No.

# In the Supreme Court of the United States

OTHA RAY FLOWERS, PETITIONER,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Terry* v. *Ohio*, this Court held that officers may, consistent with the Fourth Amendment, briefly detain a person based on reasonable suspicion of involvement in criminal activity. 392 U.S. 1, 30 (1968). This Court subsequently clarified in *Illinois* v. *Wardlow* that a suspect's mere presence in a high-crime area, without more, is an insufficient basis for reasonable suspicion. 528 U.S. 119, 124 (2000). The question presented is:

Whether conduct that is consistent with either lawful or unlawful behavior, and in which law-abiding members of the general public routinely engage, can establish reasonable suspicion justifying a *Terry* stop merely because it occurs in a high-crime area.

## RELATED PROCEEDINGS

United States Court of Appeals for the Fifth Circuit:

*United States of America* v. *Otha Ray Flowers*, No. 20-60056 (July 30, 2021).

United States District Court for the Southern District of Mississippi:

*United States of America* v. *Otha Ray Flowers*, No. 3:19-CR-41-1 (July 24, 2019, order denying defendant's motion to suppress) (Aug. 19, 2019, verdict).

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## PETITION FOR A WRIT OF CERTIORARI

Otha Ray Flowers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, App., *infra*, 1a-22a, is reported at 6 F.4th 651.

## JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 30, 2021. On October 18, 2021, Justice Alito extended the deadline for a certiorari petition to November 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## INTRODUCTION

In 1963, a police officer observed two men take turns walking up to a store, peering into the window, and returning to confer. After seeing this ritual repeated a dozen times over the course of several minutes, the officer stopped them to investigate. In 2017, an officer observed two men sitting in their parked car outside of

an open convenience store for 10 to 15 seconds before six patrol cars descended on them to conduct a "field interview." In the first case, this Court held that reasonable suspicion supported the stop. *Terry* v. *Ohio*, 392 U.S. 1, 6, 29 (1968). In the second, the divided Fifth Circuit panel below found that this Court's 1968 precedent justified the same outcome. As Judge Elrod remarked in dissent, "[h]ow far we have come" since *Terry*. App., *infra*, at 14a (Elrod, J., concurring in part and dissenting in part).

This case is emblematic of a "slow systemic erosion of Fourth Amendment protections" for residents of high-crime areas. *United States* v. *Black*, 707 F.3d 531, 542 (4th Cir. 2013). This Court long ago held that an individual's presence in a high-crime area alone "is not enough to support a reasonable, particularized suspicion." *Illinois* v. *Wardlow,* 528 U.S. 119, 124 (2000). But in the two decades since *Wardlow*, lower courts have struggled to define what conduct *is* enough for reasonable suspicion when a police interaction occurs in a high-crime area. Lacking guidance from this Court, federal and state courts have reached irreconcilable conclusions about whether ambiguous conduct—i.e., conduct that is fully consistent with lawful behavior, of the type that many law-abiding Americans frequently engage in—is enough to support reasonable suspicion, merely because that conduct occurs in a high-crime area. Some courts have correctly refused to treat "residents of * * * [a] high crime area * * * [as] less worthy of Fourth Amendment protection." *United States* v. *Curry*, 965 F.3d 313, 331 (4th Cir. 2020). Other courts, including the Fifth Circuit

here, have effectively eviscerated the reasonable-suspicion requirement as it applies in high-crime areas.

In this case, over a sharp dissent from Judge Elrod, a Fifth Circuit panel held that reasonable suspicion supported a stop of petitioner Otha Ray Flowers where an officer observed him sitting in his car in the parking lot of an open convenience store in the early evening, for 10-15 seconds. App., *infra*, at 8a-9a. In seeking to defend the stop, the officer pointed to conduct—petitioner's decision to linger briefly in his car, which was parked adjacent to an open convenience store's front door—which is not only fully consistent with innocuous behavior, but of the type that is undertaken every day by scores of law-abiding Americans. But because petitioner was outside a convenience store in a heavily-patrolled urban area, the Fifth Circuit found reasonable suspicion existed to justify the stop. App., *infra*, at 7a-9a. That troubling ruling implicates a split among several federal courts of appeals and state courts of last resort which have reached opposite conclusions when faced with analogous conduct in high-crime areas.

The Fifth Circuit's decision is critically important and clearly wrong. That Court has now authorized stops based on the kind of commonplace behavior undertaken by law-abiding citizens nationwide—here, sitting in a parked car for a mere 10-15 seconds, during which time petitioner might have been finishing a conversation with his companion, reading a text message, or simply gathering his thoughts before entering the store to run an errand. That threadbare showing of "reasonable suspicion" cannot be justified by the fact that petitioner's car was parked in an urban area with

a higher crime rate, since that rationale would make almost anyone present in a high-crime area subject to arbitrary detention. Indeed, the panel majority "comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment." App., *infra*, at 22a (Elrod, J., concurring in part and dissenting in part) (quoting *United States* v. *Rideau*, 969 F.2d 1572, 1577 (5th Cir. 1992) (en banc) (Smith, J., dissenting)). Investigatory stops are significant invasions of individuals' right to be free from arbitrary interference by police. *Terry*'s threshold requirement of reasonable suspicion has become a hollow protection if an act that "any law-abiding citizen might do in order to patronize the store" is enough in a high-crime area to justify a seizure. App., *infra*, at 18a (Elrod, J., concurring in part and dissenting in part).

The question presented is of nationwide importance and urgently calls for this Court's intervention. So-called "hot-spot" policing techniques like those used in this case are widespread today, and frequently precipitate police interactions based on observed conduct that is fully consistent with lawful behavior. This Court's review is needed to ensure uniformity in this important area of law, and to provide clarity both to officers engaged in similar policing techniques and the millions of law-abiding citizens who live and work in areas where such policing strategies are often employed.

## STATEMENT

### 1. Legal Background

The Fourth Amendment protects "[t]he right of the people to be secure in their persons." U.S. Const. amend. IV. The "basic purpose" of this guarantee "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara* v. *Mun. Court*, 387 U.S. 523, 528 (1967)). To this end, the Fourth Amendment prohibits "unreasonable * * * seizures," U.S. Const. amend. IV, "including seizures that involve only a brief detention short of traditional arrest." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

A brief detention of this kind comports with the Constitution only when an "objectively reasonable police officer" would have "'a particularized and objective basis' for suspecting the particular person stopped of criminal activity." *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-18 (1981)). This basis is known as "reasonable suspicion." *Ornelas*, 517 U.S. at 696.

In a line of cases beginning with *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has clarified what reasonable suspicion demands. The government bears the burden to present facts supporting reasonable suspicion. See *Terry*, 392 U.S. at 21; *Brignoni-Ponce*, 422 U.S. at 884-86. Those facts must be "specific and articulable" and "particularized to the individual." *Kansas* v. *Glover*, 140 S. Ct. 1183, 1190 (2020) (internal quotation marks omitted). And an officer must have more than a "mere

hunch" that someone might violate the law. *Id.* at 1187 (internal quotation marks omitted).

These basic principles guard against law enforcement claiming a "broad and unlimited discretion to stop [persons] at random" and an unconstrained power to detain those "whose conduct is no different from any other['s]." *Glover*, 140 S. Ct. at 1190 (internal quotation marks omitted).

**2. Factual Background**

"The key facts are undisputed in this case." App., *infra*, at 14a (Elrod, J., concurring in part and dissenting in part). Petitioner Otha Ray Flowers spent Saturday, February 18, 2017, socializing with his friend, Jeremy Mayo, in Jackson, Mississippi. *Id.* at 1a-3a, 20a. The two men visited petitioner's mother, went to a park, went shopping, and, in the evening, decided to go out and shoot pool. *Id.* at 57a. On their way to the pool hall, Mayo and petitioner stopped to buy cigarettes at Big Boy's Food Mart, a local corner store. *Id.* at 27a, 57a, 75a.

Big Boy's is located in western Jackson, at the corner of Capitol Street and Road of Remembrance. App., *infra*, at 27a. It is a small store with a small parking lot. See Figure 1.[1] The lot's single row of parking spaces is three feet from the public roadway. App.,

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[1] Figure 1, which appears on page 8 of this Petition, is a reproduction of a photographic exhibit admitted at the suppression hearing showing the store where petitioner was stopped. See App., *infra*, at 66a. The black rectangle marks the uncontested location of petitioner's car. The red "x" marks indicate the positions of three of the six police cars that surrounded petitioner. *Id.* at 65a-67a.

*infra*, at 29a-30a. Most of the marked spaces either face or neighbor the store's glass doors and windows. See Figure 1. Petitioner arrived at Big Boy's around 8:30pm, *id.* at 2a, 57a, and parked facing the store, just south of its front door, in the first spot along the store's wall as one turns left into the lot. See Figure 1.

Figure 1

That evening, Officer Eric Stanton was patrolling Jackson by car, accompanied by five or six other officers. App., *infra*, at 2a-3a. Officer Stanton was at the time a member of the Jackson Police Department's Direct Action Response Team, or DART. *Id.* at 2a-3a. That team, in Officer Stanton's words, was a "proactive unit" sent to areas where police "deemed" "crime * * * to be increasing." *Id.* at 27a. As his six-car caravan turned onto Road of Remembrance, Officer Stanton spotted petitioner's car parked in the Big Boy's lot. *Id.* at 3a.

Officer Stanton observed petitioner's car for "approximately 10 to 15 seconds." App., *infra*, at 3a, 27a. As far as he knew, the vehicle had only been there for up to 15 seconds. *Id.* at 49a. In that brief interval, Officer Stanton observed two passengers sitting in the front seats. *Id.* at 3a, 27a. Officer Stanton later testified that the passengers "didn't appear to be exiting the vehicle." *Id.* at 27a. "Pretty immediate[ly]" after petitioner's car came to a stop, *id.* at 61a, Officer Stanton decided to initiate what he called a "field interview," *id.* at 3a, 28a. As Officer Stanton later explained, he wanted to "ensure that [Mayo and petitioner] had legitimate reasons at the business" and "weren't casing the business." *Id.* at 32a. To effect the "field interview," the six-cruiser caravan pulled up, blue lights flashing, and blocked petitioner's exit onto the street. *Id.* at 3a. Officer Stanton later acknowledged that "it would have been impossible" for petitioner to drive away "because of the way the officers parked their cars" around him. *Ibid.*

When Officer Stanton approached the car, petitioner rolled down the car window. App., *infra* at 4a.

The officer later testified that he smelled marijuana. *Ibid.* Mayo then appeared to put something into his mouth, and, in response, Officer Stanton ordered both passengers out of the car. *Ibid.* When petitioner stood up, Officer Stanton spotted a gun on petitioner's seat. *Ibid.*

Petitioner was indicted on a single charge of being a felon in possession of a firearm. App., *infra*, at 4a; see 18 U.S.C. § 922(g)(1). Before trial, petitioner moved to suppress evidence of the gun on the ground that it resulted from a seizure violating the Fourth Amendment. App., *infra*, at 4a. After a hearing, the District Court orally denied that motion. *Id.* at 4a-5a; see *id.* at 104a-109a (transcript of ruling). In the District Court's view, the case was akin to a "stop and frisk" situation. *Id.* at 105a. The District Court found that petitioner had parked the car for "a period of time" in a high-crime area, and that during police surveillance "no occupant exited the vehicle and no one visited the vehicle." *Id.* at 114a. To the District Court, those facts alone justified a *Terry* stop, which continued until the smell of marijuana provided probable cause for an arrest. *Id.* at 105a-106a. Officer Stanton did not testify, and the District Court did not find, that the spot where petitioner's car was parked was in any way suspicious.

Petitioner proceeded to a jury trial, where he renewed his motion to suppress. Aug. 16, 2019 Trial Tr. at 41:13-18. The District Court denied that motion without further reasoning, *id.* at 41:21-22, and the jury convicted. App., *infra*, at 5a.

On appeal, petitioner renewed his Fourth Amendment argument. Again relying on *Terry* and its

progeny, he argued that sitting in a parked car for 10 to 15 seconds outside an open convenience store in a high-crime area could not support the reasonable, particularized suspicion that *Terry* requires. See App., *infra*, at 9a.

A divided panel of the Fifth Circuit disagreed. App., *infra*, at 8a-13a. The panel majority assumed arguendo that petitioner was seized when six police cruisers surrounded his car. *Id.* at 7a. But the majority found that reasonable suspicion justified that seizure. The Court relied on the facts that (1) petitioner was stopped in a "high crime area"; (2) the stop took place after dark; (3) petitioners' car was "the only [one] in a convenience store lot," parked "in a suspicious spot" "as far as possible from the storefront"[2]; and (4) neither petitioner nor Mayo had stepped out of the car for 10 to 15 seconds. *Id.* at 3a, 7a-8a, 10a.

The majority concluded that this case presented "a similarly suspicious scenario to that which alerted the officer in *Terry*." App., *infra*, at 11a. In *Terry*, a police officer observed two men suspected of casing a store for burglary over the course of 10 to 12 minutes. 392 U.S. at 5-6. During that time, the suspects engaged in a "ritual," walking past and peering into the same store window about a dozen times. *Id.* at 6. In the Fifth Circuit's view, Officer Stanton saw an ambiguous situation suggesting preparations for burglary and therefore had the right to detain petitioner "to resolve the ambiguity" in his conduct. App., *infra*, at 12a

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[2] Without acknowledging the contradiction, the majority later characterized petitioner as having parked "suspiciously close to a convenience store." App., *infra*, at 10a.

(quoting *Wardlow*, 528 U.S. at 125). The majority characterized Officer Stanton's conduct as "non-threatening" and "benign," and took that as evidence that the stop had been reasonable from the outset. *Id.* at 7a, 11a.

Judge Elrod dissented from the panel's *Terry* holding. To begin, Judge Elrod found that petitioner had unquestionably been seized. App., *infra*, at 15a (Elrod, J., concurring in part and dissenting in part). And she concluded that his seizure was not justified by reasonable suspicion. *Id.* at 17a. In her view, petitioner had been parked in an unexceptional place, at an unexceptional hour, for an unexceptional amount of time. See *id.* at 17a-18a. Judge Elrod emphasized that petitioner parked in one of only "five or six" available spots—hardly a suspicious location. *Id.* at 14a. The stop occurred at 8:30 p.m. on a Saturday—hardly a suspicious time. *Ibid.* On the record here, she explained, Officer Stanton "merely noticed that [Mayo and petitioner] had not exited the car during the time that the police caravan turned the corner." *Id.* at 15a. In short, "[t]wo men were sitting in a parked car outside an open convenience store during the early evening for a mere ten seconds. That is not suspicious behavior, nor does it transform into suspicious behavior because the convenience store was located in a high crime area." *Id.* at 17a.

Judge Elrod also emphasized that the majority's Fourth Amendment analysis was in tension with case law from other Circuits. See App., *infra*, at 20a n.2 (Elrod, J., concurring in part and dissenting in part) (citing cases from three Circuits). To Judge Elrod, what Mayo and petitioner did was "something that any

law-abiding citizen might do." *Id.* at 18a. Holding that such "innocuous" behavior justified a stop was, to her, akin to holding that "living in a high crime area renders all actions suspicious." *Id.* at 20a-21a. "For citizens to become suspects," she concluded, "they must do more than merely exist in an 'unsavory' neighborhood." *Id.* at 22a.

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Deepens a Split of Authority On An Important Fourth Amendment Question.

#### A. The Fifth Circuit Adopted the Minority View By Holding That Ambiguous Conduct Widespread Among the Law-Abiding General Public May Support Reasonable Suspicion.

In the decision below, the Fifth Circuit found reasonable suspicion to detain petitioner because an officer observed him for 10-15 seconds in the early evening, sitting in the front seat of a car, parked in the lot of an open convenience store in a high-crime area. App., *infra*, at 9a-13a. In dissent, Judge Elrod noted that "[p]arking in one of only a few available parking spots in front of a convenience store at an unextraordinary time of evening—8:30 p.m.—is something that any law-abiding citizen might do in order to patronize the store." *Id.* at 18a (Elrod, J., concurring in part and dissenting in part). Judge Elrod stated that "it defies reason to base a justification for a search upon actions that any similarly-situated person would have taken." *Id.* at 22a (quoting *Rideau*, 969 F.2d at 1581 (Smith, J., dissenting)).

In holding that the officers had reasonable suspicion, the Fifth Circuit deepened a split of authority with other federal courts of appeals and state courts of last resort. The Court's decision aligns it with a minority of other courts which have held that the kind of innocuous activity in which broad swaths of law-abiding people regularly engage, if observed in a high-crime area, is enough to establish the reasonable suspicion needed to conduct a *Terry* stop.

The Sixth Circuit's decision in *United States* v. *Young* is illustrative. 707 F.3d 598 (2012). There, the police saw the defendant parked in a parking lot outside a restaurant located in a high-crime area. *Id.* at 600. After observing the defendant "for approximately a minute and a half" and noticing that he was sitting "in a reclined position," the police initiated an investigatory stop. *Id.* at 600-01. The Court reasoned that because of the "high-crime history of [the] lot, pat-downs of [the restaurant's] patrons, and [the individual's] reclined position"—conduct the Court labeled as "ambiguous" and the Government had conceded was "compatible with an innocent explanation"—officers had reasonable suspicion to conduct a *Terry* stop. *Id.* at 603-04; Br. for Appellee at 9, *United States* v. *Young*, 707 F.3d 598 (6th Cir. 2012) (No. 11-2296). The Court so held even though "[t]he lot was regularly used for parking by patrons" of the restaurant, meaning that a comparatively large number of law-abiding people might wait for "a minute and a half" outside of the establishment during its business hours. *Id.* at 600. See also *United States* v. *Carr*, 674 F.3d 570 (6th Cir. 2012) (finding reasonable suspicion where the defendant was parked at a car wash but not washing a car).

The D.C. Circuit took a similar approach in *United States* v. *Jones*, 1 F.4th 50 (2021). In that case, police responded to a report of gunshots in a high-crime area and "decided to stop" an individual "walking quickly" through the neighborhood. *Id.* at 51. The suspect did not immediately respond to an officer's "repeated efforts to get his attention," but stopped after about ten seconds and removed a pair of headphones he was wearing under his jacket's hood. *Id.* at 52-53. The Court recognized that the officer "could have drawn an alternative, non-suspicious inference" from the individual's failure to respond—*e.g.*, that he was "listening to loud music and initially failed to hear [the officer] calling out." *Id.* at 53. The Government had also argued that the area was "known for gun fire," indicating that a large number of innocent individuals would regularly walk down the street near recent gunshots. Br. for Appellee at 13, *United States* v. *Jones*, 1 F.4th 50 (D.C. Cir. 2021) (No. 20-3034). Similarly, many members of the innocent general public might favor "walking quickly" when traveling through a high-crime area at night, or—like the suspect—choose to wear headphones while doing so. *Jones*, 1 F.4th at 51-52. Nonetheless, the Court held that the officers had reasonable suspicion because the individual was "the only person" the officers saw, and he did not immediately respond to the officer's call. *Id.* at 52. See also *Commonwealth* v. *DePeiza*, 868 N.E.2d 90, 96 (Mass. 2007) (finding that officers who observed a defendant in a high-crime area holding his arm straight against his body "suggested that he was carrying a concealed firearm," based on their training, had reasonable suspicion for a *Terry* stop, even though "there may be innocent explanations for the walk").

### B. The Majority of Jurisdictions Insist That Officers Must Show More Than Ambiguous, Commonplace, Law-Abiding Behavior To Establish Reasonable Suspicion.

