No. 25-

IN THE

# Supreme Court of the United States

MARK BOLLING,

*Petitioner,*

*v.*

UNITED STATES,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is:

> Whether the presence of impeachable fact is required under *Nix* before an inevitable discovery analysis can be allowed in the context of a Fourth Amendment search or seizure.

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Mark Bolling was a Defendant and Appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation. The caption of this case contains the names of all parties.

## RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii).

*United States v. Bolling*, United States District Court for the Southern District of West Virginia (2:21-cr-00087-1)

*United States v. Bolling*, United States Court of Appeals for the Fourth Circuit (23-4572)

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Mark Bolling, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINION BELOW

The Fourth Circuit's published opinion (*United States v. Bolling*, No. 23-4572 (4th Cir. June 16, 2025) affirming the trial court's application of the inevitable discovery doctrine, is attached at Appendix 1a. The memorandum decision at the district court denying the motion to suppress is at Appendix 24a. The order denying Mr. Bolling's petition for rehearing *en banc* is at Appendix 43a.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions, and specifically, affirming the trial court's use of the inevitable discovery doctrine to justify a warrantless search and seizure, was entered on June 16, 2025. After this decision was rendered, prior panel counsel took new employment and had to be relieved. Current counsel was appointed, and extensions were given, but eventually, a timely petition for rehearing and rehearing *en banc* was filed on August 27, 2025. The motion for rehearing was denied on September 9, 2025, and the mandate was issued on September 17, 2025.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

**Issue I: Unlawful Search and Seizure and the Inevitable Discovery Doctrine.**

*U.S. Const. amend. IV.*

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.

## STATEMENT OF THE CASE

On September 19, 2020, Mr. Bolling was stopped by Patrolman Farley, a 20-year-old with one year of experience. The patrolman's testimony was inconsistent at best. After at least twenty-five (25) minutes into the stop, Farley removed the passengers from the vehicle. He decided that after 25 minutes, he would make everyone exit the car. The patrolman justified this action because Bolling was too nervous and because two other passengers were present. (not because Farley was going to have it towed)

Farley's police report did not indicate his intent to tow the vehicle for lack of insurance. However, at the motions hearing, Patrolman Farley testified that he decided to have the vehicle towed because Bolling could not provide proof of insurance, which was both his typical practice and the Fayetteville Police Department's policy.

The Court denied Bolling's Motion to Suppress based on a finding that the vehicle had to be towed and that the universe of facts known to Farley at that point was sufficient to generate a reasonable suspicion of illegal activity. Those facts include 1) a car speeding at almost 3:00 a.m.; 2) a driver who is unable to provide a driver's license, registration, or proof of insurance for that vehicle; 3) a hole in the steering wheel where the airbag should be; 4) the fact that the vehicle was a rental; 5) a suspicious travel route; and 6) a driver who acted nervous.

The Panel did not address whether the officer had reasonable suspicion to justify the search; instead, it upheld the search's validity based on testimony regarding the unwritten tow policy for those who fail to provide insurance. Appendix 4a, 7a, 8a.

The jury then convicted Bolling on Counts Two, Three, Four, Five and Six of the indictment against him. On August 31, 2023, Bolling was sentenced to 180-month sentence of imprisonment on Count 2; 180-month sentence of imprisonment on Count 3; 120- month sentence of imprisonment on Counts 4 and 5; and, 120-month sentence of imprisonment on Count 6, all to run concurrently with one another. A timely notice of appeal was filed on September 11, 2023.

Oral argument was held on September 27, 2024. On June 16, 2025, the Fourth Circuit affirmed the judgment of the District Court. *See* Appendix 1a. In its opinion, the Fourth Circuit relied on its precedent in *United States v. Bullette*, 854 F.3d 261 (4th Cir. 2017). Appendix 7a.

Following the affirmation of the judgment and sentence in his case, Mr. Bolling filed a petition for panel rehearing and rehearing en banc on August 27, 2025. Mr. Bolling appealed several issues related to his trial but relied on only one for his petition for rehearing. That is, the trial court erred in allowing the police in this case to conduct an unlawful search and seizure and inappropriately applied the inevitable discovery doctrine without requiring impeachable facts. The petition for rehearing was denied on September 9, 2025. This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE PETITION

It is a tradition in American criminal jurisprudence for law enforcement to rely heavily on previously unavailable precedent to their advantage. Only once has this Court addressed inevitable discovery, forty years ago, in *Nix v. Williams*, but it has had a lasting impact on the privacy rights of Americans. *See Nix v. Williams*, 467 U.S. 431 (1984). A quick search of federal appellate court databases searching for the combined terms of "Nix" and "inevitable discovery" turns up one thousand seven hundred and forty-six cases. (1,746)(This does not include any state appellate decisions).

In the absence of further guidance after Nix, federal circuit courts have applied meaningfully different standards to try to implement the doctrine. *See The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 U. Pa. L. Rev. 1, 15, 16 (2022).

The inevitable-discovery exception requires an "untainted" investigation that establishes a "genuinely independent source of the information and tangible evidence at issue." *Murray v. United States*, 487 U.S. 533, 538, 542 (1988). And inevitable discovery must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." *Nix*, 467 U.S. at 444 n.5.

The panel in Mr. Bolling's case, and the precedent before it in *Bullette*, did and do not require a "demonstrated historical fact[ ] capable of ready verification or impeachment" before making a finding of inevitable discovery. *See Nix*, 467 U.S. at 444 n.5.

There is a circuit split and differing analyses among the circuits, and this Court should resolve it. *Nix* demands impeachable facts before excusing a Fourth Amendment violation.

## I. FOURTH CIRCUIT PRECEDENT IN *BULLETTE* CONFLICTS WITH SUPREME COURT PRECEDENT IN *NIX* AND SOME SISTER CIRCUITS BECAUSE THE FOURTH CIRCUIT COURT PRECEDENT DOES NOT REQUIRE THE ELEMENT OF IMPEACHABLE FACTS, WHICH WAS ANTICIPATED TO BE A REQUIREMENT UNDER THE *NIX* DECISION

A plain reading of the motions hearing below shows, at best, a moving target with respect to Patrolman Foley's motives during the stop of Bolling's car. This is precisely the type of case where impeachable facts are crucial to protecting constitutional rights.

Foley's report stated that "Based on the nervousness of Mr. Bolling and the fact that there were two other subjects in the vehicle, I requested the passengers to exit the vehicle." At the hearing, Farley explained that he had decided early on during the stop that the car would need to

be towed due to Bolling's failure to provide proof of insurance. He testified that he consistently tows vehicles without proof of insurance.

Patrolman Farley made this decision because Bolling could not provide proof of insurance, which was both his typical practice and the Fayetteville Police Department's policy. At the motions hearing, the Government provided no contemporaneous proof that Patrolman Farley intended to tow the vehicle for lack of insurance.

A panel of the Fourth Court justified inevitable discovery in this instance based on an impeached motive for the stop (no proof of insurance, which was not mentioned as justification in his report) and an unimpeachable policy reason. (an undocumented oral police policy to tow vehicles when there is no proof of insurance)

Limiting examination to impeachable facts "places an important limit on potentially quite permissive speculation by the courts of what police may or may not have done, which could have led to the discovery of evidence." Tonja Jacobi & Elliot Louthen, *The Corrosive Effect of Inevitable Discovery on the Fourth Amendment*, 171 U. Pa. L. Rev. 1, 15, 16 (2022).

The Second Circuit cites to this impeachable facts requirement, noting that this "focus on demonstrated historical facts keeps speculation to a minimum, by requiring the 'district court to determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred.'" *United States v. Stokes*, 733 F.3d 438, 444 (2d Cir. 2013) (citation omitted).

The Third and Sixth Circuits have also invoked the requirement of impeachable facts to limit judicial speculation. *See, e.g., United States v. Bradley*, 959 F.3d 551, 557 (3d Cir. 2020); *United States v. Cooper*, 24 F.4th 1086, 1094 (6th Cir. 2022).

