
IN THE
SUPREME COURT OF THE UNITED STATES

MELVIN MCGREGOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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United States Court of Appeals For the First Circuit

No. 17-1142

UNITED STATES,

Appellee,

v.

MELVIN MCGREGOR,

Defendant, Appellant.

Before

Lynch, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: January 18, 2018

Appellant Melvin McGregor appeals from the amended judgment the district court entered after granting his 28 U.S.C. § 2255 motion and resentencing him. During resentencing, the district court determined that McGregor still qualified as an armed career criminal after Johnson v. United States, 135 S. Ct. 2551 (2015), and sentenced him to the statutory mandatory minimum of 15 years for his 18 U.S.C. § 922(g) conviction. See 18 U.S.C. § 924(e). The government has moved for summary affirmance.

Having considered fully the arguments set out in McGregor's opening brief, we conclude, based on prior precedent, that the appeal does not present a "substantial question" and that the district court did not err. See Local Rule 27.0(c); see also United States v. Edwards, 857 F.3d 420, 422-27 (1st Cir.), cert. denied, 138 S. Ct. 283 (2017) (affirming finding of armed career criminal status based, in part, on same predicate offense challenged by appellant); United States v. Whindleton, 797 F.3d 105, 108 (1st Cir. 2015) (de novo review of legal question whether offense qualifies as ACCA predicate).

The government's motion for summary affirmance is **GRANTED**, and the judgment of the district court is **AFFIRMED**.

By the Court:

/s/ Margaret Carter, Clerk

cc:

William W. Fick

Melvin McGregor

Christopher John Pohl

Mark T. Quinlivan

Dina Michael Chaitowitz

Amy E. Condon

David M. Jellinek

**United States District Court
District of Massachusetts**

United States of America,	)	
v.	)	Criminal Action No.
Melvin McGregor	)	07-10312-NMG
Defendant.	)	

MEMORANDUM & ORDER

GORTON, J.

Defendant Melvin McGregor ("defendant") pled guilty in May, 2009, to one count of felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Defendant was originally sentenced as armed career criminal to 188 months incarceration followed by three years of supervised release.

In June, 2016, defendant petitioned to vacate his sentence pursuant to 28 U.S.C. § 2255 based upon the decision in Johnson v. United States, 135 S. Ct. 2551 (2015) ("Johnson II"). The government was granted an extension of time to respond to the petition but missed the court-imposed deadline despite a posted reminder on the docket. It belatedly moved for an additional extension of time and filed its opposition to the petition on September 16, 2016. The government was admonished for its dilatory conduct and the Court allowed defendant's petition and vacated his sentence in October, 2016.

Initially scheduled as a re-sentencing, the Court held a hearing on December 22, 2016, during which the parties debated defendant's status as an armed career criminal. Because the determination of that issue is critical to the re-sentencing and the subject of significant current jurisprudential debate, the Court postponed the re-sentencing and took the matter under advisement.

Defendant's status under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is the subject of this memorandum.

I. The ACCA Predicate Offenses at Issue

The following four offenses were identified in the 2009 Pre-sentence Report ("PSR") as predicate offenses under the ACCA:

- 1) Possession with Intent to Distribute a Class A Controlled Substance (§ 43 of the PSR);
- 2) Possession with Intent to Distribute a Class A Controlled Substance (§ 45);
- 3) Assault and Battery; Assault and Battery with a Dangerous Weapon (§ 46) and
- 4) Armed Assault with Intent to Murder; Assault and Battery with a Dangerous Weapon (§ 49).

The two drug-related offenses are not challenged in defendant's § 2255 petition. Defendant contends, however, that the convictions for assault and battery with a dangerous weapon and armed assault with intent to murder are not ACCA predicate offenses.

A. Assault and Battery with a Dangerous Weapon

Defendant's reliance on United States v. Fish, 758 F.3d 1 (1st Cir. 2014), for the proposition that assault and battery with a dangerous weapon ("ABDW") is not an ACCA predicate offense is no longer well-founded. The First Circuit Court of Appeals ("First Circuit") has since held that its language in Fish with respect to whether ABDW is a crime of violence under the "force clause" of the ACCA was dicta. United States v. Fields, 823 F.3d 20, 35 n.12 (1st Cir. 2016). Moreover, on December 1, 2016, the First Circuit concluded that an intentional form of ABDW is a crime of violence within the meaning of the ACCA. United States v. Tavares, 843 F.3d 1, 13 (1st Cir. 2016). The First Circuit also found that the intentional and reckless forms of ABDW are divisible but it chose not to determine whether the reckless form qualifies as a crime of violence under the ACCA. Id. at 19.

Thus First Circuit law now confirms that if the government can provide Shepard-approved documents showing that a defendant's ABDW conviction was based on the intentional version of the offense, the conviction qualifies as an ACCA predicate offense. See id. at 20. Even if the government cannot provide those documents in this case, it appears to this judicial

officer that the First Circuit is predetermined to recognize that any form of ABDW is an ACCA predicate offense.

For example, United States District Judge William G. Young recently held that ABDW is a predicate offense under the ACCA. His opinion was issued before the First Circuit's decision in Tavares but he applied consistent reasoning to conclude that the intentional and reckless forms of ABDW were violent crimes under the ACCA. United States v. Webb, Docket Nos. 01-10267, 06-10251, 2016 WL 6647929, at *10-12 (D. Mass. Nov. 9, 2016).

Both the First Circuit and Judge Young found instructive a decision by the United States Supreme Court concluding that a misdemeanor crime of domestic violence involving reckless conduct was a crime of violence in the context of a statute prohibiting someone "who had committed a misdemeanor crime of violence from possessing a firearm." Id. at *12 (citing Voisine v. United States, 136 S. Ct. 2272, 2276-78 (2016)).

In light of 1) the First Circuit's classification of the relevant Fish decision language as dicta and 2) persuasive authority of an esteemed jurist, this Court finds that ABDW is a crime of violence and thus a predicate offense under the ACCA.

B. Armed Assault with Intent to Murder

Since the Supreme Court's decision in Johnson II, there has been no published authority discussing armed assault with intent to murder in the context of the ACCA.

At the hearing on December 22, 2016, defendant relied primarily on a decision from the bench by Senior United States District Judge Douglas P. Woodlock that armed assault with intent to murder is not a crime of violence under the ACCA. At the sentencing hearing in United States v. Edwards, Docket No. 13-10342 (D. Mass. Oct. 13, 2015), Judge Woodlock declined to find that armed assault with intent to murder was an ACCA predicate offense only because there was no binding authority from the First Circuit on that issue (Tr. of Sentencing Hearing 32, ECF No. 155).

The government contends in its opposition memorandum here that the “proof of assault (while armed with a dangerous weapon) and a specific intent to kill that equates with malice,” Commonwealth v. Vick, 910 N.E.2d 339, 350 (Mass. 2009), eliminates the possibility that a defendant could be convicted of the subject crime merely by committing an attempted or threatened “offensive touching.” See United States v. Martinez, 762 F.3d 127, 138 (1st Cir. 2014) (concluding that the crime of assault was not a violent felony under the ACCA because it could involve attempted or threatened offensive touching).

The government further explains that an intent to kill may be inferred from a defendant’s conduct, Commonwealth v. Hansen, 476 N.E.2d 947, 952 (1985), and it is implausible that such intent could be inferred by a simple “offensive touching”.

Despite Judge Woodlock's conclusion, this Court finds the government's reasoning persuasive and concludes that armed assault with intent to murder is an ACCA predicate offense.

Because the Court finds that both ABDW and armed assault with intent to murder are ACCA predicate offenses, it concludes that defendant must be re-sentenced as an armed career criminal. This conclusion is reinforced by the fact that only one of those crimes must be found to be a predicate offense when combined with defendant's two unchallenged drug offenses. See 18 U.S.C. § 924(e)(1) (noting that three predicate offenses suffice to classify a defendant as an armed career criminal).

ORDER

For the forgoing reasons, the Court will re-sentence the defendant, at the appointed time, as an armed career criminal.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated January 10, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

* * * * * 07CR10312-NMG
UNITED STATES OF AMERICA *
VS. * JANUARY 18, 2017
* 11:23 A.M.
MELVIN McGREGOR *
* * * * * BOSTON, MA

BEFORE THE HONORABLE NATHANIEL M. GORTON
DISTRICT JUDGE
(Re-sentencing)

APPEARANCES:

FOR THE GOVERNMENT: GLENN A. MacKINLAY, AUSA
United States Attorney's Office
One Courthouse Way
Suite 9200
Boston, MA 02210

FOR THE DEFENDANT: WILLIAM W. FICK, ESQ.
Fick & Marx LLP
7th Floor
100 Franklin Street
Boston, MA 02110

Court Reporter: Debra D. Lajoie, RPR-FCRR-CRI-RMR
One Courthouse Way
Boston, MA 02210

Proceeding reported and produced
by computer-aided stenography

1 18 JANUARY 2017 -- 11:23 A.M.

2 THE CLERK: This is Criminal Action
3 No. 07-10312, the United States of America vs.
4 Melvin McGregor.

5 Will Counsel please identify themselves for the
6 record.

7 MR. MacKINLAY: Good morning, Your Honor.
8 Glenn MacKinlay on behalf of the Government.

9 THE COURT: Good morning, Mr. MacKinlay.

10 MR. FICK: Good morning, Your Honor.
11 William Fick for Mr. McGregor.

12 THE COURT: Mr. Fick and Mr. McGregor.

13 I would just remind Counsel that you're going to
14 have to speak into those microphones, so that you
15 actually don't have to stand. If it would be easier
16 for you speak into the microphones, you can just remain
17 seated.

18 We also have Ms. Walls from Probation with us
19 this morning.

20 And we are here on what has been scheduled as a
21 re-sentencing for Mr. Melvin MacGregor, and as we all
22 know, we had a hearing back in December, on
23 December 22nd, at which point, the matter of the issue
24 of -- that the so-called *Johnson* issue was debated, and
25 the Court at that point took the matter under

1 advisement and said that it would have a short
2 postponement and then a re-scheduling.

3 Since that time, the Court has entered a
4 memorandum and order dated January 10th of 2017 in
5 which it concluded, after further consideration, that
6 it was, under First Circuit law, compelled to
7 re-sentence the Defendant as an armed career criminal.
8 I have given copies -- or, obviously, Counsel have
9 received copies and read that memorandum and order, so
10 we are now here for the re-scheduling.

11 I understand the Government may or may not have
12 a request of the Court not to re-sentence the
13 Defendant. Do you wish to address that, Mr. MacKinlay?
14 And I understand you're standing in for Mr. Pohl who is
15 the assigned Assistant United States Attorney; is that
16 right?

17 MR. MacKINLAY: I am filling in for Assistant
18 US Attorney Mr. Pohl, Your Honor, and that the
19 Government is prepared to proceed with the
20 re-sentencing, and we'll have a recommendation for the
21 Court.

22 THE COURT: All right. Mr. Fick, do you wish to
23 address the issues before we proceed?

24 MR. FICK: I think just, in an abundance of
25 caution, to preserve the record for the First Circuit,

1 I need to orally state that I maintain or preserve the
2 objection to the finding that Mr. McGregor remains an
3 armed career criminal.

4 Specifically, I object to the Court's finding
5 that PSR Paragraphs 46 and 49, the offenses described
6 therein, the, in particular, assault and battery with a
7 dangerous weapon and armed assault with intent to
8 murder. It's my contention that, in light of *Johnson*,
9 those offenses no longer qualify as violent felonies
10 under either the force clause or the residual clause of
11 the Armed Career Criminal Act, and for that reason,
12 Mr. McGregor is not an armed career criminal, and the
13 mandatory minimum does not apply, and he would have
14 over-served, then, the maximum sentence.

15 I understand the Court has found otherwise, but
16 simply, again, to preserve the record for the appeal
17 that likely will follow, I articulate those positions.

18 THE COURT: Yes. Thank you, Mr. Fick.

19 Does the Government wish to respond to that?

20 MR. MacKINLAY: No, Your Honor. We will,
21 obviously, have had an opportunity to read the Court's
22 order and findings relative to those two predicate
23 offenses and is in agreement with the Court's finding
24 and believes that the Defendant is an armed career
25 criminal and should be sentenced as such.

1 THE COURT: All right. Do Counsel have any
2 disagreement with the understanding of the Court that,
3 even though this is a re-sentencing, I do not need to
4 go back through and make the same findings that I made
5 the first time around, in other words, I don't have to
6 deal with the objections? I think we agreed back eight
7 years ago that they were informational only, so we
8 didn't actually make rulings on those objections, but I
9 take it there's no move at this stage to re-open that
10 subject matter; is that right, Mr. Fick?

11 MR. FICK: I think that's right, Your Honor.
12 The operative issue here really is simply whether the
13 Armed Career Criminal Act is triggered and what the
14 ultimate sentence should be, without revisiting
15 everything else that's already been litigated.

16 THE COURT: All right. Do you agree with that,
17 Mr. MacKinlay?

18 MR. MacKINLAY: The Government agrees,
19 Your Honor.

20 THE COURT: All right. Then, the Court will,
21 just simply by reference, adopt all of its findings
22 made at the original sentencing, the date of which I
23 have here somewhere.

24 MR. FICK: I believe October 1st of '09,
25 Your Honor, was that date.

1 THE COURT: Thank you. October 1st of 2009.
2 Thank you, Mr. Fick.

3 And, therefore, we came to the conclusion at
4 that time that the guideline range for sentencing was
5 188 to 235 months, that the Defendant was subject to a
6 mandatory minimum sentence of 15 years, or 180 months,
7 and the Court at that time imposed a sentence of
8 188 months, being the low end of the guideline range.

9 I will hear now recommendations for sentencing
10 first from the Government, Mr. MacKinlay.

11 MR. MacKINLAY: Your Honor, the Government's
12 position is that the Court should re-impose the
13 original sentence that the Court imposed in this
14 matter, and that is the low end of the guideline
15 sentencing range that was applicable to Mr. McGregor, a
16 sentence of 188 months' imprisonment, followed by three
17 years of supervised release, and a \$100 special
18 assessment.

19 The Government will not belabor the reasons,
20 Your Honor, and certainly the Court's well aware of
21 them, and the reasons would be as stated during the
22 course of the original sentencing hearing, Your Honor,
23 and the Government's position is, is an armed career
24 criminal, and given his criminal record, that the low
25 end of the guidelines is appropriate, and given the

1 mandatory minimum of 180 months, it's the appropriate
2 sentence for this particular Defendant, Your Honor.

3 THE COURT: All right. Mr. Fick.

4 MR. FICK: In light of the Court's finding on
5 the armed career criminal, Your Honor, I would urge a
6 sentence at the mandatory minimum of 180 months, rather
7 than the 188 that was originally imposed.

8 It's not a giant difference of course, eight
9 months, but it is something, and I think it's worth
10 considering in this case in particular because of what,
11 from all accounts, is a very, very positive
12 institutional adjustment exhibited by Mr. McGregor
13 while in custody.

14 He's at a low-security facility, he's had no
15 disciplinary history whatsoever since 2010, and even
16 that was minimal, he's gotten his GED, he's
17 participated in classes, he's worked. He's really done
18 everything we would hope and expect someone sentenced
19 to a term of incarceration, in particular a lengthy
20 one, would do, and I think that is worth recognizing by
21 imposing the mandatory minimum rather than the
22 guideline sentence.

23 There's certainly ample authority for the Court
24 to do that. I think the leading case in the
25 First Circuit is actually a case out of this Court

1 that -- in which I was involved as Counsel. It's the
2 *Bryant* case, the second time around. That was a
3 situation where the Defendant was re-sentenced, and the
4 Court, this Court, did make an adjustment in light of
5 his performance, his good performance, while in
6 custody. And that was after -- well, initially, the
7 Court had declined to do that, thinking there was no
8 authority to do so. The First Circuit reversed, and
9 upon re-sentencing, the Court did in fact impose a
10 lower sentence than had been imposed originally.

11 Again, here, I think eight months is a very
12 modest adjustment, but in light of Mr. McGregor's
13 excellent institutional history, I would suggest that
14 is the fair, appropriate sentence that is greater --
15 that is sufficient but no greater than necessary, in
16 light of the mandatory minimum.

17 THE COURT: All right. Thank you, Mr. Fick.

18 Does the Defendant wish to address the Court
19 before he is re-sentenced, Mr. McGregor?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: All right.

22 THE DEFENDANT: No.

23 THE COURT: Do Counsel know of any reason why
24 the Court ought not re-sentence Mr. McGregor at this
25 time?

1 MR. MacKINLAY: No, Your Honor.

2 MR. FICK: No, Your Honor.

3 THE COURT: All right. Before I impose
4 re-sentence -- before I re-sentence this Defendant, I
5 will just briefly explain how we got here.

6 The Court is not going to dismiss the
7 Defendant's habeas petition and simply re-impose the
8 original sentence. The Court's allowance of the
9 Defendant's habeas petition will stand, and consistent
10 with this Court's memorandum and order dated
11 January 10th, 2017, the Court will proceed with this
12 re-sentencing.

13 Although, when the Court first considered
14 Defendant's petition for habeas corpus relief, it did
15 not have the benefit of the Government's opposition,
16 the Government having missed the extended deadline for
17 filing such opposition by four weeks, upon further
18 consideration -- I'm going to try to wait until the
19 interruption at the prison facility is completed.

20 As I said, upon further consideration of the
21 critical *Johnson* issues and at and after the
22 December 22, 2016 hearing, the Court has concluded, as
23 described more fully in its memorandum dated
24 January 10th, 2017, that the Defendant should be
25 re-sentenced as an armed career criminal.

1 Because, first, the Defendant completed his GED
2 while incarcerated; second, his disciplinary history is
3 minimal; third, he has shown real progress toward
4 rehabilitation while incarcerated; and, fourth, because
5 of the opportunity for further rehabilitation upon
6 release, the Court will re-sentence this Defendant to a
7 mandatory minimum sentence of 180 months, which is, as
8 previously noted, eight months below the low end of the
9 previously calculated guideline range of 188 to
10 235 months.

11 Therefore, pursuant to the Sentencing Reform Act
12 of 1984, and having considered the sentencing factors
13 enumerated in Title 18 of the United States Code,
14 Section 3553(a), it is the judgment of this Court that
15 the Defendant, Melvin MacGregor, is hereby committed to
16 the custody of the Bureau of Prisons to be imprisoned
17 for a term of 180 months.

18 The Court makes a judicial recommendation that
19 the Defendant participate in substance-abuse treatment
20 while in the Bureau of Prisons' custody, and upon
21 release from imprisonment, the Defendant shall be
22 placed on supervised release for a term of three years.
23 Within 72 hours of release from custody of the Bureau
24 of Prisons, the Defendant shall report in person to the
25 district to which he is released.

1 The Court makes a judicial recommendation that
2 Mr. McGregor consider participation in the Probation
3 Office's Restart Program during the term of supervised
4 release, if deemed to be an appropriate candidate.

5 No fine is imposed, as the Defendant does not
6 have the financial ability to pay a fine.

7 The Court, I believe, originally granted the
8 United States' motion for entry of a preliminary order
9 of forfeiture. That grant stands. The Court finds
10 that the United States has established the requisite
11 nexus between this property and the offense on which
12 the Defendant has been convicted.

13 While under the Probation Office's supervision,
14 you shall not -- you shall comply with the following
15 terms and conditions, Mr. McGregor: First, you shall
16 not commit another Federal, state or local crime and
17 shall not illegally possess a controlled substance;
18 second, you shall refrain from any unlawful use of a
19 controlled substance and submit to one drug test within
20 15 days of release from imprisonment and at least two
21 periodic drug tests thereafter, not to exceed 50 tests
22 per year, as directed by the Probation Office; third,
23 you shall submit to the collection of a DNA sample, as
24 directed by the Probation Office. And you are to
25 comply with the standard conditions that have been

1 adopted by this Court and are described in the
2 sentencing guidelines at Section 5D1.3(c) and which
3 will be set forth in detail in the judgment and
4 committal.

5 The following further special conditions apply
6 during your supervised release: You are prohibited
7 from possessing a firearm, destructive device or other
8 dangerous weapon. And you are to participate in a
9 program for substance-abuse counseling, as directed by
10 the Probation Office, which program may include
11 testing, not to exceed 50 drug tests per year, to
12 determine whether you have reverted to the use of
13 alcohol or drugs. You shall be required to contribute
14 to the costs of services for that treatment based upon
15 your ability to pay or the availability of third-party
16 payment.

17 It is further ordered that you shall pay to the
18 United States a special assessment of \$100, which the
19 Court acknowledges you have already paid.

20 Mr. McGregor, you have a right to appeal this
21 sentence. If you choose to appeal, you must do so
22 within 14 days. If you cannot afford an attorney, an
23 attorney will be appointed on your behalf; do you
24 understand that?

25 THE DEFENDANT: Yes, I do.

1 THE COURT: All right. Is there any further
2 business, then, to come before the Court in these
3 proceedings; Mr. MacKinlay --

4 MR. MacKINLAY: No, Your Honor.

5 THE COURT: -- or Mr. Fick?

6 MR. FICK: No, Your Honor. Thank you.

7 THE COURT: Thank you. Then, we are adjourned.

8 THE CLERK: All rise. The Court is in recess.

9 (Adjourned, 11:39 a.m.)
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C E R T I F I C A T I O N

I, Debra D. Lajoie, RPR-FCRR-CRI-RMR, do
hereby certify that the foregoing pages are a true and
accurate transcription of my stenographic notes in the
above-entitled case.

/s/ Debra D. Lajoie

5/10/17

UNITED STATES DISTRICT COURT

District of

Massachusetts

UNITED STATES OF AMERICA

V.

MELVIN MCGREGOR

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 1:07-cr-10312-NMG-1

USM Number: 21298-038

William W. Fick, Esq.

Defendant's Attorney

Date of Original Judgment: 10/1/2009

(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☒ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☒ Direct Motion to District Court Pursuant ☒ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☒ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

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

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §922(g)(1)	Felon in Possession of a Firearm and Ammunition	7/13/2007	1
18 USC §924(d) and 28 USC §2461(c)	Criminal Forfeiture Allegation		

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

1/18/2017

Date of Imposition of Judgment



Signature of Judge

Honorable Nathaniel M. Gorton

US District Judge

Name of Judge

Title of Judge

Date

2/6/17

DEFENDANT: MELVIN MCGREGOR
CASE NUMBER: 1:07-cr-10312-NMG-1

Judgment — Page 2 of 73

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of
180 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court makes a judicial recommendation that the defendant participate in substance abuse treatment while in Bureau of Prisons' custody.

☒ 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: MELVIN MCGREGOR
CASE NUMBER: 1:07-cr-10312-NMG-1

Judgment—Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

DEFENDANT: MELVIN MCGREGOR
CASE NUMBER: 1:07-cr-10312-NMG-1

Judgment—Page 4 of 78

ADDITIONAL SUPERVISED RELEASE TERMS

The Court makes a judicial recommendation that the defendant consider participation in the Probation Office's RESTART program during the term of supervised release if deemed to be an appropriate candidate.

1. The defendant is prohibited from possessing a firearm, destructive device, or other dangerous weapon.
2. The defendant is to participate in a program for substance abuse counseling as directed by the Probation Office, which program may include testing, not to exceed 50 drug tests per year to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third-party payment.

DEFENDANT: MELVIN MCGREGOR
 CASE NUMBER: 1:07-cr-10312-NMG-1

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

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

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

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 the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

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

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

* 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: MELVIN MCGREGOR
CASE NUMBER: 1:07-cr-10312-NMG-1

SCHEDULE OF PAYMENTS

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

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

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

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and 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:

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

DEFENDANT: MELVIN MCGREGOR
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ADDITIONAL FORFEITED PROPERTY

S&W .40 caliber PKD1403 and 10 rounds of .40 caliber ammunition.

United States v. McGregor

United States Court of Appeals for the First Circuit

May 27, 2011, Decided

No. 09-2650

Reporter

650 F.3d 813 *; 2011 U.S. App. LEXIS 10883 **

UNITED STATES, Appellee, v. MELVIN MCGREGOR,
Defendant, Appellant.

Subsequent History: Post-conviction relief granted at
[United States v. McGregor, 2017 U.S. Dist. LEXIS 3415](#)
(D. Mass., Jan. 10, 2017)

Prior History: **[**1]** APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS. Hon. Nathaniel M. Gorton, U.S.
District Judge.

[United States v. McGregor, 2008 U.S. Dist. LEXIS](#)
[102999 \(D. Mass., Dec. 17, 2008\)](#)

Disposition: Affirmed.

Core Terms

weapons, hide, magnet, Gang, arrest, Street, gun,
suppression, suspicion, reasonable suspicion, probable
cause, compartment, officer's, console, passenger
compartment, protective search, dashboard, shooting,
traffic, driver, passengers, firearms, cases, seat, center
console, traffic stop, circumstances, suspiciously,
activities, grabbed

Case Summary

Procedural Posture

Defendant appealed from the United States District
Court for the District of Massachusetts, where he
entered a conditional guilty plea to a charge of being a
felon in possession of a firearm and ammunition,
pursuant to 18 U.S.C.S. § 922(g)(1), after his motion to
suppress evidence taken from a warrantless car search
was denied. Defendant challenged that ruling on appeal.

Overview

Defendant asserted that a traffic stop following a gang
shooting was a pretext, and the warrantless search of
the vehicle was unreasonable. Affirming, the court
upheld the district judge's finding that the police actually
and reasonably suspected that the men might be
armed, thus justifying a limited weapons search under
the Michigan v. Long line of decisions. The court also
rejected defendant's suggestion that the search was
illegal because the officers used the traffic offenses as
an excuse to comb the car for guns without a warrant.
The judge found that the officers actually saw the traffic
violations, which validated the stop. Each investigatory
act — grabbing a magnet, knocking at the car's
undercarriage, poking at the cup holder, and taking CDs
from the center console — logically led to the next, was
done quickly, and was tied tightly to the officers'
reasonable suspicion that the vehicle had a hide. That
an officer reached into the console and popped open
the access panel did not exceed the outer limits of what
the law allowed, either. Given the specific facts, there
was no reason to treat the easily-accessible passenger-
compartment hidden area differently from any other.

Outcome

The court affirmed, upholding the district judge's order
denying defendant's motion to suppress.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Warrantless
Searches > Vehicle Searches > General Overview

[HN1](#)  **Warrantless Searches, Vehicle Searches**

Michigan v. Long requires that a protective search of an
auto be brief, limited in scope, and based on articulable
suspicion that a person could gain immediate access to

weapons.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

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

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

[HN2](#) **De Novo Review, Conclusions of Law**

The United States Court of Appeals for the First Circuit reviews the district judge's denial of a defendant's suppression motion under a two-tiered standard, evaluating legal and constitutional conclusions de novo, and factual and credibility findings for clear error. Clear-error review is highly deferential, requiring the reviewing court to let the judge's fact-sensitive conclusions and credibility calls stand unless we are left with a definite and firm conviction that the judge made a mistake. And, ultimately, the First Circuit must affirm if the judge's ruling is supported by any grounds fairly presented by the record.

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

[HN3](#) **Search & Seizure, Scope of Protection**

The *Fourth Amendment* bans only unreasonable searches and seizures, and a search done without a warrant supported by probable cause is presumptively unreasonable unless an exception to the warrant requirement applies.

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

Criminal Law & Procedure > ... > Warrantless Searches > Vehicle Searches > General Overview

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

[HN4](#) **Search & Seizure, Scope of Protection**

An officer can stop a car if he sees a driver commit a traffic offense, even if the stop is just an excuse to investigate something else. He can then order the occupants out of the auto. And if he has some articulable, reasonable suspicion that the persons stopped may be dangerous, he can pat them down and search the car's interior — including closed compartments — for weapons that they could quickly lay their hands on. But the scope of the search must be limited to this protective purpose. In sorting out the reasonableness of an officer's actions in this context, the United States Court of Appeals for the First Circuit typically asks two questions: Was he justified in making the stop? And, if yes, was the protective search reasonably related to the events justifying the stop, factoring in what happened and what he learned during the encounter? To answer the second question, the court must ask two more: Was there an objectively reasonable basis to suspect that weapons were present? And did the officer in fact entertain such a suspicion? Of course, the officer must work purposefully to confirm or dispel his suspicions promptly. But there are no hard time limits. Obviously, then, context matters, and the court must take a practical approach to all of this, keeping in mind the totality of the circumstances as seen and interpreted by the police at the scene.

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

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

[HN5](#) **Search & Seizure, Scope of Protection**

No simple, mechanical formula tells us what reasonable suspicion is, though it is less than probable cause and more than a naked hunch. And no one-size-fits-all template exists to sketch out whether an officer acted with reasonable suspicion. Rather, courts must gauge its presence in a commonsense, case-by-case way, taking in the whole picture.

Criminal Law & Procedure > Search &
Seizure > Warrantless Searches > General
Overview

[HN6](#) **Search & Seizure, Warrantless Searches**

In the context of a warrantless weapons search, *United States v. Lott* requires that there be an objectively reasonable basis that officers feared for their safety.

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

[HN7](#) **Stop & Frisk, Reasonable Suspicion**

Courts do not plumb an officer's "actual motive" in performing a reasonable-suspicion analysis.

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

Criminal Law & Procedure > Search &
Seizure > Warrantless Searches > General
Overview

Criminal Law & Procedure > ... > Warrantless
Searches > Stop & Frisk > General Overview

[HN8](#) **Search & Seizure, Scope of Protection**

Officers can amp up their investigation depending on what they learn following a stop.

Criminal Law & Procedure > Appeals > Standards of
Review > General Overview

Criminal Law & Procedure > Preliminary
Proceedings > Pretrial Motions &
Procedures > Suppression of Evidence

[HN9](#) **Appeals, Standards of Review**

The United States Court of Appeals for the First Circuit may affirm a suppression ruling for any reason appearing in the record.

Criminal Law & Procedure > ... > Warrantless
Searches > Vehicle Searches > General Overview

[HN10](#) **Warrantless Searches, Vehicle Searches**

The only lawful purpose of a *Michigan v. Long* search is to protect officers from the danger that the persons they have stopped will grab for weapons. And the search must be no more invasive than necessary to serve that safety function. A *Long* search is a limited search. But it is limited in this sense: officers with reasonable grounds for suspecting that the detainees are dangerous must confine their weapons search to accessible areas of the vehicle.

Counsel: William W. Fick, Assistant Federal Defender, Federal Public Defender Office, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Carmen M. Ortiz, United States Attorney, was on brief, for appellee.

Judges: Before Lynch, Chief Judge, Boudin and Thompson, Circuit Judges.

Opinion by: THOMPSON

Opinion

[*816] THOMPSON, Circuit Judge. Indicted as a felon in possession of a firearm and ammunition, Melvin McGregor moved to suppress evidence taken from a warrantless car search. After the district judge denied the motion, McGregor conditionally pled guilty, reserving his right to challenge the ruling on appeal. This is that appeal. We affirm, though our reasoning differs from the judge's on one issue.

FACTS

Consistent with our usual practice, we take the facts from the judge's decision and from the hearing on the motion, presenting them in the light most compatible with his ruling. See, e.g., *United States v. Dancy*, No. 09-2628, 640 F.3d 455, 2011 U.S. App. LEXIS 7556, 2011 WL 1418854, at *1, *4 (1st Cir. Apr. 13, 2011).

A Shooting in Dorchester

Just before midnight, on July 12, 2007, Officer Brian

Smigielski and Sergeant **[**2]** Detective John Fitzgerald of the Boston Police's Youth Violence Strike Force (a specialized unit tasked with monitoring gang activity) heard about a shooting at a housing development in the Dorchester section of Boston. After driving to the scene in an unmarked car, Smigielski spotted two men riddled with bullets slumped in a parked auto — still alive, but not for long. He knew both men were members of the notoriously violent Magnolia Street Gang — actually, he recognized one of them as a founding member. He helped emergency medical personnel put the two in an ambulance, which then took off for Boston Medical Center with the officers in tow.

Suspicious Activities

It was now around 1 a.m. on July 13. Smigielski and Fitzgerald parked in a driveway near a lot across from the hospital's emergency-room entrance. Staking out a hospital after a shooting is a great way to collect intelligence about gangs, Smigielski later said. And Smigielski was not disappointed on this night. Two men soon got out of a newish-looking "silver sedan." Smigielski recognized one of them as Antonio Duncan, a Magnolia Street Gang member who had been arrested on gun charges in the past. The men made a beeline for **[**3]** a group of people hanging out near the emergency-room entrance. Within seconds, the duo left with two other men, one of whom was McGregor. They all piled into a "gray" Honda Accord with tinted windows and sped off.¹ McGregor was no stranger to the criminal justice system. Based on reports and talks with colleagues, Smigielski knew that McGregor was a Magnolia Street Gang founder and that he was out on parole after serving time for firearms offenses. **[*817]** Smigielski also knew that McGregor had had a couple of run-ins with the police since his release. The first involved his fleeing the scene when stopped for a traffic infraction. The second also involved a traffic stop with a twist. Pulled over by Boston police, McGregor was chauffeuring another Magnolia Street Gang member, Christian Miranda, who gave officers a fake name when arrested for disorderly conduct during the encounter. And, it turned out, Miranda was wanted for murder in North Carolina.

Fearing that the foursome might try to avenge the shooting of their comrades in crime, Smigielski and Fitzgerald tailed the Honda. Smigielski radioed **[**4]** for

backup. Boston Police Officer Mark Freire and his partner quickly joined in, driving an unmarked car equipped with flashing blue lights — something Smigielski and Fitzgerald's car lacked. Smigielski determined that the Honda was going at least 50 m.p.h. in a 30 m.p.h. zone. Freire also saw the Honda run a flashing red light, and he radioed that news to Smigielski.

Acting on Smigielski's order, Freire turned his car's blue lights on and pulled the Honda over. Freire approached the car with his gun holstered. Smigielski and Fitzgerald parked farther back and converged on the Honda too. Smigielski saw McGregor in the Honda's driver's seat, Duncan in the front passenger's seat, and Antwan Green — a known Magnolia Street Gang member out on bail pending trial on a firearms charge — in the seat directly behind McGregor's. Smigielski did not recognize the fourth person (later identified as Dominique Jean-Pierre) in the Honda.

As the officers closed in, some of the occupants became noticeably nervous. Watch the person in the back seat, driver's side of the car, Freire told Smigielski. "He's leaning forward," and his chest is "pounding," Freire added. McGregor had opened the driver's door, **[**5]** which concerned Smigielski because drivers do not usually do that during traffic stops. But with the door open, Smigielski could see McGregor's left leg shaking, his chest heaving up and down, and his heart pounding through his t-shirt.

Incriminating Evidence

Given what he knew about the shooting, the Magnolia Street Gang, and McGregor, Smigielski feared that the car contained a gun. Concerned about officer safety, he and his colleagues removed the men from the Honda and patted them down for weapons. They came up empty, so they moved the men to the curb and focused their attention on the car. By this time other officers had showed up to help secure the scene. Among those arriving was Scott O'Brien, an officer specially trained in how to detect hidden compartments, commonly called "hides."

Smigielski got into the car and started looking for easily-accessible weapons. Smigielski asked O'Brien if he recognized any of the men. And O'Brien did — he knew Green from an earlier firearms arrest. "Scotty," Smigielski then said to O'Brien, "there's got to be a gun in this car."

¹ We cannot tell whether the silver sedan and the gray Honda are one and same, but it does not matter.

From the start, O'Brien saw telltale signs of a hide in the Honda where one could stash a gun. Almost immediately, his eye **[**6]** was caught by an object on the dashboard just below the car stereo. It was only a couple of inches long and looked like a "Lego piece."² "Smig, **[*818]** what'ss that?" O'Brien said to Smigielski. But O'Brien already knew — it was an "alarm magnet," which he knew from extensive training and experience could be used as a magnetic switch to activate an electronic hide (rubbing the magnet over a specific area will complete a circuit that will open the hide). And, as far as he knew, magnets like this one played no part in the normal workings of a car. His instructors had drilled into him to always be on the lookout for magnets in situations like this. In any event, Smigielski grabbed the magnet and gave it to O'Brien.

His interest piqued, O'Brien looked underneath the Honda to see what he could see. And he saw plenty: an exhaust pipe that had been tinkered with suspiciously (it was off-center and lower than usual); and a piece of metal that had more rust on it than the rest of the undercarriage, with a considerable amount of "Bondo" (a substance used in auto-body work) around the edges to help seal the piece in place — both dead giveaways that the car had a "false bottom." O'Brien crawled under the Honda and tapped the area with his flashlight, and he heard a hollow rather than a solid sound.

Convinced more than ever that the Honda had a hide, O'Brien got into the car and focused his attention on the center-console area — the very area where he thought the hide would be. He started **[**8]** with the cup holder, which was next to the console. Normally cup holders are removable so people can clean them more easily. But

O'Brien could not lift this one. It had been glued down, a sure sign that someone did not want others to get at that area. O'Brien then lifted up the lid to the console and removed the CDs that were there. He wanted to open the access panel (something most cars have so persons can get to and work on the emergency-brake cables that run underneath). But this panel had glue around it, so O'Brien put a knife in the panel's latch and with little effort popped the panel open. Peering inside, O'Brien found a handgun, which turned out to be loaded, and some crack cocaine. Only about five minutes passed between the time the officers sat McGregor and the others on the curb and the time O'Brien found the damning evidence.

The police arrested McGregor and his companions and had the Honda towed to a secure location. The next day Sergeant Detective William Feeney of the Boston Police executed a warrant to search the car. Usually when officers suspect that an auto has a hide, Feeney gets involved. Intimately familiar with automotive systems (mechanical and electrical), Feeney **[**9]** is considered the department's foremost expert on hides. He has studied them for years and has taught other officers (including FBI and DEA personnel) all about them. He had even trained O'Brien. Look for magnets inside cars, he tells his students. See if the center console or dashboard is loose or glued-down in a manner that is out of the norm. Look under the car and see if anything has been modified suspiciously (inspecting the exhaust system is a good place to start).

[*819] Feeney knew that O'Brien had found a hide in the Honda's center console. And he knew too that O'Brien had come across a magnet near the dashboard. So he looked there to see if anyone had rejiggered the wiring in a way necessary to run an electric hide. And he saw exactly that. He then figured out how the system worked: put the key in the ignition, fasten a seatbelt, switch on the cruise control, turn on the rear-window defroster, tug on the emergency brake, move the ceiling-light switch to the middle position, move a magnet around a spot on the dashboard (which would trigger a magnetic switch behind the dashboard), and press the sunroof button — doing this activates a series of switches, which starts up a motor under **[**10]** the center console, which opens up the hide so one can reach right through the bottom of the console and into a secret compartment. These steps can be done in any order, and it takes about 20 seconds to run through them from start to finish. But you could speed up the process considerably if, say, you did 7 of the 8 steps first and left only one for later — then it would take less

²As most everyone knows, a Lego is a brick-shaped plastic children's toy that can be found in playrooms all over the world. See, e.g., Leo Cendrowicz, "Lego Celebrates 50 Years of Building" (Jan. 28, 2008), <http://www.time.com/time/world/article/0,8599,1707379,00.htm> (visited Apr. 13, 2011). Created by a Danish carpenter, Lego's name is a fusion of the Danish phrase "leg godt," which means "play well." *Id.* (double emphasis added). Judicial notice is typically limited to "undisputable **[**7]** facts like Greenwich mean time," *Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 353 (7th Cir. 2001), but given the Lego's near-iconic status — *Fortune* magazine crowned it the "Toy of the Century," see Joseph Pisani, "The Making of . . . a LEGO" (Nov. 29, 2006), http://businessweek.com/bwdaily/dnflash/content/nov2006/db20061127_153826.htm (visited Apr. 26, 2011) - we do not think that we are out on a limb here by any stretch.

than 5 seconds to open the hide. Feeney did the steps and found (among other things) another round of ammo tucked inside the hide.

PROCEEDINGS

A federal grand jury charged McGregor with being a felon in possession of a firearm and ammunition. See 18 U.S.C. § 922(g)(1). He later moved to suppress the evidence on two principal *Fourth Amendment* grounds: The stop based on traffic violations was a pretext because the officers really wanted to check for weapons — an ulterior motive that invalidated the stop. Also, the warrantless search of the Honda was unreasonable both because the officers lacked reasonable suspicion that the car contained weapons and because the scope and intrusiveness of the search surpassed what was reasonably needed to ensure their safety. See, e.g., [HN1](#) [↑] *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) [**11] (requiring that a protective search of an auto be brief, limited in scope, and based on articulable suspicion that a person could gain immediate access to weapons).

Smigielski, Freire, O'Brien, and Feeney testified at the two-day hearing on the motion to suppress. Jean-Pierre (one of the Honda passengers) did too. McGregor did not. In denying McGregor's motion, the judge's reasoning ran like this. The traffic violations gave the officers probable cause to stop the Honda, which immunized the stop from attack even if their true aim was to look for weapons. See *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) (holding that "[s]ubjective intentions play no role in ordinary, probable-cause *Fourth Amendment* analysis"). Also, the totality of the circumstances showed that the officers actually and reasonably suspected that the Honda passengers might be armed, so they could pat-down not only the men but also the car's compartment area for possible weapons that might endanger them — and they did nothing more than *Long* and its successors authorized them to do. And finally, what O'Brien learned during this limited protective search gave him probable cause to pop open the center console's access [**12] panel. McGregor's conditional guilty plea followed, which preserved the suppression issue for appellate review. See *Fed. R. Crim. P. 11(a)(2)*. The judge then sentenced McGregor to 188 months in prison and 3 years of supervised release. This appeal ensued.

STANDARD OF REVIEW

[HN2](#) [↑] We review the district judge's denial of McGregor's suppression motion [**820] under a two-tiered standard, evaluating legal and constitutional conclusions *de novo*, and factual and credibility findings for clear error. See, e.g., *Dancy*, 2011 U.S. App. LEXIS 7556, 2011 WL 1418854, at *8. Clear-error review is highly deferential, requiring us to let the judge's fact-sensitive conclusions and credibility calls stand unless we are left with a definite and firm conviction that the judge made a mistake. See, e.g., *United States v. Woodbury*, 511 F.3d 93, 96 (1st Cir. 2007). And, ultimately, we must affirm if the judge's ruling is supported by any grounds fairly presented by the record. See, e.g., *United States v. Bater*, 594 F.3d 51, 55 (1st Cir. 2010); *United States v. Owens*, 167 F.3d 739, 743 (1st Cir. 1999); *United States v. Soule*, 908 F.2d 1032, 1036 n.7 (1st Cir. 1990).

FIRST PRINCIPLES

The basics are familiar. [HN3](#) [↑] The *Fourth Amendment* bans only unreasonable [**13] searches and seizures, see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and a search done without a warrant supported by probable cause is presumptively unreasonable unless an exception to the warrant requirement applies, see, e.g., *United States v. Lopez*, 989 F.2d 24, 26 (1st Cir. 1993). So we jump directly to the exception that applies here.

[HN4](#) [↑] An officer can stop a car if he sees a driver commit a traffic offense, even if the stop is just an excuse to investigate something else. See, e.g., *Whren*, 517 U.S. at 810. He can then order the occupants out of the auto. See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 410, 414-15, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). And if he has some articulable, reasonable suspicion that the persons stopped may be dangerous, he can pat them down and search the car's interior — including closed compartments — for weapons that they could quickly lay their hands on. See, e.g., *Long*, 463 U.S. at 1037, 1049-50 (permitting a patdown under the car seats and dashboard and in the glove compartment — areas where persons could place or hide weapons and reach right away). But the scope of the search must be limited to this protective purpose. See, e.g., *id.* at 1049-50; *United States v. Lott*, 870 F.2d 778, 783, 785 (1st Cir. 1989).

In [**14] sorting out the reasonableness of an officer's

actions in this context, we typically ask two questions: Was he justified in making the stop? And, if yes, was the protective search reasonably related to the events justifying the stop, factoring in what happened and what he learned during the encounter? See, e.g., *United States v. Ivery*, 427 F.3d 69, 72 (1st Cir. 2005); *United States v. Chhien*, 266 F.3d 1, 6 (1st Cir. 2001). To answer the second question, we must ask two more: Was there an objectively reasonable basis to suspect that weapons were present? And (assuming *Lott* is still good law — more on this later) did the officer in fact entertain such a suspicion? See, e.g., *Ivery*, 427 F.3d at 72 (discussing *Lott*, 870 F.2d at 783-84). Of course, the officer must work purposefully to confirm or dispel his suspicions promptly. But there are no hard time limits. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); *Owens*, 167 F.3d at 748-49. Obviously, then, context matters, and we must take a practical approach to all of this, keeping in mind the totality of the circumstances as seen and interpreted by the police at the scene. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); **[**15]** *United States v. Soares*, 521 F.3d 117, 120 (1st Cir. 2008).

[*821] ANALYSIS

In something of an about-face, McGregor no longer questions the legality of the traffic stop. Instead, he trains his sights on the second step in the above-described analysis, complaining that the officers lacked reasonable suspicion needed to justify a limited protective search of the car — a search that he insists was too long and too intrusive to boot. We see things quite differently, however.

Reasonable Suspicion

HNS  No simple, mechanical formula tells us what reasonable suspicion is, though we know that it is less than probable cause and more than a naked hunch. See, e.g., *Chhien*, 266 F.3d at 6. And no one-size-fits-all template exists to sketch out whether an officer acted with reasonable suspicion. See, e.g., *United States v. Espinoza*, 490 F.3d 41, 46 (1st Cir. 2007). Rather, courts must gauge its presence in a commonsense, case-by-case way, taking in the whole picture. See, e.g., *Chhien*, 266 F.3d at 6. So let us go over what the police knew and saw before the protective search took place. (a) Someone had gunned down two heavy-hitters in the Magnolia Street Gang, a brutal cartel conspicuous for its

drug-dealing and **[**16]** gun-carrying. (b) Two men drove up to the hospital where the victims were, grabbed two others, and then double-timed it to the Honda with their compatriots in tow. (c) The men hightailed it out of there, exceeding the speed limit and running a flashing red light. (d) Three of the four — Duncan, Green, and, most importantly for our purposes, McGregor — stood out as Magnolia Street Gang members who had had serial scrapes with the law, including arrests (and in McGregor's case, conviction) for firearms offenses. And (e) some of the men seemed suspiciously nervous — breathing hard, shaking, etc. — as the officers approached the car. Given facts (a)-(d), Smigielski worried that the men thirsted for revenge against the shooter. Add fact (e) to the mix, and Smigielski feared — his word, not ours — that they had a gun in the car too. On this record, we cannot fault the judge's finding that the police actually and reasonably suspected that the men might be armed — a suspicion resting on rational reasons, rather than pure gut feelings — which, we agree, justified a limited weapons search under the *Long* line of decisions.

McGregor musters multiple counterarguments aimed at persuading us otherwise. **[**17]** None can carry the day, however.

1. McGregor protests that the judge botched the case from the get-go by framing the legal question inexactly. Quoting *Lott*, McGregor claims that a search cannot measure up to *Long*'s high demands if the officers did not "actually" fear "for their safety." See 870 F.2d at 783-84. And, he says, the judge slipped by focusing on whether the officers had objectively reasonable suspicion that the men posed a danger rather than on whether they had actual safety concerns. On top of that, the officers had no actual fear, he insists — they outnumbered the men and had "secured" the scene, at least in Smigielski's mind, by frisking them and moving them away from the auto, so the detainees could not reach any weapons. The net result, then, is that the car search flunked *Long* and *Lott*.

It is an open question whether *Lott*'s "actual fear" analysis is consistent with the Supreme Court's later comment in *Whren* that "the constitutional reasonableness of traffic stops [does not depend] on the actual motivations of the individual officers involved." 517 U.S. at 813. True, *Whren* held that an officer's subjective intentions were irrelevant to the constitutionality of the traffic **[**18]** stop itself. But **[*822]** its reasoning casts doubt on *Lott*'s holding that an officer's subjective fears must be demonstrated

to justify a car search under Long even if there is an objectively reasonable basis for an officer to fear for his safety. Twice we have highlighted this issue but decided not to address it directly. See Ivery, 427 F.3d at 73 (noting that, "[h]aving concluded that Lott's actual suspicion requirement is satisfied here, we decline the government's invitation to reconsider the continuing validity of that aspect of Lott in light of . . . Whren"); United States v. Nee, 261 F.3d 79, 85 (1st Cir. 2001) (declining to address the government's waived argument that Lott is no longer good law after Whren). Other circuits have held that an officer's subjective intentions matter not when deciding whether a Long-based search is constitutional. See United States v. Brown, 188 F.3d 860, 866 (7th Cir. 1999); United States v. Cummins, 920 F.2d 498, 502 (8th Cir. 1990); see also United States v. Wald, 216 F.3d 1222, 1227 (10th Cir. 2000). But the government has not raised the issue here, so we will not address it.

Even so, McGregor's claim that Lott's standards have not been met fails. There **[**19]** is nothing in this record to make us doubt that the officers feared for their safety. Our conclusion otherwise in Lott largely turned on the fact that the officers there opted not to frisk the defendants after they had exited the car. 870 F.2d at 785. Here, in contrast, the officers frisked each Honda passenger. That the police had superior numbers and had moved the men away from the auto does not change matters. The Supreme Court rejected a strikingly similar argument in Long, reasoning that detainees might break free from the police or reenter the car with police permission (either during or after the stop) and get at weapons straightaway — scenarios that justify a limited protective sweep. See 463 U.S. at 1051-52; accord United States v. Diaz, 519 F.3d 56, 62 (1st Cir. 2008) (collecting cases). HN6 [↑] Lott requires that there be an objectively reasonable basis for fear. See id. at 783-84; see also Ivery, 427 F.3d at 72. And that prong is undoubtedly met in this case.

2. Also insubstantial is McGregor's suggestion that the search was illegal because the officers used the traffic offenses as an excuse to comb the car for guns without a warrant. The judge found that Smigielski and his colleagues **[**20]** actually saw the traffic violations, which validates the stop. See, e.g., Whren, 517 U.S. at 813.

As a fallback, McGregor attempts to confine Whren's holding to probable-cause cases, not reasonable-suspicion cases. That is a non-starter for two reasons. First, having seen the traffic infractions, the officers had

probable cause to pull the Honda over (again, McGregor does not attack that ruling here), which puts Whren front and center. And second, citing Whren, we have held that HN7 [↑] courts do not "plumb[]" an officer's "actual motive" in performing a reasonable-suspicion analysis. Bolton v. Taylor, 367 F.3d 5, 7 (1st Cir. 2004).

3. McGregor fares no better in arguing that certain factors relied on by the judge — three occupants' criminal pasts, gang ties, and nervousness — were too old, too speculative, or too unconnected to the stop's purpose to support a reasonable-suspicion finding. For openers, this kind of "divide-and-conquer analysis" — taking the facts one by one, divining innocent explanations for each, and then second-guessing the officers' on-the-spot evaluations — is off limits to judges. See, e.g., Arvizu, 534 U.S. at 274-78. What is more, none of McGregor's arguments holds water. **[**21]** In sizing up the whole situation, the officers could consider all the men's **[*823]** criminal doings and gang associations, see United States v. Am, 564 F.3d 25, 30-31 (1st Cir. 2009), so there is no need to quibble over McGregor's too-old epithet. And they could consider the men's nervousness too, see, e.g., Ivery, 427 F.3d at 73. Also, the judge could and did credit the practical, real-world experience of front-line officers who have their fingers on the pulse of the streets, see, e.g., Arvizu, 534 U.S. at 273 which undercuts McGregor's too-speculative charge. Finally, HN8 [↑] officers can amp up their investigation depending on what they learn following a stop, see, e.g., Chhien, 266 F.3d at 6, and the judge supportably found that the officers' suspicion level here justifiably rose as the post-stop events unfolded — which puts the kibosh on McGregor's factors-too-unconnected-to-the-stop complaint, see generally Graham v. Connor, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (emphasizing that the reasonableness calculus must allow "for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving"); Terry, 392 U.S. at 10 (explaining **[**22]** that "the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess").

The totality of the circumstances here makes this case unlike United States v. Monteiro, 447 F.3d 39 (1st Cir. 2006), and United States v. McKoy, 428 F.3d 38 (1st Cir. 2005), which McGregor plays as trump cards. Monteiro affirmed an order suppressing evidence discovered during a warrantless car search, stressing that the police had no reason to believe that either the driver or the passengers had been or were about to be

criminally active when the stop occurred. See [447 F.3d at 42-43](#). McKoy also required suppression of evidence seized during a warrantless car search, holding that the police infringed the defendant's constitutional rights by bottoming their suspicion solely on his apparent nervousness and the area's dangerousness. [428 F.3d at 40-41](#). But in our case the judge supportably found that the officers sensibly suspected that the men might be armed and bent on retaliating for the shooting, and that they had reasonably grounded their suspicion on a host of facts beyond the men's obvious nervousness — i.e., the earlier shooting of two Magnolia **[**23]** Street Gang members, the suspicious activities at the hospital, the clique of Magnolia Street Gang operatives in the Honda, the knowledge that three of the four men had been collared on gun charges before, and the unlawful way in which the Honda raced around the area (the area's dangerousness — or not — played no part in the analysis). Consequently, neither Monteiro nor McKoy helps McGregor.

To sum up, McGregor falls short of showing that the judge erred in ruling that the officers had reasonable suspicion to conduct a limited protective search under the Long set of cases. So we move on.

Duration

McGregor contends that the car search was too long — though he does not come straight out and say that the encounter had matured into a de facto arrest before there was probable cause. Relying on the police dispatch log, McGregor notes that the officers stopped the Honda at 1:47 a.m. and arrested the men at 2:46 a.m., or 2:45 a.m., according to the booking sheet. And during that time (the argument continues) the police searched the auto for weapons — a period that exceeded what Long and its heirs allow. McGregor's big problem is that the judge made no findings concerning how long the search took **[**24]** — which means that we must read the record in the light most hospitable to the judge's suppression ruling, drawing all reasonable **[*824]** inferences in the ruling's favor. See, e.g., Owens, [167 F.3d at 743](#). With this in mind, we repeat that Smigielski testified that it only took five minutes for the officers to find the loaded gun after they had moved the men to the curb. And neither the dispatch log nor the booking sheet changed that reality, he said. Again, there are no fixed time limits in this context. See, e.g., United States v. McCarthy, [77 F.3d 522, 531 \(1st Cir. 1996\)](#). Rather, the police must conscientiously pursue an investigative course likely to confirm or refute their

suspicion quickly, see, e.g., Sharpe, [470 U.S. at 686](#), and we think that the officers' five-minute search — during which they acted diligently and swiftly — clearly falls within that category. See generally Owens, [167 F.3d at 749](#) (approving a 55-minute investigative stop); McCarthy, [77 F.3d at 529-31](#) (approving a 75-minute investigative stop).³

Scope

McGregor challenges the judge's ruling that what the officers did before they opened the access panel — picking up the alarm magnet, tapping the car's undercarriage, fiddling with the cup holder, removing the CDs from the center console — was permissible under Long. Their actions were too intrusive to squeeze within Long's narrow confines, he says. He also attacks the judge's conclusion that what the officers learned during the Long search gave them probable cause to open the panel. We, however, think that Long covers the whole gamut of police activities here, so we skip the probable-cause analysis. See, e.g., Soule, [908 F.2d at 1036 n.7](#) (emphasizing that HN9[↑] we may affirm a suppression ruling for any reason appearing in the record).⁴ We explain.

McGregor is right that HN10[↑] the only lawful purpose of a Long search is to protect officers from the danger that the persons **[**26]** they have stopped will grab for weapons. See [463 U.S. at 1047-48](#). And he is also right that the search must be no more invasive than necessary to serve that safety function. [Id. at 1052 n.16](#). A Long search is a limited search. [Id.](#) But it is limited in this sense: officers with reasonable grounds for suspecting that the detainees are dangerous must confine their weapons search to accessible areas of the vehicle. [Id. at 1049](#). The question here is whether the console hide was a searchable part of the passenger compartment under Long and its successors. Our answer is yes, for these reasons.

³ These cases suggest that, even if the search had lasted 60 minutes as McGregor hints at, his argument would still fail — though, as we said above, this is not an issue we **[**25]** need address.

⁴ The government conceded below that the police needed probable cause to open the panel, but that concession does not bind us. See generally Roberts v. Galen of Va., Inc., [525 U.S. 249, 253, 119 S. Ct. 685, 142 L. Ed. 2d 648 \(1999\)](#) (explaining that "the concession of a point on appeal by respondent is by no means dispositive of a legal issue").

The Long Court set the parameters for a protective search in part by copying the search-incident-to-arrest standard in New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). See Long, 463 U.S. at 1048-49. Belton held that police may search an auto's passenger compartment incident to an occupant's lawful arrest both to protect officer safety and to preserve evidence. See 453 U.S. at 460. Long's rationale is limited to officer safety. But if officers restrict their searches to areas "that may contain a weapon and to which the motorist may have access," the physical borders of the passenger compartment [*825] covered by Belton [*27] and Long are the same.⁵ United States v. Arnold, 388 F.3d 237, 240 (7th Cir. 2004).

Applying these principles, another circuit court has held that a secret "trap" built into an auto's backseat is a searchable part of the passenger compartment under Belton. See United States v. Veras, 51 F.3d 1365, 1372 (7th Cir. 1995). And others have held that locked glove compartments, see, e.g., United States v. Palmer, 360 F.3d 1243, 1246-48 (10th Cir. 2004), and center consoles, see, e.g., United States v. Holmes, 376 F.3d 270, 280-81 (4th Cir. 2004), including one that had been tampered with and that officers had to pull on to open, see United States v. Boyett, 295 Fed. Appx. 781, 783, 785 (6th Cir. 2008), are searchable parts of a passenger compartment under Long too.⁶ Easy accessibility is the

⁵ Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), tweaked Belton a bit, but not in a way that affects our case. Some lower courts had read Belton broadly, permitting the police to search the car's passenger compartment as a matter of course after arresting the occupants. See, e.g., United States v. Polanco, 634 F.3d 39, 42 (1st Cir. 2011) (discussing the phenomenon). Gant clarified that officers may search an auto "incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest." 129 S. Ct. at 1723. Critically, Gant explicitly limited its holding to a search-incident-to-arrest setting, leaving Long intact. See, e.g., id. at 1721-24; see also id. at 1724 (Scalia, J., concurring) (explaining that "[w]here no arrest is made, we have held that officers may search the car if they reasonably believe 'the suspect is dangerous and . . . may gain immediate control of weapons,'" adding that "[i]n the no-arrest case, the possibility of access to weapons [*28] in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle when the interrogation is completed") (quoting Long, 463 U.S. at 1049). And we do not read Gant as changing the passenger-compartment-boundaries analysis under the Belton line of cases.

concern that animates each case. See, e.g., Arnold, 388 F.3d at 240.

Getting [*29] back to McGregor, the officers had the requisite reasonable suspicion that the men were armed, as we have already explained at some length. They also took sensible steps to secure their safety. Each investigatory act — grabbing the magnet, knocking at the car's undercarriage, poking at the cup holder, and taking the CDs from the center console — logically led to the next, was done quickly, and was tied tightly to the police's reasonable suspicion that the Honda had a hide. See generally Flowers v. Fiore, 359 F.3d 24, 30 (1st Cir. 2004) (emphasizing that "officers may take necessary steps to protect themselves if the circumstances reasonably warrant such measures").

A few more words about the magnet-grabbing and the undercarriage-tapping: McGregor faults the judge for finding that O'Brien knew that the Lego-size object on the dashboard was an alarm magnet before Smigielski snatched it up — which, McGregor quickly adds, Smigielski had no right to do. That argument depends on too myopic a view of O'Brien's suppression-hearing testimony. Sure, O'Brien did testify on direct that he said, "Smig, what's that?" before Smigielski reached for the magnet. But he clarified on cross that in his [*30] mind he knew all along that it was an alarm magnet that could possibly help open a gun-holding hide, and the judge could certainly credit that testimony. Also, if officers can take keys from a car ignition or seat to unlock a glove compartment, see, e.g., Palmer, 360 F.3d at 1246-48; United States v. Brown, 913 F.2d 570, 571-72 [*826] (8th Cir. 1990), then we see no reason why Smigielski could not hand O'Brien the hide-opening magnet. And, despite what McGregor says, neither the viewing of nor the tapping on the undercarriage gives us reason to reverse. Compare New York v. Class, 475 U.S. 106, 114, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986) (explaining that "[t]he exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search'"), and Kyllo v. United States, 533 U.S. 27, 32, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (noting that a naked-eye observation "is no 'search' at all"), with Cardwell v. Lewis, 417 U.S. 583, 588-89, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (plurality opinion) (concluding that the police's scraping paint off a car's exterior was not a search).

⁶ Boyett is an unpublished opinion, but we can rely on its persuasive authority. See, e.g., Booker v. Mass. Dep't of Pub. Health, 612 F.3d 34, 42 n.8 (1st Cir. 2010).

That O'Brien reached into the console and popped open the access panel did not exceed the outer limits of what the law allows, either. Just like if the gun had been in a backseat trap **[**31]** or in a locked glove compartment, McGregor and his buddies could have grabbed the weapon from the console hide in a flash had they gotten back into the car — the uncontradicted testimony at the hearing discloses that one could open the hide electronically in a matter of seconds. See [Arnold, 388 F.3d at 241](#) (providing a useful analytic model for resolving a similar case). Given the specific facts here, there is no reason to treat this easily-accessible passenger-compartment area differently from any other. See [id. at 240-41](#).

CONCLUSION

For the reasons bared above, we uphold the district judge's order denying McGregor's motion to suppress.

Affirmed.

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