

No. _____

IN THE
Supreme Court of the United States

DAZMINE ERVING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the clarification of the “immediate control” standard in *Arizona v. Gant*, 556 U.S. 332, 341 (2009), apply to protective searches of automobiles under *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)?
2. May the government rely on the protective-sweep doctrine by merely arguing that the officer *could have* conducted a protective search, even if the record shows that the officer objectively did not conduct a protective search and the government failed to develop any inevitable-discovery argument?

LIST OF PARTIES

Dazmine Erving (petitioner); and
United States of America (respondent).

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Erving, Nos. 23-2828 & 23-2831, (January 20, 2026).

United States District Court (C.D. Ill.):

United States v. Erving, No. 1:22-cr-10033 (September 7, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dazmine Erving respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The Seventh Circuit's opinion is published at 164 F.4th 953 and included as Appendix A. The district court's criminal judgment is unpublished and included as Appendix B. The district court's order denying the motion to suppress is unpublished and included as Appendix C.

JURISDICTION

The Seventh Circuit entered judgment on January 20, 2026. (App. 1a.) Neither side petitioned for rehearing. This petition is filed within 90 days of the January 20, 2026 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States 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

Under the “protective search” doctrine, an officer may search an automobile if he has reasonable suspicion that an individual (1) is “dangerous”; and (2) might “gain immediate control of weapons” inside the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The second prong is not unique to protective searches of automobiles; the same “immediate control of weapons” requirement also applies when courts analyze whether an officer may search an automobile incident to arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969).

For decades, lower courts misunderstood the “immediate control” requirement and allowed officers to search a car incident to arrest even when there was no possibility that the arrestee could gain access to the vehicle. *Arizona v. Gant*, 556 U.S. 332, 341 (2009). In *Gant*, this Court clarified the “immediate control” requirement, explaining that a search incident to arrest was reasonable “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.* at 343.

Following *Gant*, however, courts have disagreed over whether *Gant*’s clarifications apply to “protective searches” as well as searches incident to arrest. The Seventh Circuit, like most federal circuits, definitively holds that *Gant* does not apply to protective searches. If an officer has no grounds to arrest someone, the Seventh Circuit says, the officer may assume that the suspect might access weapons in the vehicle after the officer lets him go. Accordingly, every time an officer stops a motorist but does not arrest him, the “immediate control” prong is automatically

satisfied. On the other hand, some state courts of final review have reached the opposite conclusion, holding that *Gant* applies to protective searches as well as searches incident to arrest. *E.g.*, *State v. Buchanan*, 2011 WI 49, ¶ 6 n.6, 799 N.W.2d 775, 779 (Wis. 2011).

This case is about evidence discovered during a purported protective search of a vehicle. Because the officer in this case searched the petitioner’s car while all occupants were secured away from the vehicle (and thus could not access anything inside), the applicability of *Gant* to the search determines the search’s legality. If prosecuted in Wisconsin state court, for example, the fruits of the search would have been suppressed. But in federal courts within the Seventh Circuit (which includes Wisconsin), the search is considered legal.

The Seventh Circuit’s opinion below also implicates another split. The officer in this case had no real concern for his safety when he conducted the “protective search.” He stumbled upon the petitioner and a female companion *in flagrante delicto*, using their parked car for a covert sexual encounter. This was not an interrupted drug deal, warrant execution, or other situation involving heightened security risks. The officer testified that he immediately understood that he found a couple trying to have sex. And the manner of the search that followed was, based on the video evidence, not a protective search for weapons but a focused attempt to find contraband. Of course, the officer’s subjective intent is irrelevant to the search’s legality. But any objective observer would have recognized that the officer’s actions

were more consistent with a search for evidence than an attempt to protect officer safety.

Other circuits would have invalidated the search because the “protective search” rationale was merely a post-hoc justification that did not match an objective view of the officer’s actions. *United States v. Yarbrough*, 961 F.3d 1157, 1166 (11th Cir. 2020); *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983). But the Seventh Circuit summarily dismissed this argument as inappropriately invoking the officer’s subjective intent. In doing so, the court failed to acknowledge that it was creating a circuit split.

This petition asks this Court to resolve these splits.

STATEMENT OF THE CASE

I. The law of vehicle searches prior to Dazmine Erving’s arrest.

For more than a century, cars have been treated differently than other personal effects under the Fourth Amendment. This Court has recognized that the pervasive regulation of vehicles means that “the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.” *California v. Carney*, 471 U.S. 386, 390–91 (1985). And a car’s “ready mobility” means that any opportunity to search a car may be only temporary. *Id.*

Accordingly, this Court has identified car-specific exceptions to the Fourth Amendment’s warrant requirement. For example, starting with *Carroll v. United States*, 267 U.S. 132 (1925), and later clarified in *United States v. Ross*, 456 U.S. 798 (1982), this Court has recognized an “automobile exception” to allow police to search

a vehicle without a warrant if there is probable cause to believe it contains evidence of criminal activity. Separately, police are permitted to perform “inventory searches” of impounded cars for the purpose cataloging their contents. *Florida v. Wells*, 495 U.S. 1 (1990). And in some circumstances, government actors may even set up roadblocks for suspicion-less seizures of motorists to further policy interests. *See, e.g., Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoints).

Two specific exceptions are relevant to this appeal. First, this Court has recognized situations in which an officer may conduct a “protective search” of a car subject to mere reasonable suspicion, regardless of probable cause to suspect criminal activity. *See Michigan v. Long*, 463 U.S. 1032 (1983). Relying on the principles of *Terry v. Ohio*, 392 U. S. 1 (1968), this Court held in *Long* that officers may search for weapons in a car when necessary to protect officer safety. A search under *Long* is reasonable if an officer has justified suspicion that an individual (1) is “dangerous”; and (2) might access the vehicle to “gain immediate control of weapons.” *Long*, 463 U.S. at 1049.

Second, a close sibling to *Long*’s protective search is a “search incident to arrest.” When arresting a suspect, an officer may search the area of a car from which an arrestee might gain possession of a weapon or destructible evidence of the offense of arrest. *Thornton v. United States*, 541 U.S. 615, 620 (2004). Like the protective-search rule, this rule stems in part from concerns for officer safety. *Id* at 621. And like protective searches, a necessary requirement of the search is that it be

limited to areas within the “immediate control” of the suspect. *Id.* at 619–20. *See also Chimel v. California*, 395 U.S. 752 (1969) (recognizing exception for search of persons arrested in home).

The “gain immediate control of weapons” element—common to both protective searches and searches incident to arrest—has caused confusion in the past. Prior to 2009, many courts construed the “immediate control” requirement broadly, finding the passenger compartment of a car to be fair game regardless of whether the suspect could realistically grab a weapon from the car. *Arizona v. Gant*, 556 U.S. 332, 341 (2009). Accordingly, lower courts would allow police to search a car incident to arrest even when there was no possibility that the arrestee could gain access to the vehicle. *Id.*

In *Gant*, this Court stepped in to say that lower courts’ understanding of the “immediate control” requirement was wrong. “Immediate control,” the Court explained, means that police may search a car “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.* at 343. In doing so, this Court held that it was unreasonable for officers to search a suspect’s car incident to arrest after the officers had already handcuffed the suspect and secured him in the back of a patrol car. *Id.* at 336.

Gant has not settled the issue, however, as lower courts have been hesitant to follow *Gant* outside the narrow context of searches incident to arrest. Even though protective searches under *Long* involve the same “immediate control” requirement, most circuit courts have held that *Gant* does not apply to protective searches. The

Seventh Circuit, for example, believes that “*Gant* applies [only] to arrests.” *United States v. Vaccaro*, 915 F.3d 431, 437 (7th Cir. 2019). It continues to rely on pre-*Gant* precedent to hold that the “immediate control” requirement of *Long* is satisfied whenever police investigate a non-jailable offense because, without an arrest, a suspect will always be able to regain access to the car after receiving a citation. *Id.* A suspect’s inability to reach the car during the police encounter is irrelevant. *Id.*

While most federal courts agree with the Seventh Circuit, state courts have been more divided. Some, like the Seventh Circuit, hold that *Gant*’s analysis does not apply to protective searches under *Long*. *E.g.*, *People v. Delacruz*, 2016 CO 76, ¶ 20, 384 P.3d 349, 354 (Colo. 2016). But others have concluded that both searches incident to arrest and protective searches are limited to “the area within the reach of the person being detained.” *State v. Buchanan*, 2011 WI 49, ¶ 6 n.6, 799 N.W.2d 775, 779.

II. Dazmine Erving’s arrest.

The facts of this case involve the archetypical example of a couple in the backseat of a car on lover’s lane.

At around 2:45 a.m., on a September night, local Police Lieutenant Erin Barisch drove into the River Front Park in Peoria, Illinois. (App. 2a.) The park was closed. (App. 29a.) But Barisch saw an SUV parked at the far end of the parking lot. (App. 2a.) This was not unusual; during his 17 years of experience patrolling the area, Barisch had learned that the park was a popular spot for couples to hook up.

(R. 33 at 36.) And indeed, that night Dazmine Erving was in the backseat of the car with a woman. (App. 3a.)

Barisch stopped to investigate. (App. 2a.) The area where Erving had parked the car was “very dark,” and no lights were on inside the car. (R. 33 at 14–15.) But Barisch claimed that when he shined lights on the car, he could see both occupants make “sudden movements,” including Erving leaning down toward what looked like the back of the driver’s seat. (App. 2a.) Because the rear windows of the car were darkly tinted, Barisch admitted that he could not see “[s]pecifics” inside the car—only the occupants’ general movements. (R. 33 at 44–45.) But he later claimed that the movements looked like Erving had hid something beneath the driver’s seat. (App. 2a–3a.)

When Barisch reached the vehicle, he found Erving and his companion only semi-dressed. (App. 3a.) Erving in particular appeared to have quickly pulled on his pants, but not had time to grab any other clothes:



(C.D. Ill. Case No. 22-cr-10033, March 9, 2023 minute order, Gov't Suppression Ex. D, "Video" at 00:40.)¹ When Erving reached forward to get his identification from the front seat, it became clear that Erving had not even had time to completely pull on his pants:

¹ This exhibit is in custody of the government. See C.D. Ill. Case No. 22-cr-10033, Dkt. 38. Nonetheless, the defense can provide a copy of the video upon request.



(Id. at 01:01.)

Barisch would later testify that he knew as soon as he arrived that the couple had been attempting to have sex. (R. 33 at 34–35.) Couples having sex was a “common thing” in this location, and “[w]hen I approached the vehicle, the way that they were in the backseat, I, you know, I—that’s what I suspected of occurring.” (R.

