gestured for Mr. Gaines to get out of the car. He did, and Officer Rowland confronted Mr. Gaines with the report that he was selling drugs. The police officers soon observed an open container of alcohol and smelled PCP. When they said they were going to detain Mr. Gaines, he grabbed a pouch from his car and fled. The police caught Mr. Gaines and discovered the evidence that underlies this appeal.

II. Was there a seizure?

The threshold issue is applicability of the Fourth Amendment. This amendment applies if the police had seized Mr. Gaines; it doesn't if the encounter had been consensual. *United States v. Reeves*, 524 F.3d 1161, 1166 (10th Cir. 2008). The district court characterized the entire encounter as consensual. To determine whether the encounter was consensual or constituted a seizure, we apply a dual standard of review, using the clear-error standard for the district court's findings of historical fact and de

[2] In videos of the stop, it is hard to tell whether Officer Davis's roof lights were on. But Officer Davis testified in the suppression hearing that she had activated her roof lights.

novo review for the court's legal conclusions. *United States v. Roberson*, 864 F.3d 1118, 1121 (10th Cir. 2017).[3]

The existence of a seizure involves a matter of law. *See United States v. Salazar*, 609 F.3d 1059, 1064 (10th Cir. 2010) (stating that determining "when the seizure occurred . . . is a legal [question]"). On this matter of law, we consider whether Mr. Gaines yielded to a police officer's show of authority. *California v. Hodari D.*, 499 U.S. 621, 626–27 (1991). To answer this question of law, we apply an objective test, considering whether a reasonable person would have felt free to leave or terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 436 (1991). We apply this objective test to the historical facts, which are largely undisputed. Even if a reasonable person would not have felt free to leave, a seizure would

[3] When considering whether the district court clearly erred, we have often said that we view the evidence in the light most favorable to the district court's ruling or to the prevailing party. *See United States v. Salazar*, 609 F.3d 1059, 1063 (10th Cir. 2010) (favorable to the prevailing party); *United States v. Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004) (favorable to the district court's determination). Mr. Gaines challenges these statements, urging us to jettison our existing approach. But one panel of this court can't overrule another panel. *United States v. Doe*, 865 F.3d 1295, 1298 (10th Cir. 2017). So we continue to view the evidence in the light most favorable to the district court's ruling or to the prevailing party. *E.g.*, *United States v. Cone*, 868 F.3d 1150, 1152 (10th Cir. 2017).

occur only if the suspect yielded to a police officer's show of authority. *Hodari D.*, 499 U.S. at 626–27.

So let's consider how a reasonable person would have felt, facing the same circumstances that Mr. Gaines confronted. The encounter began with Mr. Gaines sitting in his car in a parking lot. Two uniformed police officers arrived in marked police cars, both flashing their roof lights. Would a reasonable person have felt free to leave? Perhaps. But the flashing roof lights,[4] two marked police cars, and two uniformed officers[5] would undoubtedly have cast at least some doubt on a reasonable person's belief in his or her freedom to leave.

This doubt would likely have intensified in Kansas (where Mr. Gaines was stopped) because of Kansas's traffic laws. *See Berkemer v. McCarty*, 468 U.S. 420, 436–37 (1984) (considering the laws of most states, which criminalize the failure to heed a police officer's signal to

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[4] *See* 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.4(a), at 598–99 (5th ed. 2012) (stating that the "use of flashing lights as a show of authority . . . will likely convert the event into a Fourth Amendment seizure").

[5] *See United States v. Williams*, 615 F.3d 657, 660 (6th Cir. 2010) ("Williams was seized: a reasonable person would not have felt free to leave upon being approached by two uniformed officers in a marked car, singled out of a group, and immediately accused of a crime."); *see also United States v. Lopez*, 443 F.3d 1280, 1284 (10th Cir. 2006) (stating that the presence of uniformed officers bears on whether a police encounter constitutes a seizure).

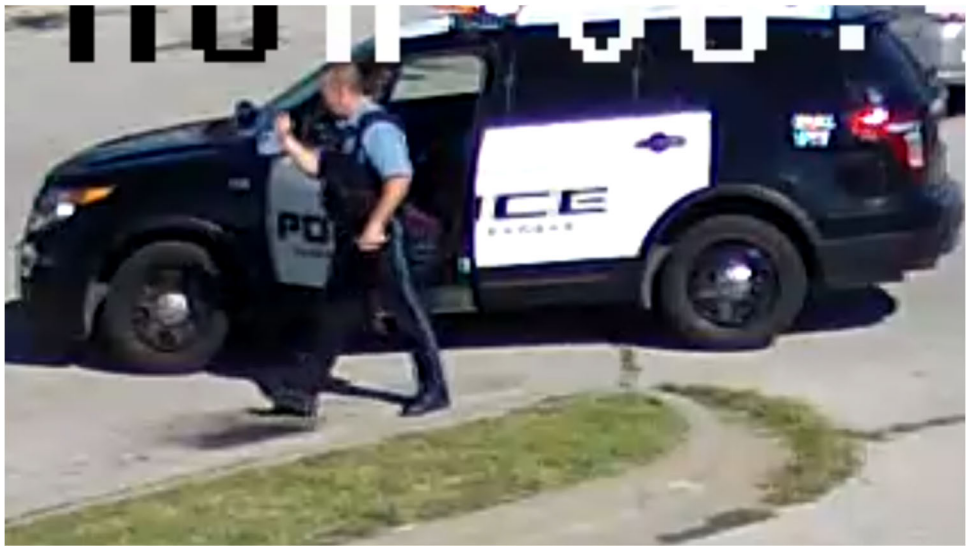
stop, as informative on whether the defendant reasonably believed that he wasn't free to leave). Under Kansas law, motorists must stop whenever a police officer flashes his or her emergency lights. Kan. Stat. Ann. § 8-1568(a)(1), (d).

The district court minimized the impact of the flashing roof lights, crediting testimony by the police officers that they had activated their lights only because their cars were blocking a lane of traffic. But the officers' subjective intent had little bearing on whether a reasonable person would have thought that he or she could leave. *See Brendlin v. California*, 551 U.S. 249, 260–61 (2007) ("The intent that counts under the Fourth Amendment" is the intent conveyed to the suspect, and the court does not consider the officers' "subjective intent when determining who is seized."); *see also United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (concluding that a law-enforcement agent's "subjective intention . . . to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent").

But let's assume that a reasonable person would have felt free to drive away at this point.[6] One of the police officers then exited his car and

[6] If the police officers had followed and reactivated their roof lights, Kansas law would have required the person to pull over. *See* Kan. Stat. Ann. § 8-1568(a)(1), (d); *State v. Morris*, 72 P.3d 570, 577 (Kan. 2003).

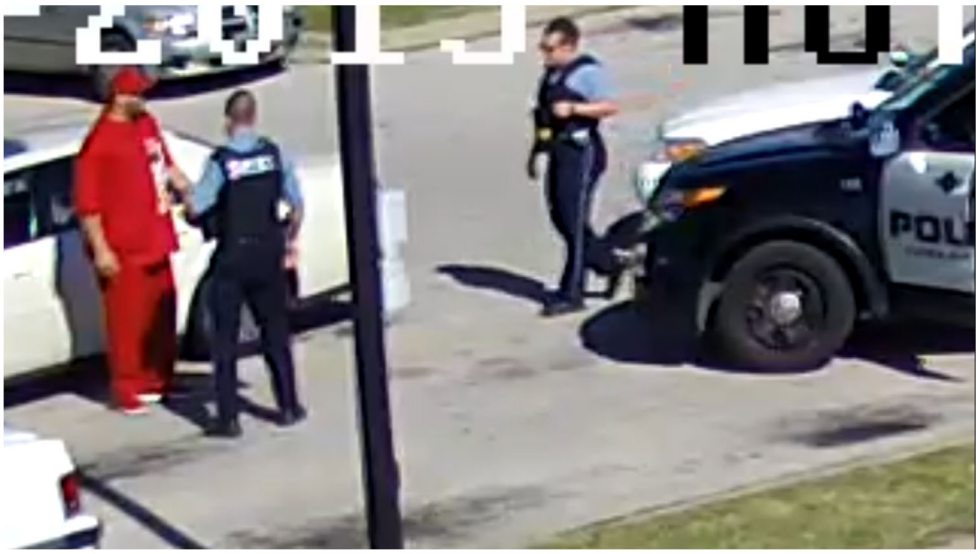
gestured for Mr. Gaines to get out of the car. Here is what our reasonable person would have seen:



At a minimum, the police officer's gesture would have cast further doubt on a reasonable person's belief that he or she was free to drive away. *See Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 462 (4th Cir. 2013) (holding that two deputy sheriffs' gestures to stay seated constituted a seizure).

But let's assume that a reasonable person would still have felt free to leave. As Mr. Gaines exited the car, one police officer stood just a few feet away and said that they had come because of a report that Mr. Gaines was "up here selling some dope." The police officer then asked Mr. Gaines

whether he had been selling "wet" (street-language for PCP). Meanwhile, another uniformed police officer circled the car, looking inside.[7]



Would a reasonable person have felt free to leave? At a minimum, the accusatory question would have added to the reasonable person's doubt about his or her freedom to return to the car and drive away. *See United States v. Glass*, 128 F.3d 1398, 1407 (10th Cir. 1997) (stating that "particularized focus" on an individual "is certainly a factor" to consider when determining whether a seizure took place).[8]

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[7] At a hearing, a prosecutor told the district court that the police officers had "encircle[d] the location" because the situation was "heightened." R., vol. I at 372.

