No. 21-

IN THE

Supreme Court of the United States

LAMONT LENDELL BAGLEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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December 20, 2021

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QUESTION PRESENTED

Whether the protective search exception to the Fourth Amendment's warrant requirement extends to an unoccupied vehicle if the former occupant is detained and secured away from the vehicle and is not subject to a traffic stop or roadside encounter.

PARTIES TO THE PROCEEDING

The Petitioner is Lamont Lendell Bagley.

The Respondent is the Commonwealth of Virginia.

RELATED PROCEEDINGS

Supreme Court of Virginia

Lamont L. Bagley v. Commonwealth of Virginia, No. 21-0390 (Sept. 20, 2021) (denying petition)

Court of Appeals of Virginia

Lamont L. Bagley v. Commonwealth of Virginia, 73 Va. App. 1 (2021), No. 0249-20-2 (Feb. 23, 2021)

Henrico County Circuit Court

Commonwealth of Virginia v. Lamont L. Bagley, CR19-1677-F, CR11-3318-02 (Nov. 13, 2019)

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STATUTES AND OTHER AUTHORITIES:

Petitioner Lamont Lendell Bagley respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Virginia.

OPINION BELOW

The order of the Supreme Court of Virginia denying a petition for review is unreported. App. 1a, 2a. The opinion of the Court of Appeals of Virginia is reported at 73 Va. App. 1 (2021). App. 3a–32a. The trial court's order is not reported. App. 38a.

JURISDICTION

The Supreme Court of Virginia denied Mr. Bagley's timely petition for appeal on September 20, 2021. App. 1a. The Court of Appeals of Virginia entered judgment on February 23, 2021. App. 3a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution reads:

> 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

I. Factual history.

The facts are not in dispute. At approximately 3:00 a.m. on January 26, 2019, Officers Lynch and Earlenbaugh of the Henrico County Police Department responded to a call for police assistance for a "disorderly situation" at 3527 Bolling Road. App. 4a. Officer Lynch was told that the caller reported two black males and one black female were "blocking his driveway" in a white Nissan and had "brandished a firearm at him." App. 4a. The caller reported that one or both of the men were in their twenties. App. 4a. The caller provided the police dispatcher with his name and other identifying information, although Lynch and Earlenbaugh did not know the identity of the caller at the time. App. 4a.

The officers arrived at the address while displaying their badges of authority. App. 4a. They determined that the dwelling was a small apartment building with an adjacent driveway. App. 4a. They found two cars in the driveway, one white and one maroon. The white vehicle was not a Nissan. App. 4a, 5a. The officers did not activate their emergency lights or sirens and approached on foot. App. 5a. They cast flashlights into the white car and saw Mr. Bagley, a black male, in the driver's seat. App. 5a.

Lynch was approximately ten feet from the white car on the passenger side and Earlenbaugh stood more than ten feet away from the driver's side. App. 5a. The officers also saw a man inside the maroon car. App. 5a. Mr. Bagley and the occupant of the maroon car were the only people other than the officers at the scene.

App. 5a. Once the beam from Lynch's flashlight shone on the windshield of the white car, Mr. Bagley engaged in "furtive movement," "very rapidly" and "threw" his hands down toward the bottom half of the car. App. 5a. Lynch could not see his hands but saw his arms move and believed that he was "sticking his hands . . . underneath the driver's seat." App. 5a. Earlenbaugh stood to the side of the white car and described Mr. Bagley's movements as "quickly leaning under the [driver's] seat." App. 5a. After making these movements, Mr. Bagley opened the car door, got out "quickly," and moved rapidly toward the apartment building and tried to enter the front door of the apartment. App. 5a, 34a. The officers stopped him from going inside the apartment in order to "speak to him about the situation" for which they had been dispatched. App. 5a. At this point, other officers had arrived and Mr. Bagley was approximately twenty to twenty-five feet away from the vehicle. App. 34a. They frisked Mr. Bagley for weapons and found nothing on him. App. 6a. They obtained his identification and placed him in handcuffs. App. 6a. His identification reflected that he was in his late-thirties. App. 6a.

Lynch then went to the white car and conducted a "protective sweep" of the driver's seat because she believed Mr. Bagley tried to hide something and knew the caller reported an occupant of a white Nissan brandished a firearm. App. 6a. She would later concede that Mr. Bagley could not access the vehicle in any way when he was being detained at the front door of the apartment at least twenty feet away. App. 34a. When Lynch opened the car door, she saw a latex glove between the driver's seat and the door. App. 6a. She left the glove in place and limited her search to the area beneath the driver's seat. App. 6a.

Two to three inches from the front of the seat, she found a bag containing a large quantity of white powder that appeared to be cocaine, as well as a digital scale. App. 6a. Once Lynch found the suspected cocaine and scale beneath the seat, the rest of the vehicle was searched. App. 6a. Inside the blue glove was a white substance believed to be cocaine. App. 6a. Mr. Bagley was placed under arrest for possession of a controlled substance with intent to distribute.

II. Proceedings below.

Mr. Bagley was charged with second-offense possession of a Schedule I or II controlled substance with intent to distribute in violation of Va. Code § 18.2-248. He moved to suppress the evidence, arguing that the officers were not permitted to search the vehicle. App. 6a. The court denied the motion to suppress and reasoned that because Mr. Bagley was detained rather than arrested, he could be expected to re-enter the vehicle when the detention ended and would once again have access to the firearm believed to be in the car. App. 7a. The court held that the search was a lawful protective search and found Mr. Bagley guilty of the offense. App. 7a, 38a.

Mr. Bagley appealed to the Court of Appeals of Virginia, which held that he was merely subject to an investigatory detention rather than a formal arrest at the time of the search, therefore the search was permissible pursuant to the protective search exception to the Fourth Amendment as recognized in *Michigan v. Long*, 463 U.S. 1032 (1983). App. 17a, 18a. He appealed the decision to the Supreme Court of Virginia but his petition was denied. App. 1a.

REASONS FOR GRANTING THE PETITION

The issue in this case is whether the protective search exception to the Fourth Amendment's warrant requirement extends to an unoccupied vehicle if the former occupant is detained and secured away from the vehicle and not subject to a traffic stop or roadside encounter.

The Court of Appeals of Virginia held that such a warrantless search is permitted. This was a gross constitutional error.

Police may conduct investigatory stops and frisk a person for weapons if there is reasonable, articulable, and particularized suspicion that criminal activity is afoot and the subject may be armed and dangerous. *See Terry v. Ohio*, 392 U.S. 1, 27, 30–31 (1968). Police may remove an individual from a vehicle during a traffic stop, *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam), and may conduct a protective search of the vehicle for weapons under certain circumstances. *Long*, *supra*. Similarly, a vehicle may be searched incident to the arrest of a recent occupant if it is reasonable to believe there is evidence of the crime of arrest or if the arrestee is unsecured and within reaching distance of the passenger compartment. *Arizona v. Gant*, 556 U.S. 332 (2009). Once an arrestee is secured away from the vehicle, neither the "protective search" nor "search incident to arrest" exceptions apply. *Id.*

The primary justification underlying *Long*'s protective search exception for a vehicle is that the detainee will return to the vehicle during or immediately after a traffic stop and may regain access to any weapons inside. *Id.*

at 352 (Scalia, J., concurring). This case presents an important scenario where law enforcement conducted a *Terry* stop of a pedestrian, frisked him, and placed him in handcuffs away from a vehicle but extended their search to an unoccupied automobile. Unlike a protective search during a traffic stop, there was no reason to expect Mr. Bagley would access the vehicle while law enforcement was present.

Certiorari is warranted to clarify whether the scope of *Long*'s protective search exception requires a showing that the detainee will return to the vehicle during the *Terry* stop or whether it has broadened to include situations where the vehicle is not subject to a stop and the former occupant is secured away from the vehicle. Failure to address this issue will allow protective searches to extend to any vehicle that was recently occupied by a detainee without a showing that the detainee is likely to return to it during or after the investigation. The Fourth Amendment cannot allow this precedent to stand.

I. The Court of Appeals of Virginia erred by expanding the protective search exception.

A. The protective search exception for a vehicle does not apply unless the vehicle is involved in a roadside encounter or the detainee is unsecured and in the immediate vicinity of the vehicle.

The court below determined that the lawfulness of a warrantless search of a vehicle depends on the custodial status of the suspect. App. 12a. The court reasoned that when a suspect is subject to a *Terry* stop and there is

reason to believe they may be armed and dangerous, police can conduct a protective search of a recently occupied vehicle regardless of whether the detainee is a pedestrian or in the vehicle, because there is a per se presumption that when the stop concludes the individual "will be permitted to reenter his automobile" and "will then have access to any weapons inside." App. 12a (citing *Long*, 463 U.S. at 1052).

