

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1469

UNITED STATES OF AMERICA

v.

GARNET SMALL,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-16-cr-00381-001)
U.S. District Judge: Honorable Mitchell S. Goldberg

(Argued May 16, 2023)

Before: SHWARTZ, MONTGOMERY-REEVES, and ROTH, Circuit Judges.

(Filed: July 7, 2023)

OPINION*

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

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SHWARTZ, Circuit Judge.

Garnet Small appeals the District Court’s order denying his motion to suppress evidence found during a search and his sentence. Because Small does not have standing to object to the search and the delay in his sentencing did not violate due process, we will affirm.

I

A

Police Officers David Dohan and Lucas Lesko stopped a vehicle for having illegally tinted windows. Dohan approached the passenger side of the vehicle from behind and saw Small moving forward and back in the reflection in the passenger side mirror. Small’s movements suggested to Dohan that he was attempting to put something underneath the passenger seat. Dohan noticed that Small was breathing rapidly, that his chest was “flutter[ing] back and forth,” App. 88, and that his legs were not extended out into the footwell, but rather were very close to the seat. When Small responded to Dohan’s question asking if he was “okay,” his voice sounded “nervous” and “shaky,”

App. 88. Dohan also saw Small attempt to push a black backpack underneath the passenger seat with his heels.

Dohan asked whether Small had a gun, to which Small replied, “I don’t have a gun on me,” App. 90, 117, 163, with emphasis on the word “on,” App. 90, 163. Dohan found this suspicious, and so he asked whether Small had a gun in the car, to which Small replied, “I don’t know if a gun is in this car, but this is not my backpack,” and pointed to the backpack he had tried to conceal, App. 163.

Dohan instructed Small to exit the car. Small complied and walked with Lesko to the rear of the car. Dohan reached into the car and picked up the backpack, which was “completely empty except for a single heavy object,” App. 95, 120, which he believed was a firearm. Dohan asked Small whether he had a permit to carry a gun, and Small said he did not. Dohan opened the backpack and discovered a handgun. Small was eventually charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).

Small moved to suppress the handgun. The District Court denied Small’s motion, finding that the stop was proper based on the police officers’ observations of illegal window tinting, and that Small lacked Fourth Amendment standing to challenge the search because he “disavowed himself of any type of possessory ownership” of the backpack and thus relinquished his privacy interest in it, App. 162-63.

B

Small pleaded guilty on September 20, 2017.¹ His initial sentencing hearing took place in December 2017, at which time the District Court heard argument concerning the applicability of the Armed Career Criminal Act (“ACCA”) and adjourned to review the evolving ACCA caselaw.² Before the next sentencing status hearing scheduled for March 2018, Small filed a brief again arguing that the ACCA did not apply and noting that United States v. Harris, Case No. 17-1861 (3d Cir.),³ could impact his sentence. As a result, the Court rescheduled the sentencing for May 2018. Small’s counsel thereafter asked to adjourn the sentencing three times pending a ruling in Harris. By October 2019,

¹ Small’s plea agreement precluded appeal except for, among other things, appeal of: (1) his sentence if the Government appealed the sentence; (2) a determination that he qualified for enhanced sentencing under the ACCA; and (3) the District Court’s denial of the motion to suppress.

² The ACCA requires a minimum sentence of fifteen years where an individual convicted under 18 U.S.C. § 922(g) has three previous convictions for “a violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e)(1). The Government initially argued that the ACCA applied because Small had two serious drug offense convictions and two convictions that qualified as crimes of violence, namely a second-degree robbery conviction and a first-degree aggravated assault conviction. United States v. Harris, Case No. 17-1861 (3d Cir.), presented the question of whether the Pennsylvania first-degree aggravated assault and second-degree robbery crimes qualify as “violent felonies” under the ACCA. Harris was ultimately decided in May, 2023, and held that United States v. Mayo, 901 F.3d 918 (3d Cir. 2018), and its holding that Pennsylvania’s first-degree aggravated assault did not qualify as a violent felony because it could be committed without force remained good law. United States v. Harris, __ F.4th __, 2023 WL 3494771 (3d Cir. May 17, 2023). Harris did not address whether Pennsylvania’s second-degree robbery qualified as a violent felony. Id. at n. 7.

³ Small explained that the District Court had declined at his first sentencing hearing to decide whether United States v. Voisine, 579 U.S. 686 (2016), impacted our law limiting the force clause of the ACCA to intentional crimes, because that question was being considered in United States v. Santiago, Case No. 16-4194 (3d Cir.). In doing so, Small alerted the District Court that the question was also on appeal in Harris.

Harris, and a similar case, United States v. Santiago, Case No. 16-4194 (3d Cir.), had been set for review before the en banc Court.

In late October 2020, Small informed the District Court that he no longer wished to delay his sentencing pending a ruling in Harris and asked the Court to proceed with sentencing. The Court scheduled a sentencing hearing for December 2020, but it was postponed until January 2021 due to the COVID-19 pandemic. A remote sentencing hearing was then held in January 2021, where the Government asked the Court to adjourn the sentencing until the Supreme Court ruled in Borden v. United States, 141 S. Ct. 1817 (2021), which involved identifying the mens rea for qualifying ACCA offenses and which could therefore impact Small's sentence. The District Court agreed and continued sentencing pending a decision in Borden.

In June 2021, Borden was decided,⁴ and Small alerted the Court of the decision a month later. In response, the Court scheduled Small's sentencing for October 2021, at which it decided to await a decision in Harris before sentencing Small.⁵

⁴ The Borden Court held that crimes that can be committed with a mens rea of recklessness do not qualify as ACCA predicates. 141 S. Ct. at 1821-22.

⁵ The Government conceded that under Borden, Small's robbery conviction did not qualify as a violent felony for purposes of the ACCA because it can be committed with a mens rea of recklessness. See 18 Pa. Cons. Stat. § 3701(a)(1)(iv) ("A person is guilty of robbery if, in the course of committing a theft, he . . . inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury"); 18 Pa. Cons. Stat. § 302(c) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto."). However, the Government continued to assert that Small's aggravated assault conviction under 18 Pa. Cons. Stat. § 2702(a)(1) qualifies as a violent felony under the ACCA because it is subject to a mens rea of "extreme recklessness" rather than "ordinary recklessness," and

In February 2022, Small submitted a letter pro se seeking new counsel and stating that he understood that his sentencing had been delayed for a ruling in Borden and reminding the Court that Borden had been decided. In response, on March 10, 2022, the Court convened a sentencing hearing, held that the ACCA did not apply, and sentenced Small to 120 months' imprisonment and three years' supervised release.

Small appeals the suppression ruling and asserts that he should receive a sentence reduction due to the delay in his sentencing. We address each issue in turn.

II⁶

A⁷

A defendant moving to suppress evidence bears the burden of showing that his Fourth Amendment interest in being free from an “unreasonable search[] and seizure[],” U.S. Const. amend. IV, was infringed by an invasion of his legitimate expectation of privacy in the property searched.⁸ United States v. Stearn, 597 F.3d 540, 551 (3d Cir. 2010); Byrd v. United States, 138 S. Ct. 1518, 1528 (2018).

Borden addressed only the latter. App. 380-81. We held in United States v. Mayo, 901 F.3d 218, 229-30 (3d Cir. 2018), that § 2701(a)(1)'s aggravated assault crime does not qualify as a violent felony under the ACCA, but the Government sought to overturn Mayo in Harris, as stated infra at n 2.

⁶ The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1).

⁷ We review a district court's order denying a motion to suppress for clear error as to findings of fact and exercise plenary review over legal determinations. United States v. Dyer, 54 F.4th 155, 158 (3d Cir. 2022).

⁸ To evaluate whether a legitimate expectation of privacy exists, we must determine whether “(1) the individual demonstrated a subjective expectation of privacy in the subject of the search and (2) this expectation of privacy is objectively reasonable.” United States v. Cortez-Dutrieuille, 743 F.3d 881, 884 (3d Cir. 2014).

An individual may abandon his legitimate expectation of privacy. United States v. Harrison, 689 F.3d 301, 307 (3d Cir. 2012). Abandonment turns not on physical abandonment of the object or location being searched but rather whether the individual abandoned a reasonable expectation of privacy in the item or place itself. United States v. Fulani, 368 F.3d 351, 354-55 (3d Cir. 2004) (rejecting defendant’s argument that he had to physically distance himself from his luggage stored in the overhead rack on a bus to abandon it where he explicitly and implicitly denied ownership to the police). Intent to abandon a legitimate expectation of privacy must be established by “clear and unequivocal evidence.” Harrison, 689 F.3d at 307. “In most cases, disclaiming ownership or physically relinquishing the property is sufficient to establish abandonment.” Id.

Small abandoned his legitimate expectation of privacy in the backpack. Although Small arguably demonstrated a subjective expectation of privacy by attempting to hide the backpack under his seat (though this act could also be viewed as an effort to physically abandon the backpack in the closed car), any subjective expectation was rendered objectively unreasonable when he explicitly disclaimed ownership by stating “this is not my backpack.” App. 163. See United States v. Cortez-Dutrieuille, 743 F.3d 881, 884-85 (3d Cir. 2014); see also United States v. Denny, 441 F.3d 1220, 1227-28 (10th Cir. 2006) (stating that a passenger’s act of hiding a plastic bag underneath his seat demonstrated a subjective expectation of privacy, but it was objectively unreasonable to expect an officer to recognize defendant’s property interest when he denied knowledge of the bag and disclaimed ownership of it).

Small thus abandoned his legitimate expectation of privacy in the backpack, and the District Court therefore appropriately concluded that he lacked standing to challenge the search of the bag,⁹ and correctly denied the suppression motion.

B

We next examine Small's claim that the long delay between his plea and sentencing violated his due process right to a speedy sentence.¹⁰ Convicted defendants

⁹ Small argues that his disclaimer of ownership is irrelevant because he was either (1) a lawful bailee of the backpack or (2) in legal possession of the backpack. Small did not raise the bailee argument before the District Court, and thus it is forfeited. See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist., 877 F.3d 136, 146-48 (3d Cir. 2017). Moreover, Small's legal possession argument does not provide a basis for relief. The Supreme Court has rejected the notion that legal ownership alone grants the owner a reasonable expectation of privacy. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980); see also United States v. Salvucci, 448 U.S. 83, 91 (1980) ("[P]roperty rights are neither the beginning nor the end of [the] inquiry."). For purposes of Fourth Amendment standing, we do not generally "examine[] the individual's . . . property interest in the item" at issue. Fulani, 368 F.3d at 354. Rather, we consider ownership only insofar as a disclaimer thereof can indicate one's intent to abandon a privacy interest. See id. ("[Defendant's] explicit denial of ownership . . . show[s] [his] . . . abandonment of his privacy interest.>").

¹⁰ Although Small did not explicitly assert before the District Court that the delays in his sentencing violated due process, he invoked his right to due process by his three requests that the District Court sentence him, and therefore preserved his due process claim. Indeed, evidence that a defendant "urged the speedy disposition of his case" is enough to show he raised a speedy sentencing due process claim. See Burkett v. Fulcomer, 951 F.2d 1431, 1441 (3d Cir. 1991) ("Burkett II"); see also United States v. Lacerda, 958 F.3d 196, 220 (3d Cir. 2020) (holding that the defendant had "asserted his right to a speedy sentencing" in a motion where he had requested only an expedited resolution without asserting a Due Process or Sixth Amendment right to a speedy sentencing and where the district court made no finding on a speedy sentencing claim); see also Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection."). Because Small preserved his speedy sentencing argument, we review his due process claim de novo and review factual findings for clear error. Burkett II, 951 F.2d at 1437.

have a due process right to a speedy sentencing. See, e.g., Betterman v. Montana, 578 U.S. 437, 447-48 (2016) (noting that at the sentencing stage “due process serves as a backstop against exorbitant delay”); United States v. Lacerda, 958 F.3d 196, 219 (3d Cir. 2020) (stating that “the convicted defendant maintains his due process rights” at the sentencing stage). To determine whether a defendant was deprived of this due process right, we consider: “(1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his right; and (4) any prejudice suffered by the defendant.” Lacerda, 958 F.3d at 219-20. No factor is “necessary or sufficient” to find a due process deprivation, but rather they are “related factors and must be considered together with such other circumstances as may be relevant.” Burkett v. Fulcomer, 951 F.2d 1431, 1439 (3d Cir. 1991) (“Burkett II”) (quoting Barker v. Wingo, 407 U.S. 514, 533 (1972)). Courts must therefore engage in a “difficult,” “sensitive,” and “fluid” “balancing” of the factors. Id. (quoting Barker, 407 U.S. at 533).

The length of delay between conviction and sentencing is a “threshold requirement,” and a lengthy enough delay will “invite[] inquiry” into the remaining factors. Id. Here, the delay between Small’s guilty plea and his sentencing was over four years, as he pleaded guilty on September 20, 2017, and was sentenced on March 10, 2022. This is a substantial delay that weighs heavily against the Government. See Lacerda, 958 F.3d at 220 (observing a two-and-a-half year or more delay was

Additionally, Small did not waive his right to challenge the delay of his sentence in his plea agreement. Small’s plea agreement allowed him to file a direct appeal of his sentence if the Government appealed. The Government appealed the sentence on April 6, 2022, Case No. 22-1631, Dkt. No. 1-1 (3d Cir.), and therefore the exception applies.

“substantial”); see also Burkett II, 951 F.2d at 1439 (holding that a twenty-nine month delay was sufficient to invite inquiry into the remaining factors, and noting cases with other more “egregious” delays spanning from thirty-one months to six years). We therefore balance the remaining factors to determine whether the delay in this case violated Small’s due process rights.

We first consider the reasons for the delay. Here, the reasons differed over the course of the more than four-year delay, and thus we consider each portion of the delay between his plea and sentencing. Small does not assert that the time between his September 2017 plea and his original December 2017 sentencing hearing was problematic, and thus it does not weigh in favor of a due process violation.

We next consider the period between December 2017 and October 2020. At the December 2017 hearing, Small argued that the then-applicable law supported a non-ACCA sentence, but the District Court determined that it needed time to evaluate the evolving law and scheduled sentencing for March 2018. In his February 2018 sentencing memo, Small acknowledged that the Supreme Court’s ruling in United States v. Voisine, 579 U.S. 686 (2016), was the subject of two cases before this Court and that if the District Court was “[dis]inclined to rule on the Voisine issue until the Third Circuit ha[d] spoken, it should reserve a decision until both Santiago and Harris” were decided. App. 350. Thus, as of February 2018, Small agreed that the resolution of Voisine was dispositive and he expressed a willingness to accede to a delay until the en banc court ruled. He repeated his request to delay the sentencing (1) in a May 2018 letter, where he sought a delay until early fall 2018, (2) in a September 2018 letter, where he sought a

delay until Harris was decided, and (3) in a July 2019 unopposed motion to continue the sentencing pending a resolution in Harris. He did not assert his right to be sentenced until October 2020. Thus, because Small sought or agreed to delay the sentencing from at least February 2018 through October 2020, this period weighs against Small and not the Government. Lacerda, 958 F.3d at 220.

We next consider the reasons for delay during the period between October 2020 and January 2021. In late October 2020, Small notified the District Court that he no longer wished to wait for the pending cases. Two days later, the Court scheduled a hearing for December 2020, which was postponed “due to [the] COVID-19 pandemic” until January 2021. App. 17. Thus, the Court acted promptly on his request but could not then proceed due a neutral reason: the pandemic. This period of delay weighs against neither party. See United States v. Keith, 61 F.4th 839, 853 (10th Cir. 2023) (considering a Sixth Amendment speedy trial claim and noting that “no circuit has yet published an opinion classifying COVID-19 delays under the second Barker factor,” but determining that COVID-19 is “a truly neutral justification—not favoring either side”); United States v. Jones, No. 21-3252, 2023 WL 1861317, at *8 (6th Cir. Feb. 9, 2023) (holding no violation of Sixth Amendment speedy trial right because the “public health challenges posed by COVID-19” and defense counsel’s non-COVID delays outweighed defendant’s assertion of his speedy trial right).¹¹

¹¹ See also In re: Video Teleconferencing and Telephone Conferencing for Criminal Proceedings Under the Cares Act – Second Extension, Standing Order, available at

We next examine the reason for the delay from January 2021 until March 2022. Like the earlier periods, the District Court delayed the sentencing to await a decision in Borden, which was resolved in June 2021, and Harris, which was still pending when Small was ultimately sentenced. Whether a delay in sentencing due to a lack of clarity in the law is proper will depend on the circumstances of a particular case. Absent some sort of bad faith or dilatoriness, a delay caused by the wait “does not weigh strongly, if at all, against the [G]overnment.” Gov’t of V.I. v. Burmingham, 788 F.2d 933, 937 (3d Cir. 1986) (noting that the delay of a trial due to the court’s attempt to reach a decision en banc on the applicability of the relevant law was not a deliberate attempt to “hamper the defense”). Rather, a court may consider the following factors, among others, when evaluating the reasonableness of a delay: (1) the strength of the legal position on appeal, (2) the importance of the issue in the posture of the case, and (3) whether there was bad faith or dilatoriness.¹² See United States v. Loud Hawk, 474 U.S. 302, 315-16 (1986) (considering these factors in evaluating a trial delay due to an interlocutory appeal).

Applying these factors here shows that the delay while waiting for Borden and Harris does not weigh against the Government. First, for the period from January 2021 until March 2022, the lack of clarity in the law was evidenced by the fact that both our Court sitting en banc in Harris and the Supreme Court in Borden chose to consider the

<https://www.paed.uscourts.gov/documents/standord/StandingOrderExtendingVidTelCrPr oceedings2.pdf> (prohibiting in-person felony sentences and permitting remote sentencing if a district court judge found that a felony sentencing could not be further delayed “without serious harm to the interests of justice”).

¹² The Court also observed that sometimes consideration also should be given to the seriousness of the crime. Loud Hawk, 474 U.S. at 315.

proper application of the ACCA, which could have had an impact on Small's sentence because, as noted, the resolution of each case would determine whether two of Small's prior convictions qualified as ACCA predicates.¹³ Second, while Small contends the Government sought to wait in the hope that these courts would announce holdings that would result in a harsher sentence, there is nothing to show the Government or the Court acted in bad faith.¹⁴ In fact, Small's own requests for continuances were based on the pending Harris and Santiago cases and they remained relevant to his sentencing. In sum, while there was a lengthy delay in imposing sentence, Small agreed to several years of it. As to the additional fourteen months during which Small asserted his desire to be sentenced, the same relevant cases remained pending before the en banc Court and

¹³ We note that the District Court stated that it would proceed to sentencing after the Supreme Court issued its opinion in Borden, and on this basis, it would be fair to say that Small reasonably expected to be sentenced closer to June 2021. Borden, however, addressed only whether crimes that could be committed with a reckless mens rea qualified as ACCA predicates, 141 S. Ct. at 1821-22, and did not explicitly address the Pennsylvania aggravated assault crime that Small committed. Harris was expected to directly address whether that crime qualifies as an ACCA predicate, so we cannot say that the District Court lacked good reason to wait for the ruling in Harris. In fact, we have stayed many cases pending Harris. That said, it was equally reasonable for the District Court to proceed to sentence Small given the passage of time.

¹⁴ Our dissenting colleague relies on United States v. Tanner, 544 F.3d 793 (7th Cir. 2008). Tanner involved an evaluation of whether there was good cause to grant a defendant's request for a continuance of a sentencing to take advantage of a favorable Guideline amendment, and was not rendering any views about due process violations. In any event, "[s]entencing judges can properly grant continuances to await clarification of the law, e.g., United States v. Brown, No. 00-CR-939, 2004 WL 1879949, at *1 (N.D. Ill. Aug. 18, 2004), or, what is analytically similar, if an impending change in law would require modification of a judgment entered on the basis of the law currently in force." Tanner, 544 F.3d at 795.

Supreme Court.¹⁵ Thus, despite Small’s assertion of his right to be sentenced during the latter portion of the period, the reasons for delay do not weigh against the Government.

Finally, Small has not demonstrated prejudice. First, his contention that he lost the chance to earn time credit under the First Step Act during the period of delay is speculative. Although he may have sought to earn such credit had he been sentenced, whether he would have earned the time credits is subject to a complex set of requirements that include both his program participation and his classification under a risk assessment tool. 18 U.S.C. § 3632. His potential denial of opportunities to earn the time credit is too speculative to demonstrate prejudice.¹⁶ See Burkett II, 951 F.2d at 1443.

Second, the delay of his appeal did not cause him prejudice. While delays in the appellate process can violate due process in some circumstances, Burkett II, 951 F.2d at 1446; Burkett v. Cunningham, 826 F.2d 1208, 1221 (3d Cir. 1987) (“Burkett I”) (“Where post-verdict delays not only impede sentencing but also the appeal as of right, the [due process] clause is doubly implicated.”), “not every delay in the appeal of a case, even an inordinate one,” does so. Burkett I, 826 F.2d at 1221 (quotation marks omitted). Here, Small has not shown that the delay in appeal impaired his defense. See, e.g., Barker, 407 U.S. at 532 (noting that the “most serious” prejudice to the defendant is “the possibility

¹⁵ The dissent posits that Small’s situation is similar to the defendant in United States v. Baron, 336 F. Supp. 303, 305-06 (S.D.N.Y. 1971), but that case involved a speedy trial violation claim based upon the Government’s decision to try eleven separate cases, serially, to obtain a tactical advantage. This differs from Small’s situation, where the delay was to enable both parties and the Court to obtain clarification of the law.

¹⁶ Moreover, although a pretrial detainee’s inability to avail himself of institutional rehabilitative programs can contribute to a finding of prejudice, Burkett II, 951 F.2d at 1443, it does not, standing alone, establish prejudice.

that the defense will be impaired”). Indeed, he would be hard-pressed to do so here where the facts underlying the suppression issue were not contested, and the applicable law was settled.

Third, he has not asserted his pretrial detention was oppressive or that he suffered unusual anxiety as compared to other defendants awaiting sentencing and hoping for a successful appeal. See, e.g., Burkett I, 826 F.2d at 1222. Of course, “a certain amount of anxiety is bound to accompany criminal charges, [but] only unusual or specific problems of personal prejudice will satisfy” this factor. Heiser v. Ryan, 15 F.3d 299, 305 (3d Cir. 1994). Small has presented no facts that suggest his anxiety was out of the ordinary, and so he has failed to show prejudice due to anxiety.¹⁷ Cf. Burkett II, 951 F.2d at 1444 (declining to conclude that evidence that the defendant’s anxiety resulted in “lack of sleep, loss of appetite, loss of companionship and emotional stress associated with his inability to determine the length of his incarceration” would on its own support relief but noting that it did “tip the scale slightly in [the defendant’s] favor”).

In sum, Small has not shown that the reasons for the lengthy delay weigh in his favor or that he was prejudiced by the delay and, therefore, his due process right to a speedy sentence was not violated.

III

¹⁷ As to prejudice, the dissent cites Heiser v. Ryan, 15 F.3d 299, 307 (3d Cir. 1994), as teaching that generalized anxiety in combination with a lack of access to rehabilitation programs is sufficient for a finding of prejudice. Burkett II, however, a case on which Heiser relies, holds that the anxiety that a defendant must experience, with or without other circumstances, must be “above the level of anxiety indigenous to any term of incarceration.” Burkett, 951 F.2d at 1444.

For the foregoing reasons, we will affirm.

ROTH, Circuit Judge, dissenting

I join my colleagues in affirming the District Court’s denial of Small’s suppression motion. For the well-stated reasons set forth in Part II.A of the opinion, I conclude that the District Court did not clearly err in determining that Small abandoned his legitimate expectation of privacy in the backpack and properly held that Small lacked standing to challenge the bag’s search. Nevertheless, I respectfully dissent from Part II.B. Under the *Barker v. Wingo* framework, I find the reasons for the delay in sentencing weigh against the government and that Small adequately demonstrated prejudice. Accordingly, I would hold that Small demonstrated that the lengthy delay violated his due process right.

I.

Federal Rule of Criminal Procedure 32(b)(1) requires courts to “impose sentence without unnecessary delay.” Coupled with this procedural rule, the constitutional right to “due process serves as a backstop against exorbitant delay.”¹ As explained by the Majority, to determine whether a sentencing delay breaches an individual’s constitutional rights, we apply the framework set forth by the Supreme Court in *Barker v. Wingo*, balancing “(1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his right; and (4) any prejudice suffered by the defendant.”² I agree with my colleagues that

¹ *Betterman v. Montana*, 578 U.S. 437, 447 (2016) (quotations omitted) (quoting Fed. R. Crim. P. 32(b)(1)).

² *United States v. Lacerda*, 958 F.3d 196, 219–20 (3d Cir. 2020); see Op. Lines 160–74.

the first and third factors weigh against the government.³ Accordingly, my dissent centers on the remaining factors, particularly the reason for delay.

It is true that Small either initiated or agreed to continuations of sentencing between December 2017 and October 2020.⁴ While the Majority assesses this time against him,⁵ I view this as a neutral factor. The District Court proposed the initial continuance. The government and Small, who both expressed concern about an open-ended delay, cautiously accepted. The government then joined or expressly declined to oppose Small’s subsequent requests for delay. Given the parties’ united front on the delay during this period and the fact that neither was clearly advantaged, I would hold it equally against the parties, or at most only weakly against Small because he initiated the requests.⁶

Small began to assert his right to proceed to sentencing in October 2020. I would not hold the subsequent one-month delay caused by the COVID-19 pandemic against either party.⁷ However, sixteen months then ensued during which sentencing was delayed at the government’s request over Small’s objections. This period alone exceeds the one-year threshold that courts consider “presumptively prejudicial” for *Barker* purposes.⁸

³ Op. Lines 167–77, 153 n.10.

⁴ See Op. Lines 183–99.

⁵ Op. 198–99.

⁶ See *Burkett v. Fulcomer* (“*Burkett II*”), 951 F.2d 1431, 1439 (3d Cir. 1991) (“*Burkett II*”) (quoting *Barker v. Wingo*, 407 U.S. 514, 533 (1972)) (discussing the “sensitive” and “fluid” “balancing” required by this analysis).

⁷ Accord Op. Lines 2054–13.

⁸ *United States v. Thomas*, 167 F.3d 299, 304 (6th Cir. 1999) (quotations omitted) (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)); see *United States v. Yelverton*, 197 F.3d 531, 537 n.8 (D.C. Cir. 1999) (citing *United States v. Lindsey*, 47 F.3d 440, 443 (D.C. Cir.), vacated on other grounds, *Robinson v. United States*, 516 U.S. 1023 (1995)); *Perez v. Sullivan*, 793 F.2d 249, 255 (10th Cir. 1986).

As the Supreme Court has observed, “the time for sentence is of course not at the will of the judge. Rule 32(b)(1) of the Federal Rules of Criminal Procedure requires the imposition of sentence ‘without unreasonable delay.’”⁹ Any delay “must not be purposeful or oppressive.”¹⁰ In *United States v. Tanner*, the Seventh Circuit Court of Appeals held, in light of Rule 32(b)(1)’s command, that it “is improper for a judge to grant (or deny) a continuance for the very purpose of changing the substantive law applicable to the case.”¹¹ The court affirmed the District Court’s decision not to delay sentencing for five months, at the defendant’s request, for the purpose of enabling the defendant to benefit from revised guidelines that would then be in effect.¹² The court observed that, while the “decision to grant or deny a continuance (the conventional term for an interim delay in a litigation) is a management tool,”¹³ “[i]t is especially improper for a judge to delay sentencing because he wants to give the defendant a lighter (or a heavier) sentence than the current law permits.”¹⁴ The court underscored that “[a] sentencing judge cannot rightly say, ‘I do not like the

⁹ Fed. R. Crim. P. 32(b)(1); see *Pollard v. United States*, 352 U.S. 354, 361 (1957) (quoting Rule 32(b)(1)).

¹⁰ *Pollard*, 352 U.S. at 361; see *Burkett II*, 951 F.2d at 1440; *Hedgepeth v. United States*, 364 F.2d 684, 688 (D.C. Cir. 1966). While we have not expressly analyzed the import of *Pollard*’s proscription against “oppressive” delay in the sentencing context, the fourth prong of the *Barker* analysis—prejudice—appears to address this issue. The Second Circuit Court of Appeals, which does not use the *Barker* factors to guide its due process analysis, has held that an oppressive delay exists where there is “both prejudice and an unjustified reason for the delay.” See *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (citing *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007)).

¹¹ *United States v. Tanner*, 544 F.3d 793, 796 (7th Cir. 2008) (“A sentencing judge cannot rightly say, ‘I do not like the current guidelines, so I am continuing the sentencing hearing in the hope and expectation (in this case, the certainty) that they will change.’”).