33 at 36.) Barisch would also later claim that he had smelled a “lingering odor of burnt cannabis,” but he did not see any other indicia of cannabis use or ultimately find cannabis in the car. (App. 3a, 30a.) And because Illinois had legalized recreational cannabis, and the couple was not driving, Barisch testified that the smell “wasn’t a concern.” (R. 33 at 40.)

Barisch asked the couple for identification. (App. 3a.) Erving gave Barisch his Illinois ID card, but Erving’s companion gave a fake name. (App. 3a.) Barisch shut the car door and left the couple alone while he looked up their information inside his squad car. (App. 3a.)

Barisch discovered that Erving was on federal supervised release. (App. 3a.) No record showed up for the woman’s name. (App. 3a.) Barisch returned to Erving’s car and confirmed Erving’s supervision status. (App. 3a.) Barisch then ordered the couple to get out of the car. (App. 3a.)

Erving asked for permission to get his shoes from the front seat, and Barisch agreed. (App. 3a.) Barisch then stood idly while Erving opened the driver’s door, grabbed his shoes, and rummaged around for other clothing. (Video at 4:54–5:20.) After gathering his items, Erving walked away from the car and started to get dressed. (Video at 5:20–5:30.) Barisch did not pat down Erving, nor did Barisch search any of the items that Erving removed from the car. (Video at 5:20–5:40.)

Meanwhile, Erving’s companion had moved to the front passenger seat while Barisch had been looking up the couple’s information. (Video at 4:55–4:57.) She too had rummaged around the car to grab more articles of clothing and was now more

fully dressed. (Video at 5:30–5:37.) She also took her purse out of the car. (R. 33 at 39; Video at 5:30–5:37.) Barish did not object to the woman retrieving her purse. (App. 3a.) Nor did he pat down the woman or search the items she grabbed from the car. (Video at 5:30–5:37.)

Barisch asked the couple to stand in front of the car's hood away from the doors. (R. 33 at 30; Video at 5:32–5:37.) He then walked up to the car and looked under the driver's seat, where he saw a handgun. (App. 4a; Video at 5:40–5:50.) He did not search any other part of the car at this time. (Video at 5:40–5:50.) Nor did he remove the gun. (Video at 5:40–5:50.)

Barisch walked back to his patrol car and faced away from the couple while he called for backup. (R. 33 at 31; Video at 5:50–6:20.) Barisch then walked back and forth between the couple and his patrol car as he tried to get more information about the woman's identity. (Video at 6:20–8:00.) The video shows that Barisch did not keep a close eye on the couple but faced away from them for significant periods of time. (E.g., Video at 7:20–7:55.)

Later, when backup arrived, Barisch arrested Erving for possessing the gun as a felon. (R. 33 at 32; Video at 8:05–8:35.) Only after the arrest did Barisch retrieve the gun from the car. (Video at 21:10–22:07.)

III. The district court proceedings

Erving was charged with unlawful possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). Because Erving was on supervised release, this new charge also formed the basis of a petition for revocation.

Erving moved to suppress the gun as fruit of an illegal warrantless search. In response, the government argued that the search fell within two exceptions to the warrant requirement. First, the government contended that the search was a protective search under *Michigan v. Long*, 463 U.S. 1032 (1983), because Erving’s “furtive movements” provided reasonable suspicion that Erving was dangerous and had weapons in the car. (R. 16 at 6–11.) Second, the government contended that the search was permissible under the “automobile exception” because the odor of cannabis gave Barisch probable cause to believe that Erving had contraband in the car. (R. 16. at 13–17.) Regarding the second exception, the government conceded that cannabis was legal in Illinois but argued that Barish had probable cause that Erving used or stored it in a way that violated state law. (App. 32a.) The government did not raise any argument based on cannabis’s illegality under federal law, even after the district court raised the issue *sua sponte*. (App. 32a.)

Ultimately, the district court denied the motion to suppress, concluding that Erving’s furtive movements and his companion’s false statements created reasonable suspicion of dangerousness. (App. 5a.) And although Barisch had secured the couple away from the vehicle before the search, the court ruled that Barisch “had no other basis to arrest Erving” and thus could check the car for weapons before writing a citation and letting Erving return to the vehicle. (App. 37a.) Nonetheless, the judge thought the case a “close call.” (App. 38a.)

The district court avoided any ruling on whether cannabis odor could create probable cause of a violation of Illinois law. (App. 31–33a.) Illinois’s legalization of

recreational cannabis had created ambiguity, and the court wanted to avoid a “foggy issue.” (App. 32a–33a.) (Later, while Erving’s appeal was pending, the Illinois Supreme Court would hold that the smell of burnt cannabis alone does *not* create probable cause for a vehicle search. *People v. Redmond*, 2024 IL 129201 (Ill. 2024).)

Erving then entered a conditional plea of guilty and admitted to violating his supervised release, while reserving his right to appeal the suppression ruling. (App. 56a.) The court imposed a sentence of 41 months’ imprisonment on the new charge, followed by a consecutive sentence of 24 months for the revocation. (App. 7a.) It also imposed three years of supervised release on the new conviction (but no further supervision following revocation in Erving’s old case). (App. 24a.)

IV. The Seventh Circuit’s decision

On appeal, the Seventh Circuit upheld the search. (Appendix A.) It recognized that a protective search under *Michigan v. Long* had two requirements: reasonable suspicion to believe that (1) the suspect is dangerous” and (2) the suspect “may gain immediate control of weapons.” (App. 10a.) Regarding the first prong, the court rejected Erving’s arguments that the context of the encounter (police surprising a couple having sex) explained the furtive movements. (App. 11a–12a.) It instead ruled that the district court could credit Barisch’s claim that Erving’s furtive movement looked more like hiding something than getting dressed. (App. 11a–12a.)

On the second prong of *Long*, the court cited its prior decision in *Vaccaro*, 915 F.3d at 437–38, which had held that *Gant* does not apply to protective searches.

(App. 14a.) No matter that Barisch had secured the couple away from the interior of the car, the “immediate control” prong was automatically met because Barisch lacked grounds to arrest Erving. (App. 14a.)

Erving argued in the alternative that, even if the prongs of *Long* were met, the search was not a protective search because Barisch did not perform a protective search. (App. 14a–16a.) In support, he cited cases from the Eleventh Circuit holding that, when an officer’s objective actions are inconsistent with a protective search, warrant exceptions that rely on officer protection as a justification do not apply. See *United States v. Yarbrough*, 961 F.3d 1157, 1166 (11th Cir. 2020); *United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991). The Seventh Circuit, however, construed Erving’s argument as challenging Barisch’s subjective beliefs during the search. (App. 14a–15a.) And because the Fourth Amendment is objective, Barisch’s lack of actual concern for safety was irrelevant. (App. 15a–16a.)

Like the district court, the court of appeals refrained from ruling on whether the smell of cannabis could have allowed a search under the automobile exception. (App. 16a n.4.)

REASONS FOR GRANTING THE PETITION

Dazmine Erving engaged in a late-night tryst in his car. Short-sighted? Perhaps. Salacious? To some. But his “furtive movements” when caught undressed created only the thinnest justification for a protective search of his car. And even assuming that the officer had a justified suspicion of danger, any risk that Erving could grab a weapon disappeared when the officer removed him from the car. These facts help explain why, from an objective review of the body-camera video, the officer did not seem to be concerned with performing a protective search.

The officer could have simply written Erving a citation and moved along. But he had a hunch, and followed that hunch to search for contraband in Erving’s car. After the fact, the government characterized this action as a “protective search.” And the purported reasonableness of a protective search is the only ground upon which the search was upheld.

The Seventh Circuit’s opinion implicates two legal questions that have divided the judiciary. First, is a protective search reasonable even if a suspect cannot access the automobile in question? This Court has said that an officer may perform a protective search of an automobile only with reasonable suspicion that an individual (1) is “dangerous”; and (2) might “gain immediate control of weapons” inside the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). And when discussing searches incident to arrest in *Arizona v. Gant*, 556 U.S. 332, 343 (2009), this Court clarified that “immediate control” means an arrestee who “is unsecured and within reaching distance of the passenger compartment at the time of the

search.” But even though *Gant* involved the same “immediate control” requirement as *Long*, courts disagree whether *Gant* applies to protective searches.

Second, at least two circuits have recognized that courts may look at an officer’s objective actions to determine whether they actually performed a protective search. See *United States v. Yarbrough*, 961 F.3d 1157, 1166 (11th Cir. 2020) (citing *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999)); *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983). This rule reflects the federal courts’ longstanding skepticism of protective searches as ripe for abuse by police officers trying to go beyond the scope of their authority. *E.g.*, *United States v. Hassock*, 631 F.3d 79, 86 (2d Cir. 2011). Erving raised this argument on appeal, but the Seventh Circuit broke with its sister courts to hold that his arguments inappropriately hinged on the officer’s subjective intent.

This Court should step in to resolve these splits, and this case presents an ideal opportunity. Erving’s conviction hinges solely upon the legality of the challenged search. The search would not have been a reasonable “protective search” if the Seventh Circuit sided with Erving on either of the issues listed above. And the court cited no other exception to the Fourth Amendment’s warrant requirement to justify the search. Erving will continue to serve his sentence until 2030, so his case poses an ongoing controversy.

I. The test for protective searches of automobiles has divided the courts.

A. Court are split on whether *Gant*'s clarification of the "immediate control" requirement applies to protective searches

To justify a protective search under *Long*, the government must establish that a suspect could "gain immediate control of weapons" inside the vehicle. 463 U.S. at 1049. The exact same requirement applies to a search incident to arrest under *Gant*. 556 U.S. at 335. *Gant* also clarifies that a car's passenger compartment is within an arrestee's "immediate control" only if the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343.

Gant's clarification of "immediate control" should seemingly apply to *Long*. Not only did this Court publish *Gant* after *Long*, but it also explained in *Gant* that the judiciary's previous applications of the "immediate control" rule had given police too much leeway. *Id.* at 341. *Gant* was this Court's attempt to correct the rule and bring automobile searches back in conformity with the Fourth Amendment.

