

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

SID EDWARD WILLIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX

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UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 30 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SID EDWARD WILLIS, Jr.,

Defendant-Appellant.

No. 17-35568

D.C. Nos. 3:16-cv-00468-BR
3:12-cr-00292-BR-1

District of Oregon,
Portland

ORDER

Before: NGUYEN and OWENS, Circuit Judges.

The motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir.

R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

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No. 17-35568

D.C. Nos. 3:16-cv-00468-BR
3:12-cr-00292-BR-1

District of Oregon,
Portland

ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 3 and 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

3:12-CR-00292-BR
(3:16-CV-00468-BR)

Plaintiff,

OPINION AND ORDER

v.

SID EDWARD WILLIS, JR.,

Defendant.

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1 - OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendant Sid Edward Willis's Motion (#91) to Vacate or Correct Sentence under 28 U.S.C. § 2255, Defendant's Amended Motion (#99) to Vacate or Correct Sentence under 28 U.S.C. § 2255, and Defendant's Motion (#134) for Evidentiary Hearing. For the reasons that follow, the Court **DENIES** Defendant's Motions and **DECLINES** to issue a certificate of appealability.

BACKGROUND

The Court takes the underlying facts from evidence admitted at the May 20, 2013, evidentiary hearing on Defendant Sid Edward Willis's Motion to Suppress and from the case record.

On May 24, 2012, Greg Morris and his girlfriend, Clarisse Smith, drove to a Plaid Pantry market in Southeast Portland. Morris went into the Plaid Pantry, and Smith remained in the car. Several minutes later Smith went into the market and told Morris that Defendant had made threatening statements to Smith while displaying a handgun, and Defendant had asked Smith why Morris was "mugging" him (*i.e.*, giving Defendant a "weird look"). When Morris exited the Plaid Pantry, Defendant and another man approached Morris. Defendant pulled a handgun from his side pocket and pointed it at Morris's chest. Defendant asked Morris why he was "mugging" him and stated "you can't be mugging me."

I'll kill you. I'm a gangsta." Defendant then demanded Morris drive him to S.E. 102nd Street.

Morris and Smith, however, were able to get away from Defendant and to call 911. When officers arrived, Defendant fled the Plaid Pantry parking lot, but he was ultimately detained a short distance away. A police officer then brought Morris to the area where other officers had detained Defendant. Morris positively identified Defendant as the man who threatened him with a gun and stated: "I guarantee that's the guy." In addition to Morris's identification of Defendant, an officer who reviewed the surveillance video footage at the Plaid Pantry testified the video showed Defendant pointing his gun at Morris.

On June 5, 2012, Defendant was charged in an Indictment with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1).

On May 10, 2013, Defendant filed a Motion to Suppress Evidence. On May 20, 2013, the Court conducted an evidentiary hearing, heard oral argument on the Motion to Suppress, and denied Defendant's Motion for the reasons stated on the record.

On July 22, 2013, Defendant pled guilty at a change-of-plea hearing.

In his Plea Agreement Defendant agreed he "waive[d] the right to file any collateral attack, including a motion under 28 U.S.C. § 2255, challenging any aspect of the conviction or

sentence on any grounds, except on grounds of ineffective assistance of counsel." At the change-of-plea hearing the Court explained to Defendant that he was waiving his right to collaterally attack his sentence on any ground other than ineffective assistance of counsel, and Defendant stated he understood. Defendant also agreed he "freely and voluntarily accept[ed] the terms and conditions of th[e] plea offer." The Court concluded it was "satisfied [Defendant is] fully competent . . . and he is making a knowing, intelligent, and voluntary waiver of [his] rights."

On December 23, 2013, the Court sentenced Defendant to a term of 180 months imprisonment followed by three years of supervised release.

On December 24, 2013, the Court entered a Judgment.

On December 26, 2013, Defendant filed an appeal of his conviction with the Ninth Circuit.

On July 29, 2015, the Ninth Circuit affirmed Defendant's conviction for Felon in Possession.

On March 14, 2016, Defendant filed a *pro se* Motion (#91) to Vacate or Correct Sentence under 28 U.S.C. § 2255 in which he alleges he received ineffective assistance from his trial counsel, Bear Wilner-Nugent.

On June 7, 2016, Defendant filed a *pro se* Amended Motion (#99) to Vacate or Correct Sentence under 28 U.S.C. § 2255 in

which he continues to assert he received ineffective assistance from Wilner-Nugent. Defendant also asserts he was subjected to selective prosecution because of his race and that the prosecutor violated his due-process rights when he failed to correct what Defendant believes was false testimony by Portland Police Officer Kimberley Hubbard at the suppression hearing.

On July 6, 2016, the Court entered an Order in which it directed Wilner-Nugent to submit information pertinent to Defendant's § 2255 Motions.

On July 27, 2016, Wilner-Nugent filed a Declaration in response to the Court's July 6, 2016, Order.

On September 16, 2016, the Court appointed James Halley as defense counsel.

On March 20, 2017, Defendant's counsel filed a Memorandum in Support of Defendant's § 2255 Motions. The Court took Defendant's Motions to Vacate or Correct Sentence under advisement on May 1, 2017.

On May 24, 2017, Defendant filed a *pro se* Motion for Evidentiary Hearing related to his Motions to Vacate or Correct Sentence.

STANDARDS

The Supreme Court has established a two-part test to determine whether a defendant has received constitutionally

deficient assistance of counsel. *Premo v. Moore*, 131 S. Ct. 733, 739 (2011). See also *Strickland v. Washington*, 466 U.S. 668, 678, 687 (1984). Under this test a defendant must not only prove counsel's assistance was deficient, but also that the deficient performance prejudiced the defense. *Premo*, 131 S. Ct. at 739. See also *Sexton v. Cozner*, 679 F.3d 1150, 1159 (9th Cir. 2012); *Ben-Sholom v. Ayers*, 674 F.3d 1095, 1100 (9th Cir. 2012).

"To prove deficiency of performance, the defendant must show counsel made errors so serious that performance fell below an objective standard of reasonableness under prevailing professional norms." *Mak v. Blodgett*, 970 F.2d 614, 618 (9th Cir. 1992) (citing *Strickland*, 466 U.S. at 687-88)). See also *Sexton*, 679 F.3d at 1159 (citing *Premo*, 131 S. Ct. at 739). The court must inquire "whether counsel's assistance was reasonable considering all the circumstances" at the time of the assistance. *Strickland*, 466 U.S. at 688. See also *Detrich v. Ryan*, 677 F.3d 958, 973 (9th Cir. 2012). There is a strong presumption that counsel's assistance was adequate. *Strickland*, 466 U.S. at 689. See also *Sexton*, 679 F.3d at 1159. To overturn a guilty plea, the defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). See also *Smith v. Mahoney*, 611 F.3d 978, 988 (9th Cir. 2010).

To prove prejudice "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. See also *Sexton*, 679 F.3d at 1159-60. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. See also *Sexton*, 679 F.3d at 1160.

The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. See also *Heishman v. Ayers*, 621 F.3d 1030, 1036 (9th Cir. 2010). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697. See also *Heishman*, 621 F.3d at 1036.

DISCUSSION

As noted, Defendant moves to vacate or to correct his sentence on the grounds that (1) he was selectively prosecuted because of his race, (2) the prosecution violated his right to due process, and (3) he received ineffective assistance of counsel.

I. Waiver of All Grounds Except Ineffective Assistance of Counsel

As noted, in the Plea Agreement Defendant waived his right to bring a § 2255 motion on any ground other than ineffective assistance of counsel. The Court engaged in a thorough colloquy with Defendant as to that fact, and Defendant indicated he understood.

Even if Defendant had not waived his right to assert other bases for collateral attack, the record does not support Defendant's claims. For example, Defendant asserts he was selectively prosecuted because he is African American and supports his allegation by pointing out that the individual he was with on the night in question, Alejandro Herrera, who is Hispanic, was not prosecuted. The record, however, reflects Herrera was not alleged to have possessed a firearm during the events that formed the basis for the charge of felon in possession, but Defendant possessed a firearm at that time.

Defendant also asserts the prosecutor violated Defendant's due-process rights by failing to correct Officer Hubbard's testimony at the suppression hearing as to which officers transported Defendant to the Multnomah County Detention Center (MCDC) after his arrest. Specifically, Officer Hubbard testified she and Officer Derek Carmon transported Defendant to MCDC after his arrest. Officer Carmon, however, did not remember taking Defendant to MCDC. In any event, the Court notes the issue of

which officers brought Defendant to MDCD after his arrest was not central or relevant to the crime charged, and the issue was explored adequately in direct testimony at the suppression hearing.

On this record the Court concludes Defendant waived all grounds to bring a § 2255 Motion except ineffective assistance of counsel and, in any event, Defendant cannot support any claim for selective prosecution or violation of his due-process rights.

II. Ineffective Assistance of Counsel

Defendant also moves to correct his sentence on the ground of ineffective assistance of counsel. Specifically, Defendant alleges Wilner-Nugent was ineffective when he (1) failed to impeach Officer Hubbard as to her testimony at the suppression hearing that she transported Defendant to MDCD, (2) failed to impeach Officer Hubbard as to his testimony about Defendant's personal property taken incident to his arrest, and (3) failed to call Officer John Andonian as a witness at the suppression hearing.

A. Officer Testimony and Reports

Officer Hubbard testified at the suppression hearing that she and Officer Carmon were dispatched on a call that a recent threat with a gun had been made at S.E. Division and S.E. 162nd Avenue on May 24, 2012, at 10:21 p.m. As Officers Hubbard and Carmon drove eastbound on S.E. Division, they saw two men

(Defendant and Herrera) who matched the descriptions of the suspects walking westbound on the opposite side of the street. Officer Carmon made a U-turn, turned on the emergency lights, and came to a stop pointing the vehicle at the two suspects. As the patrol car made the U-turn, Herrera remained standing on the sidewalk and Defendant moved behind some nearby bushes. Officers Hubbard and Carmon exited the patrol car. Officer Hubbard drew her gun on Herrera and ordered him to lie on the ground. Herrera complied with Officer Hubbard's directives, and Officer Hubbard "proned out" Herrera and handcuffed him. At the same time Officer Carmon looked into the bushes with his gun drawn and commanded Defendant to come out. Defendant crawled out of the bushes and complied with Officer Carmon's orders to lie on the ground. After Officer Hubbard handcuffed Herrera, she helped Officer Carmon handcuff Defendant and roll him onto his side to help him get up. When Defendant rolled onto his side, the officers found a small bag of white powder directly underneath Defendant, which they believed contained cocaine. While Officers Hubbard and Carmon were taking Defendant into custody, Officer John Billard looked in the bushes from which Defendant had emerged and found a revolver. Officer Hubbard, relying on the "BOEC print of officer activity," testified she and Officer Carmon then transported Defendant to the East Precinct and then to MCDC. Officer Hubbard also noted on a Force Data Collection

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Report that she did not find any items of value other than the bundle of cocaine during her inventory of Defendant.

Officer Carmon's testimony at the suppression hearing regarding the events preceding and concurrent with the arrest of Defendant and Herrera is substantially similar to that of Officer Hubbard. Officer Carmon, however, testified Officers Billard and Andonian transported Defendant from the East Precinct to MCDC. Officer Carmon also testified on cross-examination that he took Defendant's shoes, money, cigarettes, and cell phone before he placed Defendant in the patrol car. Officer Carmon's Custody Report reflects Officers Billard and Andonian transported Defendant to MCDC, and Defendant "had no items of value on his person."

Officer Andonian's report of the incident does not reflect that either Officer Andonian or Officer Billard transported Defendant to MCDC.

B. Impeachment of Officer Hubbard Regarding Transport of Defendant to MCDC

Defendant asserts Wilner-Nugent provided him with ineffective assistance of counsel when he failed to impeach Officer Hubbard regarding her testimony that she transported Defendant to MCDC.

Wilner-Nugent testifies in his Declaration that he "was [never] presented with evidence to support a good-faith belief that the officers were not telling the truth in their police

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reports or on the witness stand about which officer transported [Defendant] to which destination at which time." Decl. of Bear Wilner-Nugent at ¶ 7. In addition, Wilner-Nugent notes the thrust of the Motion to Suppress filed on Defendant's behalf was that Defendant "was arrested based on insufficiently personalized factors. . . . The purportedly bad impeachment was orthogonal to this argument at the suppression hearing." *Id.* at ¶ 8.

The record reflects the minor issues that Defendant raises about Officer Hubbard's testimony regarding which officers transported Defendant after his arrest are irrelevant to the issues the Court considered when deciding Defendant's Motion to Suppress; the Court, in any event, addressed the discrepancies during the suppression hearing; and the Court, well aware of the variations in the witnesses' testimony, did not find any indication of untruthfulness:

I expect that witnesses to the same event will often have different perspectives, and this case isn't any different. We have minor variations among the accounts of the officers and even the defendant's account. But fundamentally consistent from the testimony of the officers and even from the defendant's testimony to the extent he chose to share it with me.

* * *

I find all of the witnesses testified truthfully, to the best of their knowledge. . . . The officer, I have no reason to distrust, other than in the normal run of human encounters, people remember details; some don't. One officer writes down 20:51 hours when it's 22:51 hours. There are human errors inherent in their accounts. But

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nobody is lying to me about the key facts here,
and I accept the key presentation as true.

Evid. Hearing Tr. (#49) at 112-13.

The Court concludes on this record that Defendant has not established defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms with respect to the impeachment of Officer Hubbard as to her testimony relating to Defendant's transport to MCDC.

C. Impeachment of Officer Hubbard Regarding Personal Property Taken from Defendant

Defendant asserts he received ineffective assistance of counsel when Wilner-Nugent failed to impeach Officer Hubbard with the testimony and reports of Officer Carmon as to when or what property was removed from Defendant. Wilner-Nugent testifies in his Declaration that this evidence was also "orthogonal to [Wilner-Nugent's] argument at the suppression hearing," and, in any event, "Officers Hubbard and Carmona [sic] testified consistently and believably as to the nature of the personal property that they seized from Mr. Willis incident to arrest." Wilner-Nugent Decl. at ¶ 8.

As with Defendant's assertion of ineffective assistance of counsel regarding his transportation to MCDC, the record reflects Officer Hubbard's testimony regarding the items of personal property that were seized from Defendant is irrelevant

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to the issues the Court, in any event, considered when deciding Defendant's Motion to Suppress; the Court addressed the discrepancies during the suppression hearing; and the Court, well aware of the variations in the witnesses' testimony, did not find any indication of untruthfulness.

The Court concludes on this record that Defendant has not established defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms with respect to impeachment of Officer Hubbard relating to the items of personal property that were seized from Defendant.

D. Failure to Call Officer Andonian as a Witness

Finally, Defendant asserts he received ineffective assistance of counsel when Wilner-Nugent failed to call Officer Andonian as a witness at the suppression hearing. Defendant contends Officer Andonian would have contradicted Officer Carmon's testimony and report that Officers Andonian and Billard transported Defendant to MCDC.

Wilner-Nugent testifies in his Declaration that he is "unaware of any reason why Officer Andonian would have been a helpful witness for the defense. Additionally, [his] notes do not reveal any information supplied by Mr. Willis before the suppression hearing that would have suggested anything to the contrary." Wilner-Nugent Decl. at ¶ 9.

As noted, the issue of which officers transported Defendant to MCDC was tangential and irrelevant to the issues the Court considered at the suppression hearing, and the Court addressed the discrepancies in the officers' testimony at the hearing. The Court, therefore, concludes on this record that Defendant has not established defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms when he declined to call Officer Andonian as a witness at the suppression hearing.