[8] We have sometimes cautioned that the mere existence of incriminating questions is not relevant to the existence of a seizure. *See United States v. Little*, 18 F.3d 1499, 1506 (10th Cir. 1994) (en banc); *United States v. Ringold*, 335 F.3d 1168, 1173 (10th Cir. 2003). We do not question these cautionary statements. But here the police officer didn't just ask incriminating questions; he began by explaining that he had come (with roof lights flashing) because of a report that this person was selling drugs

These were the five circumstances that confronted Mr. Gaines:

1. He was sitting in his car when two marked police cars approached and stopped right behind him with their roof lights flashing.

2. Both police officers were uniformed.

3. One police officer gestured for Mr. Gaines to get out of his car.

4. Mr. Gaines exited his car, and one of the police officers said that they had come based on a report that he was selling PCP in the parking lot.

5. While one police officer told Mr. Gaines that someone had accused him of selling PCP, the other police officer circled Mr. Gaines's car and looked inside.

in the parking lot. *See United States v. Smith*, 794 F.3d 681, 686 (7th Cir. 2015) ("The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime.").

Viewing these circumstances as a whole, we conclude that (1) the police officers showed their authority and (2) no reasonable person would have felt free to leave.

Still, the encounter would constitute a seizure only if Mr. Gaines had yielded to the show of authority. He ultimately fled, so the government denies that Mr. Gaines yielded. We disagree. One officer gestured for Mr. Gaines to get out of his car, and he did. When Mr. Gaines was asked questions, he responded. *See United States v. Camacho*, 661 F.3d 718, 726 (1st Cir. 2011) (stating that a suspect "submitted" to a police officer's "show of authority by responding to his questions"). And when Mr. Gaines was asked for his identification, he opened his car trunk to look for his identification.

Mr. Gaines then fled. But by that point, he had already yielded to the show of authority. We addressed a similar issue in *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991). There the defendant exited his car and fled after asking the officer: "What do you want?" *Morgan*, 936 F.2d at 1566. We considered this single question enough to conclude that the defendant had yielded to authority. *Id.* at 1567. By comparison, Mr. Gaines had done more to yield: getting out of his car, answering the officer's questions, and looking for his identification.

We thus conclude that Mr. Gaines was seized.

III. Even if the seizure itself had been improper, would the attenuation doctrine permit introduction of the subsequently discovered evidence?

The government argues that even if the seizure had been improper, it would have had only an attenuated connection to the later discovery of evidence. This argument is based on the attenuation doctrine. Under this doctrine, a constitutional violation leading to the discovery of evidence does not require exclusion when only an attenuated connection exists between the constitutional violation and discovery of the evidence. *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

To invoke the attenuation doctrine, the government bears a "heavy burden." *United States v. Fox*, 600 F.3d 1253, 1259 (10th Cir. 2010). Trying to satisfy this burden, the government alleges two attenuating circumstances:

1. An outstanding arrest warrant existed for Mr. Gaines prior to the encounter.

2. The police officers obtained probable cause to search the car based on the smell of PCP and observation of an open container of alcohol.

The district court found attenuation based on the outstanding arrest warrant. The court didn't address probable cause, but the government points to probable cause as an alternative basis to affirm the finding of attenuation. In our view, attenuation cannot be based on either the arrest warrant or the eventual development of probable cause.

A. Arrest Warrant

When the police officers searched the car, they did not know of any outstanding arrest warrants. But shortly after conducting the search and arresting Mr. Gaines, the police learned that he had an outstanding arrest warrant. Based on the discovery of the warrant, the district court found that the attenuation doctrine would allow introduction of the evidence even if the initial encounter had constituted an unlawful seizure. We disagree because (1) the execution of the arrest warrant might not have allowed a search of the car and (2) two of the attenuation doctrine's three factors support exclusion.

We again apply a dual standard of review, using the clear-error standard for findings of historical fact and de novo review for legal conclusions. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The arrest warrant might have led to an arrest, and arresting Mr. Gaines would have allowed the police to conduct a search incident to an arrest. *Chimel v. California*, 395 U.S. 752, 762–63 (1969). For a search incident to an arrest, the police could search Mr. Gaines's person and places within his immediate control at the time of the search. *See United States v. Edward*, 632 F.3d 633, 643 (10th Cir. 2001); *see also United States v. Knapp*, No. 18-8031, slip op. at 12, ___ F.3d ___ (10th Cir. Mar. 5, 2019) (to be published) ("We therefore join the Third Circuit in interpreting *Gant* as focusing attention on the arrestee's ability to access

weapons or destroy evidence at the time of the search, rather than the time of the arrest, regardless of whether the search involved a vehicle.").

Here, the evidence at issue was in Mr. Gaines's car. If the police had arrested Mr. Gaines based on the arrest warrant, he might or might not have been within reach of the car at the time of the search. If Mr. Gaines was not within reach, the police could not have searched the car incident to the arrest. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009) (stating that the police can "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search").

At oral argument, the government theorized for the first time that the police could have impounded the car and conducted an inventory search. Though the district court didn't consider these theories, we can ordinarily consider alternative arguments to affirm if the record is adequately developed. *United States v. Bagley*, 877 F.3d 1151, 1154 (10th Cir. 2017). Here, however, the government did not present this contention until oral argument. We typically decline to consider an appellee's contentions raised for the first time in oral argument. *See Adamscheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 588 (10th Cir. 2016) (rejecting an appellee's contention to affirm on an alternative ground because the contention was raised for the first time at oral argument).

Even if we were to consider the government's new contention, however, we would reject it. To conduct an inventory search, the government had to prove that the police could lawfully impound Mr. Gaines's car. *See United States v. Sanders*, 796 F.3d 1241, 1244 (10th Cir. 2015) ("The government bears the burden of proving that its impoundment of a vehicle satisfies the fourth Amendment."). To satisfy this burden, the government had to show that the police had standardized criteria justifying impoundment and a legitimate community-caretaking reason to impound the car. *Id.* at 1248.

Here the government presented no evidence of standardized criteria for impoundment. Even with such evidence, however, the police could impound the car only upon proof of a community-caretaking rationale. For example, impoundment might have been permissible if the car had obstructed traffic or imperiled public safety. *South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976). But we lack any evidence that the car was illegally parked or imperiling public safety.[9]

But let's generously assume that the police could have searched the car based on (1) discovery of the arrest warrant or (2) impoundment of the

[9] After arresting Mr. Gaines, the police didn't impound the car. Instead, the police gave the keys to Mr. Gaines's acquaintance, who delivered the car to Mr. Gaines's mother.

car. Even with this assumption, we could apply the attenuation doctrine only after considering three factors:

1. the "temporal proximity" between the Fourth Amendment violation and discovery of the evidence
2. the presence of "intervening circumstances"
3. the "purpose and flagrancy" of the officer's wrongdoing

Brown v. Illinois, 422 U.S. 590, 603–04 (1975). The first two factors favor suppression of the evidence; only the third arguably favors the government.

The first factor (temporal proximity) supports Mr. Gaines because the evidence was discovered only minutes after the seizure. *See Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016).

The third factor (the purpose and flagrancy of the police wrongdoing) supports the government. The police officers arguably should have known that the encounter constituted a seizure. But the district court found that the police had been negligent (at worst). This finding was reasonable because the issue of reasonable suspicion is close. (We discuss this issue below.) So if the search had been unlawful, the police would have been (at worst) negligent.

We also consider the second factor (the presence of intervening circumstances between the allegedly unlawful stop and discovery of the evidence). This factor supports Mr. Gaines because the arrest warrant

wasn't discovered until after the search. *See United States v. Gaines*, 668 F.3d 170, 175 (4th Cir. 2012) (concluding that when evidence is discovered prior to the defendant's independent criminal act, this criminal act cannot serve as "an intervening event" to purge the taint of an unlawful police action); *United States v. Beauchamp*, 659 F.3d 560, 574 (6th Cir. 2011) (concluding that no intervening circumstances existed because the new ground for the search had arisen after discovery of the evidence); *United States v. Camacho*, 661 F.3d 718, 730–31 (1st Cir. 2011) (same).

The government contends that if Mr. Gaines had not fled, the police

- would have learned of the arrest warrant before searching the car and
- might have impounded the car.

For the sake of argument, we can assume that the government is right. But the attenuation doctrine addresses events as they actually occurred, not as they might have transpired. Thus, the arrest warrant and potential impoundment do not attenuate the connection between a possible Fourth Amendment violation and discovery of the evidence.

B. Probable Cause

The government also insists that the development of probable cause would have triggered the attenuation doctrine. We reject this argument.

According to the government, the police officers obtained probable cause when they smelled PCP and observed an open container of alcohol in

Mr. Gaines's car. But even if probable cause existed, it would have flowed directly from the seizure. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). So the discovery of evidence would still be traced directly to the possible Fourth Amendment violation. *See id*. Given this direct causal connection, the eventual development of probable cause would not trigger the attenuation doctrine.[10]

IV. Was the police's suspicion reasonable?

Even though Mr. Gaines was seized, the seizure would have been permissible if the police had a reasonable ground to suspect Mr. Gaines of a crime. *See United States v. Cortez*, 449 U.S. 411, 417–18 (1981). The district court didn't address the reasonableness of the police's suspicion. So our threshold decision is whether to decide this issue or remand for the district court to address this issue in the first instance.