Nonetheless, federal courts have refused to consider *Gant* when analyzing protective searches. Prior to this case, the Seventh Circuit had already explicitly held that *Gant* does not apply to protective searches. *United States v. Vaccaro*, 915 F.3d 431, 437 (7th Cir. 2019).² Most other circuits have reached the same conclusion

² Oddly, the Seventh Circuit has not applied the same logic to *Terry* stops outside of vehicles. See *United States v. Leo*, 792 F.3d 742, 750–51 (7th Cir. 2015) (regarding search of backpack, rejecting argument under *Long* that defendant could gain access to weapons because officers lacked authority to detain him indefinitely). On the facts of *Leo*, the officers' concerns about the suspect accessing a weapon post-encounter were just as strong as in this case. Indeed, the officers had more

as the Seventh, concluding that *Gant* does not apply outside of searches incident to arrest. See *United States v. Guerrero*, 19 F.4th 547, 560 (1st Cir. 2021); *United States v. Jackson*, 456 F. App'x 142, 144 (3d Cir. 2011); *United States v. Griffin*, 589 F.3d 148, 154 n.8 (4th Cir. 2009); *United States v. Rodriguez*, 33 F.4th 807, 813 (5th Cir. 2022); *United States v. Lambert*, 770 F. App'x 737, 741 (6th Cir. 2019); *United States v. Scott*, 818 F.3d 424, 431 (8th Cir. 2016); *United States v. Canada*, 76 F.4th 1304, 1310 (10th Cir. 2023); *United States v. Vinton*, 594 F.3d 14, 24 n.3 (D.C. Cir. 2010). In the decision below, the Seventh Circuit cited only *Vaccaro* and *Long* when discussing the “immediate control” requirement. (App. 14a.) It did not consider *Gant* at all.

Counsel is not aware of circuits expressly disagreeing with this view. But the Ninth Circuit’s position is ambiguous. In an unpublished decision, a panel majority from that court held that a protective search of a car was illegal because the handcuffed suspects could not gain control of the car. *United States v. Perryman*, 716 F. App'x 594, 596 (9th Cir. 2017). In doing so, the majority rejected arguments that the officers did not have grounds to arrest the suspect and would have allowed them to retrieve objects from the car after the investigation. *Id.* And it rejected the views of a dissenting judge, who would have applied *Long* in a fashion similar to the other circuits listed above. *Id.* at 597 (Owens, J., Dissenting). Yet the court

to worry about in *Leo* because the suspect, who they believed had attempted a burglary, was about to enter a preschool.

expressly “decline[d] to consider the intersection of *Long* and *Gant*.” *Id.* at 595. So, for now, the question seems unsettled there.

State courts applying the Fourth Amendment are more divided. Some have construed *Gant* as applying only to searches incident to arrest. *See State v. Butler*, 296 Conn. 62, 71, 993 A.2d 970, 976 (Conn. 2010); *People v. Delacruz*, 2016 CO 76, ¶ 20, 384 P.3d 349, 354. *See also State v. Santos*, 64 A.3d 314, 322 (R.I. 2013) (rejecting argument that officers manipulated events by delaying arrest while they conducted a protective search that would have violated *Gant* if a search incident to arrest). Other states have strictly applied *Gant*’s “reaching distance” even when a suspect is not subject to arrest at the time of the search. *See State v. Robinson*, 228 N.J. 529, 549, 159 A.3d 373, 385 (N.J. 2017) (protective search not justified when car passengers, who were not suspected of arrestable offense, detained away from vehicle where could not immediately access weapons); *State v. Buchanan*, 2011 WI 49, ¶ 6 n.6, 799 N.W.2d 775, 779 (Wis. 2011) (both searches incident to arrest and protective searches are limited under Fourth Amendment to the “lunge area” that is “within the reach of the person being detained”).

The result of this mishmash? Despite the seeming near-consensus among most federal circuits, the application of the Fourth Amendment to car searches remains woefully inconsistent depending on the court system. In Wisconsin, for example, the legality of a search sometimes depends on whether prosecutors funnel the case into the state or federal court. *Compare Buchanan*, 2011 WI 49, ¶ 6 n.6 (applying *Gant*’s restrictions to protective searches in Wisconsin) *with Vaccaro*, 915

F.3d at 437 (rejecting applicability of *Gant* to protective search performed by Wisconsin police officers in Wisconsin). And to be clear, this is not a difference of state versus federal law. *Buchanan* is applying the same Fourth Amendment.

This inconsistency is abhorrent to our legal system, and the Wisconsin example in particular shows why this inconsistency is dangerous. State and federal authorities have incentive to work together to forum-shop for a venue with the weakest protections, resulting in a slow erosion of a core Constitutional provision.

Moreover, because the federal circuits are already at near unanimity, this issue is unlikely to come before this Court very often. Erving preserved the argument, because he was already appealing the search on other grounds. But most federal defendants will not bother to preserve an argument that is doomed to fail under circuit law. This Court should use this case to address the issue.

B. The Seventh Circuit is on the wrong side of the split.

This Court's decision in *Gant* was meant to correct the misconception that officers could warrantlessly search a car "even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 556 U.S. at 341. In the Seventh Circuit, as in most federal circuits, officers can still warrantlessly search a car regardless of the suspects inability to access it "at the time of the search." *Id.* All it takes is for the officer to avoid arresting the suspect until after the search is complete, thereby avoiding the magic line between protective search and search incident to arrest.

The Seventh Circuit’s rule effectively nullifies the “gain immediate control of weapons” prong of *Long*. According to circuit precedent, the “immediate control” requirement is always satisfied when a suspect does not face arrest. *Vaccaro*, 915 F.3d at 437. But a suspect will never be arrested before a protective search, because a pre-search arrest transforms the search into one incident to arrest under *Gant*. Thus, under the Seventh Circuit’s reasoning, courts will never see a case in which the “immediate control” prong of *Long* is in dispute. The prong is satisfied *because* the search is a protective search. On the other hand, a suspect who commits a more serious crime, and thus faces jail time, receives the stronger protection of *Gant*. So, does this mean that people who commit more serious offenses have a greater expectation of privacy in their cars?

If this Court wanted, it could have created a bright-line rule that automobile searches are always permissible when an officer has reasonable suspicion of weapons. But *Long* does not say that. Like its predecessor *Terry*, *Long* limited searches to only what was reasonably necessary to detect weapons that could immediately threaten officer safety—that is, to areas within the “immediate control” of the suspect. The Seventh Circuit has essentially written this requirement out of the rule.

II. The circuits are further split regarding whether courts may consider whether an officer’s conduct is objectively consistent with a protective search.

Erving’s alternative challenge to the protective search also implicates a circuit split. He argued below that, even if the prongs of *Long* were met, the

doctrine should not apply in the first place because Barisch did not *perform* a protective search. (App. 14a–16a.) As the Eleventh Circuit has explained, when officers act inconsistent with a purported protective search, their actions can “objectively prove[] that there was no danger to the officers.” *United States v. Yarbrough*, 961 F.3d 1157, 1166 (11th Cir. 2020) (citing *United States v. Chaves*, 169 F.3d 687, 692 (11th Cir. 1999)). *See also United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir. 1991) (search was not a protective sweep because officer merely entered the home, seized guns, and stepped outside without making “any inspection of the rest of the premises”).

The video record leaves little doubt that a “protective search” was a post-hoc rationalization. Even after Barisch learned that Erving was on supervised release for a prior “weapon” conviction, Barisch showed no concern that Erving or his companion were *currently* armed. He asked the couple to get out of the car, but he did not pat them down or otherwise search their persons. (Video at 4:45–4:54.) Instead, Barisch gave Erving permission to open the front driver’s side door and rummage around for his shoes. (Video at 4:52–5:15.) He then allowed Erving and Erving’s companion to grab other clothes out of the car and get dressed—again, without patting them down or checking whether a weapon was hidden within those clothes. (Video at 5:10–5:40.) Barisch even allowed the woman to take *her purse* out of the car without asking to check the bag for contraband. (Video at 5:34–5:37.) No reasonable viewer could conclude from the video that Barisch’s actions were consistent with an officer who thought that the couple had secreted weapons.

As for the search itself, Barisch beelined to the driver's seat to look under it. (Video at 5:40–5:50.) After he saw the gun, he stopped the search. (*Id.*) He did not remove the weapon to prevent Erving from grabbing it. He did not sweep the rest of the car to look for additional weapons. And he did not arrest or restrain Erving to stop him from going back to the car to grab the gun. Instead, Barisch walked back to his patrol car and faced away from the couple while he called for backup. (R. 33 at 31; Video at 5:50–6:20.) For the next couple of minutes, while Barisch waited for backup, he walked back and forth between the couple and his patrol car as he tried to get more information about the woman's identity. (Video at 6:20–7:40.) He faced away from the couple for an extended amount of time. (Video at 7:20–7:55.) As explained above, Barisch did secure Erving *before* searching for the gun. But if Barisch was concerned that Erving could access the gun after finding it, he did nothing to prevent Erving from getting it.

From an objective standpoint, Barisch's actions were inconsistent with a protective search. And, contrary to the Seventh Circuit's mischaracterization of Erving's argument below, Erving did *not* argue below that the search was illegal merely because "Barisch was not *really* concerned for his safety." (App. 14a–15a.) Erving expressly disclaimed any argument that Barisch's subjective beliefs were relevant. (7th Cir. Nos. 23-2828 & 23-2831, Dkt. 24, Reply Br. at 7.) To be sure, at least one circuit follows a rule that seemingly considers an officer's subjective views as relevant to the legality of a protective search. *See United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983) ("Although the existence of reasonable suspicion or

probable cause is judicially viewed under an objective standard, it is a standard applied to the actual and/or perceived belief of the law enforcement officer as he either stops and detains or engages in search and seizure.”). But because the Fourth Amendment is objective, *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006), Erving would agree with the Seventh Circuit that the Ninth Circuit’s test is wrong to the extent that it incorporates an officer’s “actual ... belief.” *Prim*, 698 F.2d at 975.

But that concession doesn’t matter, because Erving did not focus on subjective belief. He argued that no objective observer could perceive Barisch’s search as a protective search within the meaning of *Long*. He cited *Yarbrough*, 961 F.3d 1157, and *Rodgers*, 924 F.2d 219, in support of his argument. And although not cited below, the Ninth Circuit’s rule in *Prim* would also support an objective review of the officer’s “perceived belief” even if one disagrees with *Prim*’s subjective component. *Prim*, 698 F.2d at 975.

The Seventh Circuit thus created a circuit split when it summarily rejected Erving’s arguments as irrelevant to an objective inquiry. (App. 15a.) Confusingly, the Seventh Circuit still cited the Eleventh Circuit’s *Rodgers* case and summarized its holding in Erving’s favor. (App. 15a.) But without any attempt to differentiate the facts of *Rodgers* from this case, the court went on to ignore *Rodgers* and hold that any appearances regarding the scope of the search are irrelevant. (App. 15a.) In doing so, the Seventh Circuit seems to have been echoing a *dissenting* judge from that circuit who objected to the Eleventh Circuit’s rule. *See Yarbrough*, 961 F.3d at

1167 (Ungaro, D.J., dissenting). Yet it failed to acknowledge that it was siding with a sister court's dissenter and therefore, necessarily, splitting the courts of appeals.