In Mr. Bolling's appeal, the Fourth Circuit panel cites its own decision in *Bullette*, which shows precisely how "inevitability can expand when no emphasis is placed on historical impeachable facts." *Corrosive Effect of Inevitable Discovery* at 17, citing to *United States v. Bullette*, 854 F.3d 261 (4th Cir. 2017). In *Bullette*, this Court justified the warrantless search because the agent testified that it was standard practice to impound and inventory vehicles when no one was present. *Id*. at 264, 266. This conclusion did not require impeachable facts, as there was no requirement for a written inventory policy from this Court. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (hinging the lawfulness of an inventory of the contents of a car on following standard police procedure).

In *Bullette*, there was no standardized criterion for conducting the inventory search that the defendant could use as a reference point for impeachment. Trial counsel in Bullette and here in Bolling, had no real opportunity to challenge the justification for the search. This Court's rulings are inconsistent with those of its sister circuits on the impeachable evidence requirement necessitated by the *Nix* decision.

Here, trial defense counsel was able to impeach the officer regarding his alleged justification for the search, specifically that there was no proof of insurance, as it was not included in his police report. However, trial defense counsel could not reasonably impeach the officers on the alleged police policy, which ultimately favored the police, because there was no written proof that such a tow policy existed regarding proof of insurance.

West Virginia law requires car rental companies to have liability insurance for their cars. W.Va. Code §§ 33-6-29; 17D- 2A-3; 17D-4-2. The law does not require rental car drivers to have separate insurance. West Virginia law also does not require towing of vehicles when no proof of insurance is provided. W.Va. Code § 17D-2A-4(b) provides, "Provided, that an insured shall not

be guilty of a violation of this subsection (b) if he or she furnishes proof that such insurance was in effect within seven days of being cited for not carrying such certificate or other proof in such vehicle." When no law allows it or requires it on its face, the very least a police department can do is provide a written formal policy.

## CONCLUSION

The most likely place for anyone to come into a stressful and impactful police interaction in this country is during a car stop. There has been a significant surge in police scrutiny over the last several years. And with so much at stake, this is reasonable. Police policy is primarily driven by what they can get away with before their cases are dismissed or their evidence is excluded:

> The desperate need for this intervention is amplified by the fact that law enforcement is not an idle bystander. Instead, their tactics evolve with the law, meaning a doctrinal backstop for police misconduct like inevitable discovery can—and does—undermine jurisprudence that the Supreme Court carefully develops in other domains of criminal procedure.

*Corrosive Effect of Inevitable Discovery* at 74-75.

Allowing unimpeachable evidence to justify unconstitutional searches can lead to police misconduct. If a police officer violates a written inventory, you can challenge him in court. If he violates a written personnel policy, you can have him investigated. If he says you violated an unwritten oral policy, there is nothing you can do about it.

It is a matter of exceptional importance that this Court lay a strong groundwork to protect against police misconduct. Especially since minorities in this country are even more likely than others to be exposed to excessive policing. *See* Steven J. Briggs & Kelsey A. Keimig, *The Impact of Police Deployment on Racial Disparities in Discretionary Searches*, 7 RACE & JUST. 256, 270 (2017) ("[S]tops involving Black drivers are more likely to include discretionary searches.").

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 23-4572**

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MARK BOLLING,

Defendant – Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. David A. Faber, Senior District Judge. (2:21-cr-00087-1)

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Argued: September 27, 2024 Decided: June 16, 2025

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Before DIAZ, Chief Judge, and HEYTENS and BENJAMIN, Circuit Judges.

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Affirmed by unpublished opinion. Judge Benjamin wrote the opinion, in which Chief Judge Diaz and Judge Heytens joined.

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**ARGUED:** Brian David Yost, HOLROYD & YOST, Charleston, West Virginia, for Appellant. Jennifer Rada Herrald, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** William S. Thompson, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

DEANDREA GIST BENJAMIN, Circuit Judge:

Mark Alan Bolling was convicted of various charges related to the possession of drugs, guns, and ammunition. Before trial, Bolling filed several motions, including a motion for a *Franks* hearing, multiple motions to suppress, and multiple motions to dismiss counts of the indictment. At trial, Bolling moved to strike a juror for cause, and after trial, Bolling filed a motion for judgment of acquittal. Bolling challenges the district court's denial of each of these motions. For the reasons below, we affirm.

I.

On September 14, 2020, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began investigating Bolling after identifying him as a convicted felon who was both distributing heroin and methamphetamine and in possession of firearms. Throughout the investigation, the ATF conducted interviews with a confidential informant, pulled tax records, requested a mail watch on Bolling's residence, installed a pole camera overlooking Bolling's residence, and conducted a controlled buy through the confidential informant.

On September 19, 2020, police officers with the Fayetteville Police Department stopped Bolling on Route 19 in the city of Fayetteville in Fayette County, West Virginia for speeding. This stop was coincidental and unrelated to the ATF investigation. During the stop, officers searched the car and recovered approximately 100 grams of methamphetamine, 30 grams of heroin (which was later identified as fentanyl), ammunition, and over $7,000 in cash. Officers also seized a cell phone from Bolling which

they transferred to the ATF on September 23, 2020. Bolling was arrested at the scene, and his cell phone and residence were later searched pursuant to warrants.

Bolling was ultimately charged with: (1) distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1); (2) possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1); (3) possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1); (4) felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (5) felon in possession of multiple firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and (6) knowingly possessing a firearm, as defined by 26 U.S.C. § 5845(a)(7) and 18 U.S.C. § 921(a)(25), specifically a firearm silencer and a firearm muffler, in violation of 26 U.S.C. §§ 5861(d) and 5871. Following a jury trial, Bolling was convicted of Counts Two through Six.

## II.

We begin with Bolling's motions to suppress. "When reviewing a district court's ruling on a motion to suppress, 'we review factual findings for clear error and legal determinations de novo' " and " 'construe the evidence in the light most favorable to the prevailing party.' " *United States v. Lull*, 824 F.3d 109, 114–15 (4th Cir. 2016) (quoting *United States v. Lewis*, 606 F.3d 193, 197 (4th Cir. 2010)).

### A.

The parties dispute whether the police officer who stopped Bolling, Patrolman T.L. Farley, had reasonable suspicion to prolong the stop. Bolling concedes that he was

properly stopped for speeding but argues that Farley violated his Fourth Amendment rights by delaying the "normal activities" involved in a traffic stop—namely, running his license—and by extending the stop without reasonable suspicion to perform a dog sniff. Appellant's Br. at 33, 36, 39. The Government responds that the district court correctly found that the purpose of the initial stop and its permissible associated safety checks (i.e., requesting Bolling's driver's license, vehicle registration, proof of insurance, and checking for outstanding warrants) were not completed prior to the search because Bolling had not demonstrated that he could lawfully drive the car. Appellee's Br. at 28–29 (citing *Rodriguez v. United States*, 575 U.S. 348, 355 (2015)). The Government contends that while this failure alone justified extending the stop, Farley also had reasonable suspicion, further permitting the extension. *Id.* at 29–30. For the reasons explained below, we need not address whether Farley had reasonable suspicion to extend the stop, as the evidence in the car would have been seized under the inevitable discovery doctrine.

Farley observed Bolling driving 68 miles per hour in a 55 mile per hour zone and initiated a stop for speeding at approximately 2:48 a.m. When he approached the vehicle, Farley requested Bolling's license, insurance, and registration. J.A. 261:21–23, 262:3–12, 265:13–16.[1] Bolling only provided a learner's permit and refused to provide the registration or proof of insurance, stating that the information was "in the car" and he would "have to look for it" but "[didn't] want to do that out [t]here at 3:00 in the morning in the

[1] Citations to "J.A." refer to the joint appendix—the record of proceedings at the district court—filed by the parties.

dark." J.A. 340:10–14.[2] Upon approaching the vehicle, Farley noticed that the cover of the steering wheel was missing, and the airbag appeared to have been deployed and cut, leaving a hole in the steering wheel. After making this observation and noting Bolling's refusal to provide registration or insurance information, Farley asked Bolling to exit the vehicle, and Bolling complied.