Accordingly, the Court concludes Defendant did not receive ineffective assistance of counsel, and, therefore, the Court denies Defendant's Motion to Vacate or Correct Sentence under 28 U.S.C. § 2255 and Defendant's Amended Motion to Vacate or Correct Sentence under 28 U.S.C. § 2255.

III. Evidentiary Hearing

Defendant moves for an evidentiary hearing to support his Motions to Vacate or Correct Sentence.

An evidentiary hearing "is not automatically required on every section 2255 petition." *Baumann v. United States*, 692 F.2d 565, 570-71 (9th Cir. 1982). See also *United States v. Reyes-Bosque*, 624 F. App'x 529, 530 (9th Cir. 2015) (same). A hearing is not required when "the files and records conclusively show that the movant is not entitled to relief," *United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998), or when the

"record is sufficiently developed for the court to conclude that their claim lack[s] merit." *Joseph v. United States*, 583 F. App'x 830, 831 (9th Cir. 2014).

"To earn the right to a hearing" the defendant must allege "specific facts which, if true, would entitle him to relief." *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996). See also *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (an evidentiary hearing is required only when "the movant has made specific factual allegations that, if true, state a claim on which relief could be granted") (internal quotation marks and citation omitted). "[B]ald, conclusory or inherently incredible assertions" do not require an evidentiary hearing. *United States v. Howard*, 381 F.3d 873, 879 (9th Cir. 2004).

The Court finds the files and records in this matter conclusively establish Defendant is not entitled to relief and the record is sufficiently developed for the Court to conclude that Defendant's claims lack merit. Accordingly, the Court denies Defendant's Motion for Evidentiary Hearing.

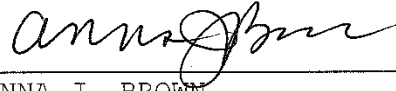
CONCLUSION

For these reasons, the Court **DENIES** Motion (#91) to Vacate or Correct Sentence under 28 U.S.C. § 2255, **DENIES** Defendant's Amended Motion (#99) to Vacate or Correct Sentence under 28 U.S.C. § 2255, and **DENIES** Defendant's Motion (#134) for

Evidentiary Hearing. The Court finds Defendant has not made a substantial showing of the denial of a constitutional right. Accordingly, the Court **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 9th day of June, 2017.



ANNA J. BROWN
United States District Judge

AO 243 (Rev. 5/85)

United States District Court

Case No.
3:12-cr-00292-BR

V. SID EDWARD WILLIS JR.
(name under which convicted)

WILLS CERT. PET. APP. - 020

AO 243 (Rev. 5/85)

9. If you did appeal, answer the following:

- (a) Name of court Ninth Circuit
- (b) Result Affirmed. UNITED STATES v. WILLIS 610 Fed Appx 696 (9th Cir)
- (c) Date of result July 29, 2015.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____
- (4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
- (5) Result _____
- (6) Date of result _____

(b) As to any second petition, application or motion give the same information:

- (1) Name of court _____
- (2) Nature of proceeding _____
- (3) Grounds raised _____

Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

[illegible]

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- b) Conviction obtained by use of coerced confession.

AO 243 (Rev. 5/85)

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: SEE: ATTACHMENTS.

Supporting FACTS (state *briefly* without citing cases or law)

B. Ground two: SEE: ATTACHMENTS.

Supporting FACTS (state *briefly* without citing cases or law):

C. Ground three: SEE ATTACHMENTS.

Supporting FACTS (state *briefly* without citing cases or law):

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D. Ground four: SEE. ATTACHMENTS.

Supporting FACTS (state *briefly* without citing cases or law):

See Additional Claims Attached
13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: Ineffective assistance of counsel is best presented in a § 2255.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Russell Barnett III. 1500 Sw 1st Ave Suite 780
Portland, Or 97201.

(b) At arraignment and plea Bear Wilner-Nugent 620 SW 5th Ave. Portland, Or 97204

(c) At trial None.

(d) At sentencing James Maher PO BOX 19973 Portland, Or 97280

A. ground one: Ineffective assistance of trial counsel. Counsel Bear Wilner-Nugent failed to request a hearing due to selective prosecution or discovery.

SUPPORTING FACTS: ON MAY 24, 2012 Sid Willis and Alejandro Herrera were arrested by the Portland Police for threatening a person with a gun. ON JUNE 5, 2012, Willis was indicted for being a felon in possession of a firearm U.S.C. 922 (g) and also 924(c). ON MAY 20, 2013, Willis went to a evidentiary hearing. The court even wondered was Mr. Herrera charged? (Tr 127). Mr. Herrera was a felon and on federal Probation. See officer Samaras investigation report Attachment (Exhibit 2) according to officer

Samoras investigation report. The "Victim" told her that Herrera, stated "why are you still here talking... we'll just shoot you and take your car. Counsel failed to request a hearing and discovery. Due to selective prosecution which was prejudicial to my defense, counsel should have asked for a motion to dismiss.

B. Ground two: Ineffective assistance of trial counsel. Counsel failed to impeach officer Hubbard with statements made by other witnesses which contradicted her police report.

SUPPORTING FACTS: Bear Wilner-Nugent failed to impeach officer Hubbard at the evidentiary hearing held on May 20, 2013. Officer Hubbard testified that her PIV

Officer Carmona were dealing with me and Herrera at MDC. (TR 26). She also wrote a special report stating the same Attachment (Exhibit 5). But see (TR 53) And then also from East Precinct to The Multnomah County Detention Center No Okay who did that? Just officer Billard and officer Mandoni I have in my report. See Attachment (Exhibit 3). Counsel failed to properly cross examine and impeach officer Hubbard. At The Evidentiary hearing held on May 20, 2013, which was prejudicial and detrimental to my defense.

C. ground Three: Ineffective assistance of Counsel.

SUPPORTING FACTS: Counsel failed to impeach

Officer Hubbard based off a false Police report and testimony Bear Wilner-Nugent failed to impeach officer Hubbard based off officer Carmon's Police report and also testimony stating that he never went to MCIX (T-53) and also see Attachment (Exhibit 3). Counsel should have impeached Officer Hubbard's testimony which could have effected the outcome of the evidentiary hearing held on May 20, 2013. Counsel's failure to impeach officer Hubbard's testimony was prejudicial to my defense.

Ground four: Ineffective assistance of trial counsel. Bear Wilner-Nugent failed to impeach officer Hubbard and officer

CARMON based off their Police report, and testimony at the evidentiary hearing.

SUPPORTING FACTS: Counsel Bear Wilner-Negant questioned both officers stating that they took my Phone, money, shoes, and Cigarettes, at the Patrol car (Tr 36) officer Hubbard's testimony (Tr 57) officer Carmon's testimony. But see officer Hubbard's report Attachment (EXHIBIT 4) During my inventory of Willis, he had no items of value on his Person. See officer Carmon's report Attachment (EXHIBIT 3) Willis was transported to MCDC, and he had no items of value on his Person. Counsel failed to question the officers on why they removed my Phone, money, shoes, and also cigarettes, if they were

were just doing an investigatory stop and show up identification by the victim. Because I was in handcuffs not a danger to sit in a car that is not transmitting. Counsel's failure to impeach Officer Carmon and Officer Hubbard based off their reports was prejudicial to my defense. My property was removed while I was on the grand questioning. The officer property could have changed the outcome of my evidentiary hearing.

Grand Five: Ineffective assistance of trial counsel. Bear Wilner-Negent failed to subpoena officer John Andonian as a defense witness.

SUPPORTING FACTS: The government presented four of the six officers that were at the arrest scene on May 24, 2012. At the

Evidentiary hearing on May 20, 2013. Counsel only offered Mr. Willis as a defense witness. Officer John Andonian was part of the arrest team on May 24, 2012. Officer John Andonian was an important fact witness. See Attachment (Exhibit 1) on May 24, 2012, Officer Andonian stopped Plus helped take the two males into custody at apartment AC. Bilbao, and I handcuffed SB Herrera. I walked him to my air patrol car I searched him, he did not have anything of value on his person other than a cell phone, he was also advised of his Miranda rights. Officer Andonian, was a critical and favorable witness to the

FACTS AND EVENTS THAT OCCURRED THE evening of Mr. Willis's arrest. Mr. Willis advised counsel that he would like Officer Anderson subpoenaed as a defense witness. Counsel failed to have Officer Anderson subpoenaed as a defense witness to the evidentiary hearing which was prejudicial to Mr. Willis's defense. Because Officer Anderson was a favorable witness that could have changed the outcome of the proceedings. Counsel's duty is to call favorable witnesses, which is guaranteed by the Sixth Amendment.

F. Denial of right to due process, equal protection and fair trial under the 5th, 6th, 8th, and 14th amendments when the prosecutor selectively prosecuted petitioner based upon petitioner's race.

SUPPORTING FACTS: The Government indicted Sid Willis on June 5, 2012 for being a felon in possession of a firearm. Sid Willis is African American. Alejandro Herrera was not indicted for joint possession of a firearm. Mr. Herrera is of Hispanic descent. The court even wondered was Mr. Herrera charged/CR 12).

9. ground seven: Denial of the 6th amendment when counsel failed to examine and impeach Hubbard with contradictory statements made by other witnesses and contradictory statements made in his own police reports.

SUPPORTING FACTS: Counsel Bear Wilner-Nugent heard all of the officer's testify at the evidentiary hearing

and also counsel had the Police reports. Carmon stated that he never went to MCIX and also his report states he never went to MCIX. Counsel failed to impeach Officer Hubbard based on these points. Counsel also failed to impeach her testimony stating that she took my property at the car. (Tr 38). With her Police report Attachment (Exhibit 4) stating that during her inventory I had no items of value on my person. Counsel's failure to impeach Officer Hubbard based on these points was prejudicial to my defense.

H ground eight: Denial of right to due process and fair trial under the 5th, 6th, 8th, and 14th amendments when the Prosecutor

Case 3:12-cr-00292-BR Document 99 Filed 06/07/16 Page 16 of 20
Presented false testimony from officer
Hubbard.

SUPPORTING FACTS: The government heard
Officer Hubbard testify that her PAs officer
Carmen spoke to me at "MCDC" (Tr 26). But
See (Tr 53) Officer Carmen's testimony and
Then also from East Precinct to the
Multnomah County Detention Center NO OKAY
who did that? Just officer Billard and
Officer Mandoni I have in my report.
Attachment (EXHIBIT 3). The government failed
to correct Officer Hubbard's false testimony
and also SPECIAL REPORT ATTACHMENT
(EXHIBIT 5).

I Denial of the 6th amendment when
counsel failed to call Anderson to impeach
Hubbard's apparent contrary testimony and

To Prove That Hubbard took all of Petitioner's Property from him, including his shoes while Petitioner was still lying face down on the ground.

SUPPORTING FACTS: Officer Carmon wrote in his Police report Attachment (EXHIBIT 3) That Officer Andonian and Officer Billard transported me to MCDC without incident. And I had no items of value on my person. Counsel failed to call Andonian. Because he was part of the arrest team. And a fact witness. To Prove That officer Hubbard plus Carmon removed all of my property while I was still lying face down on the ground. Counsel's failure to call Andonian was prejudicial to my defense.

AO 243 (Rev. 5/85)

(e) On appeal Tonia L. Moro, 19 S. Orange St. Medford, Or 97501.

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

amended motion.
I declare under penalty of perjury that the foregoing is true and correct. Executed on

May 26, 2016
(date)

Isid Wills
Isid Wills
Signature of Movant

Certificate of Service

I Sid Willis Jr hereby certify
under penalty of Perjury Title 28
U.S.C 1746 The contents as true
and correct a complete copy of
The following Motion sent to the
Court.

District Court Clerk
District Court
1000 SW Third Ave
Portland, OR 97204

Respectfully Submitted May 26, 2016

15 Sid Willis
SID WILLIS

United States Courts
CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA VS. SID EDWARD WILLIS JR;
CASE # 3:12-cr-00292-BR.

I, Sid Willis Jr; hereby certify under penalty of perjury pursuant to Title 28 U.S.C. §1746 the contents as true and correct, a complete copy of the following Motion sent to the Court and Respondent of:

District Court Clerk.
1000 S.W. Third Avenue.
Portland, Or 97204.

Which is deemed filed on the date that it is presented to prison officials receive it for forwarding to the United States Postal Service, under Houston vs. Lack, 101 L.Ed.2d 245 (1988), upon the Court and served parties to the litigation and/or his/her attorney's of record, by placing same in a sealed, postage prepaid envelope addressed to:

and deposited same in the Legal Mail Depository for the United States Post Office, at the United States Penitentiary; signed this 26 day of May, 2016.

CERTIFIED MAIL NUMBER

Respectfully Submitted,
SID WILLIS JR;

Petitioner's Printed Name
/s/Sid Willis Jr;

Petitioner's Signature
Reg. # 66064-065.

USP Victorville, Po Box 3900
Adelanto, California 92301

MAY 25 2012 12:09PM

Exhibit 1

NO. 1493 P. 18

APPROVAL
ROUTE East Precinct

12-044558 CASE NUMBER	PORTLAND POLICE BUREAU		CUSTODY REPORT				☒ ADULT ☐ JUVENILE		PAGE OF 1 / 2	
	CASE NUMBER 12-044558		REFER CASE NUMBER		CLASSIFICATION					
	DATE/TIME REPORTED 05/24/12 2228		DATE/TIME ARRESTED 05/24/12 2228		TYPE OF CUSTODY ☒ 1. PROBABLE CAUSE ☐ 2. WARRANT		☐ 3. STATUS OFFENSE ☐ 4. CITIZEN ARREST ☐ 5. CITE IN LIEU		☐ 6. PROTECTIVE CUSTODY ☐ 7.	
	LOCATION OF CUSTODY ☐ SAME AS INCIDENT LOCATION SE 157th Ave/ SE Division				PRECINCT OF ARREST Central Precinct					
	NAME OF PERSON IN CUSTODY (Last, First Middle) Herrera, Alejandro Arturo				SEX M		RACE H		DOB /82	
	AKA / MONICKER / NICKNAME				SEX		RACE		DOB	
	COPIES		HEIGHT 5-8		WEIGHT 140		HAIR BLK		EYES BRO	
	☐ DET		HOME ADDRESS 3027 SE 38th Ct		CITY Hillsboro		STATE Oregon		ZIP	
	☐ CENTRAL		BUSINESS / SCHOOL ADDRESS		☐ WORK PHONE		☐ MRS. PHONE		MOBILE PHONE 503 935-1845	
	☐ EAST		SCARS / MARKS / TATTOOS							
☐ NORTH		DRIVERS LICENSE		STATE OR		SEX		DOB NO.		
☐ NE		OTHER ID / UNIQUE FEATURES								
☐ SE		PROPERTY RECEIPT NUMBER(S)								
☐ DAT		COMPLAINS OF ILLNESS OR INJURY? ☐ YES ☒ NO		EVIDENCE OF ILLNESS OR INJURY? ☐ YES ☒ NO		TREATED BY				
☐ DHS/CMS		EXPLAIN								
☐ DVD		CHARGES								
☐ DVRU		IN CUSTODY REFERRED TO: MCDC		ADVISED OF RIGHTS? ☒ YES ☐ NO		REGISTERED ARREST? ☐ YES ☒ NO		ASSAULTED OFFICER? ☐ YES ☒ NO		
☐ SORT		CASE NUMBER 163.275		☒ STATE CHARGE / WARRANT / CITE NUMBER Coercion		LIEU-OF-CITE NO.		BAIL 5000		
☐ JDH		CASE NUMBER 166.025		☒ STATE CHARGE / WARRANT / CITE NUMBER Discon II		LIEU-OF-CITE NO.		BAIL 1000		
☐ JUV		CASE NUMBER 163.190		☒ STATE CHARGE / WARRANT / CITE NUMBER Menacing		LIEU-OF-CITE NO.		BAIL 2500		
☐ CS		VEHICLE T-TOWED ☐ LEFT AT SCENE RELEASED TO:								
☐ DVCB		PERSONS AO - Associates ☐ See Investigation Report for Narrative								
☐		DOCS NAME (Last, First Middle) AO Willis, Sid Edward		SEX M		RACE B		DOB 05/01/79		
☐		NARRATIVE - The order of appearance for additional information will be:		ITEM 1: NA						
☐		ITEM 2: NA		ITEM 3: NA						
☐		ITEM 4: NA		ITEM 5: NA						
☐		ITEM 6: ADDITIONAL WORKSHEET DOCUMENTS - Record multiple worksheets documents on a single supplemental form. Record in the narrative the total number of worksheets documents written.		ITEM 7: SUMMARY - A short summary is necessary if the narrative is more than one full page in length.						
☐				ITEM 8: NARRATIVE - List in chronological order, all of the relevant details of the incident and/or statements of the victim or witness.						
☐		FOR FORENSIC EVIDENCE DIVISION ONLY								
☐		NAME (Last, First Middle)		POS						
☐		IDENTIFIERS LISTED BELOW		SEX		RACE		DOB		
☐		OTHER:		HEIGHT		WEIGHT		HAIR		
☐		PROCESSING		JAIL TECH		ID TECH		TYPED		
☐		REPORTING OFFICER John Andonian		DOCS 50654		PREC / DIV CE/U		RUP / SHFT A		
☐				ASSN / CRT GET		SUPERVISOR'S SIGNATURE		05-25-12 0849 2nd (N07)		