Long remains applicable after this Court's decision in *Gant* because there are situations when an individual, "whether or not the arrestee," will gain or regain access to the interior of a vehicle during or immediately after a traffic stop. *See Gant*, 556 U.S. at 346. During a traffic stop or other roadside encounter, detainees and their vehicles are on public highways or engaged in some form of travel such that the return to their vehicle can typically be presumed. The mobility of vehicles historically plays a material role in determining the scope of the Fourth Amendment's application and the expectations of privacy are lower during these public-highway encounters. *See California v. Carney*, 471 U.S. 386, 390–93 (1985) (discussing underlying justifications of the automobile exception to the warrant requirement and applying it "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise."). Nevertheless, when there is no reason to expect a detainee will return to a vehicle during or immediately after a *Terry* stop, the safety concerns recognized in *Long* do not exist and the protective search exception cannot apply. *Cf. Gant*, 556 U.S. at 339 ("If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both

justifications for the search-incident-to-arrest exception are absent and the rule does not apply.").

Unless it is in the context of a traffic stop, a traffic accident, or the ordered removal of an individual from a stationary vehicle, police cannot presume a secured detainee is going to access the interior of a vehicle again during a *Terry* stop. Just as the protective search exception does not apply when an arrestee is secured outside the reach of a vehicle, it cannot apply when there is no traffic stop and a detainee is secured away from the vehicle. *Cf Id.*

The problem in this case is that the lower court extended *Long*'s protective search exception to a situation where the suspect was not in the vehicle when detained, officers did not attempt to engage in a traffic stop or order him from the vehicle, he was not able to access the vehicle, and he was stopped as a pedestrian, frisked, handcuffed, and identified while on his way into an apartment.

This Court has reiterated that an officer may "conduct a '*Terry* patdown' of the passenger compartment of a vehicle upon reasonable suspicion that *an occupant* is dangerous and may gain immediate control of a weapon." *Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (emphasis added). In this case, Mr. Bagley was not an occupant when seized and was not within a proximity of the vehicle where he could gain immediate control of the passenger compartment of the vehicle.

Though perhaps not formally "under arrest," Mr. Bagley was undoubtedly seized, detained, and secured, therefore the search of the vehicle cannot be justified

under *Long*'s dangerousness rationale simply because he was going to regain the preexisting liberty to move about as he wished and therefore could, theoretically, choose to return to his unseized vehicle. At a minimum, the protective search of an unoccupied vehicle is not justified when the automobile has not been stopped and the former occupant is secured away from the vehicle during an investigative detention.

B. There is no reason to presume a former occupant of a vehicle will return to the vehicle during or immediately after an investigative detention when the vehicle is not subject to a traffic stop or roadside encounter.

Law enforcement may generally conduct a protective search of a vehicle if there is reasonable suspicion that weapons may be present because there is an assumption that when the stop concludes, the individual "will be permitted to reenter his automobile" and "will then have access to any weapons inside." *Long*, 463 U.S. at 1052. This rationale disappears when the situation does not involve a traffic stop or other roadside encounter and the former occupant is secured away from the vehicle. A prohibition on protective searches must apply when no additional evidence is offered to suggest the detainee will actually return to a vehicle during a *Terry* stop.

Once an officer realizes a pedestrian does not have a weapon on his person or in their immediate reach, the need to continue a *Terry* search is negated. Protective searches are not meant to discover evidence of crime but to allow an officer to pursue his investigation without

fear of violence. *Adams v. Williams*, 407 U.S. 143, 146 (1972). The fruit of a search that goes beyond what is necessary to determine if a suspect is armed must be suppressed. *Sibron v. New York*, 392 U.S. 40, 65–66 (1967). Searches that exceed what is necessary to determine if an individual is armed amount to the evidentiary search that *Terry* expressly refused to authorize and the Court condemned in *Sibron* and *Long*. *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993).

In this case, the lower court erred when it held that the lack of a firearm on Mr. Bagley's person "served only to heighten" the officers' suspicion that a firearm was hidden in the car and therefore the protective search was allowed to extend to an unoccupied vehicle. App. 17a. To allow the protective search exception to extend to vehicles that are not subject to a traffic stop and not within the immediate reach of a secured detainee will allow *Long*'s protective searches to inherently turn into evidentiary searches.

II. There is no justification for expanding the protective search exception to an unoccupied vehicle that is not subject to a traffic stop or is outside of the immediate vicinity of a suspect who is secured and detained pursuant to *Terry*.

A. The fact that the subject of an investigatory stop will eventually regain the liberty to return to their vehicle once an investigation is over cannot continue to justify otherwise unlawful searches.

During a *Terry* stop of a vehicle, an officer may remove the occupants to search them and the passenger

compartment for weapons if there is reason to believe they may be armed and dangerous. *Long*, 463 U.S. at 1032. It is reasonable to either secure the occupants and keep them away from the vehicle for the duration of the investigation or allow them to return to the vehicle once the protective search is complete so officers may continue the investigation. Nevertheless, once the purpose of the *Terry* stop is over and the investigation is complete, that is the end of the potential "threat" to an officer. At this stage, any threat reverts to the status quo, as parties are free to go on their way. It is reasonable to conduct protective searches if detainees are going to be free to return to a vehicle *during* the stop and wait in their vehicle, but there is no justifiable reason to conduct a protective search of a vehicle if the suspect is secured away from the vehicle for the duration of the investigation simply because the occupant will eventually be free to return once the investigation is over.

In situations where police secure an occupant away from the vehicle, a protective search is not warranted unless it is apparent that the detainee will return to the vehicle while the stop continues. To permit a protective search of a vehicle merely because the detainee will return to the vehicle once the stop is finished is not only investigatory, it inherently extends the duration of the stop longer than is reasonable or necessary. *Cf. Rodriguez v. United Sates*, 575 U.S. 348 (2015) (finding the unnecessary extension of an investigatory stop of a vehicle to be unreasonable and a violation of the Fourth Amendment). A protective search premised on a detainee's return to the vehicle at the end of a stop is also unsound because the stop will not only be finished in this scenario, but any lawfully possessed weapon that was found in the vehicle

would then need to be returned so the former-detainee can go on their way.

B. This case squarely presents the opportunity for the Court to clarify if and when the protective search exception for a vehicle applies if the former occupant is secured away from the vehicle.

The ruling of the lower court is so beyond the scope of this Court's jurisprudence that it makes this case a unique vehicle for clarifying several issues concerning *Long*'s protective search doctrine. The Court can declare whether the protective search exception requires an affirmative showing that a detainee is likely to regain access to the interior of a vehicle generally or just likely to regain access to the interior during the stop. The Court can consider whether such an affirmative showing is established during traffic stops per se, whether all vehicles are considered capable of being accessed by a released detainee, or whether more is required to justify a protective search. The Court could determine whether *Gant*'s limitation—that a search for weapons is permissible *only* where the arrestee is unsecured and near the vehicle—also applies to *Long*'s protective searches involving detainees. Additionally, if *Gant*'s limitation does not appy to *Terry* stops, this case gives the Court an opportunity to address the factors that courts should consider when delineating between situations where detainees are and are not expected to regain access to the interior of a vehicle for the purposes of a *Long* search. Finally, the Court can grant certiorari and simply reaffirm *Long*'s decision while finding it only applies in the context of roadside encounters or when an unsecured detainee is

in the immediate vicinity of the vehicle. All of these issues are embedded in this case and provide the Court with a clean opportunity to clarify the state of the protective search doctrine in light of *Long* and *Gant*.

III. Courts are split as to whether the protective search exception for a vehicle applies when a detainee is secured away from a vehicle and not subject to a traffic stop and Circuits and States are split as to whether there must be an affirmative showing that the detainee is expected to regain access to the interior of the vehicle during the stop.

A. Courts are divided as to whether a protective search of a vehicle may take place without a traffic stop or roadside encounter when the detainee is secured away from the vehicle.

While some courts have found the facts at issue do not justify a protective search of a vehicle pursuant to *Long*, several others have held the opposite. All of these issues raise the unacceptable specter of Fourth Amendment protections varying among jurisdictions. *See See Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (cautioning against such a scenario).

In *United States v. Brown*, the district court for the Western District of Pennsylvania held that a search was not justified as "protective" because the defendant already exited the vehicle, closed the driver's door, and walked away from the car before being stopped and ultimately handcuffed prior to the search taking place. 2012 U.S. Dist. LEXIS 167017 (W.D. Pa. Nov. 26, 2012).