¹² *Id.* at 794–95.

¹³ *Id.* at 795 (citing *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983)).

¹⁴ *Id.* at 796 (emphasis added).

current guidelines, so I am continuing the sentencing hearing in the hope and expectation . . . that they will change.”¹⁵

Here, the District Court delayed sentencing in anticipation that we might change our interpretation of the Armed Criminal Career Act. Contrary to the Majority’s assertion, there was no “lack of clarity” in the law during the relevant period here. Rather, as the government repeatedly acknowledged—and as the District Court finally conceded—the court was bound to sentence Small under our 2018 holding in *United States v. Mayo*.¹⁶ At Small’s final sentencing hearing, the court expressed its frustration with the categorical approach and our holding in *Mayo* as it applied to Small.¹⁷ Our system of justice demands that “District courts are bound by the law of their own circuit. . . . no matter how egregiously in error they may feel their own circuit to be.”¹⁸ That the government,

¹⁵ *Id.* See *Kolman v. Kolman*, 58 F.R.D. 632, 633 (W.D. Pa. 1973) (“While plaintiff may have an interest in seeking a continuance until the new rules become effective, defendant on the other hand has an equally strong interest in seeing that the case is tried at once”).

¹⁶ *Mayo*, 901 F.3d at 220. Indeed, even as we sought clarification of the law from the Pennsylvania Supreme Court in *Harris*, we emphasized *Mayo*’s binding effect. See Pet. Cert. Question Law 6, Jan. 4, 2022, ECF248 (“In deciding *Harris*’ appeal, we are bound by our precedent in *Mayo*.”).

¹⁷ App. 443–45, 449–50. See also App. 454 (stating “I’m just hesitating, because the result is just—it’s just so hard to swallow that we could be debating whether [Small’s particular conduct] is not an agg[ravated] assault. It’s really perplexing and frustrating.”).

¹⁸ *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981); *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) (“[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court’s decision as binding authority.”).

throughout Small’s sentencing proceedings, was attempting to overturn that holding¹⁹ did not make it less clear or weaken its binding impact.²⁰

Additionally, “the government’s motive for the delay plays an important role in determining whether a due process violation has occurred.”²¹ In *Barker*, the Supreme Court noted that “[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government,” adding “it is improper for the prosecution intentionally to delay ‘to gain some tactical advantage.’”²²

Here, after Small asked to proceed in October 2020, the government purposefully sought to delay Small’s sentencing until decisions were issued in two pending sentencing appeals, *Borden v. United States*²³ and *United States v. Harris*,²⁴ in order to facilitate its

¹⁹ See Op. Line 110 n.5.

²⁰ In addition, both the Majority, Op. Line 244 n.13, and the District Court acknowledge that we have stayed many cases pending *Harris*. But our management of our docket is irrelevant to the question of whether the District Court improperly delayed Small’s sentencing. To the extent that the District Court’s decision to delay was based on its expectation of congestion or delay within the court system, it must be ‘weighed against the government.’” See *Burkett II*, 951 F.2d at 1439–40. Finally, the District Court’s apparent haziness about its obligations not to unreasonably delay sentencing should weigh against any presumption that it fulfilled them. See App. 332 (“I seem to remember there’s some case law out there that says the Defendant is entitled to a prompt sentencing. It’s not as—it’s not like a Speedy Trial Act issue, but you can’t kick the can down the road forever”); App. 409 (“I’m not really a student in this area of the law, but. I know he’s entitled to a prompt sentencing, but it’s not as exacting as a prompt trial. It’s not a speedy trial exacting, I think.”).

²¹ *United States v. Sanders*, 452 F.3d 572, 581 (6th Cir. 2006).

²² *Barker*, 407 U.S. at 531, 531 n.32 (quoting *United States v. Marion*, 404 U.S. 307, 325 (1971)).

²³ 141 S. Ct. 1817 (2021). In *Borden*, the Supreme Court determined that a criminal offense that can be committed by recklessness does not constitute a “violent felony” under the ACCA.

²⁴ 68 F4th 140 (3d Cir. May 17, 2023). Here, the government unsuccessfully challenged our holding in *Mayo* that Pennsylvania’s first-degree aggravated offense does not qualify

litigation of Small’s case. To justify this delay, the Majority relies on case law arising in the distinguishable context of interlocutory appeals.²⁵ On an interlocutory appeal, the defendant can participate in the substantive and procedural development of the case. Here, Small could only watch from the sidelines as *Borden* and *Harris* wound through the courts, unable to raise any argument that might differ from those put forward by the defendants in those cases. Rather, Small’s situation is more akin to that of the defendant in *United States v. Baron*, where sentencing was delayed because of the government’s strategic decision to try Baron and ten other individuals on similar charges serially in hope that the iterative process would clarify a point of law, “accumulate knowledge as to how such cases are best tried,” and avoid “inconsistent results.”²⁶ As the District Court for the Southern District of New York put it, in ruling for the defendant: “[T]he rights of this defendant should not have been ‘sacrificed’ in order to give Government lawyers a chance to ‘practice.’”²⁷

For the foregoing reasons, I find the second factor of the *Barker* analysis weighs heavily against the government.

II.

as a violent felony under the ACCA because it “does not categorically require the use of physical force against another.” *Id.* at 143 (citing *Mayo*, 901 F.3d at 224, 230).

²⁵ Op. Line 227–239 (citing *Virgin Islands v. Birmingham* 788 F.2d 933, 937 (3d Cir. 1986); *United States v. Loud Hawk*, 474 U.S. 302, 315–16 (1986)).

²⁶ *United States v. Baron*, 336 F. Supp. 303, 305–06 (S.D.N.Y. 1971).

²⁷ *Id.* at 306.

I also find that Small has met his burden to show prejudice, the fourth *Barker* factor. The defendant's burden to show prejudice is significant in the post-conviction context.²⁸ The fact that Small was ultimately sentenced within the Guideline range, and not as an armed career criminal, "weighs heavily against" him.²⁹ Moreover, although Small indicates that he experienced anxiety arising from the uncertainty around his sentencing, "in a post-verdict, presentence context, 'mere generalized anxiety' is not enough to show prejudice . . . particularly where a defendant, as here, is serving a mandatory minimum term of imprisonment while awaiting sentencing."³⁰

Nevertheless, Small has alleged forms of prejudice that we have recognized, including the inability to participate in institutional programming. We have acknowledged prejudice arising from a defendant's "inability to avail himself of institutional programs he would have had in the state prison but did not have in the county penal system where he was incarcerated during the pendency of his sentencing."³¹ While the Majority correctly

²⁸ *Burmingham*, 788 F.2d at 936 ("Prejudice is the key factor here, and its absence is decisive in this case.").

²⁹ *Lacerda*, 958 F.3d at 220 (finding that the defendant's "[g]uidelines range was unaffected [by the delay], [so] he has failed to show prejudice"); see *Brady v. Superintendent, Anne Arundel Cnty. Det. Ctr.*, 443 F.2d 1307, 1311 (4th Cir. 1971) ("[W]here, as here, the delay falls between conviction and sentence, and at sentencing defendant receives the minimum punishment that could be imposed, the prejudicial effect of delay cannot be assumed.").

³⁰ *United States v. Gibson*, 353 F.3d 21, 28 (D.C. Cir. 2003) (citing *Yelverton*, 197 F.3d at 538 n.9); see *Heiser v. Ryan*, 15 F.3d 299, 305 (3d Cir. 1994); see also *Hakeem v. Beyer*, 990 F.2d 750, 762 (3d Cir. 1993) (explaining that "[v]ague allegations of anxiety are insufficient" and "evidence of psychic injury" is required).

³¹ *Heiser*, 15 F.3d at 307; *Burkett II*, 951 F.2d at 1443. But see *Betterman*, 578 U.S. at 437, 447 n.9 (explaining that "a convicted defendant has no right to serve his sentence in the penal institution he prefers").

observes that neither this nor anxiety *alone* can support a finding of prejudice,³² we have recognized both as a source of prejudice *in combination*.³³ Small has also identified his inability to timely appeal his conviction as a source of prejudice. We have held that delaying a defendant's right to appeal his conviction is *itself* prejudicial, regardless of the merits or underlying success of that appeal.³⁴ In doing so, we explained that "[w]here post-verdict delays not only impede sentencing but also the appeal as of right, the [due process] clause is doubly implicated" and that "due process can be denied by any substantial retardation of the appellate process."³⁵

Accordingly, I would hold that Small has met his heavy burden to show prejudice by demonstrating that his delayed sentencing caused him undue anxiety, deprived him of access to rehabilitative programs, and prevented him from timely appealing his conviction.

* * * * *

For the foregoing reasons, I join my colleagues in affirming the District Court's denial of Small's motion to suppress, but dissent from the determination that the delay in Small's sentencing did not infringe upon his due process right.

³² Op. Lines 271–81.

³³ See *Heiser*, 15 F.3d at 307 (citing *Burkett II*, 951 F.3d at 1445–46).

³⁴ *Burkett I*, 826 F.2d 1208, 1221 (3d Cir. 1987), *abrogated on other grounds by Betterman II*, 578 U.S. 437.

³⁵ *Id.* (quoting *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980)). But see *Yelverton*, 197 F.3d at 538 (finding protection of the right of appeal implicit in Rule 32(b)(1) and that deprivation of this right goes to remedy).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, . Case No. 2:16-CR-00381 (MSG)_
Plaintiff, .
v. . U.S. Courthouse
GARNET SMALL, . 601 Market Street
Defendant. . Philadelphia, PA 19106
May 24, 2017
10:11 a.m.

TRANSCRIPT OF SUPPRESSION HEARING
BEFORE HONORABLE MITCHELL S. GOLDBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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recording, transcript produced by transcription service.

1 they get to argue a Fourth Amendment violation when their own
2 client is actually undermining the very theory that they're
3 proposing that this Court accept.

4 THE COURT: Okay. I understand everyone's argument,
5 so we'll take a 15-minute recess.

6 MR. ARTEAGA: Judge, I have the exhibits here.

7 THE COURT: Yeah. Leave those with Mr. Stoney. I
8 have copies.

9 (Off the record at 12:01 p.m.)

10 (On the record at 12:14 p.m.)

11 THE COURT: All right. Let me make some findings of
12 fact first, and then I'll add some law and give you my ruling.

13 I'm not going to go through all of the facts, just
14 the facts that I think are germane to the ruling. Officer
15 Dohan, I find, credibly find that Officer Dohan, on the date of
16 July 20th, 2016, at 8:28 p.m. was with his partner, Officer
17 Lesko, in the 5000 -- 500 or 5000? 5000 block?

18 MS. TOPLIN: 500, Your Honor.

19 THE COURT: 500 block of East Walnut. They observed
20 the vehicle in question. They observed the vehicle from
21 behind, at first. It was stopped at a light. They observed
22 tinted windows. They couldn't observe who was in the car.
23 They did not effectuate the stop at that time. I think the
24 record reflects that they let the car make a left, at which
25 time they were also able to observe the side of car.

1 And in both instances, at the side and back, they
2 observed that there was illegal tinting on the window. And
3 after they observed both the rear and the side views, they
4 effectuated the stop. No one disputes that the tint is a
5 violation of the Motor Vehicle Code.

6 I think both officers testified that they could not
7 see in the car at all. They effectuated the stop. As Officer
8 Dohan exits the passenger side of the police vehicle, he walks
9 up to the passenger side of the car. He credibly testified
10 that both of the windows went down.

11 He observed the defendant in the passenger seat. And
12 also, before he got to that area of the car where the defendant
13 was sitting, he still walks outside of the car, he observed,
14 because the window was down, and observed it through the rear-
15 view mirror, he saw the defendant, I think his words were,
16 leaned forward and then leaned back in a way that, to reflect
17 that the defendant was trying to put something under the seat
18 of the passenger side of the car.

19 He observed the defendant, in his view, acting in an
20 unusual fashion. Point well taken by the defense, well people
21 exhibit these symptoms for any police stop, whether they have
22 something to hide or not. But he did observe the defendant's
23 rapid breathing patterns. He testified he didn't think his
24 voice was normal.

25 He asked him, are you okay? He also observed the

1 defendant's feet in a way, during this time -- and this is, I
2 think, a crucial fact, that defendant was moving his feet in a
3 way so that it appeared that he was trying to push something
4 with the heels of his feet underneath he seat.

5 He observed that, as the officer observed that to be
6 a black backpack. The officer asked, do you have a gun? I
7 find the defendant said, I don't have a gun on me. The record
8 should reflect that I find that emphasis was placed on the
9 "on." And the officer found that, in addition to everything
10 else, to be also suspicious.

11 The officer asked, do you have a gun in the car? And
12 I credit the officer and his testimony where he said, I don't
13 know if a gun is in this car, but this is not my backpack. I
14 don't need that I -- I don't think I need to go further,
15 because having found those facts, I find that under the law, I
16 do find, based on those facts, that defendant disavowed himself
17 of any type of possessory ownership or possession of the
18 backpack. He loses his privacy interest.

19 He has no Fourth Amendment right then, to challenge
20 anything that occurred as it relates to a possible Fourth
21 Amendment violation. He has no standing. So I find that, as a
22 matter of law, based on those facts, and I also find, based on
23 those facts, that there was a proper stop, based on the
24 observations and the violation of the Motor Vehicle Code.

25 The Code does say, no person shall drive any motor

1 vehicle with any sun screening device or other material which
2 does not permit a person to see or view the inside of the
3 vehicle through the windshield. It doesn't delineate front,
4 back. It does later say side wing or side window, but it
5 doesn't delineate front or back. I agree with the government
6 that, had the Philadelphia Legislature wanted to just delineate
7 the front, they could have said so, so I believe I'm obligated
8 to read the statute broadly.

9 So for all those reasons, the defendant's motion to
10 suppress is denied. I don't think I need to analyze anything
11 after that, going forward, because I'm finding that there is no
12 standing to raise a Fourth Amendment violation. Just give me
13 one moment, please.

14 Hayden (phonetic), could I talk to you for a second?

15 (Off microphone discussion)

16 THE COURT: Okay. Anything else?

17 MS. TOPLIN: No, Your Honor.

18 MR. ARTEAGA: No, Your Honor.

19 MR. DALACK: No, Your Honor.

20 THE COURT: Okay. Good afternoon. And you'll
21 communicate with Mr. Stoney as to what the status of the case
22 is going to be, going forward?

23 MS. TOPLIN: Yes, we will.

24 THE COURT: Okay. Thank you.

25 MR. ARTEAGA: Thank you.

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(Off the record at 12:20 p.m.)

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C E R T I F I C A T I O N

We, ASC SERVICES LLC, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

ASC SERVICES LLC



Ellen Piacente

DATE: June 14, 2017

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, . Case No. 2:16-CR-00381 (MSG)_
Plaintiff, .
v. . U.S. Courthouse
GARNET SMALL, . 601 Market Street
Defendant. . Philadelphia, PA 19106
May 24, 2017
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TRANSCRIPT OF SUPPRESSION HEARING
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Proceedings recorded by electronic sound
recording, transcript produced by transcription service.

1 MR. ARTEAGA: And Iman is spelled I-M-A-N, as in
2 Nancy.

3 COURTROOM DEPUTY: Good morning, sir. Could you
4 please raise your right hand?

5 DAVID DOHAN, PLAINTIFF'S WITNESS, SWORN

6 COURTROOM DEPUTY: Could you please state your name?

7 THE WITNESS: Police Officer David Dohan, D-O-H-A-N.
8 My badge number is 4690. Philadelphia Police Department,
9 assigned to the 14th District.

10 COURTROOM DEPUTY: Thank you. You can have a seat.

11 THE WITNESS: Good morning, Your Honor.

12 THE COURT: Good morning.

13 DIRECT EXAMINATION

14 BY MR. ARTEAGA:

15 Q Officer Dohan, by who are you employed?

16 A I'm sorry?

17 Q By whom are you employed?

18 A Philadelphia Police Department.

19 Q And how long have you been employed by the Philadelphia
20 Police Department?

21 A I've been employed by Philadelphia since 2010, and prior
22 to that, I was a police officer at another, in another
23 jurisdiction.

24 Q Okay. And how long were you a police officer in this
25 other jurisdiction?

1 A Just, about a year.

2 Q All right. And you're employed as a patrolman; is that
3 correct?

4 A Yes, sir.

5 Q And what district are you assigned to in the City of
6 Philadelphia?

7 A The 14th District.

8 Q Okay. What shift do you work?

9 A We're in a tactical vice squad. It's 6 p.m. to 2 a.m.,
10 two weeks of night work, and then one week of day work, which
11 is 8 a.m. to 4 p.m.

12 Q I want to take you back to July 20th of 2016. Were you
13 working that day?

14 A Yes, sir. I was.

15 Q Can you tell the Court what shift you were working on July
16 20th, 2016?

17 A It was 6 p.m. to 2 a.m.

18 Q Do you normally work with a partner, with another officer?

19 A Yes, sir.

20 Q And what is your partner's name?

21 A Police Officer Luke Lesko, L-E-S-K-O, and his badge is
22 3374.

23 Q Was Officer Lesko working with you on July 20th, 2016?

24 A Yes, sir. He was.

25 Q Is he your normal, everyday partner, for lack of a better

1 term?

2 A Yes, sir. Every day.

3 Q Okay. And how long have you been partners?

4 A Since early 2014, I believe.

5 Q Okay. All right. Let me take you to July 20, 2016,
6 approximately 8:28 in the evening. Were --

7 THE COURT: Did you say 8:20 or 8:28?

8 MR. ARTEAGA: Eight twenty-eight in the evening.

9 BY MR. ARTEAGA:

10 Q Were you on patrol on that day and time with your partner
11 who you've identified as Officer Lesko?

12 A Yes, sir.

13 Q Okay. And where were you at that particular time on July
14 20th, 2016?

15 A We were in the area of 500 East Walnut Lane. And we were
16 assigned as a marked unit, 14 Tom 2, which is our callsign
17 every day.

18 Q All right. Now when you say, a marked unit, you're
19 referring to a normal police vehicle, with the markings outside
20 that said "Police," correct?

21 A Yes, sir. Yeah.

22 Q Can you tell the Court how you were dressed that day?

23 A Full uniform.

24 Q And what about your partner?

25 A The same.

1 Q Okay. All right. Now, Officer Dohan, were you armed?

2 A Yes, sir.

3 Q Was your partner armed?

4 A Yes, sir.

5 Q All right. Is your vehicle equipped with a computer
6 system?

7 A Yes, sir.

8 Q And what is that system that it's equipped with?

9 A It's considered a -- it's called an MDT. It's basically,
10 uses a wireless connection to the state, so that we can
11 wirelessly run vehicle tags, persons through NCIC, PCIC, and
12 also the Bureau of Motor Vehicles. And then there's also some
13 other functions that -- but the main purposes of it is to run
14 persons and run tags of vehicles.

15 Q Was the equipment working properly that day, on July 20th,
16 2016?

17 A Yes, sir.

18 Q Okay. Who was driving that day?

19 A Officer Lesko.

20 Q All right. Now, during your patrol, did you see anything
21 that caught your attention?

22 A On that date and time, we made a vehicle stop of a maroon
23 BMW 6 Series for Motor Vehicle Code Violation 4524E-1, which
24 was illegal sunscreen. It just had very dark tint on the
25 windows.

1 Q And when you say dark tint on the windows, were you able
2 to see through the windows at all?

3 A No.

4 Q From your vantage point?

5 A When we were behind the vehicle, Your Honor, we were
6 unable to see any type of silhouette, any type of outline of
7 any persons inside the vehicle. It was extremely dark.

8 Q Can you give the Court a sense of approximately the
9 distance between yourself and the BMW that you just testified
10 about?

11 A When we initially saw it, we were, I would say maybe 100
12 feet behind it. And then the vehicle proceeded eastbound to
13 the traffic light at Walnut Lane and Chew Avenue, at which
14 point we were directly behind it, I would say the normal
15 distance that you would be behind a vehicle when stopped at a
16 light. And again, we confirmed that this was very dark tint,
17 and it was, in fact, in violation of the Motor Vehicle Code.

18 Q What action did you take upon noticing the tinted windows
19 on the vehicle?

20 A Immediately, we did not take any action, but we did run
21 the tag of the vehicle, make sure that the vehicle and the BMV
22 matched. But when the light turned green, at that point, we
23 activated our emergency equipment and initiated a vehicle stop.

24 Q Did the vehicle comply with your signal to stop?

25 A Yes, sir.

1 Q And where did the vehicle stop?

2 A Right there, if you -- it made a left turn from Walnut
3 Lane onto Chew Avenue. And then we activated our emergency
4 equipment while in the intersection. And it pulled over almost
5 immediately to the right-hand side of the road, right there,
6 almost -- just at the intersection right there.

7 Q All right. Now, are you on the passenger side?

8 A Yes, sir.

9 Q Okay. What happened when the vehicle pulled off to the
10 side in response to your signal?

11 A We both exited our vehicles. At this point, we observed
12 the driver and passenger side windows go down.

13 Q Where were you actually located when you observed the
14 windows go down?

15 A I was somewhere between the, my driver -- or the
16 passenger-side door of our marked police vehicle and the front
17 of our marked police vehicle, so this is as we're approaching.

18 Q And which windows came down?

19 A Both the driver and passenger side.

20 Q Did you give instructions for the windows to come down?

21 A No. At this point, we had not made contact with anybody
22 in the vehicle.

23 Q All right. Let me show you Government's Exhibit Number 1.
24 And if you can look at the screen in front of you, picture
25 should pop up in a minute here. All right. Do you know what

1 that is?

2 A Yeah. That's the vehicle that we stopped, sir.

3 Q How do you know that?

4 A The tag, I remember, from referring to my notes earlier,
5 and just looking over all the paperwork, that that that was the
6 tag. And that's the color and style of vehicle that was
7 stopped that evening.

8 Q Okay. Before I go any further, do you have paperwork that
9 you brought with you, on the witness stand?

10 A No. I just, I took some notes that I -- that are in my
11 pocket. I have not looked at them since I've been up here.

12 Q Okay. All right. Now, you said that this is the vehicle
13 that you stopped?

14 A Yes, sir.

15 Q Is there anything about that vehicle that is different in
16 that photograph, from when you stopped the vehicle?

17 A No, sir.

18 Q Okay. All right. If we can go to the next photograph,
19 this is Government's Exhibit Number 2. All right. Can you
20 tell us what you see there?

21 A Yes, sir. This would have been my view of the approach on
22 the passenger's side. As you can see, that the tint is
23 extremely dark. You can't even see any type of outline, as far
24 as headrest goes. In this picture, it looks as if it was taken
25 in the middle of the day, so if you can imagine it just kind of

1 being almost dusk. I mean, it was July, but it was late, in
2 the 8 o'clock hour. That's around the time when the sun starts
3 going down, so the lighting is somewhat poor. So it was
4 extremely dark.

5 Q All right. Government's Exhibit Number 3, can you tell us
6 what you see there?

7 A This was the passenger's side of the same vehicle. And
8 again, I'd like to point out the tint on the window. You can't
9 even make out the, or you can barely make out the fender,
10 but -- or I'm sorry, you can bare -- you can't even make out
11 the fender, but if you look, you can just barely see the
12 outline of the wheel. That's looking from the inside out.

13 Q All right. I want you to take a look at the passenger's
14 seat. Who was sitting in that seat when you approached the
15 vehicle?

16 A The gentleman in the green here, to my left.

17 Q And you've identified the defendant in this case, correct?

18 A Yes, sir. It's Mr. Small.

19 Q All right. Let's go to Government's Exhibit Number 4.

20 All right. Do you see that exhibit?

21 A Yes, sir.

22 Q What do you see there?

23 A That was the passenger seat of the BMW which we stopped.

24 Q Okay. Now, I want you to take a look at the interior in
25 Government's Exhibit Number 4. Does the interior look the

1 same, or substantially the same in that photograph as it did on
2 July 20th, 2016?

3 A Yes, sir, as far as I can tell.

4 Q Okay. And by the way, did you take any of these
5 photographs?

6 A Did I -- I'm sorry.

7 Q Did you take any of these photographs?

8 A No. No, sir.

9 Q Okay. All right. Through -- does Government's Exhibit
10 Number 1 through 4 accurately depict the BMW that you stopped
11 on July 20th, 2016 in this case?

12 A Yeah. I believe it's the exact same car. Yeah.

13 Q All right. All right now, you mentioned that you got out
14 of your vehicle on the passenger side of the patrol vehicle,
15 and you testified that you saw the windows come down.

16 A Yes, sir.

17 Q And you were approaching the vehicle, correct?

18 A Yes, sir.

19 Q Take us through what happened as you were approaching the
20 vehicle.

21 A As we were approaching, again, the tint was dark enough
22 that I couldn't actually see anybody inside. And I was using
23 the passenger side rear-view mirror to kind of get a glimpse of
24 what was going on inside. And as I was approaching, I was
25 watching in that passenger rear-view mirror. I observed the

1 defendant, at his face, appear in the mirror, as he was leaning
2 forward, towards the floor board in the middle of his feet.
3 And then he leaned back.

4 Q Okay. And when you saw that movement, did that mean
5 anything to you, in terms of your training and experience?

6 A Yeah. I mean, any kind of movement inside of a vehicle
7 prior to our approach is kind of like a red flag as far as, you
8 know, be careful. There could be -- you know, it could be
9 something as little as, you know, he had got his wallet out and
10 he dropped his wallet, and he was leaning down to pick it up,
11 or it could be he was ultimately reaching for a firearm or
12 putting a firearm away.

13 Q When you observed this movement by the defendant, did you
14 take any actions with respect to the, your firearm?

15 A Nothing special. I mean, I -- when -- I'm trained that
16 when I'm approaching a vehicle -- a vehicle stop is one of
17 those unknowns that could be, can turn extremely dangerous in
18 the matter of, you know, a fraction of a second. So as a
19 standard practice, when I'm approaching a vehicle, I'll just
20 put the hood of my holster down. It's got a, like a rotating
21 hood design, so it just is -- it's a multi-step process to get
22 it out. And from my training and experience, it's easier for
23 me to remove a firearm if I disable that first step.

24 Q Tell us what happened when you reached the passenger-side
25 window that was now down.

1 A I reached the passenger side window, and I heard my
2 partner start his, just his standard spiel when he gets to,
3 when we do stop a car, you know, asking for specific paperwork,
4 and registration. And as we're, I'm listening to him speak to
5 the driver, I'm making observations of the passenger. I
6 observed his -- his chest was -- he was breathing very rapidly.

7 I was standing about 2 feet away, watching his chest
8 just flutter back and forth. It was not a normal breathing
9 pattern.

10 Q What did you do in response to that?

11 A I asked him if he was okay.

12 Q What did he say?

13 A He said, yeah, I'm okay. But the way he responded, his
14 voice was, it was not normal. It was very -- I couldn't even
15 replicate it. It just sounded very nervous or -- just nervous.
16 It was very -- as I said, I can't even replicate it. It was
17 very shaky.

18 Q Any --

19 THE COURT: But you'd never talked to him before?

20 THE WITNESS: No, sir. No, sir.

21 THE COURT: How'd you know it wasn't his normal
22 voice? How'd you know he didn't talk that way all the time?

23 THE WITNESS: It's very possible.

24 BY MR. ARTEAGA:

25 Q Did you notice anything about his physical demeanor that

1 caught your attention?

2 A He was -- as he was sitting in the seat, he was -- had a
3 water bottle that he was playing with, with the top. And he
4 was just very, kind of shaky. And as I was asking him if he as
5 okay, and he responded, I observed him, with his feet, and they
6 were extremely close together. He was moving his feet back,
7 and he was trying to push something under the seat, that was
8 between the seat and his heels.

9 And I kind of -- if you -- the way that the vehicle's
10 designed, the roof kind of slopes in. So from the outside of
11 the vehicle, I was able to see exactly what was on the floor,
12 and I observed a black backpack that, he was attempting to push
13 it underneath of the seat.

14 Q From your vantage point, were you able to see this without
15 sticking your head into the window?

16 A Yes, sir. If you could go back to that picture of the
17 rear profile of the car, it actually shows exactly what I'm
18 speaking of. It's -- as you see, the roofline slopes in from
19 where the doors are, and it was -- I was able to see, just
20 without even -- just leaning close the car, you can -- I was
21 able to see through the open window, directly to the floor.

22 It was at that point I observed the -- he was
23 attempting to stuff underneath of the seat, with his heels.
24 And the manner in which he was sitting was very, just kind of
25 odd. He was a very tall gentleman, and there was a lot of leg

1 room in front of him. And generally, someone that's tall,
2 you're going to -- you're not going to sit uncomfortably like
3 that. You're going to stretch your legs out.

4 Q Can you describe a little bit more exactly how he was
5 sitting?

6 A Yes. His legs were, you know, bunched up. They were
7 together, and he was -- there was plenty of leg room in front
8 of him, but he wasn't utilizing any of that space.

9 Q Were his knees touching?

10 A They appeared to be. Yes.

11 Q Okay. All right. Did you ask him anything when you
12 observed these, the way he was seated and his physical
13 reaction? Did you ask him anything?

14 A I did. I asked him -- my gut instinct was that there was
15 something, there was something wrong. There -- you know, the
16 way he was acting, all of the things added together. I asked
17 him, do you have a gun on you? And he stated, I don't have a
18 gun on me. And he put an emphasis on "on," which to me, was a
19 huge red flag.

20 Q Why?

21 A Just, I've never received a response like that. I've
22 asked that to thousands of people. I do thousands of car stops
23 a year with Officer Lesko, and I can ask that. I've asked
24 people that all the time, and I've gotten two responses. It's
25 either yes, or what he told me, which, I don't have a gun on

1 me, placing the emphasis on "on." It just struck me as
2 extremely odd.

3 And because of that, I asked a follow-up question. I
4 said, is there a gun in the car?

5 Q And what was his response?

6 A And he said, oh, I don't know if there's a gun in the car.
7 And there was a pause. And he said, "but this isn't my
8 backpack," pointing to the floor where his feet were.

9 Q And this is the same backpack, or bookbag that you were
10 referring to earlier?

11 A Yes, sir.

12 Q Was this the only one that was in the vehicle, as far as
13 you know?

14 A Yes, sir.

15 Q Okay. And when he said to you, this is not my bag, what
16 did you do, at that point?

17 A I kind of just stretched the interaction. I had already
18 given my partner, right when I asked that question, the high
19 sign that I wanted to -- just kind of like a communication that
20 I have between he and I, that I wished to remove this male for
21 a frisk of his person.

22 Q When you say, "a high sign," can you -- because we're
23 making a record here. Just, can you --

24 A Sure.

25 Q -- describe exactly what you're referring to?

1 A It varies. I just kind of discreetly try to get his
2 attention, and it's just something that we do between one --
3 between partners that we just, we understand. We know what it
4 means. Whether it be, I kind of raise my hand, or I'll flash
5 my flashlight in his eye, or I'll tap the top of the car,
6 something like that, just to kind of get on the same page, just
7 a non-verbal communication between he and I.

8 Q And why do you do it discreetly?

9 A Just really for officer safety reasons, so that we're not
10 cluing in the occupants of the vehicle, as far as what,
11 exactly, is going on.

12 Q Now at this point in time, do you know whether or not the
13 driver of the vehicle had been removed from the vehicle prior
14 to you giving him the high sign?

15 A I believe it was like right around that time. Our thought
16 process was, is that if our main interest is in the passenger
17 of the vehicle, that we want to isolate the driver, so that it
18 becomes a, again, officer safety issue, so that it's not one-
19 on-one. It's going to be two-on-one if something were to -- if
20 the situation were to go south.

21 Q Okay. So you give your partner the high sign, as you just
22 testified to. What happened at that point?

23 A I asked this male for his ID.

24 Q When you say, "the male," who?

25 A The passenger. I'm sorry.

1 Q Okay. Did he produce identification?

2 A He did. He got his wallet out, and he was getting his ID.

3 And at that point, Officer Lesko removed the driver, and that
4 kind of diverted his attention. He looked over, and then he
5 just like, put his wallet away. He never got his ID out. So I
6 had to prompt again. I was like yo, how about that ID? Like,
7 can I get your -- can I take a look at your ID?

8 THE COURT: Is he in the car or out of the car, at
9 this point?

10 THE WITNESS: He's inside the car, sir.

11 BY MR. ARTEAGA:

12 Q From where did he reach to get is identification? Where
13 did he get that from?

14 A I don't recall.

15 Q Was it the bag?

16 A No, it was not.

17 Q Was it the glove box?

18 A I don't remember.

19 Q Okay.

20 A It was -- I can tell you for sure, it wasn't the bag,
21 because --

22 THE COURT: He doesn't remember.

23 THE WITNESS: Yeah. I don't remember.

24 BY MR. ARTEAGA:

25 Q All right. Now, he ultimately produced identification,

1 correct?

2 A That's correct.

3 Q All right. What did you do after he produced the
4 identification?

5 A I took the ID, and I put it in my back pocket, just to
6 secure it. And that point, my partner had returned from --
7 with the -- from his interaction with the driver. He had
8 placed him in the rear of our vehicle, just to isolate him.
9 And he had come up to my left side. And at that point, I
10 opened the door, and I was like, hop out real fast for us, you
11 know.

12 And he stood up -- stood out of the car, and he went
13 with my partner to the rear of the vehicle.

14 Q If I understand your testimony, your partner secured the
15 driver, and then came to the same side that you were on. Did I
16 get that right?

17 A That's correct. Yeah.

18 Q Okay. All right. So --

19 A I know that's kind of confusing now, but it's more of a
20 officer safety issue, as I stated before, where, you know, if
21 we -- we just wanted to -- the driver was under the
22 investigation for the Motor Vehicle Code violation, but because
23 the passenger was exhibiting these red flags that we recognized
24 as suspicious, that we wanted to just kind of isolate him, so
25 that we weren't dealing with two people. We were still

1 informed.

2 Q All right. And so Officer Lesko came to your side. The
3 passenger was removed, correct?

4 A Yes, sir.

5 Q What happened when the passenger was removed?

6 A Officer Lesko walked with him to the rear of the vehicle,
7 and began a frisk of his person. At that point, I reached into
8 the vehicle, and I retrieved the book bag. When I picked up
9 the book bag, it was just completely empty except for a single,
10 heavy object, which was weighing the bookbag down to -- you
11 know, I mean, it went from a shape of a normal bookbag to like,
12 completely straight.

13 Q Can you -- I'm sorry. Go ahead.

14 A As I was holding it, I put my hand on the bottom of the
15 bag, and immediately, it was recognizable as a firearm. I
16 grabbed it somewhere. My fingers were on the top of the slide.
17 And I was able to feel with my thumb, the trigger guard that
18 was around the handle.

19 Q Can you describe this bookbag in some detail for the
20 record? Let's start with how large -- what size was this
21 bookbag?

22 A Just a standard bookbag. It wasn't like a hiking
23 backpack. It was just a standard school bag, is how I would
24 describe it. I believe it was black in color, and it was made
25 of a nylon material.

1 Q Was the bookbag -- the thickness of the material, did you
2 make any observations about the material itself, that the
3 bookbag was made out of?

4 A I kind of described it as like a parachute material. It
5 was thinner. It had some -- you know, it had some type of heft
6 to it, but it was still thin.

7 Q Still?

8 A Thin.

9 Q Thin, okay. All right. So when you picked it up, you
10 noticed that there was something heavy inside, correct?

11 A That's correct.

12 Q Take us through what happened when you made that
13 observation.

14 A I grabbed the bottom of the bag, and realized that it was
15 a firearm. At that point, I placed the bag on the -- back on
16 the passenger seat, and I joined my partner at the rear of the
17 vehicle, and we asked him if he had a permit to carry, which he
18 stated no.

19 Q When -- you testified that you realized there was a weapon
20 in the book bag. Did you come to that conclusion prior to
21 opening the bookbag?

22 A That's correct. Yeah. It was -- I mean, nothing feels
23 like what -- it was, had the weight, the shape, and it was the
24 only thing in the backpack. So it was pretty obvious.

25 Q So if I understand you correctly, you felt it, and that

1 feeling is what gave you the determination that it was a
2 book -- that it was a gun in the bookbag?

3 THE COURT: Clearly what he just said.

4 THE WITNESS: Yeah.

5 MR. ARTEAGA: I'm sorry?

6 THE COURT: Clearly what he just said.

7 MR. ARTEAGA: Okay. All right.

8 BY MR. ARTEAGA:

9 Q All right so, at what point in time is the bookbag opened?

10 A When he stated that he did not have a permit to carry. At
11 that point, he was placed in custody. And we went and opened
12 the backpack, and in fact, it was a silver and black Lorcin, L-
13 O-R-C-I-N firearm. It's a .380 automatic. It was loaded with
14 seven rounds, six of which were in the magazine and one was in
15 the chamber. And also, when I removed the firearm, I noticed
16 that it had an obliterated serial number.

17 Q How many compartments did the bookbag have?

18 A I think just two, just like a main compartment, and then a
19 smaller pouch in the front.

20 Q When you removed the bookbag, and you testified that your
21 partner had taken the defendant to a different location and
22 frisked him, right?

23 A Yes. To the rear of the vehicle.

24 Q Did you observe that? Did you observe the frisk?

25 A Yeah. I wasn't watching directly, but it was kind of just

1 in the corner of my eye. This was all kind of going on
2 simultaneously. But I had seen him --

3 THE COURT: That frisk is not at issue, correct?

4 MR. ARTEAGA: Correct.

5 THE COURT: Correct? Okay.

6 MR. ARTEAGA: Right.

7 THE WITNESS: I had seen him --

8 THE COURT: So I don't know why this is relevant.
9 It's not at issue.

10 MR. ARTEAGA: Just for the sake of completeness,
11 that's all.

12 THE COURT: Okay.

13 BY MR. ARTEAGA:

14 Q Okay. If you could finish your answer.

15 A I just had seen him, if we want to look at the picture
16 again, where the BMW emblem is on the trunk, he had kind of had
17 his hands placed in that area, with his feet spread apart. And
18 I observed him in my peripherals, just doing the, what I
19 recognized as a frisk.

20 Q When you opened the bookbag, you removed the gun, correct?

21 A That's correct.

22 Q What did you do with it?

23 A I dropped the magazine. I racked the slide, recovering --

24 Q Why did you do that?

25 A Just to make the weapon safe, so that it was not an

1 operable gun. I just dropped the magazine, and operated the
2 slide, removing the round that was in the chamber. And I don't
3 remember if the gun had a slide lock on it or not.

4 THE COURT: It's -- I don't see why this is relevant
5 to this motion. I mean, I understand completeness, but it's
6 not -- what's your next question? Move on.

7 BY MR. ARTEAGA:

8 Q Officer, did you prepare a property receipt for the
9 weapon?

10 THE COURT: Is there any chain of custody issue?

11 MR. DALACK: Your Honor, not pertaining to the gun,
12 but there is, concerning the backpack, which we'll get into on
13 cross-examination.

14 THE COURT: What is it? What's the chain of custody
15 issue regarding the backpack?

16 MR. DALACK: That there is no backpack. They never
17 recovered it, that we don't have it here before us. They never
18 seized it.

19 THE COURT: Oh, okay. Go ahead.

20 MR. DALACK: Yeah.

21 BY MR. ARTEAGA:

22 Q Did you prepare a property receipt for the weapon?

23 A I did not. Luke did.

24 Q Okay. Let me show you Government's Exhibit 5C, 5D and 5E,
25 beginning with Government's Exhibit 5C. Do you know what that

1 is?

2 A That's our property receipt. 267 are the last three. And
3 this was the one that was prepared for this firearm.

4 Q And do you see your partner's name on that receipt?

5 A Yeah.

6 Q You recognize his signature?

7 A I do.

8 Q Okay. And what is, what weapon is described on the
9 property receipt?

10 A One black and silver handgun loaded with seven live rounds
11 in the magazine and one live round in the chamber, Lorcin model
12 L-380, it's a .380 automatic caliber, and an obliterated serial
13 number.

14 Q Government's Exhibit 5D, you know what that is?

15 A That's the gun that I recovered.

16 Q Okay. And how do you know that?

17 A I just remember it. This is --

18 Q You recognize it?

19 A I do.

20 Q And Government's Exhibit 5E. I don't want you to open it.

21 A Yeah.

22 Q But do you know what's inside?

23 A These are the -- this is -- from my experience, this is
24 the rounds. When we dropped the firearm at the FIU, Firearms
25 Identification Unit, this is what we put the rounds in.

1 Q And --

2 A If you were to -- if you were able to remove this tape,
3 you'd actually see a secondary piece of tape. And I can see
4 through the transparency of this second piece of tape, my
5 partner's signature, sealing it originally.

6 Q Okay.

7 A But it would have been opened during examination.

8 Q All right. Now, Officer, do you know whether or not a
9 motor vehicle citation was issued as a result of the tinted
10 windows?

11 A I know that there was not one.

12 Q Can you explain to the Court why no citation was issued
13 for the tinted windows on the vehicle?

14 A Yes, sir. Since the vehicle stop resulted in an arrest of
15 either the driver or one of the occupants, we have a
16 departmental directive which states that TVRs will not be
17 prepared. And the reason is, is because there was a very
18 crafty DUI defense attorney who was having his cases acquitted
19 because he was having his clients plead guilty to the Motor
20 Vehicle Code violation TVRs or tickets that were written. And
21 then he was arguing that it was -- any evidence gathered after
22 that violation is a violation of the Fourth Amendment.

23 Q All right. Let me --

24 THE COURT: That -- and that was considered crafty?

25 THE WITNESS: Some would call it that. Yes, sir.

1 THE COURT: Okay.

2 BY MR. ARTEAGA:

3 Q Let me show you Government's Exhibit 5A, since you
4 referred to the policy. Do you know what that is, sir?

5 A Yes, sir. This is just one of our many directives that we
6 have for our department, which basically guides us. It's rules
7 and regulations, if you would.

8 Q And do you see that policy stated in Government's Exhibit
9 5?

10 A Yes, sir. Directive 3.2, on the second page, 3 point --

11 Q I don't want you to read it. I just want you to let us
12 know if it's there.

13 A It's there. Directive 3.2-1, an effective date of
14 3/31/15.

15 THE COURT: So the premise behind this is, if you
16 plead guilty to the traffic stop, that gives rise to a Fourth
17 Amendment violation --

18 THE WITNESS: Yes, sir.

19 THE COURT: -- in a DUI case?

20 THE WITNESS: Yes, sir.

21 THE COURT: Okay.

22 THE WITNESS: And it had been applied to other cases,
23 from what I understand.

24 THE COURT: Okay. I'm not sure I get that, but I
25 don't know that it matters. Go ahead.

1 THE WITNESS: I -- yeah. I don't --

2 THE COURT: Yeah.

3 THE WITNESS: -- understand it either, but that's
4 what they want.

5 BY MR. ARTEAGA:

6 Q Okay. Now, in this case, the citation would have been
7 issued to the driver, not the passenger, correct?

8 A Correct. Yeah. No, it would have been the driver. Yeah.

9 Q Okay. And -- all right. Well I'll skip that. Let's talk
10 a little bit about the bookbag. You have mentioned several
11 times, the bookbag was found, and seized and opened. Did you
12 seize the bookbag and place it in evidence?

13 A No.

14 Q And can you describe for the Court the reason behind that?

15 A Just a lapse of judgment. It was one of those things
16 where there was a lot going on with the vehicle as well as with
17 the gentleman that we had in custody. And it was just a lapse
18 of judgment.

19 Q All right.

20 MR. ARTEAGA: No further questions.

21 THE COURT: Cross.

22 MS. TOPLIN: Thank you. Your Honor, may I approach
23 the lectern? I can't see.

24 THE COURT: Wherever you're comfortable

25 CROSS-EXAMINATION

- 1 BY MS. TOPLIN:
- 2 Q Good morning --
- 3 A Good morning.
- 4 Q -- Officer Dohan. So, on July 20th of 2016, Lesko was the
5 driver and you were the recorder; is that correct?
- 6 A Yes, ma'am.
- 7 Q So you sit in the passenger seat, right?
- 8 A Yes, ma'am.
- 9 Q And you are the one that runs the tags and vehicles and
10 things like that?
- 11 A Yes, ma'am.
- 12 Q All right. So you've told us that you noticed this
13 vehicle when you were behind it, correct?
- 14 A Yes, ma'am.
- 15 Q Okay. And in fact, you didn't pull to the side of it or
16 pull in front of it, you stayed behind it until you signaled it
17 to pull over, correct?
- 18 A Yes, ma'am.
- 19 Q Okay.
- 20 A It was in the travel lane. It was moving.
- 21 Q Okay. And you were in the same travel lane?
- 22 A Yes, ma'am.
- 23 Q And is that block of Walnut Lane one lane?
- 24 A It is not. No. It is two lanes there, I believe.
- 25 Q Right. So, but in fact, you actually just stayed in the

1 lane behind the vehicle?

2 A Yes, ma'am.

3 Q And operated your lights and siren in an indication for
4 the vehicle to pull over, correct?

5 A Yeah. Not immediately when we saw it, but it was
6 probably, I would say, within 30 seconds or so.

7 Q Okay. And during the 30 seconds that you were driving
8 behind the vehicle, the vehicle complied with the traffic laws,
9 with the exception, I guess, of what you have described as a
10 window tint violation?

11 A From what I remember, yes.

12 Q Okay. Now, just to be clear, we're talking about a late
13 model BMW, right?

14 A I believe it was a mid-2000s. I think it was a 2004.

15 Q Okay. And there's no damage to the vehicle?

16 A Not that I remember.

17 Q And the vehicle is clean, correct?

18 A It is in this picture. Whether it was that night or not,
19 I don't recall.

20 Q You don't recall? And the vehicle pulled over immediately
21 upon your signal, correct?

22 A Yes, ma'am.

23 Q Okay. And made no move to leave beyond that, correct?

24 A No, ma'am.

25 Q Okay. And how far did Officer Lesko park behind that

1 vehicle?

2 A That, I --

3 Q Were you able to pull right behind the vehicle when it
4 pulled over?

5 A Yeah. I would just -- you know, general, maybe 15 or 20
6 feet behind it.

7 Q Okay. And just to be clear, this is -- 8:28 is when you
8 made the stop, correct?

9 A Yes, ma'am.

10 Q And that's in July?

11 A Yes, ma'am.

12 Q And it's hot, correct?

13 A I don't remember if it was -- it's warm. I don't remember
14 if it was --

15 THE COURT: I'll take judicial notice that July is a
16 hot month.

17 BY MS. TOPLIN:

18 Q And you exited the passenger side of your car, correct?

19 A Yes, ma'am.

20 Q And Lesko exited the driver side of your vehicle, correct?

21 A Yes, ma'am.

22 Q And you approached the passenger side of the BMW, correct?

23 A Yes, ma'am.

24 Q And he approached the driver side?

25 A Yes, ma'am.

1 Q And if I understand your testimony, as you are approaching
2 the vehicle, there's only 15 to 20 feet, so I'm going to assume
3 that took just a couple of seconds, right? As you're
4 approaching the passenger side, the windows start to go down.
5 Is that right?

6 A Yes, ma'am.

7 Q Okay. And so by the time -- now, before you actually get
8 to the passenger side, your testimony is that you see an
9 individual look into the side mirror, right?

10 A No, ma'am. That was not my testimony.

11 THE COURT: I thought you said he looked -- he was
12 able to see the individual from looking -- he, the witness,
13 looking into the side mirror.

14 BY MS. TOPLIN:

15 Q I'm sorry. I thought that you testified that the
16 individual bent down, you could see him bend down, and then sat
17 back up, and you were able to see his face in the mirror,
18 correct?

19 A Yes, ma'am. I was able to see, as I was looking in the
20 passenger mirror, his face appear and then disappear. He never
21 looked. It was me that was doing the looking.

22 Q Okay. Let's talk about when you noticed the window going
23 down. How close to the BMW were you when you noticed the
24 window going down?

25 A Well, as I testified before, I had just exited my vehicle.

1 The windows had rolled down somewhere between my passenger
2 side door and the front fender of our police car, so I would
3 say probably 15 to 20 feet away from the vehicle was --

4 Q Okay.

5 A -- when the window started going down.

6 Q Okay. So when you were -- you had not gotten to the
7 passenger side yet? You were walking toward the passenger side
8 before the windows went down, correct?

9 A Walking towards? I had exited my vehicle, and it was at
10 that time that the windows were rolled down.

11 Q Okay. And at that time, you were walking to the passenger
12 side?

13 A Yeah. That's correct.

14 Q Okay. Now, you indicated that prior to stopping the
15 vehicle, you ran the tag, correct?

16 A Yes, ma'am.

17 Q What information did you get at that point in time?

18 A We just received the standard return for Bureau of Motor
19 of Vehicles, NCIC/PCIC. It did not return stolen status. The
20 registration was valid, and that it, the tag was assigned to a
21 BMW coupe --

22 Q Okay.

23 A -- in the 2004 year range.

24 Q So from that perspective, there were no issues with the
25 car?

1 A No issues at that point. No, ma'am, other than obviously,
2 the aforementioned Motor Vehicle Code violation --

3 Q Right.

4 A -- of the tinted windows.

5 Q Which you observed from behind?

6 A Yes, ma'am. And then also, as the vehicle was turning
7 from Walnut Lane to Chew, as we were activating our lights and
8 sirens, we observed the side view windows were also very darkly
9 tinted.

10 Q Okay. After you had already required -- or indicated --
11 signaled for the car to be pulled over?

12 A No. It was about, I would say about the same time, or
13 shortly before. We had waited at that light. You're not going
14 to -- we wouldn't stop somebody directly at a light, because
15 then we'd be blocking traffic. So when the light turned green
16 and the vehicle started going, and it was turning onto Chew, we
17 decided to locate our traffic stop there. We activated our
18 lights and --

19 Q Okay. Because I thought you said you indicated your
20 lights, signaled for the car to pull over. The car then made a
21 left turn onto Chew and then pulled over.

22 A The vehicle, we had first observed it on 500 Walnut, and
23 it had come -- there's a traffic light right there at Chew and
24 Walnut, and the 500 block is very short. So it was waiting at
25 the light, as I said, we wouldn't locate the traffic stop

1 there, just for reasons of, logistical reasons. It would just
2 block traffic. So when the light turned green, that's when we
3 moved to activate our lights to stop the vehicle.

4 Q Okay. So you activated your lights to stop the vehicle,
5 and then the car turned?

6 A The light would turn green first. And we wouldn't --
7 because if the light would turn green, and you would activate
8 your lights there, the person just wouldn't move. So we would
9 wait until the vehicle just started in movement, and then we
10 would activate so that they would pull over outside of the
11 roadway.

12 Q So --

13 MS. TOPLIN: May I see -- no. I'm going to use yours
14 if you don't mind.

15 (Off microphone discussion between counsel)

16 THE WITNESS: Can I have some water?

17 THE COURT: Sure.

18 THE WITNESS: I got some right here. I just --

19 THE COURT: Just right there?

20 THE WITNESS: Yes, sir.

21 THE COURT: Yeah. Help yourself.

22 BY MS. TOPLIN:

23 Q So Officer Dohan, this is the view that you had when you
24 were behind the vehicle, correct?

25 A Yes, ma'am.

1 Q Okay. But it was actually a little darker out than this,
2 correct?

3 A Yeah, I would say so.

4 Q Okay.

5 MS. TOPLIN: And could I see G-2, if you don't mind?

6 BY MS. TOPLIN:

7 Q I think you testified that this is -- this vehicle is in
8 the same condition that it was on the evening that you stopped
9 it, correct?

10 A Yes, ma'am.

11 Q The lighting might be a little bit different in this
12 picture?

13 A Yeah, it's a little -- it's better. It's brighter than it
14 was.

15 Q Okay. You notice the vehicle next to it?

16 A Yes.

17 Q Do you notice an appreciable difference between the BMW
18 and the tinting of the window next to it?

19 A No. It appears that they both have aftermarket tint on
20 them.

21 Q Okay.

22 MS. TOPLIN: May I go back to the 1?

23 BY MS. TOPLIN:

24 Q You see the vehicle in the street? I think --

25 A Yes, ma'am.

1 Q -- it's in the driving lane.

2 A Yes, ma'am. That also appears to have aftermarket tint.
3 It's a great reason to stop, because almost everybody in that
4 area has window tint on their car. Yes, ma'am.

5 Q And when you say that area, what area do you mean?

6 A Germantown, where we work, in the 14th District.

7 MS. TOPLIN: May I see G-3, if you don't mind? All
8 right.

9 BY MS. TOPLIN:

10 Q This is a -- this photograph is of the inside of the car,
11 correct?

12 A Yes, ma'am.

13 Q And I notice the seats are very light in color, correct?

14 A Yes, ma'am.

15 Q And the interior is otherwise somewhat dark, right?

16 A Yes.

17 Q Okay. And I notice it has, I guess, what would that be
18 called, power seats?

19 A It appears so, yes.

20 MS. TOPLIN: May I see --

21 BY MS. TOPLIN:

22 Q And are the seats in the same place that they were on the
23 day that you pulled the vehicle over?

24 A. I couldn't tell you whether they were or not, honestly. I
25 don't know.

1 Q Well does it appear that they are?

2 A They appear to be similar seats. Whether they are in the
3 same position, I couldn't tell you for sure.

4 Q Okay.

5 MS. TOPLIN: Could we see 4?

6 BY MS. TOPLIN:

7 Q And you'll agree as well, that this is what the seat
8 looked like on the day that you pulled this vehicle over,
9 correct?

10 A Well there was a person in it. But other than that, yes.

11 Q Right. And is it in a similar position, if you recall, to
12 where it was?

13 A I do not recall, no.

14 Q Okay. Now you've already told us that you -- when you
15 approached the passenger side, the individual in the car was
16 breathing rapidly, right?

17 A Yes, ma'am.

18 Q By the way, you do not know my client, Garnet Small, and
19 had never encountered him before that day?

20 A No, ma'am.

21 Q And is it fair to say that you didn't know anything about
22 the driver, Jody Robinson (phonetic) before that day, either?

23 A No. That's a fair statement. I had never met him either.

24 Q Okay. And you indicated that Mr. Small was holding a
25 water bottle, and playing with the cap on the water bottle, and

1 to you, that was unusual, or nervous behavior?

2 A It was just kind of like a fidgeting thing. But again,
3 that's -- you know, that's not -- in and of itself, that is not
4 anything that's unusual. I think it just adds to the totality
5 of the circumstances in this case.

6 Q Okay. And Mr. Small's tall, and you noticed that when you
7 looked in the car, right?

8 A Initially, I did not notice that. It's when we removed
9 him from the vehicle, I noticed that his stature was quite
10 large. Yeah.

11 Q But you testified that there was plenty of leg room, but
12 he didn't seem to be utilizing that leg room?

13 A Yeah. That's correct. Yeah.

14 Q And is that how the legroom was?

15 A No. It would appear that there was more legroom.

16 Q Okay. So the answer to my previous question is, no the
17 seats weren't in this position, right?

18 A I don't think you can accurately judge the size of the
19 vehicle just from a picture. So it's possible that the seats
20 were in a similar horizontal position. Perhaps the back of the
21 seat was leaned back a little. But I just recall him having
22 plenty of leg room, but his legs were bunched up at the seat.

23 Q Okay. And I notice there's a ruler there, right?

24 A That's what it appears to be. Yes, ma'am.

25 Q Showing the height of the seat?

1 A Yes, ma'am. Yeah.

2 Q Is there space under that seat?

3 A No, there's not. That's why the bag was not -- unable to

4 go under the seat, just because there was really no, there is

5 no room. The seat itself is almost sitting on the floor of the

6 car. The 6 series is kind of like a sports, sporty car, so the

7 seats are very low to the ground.

8 Q Okay. So not only is this a BMW mid-2000s, it's a sports

9 car?

10 Yeah. I would describe it as a --

11 Q Okay.

12 A -- sporty car. I wouldn't say it's a sports car.

13 Q With tinted windows?

14 A Yes, ma'am.

15 Q With two African American men inside?

16 A Well, we couldn't see what their race was when we stopped

17 the vehicle, ma'am.

18 Q When you approached the vehicle you were able to see them?

19 A Right. After he rolled the windows down. Yes, ma'am.

20 Q And just to be clear, the Germantown area, that is a, I'm

21 not going to say predominantly, but maybe it is a predominantly

22 African American neighborhood, right?

23 A I would say the vast majority of the residents that live

24 in Germantown are African American.

25 Q Now, you said that you asked him if something was wrong,

1 and he told you no, nothing's wrong.

2 A Yes, ma'am.

3 Q But based on your gut, you thought there was something
4 going on?

5 A Not just based on that single response, just the way he
6 responded, the way he was continuing to act, the fact that he
7 was trying to stuff a bookbag under the seat, as long, as well
8 as the reaching movement that I observed as I was watching him
9 in the rearview mirror as I approached the vehicle.