SEW00017

WILLS CERT. PET. APP. - 040

PPS-C-1-1004

WILLS CERT. PET. APP. - 041

EXHIBIT 2

12-044558 CASE NUMBER	PORTLAND POLICE BUREAU		INVESTIGATION REPORT				PAGE OF 1 / 3	
	CASE NUMBER 12-044558		REFER CASE NUMBER 12-44571		CLASSIFICATION		CLERK	
	DATE / TIME REPORTED 05/24/12 2221		DATE / TIME OCCURRED (START) 05/24/12 2204		DATE / TIME OCCURRED (END) 05/24/12		☒ RADIO (R) ☐ S/I (S) ☐ PHONE-IN (P)	
	LOCATION OF OCCURRENCE 16226 SE Division Street (Plaid Pantry)							
	PREMISE TYPE 370 - Business, Convenience Store				PRECINCT OF OCCURRENCE East Precinct			
	ONE SENTENCE SUMMARY OF INCIDENT (X1) and (X2) threaten (VI) and (WI) with a handgun.							
	PERSONS BU - Business Complainant KN - Person w/ Knowledge OW - Owner PF - Property Finder SS - Subject RP - Reporting Person VI - Victim WI - Witness							
	COPIES ☐ DET ☐ CENTRAL ☐ EAST ☐ NORTH ☐ NE ☐ SE ☐ CAT ☐ DHS/CHS ☐ DVD ☐ DVRU ☐ ECRT ☐ JDH ☐ JUV ☐ CS ☐ DVCS							
	CODE NAME (Last, First Middle) SEX RACE DOB VI MORRIS, Gregory Lamor M B 1980 HOME ADDRESS CITY STATE ZIP HOME PHONE BUSINESS/SCHOOL ADDRESS WORK PHONE MSG. PHONE MOBILE PHONE CODE NAME (Last, First Middle) SEX RACE DOB WI SMITH, Clarisse Jane F B 1982 HOME ADDRESS CITY STATE ZIP HOME PHONE BUSINESS/SCHOOL ADDRESS WORK PHONE MSG. PHONE MOBILE PHONE							
	X1, X2, - X3 - SUSPECTS MI - Missing RW - Runaway DK - Drunk DE - Deceased AS - Attempt Suicide ME - Mental SS - Subject CODE NAME (Last, First Middle) SEX RACE DOB X1 WILLIS, Sid Edward M B 05/01/1979 HOME ADDRESS CITY STATE ZIP HEIGHT WEIGHT HAIR EYES CUSTODY? 6000 NE 80th Avenue Portland OR 5'7" 250 BLK BRO YES AKA/MONIKER WRK PHN MSG PHONE MOBILE PHONE HOME PHONE OTHER DESCRIPTION CODE NAME (Last, First Middle) SEX RACE DOB X2 HERRERA, Alejandro Arturo M H 1982 HOME ADDRESS CITY STATE ZIP HEIGHT WEIGHT HAIR EYES CUSTODY? Hillsboro OR BLK BRO YES AKA/MONIKER WRK PHN MSG PHONE MOBILE PHONE HOME PHONE OTHER DESCRIPTION							
VEHICLE S - Stolen R - Recovered L - Locate A - Abandoned T - Towed V - Victim's Vehicle X - Suspect Vehicle I - Informational M - Missing IDENTIFICATION DIVISION NOTIFIED? ☐ YES ☒ NO OUTSIDE AGENCY NOTIFIED/REFERRED TO?								
COMPUTER ENTRY ☐ Desk DPSST ☐ Person DPSST ☐ Entry / Vehicle DPSST ☐ Distribution DPSST REPORTING OFFICER(S) Shaye Samora								
PROPERTY RECEIPT NUMBER(S) PROPERTY S - STOLEN L - LOST F - FOUND D - DAMAGED K - SAFEKEEPING R - RECOVERED E - EVIDENCE NARRATIVE - The order of appearance for additional information will be: ITEM 1: N/A ITEM 2: N/A ITEM 3: N/A ITEM 4: ADDITIONAL WORTHLESS DOCUMENTS - Record multiple worthless documents on a fraud supplemental form. Record in the narrative the total number of worthless documents written. ITEM 5: N/A ITEM 6: ADDITIONAL OFFICERS - List all officers present and identify their involvement with the incident being reported. ITEM 7: SUMMARY - A short summary is necessary if the narrative is more than one full page in length. ITEM 8: NARRATIVE - List in chronological order, all of the relevant details of the incident and/or elements of the crime or violation. ASSN / DIST 965 / 962 SUPERVISOR'S SIGNATURE Jacob Clark (43501)								

SEW00126

WILLS CERT. PET. APP. - 042

WILLS CERT. PET. APP. - 043

12-044558	PORTLAND POLICE BUREAU		INVESTIGATION REPORT				PAGE OF 3 / 3
	said that (X1) walked up to her and said "why is your dude mugging me?" She said that (X1) then pulled a gun out of his pocket. She said that he did not point the gun at her and instead showed her that he had a gun. She said that she went inside the store and told (VI) what happened. She said that when they walked out of the store (X1) pulled the gun out and pointed it at (VI)'s face. She said that (X1) then got into (VI)'s face and told him that he had spent 10 years in jail and was a pimp with "six bitches." She said that she heard (X1) threaten to jump (VI) and take his car. (WI) said that she pleaded with both (X1) and (X2) to leave them alone. She said that she told them that they had small children at home. (WI) said that (VI) then got into the car and they drove away. Officers then transported (X1) and (X2) to East Precinct where they were held for questioning. I then went to the Plaid Pantry and viewed their surveillance video. The video shows that (VI) and (WI) pulled into the parking lot of Plaid Pantry at approximately 2204. After (VI) goes into the store, (X1) approaches (WI) while she is still in the front passenger seat of the vehicle. After a few moments, (X1) walks off camera and (WI) gets out of the vehicle and goes into the store. At approximately 2207, (VI) and (WI) walk out of the store and (X1) approaches (VI). The video shows (X1) pointing a handgun at (VI) as he walks off camera for a few moments. The video then shows (VI) and (WI) walking back to their car and driving away from the store. I could also see the handle of the gun sticking out of (X1)'s hoodie pocket as he walked around in the store. I requested a copy of the video surveillance which would not be ready until the next day. I then went to East Precinct to interview both suspects. I placed (X2) into an interview room where I had him read out loud the Miranda waiver, which he signed. (X2) told me that he went to the Plaid Pantry to get a beer. He denied that he was with anyone or talked to anyone at the store. (X2) told me that he called a girl on the phone and had plans to walk to her place at 102nd Avenue. He denied that he threatened (VI) and (WI) and further denied that he demanded they drive him to 102nd Avenue. I explained to (X2) that I had video from the Plaid Pantry that showed him aggressively confronting (VI) and (WI). (X2) said that he did not know what to tell me because he is not an aggressive person. (X2) denied that he knew (X1). He said he did not talk to him at the Plaid Pantry and said that he had only been standing next to (X1) on SE Division Street when the police showed up. (X2) said that he was not "with" (X1) when contacted by the police and that he was just a random person he had never seen before. I then placed (X1) into an interview room where I had him read out loud the Miranda waiver, which he signed. (X1) did not completely read aloud the waiver and stated "I know my rights." (X1) then requested a lawyer and I concluded my interview. Other officers then transported both (X1) and (X2) to MCDC where they were lodged. A copy of the video surveillance from the Plaid Pantry will be placed into evidence once obtained. Refer to other officer reports for additional information.						
CASE NUMBER							
COPIES							
☐ DET							
☐ CENTRAL							
☐ EAST							
☐ NORTH							
☐ NE							
☐ SE							
☐ CAT							
☐ DHS/CHS							
☐ DVD							
☐ DVRU							
☐ ECRT							
☐ JOH							
☐ JUV							
☐ CS							
☐ DVCS							
☐							
☐							
☐							
☐							
COMPUTER ENTRY							
☐ Desk							
DPSST							
☐ Person							
DPSST							
☐ Entry / Vehicle							
DPSST							
☐ Distribution							
DPSST							
REPORTING OFFICER(S)	DPSST	PREC / DIV	RLF / SHIFT	ASSN / DIST	SUPERVISOR'S SIGNATURE		
Shave Samora	51733	EA / U	A	965 / 962	Jacob Clark (43501)		
EXTERNAL DISTRIBUTION LIST							

SEW00128

PAGE 05/17

309 (00007)

05/25/2012 12:59 5838235848

PAGE 06/17

12-044558	PORTLAND POLICE BUREAU		CUSTODY REPORT		PAGE 06/17
	NARRATIVE - The order of appearance for additional information will be:		ITEM 5: N/A		PAGE 06/17
CASE NUMBER	ITEM 1: N/A		ITEM 6: ADDITIONAL OFFICERS - List all officers present and identify their involvement with the incident being reported.		2 / 3
	ITEM 2: N/A		ITEM 7: SUMMARY - A short summary is necessary if the narrative is more than one full page in length.		
COPIES	ITEM 4: ADDITIONAL WORTHLESS DOCUMENTS - Record multiple worthless documents on a third supplemental form. Record in the narrative the total number of worthless documents written.		ITEM 8: NARRATIVE - List in chronological order, all of the relevant details of the incident and/or elements of the crime or violation.		
COPIES	NARRATIVE				
	6 - Officer Hubbard #45126, Partner Officer Billard #44160, Cover Officer Andonian #50654, Cover Officer Samora #51773, Primary/Investigation Officer Pippen #29903, Cover				
COPIES	8 - On the above listed date and time, Officer Hubbard and I were working a partner car while assigned to the Gang Enforcement Team. We heard a call dispatched where a subject was menaced with a gun at the Plaid Pantry located at SE Division / SE 162nd and the suspects left on foot, westbound SE Division. We headed in that direction to see if we could help locate the suspects. The suspects were described as follows:				
	S1 - Light skinned black male, 32yo, 5'7, heavy, wearing a black baseball hat, black jacket, and black pants with a large silver handgun				
COPIES	S2 - Hispanic male, 20yo, black clothing				
	As we were coming into the area we saw two subjects that matched the description of the the suspects walking westbound on SE Division at about SE 158. We turned around to stop the subjects and S1 ducked in behind a tall hedge and S2 stopped. We exited our vehicles and Officer Hubbard challenged S2 while I slowly began to cut the angle to see if I could see where S1 had disappeared to. While I was trying to locate S1, he crawled back out from behind the hedge, I began to give him commands and he was compliant. Officers Billard and Andonian arrived shortly and I told Officer Hubbard to go assist them in taking S2 into custody.				
COPIES	Officer Pippen then arrived and assisted me in keeping cover on S1 until S2 was taken into custody. Once S2 was secure, Officer Hubbard came back to our position and we then took S1 into custody. As we were taking S1 into custody Officer Hubbard located what we believed to be Cocaine underneath the subject. Officer Billard came over to our location and I told him to check behind the hedge for any evidence and Officer Billard located a gun. See their respective reports for additional information. S1 was placed into our patrol car and transported to East Precinct to be interviewed by Officer Samora.				
	S1 was later identified as WILLIS Jr., SID, who is a felon on felony probation. Based on WILLIS being a felon and possessing a firearm, he was charged with such along with possessing that loaded firearm in public, based on our stop. Back at East Precinct, I field tested the suspected cocaine and received a positive result for such. I have successfully completed a NIK/ODV System of Narcotics Identification, Basic Competency Course. WILLIS was also charged with PCS II Cocaine. The cocaine was placed into the East Precinct property room on PER #1287006.				
COPIES	The additional charges of Unlawful Use of a Weapon, Menacing, Disorderly Conduct, and Coercion were added based on Officer Samora's investigation. See Officer Samora's report for additional information.				
COMPUTER ENTRY	REPORTING OFFICER(S)		DPST	PREC / DIV	RLF / SHIFT
	Derek Cannon		38197	TOD	A
COMPUTER ENTRY	ASSN / DIST		SUPERVISOR'S SIGNATURE		
	1672		Mark Snyder (28162)		
COMPUTER ENTRY	PPS-C-4-1024				
	289 (06/07)				

SEW00028

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05/25/2012 12:59 5038235848

PAGE 07/17

PORTLAND POLICE BUREAU		CUSTODY REPORT		PAGE 07 OF 17		
12-044558		Officer Billard and Officer Andonian transported WILLIS to MCDC without incident and WILLIS had no items of value on his person.				
EXTERNAL DISTRIBUTION LIST						
COPIES						
☐ DET						
☐ CENTRAL						
☐ EAST						
☐ NORTH						
☐ NE						
☐ SE						
☐ CAT						
☐ DHS/CMA						
☐ DVD						
☐ DVRU						
☐ ECRT						
☐ JCH						
☐ JUV						
☐ CS						
☐ DVCS						
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COMPUTER ENTRY						
☐ Desk						
DPST						
☐ Person						
DPST						
☐ Entry / Vehicle						
DPST						
☐ Distribution						
DPST						
REPORTING OFFICER(S)		DPST	PREC / DW	RLP / SHIFT	ASST / DIST	SUPERVISOR'S SIGNATURE
Derck Cannon		38197	TOD	A	1672	Mark Snyder (28162)
PPS-Q-1-1004		Print Form				204 (06/07)