Meanwhile, other courts continue to extend the protective search exception beyond its limits in cases similar to Mr. Bagley's. In *United States v. Davis*, the Sixth Circuit held that a *Long* protective search of a vehicle was justified without a traffic stop after the defendant parked at an apartment complex, exited an SUV, and walked to the front of the vehicle before being subjected to a *Terry* stop, frisked, handcuffed, and moved away from the car. 341 Fed. Appx. 139 (6th Cir. Aug. 11, 2009); *see also United States v. Stevenson*, 2021 U.S. Dist. LEXIS 229536 (E.D. Mich. Nov. 30, 2021) (finding protective search of parked, unoccupied, closed vehicle was permissible pursuant to *Long* even though there was no traffic stop and defendant was in handcuffs outside of car at time of search); *United States v. Sanford*, 2014 U.S. Dist. LEXIS 163957 (N.D. Iowa Nov. 24, 2014) (finding protective search of passenger side of parked, unoccupied, closed vehicle was permissible pursuant to *Long* without traffic stop where defendant was ordered out of vehicle and in handcuffs in squad car at time of search).

This case presents an opportunity for the Court to clarify if, when, and how the *Long* protective search doctrine applies in cases where a roadside encounter has not taken place and it will resolve the split that continues to develop throughout the country in our federal and state systems. Additionally, the Court can resolve a developing split between the circuits and states as to what is necessary to establish a reasonable belief that a detainee will regain access to the interior of the vehicle.

B. Circuits and States are split as to whether a protective search requires an additional showing that it was reasonable to believe the detainee would regain access to the interior of a vehicle during or immediately after the stop.

i. The Ninth Circuit and Ohio require a showing that the detainee is likely to regain access to the vehicle during the stop, while the Seventh Circuit suggested it would adopt such a rule in the proper context.

The Ninth Circuit interprets *Long* to require a showing of "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is not only dangerous, but that they may gain immediate control of weapons. *United States v. Perryman*, 716 Fed. Appx. 594 (9th Cir. Nov. 16, 2017) (finding protective search pursuant to *Long* was not justified when detainees were secured, handcuffed, and separated with one in a squad car but there was no evidence they would return to the vehicle during the stop).

In Ohio, a protective search of a vehicle pursuant to *Long* is not justified where it has not been determined that the detainee will be returned to the vehicle. *See, e.g.*, *State v. Perkins*, 145 Ohio App. 3d 583, 587 (2001) (reaffirming prior Ohio precedent requiring an affirmative showing that the detainee would be returned to the vehicle during the stop).

Meanwhile, the Seventh Circuit suggested that a protective search "requires the Government to

establish that the officers reasonably suspected that [the detainee] could gain 'immediate control' of weapons in the vehicle." *See United States v. Vaccaro*, 915 F.3d 431, 437 (7th Cir. 2019). In *Vaccaro*, the defendant was not under arrest but handcuffed and locked in the back seat of a squad car. *Id.* Nevertheless, because he was subjected to a *Terry* stop rather than an arrest, and because he conceded the issue, the *Vacarro* Court held that it could be presumed he would have been allowed back to his vehicle if the officers found no contraband. 915 F.3d at 438 ("By admitting that he would have been allowed to return to his car, Vaccaro conceded that he could have gained 'immediate control of weapons inside the vehicle.'").

ii. The First, Third, Fourth, Sixth, and Eighth Circuits, Indiana, and now Virginia have adopted a rule that does not require an additional showing that a detainee is likely to regain access to the interior of a recently occupied vehicle during a stop.

In *United States v. Guerrero*, the district court for Rhode Island cited the First Circuit finding that *Long* permits "the police to presume that a non-arrested suspect, even if handcuffed at the time and a juvenile, will have, at least theoretically, an opportunity to reenter the vehicle." 514 F. Supp. 3d 410, 415–16 (D.R.I. 2021) (citing *United States v. McGregor*, 650 F.3d 813, 825 n.5 (1st Cir. 2011)).

The Third Circuit held that even if a detainee cannot drive the vehicle, it must be presumed that they will regain access to its interior. *United States v. Jackson*, 456 Fed. Appx. 142, 144–45 (3d Cir. 2011) ("Here, however, the

police did not arrest Jackson prior to the search and thus at some point if they did not arrest him they would have released him and he might then have had unrestricted access to his vehicle even if he could not drive it.").

In a split decision, the Fourth Circuit held that even if a *Terry* stop detainee is restrained in the backseat of a police vehicle at the time, a protective search of their vehicle is permissible because it is presumed they will regain access to the passenger compartment. *United States v. Griffin*, 589 F.3d 148, 154 (4th Cir. 2009) ("If Griffin had been released *after* the brief detention, as he presumably would have been, he would have regained access to his vehicle and any weapon inside.") (emphasis added).

The Sixth and Eighth Circuits have also adopted this view. *See, e.g.*, *Davis*, 341 Fed. Appx. 139 (6th Cir. Aug. 11, 2009); *United States v. Morgan*, 729 F.3d 1086, 1091 (8th Cir. 2013) ("[I]t is reasonable for officers to fear for their safety—even when a suspect is secured—because the suspect will be permitted to return to his vehicle and to access any weapons inside at the end of the investigation."); *see also United States v. Sims*, 2019 U.S. Dist. LEXIS 226829 (S.D. Fla. Dec. 20, 2019) ("Defendant would have been free to return to his vehicle after the traffic stop was concluded. Because an individual who has been detained but not arrested may have an opportunity to return to the area that law enforcement officers seek to search, the justification for a protective search remains . . . .") (internal citations omitted).

Indiana's courts continue to recognize that "the second prong of the *Long* inquiry requires the State

to establish" that an officer "reasonably suspected" a detainee "could gain 'immediate control'" of the interior of a vehicle to perform a protective search. *See Davis v. State*, 122 N.E.3d 1046, 1050 (Ind. Ct. App. May 9, 2019). Nevertheless, Indiana relies on Justice Scalia's concurrence in *Gant* to say, "in the no-arrest case, the possibility of access to weapons in the vehicle *always* exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed." *Id.* (citing *Gant*, 556 U.S. at 352). Virginia has now adopted the same automatic presumption, as seen in Mr. Bagley's underlying case.

CONCLUSION

Mr. Bagley was stopped from entering the front door of an apartment and handcuffed while at least twenty feet away from an unoccupied vehicle he could not access in any way. App. 34a. Virginia joins a majority of courts to allow such a vehicle to be searched pursuant to the protective search exception. This precedent cannot stand. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 20, 2021

APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF VIRGINIA, DATED SEPTEMBER 20, 2021

SUPREME COURT OF VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 20th day of September, 2021.

Record No. 210390
Court of Appeals No. 0249-20-2

LAMONT LENDELL BAGLEY,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Henrico County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Appendix A

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $950.00 plus costs and expenses

A Copy,

Teste:

Muriel-Theresa Pitney, Acting Clerk

By: /s/

Deputy Clerk

APPENDIX B — OPINION OF THE COURT OF APPEALS OF VIRGINIA, DATED FEBRUARY 23, 2021

COURT OF APPEALS OF VIRGINIA

Record No. 0249-20-2

LAMONT LENDELL BAGLEY

v.

COMMONWEALTH OF VIRGINIA

February 23, 2021, Decided

OPINION BY
CHIEF JUDGE MARLA GRAFF DECKER
FEBRUARY 23, 2021

Lamont Lendell Bagley appeals his conviction for second-offense possession of a Schedule I or II controlled substance with intent to distribute in violation of Code § 18.2-248, as well as the related revocation of a suspended sentence for his prior conviction for the same crime. On appeal, he argues that the search in which the drugs were discovered was unlawful under the Fourth Amendment to the United States Constitution. He further contends that the trial court acted improperly by making erroneous written additions to the transcript. Finally, he asserts that the evidence was insufficient to prove that he possessed the drugs and therefore also failed to support the revocation of his prior suspended sentence. We hold that the trial court

did not commit reversible error. Accordingly, we affirm the challenged conviction and revocation.

I. BACKGROUND[1]

At about 3:00 a.m. on January 26, 2019, Officers Megan Lynch and Austin Earlenbaugh of the Henrico County Police Department responded to a call for police assistance. Both were "displaying [their] badge[s] of authority" at the time. The call was for a "disorderly situation" at 3527 Bolling Road. Officer Lynch was told that the caller reported that "two black males" and "one black female" were "blocking his driveway" in a white Nissan and had "brandished" "a firearm at [him]." Lynch also knew the caller reported that one or both of the men were "in their twenties." The caller additionally provided the police dispatcher with his name and other identifying information, although Lynch and Earlenbaugh did not know the identity of the caller at the time.

When the officers arrived at the address in their separate police cars, they determined that the dwelling at the given address was a small apartment building with an adjacent driveway.[2] They found two cars in the driveway,

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1. Under the applicable standard of review, an appellate court reviews the evidence in the light most favorable to the Commonwealth, as the prevailing party below. *See Armstead v. Commonwealth*, 56 Va. App. 569, 572, 695 S.E.2d 561 (2010).

2. The appellant concedes on brief that the building was a "small, six or four-plex building" and that the "alleged complaint came from someone" in that building.

one white and one maroon. The white vehicle was facing the street, and the maroon vehicle was facing the white one. The officers did not activate their emergency lights or sirens and approached on foot from the street.