Bolling was unable to explain the hole in his steering wheel or provide additional information about the vehicle, which he claimed was a rental. Bolling did, however, explain that he was driving from Hico, West Virginia, to Charleston, West Virginia. Based on Bolling's location when Farley stopped him, Farley observed that Bolling had chosen to take a longer, more circuitous route than necessary. He noted this route as suspicious. Bolling also avoided eye contact and spoke with a "crackly" voice, which Farley interpreted to mean Bolling was nervous.

At 2:54 a.m., Farley ran the vehicle's information and confirmed that the vehicle was a rental. J.A. 353–54. At 2:59 a.m., Farley ran the information for the backseat passenger, Samuel Burdette, and determined that Burdette had an expired license, but no active warrants. J.A. 354. Shortly thereafter, at 3:12 a.m., based on his suspicions that

[2] There was conflicting testimony below about when Bolling produced his license during the stop. Farley initially testified that Bolling was unable to provide any of the requested information when asked. J.A. 266:5–13. Farley later confirmed that Bolling's license information was run through the system at 4:07 a.m., meaning that he received the license during the encounter, but he did not remember receiving Bolling's license. J.A. 298:11–23. Bolling, on the other hand, testified that he provided his license at the beginning of the stop. J.A. 340:10–14. The district court credited Farley's testimony that Bolling was unable to provide a driver's license. J.A. 886, 890, 901.

arose during his conversation with Bolling, his observation of the hole in the steering wheel, and Bolling's inability to provide proof of insurance, Farley requested a K-9 unit. J.A. 276:11–19, 289:1–12. Dispatch informed Farley that they were "having trouble contacting the canine handler" at that time. J.A. 283:3–5. Farley then continued his roadside conversation with Bolling while waiting for the K-9. Throughout this conversation, Farley "knew in the back of [his] mind that [he] was going to tow th[e] vehicle" based on Bolling's failure to provide insurance, but he did not immediately call for a tow truck. J.A. 286:13–16, 291:9–18.

Eventually, Farley initiated the tow by asking the passengers to exit the car. J.A. 292:10–23. Farley first asked the front-seat passenger, Christopher Smith, to exit the vehicle. J.A. 292:21–23. When Smith exited the vehicle, Farley observed a "clear plastic bag with suspected marijuana in it." J.A. 292:25–293:1. Farley next asked Burdette to exit the vehicle. J.A. 293:4–5. Farley ran Bolling's learner's permit through dispatch at 4:07 a.m., and Smith's license was run through dispatch at 4:14 a.m. J.A. 354–55.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Although violations of the Fourth Amendment often require the suppression of any resulting evidence, there are exceptions. *See Herring v. United States*, 555 U.S. 135, 140 (2009). "One such exception is the inevitable discovery doctrine, which allows the government to use evidence gathered in an otherwise unreasonable search if it can prove by a preponderance of the evidence 'that law enforcement would have "ultimately or inevitably" discovered the evidence by "lawful means." ' " *United States v.*

*Seay*, 944 F.3d 220, 223 (4th Cir. 2019) (quoting *United States v. Bullette*, 854 F.3d 261, 265 (4th Cir. 2017)). The government must show "first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so." *United States v. Alston*, 941 F.3d 132, 138 (4th Cir. 2019) (quoting *United States v. Allen*, 159 F.3d 832, 840 (4th Cir. 1998)). Whether law enforcement would have inevitably discovered the disputed evidence through lawful means is a question of fact, "and we thus accord great deference to the district court's findings." *Bullette*, 854 F.3d at 265.

" 'Lawful means' include an inevitable search falling within an exception to the warrant requirement . . . that would have inevitably uncovered the evidence in question." *Id.* (quoting *Allen*, 159 F.3d at 841). The automobile exception to the warrant requirement "allows police to search a vehicle if they have probable cause to believe it contains contraband." *Alston*, 941 F.3d at 138 (citing *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam)).

Farley testified, and his supervisor, Patrolman Tyler McMillion, confirmed, that the department's policy was to tow a vehicle when its driver is unable to provide proof of insurance. The district court properly credited Farley and McMillion's testimony that their practice was to have a vehicle towed if the driver failed to provide proof of insurance.[3]

[3] The West Virginia statute cited by the parties, W. Va. Code Ann. § 17D-4-2, is silent about whether a car should be towed. Nonetheless, "[w]e particularly defer to a district court's credibility determinations[,]" and this court has previously affirmed a district court's decision to credit an officer's testimony about the need to tow a car for a particular traffic violation. *See United States v. Perez*, 30 F.4th 369, 377 (4th Cir. 2022).

Based on the finding that Farley could have—and would have—legally towed the car, the evidence in the car would have inevitably been discovered. The department's "tow policy" meant Farley would have had to ask the passengers to exit the car at some point. Once the front passenger exited the car, the marijuana in plain view allowed Farley to search the car through lawful means—the automobile exception to the warrant requirement. *See Alston*, 941 F.3d at 138 ("An officer's detection of marijuana creates . . . probable cause." (citing *United States v. Palmer*, 820 F.3d 640, 650 (4th Cir. 2016))); *see also United States v. Runner*, 43 F.4th 417, 422–23 (4th Cir. 2022) (considering probable cause related to drug paraphernalia in plain view) (collecting cases). Stated simply, because Farley was able to search the car based on the automobile exception, the marijuana and the other evidence seized from the vehicle would inevitably have been discovered, so the inevitable discovery doctrine applies. We therefore affirm the district court's denial of Bolling's motion to suppress the evidence recovered from the car.

B.

The parties also dispute the lawfulness of the search of Bolling's phone 17 months after the phone was recovered. Bolling argues that the 17-month delay was unreasonable and that the ATF falsely alleged that updated technology enabling the search of the phone was not available until December 2021. The Government, on the other hand, argues that law enforcement's interest in keeping Bolling's phone until the development of new technology outweighed any possessory interest Bolling had in the phone while incarcerated.

The ATF received Bolling's phone on September 23, 2020, and applied for a warrant to search it on September 30, 2020. Although a search warrant was issued the same day, officers could not unlock the phone because the available technology at the time was not compatible with Bolling's phone. Law enforcement received "specialized tools," which allowed agents to unlock and search the phone, around December 2021. On February 10, 2022, the ATF applied for and obtained a second search warrant to search the phone. Agents were able to unlock the phone the same day.

"A seizure that is 'lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests.' " *United States v. Pratt*, 915 F.3d 266, 271 (4th Cir. 2019) (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)). When considering the constitutionality of an extended seizure, we must evaluate the reasonableness of the conduct. *Id.* "Reasonableness" is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Jacobsen*, 466 U.S. at 125 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). "A strong government interest [in personal property] can justify an extended seizure." *Pratt*, 915 F.3d at 271–72 (collecting cases). Although an arrestee "has diminished privacy interests" and diminished possessory interests compared to someone who is not in custody, this "does not mean that the Fourth Amendment falls out of the picture entirely." *Riley v. California*, 573 U.S. 373, 392 (2014). An individual's interests may also be diminished "if he consents to the seizure or voluntarily shares the seized object's contents." *Pratt*, 915 F.3d at 272.

Bolling's arguments again fail. As detailed above, Bolling's phone was seized pursuant to a lawful traffic stop. Although Bolling did not consent to the search of the phone or voluntarily share its contents, he was in custody while the Government maintained possession of his phone. Bolling's possessory interests during that time were therefore diminished. *See Riley*, 573 U.S. at 392. Further, there is no evidence in the record that Bolling himself requested the return of his phone while he was in custody, nor that he requested its return through his wife or attorney. The Government, suspecting that the phone contained incriminating evidence related to drug and gun violations, had a strong interest in extending the seizure of the phone. *See Pratt*, 915 F.3d at 271–72. That interest was further strengthened by a recorded jail call between Bolling and his wife during which he asked her to wipe the contents of the phone. Balancing these interests, the weight of these circumstances leans in favor of the Government. Thus, we find no error in the district court's denial of Bolling's motion to suppress the evidence recovered from the phone.