SEW00029

WILLS CERT. PET. APP. - 047

MAY. 25. 2012 12:09PM

NO. 1493 P. 12

APPROVAL
ROUTE East Precinct

12-044558 CASE NUMBER	PORTLAND POLICE BUREAU		FORCE DATA COLLECTION REPORT				PAGE OF 1 / 2																																																																
	CASE NUMBER 12-044558		REFER CASE NUMBER 12-44571		CLASSIFICATION																																																																		
	ORIGINAL REPORT DATE / TIME 05/24/12 2221		THIS REPORT DATE / TIME 05/24/12 2225		PRECINCT OF OCCURRENCE East Precinct																																																																		
	LOCATION OF OCCURRENCE ☐ SAME AS INCIDENT LOCATION 15816 SE Division																																																																						
	CODE UF	NAME (LAST, FIRST MIDDLE) HERRERA, ALEJANDRO ARTURO			DOB M	RACE H	DOB 82																																																																
	HOME ADDRESS 3027 SE 38TH CT		CITY HILLSBORO	STATE Oregon	ZIP	HOME PHONE																																																																	
	BUSINESS/SCHOOL ADDRESS				☐ WORK PHONE ☐ MSG. PHONE		MOBILE PHONE																																																																
	AKA/MONICKER		HEIGHT 5'9"	WEIGHT 160	HAIR XXX	EYES BRO																																																																	
	PERCEIVED SUBJECT CONDITIONS (Check All That Apply) ☐ 1 Actually/Perceived Armed ☐ 7 Engaged in or Indicated the Intent to Engage in Physical Resistance ☒ 10 Alcohol (Under the Influence of) ☒ 2 Reported to be Armed ☐ 8 Engaged in or Indicated the Intent to Engage in Aggressive Physical Resistance ☐ 11 Drugs (Under the Influence of) ☐ 3 Assaulted Officer ☐ 9 High Risk Incident/Custody ☐ 12 Mental Illness ☐ 4 Assaulted Citizen ☐ 13 None Apparent ☐ 5 History of Violence ☐ 14 Other (Explain in Narrative) ☐ 6 Failure to Comply																																																																						
	USE OF FORCE/CONTROL NECESSARY TO (Check All That Apply) ☐ 1 Defend Self ☒ 3 Make Arrest ☐ 5 Civil Hold ☐ 2 Defend Another ☐ 4 Prevent Escape ☐ 6 Other (Explain in Narrative)																																																																						
OFFICER ACTIVITY IMMEDIATELY PRIOR TO FORCE RESPONSE (Check All That Apply) ☐ 1 Foot Pursuit ☐ 4 Person Search (Not Cuffed) ☐ 7 Interview/Interrogation ☐ 2 Subject Escort ☐ 5 Handcuffing ☒ 8 Other (Explain in Narrative) ☐ 3 Person Search (Cuffed) ☐ 6 Transportation in Vehicle																																																																							
SUBJECT WAS INJURED (Check All That Apply) ☐ 1 Prior to Police Involvement ☐ 3 In Custody ☐ 2 During Arrest ☐ 4 Other (Explain in Narrative)																																																																							
INJURIES (Check All That Apply) <table border="1"> <thead> <tr> <th></th> <th>1 None</th> <th>2 Bruises</th> <th>3 Abrasions</th> <th>4 Lacerations</th> <th>5 Broken Bones</th> <th>6 Other Injuries</th> </tr> </thead> <tbody> <tr> <td>Officer</td> <td>☒</td> <td>☐</td> <td>☐</td> <td>☐</td> <td>☐</td> <td>☐</td> </tr> <tr> <td>Subject</td> <td>☒</td> <td>☐</td> <td>☐</td> <td>☐</td> <td>☐</td> <td>☐</td> </tr> </tbody> </table>									1 None	2 Bruises	3 Abrasions	4 Lacerations	5 Broken Bones	6 Other Injuries	Officer	☒	☐	☐	☐	☐	☐	Subject	☒	☐	☐	☐	☐	☐																																											
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05-25-12 0059 FBI (15007)

SEW00011

WILLS CERT. PET. APP. - 048

12-044558	PORTLAND POLICE BUREAU	FORCE DATA COLLECTION REPORT					PAGE OF 2 / 2
	NARRATIVE 6-Ofc Carmon #38197-Partner 6-Ofc Pippen #29903-Cover/Pointed Firearm 6-Ofc Billard #44160-Cover/Pointed Firearm/Recovered Firearm 6-Ofc Andonian #50654-Cover/Pointed Firearm 8-Ofc Carmen and I responded to the area of SE 162nd Ave and SE Division on a report of three subjects pulling a handgun on the caller. We were advised by dispatch of the subject's description. They told us the first subject is a light skinned black male ,32 years old, 5'7, heavy build, wearing a black baseball cap, a black jacket, black pants, and possessing a large silver handgun. They told us the second subject was a Hispanic male, 20 years old, wearing black clothing. Dispatch advised the suspects fled westbound on SE Division. We arrived into the area from the west on SE Division. I saw two subjects matching the description given by dispatch walking on the south side of SE Division in front of the apartments at 15816 SE Division. As we turned the patrol vehicle around, the heavy set black male ran quickly toward the south behind a thick row of bushes out of our sight. I exited our patrol vehicle and pointed my firearm at the <u>Hispanic male who was standing next to the row of bushes the other male had run behind</u>. I commanded the male, later identified as Alejandro HERRERA, to the ground. Ofc Billard and Ofc Andonian arrived, also pointing their guns at HERRERA. Once HERRERA was lying prone on the ground, Ofc Billard and Ofc Andonian took him into custody. Simultaneously to my commanding HERRERA, the heavy set black came back out from behind the bushes. Ofc Carmon pointed his firearm at the black male, later identified as Sid WILLIS. Ofc Pippen arrived and also pointed his firearm at WILLIS. Once HERRERA was taken into custody, I joined Ofc Carmon and Ofc Pippen who were dealing with WILLIS. Ofc Carmon and myself took WILLIS into custody. As I rolled WILLIS up onto his side, I observed a small bindle with white powder inside on the ground directly underneath where WILLIS had been lying. The area where WILLIS was prone out was sparsely covered in grass, but mostly dirt. It had been raining off and on all evening prior to our contact with WILLIS and the ground was wet and muddy. It was not raining at the time we took WILLIS into custody. The bag was clean and not wet, and from my observations of the ground and the packaging, I believed the bindle came from WILLIS' person and had not been lying on the ground for any length of time. From my training and experience, I believed the powder in the bindle to be cocaine. I gave the bindle to Ofc Carmon who conducted a NIK test on the substance. See Ofc Carmon's report for additional. <u>No other items of value were found during my inventory of WILLIS.</u> WILLIS complained to Sgt Duilio about the tightness of his handcuffs, Sgt Duilio checked WILLIS' cuff and found them to be appropriately applied. Ofc Carmon and I transported WILLIS to East Precinct. See additional reports for further.						
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SEW00

WILLS CERT. PET. APP. - 049

PAGE 14/17

[REDACTED]

05-25-12 1251 423 (0807)

WILLS CERT. PET. APP. - 050

05/25/2012 12:59 5038235848

PAGE 15/17

12-044558 CASE NUMBER	APPROVAL ROUTE	North Precinct		TYPE:		PAGE OF 2 / 2
	PORTLAND POLICE BUREAU SPECIAL REPORT presumptively identified as Ecstasy.					
It should be noted that I have successfully completed a NIK/ODV System of Narcotics Identification, Basic Competency Course.						
I placed the items in the Property Room at North Precinct.						
EXTERNAL DISTRIBUTION LIST						
COPIES ☐ DIST ☐ CENTRAL ☐ EAST ☐ NORTH ☐ NE ☐ SE ☐ CAT ☐ OHM/CHS ☐ DVD ☐ DVRU ☐ SCRT ☐ JCH ☐ JUV ☐ CS ☐ DVCS ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ _____ ☐ _____						
COMPUTER ENTRY ☐ Desk ☐ Person ☐ Entry / Vehicle ☐ Distribution ☐ _____						
REPORTING OFFICER(S) Kim Hubbard		DPST 45126	PREC / DIV TOD	RLF / SHFT A	ASSN / DIST 1672	SUPERVISOR'S SIGNATURE
						05-25-12 1251 428 (08/07)

SEW00037

WILLS CERT. PET. APP. - 051

United States v. Willis

United States Court of Appeals for the Ninth Circuit

March 4, 2015, Argued and Submitted, Portland, Oregon; July 29, 2015, Filed

No. 13-30376, No. 13-30377

Reporter

610 Fed. Appx. 696 *; 2015 U.S. App. LEXIS 13232 **; 2015 WL 4550753

UNITED STATES OF AMERICA, Plaintiff - Appellee, v.
SID EDWARD WILLIS, Jr., Defendant - Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Post-conviction relief denied at, Motion denied by, Certificate of appealability denied [United States v. Willis, 2017 U.S. Dist. LEXIS 89502 \(D. Or., June 9, 2017\)](#)

Prior History: **[**1]** Appeal from the United States District Court for the District of Oregon. D.C. No. 3:12-cr-00292-BR-1. D.C. No. 3:02-cr-00120-BR-1. Anna J. Brown, District Judge, Presiding.

[United States v. Willis, 163 Fed. Appx. 562, 2006 U.S. App. LEXIS 1399 \(9th Cir. Or., Jan. 18, 2006\)](#)

Disposition: AFFIRMED.

Core Terms

case number, detention, officers', sentence, suppress

Counsel: For United States of America (**13-30376**, 13-30377), Plaintiff - Appellee: Scott Kerin, Assistant U.S. Attorney, Kelly A. Zusman, Assistant U.S. Attorney, Doj-Usao, Portland, OR.

For SID EDWARD WILLIS, Jr. (**13-30376**, 13-30377), Defendant - Appellant (**13-30376**): Tonia Louise Moro, Tonia L. Moro Attorney at Law PC, Medford, OR.

Judges: Before: FISHER, PAEZ, and IKUTA, Circuit Judges.

Opinion

[*696] MEMORANDUM*

In this consolidated appeal, Sid Willis, Jr. challenges the district court's denial of his motion to suppress evidence in case number 3:12-cr-00292, and its imposition of a 60-month sentence for violating the terms of his supervised release in case number 3:02-cr-00120.¹ We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The district court did not err in denying Willis's motion to suppress. The detention of Willis that resulted in the officers' discovery of the **[**2]** relevant evidence was a valid **[*697]** investigatory stop under [Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 \(1968\)](#). The aggressive means the officers used to stop Willis were justified and did not convert the detention into an arrest because the officers had information that Willis was currently armed, the stop closely followed a violent crime, and Willis fled upon seeing the officers' vehicle. See [United States v. Edwards, 761 F.3d 977, 982 \(9th Cir. 2014\)](#); cf. [Green v. City & Cnty. of San Francisco, 751 F.3d 1039, 1047-48 \(9th Cir. 2014\)](#). Willis concedes that the officers had reasonable suspicion to stop him. The stop therefore did not violate the *Fourth Amendment*. See [Gallegos v. City of Los Angeles, 308 F.3d 987, 990-91 \(9th Cir. 2002\)](#).

AFFIRMED.

End of Document

*This disposition is not appropriate for publication and is not precedent except as provided by [9th Cir. R. 36-3](#).

¹We resolve Willis's challenge to his sentence in a concurrently issued opinion. [United States v. Willis, 795 F.3d 986, 2015 U.S. App. LEXIS 13200 \(9th Cir. 2015\)](#).

JAMES HALLEY

WILLS CERT. PET. APP. - 052

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA,)
4 Plaintiff,) Case No. 3:12-CR-292-BR
5 v.) May 20, 2013
6 SID EDWARD WILLIS,)
7 Defendant.)
_____) Portland, Oregon

8
9 TRANSCRIPT OF PROCEEDINGS

10 (Evidentiary Hearing)

11 BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE
12

13 APPEARANCES:

14 FOR THE PLAINTIFF:

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Assistant U.S. Attorney
U.S. Attorney's Office
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(503) 727-1000

17 FOR THE DEFENDANT:

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21 COURT REPORTER:

AMANDA M. LeGORE, RDR, FCRR, CRR, CE
U.S. Courthouse
1000 SW Third Avenue, Rm. 301
Portland, OR 97204
(503) 326-8184

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Shaye Samora	59	70		
John Billard	73	83	84	

FOR THE DEFENDANT:	<u>Direct</u>	<u>Cross</u>	<u>ReDirect</u>	<u>ReCross</u>
Sid Willis	85	90	97	

-oOo-

Hubbard - X

1 Q. And the time being 1:13. That's 1:13 in the morning, on
2 May 25th?

3 A. Correct.

4 Q. And arrival at 1:26 on May 12th, 2012?

5 A. That's correct.

6 MR. KERIN: Your Honor, I have no other questions.

7 THE COURT: Let me just ask one question, please, so
8 that I'm clear.

9 We heard in the 9-1-1 audio that the complainant was
10 interacting with the call taker, indicating -- providing
11 information about the police seeing or being with the person
12 the complainant thought were the two that had been encountered.

13 Was it ever conveyed to you, when you were on scene,
14 that the complainant was actually identifying the people you
15 were with or the people you suspected as the two? That is to
16 say, before the show-up? In other words, did the dispatcher
17 relay to you that the complainant had told the call taker that
18 you were with the right two people?

19 THE WITNESS: (Pause, referring.) I -- I don't
20 recall that.

21 THE COURT: Thank you.

22 Counsel, cross.

23 MR. WILNER-NUGENT: Thank you, your Honor.

24 CROSS-EXAMINATION

25 BY MR. WILNER-NUGENT:

Hubbard - X

1 Q. Officer, do you have a copy of your use-of-force report
2 with you there?

3 A. Yes.

4 Q. And you personally completed this use-of-force report?

5 A. Yes.

6 Q. In the report, you described the particular use of force
7 in making this arrest as pointing a firearm?

8 A. That is correct.

9 Q. And you yourself pointed a firearm, and all of the other
10 officers pointed their firearms at the two suspects?

11 A. That's correct.

12 Q. How many officers?

13 A. Ah, (pause) five of us in total.

14 Q. So five -- five to take two into custody, because that's
15 for your safety. Right?

16 A. That is correct.

17 Q. And the purpose of pointing a firearm, listed in this same
18 use of force -- use of force data collection report, was to
19 make an arrest. Correct?

20 A. Correct.

21 Q. And would you agree with that purpose today, that was the
22 point of using force?

23 A. At that point we were using it to take the two suspects
24 that we were investigating into custody, yes.

25 Q. Okay. So in -- in making an arrest, it is a fair

Hubbard - X

1 summation of what you just said. Right?

2 A. Yes.

3 Q. Before you arrested Mr. Willis, you did not know anything
4 about the suspect in the menacing incident, other than what
5 dispatch told you. Correct?

6 A. That's correct.

7 Q. Because you had not spoken with the complaining person?

8 A. No, I had not.

9 Q. And in fact the show-up came about six minutes after the
10 arrest?

11 A. Correct.

12 Q. Can you walk us through, in a little more detail, the
13 actions that you yourself performed with regard to -- after you
14 got out of the car and drew your weapon, what was the next
15 thing you did?

16 A. I gave Mr. Herrera commands.

17 Q. And so were you at any point personally involved in giving
18 Mr. Willis commands?

19 A. I don't believe so, because I was dealing with Mr. Herrera
20 while Officer Carmon was dealing with -- with Mr. Willis.

21 Q. Were you involved in -- after Mr. Herrera had been put
22 into a police car, were you involved in taking Mr. Willis into
23 custody?

24 A. Yes, I was.

25 Q. And specifically before he was put in the car, in addition

Hubbard - ReD

38

1 to being cuffed, it's true, isn't it, that items were taken off
2 of him, like his shoes?

3 A. Correct.

4 Q. And his cash was taken off of him at that time?

5 A. That is -- I don't specifically recall the -- the order.
6 But it is custom -- it's typical, prior to placing someone into
7 a patrol car, for the items in their pockets to be removed from
8 their person.