Mr. Gaines asks us to remand for the district court to decide the issue in the first instance. We grant this request. The inquiry on reasonable suspicion ordinarily entails a fact-intensive inquiry better suited to the

[10] This argument might succeed in other cases when a suspect commits a new crime during an unlawful seizure. For example, if a suspect resists arrest during the seizure, the new crime of resisting arrest might arguably attenuate the link between the seizure and a subsequent search. *See United States v. Bailey*, 691 F.2d 1009, 1018 (11th Cir. 1982) (attenuation when the defendant resisted arrest during an unlawful stop because resisting arrest constituted a "new, distinct crime"). We need not address this issue because the government doesn't allege the commission of a new, distinct crime after the search.

district court than to our court. *See United States v. Esquivel-Rios*, 725 F.3d 1231, 1238 (10th Cir. 2013) (Gorsuch, J.) (discussing the benefit of remanding so that the district court could decide reasonable suspicion in the first instance); *United States v. Hauk*, 412 F.3d 1179, 1186 (10th Cir. 2005) (referring to reasonable suspicion as a "fact-intensive" issue). And here, the parties disagree on some potentially material aspects of the inquiry, such as

- whether the 911 caller implied that he or she had observed a drug sale and
- whether either police officer had known of past drug sales in the area where Mr. Gaines was located.

The issue is also close. The police learned of Mr. Gaines through an anonymous tip, and the Supreme Court concluded in *Florida v. J.L.*, 529 U.S. 266 (2000) that an anonymous tip hadn't supplied reasonable suspicion. *J.L.*, 529 U.S. at 271. But the Supreme Court also reached the opposite conclusion in *Navarette v. California*, 572 U.S. 393 (2000). There the Court relied partly on the use of the 911 system, the contemporaneous nature of the call with the reported crime, and the specificity of the information. *Navarette*, 572 U.S. at 398–403. These factors arguably apply here. But in *J.L.*, the Court also suggested the importance of predictive information and corroboration, and both are arguably missing here. *J.L.*, 529 U.S. at 270–71.

Given the closeness of the issue and the district court's superior resources for fact-finding, we grant Mr. Gaines's request to remand for the district court to decide whether the police had reasonable suspicion.

V. Did Mr. Gaines abandon the black pouch?

When Mr. Gaines fled, he threw a black pouch onto the roof of a building. The police later found the pouch, and it contained illegal drugs, cash, and drug paraphernalia. All of this evidence was introduced at the trial. Mr. Gaines alleges that the evidence should have been excluded, and the government contends that Mr. Gaines abandoned the pouch.

The district court didn't address the issue, and the record on abandonment is inadequately developed. We therefore can't consider abandonment as an alternative ground for affirmance. *See* p. 13, above.[11]

VI. Conclusion

The police effected a seizure when two uniformed police officers pulled behind Mr. Gaines in marked police cars, using their roof lights and

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[11] Mr. Gaines argues that the government waived its abandonment argument by failing to raise it in district court. For this argument, Mr. Gaines relies on *United States v. Hernandez*, 847 F.3d 1257, 1262 (10th Cir. 2017), and *United States v. Verner*, 659 F. App'x 461, 466–68 (10th Cir. 2016) (unpublished). In these cases, however, the government was the appellant. *Hernandez*, 847 F.3d at 1260; *Verner*, 659 F. App'x at 462. And we ordinarily allow the government to present new arguments for affirmance when the district court record is adequately developed. *See* p. 13, above (citing *United States v. Bagley*, 877 F.3d 1151, 1154 (10th Cir. 2017)).

pointedly telling Mr. Gaines that they had come because of a report that he was selling drugs in the parking lot. After conducting the search, the police learned of an outstanding warrant and arguably obtained probable cause during their discussion with Mr. Gaines. But neither the arrest warrant nor the later existence of probable cause attenuate the causal connection between the seizure and discovery of the evidence. We thus vacate the denial of Mr. Gaines's motion to suppress.

An issue remains on the existence of reasonable suspicion. This issue is better suited for the district court to decide in the first instance. We thus remand for consideration of the issue involving reasonable suspicion.[12]

[12] On remand, the district court is also free to consider the government's argument involving abandonment of the black pouch. The issue of abandonment is fact-intensive and better suited for the district court to decide on a fuller record. *See, e.g.*, *United States v. Driskill*, No. 98-6331, 1999 WL 730954, at *2 (10th Cir. Sept. 20, 1999) (unpublished) ("Whether a defendant 'abandoned' property in the Fourth Amendment sense is a fact-intensive determination which would ordinarily require an adequately developed record.").

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TYMKOVICH, CJ., dissenting.

I would affirm the district court because Officers Rowland and Davis had reasonable suspicion to perform a brief investigative stop. And Officer Rowland quickly gained probable cause to arrest Gaines based on the open container plainly visible inside Gaines's vehicle. Although the majority thoroughly and persuasively analyzes the existence of a seizure and the applicability of the attenuation doctrine, I would not reach these two issues. I therefore dissent.

I see no need to remand for the district court to determine reasonable suspicion, despite the district court not reaching the issue below. The government squarely presented the issue to the district court and developed a detailed record regarding the officers' knowledge and observations. And based on this record, the officers had reasonable suspicion to detain Gaines briefly while they investigated possible criminal activity.

We may affirm on an alternative ground when the facts in the record are sufficiently developed and clear. *See United States v. Springer*, 875 F.3d 968, 981 (10th Cir. 2017) ("[W]e are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." (internal quotation marks omitted)). And we should do so when, as here, an issue will almost certainly return on appeal. I would therefore exercise our

discretion to affirm on this alternative ground, which is more than "adequately supported by the record." *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

The Fourth Amendment permits brief investigative stops when law enforcement officers have "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417–18 (1981). Whether officers have reasonable suspicion depends "upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). The standard takes into account "the totality of the circumstances," *Cortez*, 449 U.S. at 417—all the information officers possessed. Although a mere hunch does not create reasonable suspicion, the level of suspicion required is "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

In this case, the officers responded to a 911 call that exhibited adequate indicia of reliability. Combined with their knowledge of PCP-related drug activity at the address and in the immediate area, a brief investigative stop was fully justified.

The Supreme Court has noted that "[a]n anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity," *Navarette v. California*, 572 U.S. 393, 397 (2014), so an anonymous tip is consequently seldom enough for reasonable suspicion. But the Court has held, "under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make [an]

investigative stop." *Id.* (internal quotation marks omitted). Thus, the Court has held that an anonymous tip can suffice for reasonable suspicion, given some indicia of reliability, though generally some additional information is needed. In this case we have both.

The Supreme Court has plainly held that not all anonymous tips give police reasonable suspicion to make an investigative stop. In *Florida v. J.L.*, 529 U.S. 266 (2000), police received an anonymous phone call alleging that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun," *id.* at 268. The call itself did not exhibit any signs of being reliable—there was "no audio recording of the tip, and nothing [was] known about the informant"—so "[a]part from the tip, the officers had no reason to suspect" the young man of any illegal conduct. *Id.* Under these circumstances, the Court unanimously held that the officers lacked reasonable suspicion to frisk the defendant for weapons.

More recently, however, the Supreme Court has under different circumstances found an anonymous tip sufficient under the Fourth Amendment. *See Navarette*, 572 U.S. at 393. The police in *Navarette* received a 911 emergency call stating that a vehicle had just run the caller off the road. The caller provided the dispatcher with the license plate number, which police used to locate and stop the vehicle. The Court found three factors especially relevant: the tipster (1) "claimed eyewitness knowledge of the alleged dangerous driving," (2) "reported the incident soon after she was run off the road," and

(3) "use[d] the 911 emergency system." *Id.* at 399–400; *see also United States v. Chavez*, 660 F.3d 1215, 1222 (10th Cir. 2011) (laying out similar considerations).

Here, the informant appears to have personally observed Gaines conducting a drug transaction, but we cannot assume that fact when the record is inconclusive. The majority is correct that this is a disputed fact because the caller never explicitly says how he knows of the illegal conduct. The caller was certainly personally observing Gaines while on the phone with the 911 operator and noted that Gaines "just made about 20 dollars." Gov't Ex. 1 at 0:46–48. And he knew how Gaines was dressed and where he had parked his car. But we ultimately cannot be sure the tipster was in a similar position to the caller in *Navarette*.

We have no need to rely on this disputed fact, however, because the claim of eyewitness knowledge is only one indicium of reliability. It cannot be dispositive in either direction because officers have even less ability to confirm a tipster's claim of personal knowledge than other aspects of an anonymous call. And the other two relevant considerations are present. The caller made a "contemporaneous report" of his observations of Gaines's activities, criminal or not, and the caller used the 911 system. *Navarette*, 572 U.S. at 399–400. The anonymous call also contained several other indicia of reliability.