Again, the Seventh Circuit is on the wrong side of the split. The Eleventh Circuit has good reasons for policing against the government's attempts to shoehorn warrantless searches into various "protective search" exceptions. Multiple courts have recognized that protective sweeps are ripe for abuse. When police enter a suspect's home through his or her consent, for example, "there is a concern that generously construing [the protective-sweep doctrine] will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home." *United States v. Hassock*, 631 F.3d 79, 86 (2d Cir. 2011). *See also United States v. Gould*, 364 F.3d 578, 589 (5th Cir. 2004) (en banc) (recognizing the same concern). In the home context, some courts have even gone so far as prohibiting protective sweeps except in the context of executing arrest warrants. *See United States v. Torres-Castro*, 470 F.3d 992, 997 (10th Cir. 2006).

This case shows why the concern of abuse is warranted. Barisch did not search Erving and his car for weapons as a precautionary measure, a la *Terry*. He seemingly had a hunch that he would find contraband, and he went fishing for that evidence. It turned out to be a gun, but maybe Barisch thought he was going to find drugs or something else. No objective viewer could view his actions as a true sweep of the area in the name of safety.

III. This case is an excellent vehicle.

In both the district court and the court of appeals, the sole rationale for upholding the search was the protective-search doctrine. But if this Court agrees with Erving that *Gant* applies to protective searches, then the government can no longer satisfy the “immediate control” prong of *Long*. Likewise, if this Court agrees with Erving that Barisch’s actions placed his search outside of the protective-search doctrine, the doctrine would no longer apply. Either way, the evidence would be suppressed. And because the entire case comes down to this search, Erving would face immediate release. (Reversing the suppression ruling would not affect Erving’s revocation of supervised release in Case No. 20-cr-10012, but he has already served the three years of imprisonment that he received for that revocation.)

The government may argue that *certiorari* is inappropriate because the lower courts could still affirm on the alternative ground that the odor of burnt cannabis justified a search under the automobile exception. In both the district court and the court of appeals, the government contended that the odor of cannabis alone could create probable cause for a search under state law. And on appeal, the government added a new argument that the smell also created probable cause for a violation of federal law. (7th Cir. Nos. 23-2828 & 23-2831, Dkt. 20, Appellee’s Br. at 36–47.)

But the lower courts had good reason for not relying on the automobile exception. Cannabis is legal in Illinois, and Illinois courts were split on whether burnt cannabis odor alone could be probable cause for a violation of Illinois laws regarding cannabis use in motor vehicles. (App. 32a.) The Illinois Supreme Court

eventually ruled against the government's position. *People v. Redmond*, 2024 IL 129201 (Ill.2024). As for cannabis's status under federal law, the government waived in the district court any argument regarding probable cause for a violation of the Controlled Substances Act. (7th Cir. Nos. 23-2828 & 23-2831, Dkt. 24, Reply Br. at 10–14.) The government also failed to establish that Barisch could distinguish between cannabis and recreational hemp, which was legal under federal law. (*Id.* at 8–10.) And even if the government could overcome those issues, Illinois law did not authorize state police to investigate violations of federal cannabis law. (*Id.* at 14–17.) Unsurprisingly, the lower courts did not want to touch an automobile-exception rationale that was both legally dubious and carried potentially toxic implications for basic federalism.

Finally, although Erving's prison sentence is relatively short, there is no danger of his case becoming moot when he is released from prison. He still faces three years of supervised release as part of the sentence for his new conviction. (App. 24a.) Unless the suppression ruling is reversed and his conviction is vacated, Erving will remain under the thumb of this judgment until 2030.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 30, 2026

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 23-2828 & 23-2831

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAZMINE ERVING,

Defendant-Appellant.

Appeals from the United States District Court for the
Central District of Illinois.

Nos. 1:22-cr-10033 & 1:20-cr-10012 — **James E. Shadid**, *Judge*.

ARGUED APRIL 15, 2024 — DECIDED JANUARY 20, 2026

Before KIRSCH, PRYOR, and KOLAR, *Circuit Judges*.

PRYOR, *Circuit Judge*. Dazmine Erving was charged with unlawfully possessing a firearm after a police officer found a handgun in his car. 18 U.S.C. § 922(g). Erving moved to suppress the evidence against him, arguing that the officer lacked reasonable suspicion for the search. The district court found the question to be a “close call” but ultimately denied the motion. Erving then pleaded guilty and received a sentence at

the upper end of the advisory United States Sentencing Guidelines range.

On appeal, Erving contends that the district court should have granted his suppression motion because the officer did not have reasonable suspicion to conduct a protective search of his car. He also argues that the court committed procedural and constitutional errors at sentencing. Because Erving points to no reversible error, we affirm.

I. BACKGROUND

We recount the facts, which are not in dispute, as they were developed at the suppression hearing. *See United States v. Davis*, 44 F.4th 685, 688 (7th Cir. 2022).

A. Factual Background

On September 14, 2022, Lieutenant Erin Barisch of the City of Peoria Police Department was on patrol in an unmarked police vehicle. He entered Peoria's River Front Park at about 2:45 a.m. and noticed a red Dodge Durango SUV parked at the back of a closed, dark parking lot. He decided to investigate. Lt. Barisch illuminated the vehicle with his headlights and then lit up the driver's side windows with a spotlight. Lt. Barisch exited his squad car and used his handheld flashlight to light up the darkly tinted rear passenger windows of the Durango.

Two individuals were observed in the rear passenger seats. As Lt. Barisch approached, he watched them make "sudden movements," one of which caught his attention: "the individual – the male behind the driver's seat [made] a quick, sudden movement leaning down and then toward the rear of the back driver's seat toward the floorboard, and then he quickly sat up." To Lt. Barisch, it looked like the man was

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hiding something. As Lt. Barisch approached the Durango, the male started to open the rear passenger door and Lt. Barisch used his flashlight to illuminate the interior.

Inside sat Dazmine Erving and a female companion. Erving was semi-dressed; his companion was mostly dressed but her shirt was pulled upwards. Lt. Barisch assumed he had interrupted a couple attempting to engage in sexual relations. In addition to observing their state of undress, Lt. Barisch smelled a “lingering odor of burnt cannabis” but saw no other indicia of marijuana use. (A later search of the Durango turned up no other evidence of cannabis.)

Lt. Barisch asked the pair for identification. Erving provided his Illinois state ID card. The woman said her name was “Adriana Smith,” born February 5, 2005. But she did not have identification. Lt. Barisch closed the door to the Durango and returned to his car to run their information. He discovered that Erving was serving a term of federal supervised release for a weapons offense, which began twelve days earlier on September 2, 2022. He also realized that the woman gave him false identifying information because a search for her name and birthdate returned no results, even though she indicated she had a driver’s license.

When Lt. Barisch returned to the Durango, he asked whether Erving was on supervised release. Erving said that he was and gave Lt. Barisch the name of his probation officer. Lt. Barisch told the pair to step out of the vehicle and they complied. Erving asked if he could retrieve his shoes from the front seat. Lt. Barisch agreed and allowed the woman to retrieve her belongings too.

After allowing Erving and the female companion to get their belongings, Lt. Barisch directed the pair to the rear of the vehicle but did not handcuff them. Lt. Barisch poked his head into the Durango and looked under the driver's seat, which is where he thought Erving may have stashed something. He saw a gun but left it alone and radioed for backup. Once backup arrived, Lt. Barisch retrieved the gun. Erving was arrested, received *Miranda* warnings, and admitted the gun belonged to him.

B. Procedural History

On September 20, 2022, Erving was indicted for unlawfully possessing a weapon as a felon. 18 U.S.C. § 922(g)(1). The charge also resulted in a petition to revoke Erving's supervised release.¹

1. The Suppression Motion

Erving moved to suppress the firearm, arguing that Lt. Barisch unlawfully searched the Durango by looking under the front seat. He contended the warrantless search of his car was not justified as a protective search. He also claimed that, because Illinois has legalized cannabis, the odor of burnt cannabis does not create probable cause to suspect a violation of state law.

¹ On February 20, 2020, Erving was indicted for unlawfully possessing a weapon as a felon in violation of 18 U.S.C. § 922(g)(1). For that offense, Erving pleaded guilty, and the district court sentenced him to serve 37 months in prison and three years' supervised release. One of the mandatory conditions of his supervised release was not committing another federal, state, or local crime. Based on his arrest for the instant offense, the Probation Office filed a petition to revoke Erving's supervised release.

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In response, the government asserted that the search was a permissible protective search and that, in any case, the odor of cannabis gave Lt. Barisch probable cause to search for evidence of a violation of Illinois law. As for this latter argument, the government requested the district court take sides in a then-unresolved split among the Illinois appellate courts over whether the odor of cannabis creates probable cause.²

The district court denied Erving's motion after an evidentiary hearing. The court concluded Lt. Barisch permissibly performed a protective search. *See Michigan v. Long*, 463 U.S. 1032 (1983). In the court's view, Erving's furtive movements, his status as a person on supervised release for a weapons offense, and his companion's false statements made it reasonable to suspect that Erving was armed and dangerous and could access the gun. The court did not address whether the odor of cannabis creates probable cause of an Illinois crime.

2. *The Sentencing Hearing*

With respect to the new offense, Erving pleaded guilty to possessing the firearm unlawfully, though he preserved his right to appeal the court's suppression decision. As for the revocation petition in the separate criminal matter, Erving admitted to violating the conditions of his supervised release. The district court held the final hearing for Erving's revocation of supervised release with his scheduled sentencing hearing in the instant offense.

At the hearing, the parties agreed that Erving faced an advisory guidelines range of 33 to 41 months' imprisonment

² The Supreme Court of Illinois has since ruled that the odor of burnt cannabis alone does not provide probable cause to conduct a warrantless search of a vehicle. *People v. Redmond*, 248 N.E.3d 1026, 1041 (Ill. 2024).

based on his criminal history category (VI) and total offense level (13). U.S.S.G §§ 2K2.1(a)(6)(A), 2K2.1(b)(4)(A), 3E1.1(a)–(b), 4A1.1(a)–(b), 4A1.2(k). The parties also agreed that Erving’s supervised-release violation carried a term of 21 to 24 months’ imprisonment.

The government asked the court to impose within-guidelines sentences for both offenses, with the terms to be served consecutively. The government argued Erving was a repeat offender whose latest offense came just a few days into his term of supervised release.

Erving sought a below-guidelines term of thirty months’ imprisonment on the § 922(g) charge and asked to serve concurrently any revocation sentence. He argued his criminal history was overstated and that pending amendments to the United States Sentencing Guidelines would reduce his criminal history score, too. He also argued that there were significant factors in mitigation that pointed to a lower sentence, including that he voluntarily left behind a former gang affiliation at no small danger to himself and his family and that he was battling mental health issues. In allocution, Erving took responsibility for his actions, described growing up in a cycle of trauma, and maintained that he carried a gun only for self-defense.

In rendering the sentence, the district court began by accepting Erving’s argument that pending amendments to the United States Sentencing Guidelines would reduce his criminal history points, and the court agreed to give him the benefit of those amendments. But that adjustment did not change Erving’s criminal history category. To reduce his criminal history category, Erving also needed to demonstrate that his criminal history was overstated.

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The court recognized Erving's argument that his criminal history was overstated but saw things differently:

[Counsel] argues why the criminal history category is overstated and points to an obstruction, a contempt, and a mob action. And if those were ignored or set aside or excused, might change the Criminal History Category from VI to V.

But I would likely say -- and I haven't reviewed the transcript of the previous sentencing, [counsel] -- that that argument was probably made by defense counsel at that time when Mr. Erving was sentenced to 37 months for a gun violation which ironically, the criminal history, the guideline range was the same then as it is now, 33 to 41 months.

...

But I would say, Mr. Erving, you're making it difficult for people to defend you and make these arguments by continuing to commit these same crimes.

After next addressing Erving's statements in allocution, the court imposed a 41-month sentence followed by a consecutive 24-month revocation sentence.

At the end of the hearing, the court offered "one last comment."

I wanted to leave -- I don't mean this -- I wanted to leave your children out of this, but these decisions you're making are now making it so that more children are growing up without the

guidance of a father, but if you're going to make the choices you make, maybe that's better for them.

But having said that, clearly the last child that you made, the one born in January was made probably while you were in a halfway house. These are simply poor decisions, and they keep leading to more poor decisions.

And the gun you picked up here was within 12 days after you were put on supervised release.

So, I don't want to say that it points -- paints a picture of somebody who's just likely to continue to recidivate because I, frankly, think after listening to you now and listening to you a couple years ago you can figure out a way to move away from this. I hope you do so.

Erving timely appealed.

II. ANALYSIS

On appeal, Erving insists that the district court erred by denying his motion to suppress the firearm. He also contends that the district court erred at sentencing in two ways. First, by rejecting the arguments about his criminal history because he "probably" made those same argument before. Second, by penalizing him for having children. We address these arguments in turn.

A. The Protective Search

Erving argues that Lt. Barisch's warrantless search violated the Fourth Amendment and the district court erred by denying his suppression motion. "When reviewing a district

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court's denial of a motion to suppress, we 'review the district court's legal conclusions de novo and its factual findings for clear error.'" *United States v. Walker*, 143 F.4th 889, 895 (7th Cir. 2025) (quoting *United States v. Williams*, 106 F.4th 639, 653 (7th Cir. 2024)). Within the realm of fact-finding, we give special deference to the district court's credibility determinations unless "we are 'left with the definite and firm conviction that a mistake has been made.'" *United States v. Olson*, 41 F.4th 792, 802 (7th Cir. 2022) (quoting *United States v. Wendt*, 465 F.3d 814, 816 (7th Cir. 2006)).

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. CONST. amend. IV. This constitutional protection means the government usually must obtain a warrant before conducting a search or seizure. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Indeed, warrantless searches are "*per se* unreasonable" unless one of the "few specifically established and well-delineated exceptions" to the warrant requirement applies. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Among these is the protective search exception. *See Terry v. Ohio*, 392 U.S. 1, 20–27 (1968); *Long*, 463 U.S. at 1045–52. *Terry* marks the genesis of this exception. 392 U.S. at 20–27. There the Supreme Court held that for "officers to protect themselves and other[s]," the Fourth Amendment allows them to conduct a search of a person, often referred to as a "frisk" or "pat down," where they "point to specific and articulable facts" indicating "that criminal activity may be afoot and that the persons with whom [they are] dealing may be armed and presently dangerous." *Id.* at 21, 24–25, 30.

Protective searches, though, are not necessarily limited to a brief search of an individual's person. Consistent with the

Fourth Amendment, an officer may also conduct “area searches” for weapons “in limited circumstances.” *United States v. Richmond*, 924 F.3d 404, 413–14 (7th Cir. 2019) (citation omitted).

Relevant here, an officer armed with a “reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons,” may “conduct[] a legitimate *Terry* search of the interior of [an] automobile.” *Long*, 463 U.S. at 1049–50 (quoting *Terry*, 392 U.S. at 21). Still, such a search “must be strictly limited to that which is necessary for the discovery of weapons,” *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (internal quotation mark and citation omitted), and confined to “those areas in which a weapon may be placed or hidden” within the car, *Long*, 463 U.S. at 1049. Thus, a protective search of a vehicle is permissible if officers have reasonable suspicion to believe: (1) “the suspect is dangerous” and (2) the suspect “may gain immediate control of weapons.” *Id.*; see also *United States v. Vaccaro*, 915 F.3d 431, 436–37 (7th Cir. 2019); *United States v. Arnold*, 388 F.3d 237, 239 (7th Cir. 2004); *United States v. Wimbush*, 337 F.3d 947, 950 (7th Cir. 2003).

1. *Dangerousness*

To meet the first criterion, Lt. Barisch needed reasonable suspicion to believe that Erving was dangerous. *Long*, 463 U.S. at 1049. Reasonable suspicion rests on particularized facts and requires “more than a hunch but less than probable cause.” *Richmond*, 924 F.3d at 411. Put another way, determinations of reasonable suspicion “must be based on commonsense judgments and inferences about human behavior.” *Illinois v.*

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Wardlow, 528 U.S. 119, 125 (2000) (citation omitted). And to resolve this question, we conduct an objective inquiry, considering the totality of the circumstances. *Richmond*, 924 F.3d at 411.

When evaluating whether a stop is objectively dangerous, context matters. See *United States v. Ford*, 872 F.3d 412, 416 (7th Cir. 2017). The stop here was conducted by a lone officer at 2:45 a.m., in a park known for its propensity to host vice and narcotics-related crime. Stops that occur in the dead of night in “area[s] where crime is not a stranger” are generally “more fraught with potential danger to an officer than would be a stop during the light of day.” *Id.* (quoting *United States v. Brown*, 273 F.3d 747, 748 (7th Cir. 2001)). That’s a fair description of the scenario that Lt. Barisch encountered in River Front Park. The increased potential for danger in a secluded, crime-prone location colors what happened next. Cf. *Vaccaro*, 915 F.3d at 436.

As Lt. Barisch approached the Durango to investigate, he saw Erving move in a manner consistent with hiding something, not with getting dressed quickly. We have long held that a suspect’s furtive movements matter to the reasonable suspicion analysis. E.g., *Vaccaro*, 915 F.3d at 434, 436 (recounting that the suspect “aggressive[ly] move[d] ... his entire top torso and both arms into the back seat of the vehicle”); *Arnold*, 388 F.3d at 238 (noting the suspect “wormed his way” into the back seat after being stopped, apparently hid something, and then returned to the front seat).

Rather than contest Lt. Barisch’s testimony (which the court expressly found credible), Erving makes two general arguments. First, he contends the phrase “furtive movement” is not a magic incantation that permits police to justify a vehicle

search at every traffic stop. *Cf. Long*, 463 U.S. at 1049 n.14 (emphasizing that every protective search must be justified on its own terms and there is no blanket right to search a vehicle). We agree in principle, but this is not a magic words case. Lt. Barisch explained the movements he saw were “not associate[d] with getting dressed.” Rather, as he approached the car, he observed Erving make “a deliberate, sudden, quick movement leaning down and then quickly back up.” Lt. Barisch then explained why this was suspicious: “the movements of trying to get dressed would have been significantly longer and different [M]ore of an up-and-leaning-back movement.” In short, “furtive movements” is shorthand for Lt. Barisch’s assessment that Erving was trying to hide something, not to regain his composure.

Second, Erving argues that even if his movements were vaguely suspicious, the obvious, innocuous explanation for his movements—getting dressed after being caught during a back seat escapade—means his movements alone do not suggest objective dangerousness. We agree reasonable suspicion does not arise from acts that are “consistent” with lawful behavior rather than illegal activity. *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014 (7th Cir. 2016). But the presence of “an innocent explanation” for suspicious behavior alone does not dispel reasonable suspicion because “absolute[] certain[ty]” of criminality is not required for a protective search. *Vaccaro*, 915 F.3d at 436. And, as already explained, Lt. Barisch reasonably ruled out the purported innocent explanation for the movements Erving now presses before us.

Even if Erving’s surreptitious actions alone did not create reasonable suspicion that Erving was dangerous, we cannot miss the forest for the trees. After observing Erving move

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furtively in a vehicle parked at the back of a closed parking lot at nearly 3 a.m., he opened the door as Lt. Barisch approached the Durango's rear passenger door. The odor of burnt cannabis emanated from the vehicle. This, too, contributed to reasonable suspicion. Reason to believe a suspect may be "under the influence of drugs," including the mere smell of intoxicants, contributes to reasonable suspicion. *Vaccaro*, 915 F.3d at 436–37; *Ford*, 872 F.3d at 415–16. We have little trouble concluding that the odor of burnt cannabis contributed to reasonable suspicion for a protective search here.³ It is reasonable to suspect that someone who is under the influence of intoxicants is more likely to pose a danger to others. *United States v. Colbert*, 54 F.4th 521, 528 (7th Cir. 2022).

Yet, even after all this, Lt. Barisch did not conduct a protective search immediately. Instead, he waited until after he learned about Erving's criminal history and the fact that Erving was presently on supervised release for a weapons offense. That adds important context because we have repeatedly held that knowledge of prior criminal activity can "contribute to reasonable suspicion." *Vaccaro*, 915 F.3d at 437.

We see this as a case where the whole is greater than the sum of its parts. Only once Lt. Barisch knew that he was alone in a dark parking lot in the dead of night, had smelled burnt

³ Lt. Barisch testified that he smelled burnt cannabis, and the district court credited this testimony. Erving seems to contest that finding, arguing that there is no way to verify whether an officer has, in fact, detected an odor of burnt cannabis. Maybe so. But it is the district court's prerogative to sort through witness testimony, even if uncorroborated, and decide who to believe. *United States v. Biggs*, 491 F.3d 616, 621–22 (7th Cir. 2007). We see no reason to think the district court clearly erred in accepting Lt. Barisch's account of what he smelled. See *Olson*, 41 F.4th at 802.

cannabis, learned one of the individuals provided him with false identifying information, and realized that he was dealing with a convicted felon who had apparently hidden something did Lt. Barisch conduct a search for weapons. At that point, Lt. Barisch had reasonable suspicion that Erving was dangerous.

2. *Immediate Control of a Weapon*

The second *Long* criterion—ability to gain immediate control of a weapon—can be satisfied if the suspect is likely to be released, or permitted to gather belongings from the vehicle. *Vaccaro*, 915 F.3d at 437–38.

The parties agree that Erving committed no arrestable offense before Lt. Barisch discovered the weapon, so Erving was likely to be released. Thus, under *Vaccaro*, Erving “was not under arrest [and] could have regained access to his vehicle,” so the second prerequisite for a protective search is met. *Id.* (citations omitted). Erving concedes the second *Long* criterion is satisfied given our decision in *Vaccaro*. Erving argues *Vaccaro* was wrongly decided and asks us to overrule it.

We decline the invitation. *Vaccaro* is not Erving’s real obstacle—*Long* is. The Supreme Court held that a protective search is permitted “if the suspect is not placed under arrest” and will be allowed to return to the vehicle. *Long*, 463 U.S. at 1051–52. In other words, *Vaccaro* applied binding precedent and forecloses Erving’s argument. 915 F.3d at 436–38.

3. *Erving’s Fallback Position*

Relying on *United States v. Rodgers*, 924 F.2d 219 (11th Cir. 1991), Erving’s last argument is that *Long* does not apply because Lt. Barisch did not act concerned for his own safety prior to searching the Durango. If Lt. Barisch was not *really*

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concerned for his safety, the argument goes, then *Long* cannot apply because *Long* is about officer safety. See *Vaccaro*, 915 F.3d at 436.

In *Rodgers*, an officer entered a mobile-home trailer without a warrant “for the purpose of seizing contraband,” seized the contraband, and then left. 924 F.2d at 222. The Eleventh Circuit concluded that there were no “specific and articulable facts” that the area searched “harbored an individual posing a danger to the officer or others,” in part because the officer did not search anywhere else in the trailer. *Id.* (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)). Given the targeted nature of the search and the lack of any reason to suspect that a dangerous person could access the trailer, the Eleventh Circuit concluded that the government was trying to shoehorn a warrantless search of a home into the protective sweep exception. *Id.*

Erving maintains that because Lt. Barisch let Erving remain in the Durango while he ran Erving’s information, let Erving retrieve belongings from the vehicle, did not handcuff Erving until backup arrived, and searched only under the driver’s seat—rather than conducting a full protective search of the vehicle or physically restraining either Erving or the female passenger—it shows Lt. Barisch was not concerned for officer safety, and thus not permitted to conduct a protective search.

This argument fails to persuade for numerous reasons. Fundamentally, our inquiry under the Fourth Amendment is objective; we are generally unconcerned with officers’ subjective motivations. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). As such, unusually calm or brave officers can conduct protective searches. Also, a quick, tailored search is less

intrusive on a person's interests than a longer one. *See Terry*, 392 U.S. at 10–12, 20–21. By limiting a search to the area that prompted concern in the first place, officers promote the purpose of the protective search—ensuring safety—while respecting the constitutional rights and dignitary interests of the person searched. Here, Lt. Barisch had reasonable suspicion to believe there was a weapon hidden beneath the driver's seat and he conducted a targeted search to confirm or dispel that suspicion. *See Wardlow*, 528 U.S. at 123.

* * *

In sum, we conclude the district court rightly denied Erving's motion to suppress the evidence obtained from Lt. Barisch's search of Erving's vehicle. The search was justified by the protective search exception to the Fourth Amendment's warrant requirement.⁴

B. Sentencing

Erving contends that the district court committed reversible procedural and constitutional error at sentencing. We review these claims de novo. *United States v. Shaw*, 39 F.4th 450, 455 (7th Cir. 2022). Though Erving never objected to either error during the sentencing hearing, he was not given a chance to object and did not have to take exception afterwards. *See United States v. Wilcher*, 91 F.4th 864, 871 (7th Cir. 2024).

This appeal implicates several principles of proper sentencing procedure. District “[c]ourts must ‘adequately explain’ the sentences they hand down,” *id.* (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)), and address the

⁴ Accordingly, we need not resolve the parties' dispute over whether the automobile exception applies.

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defendant's principal arguments in mitigation, *United States v. Williams*, 887 F.3d 326, 328 (7th Cir. 2018). Separately, defendants have a due process right to be sentenced based on accurate, reliable information. *United States v. Oliver*, 873 F.3d 601, 608–09 (7th Cir. 2017); *United States v. Holding*, 948 F.3d 864, 870 (7th Cir. 2020). A corollary of that right is the prohibition on sentencing defendants based on speculation. *United States v. Newton*, 76 F.4th 662, 674 (7th Cir. 2023).

When it comes to reviewing claims of procedural or constitutional error, we review the record “fairly and as a whole.” *United States v. Coe*, 992 F.3d 594, 598 (7th Cir. 2021). When reviewing a sentencing transcript, we read the court's remarks in context, not in isolation. *United States v. Gary*, 613 F.3d 706, 709–10 (7th Cir. 2010).

1. *The Alleged Procedural Error*

Erving first argues the district court procedurally erred by rejecting his “primary” mitigation argument that his criminal history was overstated. Specifically, he argued to the court that his prior convictions for obstruction, contempt, and a mob action exaggerated his criminal history.

But the court concluded otherwise. It focused on Erving's recidivism, remarking that by “continuing to commit these same crimes,” he made “it difficult for people to defend” him. Indeed, he committed the offense within “12 days after [he] [was] put on supervised release” for a conviction of the same offense. In rejecting Erving's request, the court also remarked that his arguments “[were] probably made by defense counsel” before at Erving's prior sentencing for “a gun violation.” On appeal, Erving contends this statement shows the district court improperly speculated in rejecting his argument.

We disagree. When fairly reviewed in context and as a whole, the court did not reject Erving's arguments regarding his criminal history because they were "probably made" before. From the record, it is clear the court determined Erving was a repeat offender who engaged in the same criminal behavior—possession of a firearm by convicted felon—even while on supervised release for a similar weapons conviction. Thus, we find the district court appropriately considered Erving's mitigation argument and did not rely on speculation in imposing Erving's sentence. See *United States v. Donelli*, 747 F.3d 936, 939–40 (7th Cir. 2014); *United States v. Nelson*, 774 F.3d 1104, 1107 (7th Cir. 2014) (per curiam).⁵

2. *The Alleged Constitutional Error*

Next, Erving asserts the district court committed constitutional error at sentencing for penalizing his decision to bear and raise children, a fundamental right. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Only constitutionally permissible factors may be used to determine a sentence. *Pepper v. United States*, 562 U.S. 476, 489 n.8 (2011). A wide swath of information falls into that category. But not everything. For example, a court cannot

⁵ At oral argument, Erving claimed the district court did not adequately address several other of Erving's primary arguments in mitigation, including his mental health struggles and difficult, voluntary withdrawal from a street gang. Because Erving omitted these arguments from his brief and did not meaningfully press these alleged errors until oral argument, we conclude he has waived them. *Tuduj v. Newbold*, 958 F.3d 576, 579 (7th Cir. 2020) (per curiam) ("[A]rguments not raised in an opening brief are waived." (citation omitted)).

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sentence a person based in part on race or gender; those considerations are constitutionally out-of-bounds. *Oliver v. United States*, 951 F.3d 841, 844 (7th Cir. 2020); *United States v. Trujillo-Castillon*, 692 F.3d 575, 579 (7th Cir. 2012). The United States Sentencing Guidelines, too, provide that “race, sex, national origin, creed, religion, and socio-economic status” are off the table at sentencing. *Trujillo-Castillon*, 692 F.3d at 579 (citing U.S.S.G. § 5H1.10).

Erving points to these comments, which the court made at the end of his sentencing hearing, in support of his argument that the court committed constitutional error:

[T]hese decisions you’re making are now making it so that more children are growing up without the guidance of a father, but if you’re going to make the choices you make, maybe that’s better for them. ... [C]learly the last child that you made, the one born in January was made probably while you were in a halfway house. These are simply poor decisions, and they keep leading to more poor decisions.

These comments, Erving contends, show that the court improperly punished him for exercising his fundamental constitutional right to bear and raise children. Erving maintains the court’s comments “poison the judgment” because they show that the court relied on a constitutionally impermissible factor in imposing sentence.

The Supreme Court has long recognized a constitutional right to familial relations, *e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977), including the right to “establish a home and bring up children,” *Meyer*, 262 U.S. at 399. Indeed,

we have recognized the right “to bear and raise ... children is the most fundamental of all rights—the foundation of not just this country, but of all civilization.” *Brokaw v. Mercer County*, 235 F.3d 1000, 1018 (7th Cir. 2000) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

We reject the idea that courts may penalize defendants for exercising their fundamental constitutional rights.⁶ But there is a world of difference between pointing out the harm that a defendant inflicts on his family by committing crimes and punishing a person for choosing to have children in the first place. When defendants invoke their family responsibilities as a reason for a lesser sentence, the district court is permitted to engage with the argument. This may include the district court reminding the defendant that his actions create hardship for his family, or even, in “truly extraordinary” cases, the

⁶ The Supreme Court has repeatedly rejected such arguments. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”); *Mitchell v. United States*, 526 U.S. 314, 328–29 (1999) (holding that courts cannot draw adverse inference at sentencing from a defendant’s choice to exercise his right to remain silent); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (holding that courts cannot increase a sentence because of a successful appeal), *overruled in part on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). So too have the courts of appeals. *E.g.*, *United States v. Peskin*, 527 F.2d 71, 87 (7th Cir. 1975) (“A sentence which reflects punishment for a defendant’s availing himself of his right to trial will be set aside.”); *United States v. Singletary*, 75 F.4th 416, 422 (4th Cir. 2023) (concluding that an appellate waiver in a plea agreement will be set aside if “the sentencing court violated a fundamental constitutional ... right” (quoting *United States v. Archie*, 771 F.3d 217, 223 (4th Cir. 2014)); *United States v. Barahona-Montenegro*, 565 F.3d 980, 985 (6th Cir. 2009) (reversing sentence imposed in part because of “irrelevant factors” like having fathered five children out of wedlock).

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district court identifying family ties as a reason to impose a lesser sentence. *United States v. Reed*, 859 F.3d 468, 473 (7th Cir. 2017). But these permissible responses are far afield of incarcerating someone because of or based in part on their decision to bear and raise children.

We do not condone the district court's insinuation that Erving's children are better off without him. Nor do we approve of the suggestion that Erving's decision to have children was a "poor decision" on par with illegally possessing weapons.

Even so, we do not think that the district court's unfortunate comments reflect a decision to punish Erving more harshly for bearing children. The comments came after the court had imposed sentence. At that point, the court had already announced its chosen sentence after it completed its analysis of the United States Sentencing Guidelines, the 18 U.S.C. § 3553(a) factors, and the parties' arguments. There is no indication in the transcript that the court relied on Erving's childbearing choices in choosing a sentence or that the comments reveal a previously unannounced sentencing rationale. *See Coe*, 992 F.3d at 598 (requiring a showing of reliance on the impermissible statement); *Trujillo-Castillon*, 692 F.3d at 579 (same). The court's "one last comment," in other words, strikes us as a poorly worded personal entreaty to Erving, not an explanation for the court's sentencing decision.

III. CONCLUSION

For these reasons, we AFFIRM the denial of Erving's suppression motion and the court's sentencing decision.

DEFENDANT: Dazmine M. Erving
CASE NUMBER: 22-CR-10033-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

41 months to be served consecutively to the revocation sentence imposed in Central District of Illinois, Docket No. 20CR10012.

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

It is recommended that the defendant serve his sentence in a facility as close to his family as possible, specifically, USP Marion. It is further recommended that he serve his sentence in a facility that will allow him to maximize his exposure to educational and vocational opportunities. It is further recommended that the defendant be afforded the opportunity to receive a mental health assessment and any treatment recommended, as well as receive any recommended medications.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Dazmine M. Erving
CASE NUMBER: 22-CR-10033-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years

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

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the federal judicial district without the permission of the court or probation officer.
2. The defendant shall report to the probation office in the district to which you are released within 72 hours of release from custody. The defendant shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.
3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination.
4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.
5. The defendant shall permit a probation officer to visit him at home or any other reasonable location between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer.
6. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
7. The defendant shall not knowingly possess a firearm, ammunition or destructive device as defined in 18 U.S.C. § 921(a)(4) or any object that you intend to use as a dangerous weapon as defined in 18 U.S.C. § 930(g)(2).
8. The defendant shall not knowingly be present at places where controlled substances are illegally sold, used, distributed, or administered.
9. The defendant shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall participate in a program for substance abuse treatment as approved by the U.S. Probation Office including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay the costs of the treatment to the extent you are financially able to pay. The U.S. Probation Office shall determine your ability to pay and any schedule for payment, subject to the court's review upon request.

DEFENDANT: Dazmine M. Erving
CASE NUMBER: 22-CR-10033-001

ADDITIONAL SUPERVISED RELEASE TERMS

10. The defendant shall participate in psychiatric services and/or a program of mental health counseling/treatment as approved by the U.S. Probation Office and shall take any and all prescribed medications recommended by the treatment providers. You shall pay the costs of the treatment to the extent you are financially able to pay. The U.S. Probation Office shall determine your ability to pay and any schedule for payment, subject to the court’s review upon request.

11. The defendant shall attempt to secure regular and lawful employment, unless excused by the probation office for schooling, training, or other acceptable reasons. The defendant shall keep the probation officer advised of any changes in his employment status.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Dazmine M. Erving
CASE NUMBER: 22-CR-10033-001

CRIMINAL MONETARY PENALTIES

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

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

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

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

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

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

TOTALS	\$	0.00	\$	0.00
---------------	----	------	----	------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

the interest requirement is waived for the fine restitution.

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Dazmine M. Erving
CASE NUMBER: 22-CR-10033-001

SCHEDULE OF PAYMENTS

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

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

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

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

Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA)	
Plaintiff,)	
)	
v.)	Case No. 22-CR-10033-JES-JEH
)	
DAZMINE M. ERVING,)	
Defendant.)	

ORDER AND OPINION

This matter is now before the Court on Defendant’s Motion (Doc. 15) to Suppress. The United States filed its Response (Doc. 16) in Opposition and the Defendant filed his Reply (Doc. 17). The United States requested an evidentiary hearing which was held on April 20, 2023. Doc. 18. For the following reasons, the Defendant’s Motion (Doc. 15) to Suppress is DENIED.

Background

On September 20, 2022, Defendant Dazmine M. Erving (“Defendant” or “Erving”) was indicted on one count of Felon in Possession of a Firearm under 18 U.S.C. §922(g). This charge arises out of a search of a Red Durango that Erving was in by Peoria Police Officer Lieutenant Erin Barisch (“Barisch” or “Lieutenant Barisch”) in the early morning hours on September 14, 2022. Erving moves to suppress the evidence obtained during that encounter on the grounds that Barisch’s search of the car Erving was in violated the Fourth Amendment.

On April 20, 2023, the Court held an evidentiary hearing at the United States’ request. The United States’ called Lieutenant Barisch as a witness and he testified about the events leading up to the challenged search. The United States submitted as additional evidence several photos of signs posted around the park showing park rules, a GPS picture with additions to show where in the park the encounter occurred, and the footage and still excerpts from Lieutenant Barisch’s body-worn camera from that night. Defendant cross-examined Barisch and called no other witnesses. The Defendant introduced into evidence a complete copy of the ordinance and

rules for the park. The following facts are taken from the evidence presented at the April 20, 2023 hearing.

In the early morning hours of September 14, 2022, at approximately 2:44 am, Lieutenant Barisch was on patrol in an unmarked police squad car patrolling an area which included the River Front Park on Morton Street in Peoria. As he was patrolling the area, he saw a Red Dodge Durango SUV backed into a parking spot in an otherwise vacant parking lot in the park. The Park was closed to the park at this time and the area was dark and not illuminated with any artificial lighting. Barisch drove towards the Durango and parked his police car roughly two car-lengths away. His headlights illuminated the ground area in front of the Durango, and he pointed the spotlight affixed on his car directly into the driver's side window of the vehicle. The light from the spotlight shone through the Durango's driver's side window and partially illuminated the interior of the vehicle. The vehicle's rear windows and rear trunk window were heavily tinted and the front windows and windshield were not tinted. Lieutenant Barisch used his handheld flashlight to further illuminate the vehicle.

Barisch exited his police car and activated his body-worn camera as he approached the Durango. He was able to see two people in the backseat of the car; one woman in the rear passenger seat and what he believed was a man sitting in the rear driver's side seat. The passengers were partially clothed. Barisch testified that as he approached, he saw both passengers make quick movements. He took specific note of one movement by the male passenger: quickly leaning down and then toward the rear of the back driver's seat toward the floorboard, and then quickly sitting back up. Barisch testified that he believed this motion could have been an attempt to conceal a firearm or contraband under the driver's seat. Barisch indicated in his report and in his testimony that he suspected that the passengers may have been

attempting to have sex, due to their being in the backseat of the car, in the park after dark , and their state of undress.

Barisch reached the rear passenger door and Barisch or the male passenger opened it and the male passenger put his hands up in the air. At this time, Barisch smelled the odor of burnt cannabis. He testified that he did not observe any other indicia of cannabis use at that point or subsequently, such as clouds of smoke, cannabis residue, or drug paraphernalia. The male passenger identified himself as Dazmine Erving and produced identification upon request. The female passenger identified herself initially as Adrianna Smith¹ but told Barisch that she had an Illinois driver's license but had left it at home. When asked for her date of birth, the female passenger told Barisch that it was 2/5/2005, which would have made her 17 at the time of the stop.

Lieutenant Barisch returned to his squad car to look up Erving and the female passenger in the law enforcement database LEADS. LEADS revealed that Erving was on federal supervised release for weapon offenses. When he entered the female passenger's given name and date of birth, LEADS returned "No Record on File." As she said she had a driver's license, the LEADS check should have returned a positive result and so Lieutenant Barisch concluded that she'd either given him a false name or false date of birth. Barisch returned to the Durango and asked Erving if he was on federal supervised release. Erving answered truthfully that he was and, upon further questioning, told Barisch that it was for weapons offenses and gave the name of his probation officer. Throughout the encounter, Erving had a calm and even demeanor and complied with Lieutenant Barisch's requests. Barisch asked Erving if there were any weapons in the car and Erving said there were not.

¹ She subsequently told officers that this was a fake name.

Barisch then told Erving and Smith to exit the vehicle and they did so. Erving asked if he could retrieve his shoes from the front seat and put them on, which Barisch allowed him to do. Barisch asked them to step to the rear of the vehicle and once there asked them to instead go to the front of the vehicle. As Erving and Smith walked to the front of the vehicle, Barisch took the opportunity to investigate the driver's seat area that he'd become suspicious of from Erving's earlier furtive movement. He leaned down and shined his handheld flashlight under the seat toward the rear and saw the barrel of a handgun. At this time, Lieutenant Barisch requested backup and arrested Erving. The firearm was retrieved from under the driver's seat and forms the factual basis of the charges Erving is facing in this case.

DISCUSSION

Erving seeks to suppress the handgun that was found in the Durango and his subsequent statements on the grounds that Lieutenant Barisch's search of the car violate the Fourth Amendment. We begin with the well-settled proposition that the warrantless searches are per se unreasonable unless they fit within a well-recognized exception to the warrant requirement. *U.S. v. Thurman*, 889 F.3d 356, 365 (7th Cir. 2018). The United States argues that two exceptions applied to Lieutenant Barisch's search: the 'automobile' exception and a protective search under *Michigan v. Long*, 463 U.S. 1032 (1983).

Automobile Exception

The United States argues that Lieutenant Barisch's testimony that he smelled cannabis provided probable cause to search the vehicle. They direct us to several cases where the Seventh Circuit that have held that the odor of cannabis alone is probable cause to search a vehicle. *See United States v. Franklin*, 547 F.3d 726, 733 (7th Cir. 2008) ("A police officer who smells marijuana from a car has probable cause to search that car.") (citing *United States v. Wimbush*,

336 F.3d 947, 951 (7th Cir. 2003)); *see also United States v. Kizart*, 967 F.3d 693 (7th Cir. 2020) (odor of burnt cannabis after traffic stop for speeding provided probable cause to search vehicle). However, each of these cases involves searches that occurred prior to the legalization of cannabis in Illinois.² There is a split in the Illinois appellate courts about what effect legalization has had on searches based on the odor of cannabis. *Compare People v. Stribling*, 2022 IL App (3d) 210098 ¶29 (Ill. App. 3d 2022) (“[T]he smell of the burnt cannabis, without any corroborating factors, is not enough to establish probable cause to search the vehicle”) *with People v. Molina*, 2022 IL App (4th) 220152 (Ill. App. 4th 2022) (reaching the opposite conclusion for the odor of unburnt or raw cannabis).³ This ambiguity has been recognized by other district courts in the Illinois,⁴ and the Illinois Supreme Court has granted leave to appeal to resolve the issue under Illinois law. *See People v. Molina*, 2023 WL 2751668 (Ill. 2023) (granting petition for leave to appeal and consolidating case with *People v. Redmond*, 2023 WL 2749120 (Ill. 2023)).

The Court asked the parties at argument what relevance, if any, it has that cannabis remains illegal as a matter of federal law. The Defendant argued that because Lieutenant Barisch was a local police officer empowered to investigate state and local laws, not federal, and therefore the federal criminalization of cannabis should not play a role in our analysis. The United States stated that it was not certain what effect it should have, but that the search was still justifiable under Illinois law as well as local ordinances prohibiting smoking cannabis in the park.

² While *Kizart* was decided on July 28, 2020, after legalization, the underlying traffic stop and search occurred pre-legalization in 2017. Brief for Appellee at 7, *United States v. Kizart*, 967 F.3d 693 (7th Cir. 2020); Cannabis Regulation and Tax Act, 410 ILCS 705/1-1 *et seq.* (legalizing possession of small amounts of cannabis on January 1, 2020).

³ The United States incorrectly characterized these as unpublished opinions in their briefing and argument. Both *Stribling* and *Molina* are published decisions of the Illinois Courts of Appeals, as indicated by the lack of a U in their public domain designation. *See* Ill. Sup. Ct. Rule 23.

⁴ *United States v. Griffin*, 023 WL 2266046 at *4 n.6 (N.D. Ill. Feb. 28, 2023).

Ultimately, the Court need not resolve this foggy issue as we find the stop constitutional under *Long*.

Protective Sweep of a Vehicle under *Long*

In *Long*, the Supreme Court held that “the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” *Long*, 463 U.S. at 1049-50. “*Long* searches are grounded in concern for officer safety,[] so if that concern is not present, *Long* does not justify the search.” *U.S. v. Vacarro*, 915 F.3d 431, 436 (7th Cir. 2019) (citing *Arizona v. Gant*, 556 U.S. 332, 338-39 (2009)). The parties dispute whether Lieutenant Barisch could reasonably suspect that Erving was armed and dangerous.

The United States argues that the furtive movement that Lieutenant Barisch observed Erving make downwards as he approached the vehicle was an adequate basis for the search. Lieutenant Barisch testified that, based on his experience as a law enforcement officer, he believed that this movement downwards towards the floor of the Durango was consistent with Erving attempting to hide a firearm. The United States directs us to several cases that held that they contend hold that furtive movements alone can be sufficient to form the reasonable suspicion required under *Long*. See *Vaccaro*, 915 F.3d at 436-37; *U.S. v. Evans*, 994 F.2d 317, 321-22 (7th Cir. 1993). In *Evans*, a driver leaned his body forward prior to a traffic stop and the officers inferred that he was reaching under the seat to place or retrieve something. *Id.* In *Vaccaro*, a driver made two movements prior to a traffic stop, one bending at the waist and another leaning back into the back seat of the vehicle, which the officers interpreted as either

hiding or retrieving weapons. *Vaccaro*, 915 F.3d at 434. In both cases, the Seventh Circuit held that the officers upheld the searches under *Long* based in part on the furtive movements.

Defendant argues that each of these cases is readily distinguishable. They note that *Evans* occurred in a high crime area and the defendants had voluntarily stopped in front of a “reputed distribution point for drugs” which the court found supported the reasonableness of officers’ safety concerns. *Evans*, 994 F.2d at 321. Defendant seeks to distinguish *Vaccaro* on the grounds that the movements in that case were described as a “vey ferocious move by bending at the waist” followed by a second “aggressive move with [the defendant’s] entire top torso and both arms into the back seat of the vehicle.” *Vaccaro*, 915 F.3d at 434.⁵ The Court finds that these differences are not enough to distinguish *Evans* and *Vaccaro* from the case at hand, especially given the additional information that Barisch learned during his investigation as discussed below. Assuming that Defendant reading is correct and *Vaccaro* and *Evans* require furtive movements plus other facts that support the officer’s reasonable suspicion, that was satisfied here.

In addition to these factual differences, Defendant argues that any reasonable suspicion was undermined by the likely innocent explanation for any movements- namely, that he was undressed and trying to get dressed quickly. Lieutenant Barisch’s initial report indicated that as he approached the vehicle, he suspected that Erving and the woman in the car were in the park to have sex. This was based on their relative states of undress, their presence in the park after hours, their being in the back seat of the vehicle and not the front, and his law enforcement experience indicating that couples would sometimes use the park after hours as a hookup spot. Defendant

⁵ Defendant also seeks to distinguish *Vaccaro* based on the fact that the officers in *Vaccaro* claimed to see a rifle case in the defendant’s car before the search. While that is true, both the District Court and the Seventh Circuit both held that their testimony on that point was not creditable and so is not an important distinction for this case. *Vaccaro*, 915 F.3d at 434-35.

argues that any movement that Lieutenant Barisch observed was consistent with his efforts to get dressed and that this innocent explanation undercuts the basis for Barisch's suspicion. The Defendant also challenges Lieutenant Barisch's ability to observe the movement in question. It was dark out, there was no lighting save the headlights and spotlight from Barisch's squad car and his own flashlight. The rear windows in the Durango were semi-tinted and his view through the front would have been partially obscured by the headrests. Defendant also notes that Barisch testified that the other person in the car was a female but said he believed Erving was a male as he approached.

When there is a proffered innocent explanation for a defendant's conduct, an officer is not required "to rule out a suspect's innocent explanation for suspicious facts." *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). The probable cause and reasonable suspicion inquiries are based on what a reasonable officer "could conclude- considering all of the surrounding circumstances, including the plausibility of the [innocent] explanation itself." *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 244 n. 13 (1983)). While he did not discount his comments in his police report that Erving and the woman may have been having or about to begin having sex, he testified that the movement he observed was not consistent with getting dressed. He described it as a "quick movement leaning down and then quickly back up." When asked if this movement could have been to pull up his pants or otherwise get dressed, he stated that in his experience "the movements of trying to get dressed would have been significantly longer and different.... if he had his pants down, the movement wouldn't have been leaning down; it would have been trying to pull up, and he would have had to lean back to pull his pants up over his knees, up his thighs and up over his butt" and that would have been more of an "up-and-leaning back movement."

The Court finds Lieutenant Barisch's testimony that he saw the movement credible and that it was a reasonable inference that Erving's movement was for the purpose of hiding something. While it was dark out, the car was lit through the untinted windshield and front windows by a spotlight, his headlights, and his flashlight. His testimony that he observed the movements in question is bolstered by the manner he carried out the search. He testified that he observed Erving in the backseat make a downward motion towards the floor of the vehicle. After asking Erving and the woman to exit the vehicle, the first place that he looked was under the driver's seat and just by shining his flashlight under the driver's seat he was able to see the barrel of the gun. He looked at this one location rather than conducting a full search of the vehicle or the more obvious locations and this is consistent with his testimony that he focused in on the area under the driver's seat because of Erving's motion. Of the two interpretations of Erving's movements -the defense's preferred interpretation that he was dressing himself quickly to be presentable when Barisch arrived, or the United States' that he was hiding something- the second was a reasonable inference from the facts that Barisch knew at the time of the search. The alternative proposed by the Defendant does not make unreasonable Barisch's conclusion that a quick motion to put something under the seat as a police officer approached could be used to hide a weapon or contraband.

Lieutenant Barisch's suspicion that Erving was armed and dangerous was bolstered by what he learned during his investigation. After asking Erving and the woman in the car for their names and identification, Barisch looked them up in the law enforcement database LEADS. In doing so, he learned that Erving was on federal supervised release. When he returned to the car, Barisch asked Erving who confirmed this and he told Barisch that he was on supervised release for weapons offences, for possession of a firearm. A "law enforcement officer's knowledge if a

suspect's criminal history may support the existence of reasonable suspicion" when it is coupled with additional facts. *U.S. v. Johnson*, 427 F.3d 1053, 1057 (7th Cir. 2005). Based on the "No Records on File" result for the information the woman gave him, that she was either lying about her date of birth or her name. Barisch's suspicion that Erving had hidden something under the driver's seat, combined with him being on federal supervised release for weapons history and the false information provided by the woman was an adequate basis for reasonable suspicion.

The Defendant argues that any inference of dangerousness was undercut by the fact that Lieutenant Barisch allowed Erving and the woman considerable freedom of movement during the stop. He notes that Barisch allowed the woman to go into the front area of the vehicle and retrieve items from the glove compartment, allowed her to take her purse with her when she left the vehicle, and subsequently let her call her mother. The Court notes that some of this occurred after the search, and is therefore of limited relevance to this inquiry. To the extent it has any relevance on whether Barisch could have reasonably suspected that Erving was armed, Barisch testified that after he confirmed where the weapon was, he was unconcerned about Erving and the woman's movements that were not near the weapon.

The second prong of "*Long* inquiry requires the government to establish that the officers reasonably suspected that [Erving] could gain immediate control of weapons in the vehicle." *Vaccaro*, 915 F.3d at 437 (internal quotations suppressed). This is easily satisfied here. It is undisputed that Erving and the woman's presence in the park afterhours was nothing more than an ordinance violation punishable on the first offense by a \$50 fine. Lieutenant Barisch had no other basis to arrest Erving so he would have gained access to the weapon as soon as Barisch finished writing a citation.

The facts of this case are a close call but the Court finds that the furtive movement that Lieutenant Barisch observed combined with the knowledge that Erving was on federal supervised release for weapons offences, that his female companion was lying about her age or name, and the smell of burnt cannabis was an adequate basis for reasonable suspicion under *Vaccaro* and *Evans*. A reasonable officer could conclude from these facts that Erving had hidden a weapon under the driver's seat and was therefore armed and dangerous and could have gained access to the weapon if released. As such, Lieutenant Barisch's search was not in violation of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Defendant's Motion (Doc. 15) to Suppress is DENIED.

Signed on this 24th day of April, 2023,

s/ James E. Shadid
James E. Shadid
United States District Judge