9 Q. And also so there were some cigarettes taken off of him?

10 A. If -- if that's on his property receipt from --

11 Q. Well, I'm asking for the best of your memory.

12 A. Well, I -- the cigarettes, I believe so.

13 Q. And, finally, his cell phone was also taken off of him
14 before being put in the patrol car, for obvious reasons?

15 A. I don't specifically recall.

16 MR. WILNER-NUGENT: Okay. Thank you. Nothing
17 further.

18 THE COURT: Anything else, Counsel?

19 MR. KERIN: Just very briefly.

20 REDIRECT EXAMINATION

21 BY MR. KERIN:

22 Q. Officer Hubbard, on that same use-of-force report, the
23 first section says, "Perceived subject conditions, check all
24 that apply."

25 Is this where you're supposed to note why you drew

Carmon - X

1 A. A NIK test is just a kit that -- there's multiple kits
2 that identify various types of drugs.

3 And they're identified when you put the drug in --
4 the suspected narcotic into the little packaging, and you break
5 the little glass vial that's inside, it has a chemical reaction
6 with the drug -- the suspected drug, and it changes the color.

7 So I used the cocaine NIK test kit. I placed a
8 little bit of the cocaine inside of there. I broke the little
9 glass vial. And it makes two color changes to -- one is a
10 pink, and the other one is blue, and then it separates. So
11 that indicated a positive test for cocaine.

12 Q. And where did you perform the NIK test at?

13 A. At East Precinct.

14 Q. And how much -- since the time between when he was taken
15 into custody, at the scene, and when you did the NIK test, was
16 how long?

17 A. I'm sorry, I couldn't hear you, I was coughing.

18 Q. Sorry. If you could estimate the time between he was
19 taken into custody, at the scene, and when you performed the
20 NIK test, or the field test, how long was that about?

21 A. (Pause.) Maybe 30 to 45 minutes.

22 MR. KERIN: Your Honor, I have no other questions.

23 THE COURT: All right. Thank you.

24 CROSS-EXAMINATION

25 BY MR. WILNER-NUGENT:

Carmon - X

1 Q. I'll be brief, Officer. Good afternoon.

2 Five officers, total, point firearms at Mr. Willis
3 and Mr. Herrera. Right?

4 A. I know that Officer Hubbard and I did.

5 Q. And then there was Officer Billard, Officer Andoni and
6 Officer Pippin?

7 A. They show up later, yes.

8 Q. Of all of the officers who were on the scene, you had
9 three --

10 THE COURT REPORTER: I'm sorry. Three gentlemen?

11 BY MR. WILNER-NUGENT:

12 Q. Three officers taking one of the gentlemen into custody,
13 and two officers, including yourself, taking Mr. Willis into
14 custody?

15 A. Yes. We -- we waited until they were done taking the
16 first suspect into custody.

17 Once they were done with him, then we went and took
18 Mr. Willis into custody.

19 Q. And under the circumstances, you thought that pointing a
20 firearm was reasonable when making an arrest?

21 A. Yes.

22 Q. And before you arrested Mr. Willis, you didn't know
23 anything about the suspect in the menacing incident, other than
24 what the dispatch was giving you by radio or by CAD?

25 A. Right.

Carmon - X

1 Q. So, in other words, you hadn't met personally with the
2 complainant yet?

3 A. No.

4 Q. So can you just describe what commands you gave, again?

5 A. It would have been something like, Hey, I know you're in
6 the bushes. I saw you go in there. Come out with your hands
7 up. You know, Show me your hands. Things like that.

8 Q. And you mentioned having a firearm.

9 You presumably couldn't see the firearm from the
10 bushes. Right?

11 A. I could not.

12 Q. But you said -- you said something about you have a gun.
13 You know, we've got our weapons, you've -- we have a gun on
14 you. Like, what did you say about your weapon?

15 A. About my weapon?

16 Q. Did you -- did you give any commands saying -- in other
17 words, implying or saying out loud to Mr. Willis that you had a
18 weapon, that the police were armed?

19 A. No.

20 Q. Okay. Was it obvious from -- well, strike that.

21 So how many seconds of commands do you think you gave
22 before he came out of the bushes?

23 A. You know, it wasn't very long. Five to ten seconds,
24 maybe.

25 Q. Did you see him walking, at any point, behind the bushes?

Carmon - ReD

1 A. Did I see him walk behind the bushes?

2 Q. Was he walking or crawling?

3 A. I saw him go down low, into the opening, or -- you know,
4 right in the photo. And then I couldn't see him inside the
5 shrubs.

6 And when he came out, he was on his hands and knees.

7 Q. Would you call that crawling?

8 A. Yes.

9 Q. And then after he was proned out, they -- you handcuffed
10 him first. Right?

11 A. Yes.

12 Q. And then after that, you took his shoes from him?

13 A. I think at the patrol car, we had him take his shoes off,
14 yes.

15 Q. And you also had some other items taken off his person in
16 the patrol car, like his money, his cigarettes, his cell phone,
17 before he was allowed to be in the back of that patrol car?

18 A. Yes.

19 MR. WILNER-NUGENT: Nothing further, thank you.

20 THE COURT: Redirect.

21 REDIRECT EXAMINATION

22 BY MR. KERIN:

23 Q. Just very briefly. Officer Carmon, you filled out the
24 custody sheet on Mr. Willis. Is that right?

25 A. Yes.

Samora - X

70

1 understand your rights?

2 Q. And -- and what did Mr. Willis say?

3 A. Well, I -- I actually had this waiver, and I had him read
4 it aloud. And before he finished reading all of the rights, he
5 looked up and said, I know my rights. I want a lawyer.

6 Q. Did you complete the advice of rights to him?

7 A. I had him sign it.

8 Q. And when he said he knows his rights, he wanted a lawyer,
9 did you terminate any questioning at that point?

10 A. I did.

11 Q. And following that, was Mr. Willis subsequently
12 transported to the downtown jail, or what's known as M.C.D.C.?

13 A. He was.

14 MR. KERIN: I have no other questions, your Honor.

15 THE COURT: Thank you.

16 Cross.

17 CROSS-EXAMINATION

18 BY MR. WILNER-NUGENT:

19 Q. Officer, if you just look through the sequence in your
20 investigation report, would you agree that you wrote things in
21 the sequence you experienced them, there?

22 A. I would.

23 Q. And so you would agree, then, that Officers Carmon and
24 Hubbard and the other officers assisting them had taken
25 Mr. Willis into custody before you got to interview Greg

Samora - X

1 Morris?

2 A. I don't know if they actually took him into custody before
3 I interviewed him, but he was definitely detained, and they
4 were dealing with that situation at 158th while I was arriving
5 and talking to Mr. Morris.

6 Q. Let's be very specific. I'm looking at the top of page 2
7 out of 3 of your report.

8 You wrote, Prior to our arrival, other officers in
9 the area located two possible suspects at Southeast Division
10 and 158th. Correct?

11 A. Correct.

12 Q. And that means before you arrived at the Plaid Pantry.
13 Correct?

14 A. Before I arrived at 157th and Division to interview the --
15 the victim.

16 Q. Okay. And then the next sentence, following this
17 incident, begins Prior to our arrival. The next sentence of
18 your report is, Both suspects were placed into custody, period.

19 A. Correct.

20 Q. And then a couple of sentences later you were advised a
21 gun was located at the custody scene, period.

22 A. Correct.

23 Q. And then you had yourself arriving at the scene and
24 contacting Mr. Morris, who's now located at Division and 152nd.
25 Correct?

Samora - X

72

1 A. Correct.

2 MR. WILNER-NUGENT: Okay. I just wanted -- the
3 sequence was important there.

4 Thank you. Nothing further.

5 MR. KERIN: No other questions, your Honor.

6 THE COURT: All right. Thank you, Officer. You're
7 free to go.

8 Go ahead and check to see if your witness is here.

9 If not, we'll take a 15-minute recess.

10 MR. KERIN: Thank you.

11 (Pause.)

12 THE COURT: We'll take our 15-minute recess --

13 MR. KERIN: Thank you.

14 THE COURT: -- ladies and gentlemen, and resume at
15 3:15.

16 MR. KERIN: Thank you, your Honor.

17 THE COURT: Thank you.

18 (Recess taken.)

19 THE COURT: Thank you. Everyone except the witness
20 should be seated.

21 Please raise your right hand, sir.

22 (Witness sworn.)

23 THE WITNESS: I do.

24 THE CLERK: Please take a seat.

25 THE COURT: Bring yourself close in to the microphone

Billard - D

1 there, please.

2 Tell us your full name and spell it all.

3 THE WITNESS: John Billard. J O H N, B I L L A R D.

4 THE COURT: Thank you.

5 Counsel.

6 DIRECT EXAMINATION

7 BY MR. KERIN:

8 Q. Are you currently an officer with the Portland Police
9 Bureau?

10 A. I am.

11 Q. And, Officer Billard, how long have you been with the
12 Portland Police Bureau?

13 A. A little over nine years.

14 Q. And are you currently assigned to the Gang Enforcement
15 Team?

16 A. I am.

17 Q. Now, I want to get you to a particular date: May 24th,
18 2012, at approximately 10:21 p.m.

19 Were you dispatched or did you respond to a call of a
20 suspect who had threatened another person with a handgun?

21 A. I did. I was working a partner car with Officer Andoni at
22 the time.

23 Q. And did --

24 A. I'm sorry. Go ahead.

25 Q. Now, you were not the first on the scene. Is that right?

Billard - X

1 A. It was. It was collected, and I found loaded rounds in
2 there, various mixed brands of .357 caliber rounds.

3 MR. KERIN: Your Honor, I have no other questions.

4 THE COURT: Thank you.

5 Cross.

6 MR. WILNER-NUGENT: Yes.

7 CROSS-EXAMINATION

8 BY MR. WILNER-NUGENT:

9 Q. Thank you, Officer.

10 When you arrived, where was Mr. Willis?

11 A. I believe he was being pruned out in the sidewalk area.

12 Q. So you didn't see him coming out of the bushes?

13 A. I couldn't say for sure where who was coming from, but --

14 Q. Okay.

15 A. -- he was going to the ground when I saw him.

16 Q. Okay. And you never saw him standing up before the time
17 of his arrest, did you?

18 A. I don't think so. No.

19 Q. And after he was on the ground, arrested, he was
20 handcuffed. Correct?

21 A. Correct.

22 Q. And at this point his shoes were taken from him before he
23 was put in the patrol car?

24 A. I'm not sure if they were, but that's standard practice,
25 yes.

Billard - X

1 Q. As well as his -- his cigarettes, his money, his cell
2 phone, basic possessions from his pockets?

3 A. Correct.

4 MR. WILNER-NUGENT: Okay. Nothing further. Thank
5 you.

6 THE COURT: Anything else?

7 REDIRECT EXAMINATION

8 BY MR. KERIN:

9 Q. If you could, Officer Billard, estimate the distance
10 between where Mr. Willis was prone out on the ground and where
11 the firearm was recovered?

12 A. I would say probably about 15 feet, is --

13 MR. KERIN: No other questions. Thank you.

14 THE COURT: All right. Thank you, sir. You're free
15 to go.

16 MR. KERIN: The Government has no other witnesses.

17 THE COURT: All right. Do you have any evidence you
18 wanted to offer?

19 MR. WILNER-NUGENT: Yes. Mr. Willis wishes to
20 testify.

21 THE COURT: All right. Mr. Willis, please come
22 forward to the witness chair.

23 Please raise your right hand. Face the deputy,
24 there, to be sworn.

25 (Witness sworn.)

Colloquy

1 THE COURT: All right. Mr. Wilner-Nugent, it's your
2 motion, so you may proceed first with argument.

3 MR. WILNER-NUGENT: Thank you.

4 Counsel didn't have any rebuttal evidence, I --

5 MR. KERIN: No. Thank you.

6 THE COURT: Didn't mean to presume anything.

7 MR. WILNER-NUGENT: Your Honor, the argument is
8 largely contained within our written submission --

9 THE COURT REPORTER: I need you to speak slower,
10 please.

11 MR. WILNER-NUGENT: I'm sorry.

12 Most of the argument is in our written submission.

13 I would ask the Court, for purposes of determining
14 whether there was probable cause to arrest Mr. Willis, to
15 disregard the post-arrest observations by Officer Samora.
16 Consistently with her testimony, I would ask that the Court
17 find as a fact that Officer Samora's discussion with Gregory
18 Morris and Clarisse Smith at the Plaid Pantry -- or -- on
19 Division Street happened after, and arrest after.

20 Of course, backing up, analytically, the most crucial
21 feature of our case is that this was in fact a full-custodial
22 arrest and not just a stop.

23 And I think the Court gets there when deadly force is
24 threatened by the pointing of a weapon, by commands given at
25 night with a flashlight, at gunpoint, and the fact that there

Colloquy

1 were five officers surrounding two men. That Mr. Willis was
2 handcuffed. That things were removed from his pocket.

3 For purposes of our motion, I think, we would ask the
4 Court to find that Mr. Willis is arrested at the time that he
5 was given commands at gunpoint when hiding in the bushes. An
6 arrest needs probable cause and the Court should -- you know,
7 the -- the argument that we made in our memorandum, which I'll
8 really just ask the Court to consider strongly here, is that
9 what we have is basically a rough identification of the person,
10 and nothing more.

11 The Court should disregard the things that the
12 dispatcher was saying over the radio in favor of what the call
13 taker was taking in from the 9-1-1 caller. And since the Court
14 in fact got to hear the 9-1-1 call, I think that 9-1-1 call
15 should be considered as the real source of probable cause, or
16 not, as in this case. So we have, in the 9-1-1 call --

17 THE COURT REPORTER: I need you to speak slower,
18 please.

19 THE COURT: Which the Court can certainly play again
20 for itself if it wants.

21 Go ahead.

22 MR. WILNER-NUGENT: Is a caller identifying a
23 250-pound, five foot seven, mixed-race person.

24 So Mr. Willis basically comes within that description
25 by about 20 percent. In other words, he's about 20 percent

Colloquy

1 lighter.

2 And he -- you know, I -- it may or may not be a
3 distinction without a difference for the caller to have in fact
4 said the person who menaced him was mixed race. And for the
5 officers to all unanimously identify Mr. Willis as
6 African-American. But I think the point is that that kind of
7 disparity and that kind of vague identification falls precisely
8 within the ambit of case law, that I cited in my memorandum --
9 and which I'll rest on today -- that says that vague
10 identifications like that can be enough to establish a
11 reasonable suspicion. But without more, it's not probable
12 cause.

13 And I just think this case rises or falls on the
14 officers moving too quickly to a full arrest, when they could
15 have easily detained Mr. Willis for further investigation; an
16 investigation would have potentially unfolded differently.
17 Unless the Court has any questions, that's our submission.

18 THE COURT: Thank you, Counsel. Appreciate it.
19 Mr. Kerin.

20 MR. KERIN: Thank you, your Honor.

21 Here, I mean, obviously, we've tried to brief it as
22 thoroughly as possible.

23 The ultimate question for the Court is it's not so
24 much only what the officers believe they were doing at a
25 particular time. But if the Court takes a step back and says,

Colloquy

1 Were all of the officers' intrusions on Mr. Willis's liberty,
2 every step, were they in fact justified? And why I point that
3 out is an officer could say, Arrest this one right off the bat.
4 And a Court could say, Well, at the point that you subjectively
5 believed you had probable cause to arrest, you didn't, but it
6 could still be justified under reasonable suspicion.

7 Here, your Honor, really, I think we have two tracks.
8 Under both of them, every action that the officers did is
9 inherently justified, and even if I start with is there just
10 reasonable suspicion. Right?

11 Mr. Willis, in his memorandum to the Court, makes
12 much of the fact that whenever officers draw their guns, that
13 somehow that almost de factorily gets converted to any police
14 encounter to an arrest. And that obviously is not the case.

15 And the courts, when you deal with a stop and an
16 arrest, there isn't that bright demarcation of when is a person
17 arrested versus when they are stopped.