The anonymous tipster described his observations to the emergency operator as he saw them, stating clearly, "I'm watching him right now." Gov't Ex. 1 at 1:39–41. This

information is the "sort of contemporaneous report [that] has long been treated as especially reliable." *Navarette*, 572 U.S. at 399. This is because "substantially contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Id.* at 400 (citing Advisory Committee's Notes on rule of evidence 803(1), which describes "the rationale for the hearsay exception for 'present sense impression[s]'"). Granted, the caller here does not describe any criminal activity contemporaneously with his observations. This weakens the reliability of the criminal allegations. But the contemporaneousness of the caller's noncriminal information increases the overall reliability of the tip because the tipster reported mostly present sense impressions, which "weigh[s] in favor of the *caller*'s veracity." *See id.* (emphasis added). And an anonymous caller's veracity is at least part of the overall reliability inquiry.

Also significant is the caller's use of the 911 emergency system. As the Supreme Court reasoned in *Navarette*, "A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity." *Id.* For instance, a recorded call "provides victims with an opportunity to identify the false tipster's voice and subject him to prosecution," and FCC regulations prohibit carriers from allowing callers to "block call recipients from obtaining their identifying information." *Id.* at 400–01. This does not "suggest that tips in 911 calls are *per se* reliable," but it does mean that a tipster's use of the 911 system is "one of the

relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call."[1] *Id.* at 401.

In this case, moreover, we have several other indicia of reliability. First, the caller told the 911 operator where he was. His first words were, "Uh yes, I'm down here at uh Frank Gill Center . . . Frank Williams Center." Gov't Ex. 1 at 0:02–07. He later confirmed this location by exiting the building briefly to verify and report the exact address where he was located. *See United States v. Madrid*, 713 F.3d 1251, 1260 (10th Cir. 2013) ("giving the address" where the crime took place and the caller's own location "was at least an indicium of reliability") (internal quotation marks omitted). This, combined with the use of the 911 emergency system, jeopardized his anonymity, which created a "disincentive for making false allegations." *United States v. Jenkins*, 313 F.3d 549, 554 (10th Cir. 2002); *see also United States v. Copening*, 506 F.3d 1241, 1247 (10th Cir. 2007) ("The fact the caller provided authorities some basis for discovering his identity makes it less likely his tip was phony.").

Second, the caller spent over two minutes on the phone with the 911 operator and answered every question put to him. When the operator asked what type of car Gaines was driving, the caller answered honestly that he did not know but continued, "I can tell

[1] Gaines's counsel at oral argument contended that a 911 call does not make a tip more reliable because tipsters may use burner phones or other methods to hide detection. But this was no more true in 2015 when this incident occurred than in 2014 when the Supreme Court decided *Navarette*.

ya if you wait." Gov't Ex. 1 at 1:36–37. He also took the time to verify the address of the building where the police needed to go.

Third, the caller did not decline to give his name; the 911 operator simply never asked. This is certainly an indicium of reliability. *See Madrid*, 713 F.3d at 1260 (finding significant that "the 911 operator never asked the caller for his name or other identifying information and there [was] no reason to believe he would not have provided this information if requested"); *United States v. Torres*, 534 F.3d 207, 212 (3d Cir. 2008) (same). Again, these considerations do not make tips reliable *per se*. But a reasonable officer could find an anonymous tip fairly credible when the caller reveals where he is located, jeopardizing his anonymity; does not decline to give any information, especially identifying information; and does not seem in any hurry to make an allegation and hang up.

The officers also had information beyond the anonymous (yet sufficiently reliable) tip on which to rely. They had first-hand officer observation and knowledge. The officers knew which person in the parking lot had been accused of drug dealing: another officer, Officer Wilcox, who at the time was off-duty at the Center, radioed in that the man getting into the Cadillac was the person who had been standing on the street corner dressed in all red when the tipster called. Thus, the officers could be confident that Gaines was the person the caller had accused of criminal activity. *See Cortez*, 449 U.S. at

417–18 (officers must have "a particularized and objective basis for suspecting the *particular person* stopped of criminal activity" (emphasis added)).

In addition, the officers had personal knowledge of drug, and specifically PCP-related, activity in the immediate area of the Wilhelmina Gill Center. *See United States v. DeJear*, 552 F.3d 1196, 1201 (10th Cir. 2009) ("[T]he fact that conduct occurs in an area known for criminal activity [is an] appropriate factor[] to consider in determining whether reasonable suspicion exists."). Officer Rowland testified at length at the suppression hearing regarding his knowledge of drug activity near the Center. Officer Davis also testified that she was aware of "a lot of medical-type calls of individuals on PCP, along with complaints of narcotics sales in the area." R., Vol. I at 192.

Gaines now claims that the two officers' knowledge of drug activity at the Center and the immediate area is a disputed issue of fact that must be resolved by the district court. But the officers' testimony that each was aware of this drug activity is unequivocal—and unrefuted.

Officer Rowland laid foundation for a government exhibit that revealed eight police reports to the exact address for drug-related medical treatment that calendar year. The police reports confirm officers had been called to the address for drug overdoses three times in the two months prior to Gaines's arrest. Two of those reports specifically mention that the person receiving treatment had taken or had likely taken PCP, the specific drug the anonymous tipster identified.

Officer Rowland also testified extensively about his personal knowledge of these events. He told the court he had personally "responded to calls for service" in the immediate area of the Wilhelmina Gill Center for various things but certainly for "a lot of narcotics complaints." R., Vol. I at 151–52, 154. The officer testified that leading up to the day of the arrest "[w]e had an increased contact with individuals under the influence of PCP." *Id.* at 152. He continued, police received "[n]umerous medical calls, sometimes multiple within a few minutes in that general area of individuals exhibiting behavior that they were under the influence of PCP . . . . So we would usually respond, whether it be a police call or a medical call." *Id.*

We may rely on this record evidence based on the district court's findings of fact and the record evidence. The district court specifically found that Officer Rowland "was familiar with the Wilhelmina Gill Center and the surrounding area" and "had responded to several drug-related calls" at the Center. R., Vol. I at 136. The court also found that "officers had been dispatched to the Wilhelmina Gill Center eight times . . . for medical calls involving reactions to PCP or other substances." *Id.* It is true that the district court did not specifically find that the officers were aware of the PCP-related medical calls established in the police records. But Gaines did not challenge the officers' assertion of this personal knowledge at the suppression hearing; he produced no evidence to contradict the officers' testimony and barely questioned them on the issue during cross-examination. *Id.* at 178–80, 195. The cross-examinations on this point were only to

clarify that not all the drug-activity of which the officers knew was specifically PCP related.

The suppression hearing record therefore shows that (1) Officers Rowland and Davis personally responded to service calls in the area of the Center, especially for narcotics complaints; and (2) at least Officer Rowland was aware of the eight police reports he sponsored into evidence of drug related activity at the same address as the arrest happened, including the two service calls for PCP-related drug activity at the Center within two months of Gaines's arrest. This is sufficient evidence to conclude that the officers had additional knowledge, beyond the anonymous phone call, to raise reasonable suspicion that Gaines was selling PCP in the parking lot of the Wilhelmina Gill Center.

Thus, the officers reasonably relied on the anonymous tip in conjunction with their own knowledge because together "the informant's story and the surrounding facts possessed an internal coherence that gave weight to the whole." *United States v. Brown*, 496 F.3d 1070, 1078–79 (10th Cir. 2007). So even "[e]xercising the significant skepticism and careful scrutiny required in the anonymous-informant context," *Copening*, 506 F.3d at 1247 (internal quotation marks omitted), I would affirm on grounds of reasonable suspicion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **DESMOND S. GAINES,** **Defendant.**	**Case No. 15-CR-20078-JAR**

MEMORANDUM AND ORDER

This matter is before the Court on Defendant Desmond Gaines' Motion to Suppress Evidence (Doc. 46). Defendant contends that evidence seized by law enforcement from an encounter on August 24, 2015 was seized in violation of his Fourth Amendment rights. This Court previously denied Defendant's motion on the grounds that Defendant's encounter with law enforcement was consensual.[1] The Tenth Circuit reversed, finding that Defendant was seized, and remanded to this Court to decide whether this seizure was based on reasonable suspicion.[2] The Government has filed a Memorandum of Law,[3] and Defendant has responded.[4] For the reasons discussed below, the Court finds that the officers had reasonable suspicion to seize Defendant, and Defendant's Motion to Suppress (Doc. 46) is **denied**.

I. Factual Background

These findings are based on the testimony and evidence admitted at the hearing before this Court on March 8, 2017 and the subsequent findings of the Tenth Circuit Court of Appeals

[1] Doc. 53.

[2] Doc. 155.

[3] Doc. 159.

[4] Doc. 160.

in *United States v. Gaines*.[5]

On August 24, 2015, Officer Carl Rowland and Officer Shenee Davis, who were both patrol officers with the Kansas City, Kansas Police Department, were dispatched to the Wilhelmina Gill Center, at 645 Nebraska Ave. Kansas City, Kansas, following an anonymous 911 call.[6] The unidentified caller stated there was a "light-skinned" man in all red clothing "selling wet," which is otherwise known as phencyclidine ("PCP"), and that "[the man] just made about twenty dollars." The caller stated that the man was in the parking lot of the Wilhelmina Gill Center sitting in a white car, but he did not know the type of car that the man was driving. The caller stated that the caller was located at the Wilhelmina Gill Center when he observed the man.