When the officers shone their flashlights "into the white car from the front, [they] saw a black male," the appellant, "in the driver['s] seat." Lynch was about ten feet away from the white car on the passenger side. Earlenbaugh stood "off[] of the driver's side" and was more than ten feet away. The officers also saw a man inside the maroon car. At that time, the appellant and the occupant of the maroon car were the only people other than the officers at the scene.

As soon as the beam from Officer Lynch's flashlight shone on the windshield of the white car, the appellant began to engage in "furtive movement," "very rapidly" "throwing" or "shooting" his hands "straight down," toward the bottom half of the car. Lynch saw the appellant engage in these movements "multiple" times. She could not see the appellant's hands, but she saw his arms move and believed that he was "sticking his hands . . . underneath the driver's seat." Earlenbaugh, who was standing to the side of the white car, also described the appellant's movements as "quickly leaning under the [driver's] seat."

After making these movements, the appellant opened the car door, got out "quickly," and moved rapidly toward the apartment building. The officers "stopped him from going inside [an] apartment" in order to "speak to him about the situation" for which they had been dispatched.

They frisked the appellant for weapons and found "nothing . . . on him." They also obtained his identification and handcuffed him. The appellant's identification reflected that he was in his mid-thirties, although Officer Lynch did not review his birth date at that time.

Lynch next conducted a protective sweep of the driver's seat of the white car because she believed that the appellant had been trying to hide something and knew the caller had reported that an occupant of the white car had brandished a firearm. When Lynch opened the car door, she saw a blue latex glove between the driver's seat and the door. She left the glove in place and limited her search to the area beneath the driver's seat. Two to three inches from the front of the seat, she found a bag containing a large quantity of white powder that appeared to be cocaine, as well as a digital scale. Some of the powder was also "scattered on[] the floor."

Once Officer Lynch found the suspected cocaine and scale beneath the seat, the rest of the vehicle was searched. Inside the blue glove was a white substance also believed to be cocaine. Plastic baggies that looked new were on the ground beside the driver's door of the car. The appellant did not own the car, but he had permission to use it. Although no evidence established how long he had been in the car at the time of the incident, a piece of mail bearing his name was found in the car's center console.

At the pre-trial suppression hearing, the appellant argued that the officers did not have reasonable suspicion to search the car. The judge rejected this claim and denied

the motion to suppress. He reasoned that because the appellant was merely detained and not under arrest, the appellant could be expected to re-enter the vehicle when the detention ended and would once again have access to the firearm that the police reasonably believed might be in the car. Consequently, the judge held that the search of the vehicle was a lawful protective sweep.

At trial, in addition to offering testimony from the officers about their encounter with the appellant, the Commonwealth introduced evidence about the drugs. That evidence proved that the white powder in the car comprised more than 80 grams of crack and powder cocaine representing about 700 individual doses. Expert testimony regarding the value of an ounce of each type of cocaine supported a finding that the drugs were worth between $4,600 and $5,100.

In a motion to strike and again during closing argument, the appellant contended that the evidence failed to prove that he had dominion and control of the drugs as required to prove constructive possession. The trial court denied the motion to strike and found the evidence sufficient to prove the appellant's guilt. The court expressly relied on the appellant's furtive movements toward the floorboard beneath the driver's seat when the officers shined their flashlights on him. It further pointed out that the appellant quickly got out of the vehicle and "tried to walk away" from the officers. The court also emphasized that the officers found multiple new baggies on the ground beside the car door.

The court found the appellant guilty of second-offense possession of a Schedule I or II controlled substance with intent to distribute. He was sentenced to twenty years in prison with thirteen years suspended. The court also revoked the appellant's suspended sentence of ten years for a prior drug offense and resuspended nine years, leaving him with one year to serve.

The appellant subsequently filed a motion to reconsider or alternatively for a new suppression hearing. The court denied the motion. After the appellant filed his notice of appeal and the relevant transcripts were prepared, he objected to the trial transcript because it was incomplete. In response, the court subsequently filed an "Addition to Transcript."

II. ANALYSIS

The appellant presents eight assignments of error covering four different subject areas. First, he contends that the search in which the drugs were discovered violated his Fourth Amendment rights. Second, he argues that the denial of his motion to reconsider the suppression ruling based on after-discovered evidence was error. Third, he suggests that the trial court's written additions to the transcript were not supported by the record. Fourth, he asserts that the evidence was insufficient to prove that he possessed the drugs and therefore also failed to support the revocation of his prior suspended sentence. We consider each of the assignments of error in turn.

Appendix B

A. Reasonableness of the Search of the Vehicle[3]

In his first four assignments of error, the appellant argues that the search of the vehicle was unreasonable under the Fourth Amendment. Consequently, he contends that the trial court erred by refusing to suppress the incriminating evidence found in the car.

Our consideration of these related claims involves well-defined principles. In reviewing the denial of a motion to suppress based on the alleged violation of an individual's Fourth Amendment rights, we consider the evidence introduced at both the suppression hearing and the trial. *Beasley v. Commonwealth*, 60 Va. App. 381, 385 n.1, 728 S.E.2d 499 (2012). The appellate court examines the trial court's application of the law *de novo*, including its assessment of whether reasonable suspicion or probable cause supported a search. *Brooks v. Commonwealth*, 282 Va. 90, 94-95, 712 S.E.2d 464 (2011); *see Kyer v. Commonwealth*, 45 Va. App. 473, 479, 612 S.E.2d 213 (2005) (*en banc*). However, we defer to the trial court's "findings of historical fact," taking care to review them "only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law

3. The Commonwealth asserts that its district court discovery response, relied upon by the appellant in his motion for reconsideration, is part of the record on appeal. We do not consider the discovery response in reviewing this assignment of error because we conclude that the contents of the record *without* it support the trial court's action. *See generally Commonwealth v. White*, 293 Va. 411, 419, 799 S.E.2d 494 (2017) (recognizing best and narrowest ground principles).

enforcement officers." *Malbrough v. Commonwealth*, 275 Va. 163, 169, 655 S.E.2d 1 (2008) (quoting *Reittinger v. Commonwealth*, 260 Va. 232, 236, 532 S.E.2d 25 (2000)).

One who is in lawful possession of an automobile has a Fourth Amendment right to privacy in that vehicle. *See Watts v. Commonwealth*, 57 Va. App. 217, 227, 700 S.E.2d 480 (2010). Nevertheless, the Fourth Amendment permits police to conduct a pat down of a person and a protective sweep of his or her vehicle for weapons under certain circumstances. *See Terry v. Ohio*, 392 U.S. 1, 27, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (person); *Michigan v. Long*, 463 U.S. 1032, 1034-35, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (vehicle), *cited with approval in Arizona v. Gant*, 556 U.S. 332, 346-47, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The "sole justification" for both types of limited searches for weapons is "the protection of police officers and others nearby." *Long*, 463 U.S. at 1049 n.14 (quoting *Terry*, 392 U.S. at 29).

More particularly, if a "'police officer possesses a reasonable belief based on "specific and articulable facts [that] . . . reasonably warrant" [an] officer in believing [a] suspect is dangerous and . . . may gain immediate control of weapons,' the officer may . . . frisk . . . the suspect himself *and* search the accessible areas of the passenger compartment of the car in which a weapon might be hidden." *Stanley v. Commonwealth*, 16 Va. App. 873, 875, 433 S.E.2d 512, 10 Va. Law Rep. 121 (1993) (second and fifth alterations in original) (emphasis added) (quoting *Long*, 463 U.S. at 1049); *see McArthur v. Commonwealth*, 72 Va. App. 352, 359, 845 S.E.2d 249 (2020) (recognizing

the ongoing validity of passenger compartment searches for weapons pursuant to *Long); Moore v. Commonwealth*, 69 Va. App. 30, 39, 813 S.E.2d 916 (2018) (same); *see also Pierson v. Commonwealth*, 16 Va. App. 202, 204, 428 S.E.2d 758, 9 Va. Law Rep. 1150 (1993) (applying *Long*); *Glover v. Commonwealth*, 3 Va. App. 152, 155-58, 348 S.E.2d 434, 3 Va. Law Rep. 723 (1986) (same), *aff'd*, 236 Va. 1, 372 S.E.2d 134, 5 Va. Law Rep. 440 (1988) (*per curiam*). A vehicle sweep justified by officer safety concerns is permissible if it occurs *during an investigatory detention that falls short of an arrest*. *See Long*, 463 U.S. at 1047, 1049-52, *cited with approval in Gant*, 556 U.S. at 346-47 (acknowledging that *Long's* protections remain in effect); *Gant*, 556 U.S. at 352 (Scalia, J., concurring) (same); 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c), at 733 & n.185 (6th ed. 2020) (recognizing that if police have reasonable suspicion that a detainee is armed and dangerous, *Long* rather than *Gant* applies and permits a "frisk" of the vehicle in which the detainee was riding).[4] In