18 The case law is legion that a person can still be
19 detained on a Terry stop. And they can be detained at
20 gunpoint, they can be placed in the back of a patrol vehicle,
21 they can be handcuffed. And that by itself does not
22 automatically convert it to an arrest. It has to be based on
23 the circumstances.

24 Now, if we start with this as ultimately the
25 Government believes there was probable cause to arrest these

Colloquy

1 people when they saw them on the street. But starting at the
2 reasonable suspicion, is there a -- was it reasonable to
3 believe that Mr. Willis and Mr. Herrera were involved in
4 pointing a gun at someone?

5 Now, when we determine reasonableness of the
6 officers' actions to infringe upon Mr. Willis's liberty on the
7 street, it comes in as a threat. The threat is that we are
8 dealing with people that are armed and dangerous, was Officer
9 Hubbard's testimony. The CAD printout references the threat
10 being a person with a gun.

11 The nature of the incident, a person at a market, has
12 been confronted by someone who has pointed a gun at them,
13 either at their chest or their head.

14 The description that's given out, mixed race, maybe
15 32, about 5,6 or 5,7, not very tall, with a heavy build,
16 wearing a black baseball hat, a black jacket, black pants, and
17 then having a large silver huge handgun and being with a second
18 person. Because Mr. Herrera factors into this because it
19 starts to narrow down the other -- the people that you're
20 looking for out in that community of who's involved in this.

21 They describe Mr. Herrera as being more Hispanic,
22 kind of white Hispanic -- whatever that means -- a little bit
23 younger, maybe 19, 20ish, and that both individuals had on all
24 black.

25 Now, I did have a chance to look at the case law that

Colloquy

1 Mr. Wilner-Nugent submitted. The Long Beach cases that talk
2 about a generalized description by itself not being probable
3 cause. But, again, that's based on context, your Honor.

4 Now, if I simply said, hey, there's an individual
5 that is white, wearing a blue-striped suit with a red and blue
6 tie that's running around the community, well, that's pretty
7 vague.

8 If I say that person is currently in Judge Brown's
9 courtroom or has just left Judge Brown's courtroom and is found
10 within the same building, it narrows down my world of
11 possibilities.

12 And here, when the officers respond to them,
13 Mr. Willis matches the description to a tee. Now, whether he
14 is 190, 200, or 220, or 250, he was a heavy build.

15 Mr. Willis told you he was wearing a hoodie
16 sweatshirt. Which I would submit, if you're wearing a hoodie
17 sweatshirt, that may look like you've added some pounds, or
18 something like that. But by his own admission, he is
19 bi-racial. He is light-skinned. He was, as he even told you,
20 32 or 33 at the time of this incident. He does have a
21 stockier, heavy build.

22 He was wearing a black baseball cap that he also said
23 had some white and red on it, I believe. He was wearing a
24 black hoodie, which is referred to as a jacket. He wants to
25 make the distinction it's a black hoodie. With black pants.

Colloquy

1 That is that description of the suspect. Plus he's walking
2 with Mr. Herrera, who is Hispanic, also dressed in all black.
3 And at this time of night, they are the only individuals in the
4 area.

5 I would submit that is a fair probability that
6 Mr. Willis was involved in criminal activity, and that's all
7 that's required for probable cause. But even if you drop down
8 to is it reasonable suspicion, well, do they have the ability
9 to conduct a **Terry** stop?

10 And Mr. Willis in his motion almost -- I mean,
11 without conceding it, comes about as close to conceding that
12 there is reasonable suspicion there as he could without saying
13 it.

14 Even if he wants to start with the operative
15 assumption this was only reasonable suspicion, given the nature
16 of the phone -- of the 9-1-1 call, armed, dangerous; but then
17 we also factor in what Mr. Willis did at the scene.

18 When he sees the vehicle, he's got a subjective
19 explanation for that, which may be, oh, I'm a gang associate or
20 a gang member. I have enemies. There could be people that are
21 out to get me. But it's also an unmarked police vehicle that
22 when it does the U-turn, Mr. Willis suddenly ducks -- ducks
23 behind a bush.

24 The issue is are the officers objectively reasonable
25 in saying that furtive movement factors into both risk as well

Colloquy

1 as danger? And I would submit it does. It would not be
2 prudent to have the officers have to detain him and say, oh,
3 I'm sorry. Why did you flee us? Oh, we can only detain you if
4 it's because you thought we were the police. But it's okay if
5 you just thought we were rival gang members coming to shoot
6 you.

7 They're in a police vehicle. They turn around, they
8 light him up. They turn on their emergency lighting, the red
9 and blue lights that are flashing. Mr. Willis says at this
10 time of night he didn't see those. I would submit that's --
11 that kind of lacks some credibility, given that the car faces
12 him and the lights are flashing in the vehicle.

13 But even if they only had reasonable suspicion, they
14 certainly had enough safety concerns -- both for themselves and
15 people in the community -- to take him out at gunpoint, prone
16 him out on the ground, and handcuff him. Even if it was to
17 await a subsequent on-scene identification.

18 But when they roll him over, they find drugs
19 underneath of him. That's probable cause to arrest him for a
20 drug crime. And it's the end of the story, at that point.

21 But even if we don't get to that point, while he's
22 pruned out on the ground, Officer Billard looks in there and
23 sees a gun sitting right where Mr. Willis came back out.

24 Now, you factor into a gun into the reasonable
25 suspicion, and it is in fact a large silver handgun, what was

Colloquy

1 described by the victim. You certainly, I would submit, have
2 probable cause at that point to arrest him, if you didn't have
3 it already.

4 You also have the issue of the on-scene
5 identification. Because we know from the case law, to detain
6 someone, to await an on-scene identification, is certainly
7 appropriate.

8 The length of the detention is appropriate as long as
9 the officers are investigating it. That's where all of the
10 information about Mr. Morris becomes relevant, because he's
11 relating to the officer -- Officer Samora -- what had happened.

12 And he even says, That's them right there. That's
13 the guy. He's a block away, and he's saying that's -- those
14 are the guys. She has to kind of say, Wait. Let's do this as
15 an on-scene identification. Let me advise you, the person may
16 or may not be in custody, et cetera.

17 Drives him even closer, and he's like, Okay, again,
18 that's the guy. I'm sure of it. That's -- I mean, Mr. Willis,
19 he's the guy who pointed the gun at me.

20 Certainly, I would submit at that point there's more
21 than enough probable cause to arrest this -- to arrest
22 Mr. Willis on all of the charges that they subsequently did.

23 It really comes down to does drawing weapons on
24 someone convert a stop into an arrest? And the case law says
25 no, if it's reasonable.

Colloquy

1 I would submit here it is reasonable to pull out a
2 gun. An individual who reportedly pulled a gun on a stranger
3 in a market a short time before this incident, who then takes
4 furtive movements and ducks behind a bush when the officers see
5 him and turn around to contact him, it is dangerous being a
6 police officer.

7 We know, as the officers testified, that people have
8 been injured. Both suspects and officers have been injured in
9 similar situations.

10 It was reasonable for them to -- to draw their
11 firearms and take protective measures both for themselves,
12 Mr. Willis, and others in the community while they investigated
13 further.

14 But I would submit the Court in this case doesn't
15 even have to go through all of that analysis. We are asking
16 for alternative findings. But I think the Court can easily
17 jump to -- based on everything -- at this point, when the
18 officers saw him -- this wasn't even a question to the officers
19 of, hey, do you think that could be the guy?

20 Both officers simultaneously, as they're driving past
21 him, look over at Mr. Willis and his partner, and they're like,
22 That's him.

23 When they turned around to contact him, they were
24 absolutely sure. Far beyond a fair probability that Mr. Willis
25 was the person that the complainant had talked about and

Colloquy

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1 identified.

2 And when you factor in the fact that Mr. Willis then
3 ducks behind the bush very quickly in that furtive movement, I
4 would say that seals the deal on -- that there's a fair
5 probability that Mr. Willis was engaged in criminal activity
6 right prior to the police officer contacting him.

7 I don't know if the Court wants me to talk about the
8 statements or not. I tried to brief it sufficiently.

9 If it does --

10 THE COURT: It's up to you.

11 MR. KERIN: Your Honor, even if the Court says the
12 contact on the street was unlawful, illegal, or improper, it
13 does not mean that his statements at the jail get suppressed in
14 any sense.

15 The statements were voluntarily made. Mr. Willis has
16 had lots of prior contacts with the police. As he told the
17 officer, he knew his rights.

18 When they gave him the form to sign -- the **Miranda**
19 form -- he said, I know my rights. I want an attorney. Fine.
20 And the officers respected that. They honored that. They
21 stopped interrogating him.

22 He was taken to the jail. And while he was being
23 booked in at the counter -- not subject to any questioning
24 designed to elicit any incriminating response, Mr. Willis
25 blurts out, I did it all. I did it all. My partner,

Colloquy

1 Mr. Herrera, here, is not responsible. I'm responsible.

2 What's important about that is in time gap, we're
3 about a little over three hours later in terms of time. It is
4 sufficiently attenuated.

5 In the interim between the detention and the
6 volunteered statements, he's been advised of his rights. He's
7 exercised his rights. His rights have been honored, and they
8 ceased questioning him.

9 When he gets to the jail booking facility, he simply
10 blurts out. Whether he's clearing his conscience, whatever
11 he's doing, it's not a product of the detention that causes it.
12 Because it is not a but-for test. That is not the standard in
13 federal court. It's whether the officers exploited, in an
14 illegal seizure, to get questioning.

15 And as the case law talks about -- I mean, obviously
16 the seminal case on this, the **Brown** case, was one where the
17 police officers went in purposefully with a pretext arrest in
18 an effort to shake someone up to basically find out what the
19 person knew, or their involvement in the homicide. And
20 rightfully, the Court had all sorts of questions -- or problems
21 with that and -- but that is not this case.

22 The officers were faithfully executing their duties
23 on this case. They had a report that Mr. Willis was involved
24 in pointing a gun at someone. They arrested him for that
25 charge. Also for the possession of cocaine. They booked him

Colloquy

1 in the jail. They took him down. They honored his invocation
2 of his rights. But, nonetheless, he made volunteered
3 statements, and they are admissible against him.

4 Your Honor, given the totality of the
5 circumstances -- and that's what this is, is under the totality
6 of the circumstances. And I would submit even under the
7 collective knowledge doctrine -- which this Court I know has --
8 had argued in front of it before -- when Mr. Morris is talking
9 to the BOEP, the Bureau of Emergency Communications 9-1-1
10 personnel, and that's being relayed to dispatch, Mr. Morris is
11 doing on-time narration.

12 I see the people. That's them. The officers just
13 drove by them. The officers are making contact with them. The
14 officers have them. That is being communicated to a law
15 enforcement personnel. And under the collective knowledge
16 doctrine, the issue is, are what the officers doing, is it
17 reasonable under the circumstances?

18 And under the collective knowledge doctrine,
19 information given to one law enforcement official does not even
20 necessarily have to be transmitted to everyone if under the
21 circumstances, factoring in the collective knowledge of
22 everyone, the contact was reasonable. And here I would submit
23 it was.

24 Thank you, your Honor.

25 THE COURT: Thank you.

Colloquy

1 Yes, Counsel.

2 MR. WILNER-NUGENT: Your Honor, with regard to
3 Mr. Morris, he was gone for five minutes, by his own admission,
4 between the alleged crime and the beginning of the 9-1-1 call.

5 He drove his girlfriend somewhere -- we don't know
6 where -- far enough that he lost the sight of the people on
7 Division Street.

8 Mr. Willis would have not have been pruned out
9 without being arrested, and if he had not been pruned out,
10 there's no indication from the evidence before the Court that
11 any cocaine would have been discovered. So the question really
12 has to be was he lawfully pruned out?

13 And this kind of total control of someone's movements
14 at gunpoint is an arrest. I disagree with counsel's reading of
15 the case law. And I ask the Court to look at the two cases
16 that are really on point, that I cited in my memorandum:

17 **United States versus Robertson**, and **Kraus versus County of**
18 **Pierce** or -- the City of Pierce, that was a typo that I
19 imported from the case. That's actually **County of Pierce**. And
20 there's -- I can give you the cites, but those are in my
21 materials.

22 And again, you know, we aren't disagreeing with what
23 the Supreme Court said in **Brown**, obviously. But the touchstone
24 of the **Brown** test, those factors that the Court identified
25 would be helpful. But the touchstone is whether the alleged

Colloquy

1 confession is sufficiently an act of free will to
2 (indiscernible) preexisting constitutional violation.

3 And Mr., you know, Willis, was not at the jail of his
4 own free will. He was not being asked booking questions by his
5 own free will. We can't improve very much on the discussion of
6 the case law that's in the material, so we'll rest there.

7 THE COURT: What's the cite of **Kraus**?

8 MR. WILNER-NUGENT: That's 793 F.2d 1105, looking at
9 pages 1108 and 1109.

10 And **Robertson** comes a year later, and --

11 THE COURT: I have that one. Give me just a minute,
12 and I'll refresh on **Kraus**.

13 MR. WILNER-NUGENT: Thank you.

14 (Pause, referring.)

15 THE COURT: All right. I read the **Kraus** case
16 earlier, and I am now reminded about it. It is a civil rights
17 case and not a criminal matter.

18 It does clearly involve the same kinds of standards
19 under the Fourth Amendment. But the facts there are really
20 quite different from the exigency the officers were facing in
21 the record that's been developed here.

22 So let me begin there. I'm making the following
23 findings of fact by a preponderance of the evidence.

24 I expect that witnesses to the same event will often
25 have different perspectives, and this case isn't any different.

Colloquy

1 We have minor variations among the accounts of the officers and
2 even the defendant's account.

3 But fundamentally consistent from the testimony of
4 the officers and even from the defendant's testimony to the
5 extent he chose to share it with me, the following scenario is
6 what I find to be more probably true than not for purposes of
7 this hearing only and not for purposes of any ultimate
8 resolution of the criminal charges against the defendant.

9 So on the evening in question, Mr. Morris and his
10 girlfriend were at the Plaid Pantry. And while at the Plaid
11 Pantry, Mr. Morris's girlfriend, Ms. Smith, was accosted by a
12 person who had a firearm.

13 She went into the store, where her boyfriend was,
14 Mr. Morris. Reported the event. And when Mr. Morris came out,
15 he himself had another -- he himself had an encounter with the
16 person who had threatened his girlfriend.

17 And in that encounter, that person pointed a firearm
18 at Mr. Morris and made some remarks consistent with what he had
19 reportedly made to the girlfriend earlier.

20 In both cases, with respect to this person's remarks
21 to the girlfriend and then to Mr. Morris directly, there was
22 some statement made about mugging. That is to say, looking at
23 the assailant in a way that the assailant found offensive.

24 The particulars are not germane to this issue. What
25 is germane is that Mr. Morris and his girlfriend each had an

Colloquy

1 encounter with a man who had a firearm and who they perceived
2 as threatening; in a way that was serious enough that
3 Mr. Morris got his girlfriend out of there, took her home, and
4 then called the police.

5 He not only called the police, but he returned to the
6 area, presumably to -- to find out where this person was and to
7 assist the police in putting the issue to rest. So that's the
8 setup.

9 Mr. Morris calls the police, and there isn't any
10 dispute about what he said, because it's recorded. It's not
11 unusual that an eyewitness to an event involving a firearm gets
12 some facts wrong. It's a very traumatizing experience to have
13 a firearm pointed at you. Indeed, Mr. Morris described the gun
14 with a lot of adjectives, ending with the word, huge. This was
15 a significant event to Mr. Morris.

16 That he used 250 as the number describing the weight
17 of the person who pointed the gun is what he said, but that --
18 that's not really that significant. The point is, he's -- he
19 described a man by height.

20 He also used words to describe the build of that man,
21 and he described a person who, it turns out, as -- excuse me.
22 I've lost my notes here. As -- as our first officer said, fit
23 the description to a tee.

24 So what we have here is a -- a -- a real-time report
25 to the police of a traumatic event by a named complainant who's

Colloquy

1 giving information while officers are being dispatched to the
2 scene.

3 That's a very key fact that distinguishes this case
4 from the vague description cases that the defense relies on.

5 Because to the extent we have vagaries, we also have
6 a -- an identified complainant who's on the line and who's
7 continuing to provide information. And, ultimately, who's
8 contacted and makes an on-scene identification.

9 So what -- what's very key here is that he, Morris,
10 reports two men involved in the encounter. He describes the
11 man with the gun at about 5'9, heavy build, wearing black
12 clothing.

13 A hoodie is described by Mr. Morris. A cap -- a
14 baseball cap, which he describes as black. But even Mr. Willis
15 says, it had black on it. It was black and blue and another
16 color, he described today.

17 And Morris said he was wearing jeans, but Mr. Willis
18 says he was wearing sweatpants. You know, the difference
19 between jeans and sweatpants, to a person who's had a gun
20 pointed at his head, really isn't material.

21 It isn't that the person he saw was wearing white
22 pants or shorts or red clothing, but a general physical
23 description. All of which was verified in real time by
24 Mr. Morris telling not only the officer at his side but the
25 person he was talking to, at radio, that the -- that -- that

Colloquy

1 the police have the two people now, down the road, within his
2 sight.

3 That the officer who was with him was trying to slow
4 him up and -- and prevent him from making ultimate conclusions
5 because she wanted to do the on-scene identification in a
6 procedurally proper way isn't of concern either.

7 Under the totality of the circumstances of
8 information known to the authorities at the time, while this is
9 happening, Mr. Morris is telling the police that he knows the
10 people he's -- they're encountering are the two.

11 So this isn't about police responding to an
12 insufficient vague description. They have a specific
13 description. They're responding. And it happens that that
14 description -- I should say, that the witness who initiated the
15 call, in the first place, is verifying that the police are
16 encountering the two men he means to be reporting.

17 Now, whether they're actually the people involved or
18 not isn't -- isn't the issue.

19 The issue is what justification do the officers have
20 to interact at all with Mr. Willis and Mr. Herrera, there on
21 Southeast -- Southeast Division, at about 158th.

22 Well, they have every justification in the world.
23 They have a hot call that just occurred involving a firearm.
24 They have suspect descriptions. They have a witness who's
25 live, who's in the area, providing information. And they go to

Colloquy

1 the locale to where the pedestrian suspects are heading. And
2 they -- the first two officers are -- are eastbound on
3 Division, and see two men who fit the description to a tee.

4 They have to stop at that point to rule out whether
5 these two men who, from the officers' subjective perspective,
6 are the two. They have to rule that -- those two out. And
7 they have an absolute right, under Terry, to make an
8 investigatory stop. So they do.

9 The officer turns the car as if to make a U-turn.
10 Doesn't quite reverse his course. But he's pointed now
11 southbound on an east-westbound street toward the place where
12 it's seen that Mr. Willis dives into the bushes.

13 Officers now know they have there two people who
14 likely are the suspects from a hot gun call that just occurred,
15 and they have one who's now out of their sight, who's dove --
16 has dived into the bushes. They don't know where the gun is at
17 that point.

18 So they have every reason to take all of the
19 precautions necessary for their own safety and for the safety
20 of anyone in the vicinity, because now we have an escalating
21 situation.

22 A firearms's pointed at someone earlier in the
23 evening -- two someones. Not so much earlier in the evening,
24 but minutes previous. And now no one knows where the gun is,
25 at least from the perspective of the officers. And someone has

Colloquy

1 affirmatively dived out of their view, as if to return or to
2 escape.

3 It so concerned one of the officers on the scene that
4 she radios in order to hopefully get a perimeter at the south
5 side of the apartments, so that whoever went into the bushes
6 can't get away. Not realizing, of course, that there's a
7 fence, and you can't get through the fence.

8 So what does **Terry** permit?

9 **Terry** permits a detention for a reasonable amount of
10 time and under reasonable circumstances, so that the officers
11 can collect information hopefully to dissipate the suspicion.

12 In this case, however, the officers have the added
13 issue of officer safety concerns and a person who's -- who's,
14 from their reasonable perspective, has sought to escape an
15 encounter with them.

16 Now, Mr. Willis may very well have believed that
17 unmarked Crown Victoria was being driven by someone who meant
18 to do him harm, who was not a police officer. That's really
19 not relevant at this point.

20 The issue is what's objectively reasonable for the
21 police officers to perceive at that time. And as I say, it's
22 extremely important that a person in these circumstances is
23 actively trying to get away, from their perspective.

24 So the officers have the authority to handle this as
25 a high-risk encounter. This isn't a -- a gentle situation in

Colloquy

1 the daylight, where they're walking down the street, and they
2 get to say to someone, Would you mind stopping so I can ask you
3 a question or two? They have, at a minimum, reasonable
4 suspicion to believe two people they are now encountering --
5 or, I should say, one person they are now encountering and one
6 who's dove into the bush, were just involved in a gun threat
7 blocks away and minutes earlier. And that very serious concern
8 is what justifies the officers for their own safety and to
9 bring the issue to a safe resolution, to act as aggressively as
10 they did. That is to say, in Mr. Wilner-Nugent's words, to
11 prone out people on the ground.

12 It is not the law that proning someone out or
13 ordering someone to lie down on the ground until he can be
14 secured is an arrest. Under circumstances like this, it is
15 reasonable for officers to secure, for their own safety, the
16 person's movements, to ensure that they are not going to harm
17 anybody and they can investigate the situation.

18 Well, as it happens, very little investigation has to
19 occur, because while the defendant is crawling out of the
20 bushes and then directed to lie down, a gun is observed by
21 Officer Billard.

22 The defendant is handcuffed and rolled over; and
23 evidently, from his person, that which was described as
24 suspected cocaine and field tested to be the same falls out of
25 what they call the kangaroo pouch on a pullover hoodie.

Colloquy

1 The officers had probable cause to arrest the
2 defendant when he was down on the ground, because as of that
3 time -- by the time he's being picked up and rolled over -- we
4 have virtually, simultaneously, Mr. Morris telling the police,
5 Those are the guys.

6 And he's the one who ran into the bush, he's the one
7 who comes out, and he's the one who left a gun behind.

8 So I -- I don't think there's any problem here at all
9 with the fact that the many steps that sometimes take days and
10 weeks and months to develop for law enforcement happened to
11 converge here in a matter of seconds and minutes.

12 He -- officers collectively have an eyewitness saying
13 they have the right person. They are treating that person
14 appropriately in a high-risk encounter because of what happened
15 just before, at the event they were investigating, and by
16 virtue of the fact that he sought to escape from their view --
17 at least from their perspective -- and the fact that a firearm
18 is found on the ground.

19 Even if they didn't have probable cause, however,
20 they certainly had reasonable suspicion to continue the
21 detention and to sort things out in a calmer way. But, as it
22 happened, they didn't need to because they had a witness
23 saying, He's the guy.

24 So now we have a firearm on the ground. I don't
25 agree that the defendant has given up standing to challenge the

Colloquy

1 gun, especially in light of his testimony that he did not
2 willingly leave the gun on the ground. He didn't throw it
3 away. It fell out in the excitement of the moment; which is
4 really quite credible and consistent with the Government's own
5 theory about how the drugs fell out. You know, these hoodies
6 with their open pockets aren't a very secure way to carry
7 anything, and they're likely to fall out.

8 So I don't find that the defendant has lost standing
9 to challenge the gun. But the gun is there, and it's seen in
10 plain view, now, by the police officers.

11 They hear sense it, as was described. That's all
12 perfectly appropriate.

13 The defendant's taken into custody when -- I mean,
14 when is the magic moment when we pronounce him, quote, under
15 arrest? Well, it's all converging. By the time he's hooked up
16 and put in the police car, though, he's -- the officers believe
17 he's the person who pointed the firearm at Mr. Morris. The
18 officers believe he's the person who possessed what looked like
19 cocaine.

20 The officers had an objectively reasonable basis for
21 that belief. And so they had probable cause to arrest him for
22 the gun felonies, for the drug felonies.

23 Now, there isn't any evidence that challenges -- and
24 I find credible the collective testimony about the advice of
25 rights -- the defendant's responses to the police officers,

Colloquy

1 none of which were coerced or elicited by the police in
2 violation of the defendant's assertion of rights.

3 So everything he said up to and including at
4 M.C.D.C., with respect to his -- I think someone -- maybe it
5 was you, Mr. Kerin -- used the phrase "falling on his sword."
6 But his statements are all voluntary. None of them are
7 inadmissible as a violation of the defendant's **Miranda** rights.

8 The physical evidence, the gun, the observations
9 around the gun, those are all admissible.

10 Have I missed anything?

11 Are there any other issues I need to address
12 specifically?

13 MR. WILNER-NUGENT: (Shakes head.) I don't think so.

14 MR. KERIN: For the Government, I have just a couple.

15 One is -- and I -- does the Court find all of the
16 officers credible on their entire testimony? You mentioned
17 credibility --

18 THE COURT: I don't find any witness, including
19 Mr. Willis, not to be credible.

20 I have -- I have recited facts that I think were
21 established here today.

22 I don't find it necessary to compare one detail
23 against another unless it's a material detail.

24 Is there a particular inconsistency you're concerned
25 with?

--oOo--

I certify, by signing below, that the foregoing is a correct transcript of the oral proceedings had in the above-entitled matter this 6th day of July, 2013. A transcript without an original signature or conformed signature is not certified. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/S/ Amanda M. LeGore

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UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

 Plaintiff/Appellee,

 vs.

 SID EDWARD WILLIS,

 Defendant/Appellant

No. 17-35568

APPELLANT MOTION FOR
 CERTIFICATE OF APPEALABILITY

Comes now petitioner/appellant Sid Willis, by and through counsel James F. Halley, and moves for a certificate of appealability pursuant to FRAP 22 and 28 U.S.C. §2253(c). Willis contends that the record establishes that he suffered constitutional violations of two kinds during a motion to suppress hearing: violations unrelated to the effectiveness of his trial counsel (selective prosecution on account of his race; and denial of his rights to due process and a fair trial under the 5th, 6th and 8th Amendments due to the prosecution's failure to correct false testimony); and ineffectiveness of trial counsel in failing to adequately impeach two officers (Hubbard and Carmon), and in failing to call a third officer (Andonian). As explained below, "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in

its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

I. TIMELINESS OF THIS MOTION FOR A CERTIFICATE OF APPEALABILITY.

A motion for a certificate of appealability in the Circuit Court is due within 35 days of the District Court's order "(1) denying a COA in full or (2) denying a timely filed post-judgment motion, whichever is later." Circuit Rule 22-1(d). Here, the District Court initially denied Willis's §2255 motion on June 9, 2017. Opinion and Order, CR 135 at 2. Willis then timely filed a *pro se* motion for reconsideration (CR 138). In a minute order issued on September 8, 2017, the District Court wrote

The grants Defendant's Motion to the extent that the Court reconsiders its June 9, 2017 Opinion and Order in which it denied Defendant's Amended Motion ... under 28 U.S.C. §2255.... Having reconsidered Defendant's arguments, the Court adheres to its conclusion that there is not any legal basis for the relief sought ... or for the Court to issue a Certificate of Appealability. Accordingly, the Court adheres to its June 9, 2017 Opinion and Order.

Minute Order, CR 142 (copy attached).

This motion for a certificate of appealability is timely pursuant to Circuit Rule 22-1 because it is being filed within 35 days of the District Court's September 8, 2017 order denying the motion for reconsideration.

II. PROCEDURAL BACKGROUND.

This case grew out of events on May 24, 2012 which led to the arrest of Mr. Willis and his companion Alejandro Herrera. The government did not prosecute Herrera, but it did charge Willis with being a felon in possession of a firearm in violation of the Armed Career Criminal Act, 18 U.S.C. §§922(g)(1), 924(d) and 924(e). Before trial, Willis filed a motion to suppress items seized (CR 37 and 39), arguing that the initial police encounter was an arrest that lacked probable cause, rather than a Terry stop based on reasonable suspicion. On May 20, 2013 the court held a hearing on the motion to

suppress at which four officers testified: Kimberly Hubbard (RT1 7); Derek Carmon (RT1 41), Shaye Samora (59) and John Billard (73).¹ Two officers who assisted in taking Herrera and Willis into custody, Officer Pippen and John Andonian did not testify.

The court denied the motion to suppress. It ruled that the call from an identified informant about a recent crime involving a gun, the match between the informant's descriptions and Willis's and Herrera's appearance, the proximity in time and location, and Willis's movement behind the bushes, all created reasonable suspicion sufficient to support a *Terry* stop. The court also found that the intensity and nature of the stop (ordering Herrera and Willis to the ground at gunpoint) was objectively reasonable due to concerns for the safety of the officers. RT1 at 112:15 – 119:17. The court found that probable cause to arrest arose when officers Hubbard and Carmon rolled Mr. Willis onto his side in an effort to get him off the ground, and in so doing uncovered a small bundle of what appeared to the officers to be cocaine. 119:18 – 120:23.

Mr. Willis then entered a conditional guilty plea admitting he possessed the gun (CR 53 and 54), and the court sentenced him to 180 months in this case on December 23, 2013. Judgment, CR 68. The court also imposed a consecutive 60 month sentence for a violation of supervised release in *United States v. Willis*, 3:02-cr-120-BR.²

Mr. Willis appealed the denial of his motion to suppress, and the Ninth Circuit affirmed, writing in an unpublished memorandum opinion that:

[t]he detention of Willis that resulted in the officers' discovery of the relevant evidence was a valid investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The aggressive means the officers used to stop Willis were justified and did not convert the detention into an arrest because the officers had information that Willis was currently armed, the stop closely followed a violent crime, and Willis fled upon seeing the officers' vehicle.

¹ . . . The transcript of the motion to suppress hearing appears at CR 49, and will be referred to here as "RT1". The transcript of the change of plea hearing appears at CR 75, and will be referred to here as "RT2".

² . The Ninth Circuit vacated and remanded for resentencing on the supervised release, on the grounds that the court had not made findings as to whether the violation conduct qualified as a crime of violence. *United States v. Willis*, USCA 13-30377 (9th Cir. 2015, 11/9/2015). On March 14, 2017, this court entered an order making that finding. *United States v. Willis*, 3:02-cr-120-BR, CR 202.

United States v. Willis, USCA #13-30376 (9th Cir. 7/29/15) (citations omitted.)

The Supreme Court denied Willis's petition for a writ of certiorari on June 28, 2016. Willis filed an initial 2255 motion on March 28, 2016, and the current amended 2255 motion on June 7, 2016. CR 99.

The amended 2255 motion makes nine claims. The issues surrounding these claims can be grouped as follows:

Claims Other Than Ineffective Assistance of Counsel:

1. Waiver;
2. Selective prosecution on race based grounds (grounds 1 and 6);
3. Due process and fair trial violations under the 5th, 6th and 8th Amendment by the prosecution in failing to correct false testimony by officer Hubbard regarding her contact with defendant at MDCDC (ground 8).

Ineffective Assistance of Counsel Claims:

1. Ineffective assistance of counsel for failing to impeach officer Hubbard regarding her testimony that she transported Willis to MDCDC with the testimony of Officers Carmon and Andonian (grounds 2, 3, 7a);
2. Ineffective assistance of counsel in failing to impeach officers Hubbard and Carmon as to when property was taken (grounds 4, 7b, and 9);
3. Ineffective assistance of counsel in failing to call officer John Andonian (grounds 5 and 9);

III. THE RELEVANT TESTIMONY AND REPORTS.

A. Officer Hubbard.

Officer Kimberley Hubbard testified that on May 24, 2012 at 10:21 p.m. she and her partner Derek Carmon were dispatched on a call about a recent threat made with a gun at SE Division and SE 162nd Ave. RT1 7:20 – 8:8. As she and Camron drove eastward on SE Division, they saw two men who matched the suspect descriptions walking westbound on the opposite side of the street near SE 158th Ave. RT1 10:15 – 10:22. Officer Camron made a U-turn, and turned on the emergency lights, and came

to a stop pointing at the two suspects. As the patrol car made the U-turn, Herrera remained standing on the sidewalk, and Willis moved behind some bushes. RT1 11:15 – 11:24. Hubbard drew her gun on Herrera and ordered him to lie on the ground. With other officers, she “proned out” Herrera and handcuffed him. RT1 17:23 – 18:10. At the same time Carmon looked into the bushes with his gun drawn and giving commands to come out. Willis then crawled from the bushes and complied with orders to lie on the ground.

Once Herrera had been cuffed, Hubbard moved to help Carmon with Willis. After cuffing Willis, the officers rolled him on his side, and in doing so revealed a small baggie of white powder that Hubbard believed was cocaine. RT1 19:25 – 21:8. Hubbard testified officer Billard then looked in the bushes from which Willis had emerged and found a silver revolver. RT1 21:18 – 21:23.

After the 911 caller had identified Herrera and Willis, officers transported them to the East Precinct and then to MCDC. Referring to the BOEC print of officer activity, Hubbard testified that she and Carmon as partners in Unit 1672 arrived on scene at 10:25:51 p.m. on the 24th, transported Willis to the East Precinct at 11:21 p.m., and then transported Willis from East Precinct to MCDC between 1:13 a.m. and 1:26 a.m. on the 25th. RT1 32:1, and 33:18 – 34:18.

Two reports written by Officer Hubbard are attached to the amended 2255 motion: Ex. 4, a Force Data Collection Report, and Ex. 5, a Special Report. The Force Data Collection Report reflects that other than the bindle of cocaine, “No other items of value were found during my inventory of Willis.” The Special Report echoes Hubbard’s testimony that she and Carmon transported Willis to MCDC.

B. Officer Carmon.

Officer Carmon described similar events regarding the stop and arrest. RT1 42:22 – 53:14. However, he testified that Officers Billard and Andonian transported Willis from East Precinct to MCDC. RT1 53:18 – 53:23.

On cross examination, Carmon testified that he took Willis’s shoes, money,

cigarettes, and cell phone, and then placed Willis in the patrol car. Counsel did not further amplify the conflict between Hubbard and Carmon regarding transport to MCDC. RT1 54:25 – 57:18.

Officer Carmon's Custody Report is attached to the amended 2255 motion. Ex. 3. It reflects that "Officers Andonian and Billard transported Willis to MCDC without incident and Willis had no items of value on his person."

C. Officer Shaye Samora.

Officer Samora testified about his contacts with the complainant, Greg Morris and his girlfriend Christine Smith. RT1 59:12 – 72:5. Samora's report, which appears as Ex. 2 to the Amended 2255 Motion (CR 99), states that Morris said Herrera threatened him, saying "You need to quit talking", demanded a ride to 102nd, and then said "why are you still talking ... we'll just shoot you and take your car."

D. Officer John Billard.

Officer Billard testified that he was with his partner John Andonian, a couple hundred feet behind Carmon and Hubbard arriving on the scene. He found the silver revolver 6-8 feet into the hedgerow and photographed it in place. He also imaged the gun with a heat sensitive Flir device, which showed some warmth initially and no warmth after 20 minutes. On the basis of that heat reading, he gave an opinion that somebody handled the gun within 20 minutes to an hour before it was found. RT1 73:7 – 83:6.

On cross examination, Billard testified that Willis was handcuffed when "proned out" on the ground, and that it is standard practice to take shoes, money, cell phones, cigarettes and other basic possessions before placing a suspect in a patrol car. 83:19 – 84:3.

E. Officer Andonian's Report.

Officer Andonian's report appears as Ex. 1 to the Amended 2255 Motion, CR 99. Contrary to Carmon's report, it does not reflect that either Andonian or Billard transported Willis to MCDC.

IV. THE 2255 ALLEGATIONS AND THE DISTRICT COURT'S RULINGS.A. The Claims Other Than Then Ineffective Assistance of Counsel: Selective Prosecution, and Due process and Fair Trial Violations.1. Waiver.

The prosecution contended that Willis waived his right to bring any §2255 claim other than ineffective assistance of counsel, and so waived his right to claim selective prosecution. Government's Response to Defendant's 28 U.S.C. §2255 Petition, CR 111 at 9. The District Court agreed. CR 135, Opinion and Order at 8-9.

Waivers of collateral attack are subject to the same requirements imposed on waivers of direct appeal: they must be knowing and voluntary. See *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) ("As a general matter therefore . . . an informed and voluntary waiver of post-conviction relief is effective to bar such relief.") A defendant's appellate waiver "must be express and unambiguous." *United States v. Hendrickson*, 22 F.3d 170, 174 (7th Cir. 1994). Further, "[w]aivers of appellate rights ... are to be applied narrowly and construed strictly against the Government." *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001) (internal quotation marks omitted). If the court advises a defendant that he or she has a right to appeal, and the government does not object, that may override an appellate waiver in the plea agreement. *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995).

Here, there are three references to waivers in the change of plea colloquy. Near the beginning of the colloquy, the prosecution referred to the conditional nature of Willis's plea, permitting him to appeal the court's denial of his motion to suppress, and reciting that "he is waiving his other rights to appeal, your Honor." RT2 at 3:24 – 3:25. Later, the court reviewed the text preceding Willis's signature, including the statement "I expressly waive my right to appeal, as outlined in this agreement." Finally, the court remarked "Mr. Willis, I'm satisfied you're fully competent today. You're making a knowing, intelligent, and voluntary waiver of your rights." RT2 at 36:19 – 36:21.

The District Court's opinion regarding waiver is brief:

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As noted, in the Plea Agreement Defendant waived his right to bring a § 2255 motion on any ground other than ineffective assistance of counsel. The court engaged in a thorough colloquy with Defendant as to that fact, and Defendant indicated he understood.

Willis contends that the colloquy was not sufficient to establish that he knew he was waiving claims he might bring under §2255, and that he should not be denied his day in court on that ground now.

2. Selective prosecution on race based grounds (grounds 1 and 6).

A claim of selective prosecution alleges that the government has charged the defendant for reasons that violate a fundamental right to equal treatment under the law. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). A selective prosecution claim falls under the equal protection clause of the Fourteenth Amendment, which forbids prosecutors from targeting an individual based upon “an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Making out a prima facie case requires that the defendant overcome, with “clear evidence to the contrary,” the presumption that prosecutors act with good faith and integrity when seeking indictments. *Armstrong*, 517 U.S. at 464 (internal citation omitted). Clear evidence to contradict this “presumption of regularity,” consists of proof that the prosecutorial decision at issue “had a discriminatory effect and that it was motivated by a discriminatory purpose.” *Id.* at 465 (internal citation omitted).

To establish that the government acted with a discriminatory purpose, the defendant must show that his prosecution “was based on an arbitrary classification such as race, religion, or the exercise of constitutional rights.” *United States v. Darif*, 446 F.3d 701, 708 (7th Cir. 2006). For example, if a defendant asserts that he was prosecuted because of his race, he must show that the actions of law enforcement were racially motivated. See, e.g., *United States v. Jones*, 159 F.3d 969, 977 (6th Cir. 1998) (finding discriminatory intent where arresting officer mailed the defendant a postcard “of an African American woman with bananas on her head”). To show discriminatory effect,

the defendant must provide “some evidence” that the government declined to prosecute similarly situated individuals outside of the protected group to which the defendant belongs. See, e.g., *id.* at 977-78 (finding that the defendant “has set forth ‘some evidence’ tending to show the existence of discriminatory effect that warrants discovery in his selective prosecution claim”).

Here, Willis contends that the government’s decision to prosecute him, an African American, but not Herrera, who is not African American, shows both the required discriminatory intent and effect, a point highlighted by Herrera’s threats to Morris as reflected in Samora’s report. See Ex. 2 to Amended 2255 Motion, CR 99. Further, Willis contends that he has a long history with AUSA Kerin which motivated this prosecution.

The District Court’s rational for rejecting Willis’s selective prosecution claim on the merits was that

[t]he record, however, reflects Herrera was not alleged to have possessed a firearm during the events that formed the basis for the charge of felon in possession, but Defendant possessed a firearm at that time.

Opinion and Order, CR 135 at 8.

The Court’s rational, though, fails to take into account the fact that Herrera acted jointly with Willis, saying “why are you still talking ... we’ll just shoot you and take your car.” Amended §2255 Petition, CR 99, Ex. 2, Samora report at p. 2. In these circumstances, a case might be made that Herrera and Willis jointly possessed the gun.

3. Due Process and fair trial violations under the 5th, 6th and 8th Amendments for failing to correct Hubbard’s false testimony regarding her contact with defendant at MCDC (ground 8).

Willis also contends that the prosecutor had a duty to correct the testimony as to whether Hubbard had contact with Willis at MCDC, and he seeks a hearing to prove the same.

The District Court acknowledged the inconsistency in Hubbard’s testimony, but

rejected this claim, concluding:

In any event, the Court notes the issue of which officer brought defendant to MCDC after his arrest was not central or relevant to the crime charged, and the issue was explored adequately in direct testimony at the suppression hearing.

Opinion and Order, CR 135 at 8 – 9.

Willis contends that had the prosecutor corrected Hubbard's error, it would have materially affected the court's determination of the merits of his claim that the officers arrested him without probable cause.

B. Ineffective assistance of counsel Claims.

1. Trial Counsel Was Ineffective for failing to impeach officer Hubbard regarding her testimony that she transported Willis to MCDC with the testimony of Officers Carmon and Andonian (grounds 2, 3, 7a).

The record discloses a clear conflict between Hubbard and Carmon as to whether they transported Willis from East Precinct to MCDC, yet the point was not explored on cross examination of either witness. The District Court rejected Willis's claim that his lawyer was ineffective for failing to impeach Hubbard, writing:

The record reflects the minor issues that Defendant raises about Officer Hubbard's testimony regarding which officers transported Defendant after his arrest are irrelevant to the issues the Court considered when deciding Defendant's Motion to Suppress; the Court, in any event, addressed the discrepancies during the suppression hearing; and the Court, well aware of the variations in the witnesses' testimony, did not find any indication of untruthfulness:

I expect that witnesses to the same event will often have different perspectives, and this case isn't any different. We have minor variations among the accounts of the officers and even the defendant's account. But fundamentally consistent from the testimony of the officers and even from the defendant's testimony to the extent he chose to share it with me.

* * *

I find all of the witnesses testified truthfully, to the best of their knowledge. The officer, I have no reason to distrust, other than in the normal run of human encounters, people remember details; some don't. One officer writes down 20:51 hours when it's 22:51 hours. There are human errors inherent in their accounts. But nobody is lying to me about the key facts here, and I accept the key presentation as true.

Evid. Hearing Tr. (#49) at 112-13.

The Court concludes on this record that Defendant has not established defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms with respect to the impeachment of Officer Hubbard as to her testimony relating to defendant's transport to MCDC.

Opinion and Order, CR 135 at 12 – 13.

Cross examination is one of the greatest engines for the detection of the truth. *State Farm v. Tan*, 691 F.Supp. 1271 (S.D. CA 1988); 6 Wigmore, Evidence § 1838 (Chadbourn rev. 1976). Here, Willis complains the tool lay dormant when it might have been used to undercut the arresting officers' credibility. He seeks a hearing to prove that the failure to cross examine fell below the *Strickland* standard and prejudiced him.

2. Ineffective assistance of counsel in failing to impeach officers Hubbard and Carmon as to when property was taken (grounds 4, 7b, and 9).

Willis makes a similar argument regarding the taking of his property, contending that Hubbard's statement in her Force Data Collection Report (Ex. 4 to Amended 2255 Motion, CR 99) that "No other items of value were found during my inventory of Willis", and Carmon's statement in his Custody Report (Ex. 3 to Amended 2255 Motion, CR 99) that "Willis had no items of value on his person".

The District Court rejected these claims, writing:

As with Defendant's assertion of ineffective assistance of counsel regarding his transportation to MCDC, the record reflects Officer Hubbard's testimony regarding the items of personal property that were seized from Defendant is irrelevant to the issues the Court, in any event, considered when deciding Defendant's Motion to Suppress; the Court addressed the discrepancies during the suppression hearing; and the Court, well aware of the variations in the witnesses' testimony, did not find any indication of untruthfulness.

Opinion and Order, CR135 at 13 – 14.

Willis contends that had his trial lawyer effectively cross examined officers Hubbard and Carmon on this conflict in the evidence, and on the point about who transported him to MCDC, the fully developed inconsistencies would have undermined the officers' credibility on the crucial issue of whether he was arrested when ordered to the ground. He seeks a hearing to prove that the failure to cross examine fell below the

Strickland standard and prejudiced him.

3. Ineffective assistance of counsel in failing to call officer John Andonian (grounds 5 and 9).

Willis contends that if called to testify, Andonian would have contradicted Carmon's testimony and report that he (Andonian) and Billard transported Willis to MCDC, and would have bolstered Willis's claim that he was subjected to an arrest when on the ground, rather than a *Terry* stop.

The District Court rejected this claim as well, writing:

As noted, the issue of which officers transported Defendant to MCDC was tangential and irrelevant to the issues the Court considered at the suppression hearing, and the Court addressed the discrepancies in the officers' testimony at the hearing. The Court, therefore, concludes on this record that Defendant has not established defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms when he declined to call Officer Andonian as a witness at the suppression hearing.

Opinion and Order, CR 135 at 15.

As stated above, Willis contends that if his trial lawyer had effectively developed this point, the arresting officers' credibility would have been undermined to the point that the District Court would have seen that the officers arrested him when they ordered him to the ground.

V. Conclusion.

For the foregoing reasons, this court should conclude that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012). Accordingly, it should grant a certificate of appealability and hear this case.

Date: October 9, 2017

JAMES F. HALLEY, P.C.

/s/ James F. Halley

James F. Halley, OSB #91-175

Attorney for Defendant / Movant

Sid Edward Willis

Megan Halley

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U.S. District Court

District of Oregon

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Case Number: [3:12-cr-00292-BR](#)
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ORDER by Judge Anna J. Brown. The Court has reviewed Defendant's Motion ([138]) for Reconsideration. The Court GRANTS Defendant's Motion to the extent that the Court reconsiders its June 9, 2017, Opinion and Order in which it denied Defendant's Amended Motion ([99]) to Vacate or Correct Sentence under 28 U.S.C. § 2255, and Defendant's Motion ([134]) for Evidentiary Hearing and declined to issue a certificate of appealability. Having reconsidered Defendant's arguments, the Court adheres to its conclusion that there is not any legal basis for the relief sought by Defendant in his Motion to Vacate or Correct Sentence or for the Court to issue a Certificate of Appealability. Accordingly, the Court ADHERES to its June 9, 2017, Opinion and Order. (jy)

3:12-cr-00292-BR-1 Notice has been electronically mailed to:

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