In contrast to the Fifth Circuit's approach here, the Fourth, Eighth, and Tenth Circuits and numerous state supreme courts have rejected the invitation to find that potentially suspicious, yet widely shared, conduct occurring in high-crime areas gives rise to reasonable suspicion.

The Eighth Circuit's decision in *United States* v. *Jones*, 606 F.3d 964 (2010), is demonstrative. There, an officer conducted a *Terry* stop while patrolling a "high-crime area." *Id.* at 965. The officer claimed to have reasonable suspicion because, based on his experience, the suspect's clutching of his hand against his body suggested he was carrying a firearm. *Id.* at 966. He also cited three other facts: the suspect was in a high-crime area; was wearing a "long-sleeved sweatshirt [that] 'was obviously hiding something'" on a warm, sunny day; and "continually watched the officers [as the cruiser drove by]." *Ibid.* The Court acknowledged that the defendant's behavior—"clutching the outside of his hoodie pocket"—fit the "firearm-carrying clues" that the officer had been "trained to observe." *Id.* at 967. The Court, however, declined to give dispositive weight to these facts because these supposedly "suspicious circumstances * * * were shared by countless, wholly innocent persons." *Ibid.* Since "nearly every person has, at one time or another, walked in public using one hand to 'clutch' a perishable or valuable or fragile item being lawfully carried in a

* * * pocket," the Eighth Circuit concluded that "[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity." *Id.* at 967-68 (internal quotation marks omitted). See also App., *infra*, at 20a n.2 (Elrod, J., concurring in part and dissenting in part) (citing *Jones* as in tension with the Fifth Circuit's holding in this case); *United States* v. *Gray*, 213 F.3d 998, 1000-01 (8th Cir. 2000) (same); *United States* v. *Crawford*, 891 F.2d 680, 682 (8th Cir. 1989) (declining to ground reasonable suspicion in conduct "typical of countless innocent people").

The Tenth Circuit's approach is similar. In *United States* v. *Hernandez*, that Court declined to find reasonable suspicion where officers observed someone "wearing all black clothing and carrying two backpacks" while walking in a high-crime area. 847 F.3d 1257, 1268 (10th Cir. 2017). The officers there were patrolling near a fenced construction site and were aware that there had recently been instances of trespass and theft at construction sites. *Id.* at 1260. In justifying a *Terry* stop, the officers cited the individual's proximity to the construction site, his dark clothing and multiple backpacks, his decision to walk along the construction site rather than on the sidewalk, and the high-crime nature of the area as their basis for reasonable suspicion. *Id.* at 1268. The Tenth Circuit found no reasonable suspicion, in part because the government's theory swept too widely: "[I]f black clothing were sufficient to confer reasonable suspicion, it could subject the ambling public * * * to virtually random seizures, inquisitions to obtain information which could then be used to suggest reasonable

suspicion, and arbitrary exercises of police power." *Id.* at 1268-69 (internal quotations omitted).

The Tenth Circuit applied the same reasoning in *United States* v. *Dell*. 487 F. App'x 440 (10th Cir. 2012). In that case, the court found no reasonable suspicion where a defendant looked into the window of a legally parked car in a high-crime area and walked away from the parked car upon seeing officers approach. *Id.* at 441. The District Court in *Dell*, like the Tenth Circuit in *Hernandez*, found the defendant's behavior "no different from that of other pedestrians in the neighborhood." *Id.* at 443. Approving this conclusion, the Tenth Circuit explained that potentially suspicious conduct that is "very much in the realm of ordinary behavior" cannot by itself establish reasonable suspicion, even if observed in a high-crime neighborhood. *Id.* at 446.

The Fourth Circuit has taken a similar approach. In *United States* v. *Slocumb*, 804 F.3d 677 (2015), that Court held that ambiguous but commonly shared behavior observed in a high-crime area is not sufficient to create reasonable suspicion. Late one night, police saw the defendant and a few others parked in a parking lot that was known for drug activity. *Id.* at 679-80. An officer approached the defendant, who was helping his girlfriend transfer a child car seat from one car to another. *Ibid.* The officer later claimed the defendant "was acting evasively" during their conversation. *Id.* at 680. After speaking to the defendant for "less than a minute," the officer decided to detain the defendant. *Ibid.* In concluding that the officer lacked reasonable suspicion, the Fourth Circuit recognized that "unusual nervousness or acts of evasion" can create reasonable

suspicion. *Id.* at 683. But when, as in *Slocumb*, the circumstances are such that "citizens would *normally* be expected to be upset," ambiguous behavior was not enough to justify a stop. *Ibid.* (emphasis added; internal quotation marks omitted). That the events occurred in a high-crime area did not change the result, the Court held, because the Government must still show why ambiguous behavior "'is likely to be indicative of some more sinister activity than may appear at first glance.'" *Id.* at 684 (quoting *United States* v. *Massenburg*, 654 F.3d 480, 491 (4th Cir. 2011)); accord *United States* v. *Black*, 707 F.3d 531, 535, 539 (4th Cir. 2013) (holding that the defendant's presence at a gas station, late at night and in a high-crime area, accompanied by another individual who was carrying a firearm and who had a prior arrest record, did not give rise to reasonable suspicion, and "admonish[ing] against the Government's misuse of innocent facts as indicia of suspicious activity").

Several state courts of last resort have also refused to treat ambiguous but commonplace activity occurring in high-crime areas as sufficient to demonstrate reasonable suspicion. Indeed, state courts *within the Fifth Circuit* have diverged from the Fifth Circuit's new standard for reasonable suspicion. For example, in *Crain* v. *State*, 315 S.W.3d 43 (Tex. Crim. App. 2010), the Texas Court of Criminal Appeals determined that a police officer lacked reasonable suspicion to stop an individual "walking late at night in a residential area in which burglaries occurred mostly after midnight" and the individual "grabb[ed] at his [own] waist." *Id.* at 53. The Court cited the officer's admission that there were "[a] hundred different things [the

defendant] could have been doing" when he touched his waistband to reject the officers' claimed basis for reasonable suspicion. *Ibid.* See also *Garza* v. *State*, 771 S.W.2d 549, 558 (Tex. Crim. App. 1989) (reasonable suspicion must be based on "some activity out of the ordinary").

The Connecticut Supreme Court has also recognized that "the crime rate of a particular area cannot transform otherwise innocent-appearing circumstances" into conduct supporting reasonable suspicion. *State* v. *Edmonds*, 145 A.3d 861, 883 (Conn. 2016). In *Edmonds*, the police stopped a defendant after observing "nothing more than a nondescript individual standing outside" a restaurant in a high-crime area "for a few seconds." *Id.* at 867. The Court accepted the notion that some of defendant's behavior, such as "the fact that the defendant turned to leave when the police arrived," was potentially suspicious. *Id.* at 883. But the Court nonetheless held that the State had failed to demonstrate reasonable suspicion because "[t]here are 1001 legitimate reasons why a man might pause for a moment outside an open eatery at the dinner hour." *Id.* at 882. "Quite simply," the Court concluded, "[t]oo many people fit" the facts before it "to justify a reasonable suspicion of criminal activity." *Ibid.* (quoting *Gray*, 213 F.3d at 1001).

Similarly, the Washington Supreme Court has rejected *Terry* stops justified solely on the basis of ambiguous behavior observed in a high-crime area. In *State* v. *Weyand*, 399 P.3d 530 (Wash. 2017), an officer observed a car parked in an area known for its "drug history." *Id.* at 532. After observing the defendant and another man walking quickly toward the car, looking

up and down the street, and getting into the parked car, the officer conducted an investigatory stop. *Ibid*. The State contended that the defendant's brisk pace and "glances up and down the street," occurring in a high-crime area, justified the officer's actions. *Id*. at 534. The Court, however, concluded that the defendant's behavior was at most "equivocal." *Id*. at 535. And because such behavior potentially described the conduct of the "many members of our society" who "live, work, and spend their days in high-crime areas," the police lacked reasonable suspicion to detain the defendant. *Id*. at 536.

In *State* v. *Andrade-Reyes*, 442 P.3d 111 (Kan. 2019), the Kansas Supreme Court took the same approach. The defendant in *Andrade-Reyes* was parked in an apartment complex's lot in a high-crime area when the police approached him. *Id*. at 114. According to one officer, the defendant "appeared startled." *Ibid*. But the officer also testified that "she could not tell what [the defendant] was doing." *Ibid*. The Court found that the defendant's conduct was "highly ambiguous and subject to innocent explanations." *Id*. at 119. Because a law-abiding citizen could have been equally startled when approached by two individuals late at night in a high-crime area, the Court held that these facts did not create reasonable suspicion. *Ibid*.

## II. The Decision Below Is Wrong.

### A. Reasonable Suspicion Requires More Than Ambiguous, Widely-Shared Conduct Occurring In a High Crime Area

To initiate an investigative stop in compliance with the Fourth Amendment, an officer must have a

reasonable suspicion of criminal activity. *Glover*, 140 S. Ct. at 1187. This Court's cases establish at least two key principles that inform the reasonable-suspicion analysis.

First, to establish reasonable suspicion, an officer must have a "*particularized* and *objective* basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18 (emphasis added). An officer must draw specific inferences from the factual circumstances and those inferences must objectively indicate unlawful as opposed to lawful activity: a mere "hunch" that an activity is unlawful will not suffice. *Terry*, 392 U.S. at 27-28. Particularity means that the facts must raise a suspicion that the "particular individual being stopped is engaged in wrongdoing." *Cortez*, 449 U.S. at 418. This requirement, in turn, does not allow officers to stop citizens for conduct no different than that of any other citizen. See *Glover*, 140 S. Ct. at 1190; see also *Reid* v. *Georgia*, 448 U.S. 436, 441 (1980) (finding observations that "described a very large category of presumably innocent travelers" insufficient to establish reasonable suspicion).

These doctrinal principles advance one of the Fourth Amendment's larger purposes, i.e., to serve as a bulwark against arbitrary policing. Indeed, "[t]he security of one's privacy against arbitrary intrusion by the police" is "at the core of the Fourth Amendment and basic to a free society." *Schmerber* v. *California*, 384 U.S. 757, 767 (1966) (internal citation and quotations omitted); cf. *Riley* v. *California*, 573 U.S. 373, 403 (2014) (quoting John Adams' response to public outcry against the "reviled 'general warrants' and 'writs of

assistance,'" which allowed British officers unrestrained power to rummage through people's homes in searching for smuggled goods, as the "first scene of the first act of opposition to the arbitrary claims of Great Britain") (citing 10 Works of John Adams 248 (C. Adams ed. 1856)).

This Court has made clear that the reasonable-suspicion inquiry "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 878. But when "a [*Terry*] stop is not based on objective criteria," including particularized suspicion, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown* v. *Texas*, 443 U.S. 47, 52 (1979). Allowing police to single out individuals based on conduct common to many other law-abiding citizens would present an intolerable risk of arbitrary and selective enforcement. Cf. *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983).

Second, while an individual's presence in a high-crime area can be relevant, it is not sufficient, without more, to show reasonable suspicion. Indeed, this Court has confirmed that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124 (citing *Brown*, 443 U.S. at 47). Although "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation," *ibid.*, this can be only one of the contextual considerations in a *Terry* analysis.

This Court's cases establish that a finding of reasonable suspicion cannot be based merely on a suspect's presence in a high-crime area, in connection with conduct commonly undertaken by a large portion of the law-abiding population. In *Brown* v. *Texas*, for example, an officer stopped the defendant in a high-crime urban area because he "looked suspicious and [the police] had never seen that subject in that area before." 443 U.S. at 49. The officer "did not claim to suspect appellant of any specific misconduct." *Ibid.* The only other facts were that the officer observed petitioner and another man walking away from each other in an alley. *Id.* at 48. Finding that "the appellant's activity was *no different from the activity of other pedestrians* in that neighborhood," *id.* at 52 (emphasis added), this Court held that "[t]he fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Ibid.* Although the conduct observed was potentially consistent with criminal activity, Brown's presence in the alley could also have been due to entirely innocent behavior. Under *Terry*, this Court in *Brown* found that even in a high-crime area, ambiguous conduct, commonly engaged in by members of the public, does not establish reasonable suspicion.

Lower court cases confirm the point. *United States* v. *Jones* found no reasonable suspicion even where a suspect was observed wearing a hooded sweatshirt and "clutching the front area of his hoodie pocket with his right hand." 606 F.3d at 965 (8th Cir. 2010). The Court acknowledged that the "clutching" could have indicated that the suspect was holding a gun. *Id.* at

967. But citing to *Reid* v. *Georgia*, the Court noted that "too many people fit this description for it to justify a reasonable suspicion of criminal activity." *Ibid.* (internal citation omitted). "[B]eing stopped and frisked on the street," the court concluded, "is a substantial invasion of an individual's interest to be free from arbitrary interference by police and the police have less invasive options for identifying the perpetrators of a crime." *Id.* at 968 (internal quotations omitted). Accord, *e.g.*, *Andrade-Reyes*, 442 P.3d at 119 (Kan. 2019) (no reasonable suspicion where conduct observed in high-crime area was "highly ambiguous and subject to innocent explanations"); *Slocumb*, 804 F.3d at 683 (4th Cir. 2015) (normal nervousness around police is not enough for reasonable suspicion even in a high-crime area); *United States* v. *Alvin*, 701 F. App'x 151, 156 (3d Cir. 2017) (refusing to "accept any suggestion that the [inferences arising out of the] officers' training should somehow be allowed to elevate ambiguous circumstances to the reasonable suspicion required for a *Terry* stop"); cf. *United States* v. *Lopez*, 518 F.3d 790, 799 (10th Cir. 2008) (Gorsuch, J.) (very common conduct, such as traveling from a known high-drug area, is "so consistent with innocent activity as to do[] little when standing alone to add to the reasonable suspicion calculus" (internal citations omitted)).

Underscoring the same conclusion, this Court's other cases upholding a finding of reasonable suspicion included additional evidence suggestive of criminal behavior. In *Wardlow*, for instance, this Court found reasonable suspicion when a suspect fled upon seeing a caravan of police vehicles. 358 U.S. at 121. This Court explained that "it was not merely respondent's

presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police." *Id.* at 124. As "flight * * * is the consummate act of evasion," and "not necessarily indicative of wrongdoing, but it is *certainly suggestive of such*," the defendant's flight was a strong plus factor supporting reasonable suspicion and distinguishing that case from *Brown*. *Ibid.* (emphasis added).

### B. Petitioner's Conduct Did Not Give Rise To Reasonable Suspicion

Petitioner's conduct here was no different than what millions of law-abiding Americans might do on a given Saturday evening. Even when viewed in the context of his presence in a high-crime area, that conduct does not rise to the level of reasonable suspicion.

The Fifth Circuit found the following facts to be determinative. First, the arrest occurred around 8:30 p.m., App., *infra*, at 2a, in an area being patrolled "because of the prevalence of violent crime and burglaries," *id.* at 7a (internal quotations omitted). Second, "[t]he officer saw a car parked in the convenience store lot as far as possible from the storefront, facing its brick wall rather than the glass door, so its occupants could not easily be viewed from within the store."[3] *Id.* at 8a. Third, Officer Stanton observed that

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[3] Reflecting its difficulty in articulating a valid basis for reasonable suspicion, the panel majority oscillated between stating that petitioner was parked suspiciously close to the store, App., *infra*, at 10a, and stating that he was parked suspiciously "far" from the store's entrance, *id.* at 8a. In reality, the lot had only a handful of available parking spots, and the record indicates that

neither of the two people sitting in the parked car stepped out after watching them for 10-15 seconds. *Ibid.* Under this Court's case law, these facts—without more—are insufficient to establish reasonable suspicion.

Petitioner's parking job, which the majority apparently viewed as probative in the reasonable-suspicion analysis, is ambiguous at best. The majority emphasized that "[c]onvenience stores are a type of establishment known to be frequent targets for theft, robbery, and burglary." App., *infra*, at 11a (emphasis added). But as Judge Elrod explained, convenience stores are "*also* a place to get soft drinks, batteries, gum, and last-minute Valentine's Day gifts." *Id.* at 17a-18a (Elrod, J., concurring in part and dissenting in part) (emphasis added). Moreover, petitioner's parking spot was one of only a few spaces available in the small lot. See *supra* p. 8 (image of parking lot); *see also id.* at 14a (Elrod, J., concurring in part and dissenting in part). If turning into the first available parking spot, next to an open convenience store's front door, is suggestive of wrongdoing, then "something that any law-abiding citizen might do in order to patronize the store" now amounts to reasonable suspicion. *Id.* at 18a (Elrod, J., concurring in part and dissenting in part).

Moreover, the 10-15 seconds that Officer Stanton viewed the parked car was not enough to generate reasonable suspicion. Although "reasonable cause for a stop and frisk" need not "only be based on the officer's

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petitioner selected one of the only ones available. See *id.* at 14a (Elrod, J., concurring in part and dissenting in part).

personal observation," *Adams* v. *Williams*, 407 U.S. 143, 147 (1972), this Court's precedent suggests that more than 10-15 seconds is required for reasonable suspicion in this context. See, *e.g.*, *Terry*, 392 U.S. at 5-6 (officer observed two men for 10-12 minutes before initiating an investigative stop). Devoid of any inference particularized to the car's occupants, Officer Stanton "merely noticed that [petitioner and the driver] had not exited the car during the time that the police caravan turned the corner." App., *infra*, at 15a (Elrod, J., concurring in part and dissenting in part). But sitting in a car for 10-15 seconds could have reflected a wide range of entirely lawful behavior: "[T]he men could have been finishing a conversation, responding to text messages, watching with curiosity as a six-car police caravan passed, or engaging in other reasonable behavior that explains the delay." *Id.* at 18a.

The conduct observed is simply too common, among many law-abiding Americans, to establish reasonable suspicion. Aside from mere presence in a high-crime area, the record shows no additional factors supporting an inference of unlawful behavior. Petitioner did not flee or even move as Officer Stanton observed him. App., *infra*, at 4a. The officers were not responding to any report of suspicious behavior, either at the store or regarding two men in a car. *Id.* at 21a-22a (Elrod, J., concurring in part and dissenting in part). Nor is 8:30 p.m. on a Saturday "a suspicious time of day." *Id.* at 21a. As in *Brown*, petitioner's conduct was no different than any other patron of the store might have undertaken.

### C. Reasonable Suspicion Cannot Rest on Conduct Undertaken By the Law-Abiding General Population On a Regular Basis

This Court's Fourth Amendment jurisprudence is sensitive to effects on the population as a whole. See *Carpenter* v. *United States*, 138 S. Ct. 2206, 2223 (2018) (finding that the "depth, breadth, and comprehensive reach" of cell-site location information on a large portion of the population justified a requirement of probable cause before accessing such information); *Riley*, 573 U.S. at 395 (noting "pervasiveness" of cell phone use in justifying a limit on the warrantless searches of cell phone data). In the *Terry* context, this Court has declined to expand the scope of reasonable suspicion to include large numbers of innocent actors. See *Brown*, 443 U.S. at 52; *Reid*, 448 U.S. at 441. The decision below, however, subjects millions of law-abiding citizens to indiscriminate stops based on their presence in a high-crime area and conduct that is not suggestive of criminal behavior.

Even in this fact-intensive context, this Court has drawn lines to protect against arbitrary policing. One such firewall is the particularity requirement. "This demand for specificity in the information upon which police action is predicated *is the central teaching of this Court's Fourth Amendment jurisprudence*." *Terry,* 392 U.S. at 21, n.18 (emphasis added). Conduct undertaken by large portions of the law-abiding population is neither "particular" nor "specific."

Petitioner's actions in this case were not unique; on the contrary, scores of people have pulled into an available parking spot at a roadside convenience store and

lingered for 10-15 seconds while gathering their belongings or thoughts. Reasonable suspicion requires more. The decision below invites arbitrary enforcement, and green-lights findings of reasonable suspicion where observed conduct is common to the law-abiding population. Put differently: While suburban teenagers are free to linger briefly in their car at a local 7-11 to respond to a text message, the same liberty was not afforded Otha Ray Flowers. The decision below "comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment." App., *infra*, at 22a (Elrod, J., concurring in part and dissenting in part).

## III. The Question Presented Is Important and Recurring.

1. The Fourth Amendment "seeks to secure the privacies of life against arbitrary power." *Carpenter*, 138 S. Ct. at 2214 (internal citations omitted). The question presented here is important and frequently recurring. One recent official study found that in a single year, at least 3.5 million people in the United States were stopped by police while parked in their vehicle along the street or in a public area. See Erika Harrell & Elizabeth Davis, U.S. Dep't of Justice, *Contacts Between Police and the Public, 2018 – Statistical Tables* 4 tbl.2 (2020), https://perma.cc/NBP8-VM6Y. In just five months of 2019, police in the District of Columbia initiated more than 11,000 investigatory stops.[4] That same year, officers in Boston initiated

[4] Metropolitan Police Dep't Washington, DC, *Stop Data Report February 2020*, at 14 tbl.2, 20 (2020), https://perma.cc/RX56-R2V9.

over 14,000[5] investigatory stops, and those in Illinois initiated around 170,000.[6] Given the prevalence of investigatory stops, it is no exaggeration to say that this case affects millions of people nationwide.

The importance of the issue is compounded by the increasing popularity of "hot spot" policing—i.e., police techniques that involve patrolling and stopping suspects in high-crime areas. See Committee on Proactive Policing: Effects on Crime, Communities, and Civil Liberties, Law and Legality, *in* Proactive Policing: Effects on Crime and Communities 87-88, 91 (David Weisburd & Malay K. Majmundar eds., 2018) (explaining that hot spot policing and similar proactive, deterrent policing strategies may encourage police officers to initiate stops that are not supported by reasonable suspicion). As these techniques become more widespread, efforts to establish reasonable suspicion based on behavior widely engaged in by law-abiding citizens will affect officers and community members alike. See e.g., Anthony A. Braga et al., *Hot Spot Policing of Small Geographic Areas Effects on Crime*, 15 Campbell Systematic Rev. 1 (2019) (citing

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[5] Gal Tziperman Lotan, *Data Show Boston Police Stop Black People Most Often*, Bos. Globe (June 15, 2020), https://perma.cc/RKJ8-DCLC.

[6] This figure reflects pedestrian stops in Illinois, which includes all frisks, searches, summons, and arrests. Mountain-Whisper-Light-Statistics & SC-B Consulting, Illinois Traffic and Pedestrian Stop Analysis: 2019 Annual Report: Pedestrian Stop Analysis 2 (2020), https://perma.cc/RH3Z-4PER. See 625 Ill. Comp. Stat. Ann. § 5/11-212 (b-5) (West 2021) (explaining what stops are included in the pedestrian stop data report).

studies of hot-spot policing conducted in over 50 U.S. counties and cities).

2. This case is a clean and attractive vehicle to resolve the conflict among federal circuit courts and state courts of last resort. The Fifth Circuit's decision was expressly grounded in the Fourth Amendment. See App., *infra*, at 5a. Moreover, "the key facts are undisputed" and uncomplicated. *Id.* at 14a (Elrod, J., concurring in part and dissenting in part). In finding that the conduct here was sufficient to create reasonable suspicion, the Fifth Circuit adopted a minority position that conflicts with decisions from other jurisdictions. And there is no doubt that this disagreement was outcome-determinative: Had petitioner visited a convenience store in Richmond, Virginia rather than Jackson, Mississippi, the stop would have been unlawful. See *Slocumb*, 804 F.3d at 683.

There is no basis to delay resolving the question to allow further percolation; numerous circuits and state high courts have explored the relevant legal arguments, and the contours of the doctrinal disagreement are clear. See *supra* Parts I.A-I.B.

3. The case is also emblematic of broader trends towards reliance on *Terry* stops in high-crime areas. See Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. Chi. L. Rev. 51, 59, 79-80, 84 (2015) (finding police invoked "high crime area" to justify 55% of *Terry* stops in New York between 2004 and 2012 and noting that a suspect's presence in a "high-crime area" was often used to justify the officer's stop in the absence of individualized suspicion). In that context, the decision in this case threatens to normalize Fourth

Amendment violations affecting residents of high-crime areas, with significant consequences for residents' well-being and sense of safety and privacy. *Terry* stops involve a "serious intrusion upon the sanctity of the person, which may inflict great indignity." *Terry*, 392 U.S., at 17. Nor do policy concerns about effective policing justify diluting Fourth Amendment protections: Police can use far less invasive methods without resorting to the "serious intrusion" of a *Terry* stop. *Terry*, 392 U.S. at 26. For instance, police could initiate a "consensual encounter, for which no articulable suspicion is required." *Jones*, 606 F.3d at 968.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2021

# APPENDIX

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 20-60056

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UNITED STATES OF AMERICA,

*Plaintiff – Appellee,*

*versus*

OTHA RAY FLOWERS,

*Defendant – Appellant.*

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Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:19-CR-41-1

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Before JONES, SMITH, and ELROD, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

Otha Ray Flowers, convicted of a federal gun violation, appeals the denial of his motion to suppress evidence as a violation of his Fourth Amendment rights. The questions on appeal are whether Flowers and Jeremy Mayo were "seized" when five or six patrol cars parked behind and around Mayo's Cadillac with their patrol lights flashing, and if they were seized, whether Officer Stanton had reasonable

suspicion to conduct a "Terry stop."[1] Under the circumstances of this case and viewing the facts in the light most favorable to the Government, assuming arguendo that these individuals were seized, there was reasonable suspicion to do so. We AFFIRM.

I.

On Saturday, February 18, 2017, around 8:30 p.m., Officer Eric Stanton of the Jackson Police Department was patrolling an area of Jackson, Mississippi. Officer Stanton was a member of the

[1] Flowers also seeks a new trial, because the prosecutor made several statements during closing arguments, which, he claims, constitute prosecutorial misconduct. Our review is for abuse of discretion. *United States v. Stephens*, 571 F.3d 401, 407 (5th Cir. 2009). To determine whether there was prosecutorial misconduct, we ask whether (1) "the prosecutor made an improper remark" and (2) "the defendant was prejudiced." *United States v. Fields*, 483 F.3d 313, 358 (5th Cir. 2007) (quotation marks and citation omitted). Prejudice is a "high bar," which is met only where "the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *Id*. (quotation marks and citation omitted). "To determine whether a remark prejudiced the defendant's substantial rights, we assess the magnitude of the statement's prejudice, the effect of any cautionary instructions given, and the strength of the evidence of the defendant's guilt." *United States v. Alaniz*, 726 F.3d 586, 615 (5th Cir. 2013) (quotation marks and citation omitted). Flowers objects to three statements: The prosecutor said that (1) he didn't need to call any other officers to corroborate Stanton's testimony, (2) certain forensic tracing on spent ammunition was impossible when dealing with a revolver—a fact that was, allegedly, not in evidence—and (3) defense counsel sought evidence that only appears on TV shows. The jury convicted Flowers of possession of a firearm that he was allegedly sitting on. After reviewing the record and considering the relevant factors, we cannot conclude that any of those remarks casts serious doubt on the correctness of that verdict.

Direct Action Response Team (DART), a proactive unit tasked to "look[] for suspicious behavior, suspicious activities, traffic stops, [and] things of that nature . . . ." On that night, Officer Stanton's supervisor had directed the DART to an area of Jackson, around Capitol Street and Road of Remembrance, where "recent violent crime and burglaries" had occurred.

As Officer Stanton was turning from Capitol Street onto Road of Remembrance, he saw a silver Cadillac parked in the south end of a small parking lot connected to an open convenience store. It was dark outside, but Officer Stanton observed that the vehicle was occupied by two men, one in the driver's seat and one in the passenger's seat. Officer Stanton observed the vehicle "for approximately 10 to 15 seconds" and noticed the occupants "didn't appear to be exiting the vehicle, [and] didn't appear to be patronizing the establishment." Therefore, he decided to conduct what he characterized as a "field interview."

Officer Stanton testified that at this point, he and five to six other officers, all in separate patrol cars, converged upon the silver vehicle with their blue lights activated. The parking lot in front of the store was narrow, with very little space or room to maneuver. Officer Stanton later acknowledged that it would have been impossible for the silver vehicle to leave the parking lot because of the way the officers parked their cars around it.

Officer Stanton got out of his patrol car and approached the silver vehicle, as did other officers. He testified that the men in the vehicle were still free to leave at this point in the encounter, but he did not

communicate that to them. Flowers, sitting in the driver's seat, did not attempt to flee. As Officer Stanton approached, Flowers lowered the driver's side window. With the window down, Officer Stanton reported smelling "what appeared to be the strong odor of marijuana coming from the vehicle." Officer Stanton asked Flowers for identification and Flowers provided his Mississippi driver's license. According to Officer Stanton, the passenger in the vehicle—Jeremy Mayo—then threw an object into his mouth. In response, Officer Stanton ordered both men to exit the Cadillac.

When Flowers stepped out of the vehicle, Officer Stanton saw in plain view a silver, .32-caliber revolver on the driver's seat where Flowers had been sitting.[2] A criminal history check revealed that Flowers had an outstanding arrest warrant, and Officer Stanton placed him under arrest. During a search incident to his arrest, Flowers stated that he had marijuana on him, and Officer Stanton recovered a small, clear plastic bag of marijuana from his front left pocket. Officer Stanton identified this marijuana as the source of the odor he smelled upon approaching Flowers's driver-side window.

Flowers was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before trial, Flowers moved to suppress evidence of the gun on the basis that the encounter with Flowers was a seizure that violated the Fourth Amendment. The district court explained orally on

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[2] Stanton found when he inspected it that the gun had five live rounds in it.

the record his reasons for rejecting the motion. The district court determined that there was "no evidence" that the "investigatory aspect of the initial approach of the officers ever evolved into a seizure." Flowers proceeded to trial, and a jury convicted him.

II.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. Evidence seized in violation of the amendment may be excluded from introduction at trial. A temporary, warrantless detention of an individual constitutes a seizure for Fourth Amendment purposes and may only be undertaken if the law enforcement officer has reasonable suspicion to believe that a crime has occurred or is in the offing. *Terry v. Ohio*, 392 U.S. 1, 30–31, 88 S. Ct. 1868, 1884–85 (1968)). Importantly, however, "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen. . . ." *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983).

This court reviews the constitutionality of the *Terry* stop *de novo*. *United States v. Cervantes*, 797 F.3d 326, 328 (5th Cir. 2015). We review the findings of fact by the trial court for clear error, *id.*, and are bound by the court's credibility determinations. Moreover, we construe the evidence presented at the suppression hearing "in the light most favorable to the prevailing party"—here, the Government. *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002).

Because a seizure under the Fourth Amendment must be "justified at its inception," our first task is ordinarily to determine when the seizure occurred. *See United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014) (quotation marks and citation omitted). Flowers contends that he was seized at the outset of the police encounter, when the patrol cars surrounded the vehicle in which he was sitting. The government contends that the police encounter with Flowers was consensual, and a seizure did not occur until after Officer Stanton smelled marijuana from Flowers's open window, giving rise to probable cause for arrest.

A seizure occurs when, under the totality of the circumstances, a law enforcement officer, by means of physical force or show of authority, terminates or restrains a person's freedom of movement. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991). The test that applies in the absence of an unambiguous intent to restrain or upon a suspect's passive acquiescence is whether "in view of all of the circumstances..., a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). And the Court added to this test that when a person "'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 2405–06 (2007) (citing *Bostick*, 501 U.S. at 435–36, 111 S. Ct. at 2387).

The parties debate the existence of a "seizure" under the circumstances present here, and there appears to be no Fifth Circuit case where a law enforcement seizure occurred by the mere surrounding presence of police cars and Officer Stanton's non-threatening approach to Mayo's auto. We need not resolve that debate and will assume arguendo that the police cars' surrounding of the Cadillac, under the totality of circumstances, "seized" Flowers and Mayo. The district court principally viewed this incident as analogous to a stop-and-frisk situation, for which the court found reasonable suspicion under *Terry*. This conclusion, based on credibility determinations to which we are bound to defer, was sufficient to vindicate the officers' actions.

The following facts are determinative. The police were patrolling on Capitol and Remembrance, the exact streets where this arrest occurred, because of the prevalence of "violent crime and burglaries." The Supreme Court has noted, "the fact that [a] stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 147–48, 92 S. Ct. 1921, 1924 (1972). In addition, Officer Stanton was no novice. He possessed an undergraduate degree in justice administration and a masters degree in criminology and had ten years of law enforcement experience. In determining reasonable suspicion, courts must consider the facts in light of the officer's experience. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883.

The officer saw a car parked in the convenience store lot as far as possible from the storefront, facing its brick wall rather than the glass door, so its occupants could not easily be viewed from within the store. Two males were in the car, and Officer Stanton observed that neither of them stepped out of the Cadillac heading toward the store for 10–15 seconds. The district court found the officer's testimony credible. Every case that turns on reasonable suspicion is intensely fact specific. *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001) (per curiam) ("The reasonable suspicion analysis is a fact-intensive test . . . ."). The reasonable, articulable facts taken in context here supported an investigation at least to the point of the officer's dispelling the ambiguity in the situation.

In 1992, this court decided en banc that a police officer did *not* violate the Fourth Amendment when he "reached out and touched the pants pocket" of an individual who, appearing to be intoxicated, was standing in the road, at night, in a high crime area. *United States v. Rideau*, 969 F.2d 1572, 1573 (5th Cir. 1992) (en banc). As happened here, the individual was later convicted of illegally possessing a gun discovered during the frisk. We reiterated en banc the reasonableness of an officer's conduct during a stop-and-frisk two years later in *United States v. Michelletti*, 13 F.3d 838 (5th Cir. 1994) (en banc) (officer lightly frisked pants pocket in which a man held his right hand while barging out of the back door of a bar at closing time, holding an open beer in his left hand, as he approached a group of police and individuals they were about to question). *Michelletti*

noted that in the seminal *Terry* case, when detained by the police, the suspects had actually turned and began walking away from the store they had possibly been casing for later burglary. Moreover, in support of its conclusion, the Supreme Court relied heavily on the police officer's seasoned judgment of what the occasion demanded. *Terry*, 392 U.S. at 22–23, 88 S. Ct. at 1880–81. Here, of course, we are not confronted with the additional physical invasion of a frisk, only the officer's attempt to question Flowers and Mayo, which was cut short by the marijuana odor wafting from their car. Time has not overborne these considered holdings in our circuit.

Ignoring these authorities, Flowers and the dissent cite other cases. The case most heavily relied upon by Flowers is *United States v. Hill*, 752 F.3d 1029 (5th Cir. 2014), but that case is distinguishable. First, the court held that there was no seizure until the officer took the suspect out of his car and told him to turn around and place hands on his car. *Id*. at 1033. The officer's merely approaching the car and insisting that the suspect talk to him did not trigger a seizure. Second, *Hill* has nothing to say about the circumstances preceding the officer's commands, other than that the elevated incidence of crime considered there spanned an entire county, not a single neighborhood as in this case. *Id*. at 1034. Third, apart from concern about crime in the county, the only facts supporting the seizure in *Hill* were that the man and woman were sitting in a car and the woman hastily exited when they noticed the police. *Id*. Fourth, the car was parked in plain view in an apartment complex, a location where one would

expect multiple cars to be parked, not in a suspicious spot as the only car in a convenience store lot. *Id.*

Nor is our holding contrary to *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979), on which the dissent relies. In that case, the court held there was no reasonable suspicion for an afternoon seizure of two individuals seen parked in a car, where no crimes had been committed recently in the vicinity, and there was no reason to suspect the vehicle's occupants were engaging in improper conduct. In *Flowers*, however, the stop occurred at night in a neighborhood so unsavory it had a special task force assigned to patrol actively, and the defendants were parked suspiciously close to a convenience store in a manner that suggested to the seasoned officer that its occupants might be casing the store or preparing to prey on patrons.

*United States v. McKinney* is also not helpful to the dissent. *See* 980 F.3d 485 (5th Cir. 2020). In that case, there was no suppression hearing in the district court, and this court's review was therefore de novo. Further, the defendant McKinney had entered a conditional guilty plea, and when this court found the facts insufficient to sustain reasonable suspicion as a matter of law, we remanded for a hearing and potentially a trial. Although *McKinney* is somewhat similar, its procedural posture prevents using that case as precedent here.

In any event, *McKinney* correctly observed that the reasonable suspicion analysis "depends on the combination of facts," *id.* at 491, but the combination of facts in *Flowers* is different. In *McKinney*, the court described the crime in the area as several recent

drive-by shootings, which is serious to be sure, but does not present the same pervasive and continuous criminal pattern described in the case before us. It also appears that the officers in *McKinney* voiced a questionable and overbroad approach to policing that did not suffice to articulate a reasonable basis for suspicion.[3] In this case, in a notoriously crime-ridden neighborhood, at night, two men were seen to be dawdling in a Cadillac parked out of view from inside the convenience store but also stationed where they could watch its entrance. Convenience stores are a type of establishment known to be frequent targets for theft, robbery, and burglary. Taken together, these facts present a similarly suspicious scenario to that which alerted the officer in *Terry*, and it captured the attention of the officer here. Finally, the non-threatening nature of Officer Stanton's approach to the car's occupants is supported here by the lack of hostility on the part of Flowers and Mayo, and indeed a reaction that indicated Flowers was attempting to cooperate with the "field interview."

It bears repeating that apart from the presence of a number of police cars, the tenor of Officer Stanton's encounter with Flowers was entirely benign until Stanton smelled marijuana. He conducted no physical frisk of Flowers's person but simply approached the Cadillac to ask some questions. If this course of

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[3] "Officer Carmona added: 'You want to know what my reasonable suspicion is? That there's been three or four shootings here in the last day and a half.' Later, Officer Holland warned the others in the group: '[If] [y]ou are hanging out over here, you are going to get stopped, you are going to get checked. Especially if you are gang members.'" *United States v. McKinney*, 980 F.3d 485, 489 (5th Cir. 2020).

conduct is constitutionally impermissible, then it is difficult to see how any active policing can take place in communities endangered and impoverished by high crime rates.[4] Officers in such areas may well require safety in numbers, while the law-abiding citizens desperately need protection that will be denied if law enforcement officials believe that incriminating evidence will be suppressed or they will be sued for alleged violations of rights. *Terry* prescribes a careful balance that protects individual rights, but not at the expense of reasonable law enforcement activity and officer safety.

More recently commenting on these types of cases, the Supreme Court noted in *Illinois v. Wardlow*, "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation." 528 U.S. at 125, 120 S. Ct. at 677 (2000). The Court rejected the proposition that because the suspect's flight from officers might have been innocent and "not necessarily indicative of ongoing criminal activity," the detention was constitutionally unreasonable. The Court reaffirmed that "officers c[an] detain [] individuals to resolve the ambiguity" in their conduct. Indeed, the Court emphasized that, in allowing such detentions, the Fourth Amendment "accepts the risk that officers may stop innocent people." *Id*. at 126, 120 S. Ct. at 677.