## III.

Following his trial, Bolling filed a motion for judgment of acquittal, or, alternatively, motion for a new trial, arguing that the Government failed to provide sufficient evidence to support any of the charges for which he was convicted. At issue on appeal is whether the Government presented sufficient evidence to support the firearms charges in Counts Five and Six.

We review a district court's denial of a Rule 29 motion for judgment of acquittal de novo. *United States v. Smith*, 54 F.4th 755, 766 (4th Cir. 2022). Our review of the

sufficiency of the evidence asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Perry*, 92 F.4th 500, 514 (4th Cir. 2024) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A defendant challenging the sufficiency of the evidence "must overcome a heavy burden." *United States v. Haas*, 986 F.3d 467, 477 (4th Cir. 2021) (quoting *United States v. Wolf*, 860 F.3d 175, 194 (4th Cir. 2017)).

A district court should grant a new trial under Rule 33 "when the evidence weighs so heavily against the verdict that it would be unjust to enter judgment." *United States v. Rafiekian* (*Rafiekian II*), 68 F.4th 177, 186 (4th Cir. 2023) (alteration accepted) (quoting *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985)). "We review a district court's grant of a new trial for abuse of discretion. Under this standard, we do not substitute our judgment for the district court's; we simply ask whether that court exercised its discretion in an arbitrary or capricious manner." *Id.* (first citing *United States v. Rafiekian* (*Rafiekian I*), 991 F.3d 529, 549 (4th Cir. 2021); and then citing *United States v. Fulcher*, 250 F.3d 244, 249 (4th Cir. 2001)).

A.

Counts Five and Six charge Bolling with being a felon in possession of multiple firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and knowingly possessing an unregistered firearm silencer and muffler in violation of 26 U.S.C. §§ 5861(d) and 5871. Bolling argues that the Government failed to prove beyond

a reasonable doubt that he actually or constructively possessed the firearms recovered during the search of the apartment building.

18 U.S.C. § 922(g)(1) "does not require proof of actual or exclusive possession; constructive or joint possession is sufficient." *United States v. Lawing*, 703 F.3d 229, 240 (4th Cir. 2012) (quoting *United States v. Gallimore*, 247 F.3d 134, 136–37 (4th Cir. 2001)). To establish constructive possession, the prosecution must show that Bolling "intentionally exercised dominion and control over the firearm, or had the power and intention to exercise dominion and control over the firearm." *United States v. Davis*, 75 F.4th 428, 437 (4th Cir. 2023) (quoting *United States v. Scott*, 424 F.3d 431, 435 (4th Cir. 2005)). The prosecution may prove constructive possession "by way of either direct or circumstantial evidence." *Id.* (citing *United States v. Laughman*, 618 F.2d 1067, 1077 (4th Cir. 1980)).

On September 21, 2020, the ATF executed a search warrant at 117 Keystone Drive. The Government presented testimony from Special Agent David J. Bullard that the ATF recovered two firearms—a Rock River Arms LAR, found in a black case, and a Bryco Arms pistol—and a silencer from Apartment 3 in the building. At the time, Donald Jordan was renting the apartment.

The Government also presented testimony from Jordan that Bolling's wife, Teresa Bolling, was his landlord, and that he believed she had access to his apartment. Jordan further testified that he did not know that the recovered guns were in his apartment, that the guns were not his, and that he was not a "gun guy." J.A. 720:18–25, 721:1–10. The Government presented photos from Bolling's phone, including a screenshot of a Google search for "rock river arms lar-15 price." J.A. 756. Other photos from Bolling's phone

showed handguns and rifles, including one with a silencer, in a background that matched the appearance of Bolling's apartment. J.A. 757–58. The guns in these photos were consistent with the guns recovered from Jordan's apartment. *See* J.A. 753–55, 757–58, 764–65, 767. Finally, the jury heard a recorded jail call in which Bolling asked his wife to move his "tools" and a black case out of his apartment two days before officers searched the building. J.A. 805.

Taken together and viewing this evidence in favor of the prosecution, this evidence is sufficient to demonstrate that Bolling had constructive possession over the firearms he was charged with possessing in the second superseding indictment. *See Perry*, 92 F.4th at 514 (quoting *Jackson*, 443 U.S. at 319). Accordingly, we affirm the district court's denials of Bolling's motions for judgment of acquittal and a new trial.

## IV.

### A.

Bolling also disputes the district court's denial of his motion for a *Franks* hearing and motion requesting additional discovery based on alleged *Brady* violations and due process violations. Bolling argues that the affidavits submitted in support of the warrants to search the 117 Keystone Drive property and his cell phone contained false statements, rendering them insufficient to establish probable cause and therefore void under *Franks v. Delaware*, 438 U.S. 154 (1978). Bolling also contends that law enforcement violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over the following evidence: (1) pole camera surveillance footage of Bolling's home; (2) the

neighbor's security DVR; (3) the "black case" referred to in a jail phone call (which prevented Bolling from comparing a gun case to a pipe bender case); and (4) the pre-search video of 117 Keystone Drive. Bolling argues that the lost video footage would have shown that there was only one way to enter Jordan's apartment and could have been used to refute the statements in the affidavits that the property was a single-family dwelling.

The Government argues that there was no evidence of bad faith. They note that the evidence it possessed was provided prior to pretrial motions and the trial and therefore was not suppressed. The Government further contends that Bolling cannot demonstrate that the lost video evidence and the black case had any exculpatory value, because photos of the black case, which were in evidence, would have allowed Bolling to make the comparison between a gun case and a pipe bender case.

B.

We review the denial of a *Franks* hearing de novo, and "we review the court's factual findings relating to such rulings for clear error." *United States v. Allen*, 631 F.3d 164, 171 (4th Cir. 2011).

*Franks* entitles a defendant to suppression of seized evidence if, during an evidentiary hearing to determine the veracity of statements in a search warrant affidavit, "perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." *United States v. Pulley*, 987 F.3d 370, 376 (4th Cir. 2021) (quoting *Franks*, 438 U.S. at 156). A defendant may also challenge an affidavit under *Franks* "when the affiant has omitted material facts from the affidavit." *Id.*

(citing *United States v. Wharton*, 840 F.3d 163, 168 (4th Cir. 2016)). "To establish a *Franks* violation, a defendant must prove that the affiant either intentionally or recklessly made a materially false statement or that the affiant intentionally or recklessly omitted material information from the affidavit." *Id.* "Allegations of negligence or innocent mistake are insufficient." *Id.* at 377 (quoting *Franks*, 438 U.S. at 171).

The Government "has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt[.]" *United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). A failure to do so is a violation of a defendant's right to due process. *Id.* Such a violation is governed by *Brady v. Maryland*, 373 U.S. 83 (1963). To prove a *Brady* violation, a defendant must show that the evidence at issue was "(1) favorable to the defendant (either because it was exculpatory or impeaching), (2) material to the defense (that is, prejudice must have ensued), and (3) suppressed (that is, within the prosecution's possession but not disclosed to the defendant)." *United States v. Young*, 916 F.3d 368, 383 (4th Cir. 2019) (citing *United States v. Sarihifard*, 155 F.3d 301, 309 (4th Cir. 1998)); *see United States v. George*, 95 F.4th 200, 209 (4th Cir. 2024) (collecting cases). "Favorable evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

A due process violation may also arise out of the prosecution's failure to preserve evidence "if the evidence 'possesses an exculpatory value that was apparent before the

evidence was destroyed' and if it is 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' " *Johnson*, 996 F.3d at 206 (alteration accepted) (quoting *Trombetta*, 467 U.S. at 489). "A showing of bad faith is required, however, when the lost evidence can only be said to be 'potentially useful' to the defendant because the contents of the evidence are unknown." *Id.* (citing *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988)). If a defendant "can only speculate as to what the requested information might reveal, he cannot satisfy *Brady*'s requirement of showing that the requested evidence would be favorable to the accused." *Caro*, 597 F.3d at 619 (cleaned up) (quoting *Brady*, 373 U.S. at 87).