At the hearing, Officer Rowland testified that he was familiar with the Wilhelmina Gill Center and the surrounding area. Officer Rowland testified that he had personally responded to several drug-related calls at the Wilhelmina Gill Center, and leading up to the arrest on August 24, "we had an increased contact with individuals under the influence of PCP" around the Wilhelmina Gill Center.[7] In fact, police dispatch records showed that between March and August 2015, officers had been dispatched to the Wilhelmina Gill Center eight times for individuals exhibiting reactions to PCP or other substances.[8] Officer Davis similarly testified that, "we had a lot of medical-type calls of individuals on PCP, along with complaints of narcotics sales in the area."[9]

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[5] 918 F.3d 793 (10th Cir. 2019).

[6] Gov't Ex. 1.

[7] Doc. 57 at 6:23–25.

[8] Gov't Ex. 7. On July 24, 2015, police records show that officers were dispatched to the Wilhelmina Gill Center for a female suspected of reacting to ingestion of PCP. *See id.*

[9] Doc. 57 at 46:15–22.

Officer Mark Wilcox, a patrol officer for the Kansas City, Kansas Police Department, was working on August 24, 2015 as an off-duty security guard at the Frank Williams Outreach Center, which is directly across the street from the Wilhelmina Gill Center. Officer Wilcox testified that he wears his police uniform at the Frank Williams Outreach Center, including his police radio. Prior to the call being dispatched, Officer Wilcox was patrolling the parking lot of the Frank Williams Outreach Center. He noticed a man in all red clothing wiping down a white Cadillac in the Wilhelmina Gill Center parking lot. Not long after this observation, Officer Wilcox heard the dispatched call that a man wearing all red was selling drugs. As Officer Rowland and Officer Davis arrived on scene, Officer Wilcox radioed about his observation of the man wearing all red entering the white Cadillac. Officer Wilcox, however, never observed this man conducting a drug transaction.

Officer Rowland, who was uniformed and driving a marked police cruiser, pulled into the Wilhelmina Gill Center parking lot from the west.[10] Officer Davis, who was also uniformed, followed directly behind him in the marked police cruiser that she was driving. Officer Rowland also observed the man (subsequently identified as Desmond Gaines, the "Defendant") entering the white Cadillac and observed that Defendant matched the description of light skinned and wearing all red (red hat, red shirt, red pants, and red shoes). Officer Rowland pulled up behind the driver's side of the white Cadillac, and Officer Davis pulled up alongside Officer Rowland's cruiser, also to the rear of the white Cadillac. Both officers activated the emergency lights on their cruisers.

[10] There is both audio and video of the encounter captured on Officer Rowland's police cruiser camera system. Gov't Ex. 3. There is also video from the Wilhelmina Gill Center cameras in the parking lot. Gov't Ex. 2.

Officer Rowland approached the driver's side of the white Cadillac and gestured for Defendant to exit the vehicle. A close review of the video reveals that Defendant, who was sitting in the driver's seat with the door closed, began to exit the white Cadillac prior to Officer Rowland's gesture. Regardless, Defendant exited the car and quickly closed the door behind him. Meanwhile, Officer Davis exited her cruiser and approached the rear of the white Cadillac. Officer Rowland began to speak to Defendant, who asked Officer Rowland what he was doing; Officer Rowland replied that there was a 911 call about a man matching his description selling drugs. Defendant denied that he was engaged in drug sales.

Officer Rowland asked Defendant for identification; Defendant responded that his identification was in the car trunk. At this point, Defendant reopened the driver's side door and pulled the trunk release. As Defendant began to walk toward the trunk, he began to close the driver's side door behind him, but Defendant then caught the door with his hand and the door remained open. Defendant positioned himself between the car and the open driver's side door. Meanwhile, Officer Davis began to walk toward the rear part of the car, and then to the passenger side.

Officer Rowland testified that as soon as Defendant reopened the driver's side door, Rowland smelled a strong chemical odor that based on his training and experience he believed was the odor of PCP. Officer Rowland further testified that once the trunk was ajar, the odor of PCP became stronger. From his position next to the driver's side door, Officer Rowland also observed a bottle of alcohol on the center console underneath a walkie talkie radio. Officer Rowland told Defendant that he was going to detain him for having an open container of alcohol within his reach in the car.[11] Photographs taken at the time of the stop depict a bottle of alcohol

[11] Possession of alcohol in a vehicle is a violation of K.S.A. § 8-1599, which is an arrestable offense.

on the center console with the lid intact on the bottle. Officer Rowland testified that although he also decided to detain Defendant in part because of the strong odor of PCP, he did not tell Defendant this at that time, because he did not want to tip Defendant off that he suspected PCP was present.

Once Officer Rowland displayed his handcuffs, he observed Defendant becoming agitated and fidgety. Officer Rowland reached for Defendant's left hand to place him in handcuffs. Defendant pulled away from Officer Rowland and reached into the car through the open driver's side door. Defendant removed the keys from the ignition, grabbed a black zippered pouch from the driver's side floorboard area, turned and shoved Officer Rowland, and fled on foot. Officers Rowland and Davis chased Defendant on foot.

Defendant fled towards the intersection of Sixth Street and State Street, then ran down an alley between a parking lot and building south of the Wilhelmina Gill Center. When his path of flight was obstructed by a fence, Defendant stopped running and threw the black zippered pouch onto the roof of the building located at 612 State Avenue. Officer Rowland observed Defendant throw the zippered pouch on to the building. Officer Rowland testified that Defendant then turned around in an aggressive stance. Officer Rowland drew his firearm because he was unsure if Defendant was armed. Officer Davis was behind Officer Rowland providing cover. After Officer Rowland commanded Defendant to get on the ground, Defendant complied, but as Officer Rowland holstered his firearm and attempted to handcuff him, Defendant resisted. Officer Davis then deployed her taser for three cycles at which point Defendant was placed in handcuffs.

Meanwhile, while Officer Rowland and Officer Davis chased Defendant on foot, Officer Wilcox, who had watched the encounter, walked from the Frank Williams Outreach Center to

Defendant's unattended car in the Wilhelmina Gill Center parking lot. The driver's side door and the trunk were both still open when Officer Wilcox approached. As he stood outside the car, Officer Wilcox could see inside the car through the open driver's side door. Officer Wilcox observed a handgun on the floorboard of the car, a fact that Officer Wilcox relayed to other officers via radio.

Meanwhile, Officer Rowland obtained a ladder and climbed on top of the building at 612 State Ave. There he recovered the black zipper pouch and its contents: a clear container of PCP, fourteen bags of marijuana, sixty-five bags of crack cocaine, one package of More brand cigarettes,[12] and $641.51 in currency. Inside the car, police recovered a large amount of crack cocaine and some powder cocaine from the center console. Police also recovered the firearm visible on the floorboard of the driver's seat, as well as three walkie talkie radios, and a cellular telephone.

II. Standard

The Supreme Court has defined "reasonable suspicion" as a "particularized and objective basis" for believing the person being stopped is committing or did commit a violation.[13] "The Fourth Amendment permits brief investigative stops when law enforcement officers have 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"[14] Whether officers have reasonable suspicion depends "upon both the content of information possessed by police and its degree of reliability."[15]

[12] Officer Rowland testified that based on his knowledge and experience as a patrol officer, More brand cigarettes are the cigarette of choice for dipping PCP and smoking it through the cigarette.

[13] *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

[14] *Id.*

[15] *Alabama v. White*, 496 U.S. 325, 330 (1990).

Reasonable suspicion is a less demanding standard than probable cause.[16] Further, in making reasonable-suspicion determinations, courts must look at the "totality of the circumstances" of each case to decide whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.[17]

III. Discussion

The Court begins its analysis with the Tenth Circuit's conclusion that Defendant was seized when officers approached his car while flashing their emergency lights and told Defendant that they had come because of a report he was selling drugs.[18] Based on this timeline, the Court must consider whether the officers had reasonable suspicion to approach Defendant in the first place.

The majority opinion noted that this issue is "close."[19] In doing so, the Court pointed to two potentially material factual disputes: (1) whether the 911 caller implied that he had observed a drug sale; and (2) whether either police officer had known of past drug sales in the area where Defendant was located.[20] Answering both questions in the affirmative and considering Supreme Court precedent with regard to anonymous tips, the Court concludes that the officers had reasonable suspicion to seize Defendant.

A. 911 Call

The Supreme Court has noted that "an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity."[21] Nevertheless, the Court has found that "under

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[16] *Id.*

[17] *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

[18] *United States v. Gaines*, 918 F.3d 793, 803 (10th Cir. 2019).

[19] *Id.* at 801.

[20] *Id.* at 802.

[21] *Navarette v. California*, 572 U.S. 393, 397 (2014) (emphasis in original).

appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop,'"[22] Certainly, not all anonymous tips contain sufficiently indicia of reliability.[23] In *J.L.*, police received an anonymous phone call from "an unknown location by an unknown caller" alerting the police that a "young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."[24] The Court noted that there was no audio recording, nothing was known about the informant, and that the call lacked "indicia of reliability" because the call provided no predictive information for the police to test the informant's knowledge or credibility.[25] The Court held that under these circumstances the officers lacked reasonable suspicion to frisk the defendant for weapons.[26]

Conversely, in *Navarette v. California*, the Supreme Court found that an anonymous 911 call was sufficiently reliability to provide reasonable suspicion for a traffic stop. In *Navarrete*, the Supreme Court considered three primary factors in assessing the reliability of an anonymous tip: the caller (1) "claimed eyewitness knowledge of the alleged dangerous driving," (2) "reported the incident soon after she was run off the road," and (3) "use[d] the 911 emergency system."[27] The Court considers these factors in turn.

With regard to the first factor, here, the caller implies that he personally observed Defendant's drug sale. He stated that Defendant was selling wet (PCP) and further that Defendant "just made about twenty dollars." He also provided detailed information about how

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[22] *Id.* (citing *Alabama v. White*, 496 U.S. 325, 327 (1990)).

[23] *See Florida v. J.L.*, 529 U.S. 266 (2000).

[24] *Id*. at 268, 270.

[25] *Id*.

[26] *Id*. at 270.

[27] *Navarette v. California*, 572 U.S. 393, 399–400 (2014).

Defendant was dressed and where he had parked his car.[28] Nonetheless, the other two factors are also clearly met here.

The caller made a contemporaneous report of his observations of Defendant's activities, criminal or not.[29] He states that "[Defendant] *just* made about twenty dollars" and told the 911 operator, "I'm watching him *right now* . . . he's still walking up the hill."[30] "Substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."[31] While Defendant asserts that the lack of criminal activity being described contemporaneously negates this factor, the Court finds that the overall reliability of the tip is increased by the caller's report of present sense impressions, which "weigh[s] in favor of the *caller's* veracity."[32] This factor distinguishes the present case from *J.L.*, where the caller did not imply that he had personally witnessed any activity, criminal or not, contemporaneously.

Further, the caller reported the tip through the 911 system. In *Navarette*, the Supreme Court noted that "[a] 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity," including providing victims of false tips "with an opportunity to identify the false tipster's voice."[33] Defendant argues that this factor is irrelevant because the Government has offered no evidence that the call was traced or traceable. The call was, however, clearly recorded. If the tip had been false,

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[28] *See United States v. Williams*, 646 F. App'x 624, 627 (10th Cir. 2016) (finding one factor to consider in assessing the reliability of a 911 call is "whether the informant provided detailed information about the events observed").

[29] *See id.* (finding one factor to consider in assessing the reliability of a 911 call is "whether the informant reported contemporaneous, firsthand knowledge").

[30] Gov't Ex. 1.

[31] *Navarette*, 572 U.S. at 400 (citing Advisory Committee's Notes on Fed. R. Evid. 803(1), which describes "the rationale for the hearsay exception for 'present sense impression[s]'").

[32] *Id*. (emphasis added).

[33] *Id*.

Defendant would have had the opportunity to identify the caller's voice. In this regard, the caller "lacked true anonymity."[34]

Additionally, the caller told the operator where he was, he stayed on the phone for over two minutes, and he answered every question that was put to him, including answering the operator honestly that he did not know what type of car Defendant was driving. The Tenth Circuit has noted that "giving the address" is "at least an 'indicium of reliability.'"[35] Moreover, the caller was not intentionally anonymous; the operator simply never asked his name, and there is no reason to believe that he would not have provided it.[36] Similarly, to the extent Defendant argues that the fact the caller did not relay any motive for the call hurts its reliability, the Court finds no basis to infer any animosity or ulterior motive here.[37] While the presence of these factors may serve as another basis to find the tip reliable, their absence is not dispositive.

Finally, the fact that the call was over two minutes long demonstrates that the caller was not in any hurry to make an allegation and then quickly hang up. While Defendant contends that the length of the call "adds nothing to the reliability calculus,"[38] the Court finds the length contributes to the credibility of the tip. While no one factor makes the tip reliable, the Court finds that the aggregate effect of the above factors makes this anonymous tip sufficiently reliable to provide reasonable suspicion.

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[34] *See Williams*, 646 F. App'x at 627.

[35] *United States v. Madrid*, 713 F.3d 1251, 1260 (10th Cir. 2013).

[36] *See id*. ("[T]he 911 operator never asked the caller for his name or other identifying information and there is no reason to believe he would not have provided this information if requested.")

[37] *See Madrid*, 713 F.3d at 1261 ("This stated motive further buttresses the reliability of the information related by the caller because it reduces the possibility that he harbored animosity towards defendant or his companions and tends to show that he was not using 'the device of a phony tip to wreak injury (indignity, invasion of privacy, suspicion, and sheer annoyance) on [his] enemies, rivals or acquaintances without fear of being held responsible.'").

[38] Doc. 160 at 18.

B. Additional Factors

Furthermore, the Court need not rely solely on the 911 call here. The responding officers had first-hand knowledge of drug sales and other drug activity in the area. Officer Davis testified that "we had a lot of medical-type calls of individuals on PCP, along with complaints of *narcotics sales* in the area."[39] Officer Rowland testified that he had personally responded to calls for service around the Wilhelmina Gill Center involving narcotics complaints. He also testified that in the time leading up to the arrest on August 24, "we had increased contact with individuals under the influence of PCP."[40] Police records show that between March and August 2015, officers had been called eight times to the area for medical calls involving reactions to PCP or other substances.[41] "[T]he fact that conduct occurs in an area known for criminal activity [is an] appropriate factor[] to consider in determining whether reasonable suspicion exists."[42]

Defendant contends that the officers' knowledge of drug-use in the area does not constitute the "particularized and objective basis for suspecting the particular person stopped of criminal activity."[43] "That the stop occurred in a high-crime area is a relevant consideration but does not permit police to detain an individual without additional, particularized observations."[44] Here, however, the officers' knowledge of drug—including PCP—use and sales in the area was not the sole factor for the stop. Rather, this background knowledge provided a particularized basis for the officers to find the 911 caller's information reliable.

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[39] Doc. 57 at 46:15–22.

[40] *Id*. at 6:23–25.

[41] Gov't Ex. 7. On July 24, 2015, police records show that officers were dispatched to the Wilhelmina Gill Center for a female suspected of reacting to ingestion of PCP. *See id.*

[42] *United States v. DeJear*, 552 F.3d 1196, 1201 (10th Cir. 2009).

[43] *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

[44] *United States v. Pena-Montes*, 589 F.3d 1048, 1055 (10th Cir. 2009)

The Officers also knew the *particular person* in the parking lot who the caller accused.[45] Officer Wilcox, who was off-duty across the street, radioed that the man in the white Cadillac had been the man standing on the corner dressed in all red when the tipster called.

While the Tenth Circuit "typically place[s] little weight on uncorroborated anonymous tips,"[46] the Court finds that the totality of the circumstances here bears sufficient indicia of reliability to provide reasonable suspicion. The reliability of the tip—including the caller's statement implying that he had observed Defendant making a drug sale, the contemporaneous nature, the use of the 911 system, the honest answers of the caller, and the length of the call—coupled with the responding officers' particularized knowledge of narcotic sales in the immediate area and Officer Wilcox's observations, "possessed an internal coherence that gave weight to the whole."[47] The officers had reasonable suspicion to conduct a brief investigative stop.

C. Abandonment

The Fourth Amendment does not prohibit a search of property that has been abandoned.[48] "Property is considered abandoned if the owner lacks an objectively reasonable expectation of privacy."[49] "Abandonment contains subjective and objective components" including whether the individual intended to relinquish any right to the property and whether his "expectation of

[45] *Cortez*, 449 U.S. at 417–18.

[46] *United States v. Martinez*, 910 F.3d 1309, 1314 n.2 (10th Cir. 2018)

[47] *United States v. Brown*, 496 F.3d 1070, 1079 (10th Cir. 2007) (citing *United States v. Jenkins,* 313 F.3d 549, 554 (10th Cir. 2002).

[48] *Abel v. United States*, 362 U.S. 217, 241 (1960); *United States v. Juszczyk*, 844 F.3d 1213, 1213 (10th Cir. 2017).

[49] *Juszczyk*, 844 F.3d at 1214

privacy" is "objectively reasonable."[50] "When individuals voluntarily abandon property, they forfeit any expectation of privacy in it they might have had."[51]

Here, Defendant fled from the officers carrying a small black pouch. When he found that he was obstructed by a fence, he stopped running and threw the black pouch onto the roof of the building located at 612 State Avenue. Officer Rowland observed Defendant throw the pouch onto the building. After Defendant was arrested, Officer Rowland obtained a ladder and climbed on top of the building at 612 State Ave to retrieve the pouch.

Defendant was clearly trying to conceal the black pouch from the police. He threw the pouch onto the rooftop at 612 State Avenue after realizing he was going to be arrested, not because he had any privacy interest in that particular building. Moreover, because he knew he was about to be arrested, he could not have intended to return for the pouch. In *Juszczyk*, the Tenth Circuit found that the Defendant "did not retain an objectively reasonable expectation of privacy once he threw the backpack onto [his neighbor's] roof."[52] Here, Defendant threw the pouch onto a random building in Kansas City, Kansas; any expectation of privacy was not objectively reasonable.

As both the Government and Defendant recognize, "[a]bandonment will not be recognized when it is the result of illegal police conduct."[53] Here, however, the Court finds that the officers had reasonable suspicion to perform a brief investigative stop. Accordingly, after

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[50] *Id*.