In the case before us, there is no indication that the officers were either abusive or threatening. Once Flowers opened his window, Officer Stanton smelled

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[4] The murder rate in Jackson, MS, has been among the highest in the nation, according to FBI statistics, in 2018, 2019 and 2020.

a distinct odor of marijuana, and immediately afterward he saw Mayo apparently attempting to swallow something that could be evidence. At that point, it is undisputed that he had probable cause to seize Flowers by asking him to step out of the car, leading to the immediate discovery of his pistol.

* * *

Based on the foregoing discussion, we AFFIRM the conviction.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring in part,[1] dissenting in part:

In *Terry v. Ohio*, the Supreme Court held that reasonable suspicion supported a stop where an officer, who suspected two men of casing a store, observed them walking back and forth in front of the store for ten to twelve *minutes*. 392 U.S. 1, 6 (1968). Here, the majority opinion finds reasonable suspicion after a police officer in Jackson, Mississippi observed two men sitting in a parked vehicle outside a convenience store for ten to fifteen *seconds*. How far we have come.

"Any analysis of reasonable suspicion is necessarily fact-specific . . . . " *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999). The key facts are undisputed in this case. Otha Ray Flowers and another man were sitting in a parked Cadillac in front of an open convenience store at 8:30 p.m. on a Saturday night. The majority opinion describes the car as being parked "as far as possible from the storefront," Maj. Op. at 7, but the exhibits submitted at the evidentiary hearing conflict with this characterization. Instead, the exhibits show that the men were parked in one of only five or six available spots in the small lot. The small parking lot offered few other parking options besides the spot Flowers chose.

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[1] I agree with the majority opinion that none of the prosecutor's statements at trial casts serious doubt on the correctness of the verdict. The statements did not prejudice Flowers's substantial rights.

Five to six officers were patrolling the area, each in a separate patrol car. They were not responding to any calls regarding suspicious behavior in the area or at the convenience store, and certainly not regarding the two men sitting in their car. After Officer Stanton turned onto Road of Remembrance, he observed the car and its occupants "for approximately 10 to 15 seconds," the time period that the majority opinion refers to as "dawdling." Maj. Op. at 9. Officer Stanton did not observe the occupants make any suspicious movements within the car during those few seconds. He merely noticed that they had not exited the car during the time that the police caravan turned the corner.

Based solely on that observation, Officer Stanton and at least four other patrol cars activated their blue emergency lights and surrounded the Cadillac in which Flowers and his passenger sat, trapping them. The officers exited their patrol cars to approach the vehicle from both sides.

Although the majority does not reach the issue, there is no doubt that this encounter constituted a seizure. A person is seized when, under the totality of the circumstances, "a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Here, the placement of the patrol cars blocked Flowers's exit from the parking lot. To leave, Flowers would have had to either collide with a patrol car to drive away or abandon his car and, on foot, weave through the patrol cars and approaching officers.

Those options were simply not reasonable. Flowers was trapped.

The majority opinion states that "there appears to be no Fifth Circuit case where a law enforcement seizure occurred by the mere surrounding presence of police cars and Officer Stanton's non-threatening approach to Mayo's auto." Maj. Op. at 6. To the contrary, this circuit has held that a seizure occurred where officers—in only one vehicle rather than five or six—pulled alongside a defendant's vehicle in close proximity to it. *United States v. Beck*, 602 F.2d 726, 729 (5th Cir. 1979) ("By pulling so close to the Chevrolet, the officers effectively restrained the movement of Beck and his passenger; from the record it is readily apparent that they were not [']free to ignore the officer(s) and proceed on (their) way.[']" (internal citation omitted) (first citing *United States v. Robinson*, 535 F.2d 881, 883 n.2 (5th Cir. 1976); then quoting *United States v. Elmore*, 595 F.2d 1036, 1041 (5th Cir. 1979))). Under our precedent, Flowers was seized at the outset of this encounter, before he rolled down his window, when officers surrounded his vehicle with their vehicles.

Other circuits have concluded similarly. For instance, in *United States v. Delaney*, 955 F.3d 1077, 1083 (D.C. Cir. 2020), the court held that a seizure had occurred where a single patrol car parked within a few feet of the defendant's vehicle in a narrow parking lot and *partially* blocked the defendant's egress, and police officers activated their take-down lights. In so holding, the court dismissed the government's argument that the defendant could have maneuvered his car around the police vehicle or

simply walked away from the encounter. *Id*. at 1083–84; *see also United States v. See*, 574 F.3d 309, 313 (6th Cir. 2009) ("Given the fact that Williams blocked See's car with his marked patrol car, a reasonable person in See's position would not have felt free to leave."); *United States v. Pavelski*, 789 F.2d 485, 488 (7th Cir. 1986) ("A reasonable person . . . bounded on three sides by police patrol cars, would not have believed that he was free to leave.").

This case turns on whether, at that moment of seizure, the officers had reasonable suspicion of the men in the vehicle sufficient to justify the stop. It is the government's burden to prove "specific and articulable facts that support the reasonableness of the suspicion." *United States v. Hill*, 752 F.3d 1029, 1033 (5th Cir. 2014). We consider the "totality of the circumstances" to determine whether the officer's suspicion was reasonable. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

Looking at the totality of the circumstances, there was no reasonable suspicion in this case, and the stop therefore violated Flowers's Fourth Amendment rights. Two men were sitting in a parked car outside an open convenience store during the early evening for a mere ten seconds. That is not suspicious behavior, nor does it transform into suspicious behavior because the convenience store was located in a high crime area. While the majority opinion notes that "[c]onvenience stores are a type of establishment known to be frequent targets for theft, robbery, and burglary," Maj. Op. at 9–10, a convenience store is also a place to get soft drinks, batteries, gum, and

last-minute Valentine's Day gifts. Parking in one of only a few available parking spots in front of a convenience store at an unextraordinary time of evening—8:30 p.m.—is something that any law-abiding citizen might do in order to patronize the store. As for the "dawdling" of approximately ten to fifteen seconds, the men could have been finishing a conversation, responding to text messages, watching with curiosity as a six-car police caravan passed, or engaging in other reasonable behavior that explains the delay. The facts in this case simply do not support an officer's reasonable suspicion.

Our court has held that reasonable suspicion was lacking in remarkably similar circumstances. In *Beck*, we held that there was nothing "inherently suspicious" about two men sitting in a parked car *in a high crime neighborhood* on a midsummer afternoon a short distance from a convenience store. 602 F.2d at 729. As we noted in *Beck*, "[h]ad [the officer] observed the vehicle for some time and seen Beck or his passenger take some suspicious actions, a stop might have been permissible, but under the facts here . . . the stop was illegal." *Id.*

Likewise, in *United States v. Hill*, we held that officers did *not* have reasonable suspicion sufficient to justify a stop after observing a man and woman sitting in a car parked in a high crime area. 752 F.3d at 1035–36. In that case, a man and woman were sitting in their parked car at an apartment complex that had a reputation for drug-dealing. It was much later at night, 11:00 p.m. on a Saturday. *Id.* at 1034, 1036. When the police arrived, the female passenger exited the car hastily. *Id.* at 1035. Based on these

circumstances, the police officer thought a drug transaction may have occurred in the car and seized the defendant. *Id*. Still, we held there was no reasonable suspicion.

The majority opinion deems it significant that in *Hill*, the court pointed to the moment Hill was asked to step out of his car and put his hands on the top of his car as the moment of seizure. Maj. Op. at 8. Of course, in *Hill*, the officers did not surround and block Hill's car with lights flashing preventing his egress entirely. *Hill*, 752 F.3d at 1034. Rather, they parked several parking spaces away, parallel to the car on the passenger side, and then approached. *Id*. Thus, the circumstances of Hill's seizure were different than Flowers's seizure. But the analysis in *Hill* that there was no reasonable suspicion under those circumstances should guide us in this case.

Most recently, in *United States v. McKinney*, we held that there was no reasonable suspicion for a seizure where officers observed the defendant standing on a sidewalk with three other people near a gas station which was in a high crime area and in recent days had been the location of multiple gang-related drive-by shootings. 980 F.3d 485, 490 (5th Cir. 2020). In that case, the defendant was wearing a jacket on a hot, humid night and red shorts (the color red was associated with a neighborhood gang). *Id*. Moreover, a woman in the group with the defendant slowly walked away when officers arrived. *Id*. Still,

we held that this behavior did not suffice to raise an officer's reasonable suspicion.[2] *Id.* at 497.

Together these cases follow the principle from the Supreme Court that the fact that individuals are present in an area with a high crime rate, standing alone, "is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

As of yet, our court has not held that living in a high crime area renders all actions suspicious. The circumstances in both *United States v. Rideau*, 969 F.2d 1572 (5th Cir. 1992) (*en banc*) and *United States v. Michelletti*, 13 F.3d 838 (5th Cir. 1994) (*en banc*), cited by the majority opinion, involve such different circumstances that they are not relevant to determining whether reasonable suspicion is present in this case.

In *Rideau*, police were driving at night in a high crime area and encountered a man wearing dark

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[2] Other circuits have similarly held. *See United States v. Delaney*, 955 F.3d 1077, 1086–87 (D.C. Cir. 2020) (no reasonable suspicion when, shortly after hearing gunshots in a high crime area, the officers came across a man and a woman sitting in a parked car); *United States v. Jones*, 606 F.3d 964, 966 (8th Cir. 2010) (no reasonable suspicion for seizure when officers observed a man clutching the front of his hooded sweatshirt on a warm, sunny day in a high crime area while watching the police cruiser as if concerned the officers would stop him); *Fam. Serv. Ass'n ex rel. Coil v. Wells Twp.*, 783 F.3d 600, 604 (6th Cir. 2015) (no reasonable suspicion when officers observed a pedestrian walk on the side of the road late at night in high crime area, initially refuse to provide the police officer with his identity, and then walk away).

clothing standing in the middle of the road. 969 F.2d at 1573. Upon pulling over and approaching the man, he seemed nervous and evasive. *Id*. Only at that point did one of the officers reach out to pat the man's outer clothing to see if he had any weapons that could harm him or his partner. *Id*. In *Michelletti*, police officers were patrolling a high crime area around 2:00 a.m. 13 F.3d at 839. They observed the defendant drinking beer as he was leaving a bar, a possible alcoholic beverage offense, and saw him approach a group of individuals the officers had previously determined were acting suspiciously outside the bar. *Id*. at 839–40. Moreover, the defendant had his right hand in his pocket at all times, making the officers suspect that he might have a gun. *Id*. at 842.

Neither of these cases involves conduct similar to the innocuous behavior observed in this case. *Rideau* and *Michelletti* are relevant only because the concerns voiced by the dissents in those cases—namely, that we must ensure that Americans living in disadvantaged or high crime communities still have Fourth Amendment protections—are squarely present in this case.

Here, as in *Hill* and *Beck*, the government did not point to any additional facts sufficient to convert an ordinary scene of two people sitting in a car into one that would support an officer's reasonable suspicion of criminal activity. It was not a suspicious time of day—8:30 p.m. on a Saturday. The officers were not responding to any reports of suspicious behavior in the area, at the convenience store, or regarding the two men sitting in their vehicle. There was no testimony that police officers were looking for Flowers

and his passenger or someone whose description they matched. Officers did not observe any suspicious movements in the vehicle as they turned the corner—the two men just sat there.

I would follow our precedent and hold that the officers did not have reasonable suspicion sufficient to justify the stop and that they violated Flowers's Fourth Amendment rights. For citizens to become suspects, they must do more than merely exist in an "unsavory" neighborhood. Maj. Op. at 8. As my able colleague once put it, "it defies reason to base a justification for a search upon actions that any similarly-situated person would have taken." *Rideau*, 969 F.2d at 1581 (Smith, J., dissenting). Otherwise, our law "comes dangerously close to declaring that persons in 'bad parts of town' enjoy second-class status in regard to the Fourth Amendment." *Id*. at 1577. I respectfully dissent.

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

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|---|---|
| UNITED STATES OF AMERICA | PLAINTIFF |
| v. | CRIMINAL ACTION NO: 3:19cr41 |
| OTHA RAY FLOWERS | DEFENDANT |

TRANSCRIPT OF MOTION TO SUPPRESS

WEDNESDAY, JULY 24, 2019

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

[3] P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: You may be seated.

All right. Call your case, please.

MR. FULCHER: Thank you, Your Honor. We have before for the court this afternoon the case of United States versus Otha Ray Flowers. This is Criminal No. 3:19cr41, and we are before the court this afternoon for a hearing on the defendant's motion to suppress evidence.

THE COURT: All right. And let me turn to the defense. Mr. Gilbert, good afternoon to you.

MR. GILBERT: Good afternoon, Your Honor.

THE COURT: You're with your client, Mr. Otha Ray Flowers?

MR. GILBERT: That's correct, Your Honor.

THE COURT: You are that person?

THE DEFENDANT: Yes, sir.

THE COURT: Now then, Mr. Gilbert, how do you wish to pursue your motion?

MR. GILBERT: Your Honor, we're ready to proceed.

Once the government's through with its presentation and they've completed their case-in-chief, then we have a potential witness to call. We'll make that decision at that point.

THE COURT: Okay. Thank you.

Y'all can have a seat again.

[4] MR. GILBERT: Thank you, Your Honor.

THE COURT: All right, then, Mr. Fulcher. Are you ready to proceed?

MR. FULCHER: I am, Your Honor. And we call Eric Stanton to the stand to provide evidence in this case.

THE COURT: All right. Come forward to be sworn.

THE CLERK: Place your left hand on the Bible, raise your right hand, please.

ERIC STANTON,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FULCHER:

Q. And if you could state your name for the record and what it is that you do for a living.

A. Eric Stanton. I'm an agent with the Mississippi Department of Corrections, Probation and Parole Service.

Q. Okay. And I want to direct your attention, if I could, to the time frame involved in this case, which is around February 18th, 2017.

A. Yes.

THE COURT: February what?

MR. FULCHER: February 18th, 2017.

THE COURT: February 18th?

MR. FULCHER: Yes, sir.

THE COURT: One second.

[5] BY MR. FULCHER:

Q. Now, if you could --

THE COURT: Go right ahead.

MR. FULCHER: Thank you, Your Honor.

BY MR. FULCHER:

Q. If you could tell the court where you were employed at that time.

A. I was employed as a member of the Direct Action Response Team with the Jackson Police Department.

Q. And I want to back up for just a second. If you could give the court the benefit of your education, training, work history and your military service.

A. I was six years with the United States Air Force as a security forces member, their law enforcement branch. Four and a half years with the Jackson Police Department. I'm currently working with the Mississippi Department of Corrections, probation and parole agent.

My education is Associate of Arts from Mississippi Gulf Coast Community College; Bachelor of Science in administration of justice from Mississippi College; and a Masters of Arts in criminology and justice services from Jackson State University.

Q. Okay. So now I want to, I want to go back and direct your attention to that time frame, February 18th of 2017, and that would be at approximately 8:30, 8:31 on that evening. If you could tell the court what it was that you were doing, and then [6] we'll proceed from there.

A. I was patrolling the area of Capitol Street and Road of Remembrance at the direction of my

supervisor due to recent violent crime and burglaries in that area. Our unit is a proactive unit where we go to where crime is deemed to be increasing in those areas and attempt to try to bring crime down in those areas.

We are out looking for suspicious behavior, suspicious activities, traffic stops, things of that nature attempting to be seen in the areas in which crime has been increasing.

Q. Now, did you have an occasion on that date and at that time to come into contact with Otha Ray Flowers?

A. I did. While patrolling that area of Capitol Street and Road of Remembrance, we were turning on to Road of Remembrance, and I saw a silver-in-color Cadillac CTS parked at the south end of the parking lot. I believe it's 637 Road of Remembrance, Big Boys Food Mart.

It was dark out, and I saw two males sitting in the vehicle, black male in the driver's seat and a white male in the passenger seat. I observed them for approximately 10 to 15 seconds. They didn't appear to be exiting the vehicle, didn't appear to be patronizing the establishment, so I stopped to conduct what's called a field interview where we just get out and speak to the occupants, name, you from the area, are you patronizing the business, things of that nature.

[7] Upon exiting my vehicle I approached the Cadillac, and the driver let his window down, and I smelled what appeared to be the strong odor of marijuana coming from the vehicle. I asked the driver for his identification card, and he handed me a

Mississippi driver's license. That's when I identified the driver as Otha Ray Flowers.

Q. Okay. And let me do this.

MR. FULCHER: Your Honor, I've got two exhibits that I have marked as Government's Exhibit G-1 and G-2, and I would move those into evidence since it's my understanding the defense has no objection to those.

THE COURT: Any objections?

MR. GILBERT: No objection, Your Honor.

THE COURT: All right. Now, what are the exhibits?

MR. FULCHER: These are two photographs of the area taken from Google of the area around Big Boys Food Mart.

THE COURT: All right. The two exhibits, G-1 and G-2, are admitted.

(Exhibit G-1 and G-2 admitted.)

MR. FULCHER: And, Your Honor, if I could use the display system.

THE COURT: All right. Go right ahead.

THE CLERK: Is it turned on?

MR. FULCHER: Doesn't seem to be.

THE CLERK: Going to have IT up here in just a minute.

[8] MR. FULCHER: Your Honor, I'll do this. I brought extra copies that I will just use if I could.

THE COURT: Okay.

MR. FULCHER: I think that will help. May I approach and pass these?

THE COURT: All right. Thank you.

MR. FULCHER: (Passing document.)

BY MR. FULCHER:

Q. Mr. Stanton, I've provided you with two exhibits, G-1 and G-2, and I believe G-1 is the one looking directly at the store.

MR. FULCHER: Your Honor, I may ask you to -- I think there's one that looks directly at the store and then the other is slightly from an angle.

THE COURT: G-1 is at the angle.

MR. FULCHER: Okay.

BY MR. FULCHER:

Q. If you could, first of all, tell us, are these photos a fair and accurate representation of the scene as you saw it in February of 2017?

A. It is.

Q. Obviously, it's a different time of day and different vehicles, but if you could tell the court from looking at those photos, if you could, describe where this Cadillac was parked when you pulled in, and then also describe where it is that you [9] pulled in.

A. The Cadillac was pulled right where the white pickup truck is. It's pulled in at that corner right there.

Q. Okay.

A. Where the building is bricked in and kind of obstructs your view from the inside.

Q. And I know it may be obvious just from looking at the photo, but approximately, from viewing the photo and having been at the scene, approximately how far off the public roadway are those parking spaces?

A. Approximately 3 feet.

Q. So very close to the --

A. Yes.

Q. --roadway. And where did you pull in?

A. I pulled in on -- I was in the roadway. We all stopped -- my unit stopped in the roadway that evening. I can't recall exactly where I stopped on that evening.

Q. Okay. Now, when you, when you mentioned earlier that you were there to conduct a field interview --

A. Yes, sir.

Q. -- was Mr. Flowers or anyone under arrest at that time?

A. No, sir.

Q. And in conducting this field interview, was anyone in custody?

A. No, sir.

[10] Q. And then also was -- were these individuals in any way prevented from leaving or were they free to go?

A. They were always free to go.

Q. And at what point did you smell the odor of marijuana coming from the vehicle?

A. Upon approaching, upon approaching the vehicle, once he let his window down.

Q. Had Mr. Flowers said anything to you or had you said anything to him prior to you smelling marijuana?

A. No, sir.

Q. Okay. Now, you mentioned as -- that he rolled down the window and you asked him for his license, whatnot. You could then proceed with telling the court what it was that you did and what happened.

A. Yes, sir. I noti -- I informed him while -- why we were out there on the scene and, again, asked him for his identification card, which he provided to me and was identified as Otha Ray Flowers.

While I was doing this, the white male passenger, who was identified later identified [sic] as Jeremy Mayo threw an object into his mouth. At that time I removed Mr. Flowers from the vehicle and had Mr. Mayo removed from the vehicle as well.

Q. Okay. And why did you do that?

A. Because I believed Mr. Mayo to be attempting to conceal evidence at that time of a possible crime.

[11] Q. And when you, when you smelled the marijuana--

A. Yes, sir.

Q. -- upon approaching the vehicle, at that point what had you determined, if anything, were going to be your actions moving forward?

A. Well, because I smelled marijuana, I would have had probable cause to search the vehicle and the individuals. Having not had a chance to get to that

point because I was attempting to identify Mr. Flowers, that's when rapidly Mr. Mayo threw some items into his mouth, and that's when we removed him from the vehicle, at that point.

Q. Okay. And with regard to the field interview that you decided to conduct, what were some of the reasons why you thought it was appropriate to conduct the field interview?

A. Just to ensure that they had legitimate reasons at the business, they weren't casing the business. There had been a lot of violent crime in that area of recent, so we just wanted to know that they were in fact in that area for legitimate reasons and weren't up to casing the area or anything like that.

Q. Okay. So then once Mr. Mayo appeared to put something in his mouth, you had both of those individuals exit the vehicle, what happened at that point?

A. At that time I observed a silver-in-color Kimmel revolver, .32 caliber revolver, sitting on the seat, in which I had just [12] removed Mr. Flowers.

Q. Okay. And so what did you do next?

A. I recovered the firearm and made sure it was safe to remove the rounds from the firearm along with -- it was two spent casings inside of the firearm. I secured it.

Q. Okay. And were there also live rounds?

A. Yes, sir, it was five live rounds and two spent shell casings in the revolver.

Q. And so then what did you do next?

A. I request permission to refer to my report.

Q. If that will refresh your recollection, sure.

A. Yes.

I asked the occupants of the vehicle whose firearm was it, and both of them said, *It's not mine*.

And then Mr. Flowers said, *Well, I'm a convicted felon on probation for being a convicted felon with a firearm*. I took that to mean that he could not have -- it could not have been his because he's a convicted felon, so he would not have had it. So at that point I contacted my supervisor and told him what I had at the scene, and he contacted the Cease Fire detectives. They told me to bring him in to the fourth floor to be questioned, of JPD headquarters.

Q. When Mr. Flowers said that, did he say it loud enough or in close enough proximity to Mr. Mayo where Mr. Mayo could hear it?

[13] A. Well, Mr. Mayo was on the other side of the vehicle. I'm not sure if he would have heard it or not.

Q. Okay. And so did you, did you or anyone else run any kind of records check to determine what Mr. Flowers' criminal history is?

A. That would have been the Cease Fire detective who would have conducted that check, yes, sir.

Q. Did you -- with regard to Mr. Flowers, did you do anything further other than hand him off to --

A. Yes, sir. A local warrant check was conducted in which he was observed to -- it was notified that he did have a valid local warrant.

Q. So he had an arrest warrant at the time?

A. He did.

Q. Okay.

A. Several.

Q. Did you -- at any point did you recover any marijuana?

A. Yes. Upon searching -- upon search incident to lawful arrest, I began the search of his person in preparation to transport him. As I went into his pocket, I was going into his left-front pocket, he stated *I have marijuana on me*.

And so at that time I removed marijuana from his front left pocket and collected it as evidence.

Q. And when you say *he*, who was that?

A. Mr. Flowers.

[14] Q. And did you, did you include the recovery of the marijuana in your report?

A. I did.

Q. Did, did Mr. Flowers make any additional statements or anything at that time?

A. Not that I can recall.

Q. Now, there's been an assertion that Mr. Flowers already had exited the vehicle at the time that you encountered him. Is there any merit to that claim?

A. No, sir, there is not. Both of them were sitting inside of the vehicle when I approached.

One other statement. After removing them from the vehicle, I did ask if any firearms or illegal contraband was inside the vehicle. Both of them stated no.

Q. Were there any other firearms recovered?

A. No, sir, just the silver-in-color Kimmel.

Q. With regard to Mr. Mayo, was there any check of his criminal history?

A. It was. A local warrant check was conducted of Mr. Mayo, and he was released from the scene. I can't recall at this time if he had any local warrants or anything like that. I don't believe he did.

Q. And, to your knowledge, did he have any felony convictions?

A. No, sir, not that I'm aware of.

MR. FULCHER: Tender the witness, Your Honor.

[15] THE COURT: All right. Cross-examination.

CROSS-EXAMINATION

BY MR. GILBERT:

Q. Officer Stanton, how many people were with you on this particular evening with the D.A.R.T. team?

A. I believe it was five or six.

Q. How many separate patrol vehicles were there with you?

A. Five or six. We all drive separate vehicles.

Q. Okay. And so when you pulled up and stopped, how many other patrol vehicles pulled up and stopped along with you?

A. Five or six.

Q. Okay. Now, I want you to take Exhibit G-1, you know which one that is?

A. No, sir.

Q. It's the one with the wide-angle shot -- I'm sorry, let's take G-2.

MR. GILBERT: G-2 is the one, Your Honor, you've got that's head on?

THE COURT: G-2 is, yes, head on.

BY MR. GILBERT:

Q. Okay. Now, I want you to take --

MR. GILBERT: May I approach the witness, Your Honor?

THE COURT: Go right ahead.

BY MR. GILBERT:

Q. I want you to take that ink pen and --

[16] MR. GILBERT: May I stand here while he marks on this exhibit, Your Honor?

THE COURT: That's a copy, isn't it?

MR. GILBERT: Yes, sir, and we'll submit this -- we'll amend this, Your Honor.

THE COURT: Okay, go right ahead.

BY MR. GILBERT:

Q. Would you draw a rectangle where the silver Cadillac was parked.

A. (Witness complies.)

Q. Okay. And then would you show me in -- by making X's, would you mark each place where a patrol unit was parked?

A. Now, I don't remember exactly where I was pulled in the street that day, but we would have been out in the street.

Q. Okay. Is that fair then to say that the vehicles, the silver Cadillac, could not have backed out into the street once you all were parked?

A. Not knowing where exactly I was parked at that time it would be hard to say. But at any moment he could have told me he didn't want to speak with me.

Q. Oh, no, that's fine. That's fine.

A. Yes, sir.

Q. What I'm asking you is that when each of you pulled up, the street was essentially blocked so he would not have been able to back out without running into your car. Or a police car; is [17] that correct?

A. That's fair to say.

Q. Okay. And your blue lights were on?

A. Yes, sir.

Q. Okay. And this was before you ever got out of the vehicle?

A. Yes, sir.

Q. Okay. Now, when you exited your vehicle, the other five officers, they exited their vehicles as well?

A. That's correct.

Q. Okay. And so this was an approach of their vehicle by as many as five or six police officers?

A. That's correct.

Q. Now, I noticed in the discovery I was provided there is a form, it's called a City of Jackson Police Department Incident Report Form; is that correct?

A. It is.

MR. GILBERT: And may I approach again, Your Honor?

THE COURT: You may.

BY MR. GILBERT:

Q. And I'm showing you that document. Is this in fact your report?

A. It is.

Q. Now, on this report you have a section that says evidence slash property; is that right?

A. It is.

[18] Q. Now, this is where you would list any property that you took off of the person that you arrested so it can be kept up with; right?

A. Any evidence. Any property would be turned over to the booking agency in which they collect all of their property.

Q. Okay. So would his driver's license have been something that would have been listed on here or turned in to the evidence -- I mean to the booking agent?

A. It should have been turned in to the booking agent. It's nothing we would have kept as evidence.

Q. And what paperwork would you memorialize as personal property?

A. The Adult City Holding, they keep up with all of that paperwork.

Q. Okay. Because you mentioned that he gave you a driver's license, and I wanted to ask you if you were positive today that that actually occurred.

And I want to draw your attention to another document. This is U.S.-0015, Bates numbered by the U.S. Attorney's Office. Do you recognize this generically as an NCIC printout?

A. I do.

Q. And you have seen a lot of these in your work, haven't you?

A. I have.

Q. And is this for Otha A. Flowers?

MR. FULCHER: I'm going ask that counsel for the [19] defense step back to the podium.

MR. GILBERT: I'm sorry, your Honor. I don't mean to offend his sensibilities about your courtroom, but I need to point some things out in this document to the witness.

THE COURT: Okay. What things do you need to point out?

MR. GILBERT: Well, I need -- I want to track through several line items here with him, Your Honor. I'll only be here for a moment.

THE COURT: Okay. Go right ahead.

BY MR. GILBERT:

Q. Is this Mr. Flowers' NCIC printout?

A. It appears to be.

Q. And this is -- I'm pointing to the section about his driver's license, am I not?

A. It appears you are.

Q. And what is the status of his driver's license?

A. Suspended.

Q. Now, down here there are three lines that list moving violations; is that right?

A. That's correct.

Q. Now, what is the one on the bottom that I am pointing to?

What does it say?

A. Expired, no DL.

Q. And what is the date that that offense occurred?

[20] A. Appears March 24th, 2014.

Q. Okay. And then the next one, the one in the middle. What moving violation is that?

A. Speeding. 20 miles over. 4/3 of '15.

Q. And then the final one is what?

A. Driving with a suspended license.

Q. Okay. And what date did that occur?

A. That would have been June 3rd, 2015.

Q. Okay. Thank you.

Now, as a police officer you are familiar with the practice, in fact, the requirement by the Department of Public Safety that when you find someone who is driving on a suspended license, if they have their license with them you take that away from them, don't you?

A. I've never done that.

Q. It's supposed to be appended to the citation and turned in, isn't it?

A. I've never done that.

Q. So you've never taken into custody a driver's license from a person whose license is suspended?

A. No, sir.

Q. Okay.

A. Not that I can recall. That's not a normal practice of mine.

Q. So it's your testimony today, then, that you feel certain [21] that Mr. Flowers, who had been driving with a suspended license for a number of years, did in fact present a driver's license to you that night.

A. Yes, sir.

Q. You would agree with me that the Department of Public Safety is not in the habit of issuing licenses to people --

MR. FULCHER: I'm going to object to what the Department of Public Safety does.

MR. GILBERT: Can I finish my question first, Your Honor, before he decides if he doesn't like it?

THE COURT: Okay. Go ahead. Finish your question.

BY MR. GILBERT:

Q. You would agree based on your experience as a law enforcement officer and with your education and background that it is typically not the practice of the Department of Public Safety to issue a license to somebody if it is suspended.

MR. FULCHER: I'm going to object again as to asking for testimony concerning the Department of Public Safety.

THE COURT: I'll let him answer if he knows.

A. I don't believe -- I would be guessing to say what their policy and procedures are, but it wouldn't make sense to me for them to issue a license if it was suspended. But I'm not familiar with their policies or procedures.

BY MR. GILBERT:

Q. Okay. Thank you.

[22] Now, you said that as you were approaching the vehicle Mr. Flowers rolled down the driver's side window; is that right?

A. That's correct.

Q. And your testimony was that you detected the strong, you said strong, odor of marijuana?

A. Yes, sir.

Q. Okay. Now, you ultimately had this vehicle towed, did you not?

A. I did.

Q. And in doing so you would have completed an inventory form for this vehicle; is that right?

A. I did.

Q. Okay. Now --

MR. GILBERT: May I approach again, Your Honor?

THE COURT: You may.

BY MR. GILBERT:

Q. This is No. 6. Is this in fact the inventory form you completed for this vehicle?

A. Yes. Well, someone -- one of the fellow officers completed it, of what was on the scene, with my information right here saying -- denoting that I was the one who requested to have the vehicle impounded.

Q. Okay. Well, right here on this Line 24, that says reporting officer, doesn't it?

[23] A. It does.

Q. And that says E. Stanton?

A. That's correct.

Q. And that's you?

A. Yes, sir.

Q. And there is no other officer's name on this inventory, is there?

A. No, sir, it would not be.

Q. Okay. Now, right here, box number -- is that 19? Does it say, *List property in the vehicle*?

A. It does.

Q. And what property was found in the vehicle?

A. Clothes, pillow, miscellaneous items.

Q. Okay. There is nothing listed here on this report -- and I'll leave this report here now for just a minute.

There is nothing listed in that inventory --

THE COURT: Counsel, would you slow down some.

MR. GILBERT: Oh, yes, sir. Sorry, Fred.

BY MR. GILBERT:

Q. There is nothing listed in that inventory that says marijuana cigarette, is there?

A. No, sir.

Q. There is nothing that says roach clip, is there?

A. No, sir.

Q. There is nothing that says marijuana residue, is there?

[24] A. No, sir.

Q. There is nothing that says -- well, there is no indication there was any sign of marijuana in the vehicle at all, is there?

A. Other than what was recovered from Mr. Flowers' front left pocket, there was nothing else.

Q. Okay. So it's your testimony that the only evidence of marijuana that was found after an exhaustive search of the vehicle was the marijuana in Mr. Flowers' front left pocket?

A. That's correct.

Q. Okay. And so that marijuana was less than a gram?

A. I don't recall exactly how much it was at this time. I would need to review the evidence.

Q. It was certainly a small amount, was it not?

A. It was.

Q. Enough to maybe make a marijuana cigarette?

A. I'm sure.

Q. Okay. But we're not talking about an ounce.

A. We're not.

Q. We're talking about something substantially less than that.

A. We are.

Q. Okay. In your experience as a police officer -- oh, I'm sorry. It was in a plastic bag, was it not?

A. It was.

Q. And in his pocket.

[25] A. It was.

Q. So you are not suggesting to the court that that is the marijuana you smelled, are you?

A. I am.

Q. So it's your testimony to the court that less than a gram or about a gram of pocket marijuana in a plastic bag in his pocket would emit a strong odor of marijuana such that you could detect it approaching the vehicle?

A. Being that I don't have the evidence in front of me right now, I can't speak to whether it was a -- less than a gram or a gram. I do recall removing a clear plastic bag containing a green, leafy substance I believed to be marijuana from his front left pocket.

Q. And it's your testimony to this court, then, that that must certainly be what caused you to detect the strong odor of marijuana as you approached from the rear of his vehicle.

A. That's correct.

Q. There was no evidence that any marijuana had been burnt inside that vehicle, was there?

A. No, sir.

Q. Okay. And you would agree with me that marijuana -- the odor of marijuana is strongest when

it is actually burning or had been burnt recently in a location.

A. I wouldn't be able to speak to that.

Q. So in all your experience in law enforcement you never [26] smelt burning marijuana before?

A. I have.

Q. Okay. And you've smelled marijuana that was not burning?

A. I have.

Q. Which one is more pronounced and more definitive in smell?

A. Both of them have distinct smells in which I can detect as either raw marijuana or burnt marijuana.

Q. Which one's easier to smell from a distance?

A. I wouldn't be able to speak to that. Marijuana, you can detect it, and I know that it's illegal and should not be present on anyone's person.

Q. Okay. But we can agree that the only source of your smell could have -- the only thing that you could have smelled was what was in his pocket.

A. That's correct.

Q. Now, it's also your testimony that when you walked up to the vehicle, that, had Mr. Flowers said, *Please move your car so I can leave*, you would have done that?

A. I would have. No, I would not have for the simple fact once I smelled the marijuana, that gave me grounds to ensure that there was no marijuana

present. So no, I would not have once I smelled the marijuana.

Q. Okay. But you did not tell Mr. Flowers that he was -- he didn't have to speak to you?

A. No. Not at that time, no.

[27] Q. And had you not smelled the marijuana you would not have told Mr. Flowers you don't have to talk to me, but let me have your driver's license?

A. I would have asked him for his identification.

Q. But at no time would you have said, *You don't have to talk to me.*

A. I would not have.

Q. Now, why was it thought Mr. Mayo was concealing evidence?

A. Because of the situation in which we approached, and I had smelled the marijuana, and at that time, when I was asking Mr. Flowers for his identification, he threw something in his mouth. And to me that says something isn't right, something is wrong. I believed him to be possibly concealing evidence.

Q. Isn't it true that it's just as likely that he could have been eating an M&M?

A. He could have.

Q. And so the fact that he put something in his mouth is not really indicative of criminal activity at all, is it?

A. Well, being that we had approached and I had smelled that marijuana and he threw something in

his mouth, at that time I believed him to be concealing evidence.

Q. Based on your smelling of the marijuana?

A. Yes, sir. I believe he could be concealing marijuana or trying to chew up marijuana or something of that nature, yes, sir.

[28] Q. The marijuana that you smelled from Mr. Flowers' pocket inside the plastic bag?

A. From the vehicle.

Q. But not any marijuana that had been burnt in the vehicle?

A. I didn't discover any burnt marijuana.

Q. Didn't discover any evidence to suggest any marijuana had been burnt in the vehicle?

A. Not that I can recall at this time.

Q. And were there other people outside, in and around the parking lot, at the time you had this interaction with Mr. Flowers?

A. At that time I just recall the officers that was currently present with me.

Q. Okay. And the Exhibit G-1, which is the shot at an angle, that shows an apartment complex right across the street, doesn't it?

A. It does.

Q. And were there people out and about there?

A. I can't recall.

Q. So even if you had smelled burning marijuana it might have just as likely been that it was coming from some other location than this vehicle; isn't that true?

A. I think I would have documented --

MR. FULCHER: Object, Your Honor. That calls for speculation, and it's inconsistent with the evidence that's [29] been presented.

THE COURT: I'll let him answer.

A. I would have known if I would have smelled it approaching the vehicle as opposed to once I approached Mr. Flowers' vehicle. If it was just out in the air, I would have took that into consideration. I didn't smell it until I approached the vehicle and Mr. Flowers let down his window.

BY MR. GILBERT:

Q. And it's your testimony that as far as you know the vehicle had only been there for up to 15 seconds.

A. That's correct. I observed it about 10 to 15 seconds, yes.

Q. And have you ever patronized a gas station or convenience store before?

A. I have.

Q. And have you ever pulled up to stop and remained in your vehicle for more than 10 to 15 seconds before you went inside?

A. I'm sure I have.

Q. And you were not committing any crime that day, were you?

A. I was not.

Q. And you would agree that that is not in any way indicative that someone is committing a crime.

A. Being that it was a high crime area, and generally people just sitting outside of convenience stores could be an indication of the area being cased, our unit, being a proactive unit, we generally get out and speak to ensure that the people [30] are patronizing that location.

Q. Okay. So the reason that your, your -- five or six patrol cars pulled up that night and stopped in the street with your blue lights on to get out and see and talk to Mr. Flowers was because you knew it was a high crime area?

A. Yes.

Q. And you wanted to make sure Mr. Flowers and the occupants of the car were not involved in or about to commit a crime?

A. That's correct.

MR. GILBERT: Can I have the court's indulgence for a moment?

THE COURT: Okay.

MR. GILBERT: That's all I have, Your Honor. Thank you.

THE COURT: All right. Redirect.

MR. GILBERT: Oh, I'm sorry, Your Honor. Can we append the exhibit that -- may I approach?

THE COURT: Yes, sir.

MR. GILBERT: Can we append the -- would you kind of make that a little more -- it's kind of hard to see.

Can we append this to Government's Exhibit 2? This will be the one with the square drawn on it.

A. (Drawing.)

MR. GILBERT: We'll make it, I guess, G-2a. We can make it D-1 if you want to. It doesn't matter.

[31] THE COURT: Turn it around, please.

MR. GILBERT: May I approach?

THE COURT: Yes.

MR. GILBERT: Would you like to look at it?

THE COURT: Okay. Any objection?

MR. FULCHER: No, sir. I would like to see it real quick, but I do think it's probably more appropriately D-1.

THE COURT: The number is fine with me. Let's make it more pronounced, if you agree.

MR. FULCHER: Just a second. I have a Sharpie, a fairly thick Sharpie. I think it will be more clear if we do that.

THE COURT: Okay.

MR. GILBERT: May I approach again, Your Honor?

THE COURT: Go right ahead.

BY MR. GILBERT:

Q. There you go.

A. (Witness drawing.)

Q. Thank you.

MR. GILBERT: And, Your Honor, may I approach now and tender this?

THE COURT: All right.

MR. GILBERT: D-1 I think is what we agreed on, Your Honor.

THE COURT: All right. It will be admitted, and this [32] will be appendage to -- well, hold it now.

No, this was --

MR. GILBERT: We can just make it D-1, Your Honor.

THE COURT: Make this D-1?

MR. GILBERT: Yes, sir.

THE COURT: Okay. D-1, then. This is D-1. Okay.

Here you go.

(Exhibit D-1 admitted.)

MR. GILBERT: And if I didn't say it before, Your Honor, that's all I have for this witness.

THE COURT: All right. Redirect.

MR. FULCHER: Thank you, Your Honor.

If I may approach.

THE COURT: Go right ahead.

REDIRECT EXAMINATION

BY MR. FULCHER:

Q. Officer Stanton, this is fairly basic. That's the NCIC printout, the page that you were shown previously by Mr. Gilbert. I believe it's marked Page 15 on the Bates number. You were asked about three charges against Mr. Flowers. Can you again, real quick, just say what those dates were on that document?

A. Appears to be June 3rd, 2015, April 3rd, 2015, and March 24th, 2014.

Q. Do you have any knowledge as to the status of Mr. Flowers' [33] license in the almost two years between June 2015 and February 2017 when you encountered Mr. Flowers?

A. I do not.

Q. Now, you were also asked about the marijuana that was -- that you found in Mr. Flowers' left pocket.

A. Front left pants pocket.

Q. So, first of all, where was Mr. Flowers seated in the car? Which position was he in?

A. Front left driver's seat.

Q. Okay. And so when he rolled down the window, approximately how far, in your estimation, was his front left pocket from the rolled-down window?

A. Well, it was his pants pocket and it would have -- he was next to the door.

Q. And so it was on the side next to the -- right next to where the door was?

A. Yes, sir.

Q. Okay. Now, this particular marijuana that was recovered, was Mr. Flowers charged with possession of marijuana?

A. He was.

Q. And with regard to this particular marijuana, you mentioned that it was unburnt or fresh marijuana. In your experience as an officer have you

encountered and smelled unburnt marijuana during the course of encountering members of the public?

A. Numerous times, yes, sir.

[34] Q. How quickly did you identify that smell on that particular night?

A. Once he let his window down, I noticed a strong odor of what appeared to be marijuana coming from the vehicle.

MR. FULCHER: I have no further questions, Your Honor.

THE COURT: All right.

You can step down.

THE WITNESS: Thank you, sir.

MR. FULCHER: If I may retrieve.

THE COURT: Please do so.

MR. GILBERT: Will you hand me mine while you're there?

MR. FULCHER: (Passing document.)

MR. GILBERT: Thank you.

THE COURT: All right. Mr. Fulcher.

MR. FULCHER: Your Honor, the government rests its presentation of its case-in-chief.

THE COURT: All right. What says the defense?

MR. GILBERT: Your Honor, we call Jeremy Mayo.

THE COURT: Okay.

MR. GILBERT: If you would indulge me, I'll go get him, Your Honor.

THE COURT: Go right ahead.

LAW CLERK: Place your left hand on the Bible and raise your right hand, please.

[35] JEREMY MAYO,

having been first duly sworn, testified as follows:

THE COURT: All right. You may have a seat.

MR. GILBERT: Thank you, Your Honor.

THE COURT: Speak directly into that microphone, all right?

THE WITNESS: (Nodding.)

THE COURT: Go right ahead.

MR. GILBERT: I'm sorry. You told him to be seated; I thought you told me to proceed. I jumped the gun. I apologize.

BY MR. GILBERT:

Q. Would you tell the judge what your name is.

A. Jeremy Mayo.

Q. And, Jeremy, what city do you live in?

A. Brandon.

Q. And how old are you?

A. Thirty.

Q. Okay. And where do you work, Jeremy?

A. I work for Transocean.

Q. And what is Transocean?

A. It's an offshore company.

Q. Okay. Talk a little slower, okay? I'm telling somebody to slow down. Talk a little slower.

It's an offshore company. So you work on an offshore oil [36] rig?

A. Yes, sir.

Q. Okay. Now, how long have you done that?

A. With this company, a little over a year now.

Q. Okay. And have you had experience in that before?

A. I have.

Q. Okay. So how long have you been doing that, generally speaking, as your trade?

A. Three years that and five years new construction, plumbing.

Q. Okay. Now, do you know Otha Ray Flowers?

A. I do.

Q. And where did you first meet Otha Ray Flowers?

A. I believe I coached Little League football and Little League baseball and his nephew played there, and I believe I met him through there. And he was talking about plumbing, and I said *I probably could get you hired on*, and then we started hanging out.

Q. So Mr. Flowers had expressed a desire to possibly get into the plumbing business?

A. Yes, sir.

Q. Okay. Now, did there ever come a time when you and Mr. Flowers hung out socially, I guess?

A. A few times.

Q. Okay. And was February of 2017 one of those times?

A. Yes, sir.

[37] Q. Tell the court what happened on this particular day in February. And you'll remember it because your car was towed.

A. Right.

Q. Right. So tell the court what happened on that particular day.

A. I went to Otha Ray's house and talked to -- went in and talked to his mom for a minute, and then he asked, you know, want to go ride around? And we went to Presidential Park, Presidential Hills, and then we stayed there for a minute, and -- for a good little bit, and a guy asked me about my car, and I told him I was thinking about selling it, and let him sit in it and, you know, looked at the dash, crunk it up and all that. And he got out, and I walked away and went over, was socializing with other people, and we left from there and we went to Citi Trends, I believe, and got an outfit. Otha got a shirt, and then I was like, Hey, you want to go back to my place and play Xbox? He was like, Let's go shoot pool. So I said, That's fine. So we left from there to go shoot pool. And on our way to shoot pool, he pulled into the corner store, I don't remember exactly where it is, but pretty much immediately as we pulled in we were approached by the police.

Q. Okay. So let's back up and let's talk about some of the things that happened up to that point, okay?

You said that you guys went to a park in Presidential Hills; is that right?

[38] A. Yes, sir.

Q. Okay. When you got to the park, how many people were there?

A. There was a lot of people there.

Q. And did Otha Ray appear to know some of those people?

A. A lot of them.

Q. Did you know any of them?

A. I did not.

Q. Did not?

A. Did not.

Q. Okay. And so you said you got out of your car.

A. Um-hum.

Q. Is that right?

A. That's right.

Q. Okay. And you have to say yes or no, okay? Because the court reporter can't type an um-hum, all right?

A. Yes, sir.

Q. So when you got out of your car, were you always there in the immediate proximity of your car, or did you walk away from your car further?

A. I walked away further.

Q. Okay. Was Otha Ray always around your car or did he walk away further?

A. He walked away for a little bit.

Q. Okay. How was it that someone else besides you or Otha Ray [39] came to be sitting in your car?

A. A guy asked me, you know, he was asking me about it and I was like, you know, I'm thinking about selling it, and he was like Yeah, how much? And we kind of talked about it for a second, and he sat in the car and he started exploring the car.

Q. Okay. What seat did he sit in?

A. The driver's seat.

Q. Okay. Now, did -- once he got out of the car, did you see anything in the car out of the ordinary?

A. No.

Q. Okay. I'm just going to ask you, did you see a gun in the car?

A. I did not.

Q. Okay. Now, when you were -- you got in the car and then you left there; is that right?

A. Yes, sir.

Q. And ultimately you ended up, you said, at a convenience store?

A. That's correct.

Q. Okay.

MR. GILBERT: Your Honor, can I retrieve the exhibits from you?

THE COURT: Go right ahead.

LAW CLERK: (Passing document.)

[40] BY MR. GILBERT:

Q. I'm going to show you --

MR. GILBERT: May I approach the witness?

THE COURT: You may.

BY MR. GILBERT:

Q. I'm going to show you what's been admitted into evidence as Government's Exhibit 2 and ask you if you recognize that.

A. Yes, sir, I recognize that store.

Q. And where do you recognize that store from?

A. From that night that the police approached us.

Q. Okay. Now, who was driving your car when you arrived at that store?

A. Otha was.

Q. And why was Otha driving your car?

A. He knew the area better, and he said, You know, let me drive; I know the area better, so we don't end up in any bad areas.

Q. Okay. Did you know where the pool hall was?

A. I did not.

Q. Did he know where it was?

A. Yes, sir.

Q. Okay. So when you pulled up into this store, how long did you sit in the parking lot before you realized the police were there?

A. As soon as I went to get out of the vehicle to go into the [41] store, my door was shut back up on me.

Q. And what did you see then at that point? How many policemen were there?

A. Three or more.

Q. And how many police cars were there?

A. Three, I believe.

Q. And where were they parked in relation to your vehicle?

A. There was one directly behind the vehicle, and there was one I know for sure to the right of the passenger of the vehicle.

Q. Now, I want you to think, and I want you to try and visualize and explain to the judge, how long after the wheels stopped turning and the car stopped moving were the police upon you?

A. It was pretty immediate.

Q. Now, what happened after the police shut your door and made you -- basically stopped you from getting out of the vehicle?

A. He told me to put my hands on the dash.

Q. Okay. And what else happened?

A. Said, Put your hands on the dash, and there was another one on the driver's side, and he was saying Roll your window down, and I believe he rolled it down, I don't really remember fully.

Q. Who was being told to roll their window down?

A. Otha was.

Q. And who was it that was telling him to do that?

[42] A. One of the police officers.

Q. Okay. And did Otha roll his window down?

A. Yes, sir.

Q. Okay. And then what happened?

A. He gave him his I.D., his credentials, and the police officer took it, and told me remain with my hands on the dash and I believe told him to remain

with his hands on the steering wheel to where they could be seen, and they got us out. They told us both to get out. And then when they got him out, they brought him off to the side of the car and they got me out and I went to adjust and one of the police officers kept accusing me of throwing something into my mouth. And I said, No, sir, I didn't throw it into my mouth. He said, You did, you did. And I was like, No, sir, I did not. And he was like, Well, I can make you vomit it up. I said, There is nothing to vomit up. I said, I don't even really understand what's going on right now.

And then one of the police officers said -- or they started searching my vehicle, and they said there was a firearm in the floorboard of the driver's seat.

Q. Did anybody ask you whose gun it was?

A. They did. They said -- well, they said, There is a gun in the driver's seat; whose gun is this? And I was like, I didn't know there was a gun in the vehicle.

And he said, Is it his gun? I said, I do not know. I did not know there was a gun in the vehicle.

[43] Q. To this day, do you know how the gun got into the vehicle?

A. Do not.

Q. Okay. So was there ever a point in time where you guys, while you were together that night, used any marijuana in the vehicle?

A. No, sir. I personally myself do not smoke marijuana.

Q. And at that time did you smoke marijuana?

A. I did not.

Q. And so had there been any marijuana consumed in the vehicle?

A. No, sir.

Q. Did you smell any marijuana?

A. I did not.

Q. Did any of the police ever ask you Where's the marijuana?

A. They asked if I had any drugs on me or if there was any drugs in the vehicle, and I said No as they were searching it.

Q. But not specifically marijuana?

A. I do not believe so, no, sir.

Q. Okay. Did any of the police officers ever say, I smell marijuana?

A. Not that I recall.

Q. Okay. Now, what happened after the gun was discovered?

A. They took Otha into custody, put him in handcuffs and took me off to the side of the car as they continued searching the car. One of the police officers said, Do you know that he is a [44] convicted felon? I said, I do not. They said, How do you know his plans weren't to kill you tonight? I said, I don't know why he would have done that.

And then they was like, Well, you never know.

And then they said they were towing my vehicle, and if I wanted to hang out with the black community, I could walk home to the black community.

Q. And let me ask you about that. So did you have a valid driver's license?

A. I did.

Q. And did they find any contraband or any sort of evidence of a crime in your car?

A. No, sir.

Q. But they still towed your car?

A. They did.

Q. And made you walk home?

A. That's correct.

Q. And tell the judge again exactly what they said.

A. If I wanted to hang out with black guys, I could walk through the black neighborhood to make it -- I believe they said the N-word, but I'm not going -- I can't say that.

Q. Well, I appreciate that. It's been said enough in the history of this country. We don't need to hear it again. But what did you do to get your car back?

A. I had to go the next day and pay for it to come out of [45] impound, a little over $300.

Q. So they didn't hold it for evidence?

A. No, sir. I was allowed to come get it. I called the next day and asked when I would be able to get my vehicle, and they told me I could come up there and get it out.

Q. All right. And has anybody -- when was the next time anybody contacted you about this case?

A. A few months ago a federal agent called me while I was in the gym, and started discussing it with me.

Q. And then you got a subpoena from me?

A. That's correct.

Q. And how many times have you and I met to discuss this case?

A. Today we met personally.

Q. For the first time?

A. For the first time.

Q. And we had a phone conversation?

A. Yes, sir.

Q. Okay. Now, other than that, have you talked to anybody about the case or your testimony today?

A. The only person I've talked about to the case outside of family of what's going on was the federal agent that called me on the phone.

Q. Okay.

MR. GILBERT: Court's indulgence just one moment.

Can I borrow that Sharpie again?

[46] Your Honor, may I approach the witness?

THE COURT: All right.

BY MR. GILBERT:

Q. I'm going to show you what's been introduced into evidence as Defendant's Exhibit 1, and I'm going to ask you to take this particular marker and mark on this exhibit where the police cars were parked, to the best of your recollection.

A. On this one?

Q. Yes, sir.

THE COURT: Now, is that -- one second. Is that the actual Exhibit 1?

MR. GILBERT: That is Defendant's Exhibit 1 that's got Officer Stanton's mark on it. I'm going to have him mark and put his initials on what he marked, if that's okay.

THE COURT: Okay.

LAW CLERK: I have a red Sharpie if that would be better.

MR. GILBERT: That would be even better.

If I may approach.

THE COURT: You may.

MR. GILBERT: Thank you.

A. So the vehicle was parked straight. It wasn't turned in.

BY MR. GILBERT:

Q. There's a black rectangle here. Is that about where the vehicle was parked?

[47] A. Yes, sir.

Q. Okay.

A. So is this acting as my vehicle?

Q. It is.

A. Okay. Then I think there was another one over here, maybe.

Q. Okay. All right. And I'll take that from you. Thank you.

Now, would it have been possible at all for your vehicle to have driven away without the police cars having to move?

A. No, sir.

Q. It would have been impossible?

A. Unless you drove through the store.

Q. Unless you drove through the store.

A. Correct.

Q. Okay.

MR. GILBERT: I tender the witness, Your Honor.

THE COURT: All right. We'll be in recess for 10 minutes. All right?

MR. GILBERT: Thank you.

LAW CLERK: All rise.

(Recess.)

LAW CLERK: All rise.

THE COURT: You may be seated.

All right. Cross-examination.

MR. FULCHER: Thank you, Your Honor.

[48] CROSS-EXAMINATION

BY MR. FULCHER:

Q. Mr. Mayo, you don't have any felony convictions, do you?

A. No, sir, I do not.

Q. And so are you aware of Mr. Flowers' felony criminal history?

A. I was not prior to that night, no, sir.

Q. Okay. And as far as you knew that night Mr. Flowers didn't have any felony convictions.

A. Correct.

Q. Have you since then learned about his criminal history?

A. I did that night.

Q. What exactly did you learn that night?

A. Police officer said that, To the best of my knowledge, he's a convicted felon.

Q. Okay. Now, he has, he has multiple felony convictions. Were you told about all those different felony convictions?

A. I don't believe they sit there and laid every one of them out for me, no, sir.

Q. And he certainly didn't tell you about his felony convictions.

A. No, sir, and I never asked him.

Q. Now, at the time do you recall that Mr. Flowers was living on Thomas Jefferson in Presidential Hills?

A. I do not believe it was in Presidential Hills where I met [49] him at his apartment. It was off of Woodrow Wilson somewhere.

Q. So if his information on his driver's license or otherwise shows a Thomas Jefferson address, that would be inconsistent with what you knew, at least at the time?

A. I didn't ask him if that was his permanent address or mailing address, no, sir.

Q. Okay. You mentioned that y'all had met during the course of your coaching football or Little League football of some sort?

A. I believe that's how we met, yes, sir.

Q. And where was that and when was that?

A. I don't remember exactly when. I just -- I believe he has a nephew that plays on one of the teams, and either his mother said something about him looking for a job or something, and then I may have said, Sure, give him my number. Because I know at one point we had discussed -- I was discussing with him getting a job plumbing. I said, I can probably help you out getting a job plumbing.

Q. And I guess what I am trying to understand is which football league did you coach?

A. Little League.

Q. Where?

A. Star.

Q. Star, Mississippi?

A. Yes, sir.

[50] Q. Okay. And that's down in Rankin County?

A. Correct.

Q. What years did you coach down there?

A. The past two years, three years.

Q. Okay. So just trying to figure that out. Would that have been -- was that in the fall? Is that when the season occurred?

A. Yes, sir.

Q. Okay. So you still this past fall were a coach?

A. For baseball, correct.

Q. Now, was it baseball or football?

A. Both. I have two children that play both sports, so therefore I offer my time to help coach them and any other children.

Q. Yeah. And I mean, look, I have been a coach as well, I know it takes a lot of time. I'm just trying to understand when you would have met Mr. Flowers. So you said it was a football league in Star.

A. I believe so. I don't know any other way that we would have met.

Q. Okay. And you, at the time, in 2017, you were living in Bay Springs?

A. No.

Q. Okay. So did you live at any time at 4469 it says SCR 99, Bay Springs, Mississippi?

[51] A. I did.

Q. And what years did you live there?

A. I'm not sure exactly what years. I married a woman from down there, and we stayed down there for a while, and that is what is on my license, but I was at the time living in Pearl.

Q. Okay. So even now that's still listed on your license?

A. It is.

Q. And it was listed on your license in February of 2017, but where were you living exactly at that time?

A. 2017, I believe still in Pearl.

Q. Okay. Now, that football season, that would have been the fall of 2016. When did that season end?

A. I'm not sure exactly, without looking at a schedule.

Q. Okay. But would it have been before Thanksgiving or --

A. I'm not, I'm not exactly sure. I don't want to give you a wrong answer.

Q. I mean, just as best you can recall, did that football season end prior to Christmas?

A. Sure.

Q. And so this is February of 2017. So this is a good two months, roughly, after Christmas. How much conduct -- how much contact did you have with Mr. Flowers between the end of football season and this particular time when you all were hanging out?

A. Not a lot.

[52] Q. How is it that he got in touch with you or you got in touch with him to discuss the sale of your car?

A. I wasn't discussing the sale of my car with him, he discussed wanting a job plumbing. I discussed the sale of my car with another gentlemen at the park, Presidential Hills.

Q. So the reason for you all getting together and hanging out was for what on that particular night?

A. He just asked if I wanted to go shoot pool and hang out, to the best of my knowledge and recollection.

Q. And how many times during that -- let's just say those first 18 days of February, had you and Mr. Flowers hung out like this on a Saturday night?

A. We haven't.

Q. What about on any other night?

A. I hung out with him a few times. We just stayed at his house and played PlayStation or something.

Q. Okay. And how, how recently to this particular night had you been hanging out with him?

A. Two weeks prior to that, maybe.

Q. Now, do you recall talking to an FBI agent on the phone about the facts of this case?

A. I do.

MR. FULCHER: Your Honor, what I would like to do, if I could, is have the witness review the FBI report on that conversation and then I would like to ask him questions as to [53] that once he's had a chance to review that.

THE COURT: Okay.

MR. GILBERT: Your Honor, I'm going to object. The witness has not indicated that he doesn't remember the conversation. That's not his statement. And so the proper way to do it would be only if the witness doesn't recall the content of the conversation, to allow him to read the document, take the document away from him, and ask him if that refreshes his recollection.

THE COURT: All right. Then I'll proceed that way. Ask the questions. Let us see what his recollection is.

MR. FULCHER: Your Honor, I disagree with Mr. Gilbert, but I'll defer to the court. I was trying to obviously expedite here.

BY MR. FULCHER:

Q. So you understood the nature and reason for the interview over the phone?

A. Yes.

Q. And you didn't mind talking to him?

A. No.

Q. And I mean I have no reason to believe otherwise at this point, but you told the agent the truth to the best of your ability?

A. That's correct.

Q. That conversation? Okay.

[54] And isn't it the case that you drove to Otha Ray Flowers' residence so that y'all could go play pool?

A. That's correct.

Q. And is it the case that you didn't remember what the exact address was for -- and I am not clear about this -- but do you remember what the exact address was for Mr. Flowers?

A. I do not.

Q. And do you recall the -- what the address was of the place where you were going to play pool?

A. I don't.

Q. Okay. Had you ever played pool with Mr. Flowers before?

A. I have not.

Q. So you had never been to any pool hall. This was kind of a new thing?

A. With him.

Q. With him. Okay.

Had you played pool locally anywhere in Jackson with --

A. Yes, the Green Room off of 55.

Q. And that's north of Northside Drive on the west side of the interstate?

A. It's north, I believe --

Q. Yeah.

A. -- off the interstate.

Q. Between Northside and Briarwood?

A. Yes, sir.

[55] Q. Okay. And right on the frontage road?

A. (No verbal response.)

Q. And do you know how -- did you know how to get to the Green Room? I mean, were you familiar with that location?

A. From where we were, no. And I'm not sure that we were going to the Green Room.

Q. Okay. You didn't know where y'all were going?

A. I didn't know what pool hall we were going to.

Q. Were you a little concerned about your safety or where you might end up if you were not at a familiar place?

A. He had not posed any threat to me and had been very friendly. You know, just two guys being casual, going to hang out.

Q. Okay. So he offered to drive and you allowed him to drive?

A. Yes.

Q. Is that correct?

Now, were y'all -- when y'all got in the car, were y'all heading to the pool hall or were you heading somewhere else first?

A. Well, after the store we were going to the pool hall.

Q. And so you all talked about going to the store first?

A. Right, we went to the store first.

Q. And what were y'all -- why were y'all going to the store?

A. Cigarettes.

Q. All right. And then from there you were going to go play [56] pool?

A. Correct.

Q. Now, I guess the other thing just to talk about, you mentioned earlier, if I understood your testimony correctly, that when you pulled into the store that the police were right there.

A. It was pretty immediate, yes, sir.

Q. So neither you or Mr. Flowers got out of the car?

A. I was attempting to exit the car to go into the store and I was surprised. The door was shut and there was a police officer there.

Q. Okay. And Mr. Flowers didn't get out of the car?

A. Did not. Until he was pulled from the car.

Q. Okay. Now, when you were getting into the car -- let me ask it this way. Let me back up.

With regard to the firearm, just to be clear, that was not your gun?

A. That's correct.

Q. And there's no reason that you knew of why a gun would have been in your car prior to Mr. Flowers getting into it?

A. No.

Q. Okay. So nobody left a gun in your car, nobody --

A. We don't have firearms around my home.

Q. I'm sorry?

A. There's no firearms around my home.

[57] Q. Okay. And there is not anybody that you know of that would have left a gun in your car for any reason?

A. No, sir.

Q. Now, I think you mentioned at some point that you were not aware that Mr. Flowers had a firearm on him when he got in your car; is that correct?

A. Correct.

MR. GILBERT: Your Honor, I'm going to object to the question. That's a mischaracterization of what he said. He's never said that Mr. Flowers --

MR. FULCHER: I'm going to object to the witness being informed as to the substance.

THE COURT: Hold on. I'm going to let him answer.

I'm going to let him answer.

Ask the question again.

BY MR. FULCHER:

Q. You can go ahead.

A. What was your question?

Q. My question was whether, whether you knew of --

MR. FULCHER: I'm going to have to ask the court reporter to read it back, if that's okay.

THE COURT: Whether when he got in the car that he knew that he had a gun on him.

BY MR. FULCHER:

Q. Did you know that Mr. -- I think previously you said that [58] you didn't know that he had any kind of firearm on him.

A. I did not see him enter my vehicle with a firearm, no.

Q. Okay. And you don't have -- I want to be -- just make sure we're okay on this, do you have any other explanation that you know of as to how a firearm could have been in your car?

A. As I said earlier, there was a guy that was asking, talking about my car, and then I started

talking about selling my vehicle, and I was thinking about selling it, and I did let him sit in my vehicle as he was exploring inside the vehicle and looking it, as, you know, you would if you were looking to buy a vehicle.

Q. And do you know who this guy was?

A. I don't.

Q. Did Mr. Flowers know who this guy was?

A. I believe so.

Q. Now, isn't it the case that when you talked to the FBI that you, you said that Mr. Flowers told you to tell the police that that wasn't his gun?

A. He said, Man, that's not my gun; tell them that's your gun.

Q. Okay. So he asked -- and it was not your gun; right?

A. It was not.

Q. Okay. So he asked you to say that it was your gun?

A. Unless he was just hoping that it was my gun. I don't think he was trying to get me to -- I don't know.

Q. Okay. I mean, you just have no way of knowing.

[59] A. Right.

Q. But you -- it wasn't your gun.

A. Correct.

Q. And you told the police it wasn't your gun.

A. Correct.

Q. Is that correct?

And did you also tell the police that if they tested the gun for prints, yours would not be on there?

A. Probably so. This was two years ago, three years ago.

Q. With regard to after your vehicle was towed, how was it that you were able to get home?

A. I had to walk home. And I didn't walk all the way home. I stopped at somebody's house, knocked on the door, asked if I could use their cell phone. They did. And I had a sister come pick me up.

Q. Okay. Now, the store was open?

A. It was, I believe, yes, sir.

Q. But you didn't go in the store to ask for help?

A. I wasn't able to make it in the store.

Q. Do what?

A. I wasn't able to make it in the store, inside.

Q. Okay. But you were sitting in the parking lot when all this happened?

A. Had just pulled into the parking lot, yes, sir.

Q. With regard to that night, was -- were you, were you unable [60] to drive the car when y'all left Mr. Flowers' residence?

A. No.

Q. Had you been drinking at all or anything?

A. I don't believe I was.

Q. And so you're at the convenience store, but instead of going in to the convenience store to ask for

help, you walked down the street to a stranger's house?

A. They pretty much told me to start walking, and they were yelling at me, pointing, start walking. So my instinct was to get away from them pretty quickly because I was very intimidated.

Q. What did the officer look like who told you that?

A. I don't remember. There was like three or four of them right there on me.

Q. You don't recall anything about those officers?

A. They were in uniforms.

Q. But as far as any identification, you don't have any other recollection?

A. No.

Q. Were you informed -- were you informed that Mr. Flowers had an outstanding warrant for his arrest?

A. He didn't tell me that.

Q. And did anyone inform you that it's standard procedure to tow vehicles involved in any kind of felony offense?

A. No.

[61] Q. Have you had any contact with Mr. Flowers since 2017 from that incident?

A. That incident, no, sir.

Q. Even up to and including today?

A. Only today.

Q. Okay. Why not?

A. I just took myself from the situation. If I didn't need to be around stuff like that, if it was going to happen like that, then apparently I was in the wrong area, so...

Q. Okay. And were you aware that Mr. Flowers had marijuana on him?

A. I was not.

Q. Did you -- were you made aware of that that night?

A. I don't think I was.

Q. Were you in a position -- were you in a location that was different from where Mr. Flowers was located while being questioned by the police?

A. I was on the opposite side of the vehicle, yes.

Q. Were you able to hear anything that was going on over there?

A. No, not really.

Q. With regard to your work in the oilfield, your current work in the oilfield, how -- what's your work schedule look like?

A. Three weeks on, three weeks off, and then I have a full-time job while I'm home.

[62] Q. Okay. And where's that full-time job?

A. I do new construction, plumbing.

Q. Now, at the time, 2017, what was your work schedule then?

A. Just normal 8:00 to -- or 7:00 till whenever we got off, during the weekdays, and Saturdays, if

something needed to be done, then we would go in and work.

Q. So in February of 2017, where were you working?

A. Hall's Plumbing.

Q. Okay. And you were not doing oilfield work at that time?

A. Not at that time, no.

Q. Did you ever mention to either the FBI or to the Jackson Police Department that someone else had been looking at your vehicle previously that evening?

A. I don't remember.

Q. You don't remember whether you said that, whether you mentioned that or not?

A. Whether I was asked or if that was something that was mentioned, I don't remember.

Q. So as far as you know, today is the first time you've mentioned that to anybody in the context of this case?

A. I believe so, yes, sir.

MR. FULCHER: No further questions, Your Honor.

MR. GILBERT: Just one redirect, Your Honor.

THE COURT: Okay.

[63] REDIRECT EXAMINATION

BY MR. GILBERT:

Q. You were just asked today, July 24th, 2019, is the first time you've ever mentioned this person

sitting in your car discussing purchasing it; is that correct?

A. I did just say that.

Q. Okay. But did you tell me that when we spoke prior to today?

A. I told you that, but I don't remember if I told the police or the FBI agent, no.

Q. And that's fine. I'm just trying to make sure that the record's clear that when you and I talked, the one time we talked about your testimony, you did mention that to me?

A. I did.

MR. GILBERT: Okay. Thank you.

That's I have, Your Honor.

EXAMINATION

BY THE COURT:

Q. Now, I want to be sure I understand the sequence. What were you doing up here that day?

A. The day of the incident?

Q. Right.

A. He called and asked if I would like to hang out.

Q. And where were you when you received that call?

A. I believe I was at home.

[64] Q. And where is home?

A. It was in Pearl at the time.

Q. In Pearl?

A. Yes, sir.

Q. So when you received that call you were over in Pearl?

A. Yes, sir.

Q. And about what time did you receive that call?

A. I don't remember.

Q. Morning?

A. Maybe evening.

Q. Evening?

A. Yes, sir.

Q. And then you went to meet him somewhere?

A. At the apartment that he was in.

Q. And did you drive over there?

A. Yes, sir.

Q. Did someone drive with you?

A. No, sir.

Q. And what did you do when you got there?

A. I went in, I spoke to his mother, said Hello, and maybe his sister that was in there, and then he asked if we wanted to go to the park, and then -- or want to go hang out in the park and, you know, go to the pool hall later, and I said sure. And he said Let me drive; I know the area better, so we don't end up in any bad spots. I said That's fine.

[65] Q. And what were you driving?

A. A Cadillac.

Q. Year?

A. 2009, I believe, CTS. Maybe a '12.

Q. Say that again.

A. It may have been a '12.

Q. 2009 or 2012?

A. Yes, sir. I don't remember the exact year model.

Q. Whose car is it?

A. It was mine.

Q. Who bought it?

A. I bought it.

Q. And from whom did you buy it?

A. An individual like three hours away in a different county.

Q. You don't know what year it was?

A. I don't remember, no, sir. I've bought many cars since then, two cars since then.

Q. Did you have a tag on the car?

A. I did.

Q. Valid tag?

A. Yes, sir.

Q. So then you went over to his place and got him?

A. Yes, sir.

Q. So how many hours or minutes were you with him before this incident occurred?

[66] A. I'd say about four, maybe.

Q. Four what?

A. Four hours, maybe.

Q. Four hours?

A. Yes, sir.

Q. So in that four-hour time period, where did you go?

A. We left from there, we hung out in Presidential Hills Park for a while, for a good little while. We stayed at his house for a minute, for a little while. We wasn't just there for a second, wasn't just in and out. We stayed there for a little bit and then we went to the park in Presidential Hills.

Q. To do what?

A. Just to hang out. He just --

Q. To do what?

A. I was riding, we drove up, and got out and he started talking to some people and I started talking to some people.

And --

Q. Well, tell me what hanging out is.

A. Socializing.

Q. And so you did what when you got to the park?

A. Socialized. Just talked amongst other people and met people.

Q. Park was full of people?

A. There was a good bit of people there, yes, sir.

Q. What day of the week was that?

[67] A. Sir?

Q. What day of the week?

A. I don't remember what day this was all on.

Q. Saturday, Sunday, Monday, Tuesday, Wednesday?

A. I'm not sure, Your Honor, exactly what day.

Q. Okay. It's the day of the incident, though; right?

A. Yes, sir.

Q. Okay. And then what happened?

A. Once we left from there, I believe we went to Citi Trends and he got an outfit or a T-shirt, or something. He bought something from there, and then when we left there we were going to go to the pool hall, I believe, and on the way to the pool hall we stopped at that convenience store.

Q. And who was driving?

A. Otha was.

Q. And you were going to go to the pool hall to do what?

A. Shoot pool.

Q. What game?

A. 8-ball or 9-ball. Whenever we got there, decide I guess.

Q. Pardon me?

A. Just whatever we decided to play once we got there we would have played, I guess.

Q. Had you played him 8-ball before?

A. Not with him, no, sir.

Q. Had you played him 9-ball before?

[68] A. With him, no, sir.

Q. This is the first time you played 8-ball or 9-ball with him?

A. With him it would have been, yes, sir.

Q. And was there going to be a slight wager on the game?

A. No, sir.

Q. And did the pool game cost anything?

A. I'm not sure if it was going to cost any money. I'm sure it would have cost a door fee to get in, and then pay by the hour. I'm not sure what their hourly fee would have been.

Q. Why do you say a door fee?

A. Like the Dream Room you have to pay a door fee to get in.

Q. And how much did the Green Room cost?

A. I think it's like $8.

Q. And then you played for how long?

A. Whenever I'm at the Green Room I would play for two or three hours at a time.

Q. Now, once you pay that entry fee you have to pay for the racks --

A. Yes, sir.

Q. -- that come up?

A. Yes, sir.

Q. So how much do you pay for rack -- per rack?

A. At the Green Room I believe it is -- for the hour, I think it's like $9 an hour, maybe. It's been a while

since I have [69] been to the Green Room. And their prices may have changed.

Q. And when you're there, do you play all comers or do you play one person?

A. Sir?

Q. When you're there, who do you play?

A. I'll play with people I go with, and then sometimes I'll end up playing with other people in the pool hall, just shoot around.

Q. And do you play with just one person?

A. Sometimes we'll play teams.

Q. You play cutthroat?

A. I didn't know they had cutthroat in pool, but I do in darts, yes, sir.

Q. Have you ever played with three people?

A. No, sir.

Q. So you played with four people?

A. Yes, sir.

Q. Just team; right?

A. Right.

Q. And so do you do that at the Green Room?

A. I have, yes, sir. It's not a -- it would be just like a game of 8-ball, and it would be like me and a buddy and him and a buddy --

Q. Right.

A. -- and he would shoot and I would shoot, and we would swap.

[70] Q. Right. So you've done that?

A. Yes, sir.

Q. Did you ever do it with him?

A. No, sir.

Q. So you never shot pool with him before?

A. No, sir.

Q. So you don't know how good he was?

A. No, sir.

Q. How did you all decide to go shoot pool?

A. He had just brought it up. I asked if he wanted to go back to my house and play Xbox, and he was like, Well, do you want to go shoot pool? And I was like, Yeah, we can go shoot pool. I enjoy shooting pool.

Q. Okay.

THE COURT: All right. Y'all have any more questions on this matter?

MR. GILBERT: I don't, Your Honor.

THE COURT: Over here?

FURTHER CROSS-EXAMINATION

BY MR. FULCHER:

Q. The judge was asking you about the time line. I'm a little bit unclear about one thing, and I guess I'm trying to follow up on that.

You said there were four hours between the time that you went to his house and the time y'all ended up at the [71] convenience store?

A. To the best of my knowledge, that I can remember, that's probably about the time frame it was, yes, sir.

Q. Okay. And the guy who looked at your car looked at your car kind of at the beginning of that?

A. Yes.

Q. Okay. So then there's a little less than four hours between that occurring and when you were at the convenience store?

A. We stayed at the park for a while.

Q. Okay. But during any of that time you didn't notice a firearm in your vehicle at any time, did you?

A. I did not. But I also wasn't looking for one.

Q. You didn't see one on the seat?

A. Correct.

From what the other -- from what I understood, it was on the floorboard, not the seat.

Q. You said socializing at the park. Were there people drinking beer?

A. I'm sure. I don't remember exactly what they were drinking.

Q. Okay. Were there people smoking weed?

A. Not that I seen, no.

Q. So what were people doing? This would have been roughly 4:00 o'clock to 8:00 o'clock on a Saturday night. What exactly [72] were people doing there socializing?

A. Well, you know, you play basketball, you hopscotch. It's a park. So you just do things like that.

Just -- I don't know if they weren't smoking weed or drinking beer, just because there was a bunch of people there in the daytime.

MR. FULCHER: And, Judge, I hate to, I hate to divert from your line of questioning.

BY MR. FULCHER:

Q. I just saw you pull your hand up and there are some tattoos on your hands.

A. Um-hum.

Q. What are the -- what's the meaning of those tattoos?

A. There is no meaning behind them. I just enjoy tattoos, and I have a friend that I grew up that owns a tattoo shop.

Q. If you could just describe what your tattoos are.

A. One of them's a wolf because my grandfather raised wolves. I like to play cards and I like how some of them look. I like music. I'm a Christian, so I have a cross. I have 601 with Mississippi on it because I'm from Mississippi and 601 was just an old-school thing. And I have a Mayflower and I have Life and One Love down my finger, and I have a half on my hand to remind me to be more than the man that my dad was.

THE COURT: I'm sorry, could you slow down and tell me that part again?

THE WITNESS: Which one?

[73] THE COURT: Start back over that.

THE WITNESS: So I have a wolf because my grandfather collects -- raised wolves.

THE COURT: All right. Now speak into the microphone, please.

THE WITNESS: I have a wolf because my grandfather raised wolves, on my right hand.

I have a heart and a crown because I'm a Leo. I like the way the spades look, the music note because I like music. I have a cross because I'm a Christian. I have the 601 with the Mississippi inside of it because I live in Mississippi and 601 is from back in the day the 601 area code.

I have a dove because it represents freedom.

I have a magnolia because our state flower is a magnolia.

I have One Love down my wedding finger because I can't wear a wedding ring.

I have a dove with Life on it because it represents when they threw the doves -- or when the doves flew when Jesus arose, so Life. I have Half to remind me to be more than the man -- or half the man that my dad was.

And I have multiple more. I have angels on my shoulders because I'm a Christian. I don't know. I have a cross here. I have another dove.

But none of them are gang related or leaning toward gangs, no, sir.

[74] BY MR. FULCHER:

Q. Okay. Tattoos are just kind of one of your things?

A. Yes, sir.

Q. Okay. That's fine.

MR. FULCHER: No further questions, Your Honor.

THE COURT: All right. Cross-examination?

MR. GILBERT: No, Your Honor.

THE COURT: All right. You can step down.

THE WITNESS: Back to the room over there?

THE COURT: Any side anticipate recalling this witness?

MR. GILBERT: I do not, Your Honor.

MR. FULCHER: I do not, Your Honor.

THE COURT: You can stay in the courtroom if you want to, or be excused, either one.

THE WITNESS: I can go home?

THE COURT: If you want to.

THE WITNESS: Okay.

MR. GILBERT: Thank you for your time.

THE WITNESS: Yes, sir.

THE COURT: All right. Mr. Gilbert.

MR. GILBERT: That's all I have, Your Honor.

THE COURT: What says the prosecution?

MR. FULCHER: Your Honor, now that defense has rested, I move to strike the affidavit of Otha Ray Flowers. It was [75] submitted as Exhibit A to the motion.

THE COURT: You move you to strike the affidavit of what?

MR. FULCHER: Of the defendant, Otha Ray Flowers.

THE COURT: Okay. Response?

MR. GILBERT: On what legal basis would he strike an affidavit from the pleading? There's no legal basis to do that. We have had testimony in the record. You've got his affidavit.

THE COURT: Whose affidavit?

MR. GILBERT: Mr. Flowers'. You don't have to consider Mr. Flowers' affidavit; he didn't testify. We've got testimony from two witnesses in the record.

I guess I don't care if you strike the affidavit, to be honest with you, but I think it needs to be attached as part of the record. What are we talking about? This makes no sense. Strike it on what legal basis? It's part of the pleading.

THE COURT: Make your argument.

MR. FULCHER: Your Honor, I move to strike it on the grounds that it is, first of all, that it is hearsay, so a defendant can't come into this court and submit an affidavit and not be subjected to cross-examination. There is no indication that the witness is unavailable. An argument could be made, of course, that the defendant has at least as to the matters therein waived his Fifth Amendment right by providing [76] an affidavit and has chosen not to remain silent. So, you know, I think there is certainly a problem with that as well. But it is just flat out hearsay.

Second of all, it's entirely inconsistent with the testimony that has been presented both by the government and by the defendant. So it's inherently unreliable. There are multiple reasons why it's

unreliable, but those can be fleshed out, if need be, at another time.

So for those reasons I move to strike the affidavit and move that the court not consider the affidavit of Otha Ray Flowers in any way whatsoever, and that it not be considered evidence for this motion or this hearing.

THE COURT: Mr. Gilbert, are you asking the court to consider this as substantive evidence?

MR. GILBERT: No, Your Honor. The affidavit's attached to make sure that the court's aware that there is an issue of material fact that requires a hearing, Your Honor. Once again Mr. Fulcher cited no law at all in support of his argument, but absolutely, Your Honor, if the court deems that that's something it shouldn't consider, I have no problem with it. I am perfectly content for you to make your ruling based on the record that's before you that came from the witness stand today.

THE COURT: All right. That's what I will do then. I'll make a ruling from the evidence that came from the [77] witness stand.

Okay?

MR. GILBERT: That's fine, Your Honor.

THE COURT: Mr. Fulcher?

MR. FULCHER: Your Honor, I would like to call Officer Stanton back briefly in rebuttal.

THE COURT: All right. Call him back.

Mr. Stanton, you previously were sworn. Do you understand that you're still under oath?

THE WITNESS: Yes, sir, I do.

THE COURT: Take a seat.

Proceed.

MR. FULCHER: Thank you, Your Honor.

ERIC STANTON,

having been previously duly sworn, testified in rebuttal as follows:

DIRECT EXAMINATION

BY MR. FULCHER:

Q. Officer Stanton, if you could, explain to the court why was Mr. Mayo's vehicle towed on the night in question?

A. It would have been towed as a part of our standard procedure. Anytime that a felony has occurred and a vehicle is involved with it, we have it towed in case the detective wants to come out and examine the vehicle or things of that nature.

The standard procedure for our detectives to release the [78] vehicle that a felony has occurred in.

MR. FULCHER: Tender the witness, Your Honor.

THE COURT: Cross-examination?

MR. GILBERT: I don't have any questions, Your Honor, on that point.

THE COURT: One question on something else.

THE WITNESS: Yes, sir.

EXAMINATION

BY THE COURT:

Q. Where exactly was the firearm found?

A. Directly under the seat of where Mr. -- in the seat Mr. Flowers was sitting in. Once I removed him from the vehicle, it was in plain view. He was sitting on top of the firearm.

Q. He was sitting on top of the firearm?

A. Yes, sir.

Q. All right. And did you do a report on this?

A. Yes, sir, it's in my report.

Q. And how did you report it in your report?

A. Upon removing -- if I can --

Q. Go ahead.

A. Upon removing Flowers from the vehicle, I observed a silver-in-color Kimmel Industries Model 5000 .32 caliber revolver, and containing five rounds of ammunition and two spent casings on the front driver's seat where Flowers was [79] previously sitting.

THE COURT: Any questions from the prosecution on this?

REDIRECT EXAMINATION

BY MR. FULCHER:

Q. I would just ask if you could read that sentence immediately following that.

A. The firearm was in plain view.

MR. FULCHER: Nothing further, Your Honor.

THE COURT: Cross-examination?

MR. GILBERT: No, Your Honor.

THE COURT: All right. You can step down. Thank you.

THE WITNESS: Thank you, sir.

THE COURT: You can remain in the courtroom if you want to. Does either side anticipate calling him for anything else?

MR. GILBERT: No, sir.

MR. FULCHER: No, Your Honor.

THE COURT: You can stay in the courtroom if you wish.

THE WITNESS: Thank you, sir.

THE COURT: Anything else from the prosecution?

MR. FULCHER: No, sir. The prosecution finally rests.

THE COURT: Defense, anything else?

MR. GILBERT: No, Your Honor.

THE COURT: All right. Then I'll take argument.

[80] MR. GILBERT: Can I have the ELMO now that it works?

THE COURT: Yeah, I understand it works.

MR. GILBERT: All right. Your Honor, the testimony here is absolutely clear about what happened. The officer, by his own admission, and four or five other officers observed Mr. Flowers and Mr. Mayo for 15 seconds or less sitting in the parking lot of an open convenience store. They converged upon them with blue lights on and blocked them in where they could not leave, they were in the vehicle. Blocked them in where they could not leave. Any reasonable

person would assume right then and there that their -- that their freedom of movement was curtailed and they were not free to go.

The officer confirmed that he never informed Mr. Flowers that he was free to go. The inception at its beginning was an illegal seizure. The act of parking the police cars with the blue lights on and having multiple officers exit their vehicles to approach this vehicle for the admitted purpose of attempting to determine whether these two people were about to commit a crime in a high-crime area is an illegal seizure.

Nothing else beyond that point matters.

There is no -- there has been -- there are no contradictory facts about what I just told you.

Had the police officers pulled up somewhere else, had they pulled up and parked and not obstructed the means of egress of the vehicle and then sought to approach the vehicle, we'd be [81] talking about a completely different story. At that point the smell of marijuana would probably matter.

Now it's the court's prerogative to decide how much credibility you give to any particular witness, but the notion -- but what we have in the record is no evidence of any burning marijuana in that vehicle. None whatsoever. And we have a very small amount of marijuana in somebody's pocket wrapped in a plastic bag.

And I submit to the court that that is just incredible testimony that someone can actually smell that small amount of marijuana approaching the vehicle.

I want the court to consider the years of experience it has in addressing search and seizure cases with dog sniffs.

Your Honor, law enforcement resorts to highly trained canines to utilize their sense of smell, to find massive amounts of marijuana in back seats and in trunks, because the human olfactory sense is not strong enough to smell it. I'm not telling you anything you don't know.

I've been in a police car, I was a cop, and I've approached cars, and it is absolutely impossible that that marijuana was the source of any detectable odor to a human being. It is incredible. It is simply not true.

But it doesn't matter. You don't even have to consider that, because these two people, Mr. Mayo and Mr. Flowers, were seized as soon as they were surrounded by the police with blue [82] lights on and approached en masse. They were not free to leave, and nobody in this room would assume that they were, under those circumstances. And the testimony and the pleadings are clear, there was no reasonable suspicion at the inception of the interference. None. This is, this is an illegal seizure because of the way it was done.

Because it's an illegal seizure, everything that was found after the fact should be suppressed.

Thank you, Your Honor.

THE COURT: Okay. Response.

MR. FULCHER: The best that the defense has is to get up here and say don't believe somebody, when the evidence is very clear as to what actually happened.

Now, the ultimate question here is whether police officers have the right and the ability to question somebody in a public place in front of a convenience store and to ask for identification and to engage members of the public. And it's very clear that police officers do have that right and that ability without running afoul of the Fourth Amendment.

So that -- there is a long line of cases that are very clear on that. I've -- we have cited those in our response, and the Fifth Circuit has, for example, as recently as 2018 in the Escalon case stated that -- or made a finding that police officers didn't, didn't seize the defendant when they approached him and had a consensual encounter during which they [83] developed probable cause to arrest him.

So there's -- this is, this is a standard police procedure. The Fourth Amendment protects people from unreasonable searches and unreasonable seizures, but there is a long line of case law that makes it clear that a public place, a convenience store parking lot, is a whole different ball game than going onto somebody's property or going into somebody's house.

But even with houses, the Fifth Circuit has followed what all the other courts have done consistently over time, and that is, they've approved a technique that's called knock-and-talk. You can go to somebody's house and knock on the door if you're law enforcement and talk to them. This is no

different. This is a vehicle in a public place. The officer went up to the window and smelled the odor of marijuana. Marijuana was in fact found in the defendant's pocket. But whether it's found or not, even the odor of marijuana, even if no marijuana is found, that's enough, the case law is clear, for probable cause to then search the entire vehicle and search the people in it.

So this is a case where the smell of marijuana -- and it's clear in this case it was not burned marijuana. Mr. Gilbert has appealed to the court's experience. I'll do the same. There is -- there are all sorts of types of unburned marijuana. Hydroponic marijuana, for example, is incredibly smelly. There's, there's all sorts of different factors at play. This was February 18th. This is during the winter months. Windows [84] are rolled up. People stay inside. People are not-- you know, the drive from the Presidential Hills park to this area over at Road of Remembrance is not a short one. So there's plenty of opportunity to -- for the smell to build up and for that smell to be obvious.

The -- ultimately the question is whether this was some form of illegal seizure and going up to this particular window, and it was not.

So the defendant's Fourth Amendment rights were not violated in any way whatsoever.

The court should deny the motion.

Thank you.

THE COURT: All right.

Counsel?

MR. GILBERT: I don't have anything further, Your Honor.

THE COURT: Okay. All right. Thank you for your arguments.

I'm prepared to rule.

The submissions of the parties adequately set out the case law that concerns us here. We are concerned with the Fourth Amendment and its protections here, and then whether there has been a violation of the Fourth Amendment that would result in a seizure and thereafter a suppression of all that is found with regard to the actions of the police officers in question.

[85] The court is to make its ruling on those matters which are undisputed or so clear to the court that the court can adjudicate the issue at this phase of the pretrial proceeding.

The primary argument of defense is that this is a seizure, that the actions of the officers in approaching this automobile and thus parking in the strategic manner that ended up, as defense contends, blocking in the defendant's automobile and the defendant and his passenger.

The exhibit in question shows that the officers parked behind the defendant's automobile. And the testimony was that this vehicle was parked there for a period of time, under surveillance, during which time no occupant exited the vehicle and no one visited the vehicle, and the vehicle presented a question in a high-crime area of his purpose in being in the area and being immobilized and without any activity that could be observed by the officers attendant to the defendant's actions or the actions of the passenger.

So the prosecution points this court's gaze at the area, high-crime area, at the circumstances I just described, which would indicate supposedly, from the viewpoint of the officers, a matter of suspicion. Thereafter, says the prosecution, the officers had a right to check into the activity to discern whether the automobile and its occupants pose a potential criminal threat against any businesses in the area or, for that matter, against any individual.

[86] This is akin to a stop and frisk, which would be actionable where an officer would have a question presented on a suspicious circumstance and where the officers are warranted in seeking to resolve the suspicious circumstance.

Whether a stop in such an instance amounts to a seizure depends upon the factors all involved with the circumstance.

The case law is replete with assertions that any such stop has to be brief in duration, aimed specifically at answering the suspicious question, and going no further, unless probable cause submits itself during the course of that resolution to allow the officers to go further in their actions.

So then the premier question and the initial question here is did the officers, under these circumstances, have a right to resolve a suspicious circumstance? Based upon what this court has heard, they did. They could resolve a suspicious circumstance.

The next question then is, in resolving that suspicious circumstance, whether the detention was lengthy enough or without basis enough to transmute

that stop, that brief investigation into an arrest type situation into a seizure at the time. The court holds that it was not.

There is no proof that this defendant nor the passenger requested permission to leave. There is no assertion that they made a nonverbal request to leave, that is, by their actions showed that they wanted to leave.

[87] There is no evidence presented here at this stage that the stop, the investigatory aspect of the initial approach of the officers ever evolved into a seizure. Because before any actions were taken against this defendant, the officer said he smelled marijuana in the vehicle.

Much has been made as to whether an odor would have emanated from the vehicle strong enough to meet the description proposed by the officer. That becomes a question of fact to be resolved, but in resolving such a question one can look at different factors. So far the evidence has focused on the marijuana that was in the defendant's possession, and the question that has been presented is whether that small amount of marijuana could generate a strong odor of marijuana.

Then there are some other things that are available, or possible, that have not been discussed at all. One, whether the occupants had smoked marijuana before and whether the smoking of marijuana prior to the stop by the police had impregnated itself, that is, the odor of marijuana, into the clothes of the defendant and/or his occupant, or

whether that odor had impregnated anywhere else in that car.

It didn't have to come from the marijuana that was in defendant's pocket. It could have emanated from somewhere else in that vehicle if they had, while parked there, smoked marijuana. So the odor may have come from another source other than the pocket of the defendant.

[88] Nevertheless, the officer said that he smelled marijuana. That makes it a fact question. And I just throw out this other possibility, only to say there is another possible explanation. But nevertheless, the court ends up by stating that the testimony is not incredible. Therefore, the court can take it as a factual assertion here, and this will be a question of fact were it to come down to a trier of fact to make some firm determination on the matter. But at present, for the purposes of this motion, this court accepts the statement of the officer.

And once the court accepts that statement, then the court necessarily arrives at its view that the officer had a right to arrest the defendant at that time. And once the officer took the defendant out of the car, then the officer could observe by plain view anything in the car, not to mention the officer would have the right to conduct a search incident to an arrest.

But the officer stated that he saw in plain view a weapon, a firearm, and that the firearm was on the seat of the car where this defendant was seated.

I asked the last witness where did he opine that the weapon was located? He said that he understood that it was on the floorboard. That's why, when the officer

here testified on redirect, I asked him the same question, Where was the weapon? He then went to his police report and read that the weapon was on the seat, seated under the defendant. Therefore, he [89] concluded, since it was in plain view, he could retrieve the weapon.

The witness in support of the defendant said that he didn't see a weapon. But then his credibility is questioned and challenged by his assertion that they went out to the park, got out of the car and fraternized with people at the park. If he got out of the car and if the firearm was in the seat of the car where this defendant was seated, he would have seen it.

If the firearm indeed was on the seat, where the officer said it was, then the question would be why didn't this passenger ever see it? Under, under what circumstances would that firearm have been placed under this defendant where his passenger, who had been with him for some four hours, had gotten out of the car with him to go and fraternize, socialize with persons in the park and then get back in the car would not have seen it. So the credibility of that witness is called into question.

Meanwhile, the court looks at the officer's testimony, that he observed a firearm in plain view. Of course under the doctrine of plain view a matter in contraband may be seized where an officer has a right to be where he is. And here the officer said that he saw it in plain view. But even if the officer had not relied upon the doctrine of plain view, he could have relied on the doctrine of a search incident to a lawful arrest. The arrest was lawful and a search, if it be [90] that, of reaching into the vehicle and obtaining the

firearm would be a search incident to the arrest and lawful.

So then with regard to all of the matters that are hereby raised, the court then determines that there is enough information here to warrant the court in denying the motion.

This is your motion, Mr. Gilbert. Is there anything else on your motion?

MR. GILBERT: There is not, Your Honor.

THE COURT: Mr. Fulcher, is there anything else on this motion?

MR. FULCHER: Nothing on this motion, Your Honor.

THE COURT: Then I turn to the next matter. And that is the matter of a trial.

Adam, when's this case set for trial?

LAW CLERK: This case is currently set for trial on Monday, August the 14th, at 9:00 o'clock in the morning.

THE COURT: Then, Mr. Gilbert, will you notify us in the next two days whether your client is still going to trial?

MR. GILBERT: Absolutely, Your Honor, we can do that.

THE COURT: All right.

MR. GILBERT: We'll do the same for the other case as well, Your Honor.

THE COURT: Okay.

MR. FULCHER: And, Your Honor, I do want to inform the court, I have a previously set trial in Hattiesburg for [91] August 19th.

I guess my request would be, in the event that either or both of these cases go to trial, that we could perhaps set a pretrial conference on Monday or at some other point, discuss the scheduling, a possible work-around.

THE COURT: And then after Mr. Gilbert reaches his conclusion as to how he wishes to proceed, then I will proceed after that to have a status conference.

MR. GILBERT: August 19th is not a date certain. That's the beginning of your trial term.

THE COURT: That's the beginning of the trial term. And Adam?

LAW CLERK: That was actually a date certain for this case.

THE COURT: That's right.

LAW CLERK: We do have a docket call on Monday for the August trial term at 1:30.

THE COURT: Okay, then.

LAW CLERK: This case is not set on that because we had this motion to suppress.

THE COURT: Then why don't you all attend that, that session?

MR. GILBERT: Just make an announcement then, Your Honor?

THE COURT: That's right.

[92] MR. FULCHER: I guess it would be helpful if we could know by the close of business on Friday.

There is one matter I guess I would like to bring up before the court in the presence of defense counsel and his client. At least I believe in the context of the other case, perhaps in this case, there was a mention by Mr. Gilbert of the possibility of a -- entering an open plea and attempting to preserve an appeal of the suppression motions that he filed. Having -- I've checked on it. That would require the consent of the government for any kind of conditional -- any sort of conditional plea, which the government would not agree to.

And I believe Mr. Gilbert has taken the position that he can enter an open plea and still preserve any of those appeal rights.

We disagree, and I simply want to make sure that that is brought forward both to the court and to Mr. Gilbert and, more importantly, for his client to hear, because I think that would be an issue, potentially.

THE COURT: We can table this issue until Mr. Gilbert talks to his client and determines how he wishes to proceed.

MR. GILBERT: That's fine, Your Honor.

THE COURT: And then, after that, if you have some notions along these lines, then you can bring them up then, all right?

MR. GILBERT: Thank you, Your Honor.

[93] THE COURT: Okay. Gentlemen, thank you so much.

MR. GILBERT: Thank you, Your Honor.

LAW CLERK: All rise.

(Proceedings concluded at 3:57 p.m.)