During the investigation, there were primarily issues with three pieces of evidence: (1) the pole camera installed outside of Bolling's house failed to record footage, *see* J.A. 565:12–16, 771; (2) agents were unable to extract data from a neighbor's DVR footage of Bolling's house, *see* J.A. 444:18–22, 444:25–445:5; and (3) the "black case," used either for a pipe bender or a gun, was never entered into evidence. *See* J.A. 702:25–703:3.

On September 21, 2020, Bullard applied for a search warrant to search the property at 117 Keystone Drive. When agents executed the search, they learned for the first time that other people lived in the building. Despite this, Bullard and Special Agent Asa M. Gravely failed to update the later warrant applications on September 30, 2020, and February 10, 2022, to reflect that discovery. *See* J.A. 82–103. The district court found that although the affidavits contained misrepresentations and omissions, "these were careless errors and not intended to mislead the magistrate judge." J.A. 862–63. The court further

determined that without the misrepresentations, the warrants were supported by probable cause. J.A. 863.

Bolling's arguments as to each of the disputed pieces of evidence are unpersuasive. The footage from the pole camera and the neighbor's DVR was all lost or unrecoverable.[4] Because none of the footage was ever reviewed or recovered, Bolling has failed to demonstrate that such footage had "apparent" exculpatory value or that officers destroyed evidence in bad faith. *See Johnson*, 996 F.3d at 206.

Bolling's arguments about the black case also fail. McNees testified that he was unaware of the ATF ever possessing the case. J.A. 702:25–703:3. Moreover, to the extent that the black case was exculpatory, Bolling could have used photos of the case to make the same argument. He has similarly failed to demonstrate bad faith by law enforcement as to this piece of evidence. *See Johnson*, 996 F.3d at 206.

Finally, Bolling's contention that the pre-search video "would likely provide additional impeachment material" is merely speculative and therefore insufficient to satisfy *Brady*'s requirements. *See Caro*, 597 F.3d at 619.

Bolling's arguments for a *Franks* hearing as to the affidavits used to apply for the search warrants also fail. In support of the initial warrant, Bullard testified that he checked

[4] At trial, Agent Bullard testified that footage from the pole camera was not recovered either because the camera was never recording, or the footage was lost when the ATF servers malfunctioned. J.A. 565:12–16. Special Agent Sean McNees confirmed that nothing was recorded on the pole camera and "it was only up for two days." J.A. 771. As for the DVR footage, Agent Bullard testified that agents "intended to extract data from" the neighbor's DVR, but failed. J.A. 444:18–22. To his knowledge, the footage from the DVR was never reviewed. J.A. 444:25–445:5.

property records, discussed the property with the confidential informant, listened to jail calls between Bolling and his wife, and attempted to secure a mail watch on the property. Based on this information, Bullard believed and represented that Bolling was the owner and occupant of the entire premises at 117 Keystone Drive. No evidence supports a finding that Bullard acted with reckless disregard for the truth, omitted material facts, or acted intentionally when he made this representation. *See Pulley*, 987 F.3d at 376.

True, Bullard and Gravely failed to update subsequent warrant applications to reflect the fact that other occupants lived at the 117 Keystone Drive property, that narcotics were not found on the property, and that agents did not find a safe with twenty guns, as represented by the confidential informant. But negligence and carelessness by the agents does not rise to the level of requiring a *Franks* hearing. *Pulley*, 987 F.3d at 377 (quoting *Franks*, 438 U.S. at 171).

Moreover, setting aside the inaccurate statements about the property in the second and third warrant applications to search the phone, law enforcement would nonetheless have had probable cause. The affidavits represented the following: (1) a confidential informant told law enforcement that he had witnessed drugs and firearms inside Bolling's residence, *see* J.A. 96–97; (2) on September 16, 2020, this confidential informant purchased methamphetamine from Bolling through a controlled buy, *see* J.A. 99–101; (3) three days later, the phone was seized from the car in which Bolling was found with fentanyl, methamphetamine, distribution materials, ammunition, and cash, *see* J.A. 101; (4) after Bolling was arrested, he was recorded on a jail call asking his wife to "remotely delete the contents of his cell phone," *see* J.A. 102; and (5) based on his training and

experience, Gravely believed that evidence of Bolling's drug-related activities remained on the "memory of the phone," *see* J.A. 102. These representations are enough to establish probable cause to search the phone. Accordingly, the district court properly denied Bolling's motion for a *Franks* hearing.

V.

Bolling also disputes the district court's denial of his motion to strike a juror, arguing that the district court's failure to exclude an allegedly "partial juror" violated his Sixth Amendment right to an impartial jury.

"District courts enjoy 'very broad discretion in deciding whether to excuse a juror for cause.' " *United States v. Odum*, 65 F.4th 714, 723 (4th Cir. 2023) (citing *Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 222 (4th Cir. 1989)). This court will uphold a district court's decisions "absent 'manifest abuse of that discretion.' " *Id.*

"In selecting a jury, the trial judge is in the best position to make judgments about the impartiality and credibility of potential jurors based on the judge's own evaluations of responses to questions." *United States v. Jones*, 716 F.3d 851, 857 (4th Cir. 2013) (quoting *United States v. Cabrera-Beltran*, 660 F.3d 742, 749 (4th Cir. 2011)). When considering whether to impanel a juror who indicates that they have preconceived notions as to the innocence or guilt of a defendant, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* (quoting *Murphy v. Florida*, 421 U.S. 794, 800 (1975)). "Although a juror's avowal of impartiality is not dispositive, 'if a district court views juror assurances of continued impartiality to be

credible, the court may rely upon such assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice.' " *Id.* (first citing *Murphy*, 421 U.S. at 800; and then quoting *United States v. Corrado*, 304 F.3d 593, 603 (6th Cir. 2002)). When a defendant fails to "cast doubt" on a juror's "assurance that she could set aside any opinion she may have had on the case, we defer to the district court's determination that she could serve impartially." *Id.* (internal citation omitted).

During voir dire, Juror No. 32 responded affirmatively when asked whether she or any member of her immediate family or any close personal friend had ever been arrested or prosecuted for a criminal charge. Juror No. 32 explained that her best friend's son was arrested "on several charges pertaining to drugs as well as breaking and entering." J.A. 504:16–18. Juror No. 32 was asked whether her involvement with her best friend's son would impact her ability to fairly and impartially consider the evidence that may relate to drugs and responded, "[y]es, it would affect it." J.A. 504:19–23.

Defense counsel noted during discussion that Juror No. 32 "g[a]ve an indication that she thought she could put it aside, but it didn't appear to [him] when questioning that she could." J.A. 506:12–16. The Government noted that they "ha[d] an awful lot of strikes for cause" and the district court noted "we're in trouble." J.A. 506:22–24. The court then stated, "I don't think I can have the fact we're in trouble on numbers impact my ruling on challenges for cause." J.A. 507:1–2.

On further questioning, Juror No. 32 was asked whether her best friend's son's involvement with drugs would impact her view on the case, and she responded, "yes, it would impact it." J.A. 508:4–8. Defense counsel then asked Juror No. 32 "[n]ow, do you

think that you could be fair and impartial if you were instructed to set that aside, or do you feel that is something that would just be a very strong fact factor for you?" J.A. 508:9–12. Before she could answer, the court said, "Let me put the question this way. If I instructed you to take that completely out of your mind and judge this case based on the evidence you hear in the courtroom and the Court's instructions as to the law, do you think you could do that?" J.A. 508:13–17. Juror No. 32 responded, "[y]es, sir." J.A. 508:18. Defense counsel challenged Juror No. 32, and the court denied the challenge based on his questioning. J.A. 508:23–509:1. After the court ruled on challenges to other jurors, it stated, "[t]hat takes us down to 31, which is the number we need." J.A. 508:23–509:1.