10 Q Let's talk about the bookbag. You keep referring to it as
11 a bookbag, but it was a backpack, right?

12 A I kind of thought that the terms were interchangeable.

13 Q Okay.

14 A I didn't think that there was really a difference.

15 Q Well, a backpack has straps, right?

16 A Right.

17 Q Padded straps.?

18 A Yes, ma'am.

19 Q It has a pocket on the front, usually.

20 A Yes, ma'am.

21 Q Sometimes it has a reinforced bottom, right?

22 A Okay, sure.

23 Q Different brands. What brand was this?

24 A I couldn't tell you.

25 Q What was the bottom made out of?

- 1 A It was of the same material as the bag.
- 2 Q So it was like a durable nylon?
- 3 A Yeah. It was -- yeah. That's a good way to describe it.
- 4 Q And it had straps, right?
- 5 A Yes, ma'am, two.
- 6 Q Two padded straps?
- 7 A From what I recall, yes.
- 8 Q And the plastic clips that the straps go in?
- 9 A Yeah, as far as I remember.
- 10 Q Zippers, double zippers?
- 11 A Yes, ma'am.
- 12 Q Now, at this point, you -- that -- now you give your
- 13 partner the high sign. Hey, we're going to investigate this
- 14 gentleman in the passenger seat, right?
- 15 A Not quite yet. No.
- 16 Q Okay. At what point was that?
- 17 A After I asked him if he had a gun on him and he said, I
- 18 don't have a gun on me. And then he stated that -- I said,
- 19 well is there one in the car? Well I don't know if there's one
- 20 in the car. And then there was a several-second pause, and
- 21 then he stated, but this isn't my bookbag, or backpack, or I
- 22 don't remember the exact wording, but it was something along
- 23 those lines.
- 24 Q Okay. And you removed Mr. Robinson from the vehicle and
- 25 actually secured him in your vehicle, correct?

1 A I did not, but my partner did. Yeah.

2 Q But you knew that he was in the back seat of the marked
3 police vehicle at that point in time?

4 A Yes, ma'am. That's correct.

5 Q So all of your -- and he didn't appear to be getting out,
6 or trying to run, or doing anything? He was staying in that
7 vehicle.

8 A Who was?

9 Q Mr. Robinson.

10 A Until we had taken him out, because we believed that there
11 was a firearm in the car. Yes, ma'am.

12 Q Okay. And -- no, no, no. I mean once he was in your
13 vehicle?

14 A Well, he wouldn't have been able to get out.

15 Q So at that point in time, Officer Lesko -- did you call
16 for backup, by the way, at that point in time?

17 A Officer -- I'm officer Dohan.

18 Q I'm sorry. I'm was going to ask you a question about
19 Officer Lesko, but --

20 A Oh, I'm sorry. It just sounded like you had addressed me
21 as Officer -- I just wanted to make sure we were clear. Yeah,
22 I think that a backup would have come, or whether or not we
23 asked for another car, I don't recall.

24 Q Okay.

25 A I know that there were other cars that showed up

1 eventually, when I had gone over the radio and stated that we
2 had a firearm recovered.

3 Q Okay. So my question was, Officer Lesko -- once Mr.
4 Robinson was secured in the back seat of your vehicle, Officer
5 Lesko could turn his attention to what you were doing, and
6 assist you?

7 A The -- yes, ma'am.

8 Q Okay. At some point in time, prior to you removing the
9 backpack, Mr. Small produced identification, correct?

10 A Yes, ma'am, to me.

11 Q And you took his identification, and you reviewed his
12 identification?

13 A I didn't review it at that time. No. My focus was, at
14 that point, on him, to make sure that there were no further
15 movements. So when he handed me his ID, I kind of just looked
16 at it and saw that it was ID, and I put it in my back pocket.

17 Q So by your inspection, it was valid identification?

18 A Only by color and design only, yes.

19 Q And you put that in you back pocket?

20 A Yes, ma'am.

21 Q And at that point in time, you removed Mr. Small from the
22 vehicle, correct?

23 A Yes.

24 Q Okay. And while Officer Lesko is taking him to the back
25 of the vehicle, you're dealing with the bag in the front seat

1 of the car, correct?

2 A That was my focus at the time. Yes.

3 Q Okay. And while Officer Lesko began the frisk of Mr.

4 Small's person, you lifted up the backpack and felt something

5 heavy in it, correct?

6 A Yes, ma'am.

7 Q Okay. And you indicated that you felt it, and recognized

8 that it was a gun?

9 A Yes, ma'am.

10 Q And you were able to recognize that it was a gun because

11 you were able to feel the -- you have it.

12 A Yeah. If it was in the backpack, I just went like this,

13 and I could tell immediately that that was a gun.

14 Q Okay.

15 A It was heavy enough that it was weighing the backpack

16 down, I observed, as I picked it up. And when I grabbed the

17 bottom of the backpack, I could feel that it was a gun.

18 Q Right. You could feel it, because it's fitting into your

19 hand just like that, and you --

20 A Yeah.

21 Q -- wrapped your hand around it, and that's a gun?

22 A Yes, ma'am.

23 Q Did you prepare the 7548 related to this case?

24 A The 7548? No.

25 Q Do you know what the 7548 is?

1 A Yes, ma'am. I do.

2 Q What is that?

3 A It's an incident report. It's prepared. It's basically a
4 short synopsis of what a person -- it's a, any kind of
5 incident, whether it be an arrest, meet complainant. There's a
6 multitude of uses for that form.

7 Q Okay. And when is that prepared?

8 A It's prepared after the arrest, and prior to any type --
9 that's basically the first piece of paperwork that's completed.

10 Q What's the 7548A?

11 A The 7548A is a vehicle or pedestrian investigation, also
12 refers to a tow truck investigation and a truant investigation.

13 So a 7548 as well as a 7548A were both prepared in this case.

14 A 7548A refers to the vehicle stop, and 7548 refers to the
15 arrest.

16 Q Okay. Have you seen the 7548 and 7548A that relate to
17 this case?

18 A Yes, ma'am.

19 THE COURT: And none of those documents you prepared;
20 is that what you said?

21 THE WITNESS: I prepared the 7548A. I did not
22 prepare the 7548.

23 BY MS. TOPLIN:

24 Q All right. I'm going to show you -- I'll mark this
25 exhibit as D-1, the (indiscernible).

1 (Defendant's Exhibit 1 marked for identification.)

2 BY MS. TOPLIN:

3 Q All right. So is that the 7548 that was prepared in
4 relation to the stop?

5 A Yes, ma'am.

6 Q And you didn't prepare that, though your name and badge
7 number are on there, I suppose, also. Lesko put your name on
8 there, and your badge number, right?

9 A Yes, ma'am.

10 Q Okay. And this was prepared when?

11 A It would have been shortly after the arrest.

12 Q So this is the very -- and it's handwritten. It's the
13 first document that's prepared?

14 A Yes, ma'am.

15 Q Okay. Now I'm going to show you what I've marked as D-2.

16 (Defendant's Exhibit D-2 marked for identification.)

17 BY MS. TOPLIN:

18 Q This is the 7548A, which was, in fact, prepared by you,
19 correct?

20 A Yes, ma'am.

21 Q And it's typed, and it's multi-page, and it looks to be a
22 computer-generated template, so we'll assume that this was
23 prepared once you had an opportunity to sit down in your -- you
24 know, at your desk, and prepare this document, right?

25 A No, ma'am. No. This is actually prepared on the computer

1 in the vehicle.

2 Q Okay.

3 A So we're able to -- when we run tags or persons, we're
4 able to, what we call, it's called populate, and just add that
5 information automatically, since it's the vehicle information
6 and stuff. However, the synopsis and the storyline is typed by
7 us.

8 Q Okay. The report indicates that it was prepared at 9:19
9 p.m., so it's generally an hour after the initial stop, right?

10 A Yeah.

11 Q Okay. And --

12 MS. TOPLIN: Court's indulgence a second. I'm being
13 paged.

14 BY MS. TOPLIN:

15 Q Okay. Two quick questions. The 7548A that you prepared,
16 take a look at it for a minute. Is there anything in there
17 about this statement that you told us Mr. Small made disavowing
18 the bag?

19 A No.

20 Q Okay. And take a look at the 7548 for a minute. Is there
21 anything in the 7548 discussing tinted windows?

22 A In the -- there wouldn't be. In the 7548, no, there
23 wouldn't be.

24 Q No? Below male stopped in relation to vehicle
25 investigation. But --

1 A On the -- we're talking about the 48?

2 Q Forty-eight.

3 A Yeah. There wouldn't --

4 Q It says, "vehicle investigation."

5 A Yeah.

6 Q There's no mention of tinted windows.

7 A Yeah. Both of these forms are just short synopses of what
8 happened. And then the more in-depth document would be your
9 arrest memo.

10 Q And then just to be clear, in the police directives that
11 you talked about, it says that the individual that's charged
12 with the substantive offense is not to be given a traffic
13 citation. In this case, Mr. Small was charged with a
14 substantive offense. Mr. Robinson would have been issued the
15 traffic citation, correct?

16 A That is -- yes. But then also, we can talk about, as far
17 as discretion, officer discretion, we do, and are afforded any
18 type of discretion as far as whether or not we want to issue a
19 citation. And from what I remember, the driver of the vehicle
20 was extremely cooperative with us. So it's not surprising that
21 he was not issued a citation. We don't very issue -- issue
22 very many written citations at all.

23 MS. TOPLIN: I have nothing further.

24 MR. ARTEAGA: May I have brief redirect, Your Honor?

25 THE COURT: On what?

1 MR. ARTEAGA: On the 48A form that the officers
2 prepared as well as the cross-examination of the statement not
3 appearing on that --

4 THE COURT: Go ahead.

5 REDIRECT EXAMINATION

6 BY MR. ARTEAGA:

7 Q All right. Officer, do you have the 48A in front of you?

8 A I do.

9 Q Can you -- you have told us that the vehicle was stopped
10 for excessive tinted windows. Where, on that form, would we
11 find that particular violation?

12 A There's several places where it would be. Under
13 Distinguishing Features, on the second page of Page 1 of 2,
14 states, "Dark tinted windows," under Distinguishing Features.
15 And under -- further down in that box, Suspected Reason -- or
16 I'm sorry, Selected Reason for Stop, and it says, "Vehicle in
17 violation of the Motor Vehicle Code, MVC."

18 Articulate fully the reason for stopping this
19 vehicle, the next box down, "The vehicle was observed
20 eastbound, 500 East Walnut Lane. Vehicle had dark aftermarket
21 tint on all windows, dark enough that police were unable to see
22 occupants in the vehicle." And then it says, "Driver advised,"
23 which is my wording for, the driver was issued a verbal warning
24 to remove the tinted windows.

25 Q Is there a Code section listed?

1 A Yes. Further down, in the same box, all the way on the
2 bottom, on the left-hand side, it says, MVC, which again stands
3 for Motor Vehicle Code, violation. And it says, "yes." The
4 next box over to the left says, Code Section, 4524E as in
5 Eddie, 1. Traffic Citation Issued, underneath, it says, "No."
6 Further to the right, "Vehicle was observed" -- it's the same
7 as higher up in the form.

8 Q All right. Now, you were asked on cross-examination about
9 where, in the box labeled Frisk Description, in the 48A -- do
10 you see that?

11 A Yes. There's a little --

12 Q You --

13 A Are you referring to the vehicle frisk, or to the person
14 frisk?

15 Q The -- where it says, Frisk Description in the vehicle
16 information.

17 A Okay. So it says -- then it says, Vehicle Frisk. Because
18 there's two different. There's one that's prepared for the BMW
19 itself, and then there's one prepared for the individual
20 itself.

21 Q I'm talking about the 48A.

22 A Yeah. It's -- on the same thing. On Page 1 or Page 2?
23 Because Page 1 --

24 Q Page 1.

25 A Okay, so the vehicle frisk.

1 Q Okay.

2 A Okay.

3 Q And you were asked, on cross-examination, where in that
4 synopsis does it say that the defendant said the bag wasn't
5 his. Do you recall that line of cross-examination?

6 A That's correct.

7 Q And do you recall your answer to counsel was, it wouldn't
8 be there, necessarily. It would be in your memo, I think is
9 the term you used.

10 A Yes. The 48A is just a general, very brief, establishing
11 reasonable suspicion or probable cause for a frisk. And when
12 you reach that threshold, that's when we stop, and then we
13 would write the rest of the narrative in the arrest memo.

14 Q Let me show you Government's Exhibit Number 8. Can you
15 tell us what this exhibit is?

16 A Yes, sir. That's my arrest memo.

17 Q Did you prepare that?

18 A I did.

19 Q When?

20 A That evening.

21 Q Where?

22 A At 35th District, Northwest Detectives. Because at that
23 point, I'm able to sit down at a physical computer and type
24 this out.

25 Q Okay. Can you read what you typed to yourself? And then

1 when you're done, let me know.

2 A Did you want me to read the whole thing?

3 Q Just the -- where you mentioned about the arrest and gun
4 in the bag.

5 A Okay.

6 Q All right. In your memo, did you memorialize the
7 defendant's statement saying that the bag was not his?

8 A I did.

9 MR. ARTEAGA: No further questions.

10 THE COURT: Anything else, Ms. Toplin?

11 MS. TOPLIN: No, Your Honor.

12 THE COURT: Next witness, please.

13 MR. ARTEAGA: Your Honor --

14 THE COURT: Thank you.

15 (Witness excused.)

16 MR. ARTEAGA: The government's next witness is
17 Officer Lukas Lesko. And for the record, Lesko is spelled L-E-
18 S-K-O.

19 COURTROOM DEPUTY: Good morning, sir. Please raise
20 your right hand.

21 LUKAS LESKO, PLAINTIFF'S WITNESS, SWORN

22 COURTROOM DEPUTY: And could you please state your
23 name?

24 THE WITNESS: Officer Luke Lesko, L-U-K-E L-E-S-K-O.
25 Badge 3374, currently assigned to the 14th Police District.

1 COURTROOM DEPUTY: Okay. You can have a seat.

2 THE COURT: You can lead him through the
3 preliminaries.

4 MR. ARTEAGA: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. ARTEAGA:

7 Q Officer Lesko, you've been employed by the Philadelphia
8 Police Department, correct?

9 A Yes.

10 Q And how long have you been employed by the Police?

11 A Approximately seven years.

12 Q And who is your partner, normally?

13 A Right, currently Officer Dohan, D-O-H-A-N, Badge 4690.

14 Q Were you working with Officer Dohan on July 20th, 2016?

15 A Yes.

16 Q And what shift were you working?

17 A The 6 to 2 shift.

18 Q All right. I want to direct your attention to July 20th
19 at 8:28 in the evening. Were you and your partner operating a
20 marked police unit on that day and time?

21 A Yes.

22 Q And you were dressed in uniform, correct?

23 A Yes.

24 Q Okay. Who was driving?

25 A I was.

1 Q All right. Did you see anything that caught your
2 attention?

3 A I saw a vehicle, a BMW 6 Series, that was parked on the --
4 it would be the southeast corner of Belfield and Walnut Lane in
5 the 500 block of East Walnut Lane. And I saw that vehicle pull
6 off into traffic. And as it pulled off into traffic eastbound
7 on the 500 block of East Walnut Lane, I observed heavy dark
8 tint on the front side windows.

9 Q When you made that observation, what did you do in
10 response?

11 A Got behind the vehicle. Ran the license plate to check
12 his registration status. He proceeded to travel eastbound on
13 500 East Walnut Lane, and then make a left northbound on Chew
14 Avenue, where I activated my lights and sirens, and the vehicle
15 stopped (indiscernible).

16 Q All right. Now, when you observed the tinted windows on
17 the vehicle, were you able to observe the passengers inside the
18 vehicle?

19 A The driver. It's --

20 Q Were you able to observe anyone in the car?

21 A During --

22 Q When you first saw the car.

23 A When I first saw the car, no. I was not able to observe
24 any occupants.

25 Q All right. And why was that?

1 A Due to the tint.

2 Q Did -- at any point in time, did that change prior to you

3 stopping the vehicle? Were you able to make any observations

4 of the interior of the car?

5 A Prior to the stop?

6 Q Correct.

7 A Correct.

8 Q All right. So you weren't able to?

9 A I was not able to.

10 Q Okay. All right. Now, was a decision made to stop the

11 vehicle?

12 A Yes.

13 Q Okay. And how did that -- how was that accomplished?

14 A Just relayed the information to my partner. We both saw

15 the motor vehicle violation. He -- my partner, Officer Dohan

16 ran the tag through the DMV system. And the vehicle stopped on

17 the, I think it was the -- it would have been the 6100 block of

18 Chew Avenue.

19 Q How did you signal to the vehicle to stop?

20 A I activated my lights and sirens.

21 Q Did the vehicle comply?

22 A Yes.

23 Q All right. Where was the car actually stopped?

24 A It was stopped -- if you go up Walnut and make a left onto

25 Chew Avenue, it was on the 6100 block, on the, it would be the

1 east side of the highway.

2 Q And when the vehicle stopped, approximately how far were
3 you from the BMW when the -- when it came to a stop?

4 A Our -- the front of our vehicle, we'll typically have it,
5 depending on the roadway, anywhere from usually 15, 20, 25
6 feet, roughly.

7 Q What did you do when you stopped the vehicle, and your
8 vehicle came to a stop?

9 A The vehicle came to a stop. I exited my patrol car, and I
10 approached the driver side, the occupant side of the vehicle.

11 Q Okay. Prior to your reaching the driver side, how were
12 the windows positioned?

13 A They were up as I initially exited the vehicle.

14 Q And did you give any commands for that to change?

15 A I don't recall exactly if I gave a verbal command to put
16 the window -- to signal the windows down. But as I approached
17 the driver side, that the window was down on the driver side.

18 Q And when you noticed that the window was coming down,
19 where exactly were you positioned at that point in time?

20 A Somewhere en route to the vehicle. I don't recall exactly
21 how far away from the vehicle, but I was approaching.

22 Q And once you approached the driver side, what happened at
23 that point?

24 A Encountered the operator. Asked for his license,
25 registration, insurance. And that was it. I was the contact

1 officer of the vehicle stop.

2 Q Okay. Now, at that point in time, understanding that you
3 were with the driver now, you're dealing with the driver --

4 A Yes.

5 Q Were you aware what, where your partner was at that time?

6 A Yes.

7 Q Where was he?

8 A He was on the passenger side of the vehicle. As I
9 approached the driver side, he approached the passenger side.

10 Q All right. And tell us what you did with the driver?

11 A Asked the driver for the information, license,
12 registration, insurance. I don't recall exactly if he had all
13 three pieces, or one or two. I don't recall exactly. I could
14 tell the man was a little bit nervous, so -- and then I saw my
15 partner motion that there was something going on, on the
16 passenger side of the vehicle.

17 So I asked the operator to step out of the vehicle,
18 which he did. And he was patted down for weapons.

19 Q Did he have anything on him?

20 A Not that I remember.

21 Q Was the driver cooperative?

22 A Yes.

23 Q You say you saw your partner signal to you. How exactly
24 were you able to see that?

25 A It'll be either a head -- I don't know exactly, but it'll

1 either be a head nod, or some hand movement, or what's --
2 pointing down, or give me the thumbs up. So it would have been
3 something that was remarkable, that I would notice.

4 Q Okay. And when you normally receive this signal from
5 Officer Dohan, do you automatically know what he's trying to
6 communicate to you?

7 A He's trying to communicate that there's an issue with that
8 occupant. I'm not exactly sure. I can't see the occupant. He
9 can. But based on his observations, that he's trying to
10 communicate to me that there is something up.

11 Q All right. Now, what happened after you removed the
12 driver from the vehicle?

13 A Removed the driver from the vehicle, patted him down for
14 weapons. I don't recall if we ever recovered anything from
15 him. But he was placed in the back of our patrol car.

16 Q And why was he placed in the back of your patrol car?

17 A To secure him, and secure the scene, the vehicle
18 investigation.

19 Q After you secured the driver in the back of your patrol
20 car, did you go anywhere else?

21 A Yes. I re-approached the vehicle again, as to my -- to
22 the passenger side, with my partner.

23 Q And where was your partner when you approached the
24 passenger side?

25 A He was at the passenger side window.

1 Q Tell us what happened when you got there.

2 A He asked the defendant to step out of the vehicle, which
3 he did. I was able to have Mr. Small, the defendant, to the
4 rear of the vehicle. I patted him down for weapons.

5 Q The rear of what vehicle?

6 A The vehicle, the BMW.

7 Q Okay. And what did you do at the rear of the vehicle?

8 A Patted him down for weapons, for officer safety, due to,
9 you know, my partner's observations that, what he saw. Patted
10 him down for weapons.

11 Q Did you find anything?

12 A I, personally, didn't find anything, but my partner was
13 signaling to me that --

14 Q I'm not asking about your partner. I'm talking about you,
15 specifically.

16 A Did I find anything?

17 Q Yes.

18 A No.

19 Q Okay. All right. Now, after you patted him down and you
20 found nothing, did you handcuff the defendant?

21 A Yes.

22 Q Why?

23 A Because my partner signaled to me that there could
24 possibly be a firearm located where the passenger was.

25 Q Okay. Did you actually see a firearm?

1 A At that time, or later?

2 Q Yes.

3 A Not at that time.

4 Q When was the first time you saw a firearm?

5 A I believe when we had the man secured, and handcuffed, my
6 partner -- I don't recall exactly, but he had it in his hand,
7 and showed it to me.

8 Q Okay. So you actually got to see it?

9 A Yes.

10 Q All right. Let me show you, by the way, Government's
11 Exhibit 5D. Is this the weapon that you saw after the
12 defendant was taken out of the car?

13 A Yes.

14 Q Is it in the same, or substantially the same condition
15 today as it was on July 28, 2016?

16 A From what I can remember.

17 Q Okay. All right. Now, when you saw the weapon, did you
18 ever take possession of it?

19 A I don't recall if I ever exactly specifically handled it,
20 or looked at it. I believe my partner, Officer Dohan cleared
21 the weapon. I don't recall exactly if I actually touched it or
22 handled it. But I knew of its existence.

23 MR. ARTEAGA: No further questions, Your Honor.

24 CROSS-EXAMINATION

25 BY MS. TOPLIN:

1 Q Good morning, Officer Lesko.

2 A Good morning, ma'am.

3 Q Who initially decided to pull the vehicle over for the
4 tint?

5 A I believe it was both of us.

6 Q Okay. Just out of the blue, together, simultaneously, you
7 guys said, let's pull that car over for the tint?

8 A Correct.

9 MS. TOPLIN: No further questions.

10 THE COURT: You can step down.

11 THE WITNESS: Thank you.

12 THE COURT: Thank you.

13 THE WITNESS: Thank Your Honor.

14 (Witness excused)

15 THE COURT: Does the government have any other
16 witnesses?

17 MR. ARTEAGA: Can I just have a moment to speak with
18 the agent?

19 THE COURT: Sure.

20 MR. ARTEAGA: No further witnesses, Your Honor.

21 THE COURT: All right. Does the defense want to
22 present any evidence?

23 MS. TOPLIN: No, Your Honor. Thank you.

24 THE COURT: Okay.

25 MS. TOPLIN: I would move for the admission of --

1 THE COURT: Why don't we admit all the exhibits.

2 MS. TOPLIN: Yeah. Thank you.

3 THE COURT: Is everyone agreeable to that?

4 MR. ARTEAGA: Yes, that's fine. And Your Honor, I do
5 have the color photos that the Court can keep, because
6 obviously, we're looking at electronic --

7 THE COURT: We'll make them part of the record. Yes.
8 Hand those to Mr. Stoney (phonetic).

9 (Government's Exhibits 1 through 5 and Defendant's
10 Exhibit's 1 and 2 received to evidence)

11 THE COURT: I'll hear argument from defense first.

12 MS. TOPLIN: Thank you, Your Honor. In addition to
13 the documents that I marked, there's been a stipulation that,
14 on the date in question, sunset -- at what time? 8:24 p.m.
15 I'll mark this as Defense Exhibit 3, and I'll submit it.

16 (Defense Exhibit 3 marked for identification.)

17 THE COURT: What is that?

18 MR. DALACK: This is where the sun rises.

19 MS. TOPLIN: It's a sunrise and sunset calendar.

20 THE COURT: And what's it essentially say?

21 MS. TOPLIN: Pardon me. It says that the sun set at
22 8:24 p.m.

23 THE COURT: Okay. That's it.

24 MR. ARTEAGA: Your Honor, the government will
25 stipulate that -- no objection.

1 (Defense Exhibit 3 received to evidence)

2 MR. ARTEAGA: We do want to ask the Court, unless
3 there's, you know, if there's objection, that the Court take
4 judicial notice of the Motor Vehicle Code on excessive tints,
5 which I've marked as Government Exhibit Number 7.

6 (Government Exhibit Number 7 marked for
7 identification.)

8 THE COURT: Yes. I don't -- that's fine.

9 (Government's Exhibit 7 received to evidence)

10 THE COURT: I don't know that I need --

11 MR. ARTEAGA: Unless you --

12 THE COURT: -- to take judicial notice of something
13 that's the law, right. It's the -- it's in the Motor Vehicle
14 Code, right?

15 MR. ARTEAGA: Correct. And I actually printed it
16 out, so.

17 THE COURT: Okay. All right. I don't think I need
18 to.

19 MR. ARTEAGA: Okay.

20 THE COURT: It's -- I'll just apply the law. And I
21 don't think the defense disputes that that's a viable Motor
22 Vehicle Code offense, but I get what you're trying to do. So
23 I'll hear argument now. Mr. Dalack, are you going to do that?

24 MR. DALACK: Yes, Your Honor.

25 THE COURT: Okay. If I were -- a question first,

1 then I'll hear what you have to say. But if I would credit the
2 testimony of Officer -- is it Dolan, or Dohan?

3 MR. DALACK: Dohan.

4 THE COURT: Dohan, regarding your client's alleged
5 statement, quote, "I don't know if a gun is in the car, but
6 this is not my backpack," if I would find that credible, first
7 question, do you concede that he doesn't have standing to
8 contest the frisk of the backpack? And if the answer --
9 depending on what your answer is, and I'm sure you're going to
10 address this, why -- what about what I just heard would lead me
11 to believe that that testimony was not credible?

12 DEFENDANT'S CLOSING ARGUMENTS

13 MR. DALACK: Regarding the credibility of the
14 testimony, the first part is that no mention of that statement
15 was made in the 7548A which was created by both Dohan and
16 Lesko. Their names are both on it. I think that's a critical
17 point, because every other statement that Officer Dohan
18 attributed to Mr. Small was contained in that 7548A.

19 And subsequent -- in a subsequent arrest memo that
20 was created, you know, well after the 7548A was written, this
21 is the first time we see this issue of Mr. Small disavowing the
22 bag.

23 I think a more critical point, though, Your Honor, is
24 that regardless of what Mr. Small may or may not have said, and
25 again, we don't think that, for that reason alone, the fact

APPENDIX D

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

v.

GARNET SMALL

JUDGMENT IN A CRIMINAL CASE

Case Number: DPAE2:16CR000381-001

USM Number: #69651-066

Elizabeth Toplin, Esq.

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) Count 1 of the Indictment.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:922(g)(1) and 924 (e)(1)	Possession of a firearm by a convicted felon.	7/20/2016	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

3/10/2022

Date of Imposition of Judgment

S/MITCHELL S. GOLDBERG

Signature of Judge

MITCHELL S. GOLDBERG, U.S.D.J.

Name and Title of Judge

3/16/2022

Date

DEFENDANT: GARNET SMALL
CASE NUMBER: DPAE2:16CR000381-001

IMPRISONMENT

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

120 months on Count 1 of the Indictment.

- ☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant receive vocational training.
Defendant receive educational training.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GARNET SMALL

CASE NUMBER: DPAE2:16CR000381-001

SUPERVISED RELEASE

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

3 years on Count 1 of the Indictment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: GARNET SMALL

CASE NUMBER: DPAE2:16CR000381-001

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: GARNET SMALL
CASE NUMBER: DPAE2:16CR000381-001

SPECIAL CONDITIONS OF SUPERVISION

The Defendant shall refrain from illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that the defendant shall submit to drug treatment as approved by the Court after receiving a recommendation by the U.S. Probation Office. The Defendant shall abide by the rules of any program and shall remain in treatment until satisfactorily discharged with the approval of the Court.

DEFENDANT: GARNET SMALL
CASE NUMBER: DPAE2:16CR000381-001**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 0.00

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

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

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

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$ _____	0.00	\$ _____	0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

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

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: GARNET SMALL
CASE NUMBER: DPAE2:16CR000381-001

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
\$100.00 special assessment is due immediately.

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

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
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- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
- a) one (1) Lorcin Engineering Co., Model L380, .380 caliber semiautomatic handgun bearing serial number 139218; and
 - b) eight (8) rounds of .380 caliber ammunition,

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.