4. In *Hill v. Commonwealth*, 68 Va. App. 610, 812 S.E.2d 452 (2018), *aff'd*, 297 Va. 804, 832 S.E.2d 33 (2019), this Court addressed the defendant's "personal seizure as a *predicate* for the [vehicle] search" but did not analyze the reasonableness of "the search of the vehicle itself." *Hill*, 297 Va. at 811 n.2 (emphasis added) (citing *Hill*, 68 Va. App. at 616 n.1). In deciding *Hill*, this Court considered *Long* and *Gant* only to the extent that it noted that *Gant* acknowledges *Long's* "ongoing validity." *See* 68 Va. App. at 620 & n.2; *id.* at 637 (Humphreys, J., dissenting). In affirming the decision in *Hill*, the Supreme Court of Virginia also did not consider the reasonableness of the search of the vehicle itself. *See* 297 Va. at 811 n.2, 822. Rather, it analyzed the search of the defendant in light of *Terry* without mentioning *Long* or *Gant*. *Id.* at 811-22; *see also McArthur*, 72 Va. App. at 359, 362-63 (applying *Long* without assessing the impact of

contrast, the scope of a vehicle search conducted *incident to arrest* is governed by other factors. *See Gant*, 556 U.S. at 346-47; *see also McGhee v. Commonwealth*, 280 Va. 620, 625, 701 S.E.2d 58 (2010) (listing the *Gant* factors).

Accordingly, the lawfulness of the warrantless search of a vehicle depends in part upon the custodial status of the suspect associated with it. The Supreme Court of the United States has recognized that "a suspect [who] is 'dangerous[]' . . . is no less dangerous simply because he is not arrested." *Long*, 463 U.S. at 1050, *quoted with approval in Servis v. Commonwealth*, 6 Va. App. 507, 519, 371 S.E.2d 156, 5 Va. Law Rep. 37 (1988). The Court reasoned that "the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected" and "the officer must make a 'quick decision as to how to protect himself and others from possible danger.'" *Long*, 463 U.S. at 1052 (quoting *Terry*, 392 U.S. at 28). Consequently, the Supreme Court "ha[s] not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved" in a protective sweep. *See id., quoted with approval in Glover*, 3 Va. App. at 158; *see* 4 LaFave, *supra*, § 9.6(e), at 940. Instead, police may conduct a protective sweep of the vehicle based on the assumption that when the stop concludes, the individual presumably "will be permitted to reenter his automobile" and "will then have access to any weapons inside." *Long*, 463 U.S. at 1052; *see* 4 LaFave, *supra*, § 9.6(e), at 944 (characterizing the *Long* test as "expansive").

Gant and holding that the facts did not support the vehicle sweep at issue); *Moore*, 69 Va. App. at 39-40 (recognizing the ongoing validity of *Long* after *Gant* but applying *Long* merely by analogy in conjunction with the community caretaker doctrine).

As a result, we turn in this case to evaluate whether, under these principles, the evidence supports the trial court's ruling denying the motion to suppress. This question first hinges on whether the officers had reasonable suspicion to believe that the appellant was the person in the white car who brandished the firearm at one of the residents of the adjacent multiplex. If they did, the officers then also had reasonable suspicion to believe that he might be armed and dangerous as ultimately required to conduct a protective sweep of the vehicle. *See Jones v. Commonwealth*, 52 Va. App. 548, 560-61, 665 S.E.2d 261 (2008) ("[W]e conclude the officers, at the time of [the defendant's] seizure, had a reasonable articulable suspicion that [the defendant] possessed a concealed weapon[,] and . . . a reasonable suspicion of that offense *ipso facto* rendered him potentially armed and dangerous." (footnote omitted)); *cf. Long*, 463 U.S. at 1052 n.16 (noting that the validity of a pat down for weapons does not depend on whether the suspect's possession is lawful); *Whitaker v. Commonwealth*, 279 Va. 268, 277-78, 687 S.E.2d 733 (2010) (holding that probable cause supported the arrest of the defendant for carrying a concealed weapon even though he might have had a permit).

To conduct a weapons pat down of a person and a sweep of his vehicle, an officer must reasonably suspect that the person is "armed and presently dangerous" or may gain access to a weapon in the vehicle's passenger compartment. *Terry*, 392 U.S. at 24 (person); *see Long*, 463 U.S. at 1049-51 (vehicle). "Circumstances relevant in this analysis include . . . the time of the stop, the specific conduct of the suspect[ed] individual, the character of the

offense under suspicion, and the unique perspective of a police officer trained and experienced in the detection of crime." *McCain v. Commonwealth*, 275 Va. 546, 554, 659 S.E.2d 512 (2008). The inquiry is not whether each individual factor, viewed alone, "is susceptible [to an] innocent explanation" but, rather, whether the various factors, "*[t]aken together*," are sufficient to "form a particularized and objective basis" for an officer's suspicion. *United States v. Arvizu*, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (emphasis added); *see Hill v. Commonwealth*, 297 Va. 804, 814, 832 S.E.2d 33 (2019). Simply put, a "determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277.

The standard requires proof of only a reasonable belief that the suspect *might* have a weapon and gain control of it. *See, e.g., Jones v. Commonwealth*, 279 Va. 665, 672, 691 S.E.2d 801 (2010). "The degree of certitude required by the reasonable suspicion standard is 'considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less demanding than that for probable cause.'" *Morris v. City of Va. Beach*, 58 Va. App. 173, 183, 707 S.E.2d 479 (2011) (quoting *Perry v. Commonwealth*, 280 Va. 572, 581, 701 S.E.2d 431 (2010)).

In the instant case, a citizen caller provided his identifying information to the police dispatcher and reported a "disorderly situation" outside his residence at around 3:00 a.m. The complainant described two men and a woman who "were blocking his driveway" in a white vehicle and, significantly, had "brandished" "a firearm *at*

[him]." (Emphasis added). When the officers arrived at the address, they learned that it was a small apartment building, containing about four units, with a private driveway and small parking area. Although the officers did not make contact with the caller when they arrived at the scene, they had reason to believe, based on the facts, that the caller was a citizen witness who resided in the small apartment building and that his identity could be readily ascertained if his information was false.[5]

Additionally, upon arriving, the officers found a white vehicle in the driveway as the caller had stated. That vehicle was facing another one in the narrow driveway, fitting the complaint provided by the caller that his driveway was blocked. The appellant, a male of the reported race, was in the driver's seat of the white car. Thus, except for the fact that the officers found only one person rather than three in the white car, the circumstances they encountered corroborated the complaint. This evidence supported the reasonable inference that the appellant, the driver

5. An informant who "provide[s] 'self-identifying information' . . . put[s] [his] 'anonymity at risk.' 'Risking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.'" *Jackson v. Commonwealth*, 267 Va. 666, 681, 594 S.E.2d 595 (2004) (citation omitted) (quoting *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, 114-15 (Wis. 2001)); *see Reed v. Commonwealth*, 36 Va. App. 260, 267-68, 549 S.E.2d 616 (2001); *see also Illinois v. Gates*, 462 U.S. 213, 234, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (recognizing that an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles [the] tip to greater weight" in the reasonable suspicion calculus).

of the white car from which the firearm seemingly had been brandished, might have committed the brandishing offense or, at the very least, have information about it. *See generally* Code § 18.2-282(A) (providing that brandishing a firearm is a Class 1 misdemeanor).

The information provided by the caller and the officers' observations permitted them to detain the appellant briefly to investigate the brandishing complaint, a crime that specifically involves a weapon. *See Branham v. Commonwealth*, 283 Va. 273, 279-80, 720 S.E.2d 74 (2012) (permitting a "brief[] det[ention]" to investigate based upon reasonable suspicion of a crime).

Further, before the officers made more than preliminary contact with the appellant, he engaged in behavior that heightened the suspicion that he was involved in the brandishing incident. When the officers, who were displaying their badges of authority, shined their flashlights on the white car's front windshield to investigate the report, the appellant immediately made repeated, quick gestures with his arms and hands toward the driver's seat floorboard area of the car. He then rapidly got out of the car and headed toward the nearby apartment building. At that point, the officers had even more evidence providing reasonable suspicion to detain the appellant to investigate whether he was the person who had brandished a firearm. *Cf. Alabama v. White*, 496 U.S. 325, 327, 331-32, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) (holding that corroborating the noncriminal aspects of a telephone tip with predictive information was adequate to support a stop to investigate its criminal portions).

Based on the appellant's furtive behavior, coupled with the report to dispatch and the other circumstances the officers observed at the scene, Officer Lynch acted reasonably and appropriately to minimize the threat by conducting the pat down. *See Beasley*, 60 Va. App. at 397 (noting that multiple furtive gestures could "suggest[] . . . a concealed firearm"); *Jones*, 52 Va. App. at 562 (stating that an individual's actions "may both crystallize previously unconfirmed suspicions of criminal activity and give rise to legitimate concerns for officer safety" (quoting *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir. 2000))).

After the officers found no firearm as a result of their pat down of the appellant's person, this fact served only to heighten their suspicion that the appellant's furtive movements inside the car, immediately prior to his hasty exit and hurried movement toward the apartment door, indicated possible efforts to hide the firearm beneath the seat and distance himself from it. *See Pierson*, 16 Va. App. at 203-05 (holding under *Long* that the "suspicious and furtive conduct" of two people seen concealing a black bag in their vehicle and denying its presence "prompted understandable concern" for officer safety, justifying the officer's seizure and examination of the bag); *Glover*, 3 Va. App. at 155-57 (upholding the search of a car's passenger compartment under *Long* where the officer, believing the suspect might be armed, observed him "with his . . . hand in a . . . gym bag" and "removing his hand from the gym bag in a deliberate manner"). Accordingly, the protective sweep of the vehicle was justified by the same factors that supported the pat down of his person and the fact that the pat down did not yield a weapon. Consequently, the trial

court's denial of the motion to suppress evidence found in the car was not error.

The appellant contends that the search of the vehicle and seizure of the drugs occurred *incident to his arrest* and were unlawful under *Gant*.[6] However, the trial court held that the appellant was merely under "investigative detention" at the time Lynch conducted a protective sweep of the car and found the drugs. In fact, the appellant conceded in the trial court that he was not under arrest at that time, and we do not consider his assertion to the contrary on appeal. *See Rowe v. Commonwealth*, 277 Va. 495, 502, 675 S.E.2d 161 (2009) (holding that a party may not complain about an issue on appeal where he "approbate[s] and reprobate[s] by taking successive positions in the course of litigation that are . . . inconsistent . . . or mutually contradictory" (quoting *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889 (2006))); *Logan v. Commonwealth*, 47 Va. App. 168, 172 n.4, 622 S.E.2d 771 (2005) (*en banc*) (explaining that an appellate court may accept a legal concession as a waiver). Thus, Gant's holding regarding the lawful scope of the search of a vehicle incident to an arrest is not applicable here.[7]

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6. In *Gant*, the Supreme Court concluded that unless police have an independent basis for conducting a warrantless search of a vehicle, they "may search [it] incident to a recent occupant's *arrest* only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. at 351 (emphasis added).

7. The Commonwealth asserts that the search was lawful even if conducted incident to arrest because *Gant* permits a vehicular

The appellant also argues that the information provided to police dispatch was in the form of an anonymous tip. Paraphrasing the holding in *Florida v. J.L.*, 529 U.S. 266, 268, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), he emphasizes that "an anonymous tip that a person is carrying a gun . . . , without more, [is in]sufficient to justify a . . . stop and frisk of that person." That holding is inapposite here.

The tip in *J.L.* was *wholly* anonymous. 529 U.S. at 268. In this case, by contrast, the caller was not anonymous. Assuming without deciding that the record does not establish that Lynch knew the police dispatcher had the caller's name and address, other evidence in the record regarding what the dispatcher told Lynch about the caller nevertheless confirms that Lynch knew the report contained identifying information about the caller. Officer Lynch testified that the dispatcher sent them to a specific street address based on the caller's report that people in a white car were "blocking *his* driveway" and had brandished a firearm "at *[him]*." (Emphases added). When Officer Lynch arrived at the address, she determined that the building contained only about four apartments and had an adjacent "parking driveway" for those residents. Based on that information, a reasonable officer in Lynch's position could have inferred that the caller was one of the finite number of residents of the small apartment building and, consequently, was subject to prosecution for giving false information to the police if the report turned out to

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search upon a reasonable belief that evidence relevant to the crime of arrest might be found in the vehicle. Based on our holding, we do not address this argument. *See White*, 293 Va. at 419.

be false. *See Jackson v. Commonwealth*, 267 Va. 666, 681, 594 S.E.2d 595 (2004); *Russell v. Commonwealth*, 33 Va. App. 604, 611, 535 S.E.2d 699 (2000). Although Lynch was not permitted to give the tip as much weight as she could have if she had known the caller's precise identity, she was entitled to give it some weight in her assessment of the totality of the circumstances. *See Jackson*, 267 Va. at 681 (noting that a caller who "identified her location" and "referred to it as 'my house'" was "not truly anonymous" (quoting *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, 114 (Wis. 2001))). Additionally, time was of the essence due to the safety concerns inherent in the nature of the call. *See Long*, 463 U.S. at 1052. Therefore, Officer Lynch was entitled to combine the information from the caller that she received through dispatch with her firsthand observations at the scene for purposes of establishing reasonable suspicion to believe that the appellant might have a firearm on his person or have just hidden one beneath the driver's seat. Under these circumstances, the officers were not required to locate and question the caller in order to have reasonable suspicion to support a frisk of the appellant and a protective sweep of the vehicle.

Accordingly, the trial court did not err by denying the motion to suppress because the evidence established reasonable suspicion for the protective sweep of the vehicle.

Appendix B

B. Motion to Reconsider

The appellant suggests that the trial court erred by denying his motion to reconsider filed after sentencing. In that motion, the appellant argued that the Commonwealth failed to provide him with information that Officer Earlenbaugh claimed to have seen the appellant move toward the center console. The appellant additionally noted that the Commonwealth's discovery response and the pre-sentence report indicated that the officers had to open the car door to look inside, information that arguably conflicted with Officer Lynch's testimony. He argued to the trial court that he was prevented from using this evidence effectively.

On appeal, the appellant points to what he characterizes as conflicting evidence from the officers about where his furtive movements were directed and whether the officers had to open the car door to look inside the vehicle. He asserts that information about these conflicts was not provided to him in discovery and establishes that he was entitled to a new suppression hearing under the standard applicable to a request for a new trial. Assuming that the new-trial standard applies, we hold that the record does not establish that the trial court erred by denying the appellant's request for reconsideration or a new suppression hearing.

Whether to grant a motion for a new trial based on after-discovered evidence "is a matter submitted to the sound discretion of the circuit court." *Orndorff v. Commonwealth*, 279 Va. 597, 601, 691 S.E.2d 177 (2010)

(quoting *Orndorff v. Commonwealth*, 271 Va. 486, 501, 628 S.E.2d 344 (2006)). To be entitled to a new trial, the moving party must prove all of the following about the evidence at issue:

> (1) [it] appears to have been discovered [after] the trial; (2) [it] could not have been secured for use at the trial in the exercise of reasonable diligence . . . ; (3) [it] is not merely cumulative, corroborative or collateral; and (4) [it] is material[] and . . . should produce opposite results on the merits at another trial.

Id. at 602 (quoting *Odum v. Commonwealth*, 225 Va. 123, 130, 301 S.E.2d 145 (1983)). Based on the appellant's reliance on this standard here, we apply these principles to our analysis of his challenge.

Earlenbaugh's Testimony Concerning the Appellant's Furtive Movements

Regarding Officer Earlenbaugh's trial testimony about the appellant's furtive movements, assuming this testimony satisfies prongs one and three of the test, the appellant failed to prove either prong two or prong four.

Concerning prong two (the appellant's diligence), discovery responses provided by the Commonwealth more than three months before the suppression hearing established that Officer Earlenbaugh participated with Officer Lynch in the encounter with the appellant. Therefore, the appellant was on notice that Officer

Earlenbaugh might have knowledge of relevant facts. Despite this notice, the appellant did not request a subpoena for Earlenbaugh for the suppression hearing. In light of this, regardless of any duty the Commonwealth may have had to provide the appellant with more information about Earlenbaugh's observations during discovery, the appellant failed to exercise reasonable diligence to obtain any relevant testimony from him in a timely fashion.[8]

Concerning prong four (the materiality of Earlenbaugh's slightly differing testimony about the appellant's furtive movements), the record reflects that the appellant raised this alleged discrepancy in his argument at trial. The prosecutor pointed out, as Officer Earlenbaugh had done in his testimony, that Earlenbaugh and Lynch viewed the appellant's movements from different angles. The court expressly addressed this point in its ruling, noting Earlenbaugh's testimony about Lynch's "different angle," which supports the conclusion that it did not view any "discrepancy" as material.

Consequently, an analysis of prongs two and four establishes that the trial court did not err by denying the appellant's motion for reconsideration or rehearing on the suppression motion.

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8. The appellant complains on brief that he requested both Earlenbaugh's body camera footage and the police report but was not provided with either. However, he does not cite any authority or make any argument regarding how the failure to provide this evidence would establish reversible error. Accordingly, pursuant to Rule 5A:20, we do not consider these points as independent arguments.

Appendix B

Lynch's Testimony Concerning the Car Door

Officer Lynch was asked on direct examination at the suppression hearing whether she opened the car door to conduct the protective search. She replied that she did not recall. On cross-examination, she first repeated that she did not recall but then concluded after additional questioning, "[Y]es, I opened the car door." The appellant, in his argument on the motion to suppress, asserted that the officers "ha[d] to open the car [door]" and committed a trespass that violated the Fourth Amendment by doing so.

The appellant argues that Lynch was "unable to establish the simple fact as to how she was able to lawfully get into the vehicle in question" and that her uncertainty "undermine[s] . . . [her] recollection" of all of the evening's events. These arguments appear to address new-trial prong four, the materiality prong, in both a substantive and impeachment fashion. In the substantive context, the Commonwealth's theory of the case was never simply that Lynch saw incriminating evidence in plain view, and the trial court's ruling on the suppression motion was that the officers had reasonable suspicion for a protective sweep of the vehicle before finding the drugs inside. Accordingly, the record does not establish that Lynch's testimony about opening the door was material from a substantive perspective.[9] Further, the fact that the appellant actually made argument regarding this evidence

9. Additionally, the appellant in fact argued this point at the suppression hearing when he contended that Lynch's opening the door was a trespass. Consequently, Lynch's testimony does not constitute after-discovered evidence under prong one of the test.

during the suppression hearing defeats any claim that he was deprived of the opportunity to use it for impeachment purposes. As a result, his claim of materiality also fails in the impeachment context.

This record establishes that the trial court did not err with regard to Lynch's testimony by denying the appellant's motion for reconsideration or rehearing on the suppression motion.

In sum, because neither category of evidence addressed by the appellant meets the test he advances for analysis, we hold that no error occurred.

C. Trial Court's Additions to the Transcript

The appellant contends that the trial court erred by making its "Addition to Transcript" of March 26, 2020, because the factual findings contained in it are not supported by the record. This claim must be viewed in context.

When the transcript of the trial was prepared for purposes of appeal, the parties learned that the court reporter's recording had terminated prematurely and had not captured the final portion of the judge's oral ruling at trial. In response, the appellant asked the trial judge to "correct and complete the transcript" by providing his full reasoning for holding that the evidence was sufficient to prove that the appellant committed the charged offense. In response, the judge filed an "Addition to Transcript."

Appendix B

Rule 5A:8(d) provided the means by which the appellant could have objected to the contents of the "Addition to Transcript." It states in pertinent part that a party "may object to a transcript or written statement on the ground that it is erroneous" by filing a notice with the clerk "within 15 days after the date the notice of filing the written statement . . . is filed." The trial court then has ten days to "overrule the objection" or take any necessary corrective action. Rule 5A:8(d).

Here, the appellant did not comply with Rule 5A:8's provisions for objecting once the trial court filed its addition to the transcript, which notably was requested by the appellant. Nothing in the record reflects a timely objection in the trial court. In fact, in conjunction with this assignment of error on brief, the appellant cites only to his earlier motion objecting to the *incompleteness* of the transcript as showing where he preserved his objection to the trial court's later *addition* to the transcript for purposes of appeal. Accordingly, we do not consider this claim of error. *See also* Rule 5A:18; *Bethea v. Commonwealth*, 297 Va. 730, 743-44, 831 S.E.2d 670 (2019).

D. Sufficiency of the Evidence

The appellant suggests that the evidence was insufficient to support his conviction and related sentence revocation because the Commonwealth failed to establish that he constructively possessed the cocaine found beside and beneath the driver's seat of the car where he was seated.

Appendix B

When considering the sufficiency of the evidence on appeal, the appellate court views the evidence in the "light most favorable" to the Commonwealth, the party who prevailed in the trial court. *See, e.g., Commonwealth v. Moseley*, 293 Va. 455, 463, 799 S.E.2d 683 (2017) (quoting *Bowman v. Commonwealth*, 290 Va. 492, 494, 777 S.E.2d 851 (2015)). This Court must "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn [from that evidence]." Cooper v. Commonwealth, 54 Va. App. 558, 562, 680 S.E.2d 361 (2009) (quoting *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755 (1980)). The reviewing court "does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Davis v. Commonwealth*, 65 Va. App. 485, 500, 778 S.E.2d 557 (2015) (quoting *Crowder v. Commonwealth*, 41 Va. App. 658, 663, 588 S.E.2d 384 (2003)). It asks instead "whether '*any* rational trier of fact could have found the essential elements of the crime'" under the applicable standard. *Id.* (quoting *Crowder*, 41 Va. App. at 663). The appellate court defers to the trial court's findings regarding the credibility of the witnesses and the inferences to be drawn "from basic facts to ultimate facts" unless no rational trier of fact could have made such findings. *See id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The "inquiry does not distinguish between direct and circumstantial evidence, as the fact finder itself 'is entitled to consider all of the evidence, without distinction, in reaching its determination.'" *Moseley*, 293 Va. at 463

(quoting *Commonwealth v. Hudson*, 265 Va. 505, 512-13, 578 S.E.2d 781 (2003)). "The only requirement" in a circumstantial case is that the Commonwealth "put on enough circumstantial evidence such that a reasonable [fact finder] could have rejected [the] defendant's [hypotheses] of innocence." *Davis*, 65 Va. App. at 502. As long as "a rational factfinder could reasonably reject [the appellant's] theories in his defense and find that the totality of the suspicious circumstances proved [his guilt] beyond a reasonable doubt," the appellate court must affirm the conviction. *Moseley*, 293 Va. at 466.

Basic legal principles regarding criminal drug possession provide that such possession may be actual or constructive. *Smallwood v. Commonwealth*, 278 Va. 625, 629-30, 688 S.E.2d 154 (2009). It may also be either sole or joint. *Id.* at 630. Constructive possession of drugs can be shown by "acts, statements, or conduct of the accused or other facts or circumstances which tend to show that [he] was aware of both the presence and character of the substance and that it was subject to his dominion and control.'" *Wilson v. Commonwealth*, 272 Va. 19, 27, 630 S.E.2d 326 (2006) (quoting *Walton v. Commonwealth*, 255 Va. 422, 426, 497 S.E.2d 869 (1998)). Moreover, "ownership or occupancy of [a vehicle in which drugs are] found" is a factor that "'may be considered in deciding whether an accused possessed the drug[s].'" *Id.* (quoting *Walton*, 255 Va. at 426). Possession of a vehicle does not create a presumption of "knowing possession" of drugs found inside it. *Brown v. Commonwealth*, 15 Va. App. 1, 9, 421 S.E.2d 877, 9 Va. Law Rep. 167 (1992) (*en banc*). "[N]evertheless, the finder of fact may infer from the

value of [the] drugs . . . that it is unlikely . . . a transient would leave [them] in a place not under his dominion and control." *Id.*; *see Ward v. Commonwealth*, 47 Va. App. 733, 753 n.4, 627 S.E.2d 520 (2006), *aff'd on other grounds*, 273 Va. 211, 639 S.E.2d 269 (2007). The Commonwealth is not required to exclude the "possibility that someone else may have planted, discarded, abandoned or placed the drugs and [scales] in the [car]" in order to prove that the appellant constructively possessed them. *Brown*, 15 Va. App. at 10. Ultimately, "the issue [of what constitutes constructive possession] is largely a factual one" left to the trier of fact, not the appellate court. *See Smallwood*, 278 Va. at 630 (alteration in original) (quoting *Ritter v. Commonwealth*, 210 Va. 732, 743, 173 S.E.2d 799 (1970)).

Here, when the police arrived in response to the dispatch, they found the appellant in the driver's seat of a suspect vehicle. At the precise instant when the officers shined their flashlights at the vehicle's front windshield, thereby making their presence known, the appellant made rapid and repeated movements with his hands toward the floorboard area of the car. He then immediately got out of the vehicle and moved quickly toward the nearby apartment building, distancing himself from the car and initially resisting the officers' attempts to make contact with him. After the police detained the appellant, they found the first bag of cocaine a few inches beneath the driver's seat of the car. This location was the precise area toward which both officers had seen the appellant making furtive gestures as soon as they shined their flashlights at his windshield. The bag appeared to have leaked and spread some of its contents beneath the seat, supporting

the inference that it had been stuffed into that location hurriedly in response to the arrival of the police and their use of flashlights to see inside the car. A second quantity of cocaine was found in another bag inside the blue rubber glove on the car floor between the driver's seat and the door jamb, in plain view of anyone entering the driver's side of the car where the appellant had been seated. New baggies were found on the ground by the door, supporting an inference that they fell out or were discarded during the appellant's quick departure from the car.

The evidence from the Commonwealth's expert witness proved that the drugs, taken together, comprised about 700 individual doses and had a street value of $4,600 to $5,100. Although the appellant did not own the car, he was authorized to use it and was the only person in it at the time. Mail addressed to him was found in the center console, suggesting that his presence in the vehicle was not an isolated incident. The drugs and scale were in close proximity to where the appellant sat in the car before his hasty exit.

Considering the appellant's status as the driver of the car, his proximity to the drugs, his furtive movements toward the location where the drugs were found immediately upon the arrival of the police, and his attempt to vacate the car as quickly as he could when he saw them, a reasonable finder of fact could conclude beyond a reasonable doubt that the appellant constructively possessed the cocaine and was guilty of the charged offense. Based on this evidence, the trial court was entitled to reject the appellant's hypothesis of innocence that he

did not know that the cocaine was in the car. *See Holloway v. Commonwealth*, 57 Va. App. 658, 666, 705 S.E.2d 510 (2011) (*en banc*) (stating that "[w]hether an alternative hypothesis of innocence is reasonable is a question of fact" subject to reversal only if plainly wrong (quoting *Emerson v. Commonwealth*, 43 Va. App. 263, 277, 597 S.E.2d 242 (2004))). The evidence was sufficient to support the finding that he constructively possessed the drugs.

The appellant also challenges the revocation of his suspended sentence. He contends only that it must be reversed because it was based largely or even "solely on his erroneous [drug] distribution conviction." Because we hold that the evidence was sufficient to support that conviction, we need not further consider the appellant's challenge to the revocation.

III. CONCLUSION

We hold that the denial of the motion to suppress was not error because the evidence, viewed under the proper standard, provided reasonable suspicion for a protective sweep of the vehicle for a weapon. The court also did not err by denying the appellant's motion to reconsider because, assuming the proper lens through which to view the assignment of error was the new-trial test, the evidence did not satisfy that test. Further, the appellant waived his right to challenge the contents of the trial judge's "Addition to Transcript" because he did not object after its filing. Finally, the evidence was sufficient to prove that the appellant had dominion and control over the drugs beneath the driver's seat and thus supported his

conviction and the revocation of his suspended sentence. We remand the matter to the trial court for the sole purpose of correcting a clerical error in the sentencing order.[10]

Affirmed and remanded.

10. The appellant was indicted and convicted for possession of a Schedule I or II substance with intent to distribute in violation of Code § 18.2-248 as a second offense. However, the sentencing order does not reflect that the conviction was for a second offense. Consequently, we remand solely for correction of the clerical error in the sentencing order. *See* Code § 8.01-428(B); *Howell v. Commonwealth*, 274 Va. 737, 739, 742, 652 S.E.2d 107 n.* (2007); *Tatum v. Commonwealth*, 17 Va. App. 585, 592-93, 440 S.E.2d 133, 10 Va. Law Rep. 830 (1994).

APPENDIX C — TRANSCRIPT EXCERPT OF PROCEEDINGS IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO, JULY 30, 2019

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

Case No.: CR19-1677-00F

COMMONWEALTH OF VIRGINIA,

Plaintiff,

vs.

LAMONT LENDELL BAGLEY,

Defendant.

Transcript of the proceedings in the above-styled matter, when heard on July 30, 2019 before the Honorable John Marshall, Judge.

* * *

[32]Q Okay at that time, you didn't determine that he had any weapons on him, correct?

A On him, no.

Q And you didn't determine he had anything illegal on him, correct?

A No, he didn't have anything.

Q And you did not determine if he had the keys on him at that time, correct?

A Correct.

Q Now at that time, Mr. Bagley could not access the car in any way when he was being held at the front door, correct?

A Correct.

Q And you would agree that he was at least thirty, twenty-five to thirty feet away, correct?

A I'm not the best with distance but sounds correct, about twenty, twenty-five feet.

Q Well, it's half of the front of a house, I mean it's a sidewalk that walks up to this house or this apartment?

A I'm not the best with distance.

Q Okay. Now you described this as an apartment complex, this is really a neighborhood of houses with one like what I call a four-plex or duplex kind of apartment, correct?

A Some of them are like that. Some of them are actual apartments.

[59]reasonable and this is in the, let's see what did I do with this, the, I was looking at the, Collins v. Commonwealth. Collins v. Virginia Supreme Court case 2018. I think it has some application here. The facts of that case are the police are trying to go in the curtilage of a piece of property to see if a cover on a motorcycle is a stolen motorcycle. The Supreme Court says you don't get to go do that. Get a search warrant.

There's nothing exigent about it that needs to be done right away. And said they didn't have a right to go on the property. That's what they've done here. They've gone on private property and they went into a car on private property without any reasonable articulable suspicion that a gun was going to be found or anything for that matter.

And so, your Honor, I'm happy to provide case after case that say the same thing. It really doesn't matter, I think. It would be a better case for the Commonwealth if he was arrested. But it's not. He was never arrested. He was just detained. And I think that's exactly what all the case law says is we don't get to just go willy-nilly searching cars and vehicles and people without any reasonable articulable suspicion that needs to be enunciated for the Court and for the Defendant to hear and for the Commonwealth to be able to argue. And we don't have those, your Honor.

THE COURT: All right. All right, well this situation, the Defendant's challenge is that based on the facts that exist[60]that the police did not have the basis to go to

the vehicle. The facts that the Court has are that there is a call to the police of, by someone, that there are two vehicles blocking access to the address, the 3527 address, which is a, I don't know whether it's a dual use road for a private residence as well as an apartment complex that's to the right of the road.

But the facts based on the pictures are that this is a at best two, the width, the pavement is the width of two vehicles. And there are parking spaces marked, which would mean it then becomes a one lane road. Be it, I don't know whether there is no signs to indicate whether it's one lane in and one, one way in or it is a two-lane road that you just have to wait for people to pass. It is a very narrow road, the width of two vehicles.

So the call is that there is two vehicles nose to nose, one of which is white that were blocking access to this road. The Defendant's witness has testified that the front door to one of the apartments is a mere 25 feet from the pavement of the road. We don't know exactly where the vehicles are on this narrow paved road. But those are the facts. And then the call says the road is being blocked by these two vehicles, one of which is a white vehicle that has two black males and a white female. And then a gun is being brandished at the person who is complaining about the road being blocked.

When the officer arrives, the officer finds a white[61] vehicle, although it is now occupied it is only occupied by one black male, not two black males and a female. After that, the Defendant who was in the one, the white vehicle

is detained and after that, the officer then does a pat down, does not find a weapon and before the Defendant is asked to get out of the vehicle, the officer has testified and the Court will note for the record used the hand motions physically of basically pressing downward with both hands on both sides. That was the movement that she gave on the witness stand, pushing down, hands down towards the floorboard area of the car. The officer couldn't see but she could only see the torso up of the Defendant but that to her indicated furtive movements. The Defendant is asked to get out of the vehicle. He is placed in investigative detention. There is no weapon found on the Defendant at the pat down. So then after that, the officer makes the decision to go into the vehicle, the driver's compartment of the vehicle.

The evidence further was that the Defendant before he can, and I am corrected, he was not asked to get out of the vehicle. When the officer shined the light on the Defendant, the flashlight on the Defendant because this is at nighttime, the Defendant after the light was shined on the Defendant directly through the windshield, he immediately got out of the vehicle after making those furtive movements with his hands as previously described and he goes to walk away from the[62]vehicle, leaving the vehicle. The evidence is it was unlocked, not positive whether the door was open or closed. Although the Defense is saying it was closed, the officer said she couldn't recall whether it was open or closed. But he leaves the vehicle.

It's been stipulated that the vehicle was not his but he had permission to drive the vehicle. But he leaves the

vehicle unattended, walks away. Then he is stopped by the officer, who placed him investigative detention. Then the officer makes the decision to go to the vehicle to look for the weapon.

The Court finds that this falls under the protective sweep. It's concerning, the facts that are important are not only that there is another vehicle with someone in it right there where the other vehicle is but as previously testified, it's a mere 25 feet at a minimum. It can be more, the most it could be is the width of another vehicle, I guess, from the front door of two of the apartment doors that are in the picture. And then there is other apartment doors down the side of the building, which could be even closer to the vehicle depending on where the vehicle is on this narrow roadway.

And the officer goes to see based on the previous call that the person in the car that was blocking the roadway, which this car is in the same position as described in the call on this narrow road and that the gun had been brandished.[63]To do otherwise would allow as the Commonwealth argues for the detention to end and the access, the Defendant go right back to the vehicle where the weapon was by the caller indicated was being brandished from the person inside the vehicle.

So I think based on the totality of the circumstances, the location of the road and proximity to the doors, multiple doors to this apartment complex that there was reasonable articulable suspicion and a protective sweep was necessary to be done. So I'll overrule your motion to suppress.

MR. BENDER: Your Honor, I'd just make my objection noted. But I want to be clear about one thing. Is the Court suggesting that the evidence was that these cars were blocking the parking lot?

THE COURT: The call for service was that they were blocking access to the roadway. That's what the call was.

MR. BENDER: But I'm saying that there was no evidence that they, I just want to know whether there was no evidence established –

THE COURT: That was the call for service.

MR. BENDER: That was the call, okay. Just that there was no evidence when they arrived.

THE COURT: And then when they got there, there

* * * *