Although Juror No. 32 stated that her perspective could be influenced by her best friend's son's experience with drugs, the district court asked whether she could be impartial, and it was satisfied with her "avowal of impartiality." *See Jones*, 716 F.3d at 857. We therefore credit the district court's credibility determination and affirm the denial of Bolling's motion to strike for cause. *See id.* Because Bolling failed to "cast doubt" about whether Juror No. 32 could set aside her stated bias and serve impartially, the district court did not abuse its discretion by denying Bolling's motion to strike the juror.

## VI.

Finally, Bolling challenges the district court's denial of his *Bruen*-based motion to dismiss two of the firearm-related charges under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Bolling argues on appeal that the plain text of the Second Amendment protects his right to possess firearms.

"We review the district court's factual findings on a motion to dismiss an indictment for clear error, but we review its legal conclusions *de novo*." *United States v. Perry*, 92 F.4th 500, 513 (4th Cir. 2024) (quoting *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014)).

A facial challenge to the constitutionality of a statute is the " 'most difficult challenge to mount successfully[]' because it requires a defendant to 'establish that no set of circumstances exists under which the Act would be valid,' " *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or that "the statute lacks any 'plainly legitimate sweep,' " *Bianchi v. Brown*, 111 F.4th 438, 452 (4th Cir. 2024) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)). The Supreme Court has consistently upheld the presumptive lawfulness of prohibitions on the possession of firearms by felons. *See District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *United States v. Rahimi*, 602 U.S. 680, 699 (2024). This court has followed suit. *See United States v. Moore*, 666 F.3d 313, 316–17 (4th Cir. 2012) (collecting cases); *United States v. Canada*, 123 F.4th 159, 161–62 (4th Cir. 2024). We decline to change course under these circumstances. Accordingly, the district court's denial of Bolling's *Bruen*-based motion to dismiss Counts Five and Six is affirmed.

VII.

Bolling has raised numerous challenges at each step of his case. Because the district court correctly rejected each challenge, the district court's denial of each of the contested motions is

*AFFIRMED*.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL NO. 2:21-00087

MARK BOLLING

**MEMORANDUM OPINION**

On January 10, 2023, the court held a hearing on defendant Mark Bolling's motion to suppress. (ECF No. 118). Present at that hearing were defendant, his counsel, Brian D. Yost, and Assistant United States Attorneys Nowles H. Heinrich and Steven I. Loew. On February 10, 2023, the court denied defendant's motion. This Memorandum Opinion sets out more fully the reasons for that ruling.

Factual Background

In the early morning on September 19, 2020, Patrolman Timothy Farley of the Fayetteville Police Department was monitoring traffic from a stationary position on Route 19 in the City of Fayetteville in Fayette County, West Virginia. At approximately 2:52 a.m., Farley observed a vehicle traveling southbound on Route 19 at a high rate of speed. Radar confirmed that the vehicle, a Nissan Kick, was exceeding the speed limit by driving 68 miles per hour in a zone with a 55 miles per hour speed limit. Deputy Levi Garretson also observed the vehicle

speeding and directed Farley to pull the vehicle over. Farley testified that he was going to pull the vehicle over even before Garretson radioed him.

Patrolman Farley initiated a stop of the vehicle he observed to be speeding. He called in the registration tag information to the dispatcher but he did not remember if he received anything back. Once the vehicle had stopped, Farley approached the driver's side of the vehicle and made contact with the driver, Bolling. There were two other individuals in the vehicle as well. Patrolman Farley requested proof of registration, proof of insurance, and a driver's license from defendant. According to Farley, Bolling was unable to provide him with any of the requested information. Farley also observed that the airbag had been deployed because the airbag cover was gone and the airbag was missing.

Once Bolling failed to provide the requested information, including a driver's license, Farley had Bolling exit the vehicle and move to the rear of the vehicle. According to Farley, Bolling would not make eye contact with him and seemed "very, very nervous." At 2:55 a.m., Patrolman Farley called in the name of Samuel Burdette, one of the passengers in the vehicle. He asked for a check to see if Burdette had any outstanding warrants. Burdette was sitting in the back seat of

the vehicle while the other passenger, Christopher Smith, was sitting in the front passenger's seat. Although Patrolman Farley testified that he "usually" checked warrants on every passenger and driver when he pulled over a vehicle, he could not remember why he did not run Bolling's name.

At approximately 3:00 a.m., dispatch informed Patrolman Farley that Samuel Burdette's license was expired and that he did not have any outstanding warrants. The Call Detail Report confirms that sometime before 2:59 a.m. Patrolman Farley asked dispatch to run information for Samuel Dylan Burdette and the information was provided at 2:59 a.m. and indicated that Burdette's license was expired.

Farley asked Bolling where he was coming from and where he was going. Bolling told him that he was coming from Hico and headed to Charleston. Farley also asked Bolling what had happened to the vehicle to make the airbag deploy. At some point while Farley and Bolling were talking at the rear of the vehicle, Farley learned that the vehicle was a rental. Bolling was unable to provide information regarding the rental.

At 3:12 a.m., Patrolman Farley requested a K-9 unit based upon his suspicion that a crime had been committed. Patrolman Farley felt that defendant's story was suspicious because the route he was taking did not "make sense" to him. According to

Farley, there was a much shorter route from Hico to Charleston. Farley also related that Bolling acted nervous. He was suspicious because the airbag had been removed and Bolling could not provide any information regarding the vehicle. Bolling's inability to provide proof of insurance also made Patrolman Farley suspicious. According to Farley, he had a reasonable suspicion that a crime was being committed but was unsure about the nature of the crime. He was concerned the vehicle might have been stolen but "there could have been warrants, bodies, vehicle stolen, possible drugs in the vehicle." Dispatch informed Farley it was having trouble contacting the K-9 unit.

According to Patrolman Farley, he had decided to have the vehicle towed when Bolling was unable to provide proof of insurance. Farley testified that he tows every vehicle that does not have insurance. Because he was going to have the vehicle towed, he needed to have the passengers exit the vehicle as well. However, for officer safety reasons, Farley needed backup before he could do so because he would not want to leave Bolling standing behind the vehicle by himself. Farley also testified that he would be concerned about having three people outside the vehicle if he were alone. Tyler McMillion, Farley's supervisor, confirmed that it was Fayetteville Police Department policy to have a vehicle towed when proof of insurance was not

provided. Therefore, Bolling would not have been free to drive away after receiving a speeding ticket because the car had to be towed.

Approximately ten minutes into the traffic stop, Patrolman McMillion arrived at the scene. Farley had Christopher Smith and Samuel Burdette exit the vehicle. Once Smith exited the vehicle, Patrolman Farley observed a clear, plastic bag in the passenger's side floorboard of what he believed to be marijuana. Upon observing the suspected marijuana, Farley began a search of the vehicle. During the search, he discovered over 100 grams of suspected methamphetamine, approximately 30 grams of suspected heroin, ammunition, and approximately $7,000. The drugs and ammunition were recovered from the driver's side door panel while the money was recovered from the backseat.

McMillion stood with the occupants of the vehicle while it was searched. Deputy Garretson arrived to assist Farley's traffic stop at approximately 3:24 a.m. According to Garretson, when he arrived, Bolling, Smith, and Burdette were already in police cars and narcotics were on the hood of the car, indicating that the search had been completed.

Bolling also testified at the suppression hearing. According to him, the Nissan Kick was rented by Heather Murphy and he had her permission to drive it. Bolling had known Murphy

for approximately three months. Bolling testified that while he did not have a driver's license, he did have a learner's permit. Bolling admitted that he did not provide Farley proof of insurance on the vehicle although he maintains that he did provide his learner's permit.