[51] *United States v. Trimble*, 986 F.2d 394, 399 (10th Cir. 1993) (quoting *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir. 1983)).

[52] *Juszczyk*, 844 F.3d at 1215.

[53] *United States v. Ward*, 961 F.2d 1526, 1535 (10th Cir. 1992), *overruled on other grounds*, *United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994).

Defendant fled, he abandoned the pouch on the rooftop, and no warrant was required to seize or search it.

IT IS THEREFORE ORDERED BY THE COURT Defendant's Motion to Suppress (Doc. 46) is **denied**

IT IS SO ORDERED.

Dated: August 9, 2019

S/ Julie A. Robinson
JULIE A. ROBINSON
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **DESMOND S. GAINES,** **Defendant.**	**Case No. 15-CR-20078-JAR**

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Desmond Gaines' Motion to Suppress Evidence (Doc. 46). Defendant contends that evidence seized by law enforcement from an encounter on August 24, 2015 was seized in violation of his Fourth Amendment rights. The Government has responded (Doc. 50), and an evidentiary hearing was held on March 8, 2017. The Court has reviewed the evidence and arguments adduced at the hearing and is now prepared to rule. As explained more fully below, Defendant's motion is denied.

I. Factual Background

Based on the testimony and evidence admitted at the hearing on this motion, the Court finds as follows. On August 24, 2015, Officer Carl Rowland and Officer Shenee Davis, who were both patrol officers with the Kansas City, Kansas Police Department, were dispatched to the Wilhelmina Gill Center, at 645 Nebraska Ave. Kansas City, Kansas, following an anonymous 911 call.[1] The unidentified caller stated there was a "light-skinned" man in all red clothing selling "wet," which is otherwise known as phencyclidine ("PCP"). The caller stated that the man was in the parking lot of the Wilhelmina Gill Center sitting in a white car, but he

[1] Gov't Ex. 1.

did not know the type of car that the man was driving. The caller stated that he was located at the Wilhelmina Gill Center when he was observing the man.

During his testimony, Officer Rowland testified that he was familiar with the Wilhelmina Gill Center and the surrounding area. Officer Rowland testified that he had responded to several drug-related calls at the Wilhelmina Gill Center. In fact, police dispatch records showed that between March and August 2015, officers had been dispatched to the Wilhelmina Gill Center eight times for reported narcotics sales or for medical calls involving reactions to PCP or other substances.[2] Officer Rowland further testified that based on his experience, he was familiar with the strong, overpowering chemical odor of PCP and with behavior resulting from ingestion of PCP.

Officer Mark Wilcox, a patrol officer for the Kansas City, Kansas Police Department, was working on August 24, 2015 as an off-duty security guard at the Frank Williams Outreach Center, which is directly across the street from the Wilhelmina Gill Center. Officer Wilcox testified that he wears his uniform at the Frank Williams Outreach Center, including his police radio. Prior to the call being dispatched, Officer Wilcox was patrolling the parking lot of the Frank Williams Outreach Center. He noticed a man in all red clothing wiping down his car, a white Cadillac, in the Wilhelmina Gill Center parking lot. Not long after this observation, Officer Wilcox heard the dispatched call that a man wearing all red was selling drugs. As Officer Rowland and Officer Davis arrived on scene, Officer Wilcox radioed about his observation of the man wearing all red entering the white Cadillac. Officer Wilcox did not at any time observe this man conducting a drug transaction.

[2] Gov't Ex. 7. On July 24, 2015, police records show that officers were dispatched to the Wilhelmina Gill Center for a female suspected of reacting to ingestion of PCP. *See id.*

Officer Rowland, who was uniformed and driving a marked police cruiser, pulled into the Wilhelmina Gill Center parking lot from the west.[3] Officer Davis, who was also uniformed, followed directly behind him in the marked police cruiser that she was driving. Officer Rowland also observed the man (subsequently identified as Desmond Gaines, the "Defendant") entering the white Cadillac and observed that Defendant matched the description of light skinned and wearing all red (red hat, red shirt, red pants, and red shoes). Officer Rowland pulled up behind the driver side of the white car, and Officer Davis pulled up alongside Officer Rowland's cruiser, also to the rear of the white car. Both officers activated the emergency lights on their cruisers because their vehicles were both blocking a lane of traffic in the parking lot. While the two police cruisers blocked the white car from the rear, the white car was not blocked in the front or on the right side and Defendant, who was the driver, could have drove forward without obstacle.

As Officer Rowland approached the driver side of the white car, Defendant, who was sitting in the driver's seat with the door closed, exited the white car and quickly closed the door behind him. Meanwhile, Officer Davis exited her cruiser and approached the rear of the white car. Officer Rowland began to speak to Defendant, who asked Officer Rowland what he was doing; Officer Rowland replied that there was a 911 call about a man matching his description selling drugs. Defendant denied that he was engaged in drug sales.

Officer Rowland asked Defendant for identification; Defendant responded that his identification was in the car trunk.[4] At this point, Defendant reopened the driver side door and pulled the trunk release. As Defendant began to walk toward the trunk, he began to close the driver side door behind him, but Defendant then caught the door with his hand and the door

[3] There is both audio and video of the encounter captured on Officer Rowland's police cruiser camera system. Gov't Ex. 3. There is also video from the Wilhelmina Gill Center cameras in the parking lot. Gov't Ex. 2.

[4] Officer Rowland testified that Defendant was not considered in custody when he asked him for his identification.

remained open. Defendant positioned himself between the car and the open driver side door. Meanwhile, Officer Davis began to walk toward the rear part of the car, and then to the passenger side.

Officer Rowland testified that as soon as Defendant reopened the driver's side door, Rowland smelled a strong chemical odor that based on his training and experience he believed was the odor of PCP. Officer Rowland further testified that once the trunk was ajar, the odor of PCP became stronger. From his position next to the driver side door, Officer Rowland also observed a bottle of alcohol on the center console underneath a walkie talkie radio. Officer Rowland told Defendant that he was going to detain him for having an open container of alcohol within his reach in the car.[5] Photographs taken at the time of the stop depict a bottle of alcohol on the center console with the lid intact on the bottle. Officer Rowland testified that although he also decided to detain Defendant in part because of the strong odor of PCP, he did not tell Defendant this at that time, because he did not want to tip Defendant off that he suspected PCP was present.

Once Officer Rowland displayed his handcuffs, he observed Defendant becoming agitated and fidgety. Officer Rowland reached for Defendant's left hand to place him in handcuffs. Defendant pulled away from Officer Rowland and reached into the car through the open driver side door. Defendant removed the keys from the ignition, grabbed a black zippered pouch from the driver side floorboard area, turned and shoved Officer Rowland, and fled on foot. Officers Rowland and Davis chased Defendant on foot.

Defendant fled towards the intersection of Sixth Street and State Street, then ran down an alley between a parking lot and building south of the Wilhelmina Gill Center. When his path of

[5] Possession of alcohol in a vehicle is a violation of K.S.A. § 8-1599, which is an arrestable offense.

flight was obstructed by a fence, Defendant stopped running and threw the black zippered pouch onto the roof of the building located at 612 State Avenue. Officer Rowland observed Defendant throw the zippered pouch on to the building. Officer Rowland testified that Defendant then turned around in an aggressive stance. Officer Rowland drew his firearm because he was unsure if Defendant was armed. Officer Davis was behind Officer Rowland providing cover. After Officer Rowland commanded Defendant to get on the ground, Defendant complied, but as Officer Rowland holstered his firearm and attempted to handcuff him, Defendant resisted. Officer Davis then deployed her Taser for three cycles at which point Defendant was placed in handcuffs.

Meanwhile, while Officer Rowland and Officer Davis chased Defendant on foot, Officer Wilcox, who had watched the encounter, walked from the Frank Williams Outreach Center to Defendant's unattended car in the Wilhelmina Gill Center parking lot. The driver side door and the trunk were both still open when Officer Wilcox approached. As he stood outside the car, Officer Wilcox could see inside the car through the open driver side door. Officer Wilcox observed a handgun on the floorboard of the car, a fact that Officer Wilcox relayed to other officers via radio.

Meanwhile, Officer Rowland obtained a ladder and climbed on top of the building at 612 State Ave. There he recovered the black zipper pouch and its contents: a clear container of PCP, fourteen bags of marijuana, sixty-five bags of crack cocaine, one package of More brand cigarettes,[6] and $641.51 in currency. Inside the car, police recovered a large amount of crack cocaine and some powder cocaine from the center console. Police also recovered the firearm

[6] Officer Rowland testified that based on his knowledge and experience as a patrol officer, More brand cigarettes are the cigarette of choice for dipping PCP and smoking it through the cigarette.

visible on the floorboard of the driver seat, as well as three walkie talkie radios, and a cellular telephone.

Following Defendant's arrest, Officer Rowland learned that Defendant had an outstanding warrant for his arrest. Officer Rowland testified that under normal practice when he takes someone's identification, he immediately runs a records check for outstanding warrants. But, given Defendant's flight, Officer Rowland was not able to immediately run a records check. Officer Rowland testified that if Defendant had not fled, he would have run a records check and presumably found the outstanding arrest warrant.

II. Discussion

Defendant argues that the evidence seized from the car and from the roof of 612 State Ave. was illegally seized in violation of the Fourth Amendment and should be suppressed. More specifically, Defendant argues the anonymous 911 call did not justify the officers' investigative stop, and that there was no intervening circumstance that purged the taint of the Fourth Amendment violation.

The Court disagrees. This was an initially a consensual encounter for the officers did not detain Defendant, who was in or near his car and who had the ability to leave. The encounter quickly evolved into an investigatory detention, based on the officer's reasonable suspicion of an open container violation and reasonable suspicion that there was PCP present in the car. The investigatory detention was quickly interrupted by Defendant's flight and attempted discard of the zippered pouch, which provided further justification for an investigatory detention. But, even if the initial encounter was an investigatory stop not based upon reasonable suspicion, the attenuation doctrine applies because Officer Rowland would have found Defendant's outstanding arrest warrant upon running Defendant's identification through the system.

A. Consensual Encounter

The Fourth Amendment prohibits unreasonable seizures by law enforcement officers.[7] However, the Fourth Amendment "does not proscribe all contact between the police and citizens."[8] Thus, the Fourth Amendment is not violated when law enforcement officers "merely approach[] an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen."[9] These are properly considered consensual encounters for which the Fourth Amendment is not implicated.[10]

To determine whether a police-citizen encounter is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[11] This test allows officers to engage in consensual encounters "so long as they don't throw their official weight around unduly."[12] This test does not have per se rules, but rather turns on the totality of the circumstances.[13]

The Tenth Circuit has enumerated a non-exhaustive list of factors to be considered in determining whether a reasonable person would feel free to terminate his encounter with police:

> the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether

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[7] U.S. Const. amend. IV. The Fourth Amendment applies to the states through incorporation of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

[8] *INS v. Delgado*, 466 U.S. 210, 215 (1984).

[9] *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)).

[10] *See United States v. Lopez*, 443 F.3d 1280, 1283 (10th Cir. 2006).

[11] *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

[12] *United States v. Tavolacci*, 895 F.2d 1423, 1425 (D.C. Cir. 1990).

[13] *United States v. Hill*, 199 F.3d 1143, 1147 (10th Cir. 1999) (quoting *United States v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994)).

> the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.[14]

The Tenth Circuit has also considered "when police officers pursue a citizen in their squad car while the citizen is on foot, courts will consider whether the officers activated their siren or flashers, operated their car in an aggressive manner to block the citizen's course or otherwise control the direction or speed of his movement, displayed their weapons, or commanded the citizen to halt."[15] These factors are not dispositive, but the Tenth Circuit has cautioned that "the strong presence of two or three factors may be sufficient to support the conclusion" that the encounter was not consensual.[16] The nature of a police-citizen encounter can change and what was initially a consensual encounter "may change to an investigative detention if the police conduct changes and vice versa."[17]

When the officers first approached Defendant, it was a consensual encounter. Although their emergency lights were activated and their cruisers blocked Defendant's car from behind, Defendant's car was not blocked from the front or on the right side. And although the emergency lights were activated, the sirens were not activated; in fact, both officers testified they only activated the lights because they had stopped their cruisers in a lane of traffic in the parking lot. The officers did not touch or physically restrain Defendant. They did not have custody of any of Defendant's property or personal effects. The encounter was in a public parking lot where others were present and able to witness the encounter. Although the officers were in

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[14] *United States v. Hernandez*, 847 F.3d 1257, 1264 (10th Cir. 2017) (citing *Lopez*, 443 F.3d at 1284).

[15] *Id.* (citing *Chesternut*, 485 U.S. at 575)

[16] *Id.* (citing *Lopez*, 443 F.3d at 1284–85) (internal quotations omitted).

[17] *United States v. Madden*, 682 F.3d 920, 925 (10th Cir. 2012) (quoting *United States v. Zapata*, 997 F.2d 751, 756 n.3 (10th Cir. 1993)). Investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity. *Id.*

uniform and marked police cruisers, the officers did not display their weapons and there is no evidence that they interacted with any indicia of coercive behavior. Officer Rowland spoke in a conversational tone, simply asking to see Defendant's identification, which Defendant agreed to provide. Based on Officer Rowland's conversational tone and Defendant's behavior, the Court finds that this was a consensual encounter. Although the officers did not advise Defendant that this was a mere consensual encounter that Defendant could terminate, they had scant chance to tell Defendant that, in light to the rapid succession of events described below.

As Defendant was in the process of retrieving his identification, he reopened his car door, left the car door open and opened his trunk, which allowed Officer Rowland to detect the strong chemical odor of PCP emanating from the passenger compartment and trunk of Defendant's car. And, when Defendant opened his car door, Officer Rowland observed a bottle of alcohol on the center console, providing him with reasonable suspicion that there was an open container violation. The Court finds that this was initially a consensual encounter that evolved into an investigatory detention upon Officer Rowland's reasonable suspicion based on his plain view observation of an open container in the car and his detection of the strong odor of PCP emanating from the car. Indeed, Officer Rowland told Defendant at that point that he was detaining him for investigation of an open container violation, and Officer Rowland attempted to place Defendant in handcuffs.

The rapidly developing events thereafter provided even more basis for reasonable suspicion, and ultimately probable cause, to arrest Defendant. Defendant grabbed a zippered pouch, shoved Officer Rowland out of the way, and fled on foot, discarding the pouch by throwing it on a rooftop before officers could apprehend him. In fact, just thirty to sixty seconds elapsed between Officer Rowland's initial contact with Defendant and Defendant's flight. The

brief consensual encounter and brief investigatory detention almost immediately evolved into a foot chase in which the officers observed Defendant discarding a pouch that Defendant evidently felt compelled to grab before fleeing from the officers. Once Defendant fled on foot with the black zippered pouch, the officers had probable cause for an arrest. Thus, there was no violation of the Fourth Amendment as this was initially a consensual encounter, which did not implicate the Fourth Amendment, and later became an investigatory stop, which was supported by reasonable suspicion, or arrest, which was supported by probable cause, based on the open container violation and presence of PCP.

B. Attenuation Doctrine

The attenuation doctrine evaluates the causal link between the government's unlawful act and the evidence seized.[18] In *Utah v. Strieff*, the Supreme Court considered whether the discovery of a valid existing warrant is sufficient to break the causal chain between an unlawful stop and the discovery of evidence.[19] The Court looked to the three factors espoused in *Brown v. Illinois* for determining whether the attenuation doctrine applied—

> (1) the court looks to the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; (2) the court considers the presence of intervening circumstances; and (3) the court examines the purpose and flagrancy of the official misconduct.[20]

The Supreme Court held in *Strieff*, a circumstance similar to this case, that "the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant."[21]

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[18] *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

[19] *Id.*

[20] *Id.* at 2062 (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)).

[21] *Id.* at 2063.

The first factor, the temporal proximity between the unconstitutional conduct and the discovery of evidence, favors suppression of the evidence. The Supreme Court has cautioned that this factor only favors attenuation if a substantial time has elapsed between the conduct and the discovery of evidence.[22] Here, if this Court were to assume the stop itself was unlawful, there were only several minutes between the initial stop and the evidence being found on the roof and in the car. Thus, this would favor suppression.

By contrast, the second factor, the presence of intervening circumstances, strongly favors the Government. In *Strieff*, the Court relied on the fact that the defendant had a valid warrant pre-existing the investigation that was wholly unconnected to the initial stop.[23] "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions."[24] Here, this is somewhat different than the case in *Strieff* because Officer Rowland and Officer Davis did not find out about the outstanding warrant until after Defendant fled on foot and was arrested. However, if Defendant had not fled the initial stop, Officer Rowland would have used Defendant's identification and ran a check. This check would have shown the existence of a valid, pre-existing warrant that was wholly unrelated to the current stop. This would have been an independent, intervening circumstance that would have warranted search of Defendant's person and his car incident to his arrest.[25] This factor strongly favors the Government.

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[22] *Kaupp v. Texas*, 538 U.S. 626, 633 (2003).

[23] *Strieff*, 136 S. Ct. at 2082.

[24] *United States v. Leon*, 468 U.S. 897, 920 n.21(1984).

[25] *See generally Arizona v. Gant*, 556 U.S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

The third factor, deterring police misconduct, also weighs in favor of the Government. The exclusionary rule exists to deter police misconduct.[26] Here, as this Court described above, Officer Rowland and Officer Davis engaged in a consensual encounter with Defendant. Thus, the Court does not believe that the officers committed any sort of police misconduct. However, even assuming the Court adopted Defendant's argument that this was not a consensual encounter and rose to the level of an investigatory stop without requisite reasonable suspicion, Officer Rowland and Officer Davis could be considered at most negligent. Because there has been no evidence presented that the stop was part of any systemic or willful police misconduct, the Court finds that this factor also strongly favors the Government. In conclusion, the Court finds, based on the three attenuation doctrine factors and the Court's holding in *Strieff*, that the evidence found on the roof and in Defendant's car is admissible because even if the stop was unlawful, it was sufficiently attenuated by the pre-existing arrest warrant.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion to Suppress Evidence (Doc. 46) is **denied**.

IT IS SO ORDERED.

Dated: April 7, 2017

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

[26] *Davis v. United States*, 564 U.S. 229, 236–237 (2011).