No. 23-

IN THE

Supreme Court of the United States

QUENTIN JOHN FISBBURNE,
A/K/A QUINTON JOHN FISHBURNE,
A/K/A Q,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals erred in failing to reverse the trial court's order denying the Petitioner's Motion to Suppress the discovery of a firearm during a traffic check point in violation of the Petitioner's Fourth Amendment right to unreasonable search and seizure.

Whether the Fourth Circuit Court of Appeals erred in failing to reverse the trial court's failure to properly charge the jury that the Petitioner had to know his prior felony conviction made him ineligible to possess a firearm.

Whether the Fourth Circuit erred in failing to reverse the trial court's sentence of the Petitioner to 285 months imprisonment in violation of the Petitioner's Fifth Amendment protection against Double Jeopardy.

LIST OF PARTIES

All parties are contained in the caption of the case.

LIST OF PROCEEDINGS

i.) USA vs. Quentin John Fishburne a/k/a Quinton John Fishburne, a/k/a Q, criminal #2:18-CR-780 US District Court, District of South Carolina. August 15, 2018, Judgement Date: December 21, 2021

ii) USA vs Quentin John Fishburne a/k/a Quinton John Fishburne, a/k/a Q, Record No: 21-4700, Fourth Circuit District Court, Judgement Date: November 1, 2023.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

A copy of the judgment and commitment order of the United States District Court for the District of South Carolina is included A1. The unpublished opinion of the Fourth Circuit Court of Appeals is attached at A6 (United States Vs Fishburne, 21-470(4th Cir.,September 06, 2023).

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

Petitioner seeks this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his sentence in violation of Title 18 U.S.C. Section 371, Title 18, U.S.C., Section 922 (g)(1), and Title 18, U.S.C., Section 924(a)(2), for conspiracy to transfer firearms to convicted felons and to make false statements with regard to the acquisition of firearms from licensed dealers, and possession of a firearm by a convicted felon. The judgment of the Court of Appeals was entered on September 6, 2023. Jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

The Petitioner filed a Petition for Rehearing on September 20, 2023. The Fourth Circuit Court of Appeals denied the Petition October 24, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searche and seizures should be violated", Fourth Amendment to the United States Constitution.

" ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty or property without due process of law..." Fifth Amendment to the United States Constitution.

If two or more person conspire wether to commit any offense against the United States, or to defraud the United States, ... and one or more of such person do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned for not more than five years, or both. Title 18 U.S.C. Section 371

It shall be unlawful for any person - (1) who has been convicted in any court of a crime, punishable by imprisonment punishable by more than one year, ... to ... possess in or effecting commerce any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Title 18, U.S.C., Section 922 (g)(1)

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, al-though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: Supreme Court Rule 10(a)

STATEMENT OF THE CASE

The Petitioner was indicted by a federal grand jury on August 15, 2018 on two counts of possession of a firearm by a convicted felon, in violation of Title 18 U.S.C. Section 922(g)(1), and one count of conspiracy to defraud the United States in violation of 18 U.S.C. 371. A second superseding indictment was returned on August 14, 2019.

The Petitioner was the driver of a Camaro vehicle on March 31, 2018 when he encountered police officers of the Walterboro Police Department,(WPD) in Colleton County, South Carolina conducting a traffic checkpoint. The checkpoint was executed in response to complaints of speeding motorists. A WPD officer assigned to conduct this traffic checkpoint confronted the Petitioner. The WPD officer believed he smelled the odor of marijuana upon the Petitioner lowering his driver's side window and directed the Petitioner to pull his car over to the side of the road and exit the vehicle. During a search of the vehicle WPD officers located a loaded firearm under the driver's side of the vehicle.

The Petitioner was indicted for the possession of the firearm found in the vehicle on March 31, 2018 and for possession of an unrelated firearm located in a vehicle he operated from a 2014 previous vehicle stop, as a prohibited person previously convicted of a felony, and for conspiracy with another co-defendant for defrauding the government in the straw purchase of firearms.

The Second Superseding Indictment charged the Petitioner in Counts 1 and 5 for a violation of Title 18, United State Code, Section 922 (g) (1), 924(a)(2) and 924(e), a convicted felon in possession of firearm. The specific allegation contained in this indictment is as follows: " ... having previously been convicted of a crime punishable by imprisonment for a term exceeding one year and knowing that he had been convicted of such a crime."

The trial court improperly instructed the jury by failing to state that in order for the Petirttioner to be guilty of illegally possessing a firearm he had to know that his prior

felon conviction made him ineligible to possess a firearm. Instead the trial court simply stated that the Government had to prove that the Petitioner knew he had a prior felony conviction. Based on the failure of the government to establish this critical element the court should have dismissed the two counts, Counts 1 and 5, charging the Petitioner of being a felon in possession of a firearm.

Following a jury trial the Petitioner was found guilty of all three counts of the second superseding indictment. The United States Probation Officer prepared a pre-sentence report and calculated a sentencing guideline range of 360 months to life, however with a statutory maximum of 300 months. This guideline sentence imprisonment range was determined by applying a cross reference to the above described 2015 night club shooting for the Petitioner being responsible as a shooter in that incident.

The Petitioner was previously indicted by the Government in 2016 with several other individuals for a November 6, 2015 involving a shooting incident located in Colleton County, South Carolina, following a drag race in which two individuals were shot in a dispute over the winner of that race. Several spent shell casings were recovered from that shooting in an area where the two individuals had suffered gunshot wounds. The recovered shell casings were subsequently determined to have been fired from the firearm recovered in the vehicle operated by he Petitioner in the March 31, 2018 traffic checkpoint stop.

The Petitioner entered a stipulated plea agreement with the Government and as to that 2016 indictment and for that conviction was sentenced to 15 months imprisonment.

The district court in those proceedings in accepting the Petitioner's guilty plea adopted the stipulation that the Petitioner was not a shooter in that incident, but was classified as an after the fact aider and abettor of the events surroundings that shooting. The district judge who accepted the plea and imposed the sentence for the 2015 incident was the trial and sentencing judge of this instant case. During the contested sentencing hearing, the district judge disregarded his previous finding and adoption of the plea agreement stipulation that the Petitioner was not a shooter but an after the fact aider and abetter in the 2015 night club shooting. The district judge ignored the evidence presented at the sentencing hearing which disputed the Petitioner possessed the firearm found in the 2018 traffic stop which was used at the 2015 nightclub shooting scene. The district judge imposed the maximum statutory sentence of 300 months, but provided credit for its previously imposed sentence of 15 months and the Petitioner was sentenced to a term of imprisonment of 285 months and three years supervised release.

ARGUMENT

I. The Fourth Circuit Court of Appeals erred in failing to reverse the trial court's order denying the Petitioner's Motion to Suppress the discovery of a firearm during a traffic check point in violation of the Petitioner's Fourth Amendment right to unreasonable search and seizure.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in "...against unreasonable searches and seizures...". The discovery of the firearm under the seat of the vehicle operated by the Petitioner was achieved through law enforcement officers' warrant less stopping the Petitioner's vehicle a traffic checkpoint. This stop was a "seizure" as defined in *United States vs. Sifuentes*, 428 U.S.

543, 96 S. Ct 3074, 556, (1976). " It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment". In order for this seizure to avoid a Fourth Amendment violation and thus suppression of the firearm found in the stopped vehicle, requires that the checkpoint stop be determined to be legally reasonable. "The reasonableness of checkpoint 'stops', however, turns on factors such as the location and method of operations of the checkpoint, factors that are not susceptible to the distortion of hindsight, and therefore will be open to post-stop review notwithstanding the absence of a warrant." *Sifuentes*, at 566-567.

This Court has permitted the use of traffic checkpoints for legitimate law enforcement initiatives for motorist related violations such as driving under the influence or driver's license and vehicle verifications and drivers operating their vehicle under the influence. " In addition, in *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) we suggested that a similar type of roadblock with the purpose of verifying driver's licenses and vehicle registrations would be permissible. In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *City of Indianapolis vs. Edmond*, 531 U.S. 32, 121 S. Ct. 447 (2000).

The Petitioner filed his pre-trial motion seeking to suppress the firearm discovered by the police at this checkpoint. He claimed that the checkpoint was in violation of the Fourth Amendment as more clearly described in *Delaware v. Prouse*, and *City of Indianapolis vs. Edmond*, as cited above. The district judge denied this motion to

suppress and the Fourth Circuit affirmed that decision.

It was disputed during the district court's suppression hearing whether the local police department employed properly its own policies in the creation of this checkpoint, particularly as for its basis in conducting the checkpoint. The checkpoint policy adopted by the police specified that it located at such as distance so that it is easily visible by approaching motorist, that a sign be posted to warn motorist that they will be stopped, and that it not be located on a curve. In addition a higher ranking supervisor of the WPD must authorize the implementation of a checkpoint. The testimony and evidence presented challenged if those conditions were violated. It was undisputed, however that the checkpoint was not conducted for the intent of verifying driver's licenses or vehicle registrations or even to stop drunk driver's, but in response to complaints of speeding. Testimony was void as to how the implementation of a traffic checkpoint was in a legitimate response to vehicles speeding.

"Third, the checkpoints must be minimally intrusive: (1) they must be clearly visible; (2) they must be a part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) they must detain drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity." *U.S. v. McFayden*, 865 F.2d 1306, 1312, (D.C. Cir. 1989). (Emphasis added).

The Fourth Circuit in affirming the district court's denial of the motion to suppress the firearm applied its own " two step analysis" in citing *U.S. v. McFayden*, 865 F.2d 1306,

1312, (D.C. Cir. 1989 In so doing the Fourth Circuit ignored the prior holdings of this Court as cited in *Delaware v. Prouse*, and *City of Indianapolis vs. Edmond* that is the checkpoint must contain a valid basis for verifying driver's licenses and vehicle registrations.

In *Moore*, the Fourth Circuit declared in upholding a warrant less seizure in a traffic checkpoint that courts should apply a two point analysis. "Second, if the checkpoint had a valid primary purpose, we then proceed to "judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." Lidster, 540 U.S. at 426, 124 S.Ct. 885. The reasonableness of a given checkpoint stop "is determined by balancing the gravity of the public interest sought to be advanced and the degree to (citations omitted) which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped."... *United States v. Moore*, a t190-191.

In addition the Fourth Circuit's rationale of this two step analysis of first determining if the checkpoint had a valid primary purpose is inconsistent with the holding of *Delaware v. Prouse*, and *City of Indianapolis vs. Edmond* and in conflict with other circuits.

In *United States v. Burgos-Coronado*, 970 F.3d 613 (5th Cir. 2020), the Fifth Circuit in citing *Delaware v. Prouse* determined that unjustified reasons for conducting are prohibited to dictate the legitimacy of the primary purpose of that traffic checkpoint.

"A checkpoint-type stop of an automobile is a seizure constrained by the Fourth Amendment." *United States v. Green*, 293 F.3d 855, 857–58 (5th Cir. 2002). While suspicionless seizures are ordinarily unreasonable, and thus Fourth Amendment violations, certain types of automobile checkpoint stops have been excepted from this general rule. Id. at 858. The Supreme Court has suggested that such checkpoints designed to check a driver's license and registration are permissible. See id. (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)). We have explained that "it is a legitimate, programmatic purpose that justifies a checkpoint stop made without any suspicion." *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). We examine the available evidence to determine the "primary purpose" of a checkpoint; "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted." *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). "...*United States v. Burgos-Coronado*, at 618.

In addition the Eight Circuit in *United States v. Arnold*, 835 F.3d 833 (8th Cir. 2016), cited the balancing test applied in *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) by weighing the public interest against improper intrusion into one's liberty.

"In determining whether the roadblock was reasonable, we must balance the following factors as set out in *Brown* : (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and, (3) the severity of the interference with individual liberty. 443 U.S. at 51, 99 S.Ct. 2637 ; see also

Brouhard v. Lee, 125 F.3d 656, 659 (8th Cir. 1997) (noting in the context of a civil rights action that highway checkpoints are reasonable under the Fourth Amendment if they maintained a proper balance between the Brown factors). A central concern in this balancing test is to guard individual liberties against "arbitrary invasions at the unfettered discretion" of law enforcement authorities. Id. (citing *Delaware v. Prouse,* 440 U.S. 648, 654–655, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), and *United States v. Brignoni – Ponce,* 422 U.S. 873, 882, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)). Accordingly, the Supreme Court has upheld certain types of brief roadblocks without individualized suspicion where the public interests advanced by the seizure outweighed the Fourth Amendment interests of the individual seized. Compare *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990) (upholding sobriety checkpoint program to combat drunk driving), and *United States v. Martinez – Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (upholding Border Patrol checkpoint to intercept illegal immigrants), with *Brignoni – Ponce*, 422 U.S. at 882–84, 95 S.Ct. 2574 (random Border Patrol roving-patrol stop to intercept illegal immigrants was impermissible), *Prouse,* 440 U.S. at 659–63, 99 S.Ct. 1391 (random spot checks to verify motorist's driver's license and registration without reasonable suspicion was impermissible), and *City of Indianapolis v. Edmond,* 531 U.S. 32, 47–48, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (suspicionless stop at highway checkpoint was unreasonable where its primary purpose was indistinguishable from a general interest in crime control)." *United States v. Arnold*, at 839.

The balancing test cited in *Arnold* above describes limited intrusions justified for non arbitrary police conduct such as verifying driver's licenses and vehicle registrations- not speeders.

The Fourth Circuit's two step analysis runs candor to the Seventh Circuit's criteria more consistent with the holding of *Delaware v. Prouse* in determining whether the checkpoint is in violation of he Fourth Amendment.

"A stop of a vehicle at a sobriety checkpoint constitutes a seizure within the meaning of the Fourth Amendment, and its validity depends on whether the seizure was reasonable. *Delaware v. Prouse*, 440 U.S. 648, 653–54, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). To determine whether a checkpoint stop is reasonable, we apply a balancing test set forth by the United States Supreme Court in *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 449–50, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), in which we weigh the intrusion on an individual's Fourth Amendment rights implicated in the initial stop against the government's interest in preventing drunk driving. In performing this balancing test, we assess two types of intrusiveness—the "objective" intrusion, meaning the duration of the stop and the intensity of any questioning and visual inspection, and the "subjective" intrusion, meaning the stop's potential for generating fear and surprise to law-abiding motorists. Id. at 451–52, 110 S.Ct. 2481; see also *United States v. Trevino*, 60 F.3d 333, 336 (7th Cir.1995)." *U.S. v. Brock,* at 1002.

Either the Fourth Circuit ignored the established precedent outlined in *Delaware v. Prouse*, and *City of Indianapolis vs. Edmond*, or its decision to employ this two step

analysis is inconsitent with the holding of the Fifth, Eight and Seventh Circuits. In any review, the protections provided by the Fourth Amendment can not be over run by ignoring the basis flaws in the Fourth Circuit's holding that the checkpoint utilized by law enforcement in locating the firearm satisfied the rationale basis for the stop and did not overrun the expectations on one privacy.

II. The Fourth Circuit Court of Appeals erred in failing to reverse the trial court's failure to properly charge the jury that the Petitioner had to know his prior felony conviction made him ineligible to possess a firearm.

At the conclusion of the presentation of any evidence at the Petitioner's trial the district court charged the trial jury as to Counts 2 and 5 the following pertinent instruction : " In order for you to find Mr. Fishburne guilty of this charge (Counts 1 and 5), the Government must prove the following elements beyond a reasonable doubt as to each count. Number 1, that Mr. Fishburne had previously been convicted of a crime punishable by a term of imprisonment exceeding one year. Number 2, that Mr. Fishburne knew he had been previously convicted of a crime punishable by a term of imprisonment for one year. Number 3, that the firearm or ammunition had traveled in interstate or foreign commerce at some point during its existence. And Number 4, that Mr. Fishburne knowingly possessed a firearm or ammunition; that is Mr. Fishburne knew the item was a firearm or ammunition and the possession was voluntary and intentional."

In *Rehaif v United States*, 139 S. Ct. 2191, (2019), this Court vacated an illegal alien's Section 922 conviction because the Government failed to establish the defendant knew his previous conviction placed him into a status of a person prohibited from

possessing a firearm. The Court in its opinion settled any notion that Title 18, U. S.C. Section 922 (g) was a strict liability law. In other words the Government has to establish more than just the defendant knowingly possessed a firearm and knew he had a prior felony conviction, the Government's burden is to prove a defendant knew that his status as a convicted felon prohibited him from possessing a firearm: "...the Government must prove that a defendant knows of his status as a person barred from possessing a firearm (emphasis added). ." *Rehaif,* at (2195).

In *United States v. Medley,* 972 F.3d 399 (4th Cir. 2020), the Court of Appeals invalidated a conviction for a defendant who was charged with being a felon in possession, 18 USC Section 922, when it determined that the Government did not properly indict nor prove that the defendant not only knew he possessed a firearm, but that he knew he belonged to a class of individuals who were prohibited from possessing a firearm.

In *Medley*, the Court found fault that the Government failed to prove that the defendant knew of his convicted status and that the Court failed to instruct the jury as to that specific element, as well. The Court determined that the defendant's conviction was invalid as it did not provide him the 14th Amendment right of due process. "Accordingly, Medley did not receive (even constructive) notice; nor did he receive a sufficient description of the accusations against him. Since Medley's indictment failed to satisfy the notice function of an indictment through its charging language and description of overt acts, its defects violated Medley's substantial rights." *Medley*, at 409.

In this matter, the Government and the Petitioner had entered into a stipulation which contained the two relevant points: (1) that the Petitioner had previously been convicted of a felony punishable by a term exceeding one year; and (2)that the Petitioner knew that he had was previously been convicted of a felony punishable by a term exceeding one year and was therefore prohibited from possessing a firearm.

Knowledge of having been convicted in a crime in which the penalty is at least one year imprisonment as opposed to knowing that one's previous felony conviction makes you a person prohibited are clearly two distinct concepts of "status". Status is defined by Merriam-Webster as "the condition of a person or thing in the eyes of the law". Likewise, Black's Law dictionary defines "status" as "... the status of a person is his legal position or condition". It is knowing that the prior conviction makes one a person prohibited creates the understanding of one's status. Status creates legal liability, such as one being an employee as opposed to being an independent contractor, or a full time employee or part time employee.

The indictment and jury instruction are in direct conflict with the decision of *Rehaif*. . "As 'a matter of ordinary English grammar,' we normally read the statutory term' knowingly as applying to all the subsequently listed elements of the crime'... To the contrary, we think that by specifying that a defendant may be convicted only if he 'knowingly violates' Section 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of Section 922(g)." *Rehaif*, at 2196. The failure to include the knowledge of status as elements under a Title

18 U.S.C. Section 922 (g) and 924(a) prosecution is plain error and creates a defective indictment affecting the Petitioner's substantial rights as specified by the Fifth Amendment and the Sixth Amendment to the United States Constitution.

III. The Fourth Circuit erred in failing to reverse the trial court's sentence of the Petitioner to 285 months imprisonment in violation of the Petitioner's Fifth Amendment protection against Double Jeopardy.

Following the Petitioner's conviction of Counts 1, 2, and 5 of the Second Superseding Indictment, the United States Probation Office (USPO) prepared its Pre-Sentence Report (PSR) which provided for a guideline sentencing range of 360 months to LIFE imprisonment, based on an adjusted offense level of 41 and a criminal history category III. However, the total consecutive maximum statutory sentence for all three counts of conviction was 25 years, (count 1-10 years, count 2-5 years and count 5-10 years) and the adjusted guideline was capped to a maximum of 300 months. The guideline sentencing range included a cross references to a 2015 shooting incident. Consequently, at the conclusion of a contested sentencing hearing, the district court sentenced the Petitioner to 285 months, consisting of 105 months as to Count 1, 60 months as to Count 2, and 120 months as to Count 5, consecutive. The Sentencing Court made several errors denying the Defendant's objections and overruling the issues of Double Jeopardy and collateral estoppel

The Petitioner timely raised his objections to the PSR, mainly objecting to the inclusion of the cross reference to the 2015 shooting incident. If the objections raised by the Petitioner had been granted his offense level would have been reduced to 20, with a

Criminal History Category of III, for a sentencing imprisonment range of 41-51 months. The Petitioner submitted a sentencing memorandum in support of the objections raised in the PSR highlighting the legal impediments to the guideline calculations on the basis of the Fifth Amendment prohibition against Double Jeopardy and the doctrine of collateral estoppel.

In calculating the guideline range of 360 months to Life imprisonment, the PSR referenced the events of a shooting at a nightclub with rival gang members contested the results of a car race which occurred in Colleton County, South Carolina on November 2015. The Government following a local and federal investigation of this shooting obtained a grand jury indictment filed against Mr. Fishburne and eight co-defendants, in the United States District Court (USDC) in South Carolina Case Number 2:16-cr-122 (DCN).

The Petitioner had entered a guilty plea to Count 10 of that indictment pursuant to Fed. R. Crim. P. 11 (c) (1) (A) and (C) which charged him with attempted murder, in aid of racketeering activity. The Petitioner and the Government also, entered into a Plea Agreement Stipulated Factual Basis which the district court adopted. This factual basis limited the Petitioner's role in the 2015 nightclub shooting to that as an aider after the fact. "In the attempt to rob the people who waged on the race firearms were used as a result two victims sustained serious physical injuries. After the shooting Quinton Fishburne left the scene in his vehicle with an individual the government can prove beyond a reasonable doubt was an associate of the cowboys."

A PSR was prepared as a result of that conviction, which provided for a sentencing imprisonment guideline range of 63-78 months, based on an adjusted offense level of 24, Criminal History Category of III.

The Petitioner's objection to the 2018 conviction PSR was the application of the cross references of the attempted murder which identified the Petitioner as a shooter involved in the 2015 nightclub shooting in contradiction to the stipulated facts of the 2016 plea as an after the fact aider and abetter. In addition, the Government and the Petitioner at trial of this instant conviction entered into another stipulation, which the district court admitted into evidence, specifying that law enforcement was unable to establish that the Petitioner fired any shots in the 2015 incident. Furthermore, the evidence supplied to the district court at the contested sentencing hearing sustained that the Petitioner in fact was not a shooter.

The Fifth Amendment to the U.S. Constitution states, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....". As stated above the Petitioner was indicted in Case Number 2:16-cr-122 and named in Counts 10 and 11 for violating Title 18, United States Code, Section 1959 (a)(5) and Title 18, United States Code, Section 924 (c). Count 10 charged the Petitioner and two other co-defendants with Attempted Murder in Aid of Racketeering Activity as a a result of his alleged involvement in the November 6, 2015 shooting. Count 10 states in pertinent part: " On or about November 6, 2015, in the District of South Carolina, defendants... and QUINTON JOHN FISHBURNE, aided and abetted by others known and unknown to the grand jury, did

for the purpose of maintaining and increasing position in the COWBOYS, an enterprise engaged in racketeering activity, knowingly and unlawfully attempt to murder B.G. and T.M. In violation of South Carolina Code of Laws, Section 16-3-29."

The Petitioner pled guilty to Count 10 on February 24, 2017. The Court imposed a sentence of time served on November 27, 2017 and filed its Judgement in a Criminal Case on November 29, 2017. Jeopardy has attached to the Petitioner for the 2016 conviction for his alleged role in the 2015 shooting.

"The Double Jeopardy Clause of the Fifth Amendment provides that no one shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' *U.S. Const. amend. V.* Among the protections provided by this Clause is the assurance that a criminal defendant will not be subjected to 'repeated prosecutions for the same offense.' *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). *U.S. v. Williams*, 155 F.3d 418, 419 (4th Cir. 1998).

While the Petitioner is not contending that the 2018 indictment is in and of itself a violation of this Fifth Amendment protection, it appears that the punishment suggested in the PSR and adopted and advocated by the Government does. The cross reference cited in Paragraph 48 clearly seeks to punish the Petitioner for an offense for which he was previously convicted and sentenced. Upon his conviction and sentence, jeopardy attached and the Petitioner can not be prosecuted and punished for a second time for the activity of the same offense.

While not conceding the inaccurate presumption the probation officer has made that tyhe Petitioner possessed or used the firearm or ammunition on November 6, 2015, the recommenced sentence being based on a prior identical act for which he has been previously punished, is bared by the prohibitions of the Fifth Amendment. The Court can not consider a sentencing guideline imprisonment range sentence based on the cross reference of attempted murder as the district court has previously imposed a sentence upon the Petitioner pursuant to those same guidelines applicable in November 2017.

Fong Foo (citations omitted) establishes that the protection of the Double Jeopardy Clause turns on whether the judge or jury has resolved one or more factual elements of the government's case, not on when that resolution occurs, a principle reinforced by the Court's subsequent decisions in *Martin Linen Supply*, 430 U.S. at 572-76, 97 S.Ct. 1349, and in *Smith*, 543 U.S. at 473, 125. *U.S. v. Black Lance,* 454 F.3d 922, 924 (8th Cir. 2006).

The appropriate guideline sentence therefore should be a base offense level 20 with no enhancements or reductions and a Criminal History Category of III, for a range of 41-51 months. The government is bound by the principal of issue preclusion as to the role the Defendant played in the 2015 shooting-that is he was not the shooter and did not possess the .40 caliber firearm that night.

The Court erred in applying the cross reference because the evidence presented at the sentencing, coupled with the prior stipulations make that guideline calculation unavailable. The Court as a matter of law in exceeding the statutory maximum sentence

available to the count of conviction associated with that specific handgun being used in another crime.

The Government and the Court are collaterally estopped from advocating for or imposing any sentence based on any factual basis other than those facts adopted in the 2017 conviction.

'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161. As Mr. Justice Holmes put the matter in that case, 'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.' 242 U.S., at 87, 37 S.Ct. at 69.7 As a rule of federal law, therefore, '(i)t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.' *United States v. Kramer*, 289 F.2d 909, 913. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970).

The application of this legal principle precludes the Government from deviating from the stipulated facts in the 2017 of the November 2015 shooting. Its position in the prior sentencing became the facts of the 2020 conviction. Any deviation from that position would violate the concept of issue preclusion-that is advancing a factual and legal standing on one hand and then having license to change positions and arguments when it suited different needs without the benefit of any substantial changes to substantiate that switch.

Not only is the Government bared from advocating a position contrary to its representation to the Court of its acceptance in the 2016 Pre-Sentence Report and the guideline calculations therein, it is precluded from advocating any position that Mr. Fishburne used or possessed the .40 Smith and Wesson firearm on November 6, 2015. During the trial the Government and the Petitioner entered into a stipulation introduced as Government Exhibit #14 which states in pertinent part as follows: "Authorities were not able to determine whether or not Mr. Fishburne fired any of the shots on November 6, 2015."

The Government is bound by the terms of a stipulation just as much as any other party. A stipulation by its nature removes from either party the necessity of introducing evidence to establish those facts which are contained in the stipulation. As reinforced in *United States v. Muse*, 83 F.3d 672 (4th Cir. 1996), a stipulation is more than just an admission by a party-it is essentially the fact of the case, and one can not then claim that fact does not exist as the parties are bound by those facts for they now become undisputed. "We note at the outset the special nature of a factual stipulation, agreed to

and signed by a defendant, his attorney, and the prosecutor. Such a stipulation is more potent than simply an admission. By so stipulating, a defendant waives the requirement that the government produce evidence (other than the stipulation itself) to establish the facts stipulated to beyond a reasonable doubt." *Muse* at 678.

The Fourth Circuit failed to address the Petitioner's objections to the PSR with the application a of the attempted murder cross reference on the basis of the Double Jeopardy violation or it being preluded on the basis of collateral estoppel. The Fourth Circuit summarily stated in its opinion affirming the Petitioner's sentence that it's review was limited to the factual basis relied on by the district court for clear error. It did not rule on the Constitutional issue nor the well settled legal precedent of issue preclusion.

The application of collateral estoppel serving as a bar for the Government to re-litigate issues previously determined is well settled in several circuits, but obviously ignored by the Fourth Circuit. "In this court, the doctrine of collateral estoppel as applied in criminal cases has been used to bar not only reprosecution, which we use here as encompassing multiple or fragmented prosecutions, but also evidence of crimes of which the defendant had been acquitted in prior prosecutions. ...The conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined." *U.S. v. Keller,* 624 F.2d 1154 (3rd Cir. 1980).

See also, *United States v. Ceron*, 775 F.3d 222 (5th Cir. 2014). "Collateral estoppel applies in criminal cases, but it is not raised often and we have observed that the 'efficiency concerns that drive the collateral estoppel policy on the civil side are not nearly so important in criminal cases.' (internal citations omitted). And, "The doctrine of res judicata applies to criminal proceedings. (Citations omitted)Res judicata contains two related but distinct principles of judicial finality, merger and bar. *U.S. v. Ryan,* 810 F.2d 650 (7th Cir. 1987).

Finally, the well established correlation between the bar to a subsequent prosecution and the application of the principles of issue preclusion typically found in the civil arena defined as collateral estoppel are well established in the following opinion:

"The doctrine of collateral estoppel is a commonly used tool in the civil arena developed to conserve judicial resources "as well as those of the parties to the actions and additionally as providing the finality needed to plan for the future." *Ashe v. Swenson*, 397 U.S. 436, 464, 90 S.Ct. 1189 1204, 25 L.Ed.2d 469 (1970) (Burger, C.J., dissenting). The doctrine's use in the criminal arena, however, has traditionally been limited to only one party--the defendant.

"In Ashe, the Supreme Court associated the doctrine of collateral estoppel with a defendant's fifth amendment guarantee against double jeopardy. Thus, the Court held that a defendant acquitted in a previous case could not be tried again where the facts at issue in the first case were thesame as the facts at issue in the subsequent prosecution. Ashe, 397 U.S. at 446-447, 90 S.Ct. at 1196. "[D]ouble jeopardy, prohibits prosecution of

the crime itself, whereas collateral estoppel 'simply forbids the government from relitigating certain facts in order to establish the fact of the crime.' " *Ferenc v. Dugger*, 867 F.2d 1301, 1303 (11th Cir.), cert. denied, 493 U.S. 828, 110 S.Ct. 95, 107 L.Ed.2d 59 (1989) (citation omitted).

"A defendant's use of collateral estoppel also extends to evidentiary facts. *United States v. Lee*, 622 F.2d 787, 789 (5th Cir.1980), cert. denied, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981). Hence, this court delineated two situations in which a criminal defendant may utilize collateral estoppel: '(1) [to] bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) ... [to] completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks.' *United States v. DeMarco*, 791 F.2d 833, 836 (11th Cir.1986)." *U.S. v. Harnage*, 976 F.2d 633, at 635 (11th Cir. 1992).

The Fourth Circuit clearly ignored the application of collateral estoppel in preventing the district court from imposing a sentence based on facts and circumstances previously litigated and adopted by both the government as a party and the sentencing court which adopted those facts on two separate accessions. First in the prior sentencing of the Petitioner for the exact events leading to the prior conviction for which he was now sentenced and during the trial of facts stipulated by the government and the Petitioner and admitted into evidence.

If the Government is bound by this stipulation then it can not support any reference the Petitioner used or possessed the firearm on November 6, 2015. If the

evidence is void on this issue, then the application of the cross reference to attempted murder can not be applied. This misapplication of the cross reference not only violated the Petitioner's Constitutional rights as protected by the Fifth Amendment against twice placed in jeopardy, but during the contested sentencing hearing the Government's evidence to defend the cross reference dispelled any notion the Petitioner was the shooter who harmed the victims or that he was in the vicinity where the firearm, subsequently found in his vehicle from the traffic stop in 2018, was used in this 2015 nightclub shooting. In essence the Petitioner's Rule 11 guilty plea with the stipulated facts were consistent with the evidence produced at the contested sentencing hearing.

The application of the cross reference to the 2015 shooting is reflected in the PSR. U.S.S.G. is Section Chapter 2K.2.1 (c) Cross Reference, which states as follows: If the defendant used or possessed any firearm or ammunition cited in the offense of conviction (emphasis added) in connection with the commission of another offense or possessed or transported a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply - (A) 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater that determined above;"

It is clear that the cross reference is available only if the .40 caliber firearm charged in Count One of the Second Superseding was used by the Petitioner and not some other individual in the commission of another offense. Here the facts as supported by the above evidence at the contested sentencing hearing established by a preponderance of the

evidence that the Petitioner was not in the proximity of the two victims when they were shot and that the caliber of the firearm used in that area was not the .40 caliber handgun found in the Petitioner's vehicle as charged in count 1.

"A sentencing court may apply [a Sentencing Guidelines] cross-reference ... to conduct amounting to a violation of state law." *U.S. v. Harnage*, 976 F.2d 633, at 635 (11th Cir. 1992).); see supra n. 1. It is well-settled that the Government has the burden to prove a cross-referenced offense by a preponderance of the evidence under U.S.S.G. § 2K2.1(c)(1)(A). *U.S. v. Harnage*, 976 F.2d 633, at 635 (11th Cir. 1992).; see also *Carroll,* 3 F.3d at 100 n. 3 (noting the preponderance of the evidence standard applicable for cross-referenced offense of aggravated assault)." *United States v. Davis*, 679 F.3d 177 (4th Cir. 2012). The government has failed to establish by a preponderance of the evidence its burden of proof that the cross reference to the attempted murder applies. As discussed herein the government has already stipulated that the defendant was just an after the fact aider and abetter and that the government could not establish who fired the gun found in his car.

"[A] sentence based on an improperly calculated guidelines range will be found unreasonable and vacated. Furthermore, because a correct calculation of the advisory Guidelines range is the crucial starting point for sentencing, an error at that step infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court." *United States v. Lewis*, 606 F.3d 193, 201 (4th Cir.2010)

"Contrary to the district court's suggestion that the cross reference "federalizes a state crime," the cross reference properly distinguishes "the culpability--and the resultant punishment--of a person who passively possesses a gun [from the one] who possesses that same gun but also uses it...." *United States v. Willis,* 925 F.2d 359, 361 (10th Cir.1991). The Commission did not exceed its authority; it merely provided the means to sentence a defendant found guilty of a federal offense in a manner that "reflect[s] the reality of the crime." Id. In applying the cross reference as directed by the guidelines, a sentencing court does not punish a defendant for a state offense over which a federal court has no jurisdiction. Instead, the cross reference allows the sentencing court to move within the guidelines range and to sentence up to the statutory maximum for the offense of conviction, an offense over which the court unquestionably has jurisdiction." *Cf. Corbin* No. 92-1459, 998 F.2d at 1384-85. *U.S. v. Carroll*, 3 F.3d 98 (4th Cir. 1993).

Here in addition to mis-applying the cross reference to the attempted murder in calculating the Petitioner's guideline sentence the District Court also expended its statutory authority. The maximum sentence for the cross reference to be available in sentencing is 120, not 300 months. Count one of the second superseding indictment which charged the Petitioner with illegally possessing the .40 caliber handgun capped his maximum sentence at 10 years. The Court stacked his sentence with other statutory maximums which had no relation to the .40 caliber firearm, but were charges of conspiracy in defrauding the government and in possessing another handgun.

CONCLUSION

The Court of Appeals failed to consider, by affirming the Petitioner's conviction, the violation of the Petitioner's Fourth Amendment protection against the warrant less search and seizure resulting in the discovery of a firearm in an illegal checkpoint traffic stop. The Court of Appeals failed to vacate the Petitioner's conviction based on the district court's jury instruction which mis stated the elements necessary to convict the Petitioner of being a felon in possession of a firearm. The Court of Appeals failed to vacate the district court's sentence of the Petitioner to a term which violated the Double Jeopardy Clause guaranteed by the Fifth Amendment.

For the reasons cited herein, the Petitioner respectfully requests this Court to grant the Petition for a writ of certiorari.

Respectfully submitted,

_____

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Counsel for Petitioner

Dated: January 22, 2024
Charleston, South Carolina

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4700

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

QUENTIN JOHN FISHBURNE, a/k/a Quinton John Fishburne, a/k/a Q,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (2:18-cr-00780-DCN-1)

Submitted: August 31, 2023 Decided: September 6, 2023

Before THACKER and HEYTENS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Albert P. Shahid, Jr., SHAHID LAW OFFICE, LLC, Charleston, South Carolina, for Appellant. Adair F. Boroughs, United States Attorney, Columbia, South Carolina, Christopher B. Schoen, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Quentin John Fishburne of two counts of possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e); and one count of conspiracy to transfer and dispose of firearms and ammunition to felons, in violation of 18 U.S.C. § 371. The district court sentenced Fishburne to 285 months of imprisonment, and he now appeals. We affirm.

On appeal, Fishburne first argues that the district court erred in denying his motion to suppress the Smith & Wesson firearm law enforcement obtained during a search of Fishburne's vehicle during a 2018 traffic checkpoint stop. Specifically, Fishburne asserts that the checkpoint was not reasonable, and thus, constituted a violation of the Fourth Amendment. In reviewing a district court's ruling on a motion to suppress evidence, we review legal conclusions de novo and the underlying factual findings for clear error, viewing the evidence in the light most favorable to the government. *United States v. Cloud*, 994 F.3d 233, 241 (4th Cir. 2021).

We apply a two-step analysis to determine whether a suspicionless police checkpoint is constitutional. *United States v. Moore*, 952 F.3d 186, 190 (4th Cir. 2020). "First, we must decide whether the checkpoint had a valid primary purpose." *Id.* Checkpoints conducted for the limited purpose of checking driver's licenses and motor vehicle registrations have been considered constitutionally permissible. *Id.* "Second, if the checkpoint had a valid primary purpose, we then proceed to judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Id.* (cleaned up).

The reasonableness of a checkpoint stop "is determined by balancing the gravity of the public interest sought to be advanced and the degree to which the seizures do advance that interest against the extent of the resulting intrusion upon the liberty interests of those stopped." *Id*. (cleaned up). Examining the intrusiveness of a checkpoint, we consider whether the checkpoint was clearly visible, whether there was a systematic procedure that strictly limited the discretionary authority of the police officers, and whether the drivers were detained no longer than necessary. *Id*. at 192.

Here, a police officer testified that the Walterboro Police Department conducted the checkpoint in response to complaints about speeding vehicles near a school. Officers also testified that the checkpoint was visible from 500 feet away, marked with a sign, and police vehicles were parked at the checkpoint with blue lights activated. Further, the officers explained that every vehicle was stopped, and drivers were only detained long enough for officers to check the driver's license, vehicle registration, and proof of insurance. Viewing the evidence in the light most favorable to the Government, we find no factual or legal error in the district court's finding that the checkpoint had a valid primary purpose and was reasonable. *See Moore*, 952 F.3d at 190-92; *see also Delaware v. Prouse*, 440 U.S. 648, 658 (1979).

Fishburne next argues that the district court erred in its answer to the jury's question regarding the § 922(g)(1) charges. During the deliberations, the jury asked whether it is illegal for a convicted felon to be in a vehicle with another individual who was legally carrying a firearm. Fishburne claims that the district court should have answered with a simple no, rather than the court's answer that it depended on the circumstances.

"We review a district court's decision to respond to a jury's question, and the form of that response, for an abuse of discretion." *United States v. Foster*, 507 F.3d 233, 244 (4th Cir. 2007). In line with a district court's general "obligation to give instructions to the jury that fairly state the controlling law," *United States v. Alvarado*, 816 F.3d 242, 248 (4th Cir. 2016) (brackets and internal quotation marks omitted), if a district court chooses to respond to a jury's request for clarification, its "duty is simply to respond to the jury's apparent source of confusion fairly and accurately without creating prejudice," *United States v. Savage*, 885 F.3d 212, 224 (4th Cir. 2018) (internal quotation marks omitted).

"Section 922(g)(1) does not require proof of actual or exclusive possession; constructive or joint possession is sufficient." *United States v. Lawing*, 703 F.3d 229, 240 (4th Cir. 2012) (internal quotation marks omitted). To establish actual possession, the Government had to prove that Fishburne "voluntarily and intentionally had physical possession of [a] firearm." *United States v. Al Sabahi*, 719 F.3d 305, 311 (4th Cir. 2013) (internal quotation marks omitted). To establish constructive possession, the Government had to show that Fishburne "intentionally exercised dominion and control over the firearm, or had the power and the intention to exercise dominion and control over the firearm." *Id.* (internal quotation marks omitted). The district court answered the question in a manner consistent with case law regarding joint and constructive possession. We therefore find no abuse of discretion.

Next, Fishburne argues that district court erred in denying his post-trial motion to dismiss the second superseding indictment and vacate his conviction because the indictment and the jury instructions were not sufficient under *Rehaif v. United States*, 139

S. Ct. 2191 (2019). Because Fishburne did not raise a timely objection to the sufficiency of the indictment or the jury instructions, we review for plain error. *See United States v. King*, 628 F.3d 693, 699 (4th Cir. 2011); *United States v. Jennings*, 496 F.3d 344, 351 (4th Cir. 2007). To establish plain error, an appellant must show: (1) an error, (2) that was plain, and (3) that affected his substantial rights. *United States v. Sanya*, 774 F.3d 812, 816 (4th Cir. 2014).

Fishburne has not met these standards. Under *Rehaif*, the government need only demonstrate that the defendant knew that he was a felon, not that he knew that he was barred from possessing firearms. *See, e.g., United States v. Moody*, 2 F.4th 180, 196-98 (4th Cir. 2021). The second superseding indictment and jury instructions properly listed this element. Moreover, Fishburne stipulated that during the relevant time period, he "knew that he had previously been convicted of a felony punishable by a term exceeding one year and was therefore prohibited from possessing a firearm." Thus, Fishburne has not established plain error in the district court's denial of his motion. *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) ("[A] *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.").

Finally, Fishburne asserts that the district court erred by applying a cross-reference to attempted murder when calculating his advisory Sentencing Guidelines range based on the Government's investigation tying the firearm seized at the checkpoint to a shooting

in 2015.* In evaluating a district court's calculation of the advisory Guidelines range, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. White*, 850 F.3d 667, 674 (4th Cir. 2017). "[A] sentencing court may consider uncharged and acquitted conduct in determining a sentence, as long as that conduct is proven by a preponderance of the evidence." *United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009). The court may also draw inferences from the evidence, so long as those inferences are not clearly erroneous. *See United States v. Kiulin*, 360 F.3d 456, 460 (4th Cir. 2004).

A Guidelines error is harmless—and, thus, does not warrant reversal—if "the record shows that (1) the district court would have reached the same result even if it had decided the Guidelines issue the other way, and (2) the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor." *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019) (alterations and internal quotation marks omitted). Here, the district court stated that the 285-month sentence was an appropriate sentence based on factors set forth in 18 U.S.C. § 3553(a), regardless of the advisory Guidelines range. *See United States v. Gomez-Jimenez*, 750 F.3d 370, 382-83 (4th Cir. 2014). Therefore, it is clear that the court would have reached the same sentence even if it had resolved Fishburne's challenge to the cross-reference in his favor.

* In asserting that the district court erred in applying the cross-reference, Fishburne argues that the court was limited by a stipulation regarding Fishburne's conduct in a prior conviction, that application of the cross-reference violated his privilege against double jeopardy, and that the count exceeded its authority in "stacking" the sentences of the offense of conviction. We reject those claims.

Under the second prong of this inquiry, when reviewing the substantive reasonableness of a sentence, we "must examine the totality of the circumstances . . . to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *Mills*, 917 F.3d at 331 (brackets and internal quotation marks omitted). "And while we presume that sentences within the advisory Guidelines range are substantively reasonable, even sentences that vary outside the Guidelines range are entitled to due deference." *Gomez-Jimenez*, 750 F.3d at 383.

The district court thoroughly considered the § 3553(a) factors, including the serious nature of the offenses, Fishburne's admitted membership in street gang known for violence, the need to protect the community, and Fishburne's extensive pattern of criminal activity, which included repeated use of firearms. In light of the district court's analysis of the § 3553(a) factors, the 285-month sentence is reasonable, even though it constitutes a significant upward variance from the otherwise-applicable advisory Guidelines range. *See United States v. Bolton*, 858 F.3d 905, 916 (4th Cir. 2017) (upholding upward variant sentence 25% higher than top of Guidelines range) (citing *United States v. Hernandez-Villanueva*, 473 F.3d 118, 123 (4th Cir. 2007) (upholding sentence three times as long as upper end of Guidelines range)). Thus, we conclude that any alleged error in applying the cross-reference was harmless.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
District of South Carolina

UNITED STATES OF AMERICA

vs.

QUENTIN JOHN FISHBURNE

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18-CR-00780-DCN-1

USM Number: 31137-171

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to Count(s) ___.
☐ pleaded nolo contendere to count(s) _____which was accepted by the court.
■ was found guilty on count(s) 1, 2, and 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:922(g)(1), 18:924(a)(2)	Please see 2nd Superseding Indictment	3/31/18	1
18:371	Please see 2nd Superseding Indictment	3/31/18	2
18:922(g)(1), 18:924(a)(2)	Please see 2nd Superseding Indictment	5/2/14	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

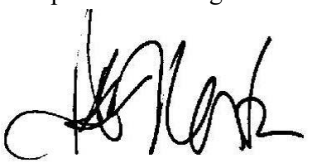
☐ The defendant has been found not guilty on count(s)_____.

■ Count(s) 3 ■is ☐ are dismissed on the motion of the United States.

☐ Forfeiture provision is hereby dismissed on motion of the United States Attorney.

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 any material changes in economic circumstances.

November 30, 2021
Date of Imposition of Judgment



Signature of Judge

DAVID C. NORTON , U.S. DISTRICT JUDGE
Name and Title of Judge

December 21, 2021
Date

DEFENDANT: QUENTIN JOHN FISHBURNE
CASE NUMBER: 2:18-CR-00780-DCN-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of TWO HUNDRED EIGHTY FIVE (285) months, consisting of 105 months as to Count 1, 60 months as to Count 2, and 120 months as to Count 5, all terms to run consecutively to each other. The defendant shall pay a $300.00 special assessment fee, due beginning immediately.

■ The court makes the following recommendations to the Bureau of Prisons: The defendant shall be designated to the facility closest to his home in South Carolina. He shall be screened for enrollment in the Bureau of Prisons 500 Hour Intensive Drug Treatment Program should he become eligible during his period of incarceration.

■ 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: QUENTIN JOHN FISHBURNE
CASE NUMBER: 2:18-CR-00780-DCN-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to each of counts 1, 2, and 5 to run concurrently. While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision and the following special conditions. 1. The defendant shall satisfactorily participate in and complete a Cognitive Behavioral Treatment Program as approved by the U.S. Probation Office. 2. The defendant shall participate in a program of testing for substance abuse as approved by the U.S. Probation Officer. 3. The defendant shall contribute to the costs of any treatment, drug testing and/or location monitoring not to exceed an amount determined reasonable by the court approved U.S. Probation Office's Sliding Scale for Services, and shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.

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 of 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: QUENTIN JOHN FISHBURNE
CASE NUMBER: 2:18-CR-00780-DCN-1

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 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 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, based on your criminal record, personal history or characteristics, that you pose a risk to another person (including an organization), the probation officer, with the prior approval of the Court, 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: QUENTIN JOHN FISHBURNE
CASE NUMBER: 2:18-CR-00780-DCN-1

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	**$300.00**	**$**	**$**		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* 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.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ 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 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: QUENTIN JOHN FISHBURNE
CASE NUMBER: 2:18-CR-00780-DCN-1

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 $300.00 special assessment due immediately.

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, or ☐ E, or ☐ F below: or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____(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:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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 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.

☐ 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:

As directed in the Preliminary Order of Forfeiture, filed 7/6/2021 and the said order is incorporated herein as part of this judgment.

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.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA, vs. QUENTIN JOHN FISHBURNE and RENATA SHONTEL ELLISON, Defendants.	)	No. 2:18-cv-0780-DCN **ORDER**

The following matter is before the court on defendant Quentin John Fishburne's ("Fishburne") motion to suppress, ECF No. 136. For the reasons set forth below, the court denies the motion.

I. BACKGROUND

The government jointly indicted Fishburne and Renata Shontel Ellison ("Ellison") for several offenses related to the alleged straw purchase of firearms and transfer of those firearms from Ellison, the purchaser, to Fishburne, who has previously been convicted of a felony, and others. Specifically, the indictment charges five counts against the defendants: Counts 1 and 5 charge Fishburne with knowingly possessing firearms after having been convicted of a felony in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e); Count 2 charges both Fishburne and Ellison with conspiracy to transport firearms to persons who have previously been convicted of felonies in violation of 18 U.S.C. § 922(d)(1); Count 3 charges both Fishburne and Ellison with knowingly making false statements in connection with the conspiracy to unlawfully obtain and sell firearms in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2); and Count 4 charges Ellison with

knowingly transferring a firearm to Fishburne, who had previously been convicted of a felony, in violation of 18 U.S.C. §§ 922(d) and 924(a)(2).

On March 31, 2018, Fishburne, travelling down Hires Corner Road in Walterboro, South Carolina, came to stop at traffic safety checkpoint. Police arrested Fishburne after a search of his vehicle revealed a .40 caliber Smith & Wesson M&P Shield pistol (the "S&W .40") under the vehicle's front seat. This initial arrest gave rise to the current action against Fishburne and Ellison. Further, the S&W .40 forms the basis for Fishburne's Count 1 charge for felony possession of a firearm. This motion to suppress challenges the legally of the initial stop of Fishburne's vehicle pursuant to the traffic safety checkpoint.

Many of the facts surrounding the stop of Fishburne's vehicle are in dispute. The following facts, however, are not. On March 31, 2018, police officers Brandon A. Duboise ("Duboise"), Robert Cook ("Cook"), and Riley[1] operated a checkpoint near the intersection of Hiers Corner Road and Center Street in Walterboro, South Carolina. Around 3:15 in the afternoon, Fishburne, travelling down Hiers Corner Road, stopped his vehicle at the traffic checkpoint and encountered Duboise. Duboise motioned for Fishburne to roll down the window, and when Fishburne partially rolled his window down in response, Duboise asked for Fishburne's license and registration. At that point, Duboise claims to have smelled the odor of marijuana emanating from Fishburne's vehicle. Duboise then directed Fishburne to pull his vehicle to a grassy area beside Center Street, approximately 100 feet from the initial stop, so that it could be searched. After Fishburne pulled over, Cook and Riley approached Fishburne's vehicle to assist

[1] Officer Riley's first name does not appear in the record.

Duboise in the search. Fishburne exited the vehicle, and Duboise patted Fishburne down but did not find any contraband on his person. Duboise and Cook proceeded to search Fishburne's vehicle. During the search, Duboise asked Cook if he could smell marijuana, to which Cook responded "faintly." Duboise then found the S&W .40 under the front passenger seat of the vehicle, and the officers arrested Fishburne. Body camera video from Cook's body camera captured a significant portion of the interaction between Fishburne and the police officers. However, Duboise did not activate his body camera during the interaction, so no footage is available until Cook arrived on the scene.

On February 5, 2020, Fishburne filed a motion to suppress. ECF No. 136. On February 10, 2020, Fishburne amended his motion to suppress. ECF No. 140. The same day, the government filed a response. ECF No. 141. A hearing on the suppression motion was held on February 12, 2020, where the court received evidence relevant to the checkpoint seizure of Fishburne. The court has considered the evidence, and the motion to suppress is now ripe for the court's review.

II. DISCUSSION

Fishburne argues that his initial stop pursuant to the police checkpoint violated his Fourth Amendment right against unreasonable searches and seizures, such that the S&W .40 discovered in his vehicle should be excluded as the fruit of an unconstitutional seizure.[2] According to Fishburne, "the stop was made on the discretion of Officer

[2] Fishburne's motion challenges the constitutionality of the initial stop of Fishburne's vehicle pursuant to the police checkpoint; Fishburne does not independently challenge the constitutionality of the police ordering Fishburne to the side of the road, nor does he challenge the subsequent search of the vehicle. Therefore, the court only analyzes the constitutionality of the searches and seizures that occurred after the initial stop of Fishburne's vehicle to the extent that they are tainted by the unconstitutionality of the initial checkpoint stop.

Duboise [without reasonable suspicion] under the guise of a traffic checkpoint." ECF No. 140 at 2. In response, the government contends that the checkpoint passes constitutional muster because it was minimally intrusive, operated in substantial compliance with the Walterboro Police Department's ("WPD") checkpoint policies, and supported by the legitimate primary purpose of traffic safety. Based on the evidence received at the suppression hearing, the court finds that the police checkpoint was a reasonable intrusion into the privacy interests of motorists and thus constitutional.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000). Generally, a seizure is reasonable only if based on probable cause, Rogers v. Pendleton, 249 F.3d 279, 290 (4th Cir. 2001) (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)), or, depending on the seizure's purpose and brevity, reasonable suspicion, see Terry v. Ohio, 392 U.S. 1, 28–29 (1968).

However, the Supreme Court has upheld seizures of persons pursuant to police checkpoints even where the stops were not supported by any degree of individualized suspicion. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (checkpoint for the purpose of removing drunk drivers from the road); United States v. Martinez—Fuerte, 428 U.S. 543 (1976) (border patrol checkpoint designed to intercept unlawfully entering foreigners); see also Delaware v. Prouse, 440 U.S. 648 (1979) (suggesting in dicta that a checkpoint with the purpose of verifying drivers' licenses and vehicle registrations would be permissible). Courts must determine the constitutionality of a

suspicion-less, traffic-stop seizure "by balancing its intrusion on the individual's Fourth Amendment interests against [the checkpoint's] promotion of legitimate governmental interests." Prouse, 440 U.S. 648 at 654–655.

The Fourth Circuit has outlined the procedure for determining the constitutionality of a police checkpoint:

> In determining the constitutionality of a checkpoint, the court must inquire into both the primary purpose and the reasonableness of the checkpoint. If the primary purpose of the checkpoint was to advance "the general interest in crime control," it is per se invalid under the Fourth Amendment. If the primary purpose was valid, the court must then judge the checkpoint's reasonableness on the basis of individual circumstances. This requires balancing "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Factors to weigh intrusiveness include whether the checkpoint: (1) is clearly visible; (2) is part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) detains drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity.

United States v. Henson, 351 F. App'x 818, 820–21 (4th Cir. 2009) (internal citations omitted). Thus, the court must first analyze the legitimacy of the primary purpose for the police checkpoint at issue. Then, if the court finds that purpose legitimate, it must employ the intrusiveness factors to balance that legitimate purpose against the checkpoint's interference with individual liberty.

The government contends that the checkpoint in this case served the legitimate purpose of traffic safety. The checkpoint was located on Hiers Corner Road. Forrest Hills Elementary School is located on one side of Hiers Corner Road, and a preschool is located on the other. The government contends that safety is a concern on Hiers Corner Road because the road "is often used as a cut-through between Highway 15 and Highway 64, and WPD had received a lot of complaints from residents of the neighborhood about

drivers speeding in the area." ECF No. 141 at 5. At the hearing, Cook testified to the primary purpose of the checkpoint:

> Q. Can you tell us what -- what led you guys to do your traffic checkpoint in this particular place?
>
> A. Yes, sir. If you look on the map, you see a Forest Hills Preschool, and directly across that is a Forest Hills Elementary School. We were getting complaints from the residents as well as the parents whose children went to the school about speeders in the area.

ECF No. 144, Tr. 6:7–13. Additionally, Corporal Albert Sweat[3] ("Sweat"), who gave verbal authorization for the checkpoint, testified that to the primary purpose of the checkpoint and that the WPD had received complaints of speeding from concerned citizens in the area.

> Q. Now, Corporal Sweat, do you remember a traffic checkpoint that was set up around March 31st, 2018, on Hiers Corner?
>
> A. Yes, ma'am.
>
> Q. And did you provide approval for that checkpoint?
>
> A. Yes, ma'am.
>
> Q. How was that approval given?
>
> A. Sergeant Cook came to me and inquired about setting up a checkpoint on the location of Hiers Corner and Center Street. Any time a checkpoint is asked to be conducted, I check the records to see what kind of traffic volume and traffic complaints we have in that area to see if it's -- deems a traffic checkpoint necessary. I checked my records through complaints of the neighborhood. Forest Hills has their own Facebook page that constantly complains about traffic and police visibility, so I approved the checkpoint for that area.

[3] Sweat is now a corporal with the Jasper County Police Department. At the time of the events in question, however, he was a captain with the WPD.

Id. at 63:23–64:12. Further, Officer Cook testified that the WPD has set up similar checkpoints along Hiers Corner Road in the past to deter unsafe driving. Id. at 53:11–13 ("And had you run checkpoints in this particular neighborhood before? A. Yes, sir, we have.").

The Fourth Circuit has found that a checkpoint's primary purpose "to promote traffic safety by allowing police to check drivers' licenses and vehicle registration" is legitimate. Henson, 351 F. App'x at 821; see also Prouse, 440 U.S. at 658–659 (stating in dicta that a checkpoint with the purpose of verifying drivers' licenses and vehicle registrations would be permissible). Therefore, in light of the evidence of traffic safety concerns on Hiers Corner Road, which were heightened by the presence of nearby schools, the court finds that the checkpoint's primary purpose of traffic safety is a legitimate purpose.

Further, the intrusiveness factors weight in favor of the checkpoint's constitutionality. As to the first factor—the visibility of the checkpoint—Fishburne contends that the traffic stop was not visible: "The checkpoint was located at the end of a curve[,] making it impossible for an oncoming motorist to have a safe visual warning of its presence." ECF No 140 at 6. Further, Fishburne notes that "there is no supporting documentation that a warning sign was erected in the distance dictated by the WPD policy." Id. In support of his contention, Fishburne presented photographs at the hearing depicting a curve on Hiers Corner Road, which the was between 400 and 500 feet away from the intersection of Hiers Corner Road and Center Street, where the checkpoint was located.

In response, the government presented testimony from the officers that the checkpoint was marked with signs along Hiers Corner Road, that officers at the checkpoint wore reflective vests, and that police vehicles were parked at the checkpoint with blue lights illuminated. The government produced a picture of the sign that Duboise testified he used to mark the checkpoint. Gov. Ex. 8. Finally, the government presented photographs and elicited testimony from Duboise that the checkpoint could be seen from over 500 feet away.[4]

> Q. What's Government's Exhibit 6?
>
> A. This is actually me walking down. This is at 500 feet from the patrol car. I turned around, and you can plainly see where the patrol car is at 500 feet.
>
> Q. Where did you park your car?
>
> A. It's parked right on Center Street.
>
> . . .
>
> Q. So based on your measurement, you can see the intersection of Center Street from 500 feet down Hiers Corner; is that correct?
>
> A. Yes, sir.

ECF No. 145, Tr. 79:23–80:12. Based on the evidence, the court finds that the checkpoint was sufficiently visible to alert oncoming motorists, which weighs in favor of the checkpoint's constitutionality.

The second factor—whether the checkpoint was part of some systematic procedure that strictly limited the discretionary authority of police officers—also favors the government. The parties agree that WPD has a policy for traffic safety checkpoints.

[4] The court notes that a vehicle traveling 30 miles-an-hour, the speed limit on Hiers Corner Road, would arrive at the checkpoint more than eleven seconds after it became visible from 500 feet away.

The government has presented the policy. See ECF No. 141-1. The parties disagree, however, as to whether the officers adhered to that policy during their operation of the checkpoint. Based on the evidence presented at the suppression hearing, the court finds that the checkpoint was operated in substantial compliance with the WPD's policies, especially with respect to the aspects of the policy that limited the officers' discretionary authority.

Before the court delves into the substance of the policy provisions at issue, it wishes to clarify a point of law. The second factor of the intrusiveness test is whether the checkpoint "is part of some systematic procedure that strictly limits the discretionary authority of police officers." Henson, 351 F. App'x at 820–21 (citing United States v. McFayden, 865 F.2d 1306, 1312 (D.C. Cir. 1989)). While courts consider whether the police officers operating the checkpoint complied with a systematic procedure governing the checkpoint, that compliance with checkpoint policy is only legally significant to the extent that the policy "limit[s] the discretionary authority of police officers." In other words, evidence that a police officer violated a checkpoint policy in a way that has no bearing on his discretionary authority to invade privacy rights has little significance in determining whether the checkpoint was minimally intrusive. Evidence that an officer may have violated his police department's policy in operating a checkpoint does not render the checkpoint unconstitutional. The court will consider policy violations to the extent that they affect the operating officer's discretionary authority. Benign violations of checkpoint policy, however, have little constitutional significance. In short, the WPD does not determine the standards for a police checkpoint's constitutionality; the Supreme Court does.

The parties dispute whether officers complied with two provisions of WPD policy. First, the WPD traffic checkpoint policy states: "The location [of the checkpoint] must allow the checkpoint to be seen by approaching motorists at a minimum of 500 feet in each direction. It must not be set up in a curve." ECF No. 141-1 at 2. Second, the WPD body worn camera ("BWC") policy states: "BWCs must be worn and activated by officers at a call for service or initiates [sic] any other law enforcement or investigative encounter between and [sic] officer and member of the public, including but not limited to: . . . (b) Traffic Stops . . . (d) Suspicious persons . . . ." ECF No. 143-2 at 2.

As to the first policy provision, the court has already discussed the evidence both parties presented with respect to the checkpoint's visibility: Fishburne presented a photograph which he represented was taken from a distance of between 400 and 500 feet in which the intersection where the checkpoint was located was not visible. However, as the government pointed out, the picture indicated that the camera was angled away from the intersection, making visibility impossible. More compelling were the photographs presented by the government, which the government represented were taken more than 500 feet away from the intersection and in which a police cruiser at the intersection of Hiers Corner and Center Street was visible. Moreover, even if the checkpoint did violate this provision of the policy, such a violation speaks more to the visibility of the checkpoint than to the officers' compliance with a policy that "limit[s] the[ir] discretionary authority."

Fishburne also pointed out that officer Duboise violated WPD's BWC policy when he failed to activate his camera during his interaction with Fishburne. As Fishburne correctly points out, the WPD BWC policy required Duboise to activate his

body camera, because the interaction constituted a "traffic stop" and the smell of marijuana had rendered Fishburne a "suspicious person" with respect to the policy. Duboise testified that his failure to turn on his BWC was a mistake.

> Q. Do you know why you didn't turn your body camera on or don't have footage from that encounter with Mr. Fishburne when you're searching him?
>
> A. That particular day, I had my safety vest on which covers pretty much my whole -- everything I wear, so when I push the button, I can't visibly see if it's on or not, and like I said, I was worried about Mr. Fishburne, if there was anything in the car, safety reasons. I never did look down to confirm it was on.
>
> Q. Okay. So did you intend to put the body camera on?
>
> A. From what I recall, I'd mashed the button through the safety check -- the actual safety vest.
>
> Q. Okay. And you just don't know why it didn't turn on?
>
> A. I don't know why.

ECF No. 140, Tr. 84:2–15. The court finds that this likely mistake does not render the traffic checkpoint unconstitutional. Duboise's failure to activate his BWC after the initial stop of Fishburne has no bearing on whether the policies in place limited his discretionary authority to invade the privacy interests of individuals. Moreover, concerns about Duboise's credibility based on his failure to activate his BWC are mitigated by the fact that Cook's BWC captured the majority of the interaction. These violations of a WPD BWC policy do not convince the court that the traffic safety checkpoint was unconstitutional.

Additionally, the government presented evidence that the checkpoint was operated in substantial compliance with the WPD checkpoint policy. Officers testified that signs were erected on Hiers Corner Road to warn oncoming motorists of the

checkpoint, that the checkpoint was operated by three officers, and that the officers received authorization for the checkpoint from their superior, Sweat. Each of these acts followed WPD policy. Most importantly, the government presented evidence that the officers had no discretionary authority to select which vehicle to stop.

> Q. What was your protocol in determining which vehicles you stopped?
>
> A. Every vehicle.
> Q. Every single vehicle that came to the traffic checkpoint?
>
> A. Yes, sir.
>
> Q. And what was it that you did when a vehicle approached that traffic –
>
> A. We would ask for a driver's license, proof of insurance, and registration.

Id. at 11:18–12:1. Fishburne did not present any evidence which indicates that the officers had any discretion in making the checkpoint stops. Therefore, the second factor weighs in favor of the checkpoint's constitutionality.

As to the third factor—whether the stop detains drivers for no longer than necessary—the government contends that "except where other facts immediately gave them reasonable suspicion to extend the stop or probable cause to search, [the officers] detained drivers no longer than necessary to check licenses and registrations." ECF No. 140. Officers at the hearing testified that they stopped drivers long enough to check their driver's license, registration, and proof of insurance. Absent circumstances giving rise to probable cause, the officers then allowed drivers to continue. Fishburne did not dispute the length of time officers detained each stopped driver. Therefore, the third factor weighs in favor of constitutionality.

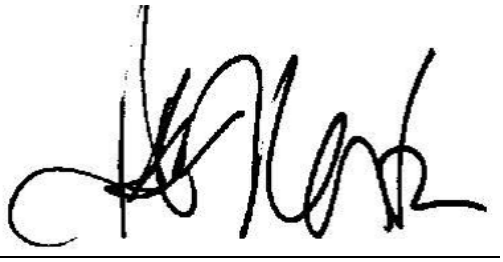
In sum, the court finds that the checkpoint had a legitimate primary purpose and was no more intrusive than necessary to serve that purpose. Thus, the checkpoint passes

constitutional muster, making the initial checkpoint seizure of Fishburne constitutional. Fishburne's motion to suppress is therefore denied.

III. CONCLUSION

For the foregoing reasons, the court **DENIES** Fishburne's motion to suppress.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

February 24, 2020
Charleston, South Carolina

FILED: October 24, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4700
(2:18-cr-00780-DCN-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

QUENTIN JOHN FISHBURNE, a/k/a Quinton John Fishburne, a/k/a Q

Defendant - Appellant

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Thacker, Judge Heytens, and Senior Judge Keenan.

For the Court

/s/ Nwamaka Anowi, Clerk