The court found Patrolman Farley to be a credible witness. Deputy Garretson and Patrolman McMillion were likewise credible. Bolling's testimony was not entirely credible. The court finds credible Patrolman Farley's assertion that Bolling did not provide a driver's license or learner's permit to him when he asked for a license.

Bolling moved to suppress "all evidence illegally seized as the result of [the] September 19, 2020, vehicle stop and subsequent warrantless search of Mr. Bolling's vehicle conducted by Patrolman T.L. Farley and T.B. McMillion of the Fayetteville (West Virginia) Police Department ("FPD")." ECF No. 118 at 1. According to defendant:

> Mr. Bolling submits that his Fourth Amendment rights were violated when Patrolman Farley failed to diligently pursue the initial basis for the stop – speeding – and instead expanded the stop into a full-blown investigation of potential drug trafficking activity without reasonable suspicion to do so. Because the stop was extended beyond the time necessary to complete the writing of a citation and other lawful attendant matters, it constituted an unreasonable seizure of Mr. Bolling, his vehicle, and

> his passengers, thus rendering the subsequent search of the vehicle unreasonable.

Id. at 3. In its opposition to defendant's motion, the government argued that defendant's Motion was without merit because "Bolling was unable to provide proof of insurance to the police, thereby justifying the seizure of the rental vehicle." ECF No. 136 at 19.

Discussion

The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure'" under the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). It is well settled that a traffic stop amounts to a "seizure" under the Fourth Amendment and therefore must "not be 'unreasonable' under the circumstances." United States v. Branch, 537 F.3d 328, 335 (4th Cir. 2008); United States v. Villavicencio, No. 18-4681, 825 F. App'x 88, 95 (4th Cir. Aug. 17, 2020) ("A traffic stop, therefore, must satisfy the Fourth Amendment's reasonableness limitation.").

"Under Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968), an officer may conduct a brief investigatory stop where the officer has reasonable suspicion that criminal activity may be afoot." United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004). And, "[b]ecause a traffic stop is more akin to an investigative detention than a custodial arrest," the two-prong standard articulated in Terry is used to determine whether a traffic stop is reasonable. United States v. Williams, 808 F.3d 238, 245 (4th Cir. 2015).

The United States Court of Appeals for the Fourth Circuit described the analysis under Terry as follows:

> Pursuant to Terry, a traffic stop comports with the reasonableness standard of the Fourth Amendment where (1) the stop [i]s legitimate at its inception and (2) the officer's actions during the seizure [are] reasonably related in scope to the basis for the traffic stop. An initial traffic stop is warranted where an officer has probable cause to believe that a traffic violation has occurred. Nonetheless, a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. For instance, [a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.
>
> The acceptable duration of a traffic stop is determined by the seizure's mission—to address the traffic violation that warranted the stop and attend to related safety concerns. Ordinary tasks related to a traffic stop include checking the driver's license, determining whether there are outstanding warrants

> against the driver, and inspecting the automobile's registration and proof of insurance. An officer can also ask about a rental car agreement. . . . These types of checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. In addition, an officer may permissibly ask questions of the vehicle's occupants that are unrelated to the violation, provided that doing so does not prolong the stop absent independent reasonable suspicion. In assessing the reasonableness of a stop, we consider what the police in fact do. Thus, the critical question is not whether the unrelated investigation occurs before or after the officer issues a ticket, but whether conducting the unrelated investigation prolongs—i.e., adds time to—the stop. A traffic stop becomes unlawful when tasks tied to the traffic infraction are—or reasonably should have been—completed.

Villavicencio, 825 F. App'x at 95 (cleaned up).

"To show the existence of reasonable suspicion, a police officer must offer specific and articulable facts that demonstrate at least a minimal level of objective justification for the belief that criminal activity is afoot." United States v. Bowman, 884 F.3d 200, 213 (4th Cir. 2018) (internal citation and quotation omitted). Although the reasonable suspicion standard requires "at least a minimal level of objective justification," it "is less demanding than the probable cause standard or even the preponderance of evidence standard." United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2021). "Reasonable suspicion is a 'commonsense, nontechnical' standard that relies on the judgment of experienced law enforcement

officers, 'not legal technicians.'" United States v. Williams, 808 F.3d 238, 246 (4th Cir. 2015) (quoting Ornelas v. United States, 517 U.S. 690, 695 (1996)).

"Observing a traffic violation provides sufficient justification for a police officer to detain the offending vehicle for as long as it takes to perform the traditional incidents of a routine traffic stop." Branch, 537 F.3d at 335. And, "pursuant to such a stop, a police officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." Id. (internal citation and quotation omitted).

"The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose." Id. at 336. According to the court in Branch,

> Thus, once the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has issued the requisite warning or ticket, the driver must be allowed to proceed on his way. Of course, if the driver obstructs the police officer's efforts in any way—for example, by providing inaccurate information—a longer traffic stop would not be unreasonable.
>
> If a police officer wants to detain a driver beyond the scope of a routine traffic stop, however, he must possess a justification for doing so other than the initial traffic violation that prompted the

stop in the first place. Thus, a prolonged automobile stop requires either the driver's consent or a reasonable suspicion that illegal activity is afoot. While a precise articulation of what constitutes reasonable suspicion is not possible, the precedents of the Supreme Court and this circuit suggest several principles that should animate any judicial evaluation of an investigatory detention pursuant to Terry.

First, Terry's reasonable suspicion standard is less demanding than probable cause. Indeed, in order to justify a Terry stop, a police officer must simply point to specific and articulable facts which, taken together with rational inferences from those facts, evince more than an inchoate and unparticularized suspicion or hunch of criminal activity. Thus, the quantum of proof necessary to demonstrate reasonable suspicion is considerably less than a preponderance of the evidence.

Second, a court must take a commonsense and contextual approach to evaluating the legality of a Terry stop. To that end, the Supreme Court has noted that reasonable suspicion is a nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Thus, context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances. And respect for the training and expertise of police officers matters as well: it is entirely appropriate for courts to credit the practical experience of officers who observe on a daily basis what transpires on the street. In sum, post hoc judicial review of police action should not serve as a platform for unrealistic second-guessing of law enforcement judgment calls.

Third, a court's review of the facts and inferences produced by a police officer to support a Terry top must be holistic. Courts must look at the cumulative information available to the officer, and not find a stop unjustified based merely on a

> piecemeal refutation of each individual fact and inference. A set of factors, each of which was individually quite consistent with innocent travel, could still, taken together, produce a reasonable suspicion of criminal activity. It is the entire mosaic that counts, not single tiles.
>
> Fourth, a police officer's decision to stop and detain an individual must be evaluated objectively. Thus, the lawfulness of a Terry stop turns not on the officer's actual state of mind at the time the challenged action was taken, but rather on an objective assessment of the officer's actions. In other words, if sufficient objective evidence exists to demonstrate reasonable suspicion, a Terry stop is justified regardless of a police officer's subjective intent.
>
> To sum up: If a police officer observes a traffic violation, he is justified in stopping the vehicle for long enough to issue the driver a citation and determine that the driver is entitled to operate his vehicle. The driver's consent or reasonable suspicion of a crime is necessary to extend a traffic stop for investigatory purposes. In order to demonstrate reasonable suspicion, a police officer must offer specific and articulable facts that demonstrate at least a minimal level of objective justification for the belief that criminal activity is afoot. Judicial review of the evidence offered to demonstrate reasonable suspicion must be commonsensical, focused on the evidence as a whole, and cognizant of both context and the particular experience of officers charged with the ongoing tasks of law enforcement.

Id. at 336-37.

An officer needs either reasonable suspicion of criminal activity or consent if the officer "extend[s] the detention of a motorist beyond the time necessary to accomplish a traffic stop's purpose." Williams, 808 F.3d at 245-46.

As to the first prong of the Terry analysis, i.e., whether the stop was legitimate at its inception, the court finds that it was. Patrolman Farley had probable cause to initiate the stop based on his observation of Bolling's vehicle exceeding the speed limit. See Williams, 808 F.3d at 246 ("Williams does not dispute that Deputy Russell was entitled to stop the Hyundai for speeding."); Villavicencio, 825 F. App'x at 96 ("[W]e find that Wiessman had probable cause to initiate the stop based on her observation of Villavicencio's vehicle exceeding the speed limit."). Bolling does not argue otherwise.

Having determined that Bolling was lawfully stopped, under the second prong of the Terry analysis, the court determines whether Patrolman Farley's "actions during the seizure were reasonably related in scope to the basis for the traffic stop." Williams, 808 F.3d at 245. "The acceptable duration of a traffic stop 'is determined by the seizure's mission—to address the traffic violation that warranted the stop and attend to related safety concerns.'" Villavicencio, 825 F. App'x at 95 (quoting Rodriguez v. United States, 575 U.S. 348, 354 (2015) (internal quotation marks and citation omitted)).

In this case, the court credited the testimony of Patrolman Farley and Patrolman McMillion that the vehicle would have to be towed. Therefore, the government is correct that, given the

need to tow the vehicle after Bolling was unable to provide proof of insurance, the stop was not unnecessarily prolonged because Bolling was not free to drive away. See United States v. Perez, 30 F.4th 369, 376 (4th Cir. 2022) ("And once officers confirmed that the vehicle's plate was fictitious and that Perez's license was revoked, Perez couldn't simply drive away even if the citations had been issued. The officers testified that they called for the car to be towed, and it hadn't been by the time the dog sniff arrived."); see also id. at 377 (Motz J., concurring) ("I concur in the judgment because of the district court's factual finding that the need to tow Perez's car — after the officers determined it had a fictitious tag and that his license had been revoked — meant that Perez was not free to drive away after receiving the citations. Given this factual finding, I cannot say that the officers prolonged the stop in violation of the Fourth Amendment."); United States v. Soderman, 983 F.3d 369, 374 (8th Cir. 2020) (holding that traffic stop was "justifiably extended . . . because of [the driver]'s legal inability to remove the vehicle from the scene and the consequential need for a licensed driver or a tow truck to do so."); United States v. Gladney, 809 F. App'x 220, 226 (5th Cir. 2020) (holding that traffic stop was not unreasonably extended where, during course of stop, officer discovered driver did not

have a valid license and "normal protocol is to either tow the vehicle, park and lock it, or have the driver call someone to come get it."); United States v. Santana-Vasquez, Docket no. 2:19-cr-00099-GZS, 2021 WL 6050930, at *3 (D. Me. Dec. 21, 2021) (holding that upon discovering that driver did not have a license and vehicle did not have a valid registration "the constitutional scope of the stop expanded to include any time necessary for a tow truck to arrive").

Furthermore, the original purpose of the original stop was never satisfied as Bolling failed to demonstrate to Patrolman Farley that his operation of the vehicle was lawful. "[T]he Fourth Circuit has held on several occasions, one of the purposes of a traffic stop is to ensure that the driver is legally operating the vehicle. . . . If that requirement is not satisfied, the stop is not at an end." United States v. Perez-Almeida, Criminal No. 3:19-cr-61, 2019 WL 4023075, at *6 (E.D. Va. Aug. 26, 2019); see also Branch, 537 F.3d at 336 ("Thus, once the driver has demonstrated that he is entitled to operate his vehicle . . . the driver must be allowed to proceed on his way. . . . Of course, if the driver obstructs the police officer's efforts in any way . . . a longer stop would not be unreasonable.") (internal citation and quotation omitted).

Furthermore, in this case, the stop was reasonable and prolonged in large part because of Bolling's failure to produce the requested documentation. "Importantly, the acceptable scope and duration of a traffic stop are not cabined by the stop's original justification if the police discover new suspicious information during the stop. Rather, 'as an investigation unfolds, an officer's focus can shift, and he can increase the scope of his investigation by degrees when his suspicions grow during the stop.'" United States v. Santana-Vasquez, Docket no. 2:19-cr-00099-GZS, 2021 WL 6050930, at *3 (D. Me. Dec. 21, 2021) (quoting United States v. Dion, 859 F.3d 114, 125 (1st Cir. 2017)); see also United States v. Soderman, 983 F.3d 369, 374 (8th Cir. 2020) ("When complications arise in carrying out the traffic-related purposes of the stop, . . . police may reasonably detain a driver for a longer duration than when a stop is strictly routine."); United States v. Davis, 4 F.3d 989, at *3 (5th Cir. 1993) ("Although what transpired went beyond the bounds of a normal traffic stop, the extended duration of the stop was because of the fact that Haney had no driver's license, lied about his name, and could not produce any documentation indicating that he owned the truck.").

Based upon the evidence presented at the suppression hearing, the court concluded that the scope and duration of the

traffic stop were justified by the events that unfolded after the vehicle was stopped. Defendant makes much of the duration of the vehicle stop but his argument completely sidesteps the emerging situation that Patrolman Farley confronted. What began as a stop to address a speeding violation "mushroomed into other inquiries that each took time," Perez, 30 F.4th at 376, once Bolling failed to produce a driver's license, proof of insurance, or registration.

In any event, sufficient objective evidence existed to give Farley a reasonable suspicion "that illegal activity was afoot." Branch, 537 F.3d at 336. The record shows that the traffic stop was initiated at 2:54 a.m., see Exhibit 1, and that the search of the vehicle was completed no more than 30 minutes later. After Farley stopped the vehicle at almost 3:00 a.m., he approached the driver who turned out to be Bolling. According to Farley, he asked Bolling for his driver's license, registration, and proof of insurance. Bolling failed to provide any of the requested information. Patrolman Farley also observed the hole in the steering wheel where the airbag used to be. At this point he asked Bolling to exit the car and move to the rear.

Patrolman Farley testified that because of Bolling's failure to provide insurance, he knew that he was going to have

the vehicle towed. Farley testified that it was his practice to have a vehicle towed if the driver was unable to provide proof of insurance. Officer McMillion corroborated Patrolman Farley's testimony on this point. To have the vehicle towed, the passengers would need to be removed from the vehicle. And, as Patrolman Farley testified, he needed additional law enforcement personnel to help in this endeavor. See United States v. Hampton, 628 F.3d 654, 658 (4th Cir. 2010) (an officer may order passengers to get out of a vehicle pending completion of a traffic stop "as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk.").

Once Bolling moved to the rear of the car, Patrolman Farley asked him about his route. This was not improper. See Arizona v. Johnson, 555 U.S. 323, 333, 129 S. Ct. 781, 783, 172 L. Ed. 2d 694 (2009) ("[a]n officer's inquiries into matters unrelated to the" traffic violation "do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."). And, as Farley testified, he found the route suspicious because there was a more direct route. Farley also learned that the car was a rental and stated that Bolling was acting nervous. Farley maintains that, at this point, he suspected Bolling of additional criminal activity.

The court agrees with Farley that the universe of facts known to Farley at that point were sufficient to generate a reasonable suspicion of illegal activity. Those facts include: 1) a car speeding at almost 3:00 a.m.; 2) a driver who is unable to provide a driver's license, registration, or proof of insurance for that vehicle; 3) a hole in the steering wheel where the airbag should be; 4) the fact that the vehicle was a rental; 5) a travel route that was suspicious; and 6) a driver who acted nervous.

## Conclusion

Based on the foregoing, defendant's motion to suppress was denied.

The Clerk is directed to send a copy of this Memorandum Opinion to counsel of record.

IT IS SO ORDERED this 31st day of August, 2023.

ENTER:

David A. Faber
Senior United States District Judge

FILED: September 9, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 23-4572
(2:21-cr-00087-1)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARK BOLLING

Defendant - Appellant

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O R D E R

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk