Case No. 17-3270

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DESMOND S. GAINES,
Defendant-Appellant.

On Appeal from the United States District Court
For the District of Kansas (Kansas City)
The Honorable Chief Judge Julie A. Robinson
Case No. 2:15-cr-20078-JAR

Appellant's Opening Brief and Required Attachments

KANSAS FEDERAL PUBLIC DEFENDER
117 SW 6th Street, Suite 200
Topeka, Kansas 66603
Tel: (785) 232-9828
Fax: (785) 232-9886
Email: paige_nichols@fd.org

MELODY BRANNON
Federal Public Defender

PAIGE A. NICHOLS
Assistant Federal Public Defender

Attorneys for Appellant
DESMOND S. GAINES

Oral argument is requested.

Table of Contents

Jurisdictional Statement 1

Issues Presented for Review 2

Statement of the Case 3

Argument Summary 13

Argument 14

1. A reasonable person would not feel free to ignore uniformed, armed police officers who aim their marked squad cars at the person, activate their emergency lights, and accuse the person of selling drugs. 14

   A. The officers acted with a show of authority. 21

   B. Mr. Gaines submitted to the officers' show of authority. 30

   C. Conclusion. 30

2. When officers *first* unlawfully seize a person, *then* discover evidence, and *then* discover an outstanding arrest warrant, that warrant is not an "intervening circumstance" that purges the taint of the officers' unlawful conduct under the attenuation doctrine. 32

   A. A later-discovered arrest warrant is not an intervening circumstance; this factor thus favored suppression. 35

   B. The temporal-proximity factor favored suppression. 38

   C. The purpose-and-flagrancy factor cannot alone establish attenuation, and it favored suppression here in any event. 38

   D. Conclusion. 41

Conclusion 41

Oral Argument Statement 41

Attachments:

Judgment: R1.124; Ruling on Motion to Suppress: R1.53

Table of Cases and Authorities

Cases

Arizona v. Gant, 556 U.S. 332 (2009) 38

Brower v. County of Inyo, 489 U.S. 593 (1989) 24, 25

Brown v. Illinois, 422 U.S. 590 (1975) 33, 34, 35, 37, 38, 39, 40

California v. Hodari D., 499 U.S. 621 (1991) 19, 20, 22

Florida v. Bostick, 501 U.S. 429 (1991) 20, 26

Florida v. J.L., 529 U.S. 266 (2000) 9, 40

In re Jarrell C., 95 N.E.3d 1153 (Ill. App. 1st Dist. 2017) 37

Jackson v. Virginia, 443 U.S. 307 (1979) 17

Ornelas v. United States, 517 U.S. 690 (1996) 16, 18, 19

People v. Maggit, 903 N.W.2d 868 (Mich. App. 2017) 36

San Francisco v. Sheehan, 135 S.Ct. 1765 (2015) 17

Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971) 16

State v. Breeden, 304 P.3d 660 (Kan. 2013) 22

State v. Rutledge, 2008 WL 4849123, 194 P.3d 1212 (Kan. App. 2008) 22

Taylor v. Alabama, 457 U.S. 687 (1982) 39

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) 17

Terry v. Ohio, 392 U.S. 1 (1968) 20

Tibbs v. Florida, 457 U.S. 31 (1982) 17

United States v. Aispuro-Aristegui, 453 Fed. Appx. 795 (10th Cir. 2011) 15

United States v. Bady, 503 Fed. Appx. 481 (7th Cir. 2013) 24

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005) 25

United States v. Berry, 670 F.2d 583 (5th Cir. 1982) 27

United States v. Bershchansky, 788 F.3d 102 (2d Cir. 2015) 17

United States v. Comacho, 661 F.3d 718 (1st Cir. 2011) 27, 30

United States v. Duty, 204 Fed. Appx. 236 (4th Cir. 2006) 25

United States v. Elliott, 107 F.3d 810 (10th Cir. 1997) 29

United States v. Fox, 600 F.3d 1253 (10th Cir. 2010) 29, 32, 33, 35, 39, 40

United States v. Gaines, 668 F.3d 170 (4th Cir. 2012) 36, 38

United States v. Glass, 128 F.3d 1398 (10th Cir. 1997) 26

United States v. Griffin, 652 F.3d 793 (7th Cir. 2011) 25

United States v. Hernandez, 847 F.3d 1257 (10th Cir. 2017) 19, 20, 28, 35

United States v. House, 684 F.3d 1173 (11th Cir. 2012) 21

United States v. Jones, 678 F.3d 293 (4th Cir. 2012) 27

United States v. King, 990 F.2d 1552 (10th Cir. 1993) 36

United States v. Miles, 449 F.2d 1272 (10th Cir. 1971) 16, 18

United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991) 24, 30

United States v. Ringold, 335 F.3d 1168 (10th Cir. 2003) 26

United States v. Roberson, 864 F.3d 1118 (10th Cir. 2017) 24

United States v. Robertson, 736 F.3d 677 (4th Cir. 2013) 27

United States v. Salazar, 609 F.3d 1059 (10th Cir. 2010) 15, 24, 30

United States v. Smith, 794 F.3d 681 (7th Cir. 2015) 27

United States v. Turner, 553 F.3d 1337 (10th Cir. 2009) 16

United States v. Valenzuela, 365 F.3d 892 (10th Cir. 2004) 15

United States v. Wallace, 429 F.3d 969 (10th Cir. 2005) 20

United States v. Zamudio-Carrillo, 499 F.3d 1206 (10th Cir. 2007) 15

Utah v. Strieff, 136 S.Ct. 2056 (2016) 34, 35, 36, 37, 38, 39, 41

Wong Sun v. United States, 371 U.S. 471 (1963) 36

Statutes

18 U.S.C. § 3231 1

18 U.S.C. § 922(g)(1) 3

18 U.S.C. § 924(a)(2) 3

18 U.S.C. § 924(c) 3

21 U.S.C. § 841(a)(1) 3

21 U.S.C. § 841(b)(1)(B)(iii) 3

21 U.S.C. § 841(b)(1)(C) 3

21 U.S.C. § 841(b)(1)(D) 3

28 U.S.C. § 1291 1

K.S.A. 8-1568 40

K.S.A. 8-1568(a)(1) 21

K.S.A. 8-1568(a)(2) 21

K.S.A. 8-1568(d) 21

Other Authorities

Fed.R.Crim.P. 12 18

Fed.R.Crim.P. 12(d) 17

Fed.R.Crim.P. 12(e) 18

Fed.R.Evid. 103(b) 14

U.S. Const. amend. IV 16, 19, 25, 30, 31, 33, 39

Wayne R. LaFave, 4 SEARCH & SEIZURE (5th ed. Oct. 2017) 25, 39

Prior or Related Appeals

Mr. Gaines has no prior appeals in this Court.

The argument below challenging this Court's standard for reviewing factual findings on a motion to suppress is also pending in *United States v. Amador*, No. 17-3018 (argued March 22, 2018), and *United States v. Shrum*, No. 17-3059 (argued January 18, 2018). We raised the argument as well (but the Court did not reach the issue) in *United States v. Nelson*, No. 16-3292, *United States v. Knox*, No. 16-3324, and *United States v. Vargas*, No. 17-3029.

Jurisdictional Statement

1. This is a direct criminal appeal from a federal jury conviction on federal drug and firearms crimes.
2. The district court had jurisdiction under 18 U.S.C. § 3231.
3. This Court has jurisdiction under 28 U.S.C. § 1291.
4. The filing dates establishing the timeliness of this appeal are:

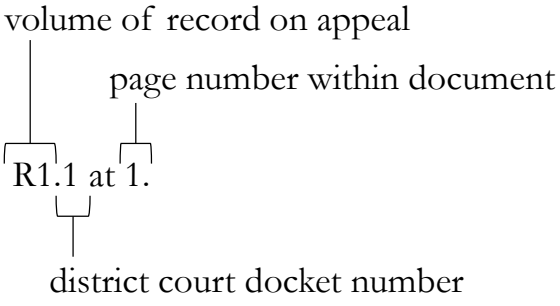
   Sentencing: December 7, 2017. R1.122.[1]

   Judgment filed: December 13, 2017. R1.124.

   Notice of appeal filed: December 19, 2017. R1.128
5. This appeal is from a final judgment that disposes of all parties' claims.

---

[1] Our citations take the following form:



See 10th Cir. R. 28.1(B).

Issues Presented for Review

Acting on an anonymous tip that a man in red was selling PCP in a local parking lot, two armed, uniformed police officers drove their respective marked squad cars into the lot and activated their emergency lights. They parked, lights still flashing, with their cars aimed at (and just a few feet away from) a Cadillac in which a red-clad Mr. Gaines was sitting. One of the officers immediately asked Mr. Gaines accusatory questions without telling him that he was free to leave. Mr. Gaines acquiesced to this show of authority until the officer moved to handcuff him; then he ran. The officers caught and arrested Mr. Gaines in short order. During and shortly after his flight, a gun and drugs were found in the Cadillac and on the flight path. Later, the officers discovered that Mr. Gaines had an outstanding arrest warrant. Mr. Gaines moved the district court to suppress the gun and the drugs, arguing that they were the fruit of an illegal initial seizure. The district court denied the motion. The issues presented are:

1. Did the district court err in holding that there was no initial seizure on these facts, because a reasonable person in Mr. Gaines's position would have felt free to leave?
2. Did the district court err in holding that, even if there had been an initial seizure, and if even if that seizure had been illegal, any illegality was attenuated by the discovery of an arrest warrant *after* the officers had seized the evidence and arrested Mr. Gaines?

Statement of the Case

On September 2, 2015, a federal grand jury indicted Desmond Gaines for five drug and gun crimes:

Count 1 Possession with intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii);

Count 2 Possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D);

Count 3 Possession with intent to distribute phencyclidine (PCP), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C);

Count 4 Possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); and

Count 5 Felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

R1.7. Mr. Gaines moved to suppress the evidence; the district court held an evidentiary hearing and denied the motion. R1.46; R1.57; R1.53. Mr. Gaines proceeded to trial, where a jury convicted him of all counts. R1.117. The district court thereafter sentenced Mr. Gaines to a total term of 180 months' imprisonment followed by 8 years of supervised release. R1.124.

Motion to suppress: factual background

The evidence presented at the hearing on Mr. Gaines's motion to suppress told the following story:

Downtown Kansas City, Kansas is home to a number of social services, including the Wilhelmina Gill Center (a food kitchen at 645 Nebraska Avenue) and, across the street, the Frank Williams Center (a resource center for homeless people at 1201 North Seventh Street). Two parking lots sit at the corner of Nebraska Avenue and Seventh Street; one is next to the food kitchen, and the other is across the street next to the resource center. R1.57 at 5, 21. The corner is "a very high-trafficked area for pedestrians." *Id.* at 5.

Mark Wilcox was a Kansas City, Kansas police officer who worked off-duty as a security guard for the Frank Williams Center. R1.57 at 53-54. Over the years, he developed "a pretty good connection with a lot of the people up there" who frequented both the resource center and the food kitchen. *Id.* at 54. His job was to provide security inside the resource center and walk the center's parking lot to "make sure there's nobody loitering and doing anything illegal up there." *Id.* at 54-55.

On the morning of August 24, 2015, Officer Wilcox noticed a man dressed in red across the street in the food-kitchen lot wiping down a car as if he had just washed it. *Id.* at 56. He did not witness any drug transactions or, despite his connections with a lot of people in the area, talk to anyone who had witnessed any drug transactions or accused the man in red of selling drugs. *Id.* at 65-66, 68. Nonetheless, later that morning, an anonymous caller dialed 911 and reported a black man "in all red

clothing selling juice" or "wet"[2] in the food-kitchen lot. R1.57 at 9; Gov't Exh. 7.[3] The caller claimed that the man had "just made about 20 dollars." Gov't Exh. 7. He further claimed that "after this guy, we only have one more supplier, and that's it." *Id.* The caller did not volunteer his own name, nor did the dispatcher ask him to identify himself. *Id.* The caller did not make any report in person to Officer Wilcox, despite the fact that civilians in the area knew that Wilcox was a police officer and that they could report drug crimes to him. R1.57 at 67-68.

Officer Wilcox (who keeps his police radio turned on even while working off-duty) heard that two patrol cars had been dispatched in response to the anonymous 911 caller's report. R1.57 at 56-57. As he saw the patrol cars driving up the street, Officer Wilcox radioed that he had just seen a man in red get into a white Cadillac in the food-kitchen lot. *Id.* at 30. The events that followed were captured both on a nearby pole camera (Gov't Exh. 2),[4] and on a responding officer's dash camera (Gov't Exh. 3).[5] These videos are the best evidence of the events.

---

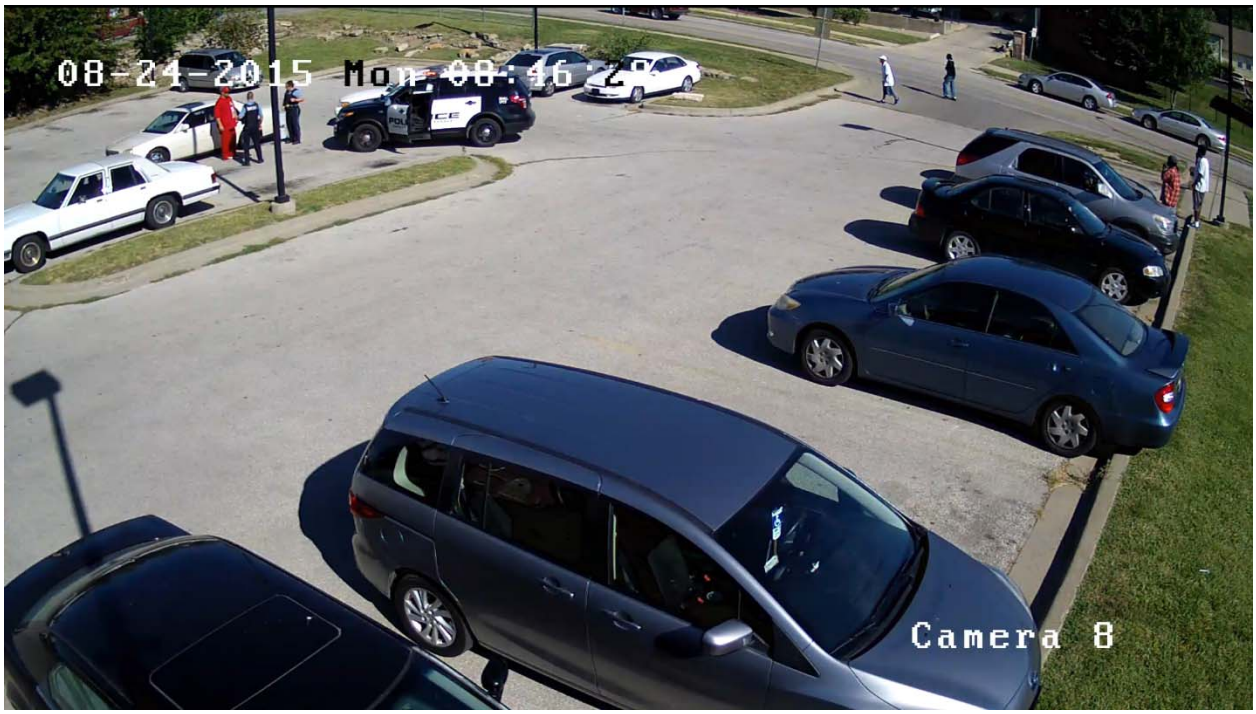
[2] Slang for phencyclidine (PCP). R1.57 at 10.

[3] Audio of the 911 call. The audio and video exhibits are in Supplemental Record Volume I. They are being filed conventionally on a flash drive along with the hard copies of this brief. *See* Order filed June 6, 2018.

[4] This video is just under 15 minutes long. The relevant action begins approximately 10 minutes and 50 seconds into the video.

[5] To play this video, open the folder on the flash drive titled Gov't Exh 3_KCKPD In Car Video. Click on the AutoPlay.exe file, and click (once) the Carl Rowland video. It may be slow to open.

Kansas City, Kansas Patrol Officer Carl Rowland was the first to pull into the lot. *Id.* at 10; Gov't Exh. 2 at 10:50. Patrol Officer Shenee Davis was right behind him. R1.57 at 12, 44; Gov't Exh. 2 at 10:59. Both officers were uniformed and armed, and both drove marked squad cars. R1.57 at 13, 20; Gov't Exh. 2 at 11:02. The officers did not seek out Officer Wilcox to determine what else he knew about the man in red. Nor did they talk with any of the people milling about the area. Nor did they attempt to surveil the white Cadillac or approach it in a low-key conversational style. Instead, they activated their emergency lights as if to conduct a traffic stop. R1.57 at 12-13, 28,



50. Officer Davis stated at the suppression hearing that this was because "we were blocking that lane of traffic entering into the parking lot." *Id.* at 50. But images of the event captured by the nearby pole camera (see image above) showed that once they

parked, the driveway into the parking lot was fully accessible. And neither officer explained why, if they truly believed they were not sufficiently visible (despite the daylight hour), they could not have simply used their hazard lights as any citizen driver would have done.

Officer Rowland pulled in "fairly close" to the Cadillac (within about ten feet, it appears from the pole-camera image above), and parked aiming his squad car (emergency lights still flashing) at the driver's side. R1.57 at 13; Gov't Exh. 2 at 11:05. He got out and approached the driver. Gov't Exh. 2 at 11:01. Officer Davis parked right next to Officer Rowland, with her squad car also aimed at the Cadillac. Exh. 2 at 11:05. The man in red—later identified as Mr. Gaines—got out of the Cadillac and closed the door. Exh. 2 at 11:02. Officer Rowland greeted him, asked him if he was "up here going to the food kitchen," and then immediately (within ten seconds of greeting him) dropped his voice to a more serious register and asked Mr. Gaines for ID, told him "we got a call about you, man," told him he was suspected of a crime ("Someone said that you were up here selling some dope.") and asked him an incriminating question: "You selling wet?" Gov't Exh. 3 at 9:44:41-9:44:57.

Mr. Gaines denied selling anything and Officer Rowland again asked him for his ID. *Id.* at 9:44:55-9:44:58. Mr. Gaines explained that he did not have his ID, and asked the officers to hold on while he retrieved it from the car. *Id.* at 9:45-9:45:04. Officer Rowland moved in close to Mr. Gaines and placed one hand on the front door of the Cadillac and his other hand on his service weapon while Mr. Gaines leaned into the

car and released the trunk latch. *Id.* at 9:45:07. Meanwhile, Officer Davis circled the Cadillac, looking into it. *Id.* at 9:45:13-9:45:30. Mr. Gaines turned as if to walk towards the trunk but then leaned into the car a second time. *Id.* at 9:45:13-9:45:17. Officer Rowland put his hand on the door again and peered around Mr. Gaines into the car, announcing, "[h]old on, you've got an open container." *Id.* at 9:45:18-9:43:21. When Mr. Gaines disagreed, Rowland said "[t]here's a bottle right there. I'm going to put you in handcuffs." *Id.* 9:43:21-9:45:27. At that point, Mr. Gaines grabbed something from the Cadillac, brushed past Officer Rowland, and loped out of the parking lot. *Id.* at 9:45:27-9:45:34; R1.57 at 15; Gov't Exh. 2 at 12:07-12:11.

Officers Rowland and Davis both gave chase. *Id.*; R1.57 at 18. As they followed Mr. Gaines through a nearby alley, they saw him throw a black bag onto a roof. *Id.* at 19. Mr. Gaines turned to face the officers, who ordered him on the ground at gunpoint; after a short struggle (during which Officer Davis tased Mr. Gaines three times), they arrested him. R1.57 at 20.

Meanwhile, during the chase, Officer Wilcox had secured the patrol cars and the Cadillac in the food-kitchen lot. *Id.* at 21, 58. He leaned over with his body partially inside the Cadillac and saw a handgun under the driver's seat. *Id.* at 59. He reported this discovery over his police radio. *Id.*

After Officers Rowland and Davis arrested Mr. Gaines, Officer Rowland climbed on top of the building where he had seen Mr. Gaines throw the black bag. *Id.* at 21-

22. He found drugs and cash inside the bag. *Id.* A search of the Cadillac revealed more drugs. *Id.* at 23-24.

At some point "maybe 10, 15 minutes" after Mr. Gaines's arrest, somebody ran Mr. Gaines's identification and the officers learned that he had an outstanding arrest warrant. *Id.* at 24, 38-39. When asked whether this happened before or after the gun and the drugs in the black bag were discovered, Officer Rowland said he "assume[d]" it was after discovery of the gun, and he was "not sure" whether it was before or after the discovery of the black bag. *Id.* at 39. He did not state any opinion about whether it was before or after the discovery of the drugs in the Cadillac. *Id.*

Motion to suppress: legal proceedings

Mr. Gaines made three arguments in his motion to suppress relevant to this appeal. **First**, he argued that he was initially seized when the officers arrived in the lot, lights flashing, and parked with their cars aimed at him. R1.46 at 7 ("the seizure began when the officers drove the police vehicle up to the vehicle in which Mr. Gaines was sitting and parked it perpendicular to the driver's side door—a position in which no reasonable civilian would believe they were free to leave"). **Second**, he argued that the anonymous tip was not sufficiently corroborated to provide reasonable suspicion for this initial seizure. *Id.* at 3-7 (discussing *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (anonymous tip does not provide reasonable suspicion absent corroboration that the tip is "reliable in its assertion of illegality, not just in its tendency to identify a determinate person")). **Third**, he argued that no intervening circumstances purged the

taint of the initial seizure's illegality. *Id.* at 7-9. For these reasons, he argued that the evidence discovered as a result of the initial seizure should be suppressed. *Id.* at 9.

The government disputed each of these arguments, claiming instead that, **first**, the initial interaction between the police and Mr. Gaines was a consensual encounter; **second**, even if the initial interaction had been a seizure, the officers were justified in conducting it; and **third**, even if the initial interaction had been a seizure, and had been illegal, any illegality was attenuated by the later discovery of the outstanding arrest warrant. R1.50.

The district court agreed with the government on the **first** point, concluding that the initial interaction between the police and Mr. Gaines was a consensual encounter, and that it only escalated to an attempted seizure when Officer Rowland attempted to handcuff Mr. Gaines.. R1.53 at 6-10. The district court therefore did not reach the **second** point (whether there was reasonable suspicion at the outset). But the district court also ruled in the government's favor on the **third** point (in the alternative), finding that the post-arrest discovery of the arrest warrant attenuated any illegality. *Id.* at 10-12. The district court denied the motion to suppress. *Id.* at 12.

Trial and sentencing

At trial, the government relied almost entirely on the evidence seized as a result of the August 24, 2015 encounter to prove the drug and gun charges against Mr. Gaines. *See, e.g.,* R2.144 at 77-81 (officer describing drugs found in black bag thrown on roof); *id.* at 144-47 (officer describing drugs found in Cadillac); *id.* at 189-91 (officer

describing gun found in Cadillac); R2.145 at 40-66 (forensic scientist identifying weight and types of drugs found in black bag and Cadillac); R2.146 at 122-154 (expert opining that quantity of drugs found in black bag and Cadillac indicated distribution as opposed to personal use, and discussing relationship of guns to drug distribution). The government did not, for instance, present any witnesses who claimed to have bought drugs from Mr. Gaines or seen Mr. Gaines handle the gun, or any confession from Mr. Gaines. Instead, the main factual dispute at trial was whether the Cadillac and the items in it belonged to Mr. Gaines. *See, e.g.,* R2.146 at 5-19 (registered owner of car testifying to Mr. Gaines's use of the Cadillac and denying ownership of items seized on August 24, 2015). In other words, the government would not have had a case without the items seized on August 24, 2015.

Towards the end of trial, Mr. Gaines renewed his motion to suppress, citing new evidence introduced by the government at trial that was not introduced at the suppression hearing. R2.147 at 100-01.[6] The district court noted that Mr. Gaines's suppression argument was already preserved for appeal: "So you want to renew your motion which, of course, you can appeal—I think your motion to suppress is preserved for appeal." *Id.* at 101. But the district court stated that "that's fine if you

[6] The new evidence was the government's introduction of the Hennessy bottle that prompted Officer Rowland to try to handcuff Mr. Gaines. *Id.*

want to renew it on the record at this time and I'll take it under advisement and probably ultimately issue a decision that I've already ruled upon it." *Id.* at 101.

At sentencing, the district court denied the renewed motion "for all of the reasons that I denied it before." R2.143 at 6. The district court then sentenced Mr. Gaines to a total term of 180 months' imprisonment followed by 8 years of supervised release. R1.124. Mr. Gaines timely appealed. R1.128.

Argument Summary

The district court concluded that Mr. Gaines's initial encounter with Officers Rowland and Davis was consensual, and therefore did not determine whether it was supported by reasonable suspicion. But the use of emergency lights (which under Kansas law is a command to stop) and immediate accusatory questioning have long been understood to indicate a show of authority. Mr. Gaines yielded to this show of authority by getting out of his car and answering Officer Rowland's questions until the officer moved to handcuff him. Under the totality of circumstances, this was a seizure, and the district court erred in concluding otherwise. This Court should vacate the district court's order denying suppression and remand this case with directions for the district court to determine, in the first instance, whether the anonymous 911 call provided the officers with reasonable suspicion to seize Mr. Gaines.

The district court further erred in concluding, in the alternative, that the officers' post-arrest discovery of an outstanding arrest warrant attenuated any constitutional violation. When officers *first* unlawfully seize a person, *then* discover evidence, and *then* discover an outstanding arrest warrant, that warrant is not an "intervening circumstance" that purges the taint of the officers' unlawful conduct under the attenuation doctrine. And the government did not otherwise bear its heavy burden of establishing attenuation. The district court's order denying suppression must be vacated.

Argument

1. A reasonable person would not feel free to ignore uniformed, armed police officers who aim their marked squad cars at the person, activate their emergency lights, and accuse the person of selling drugs.

Issue raised and ruled on

Mr. Gaines moved before trial for an order suppressing all evidence derived from law enforcement's initial seizure of him in the food-kitchen lot, arguing that the seizure was not supported by reasonable suspicion. R1.46. He asserted that "the seizure began when the officers drove the police vehicle up to the vehicle in which Mr. Gaines was sitting and parked it perpendicular to the driver's side door—a position in which no reasonable civilian would believe they were free to leave." R1.46 at 7. After an evidentiary hearing, the district court denied the motion, holding that this initial encounter was consensual, and that it only escalated to an attempted seizure when Officer Rowland attempted to handcuff Mr. Gaines. R1.53 at 6-10.

Mr. Gaines reasserted his motion towards the end of trial. R2.147 at 100-01. The district court noted that the suppression argument was already preserved for appeal. *Id.* at 101. This was so under Federal Rule of Evidence 103(b), which provides that "[o]nce the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal." The district court nonetheless took the renewed motion under advisement. R2.147 at 101. At sentencing, the district court denied the renewed motion "for all of the reasons that I denied it before." R2.143 at 6.

Standard of review

Whether and when a seizure occurred is a legal question that this Court reviews de novo. *United States v. Salazar*, 609 F.3d 1059, 1064 (10th Cir. 2010). Factual questions are reviewed for clear error. *Id.* at 1063. But this "clear error" standard has been stated in various ways:

> We review the district court's findings of fact on a motion to suppress for clear error, examining the evidence in the light *most favorable to the prevailing party*.

Id. (emphasis added).

> In reviewing a district court's order to suppress evidence, we review the district court's factual findings for clear error, considering the evidence in the light *most favorable to the district court's determination*.

United States v. Valenzuela, 365 F.3d 892, 896 (10th Cir. 2004) (emphasis added).

> When reviewing a district court's denial of a motion to suppress, we review the district court's factual findings for clear error and consider the evidence in the light *most favorable to the Government*.

United States v. Zamudio-Carrillo, 499 F.3d 1206, 1209 (10th Cir. 2007) (emphasis added).

> In reviewing the denial of Defendant's motion to suppress, "we . . . accept the district court's factual findings unless clearly erroneous" and "apply de novo review to the district court's determination of reasonableness under the Fourth Amendment."

United States v. Aispuro-Aristegui, 453 Fed. Appx. 795, 797 (10th Cir. 2011) (unpublished) (ellipsis in original) (quoting *United States v. Turner*, 553 F.3d 1337,

1344 (10th Cir. 2009), but using ellipsis to omit "view the evidence in the light most favorable to the government and").

As will be shown below, Mr. Gaines is entitled to relief under any of these standards. But before addressing the merits, we take issue with either of the "light most favorable" standards.

This expression of the standard for reviewing the district court's factual findings finds no basis in Fourth Amendment law. *See Ornelas v. United States*, 517 U.S. 690 (1996). In *Ornelas*, the Supreme Court set forth what has become the benchmark rule in reviewing Fourth Amendment suppression motions: Factual findings are reviewed for clear error, period, whereas the ultimate legal conclusion drawn from those facts is reviewed de novo. 517 U.S. at 697-699. Nothing in *Ornelas* supports the "light most favorable" language in this Court's standard of review.

This language can be traced back to a 1971 case from this Court, *United States v. Miles*, 449 F.2d 1272, 1274 (10th Cir. 1971). The sole citation for the language is to a decision in an appeal from the denial of federal habeas relief from a state murder conviction. *Id.* (citing *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971)). Although *Miles* did not include a pinpoint citation to *Sinclair*, a review of *Sinclair* reveals that its only mention of viewing evidence in the light most favorable to the government was in reviewing a jury's general guilty verdict. *Sinclair*, 447 F.2d at 1160. Indeed, *Sinclair* did not even involve a Fourth Amendment claim.

A jury verdict is one of only three contexts in which the Supreme Court views evidence in the light most favorable to a party. *See, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *cf. Tibbs v. Florida*, 457 U.S. 31, 38 n.11 (1982) (explaining that this rule does not apply when a party only asks for a new trial). The other two are a motion to dismiss, where a party has asked the court to dismiss a case before sending it to the factfinder, *see, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); and a motion for summary judgment, where one party has asked the court to decide the case instead of sending it to the factfinder, *see, e.g.*, *San Francisco v. Sheehan*, 135 S.Ct. 1765, 1769 (2015). In each instance, the district court and the appellate court respectively view the evidence in the light most favorable to a specified party. And each court does so in order to establish the universe of facts necessary to resolve the legal issue. *See United States v. Bershchansky*, 788 F.3d 102, 110 (2d Cir. 2015) ("In the first two scenarios, the trial court has not made factual findings and the decision is based on one side's factual assertions or evidence, and in the third scenario, the jury likewise has not made specific factual findings but has rendered only a general verdict.").

But in the suppression context, Federal Rule of Criminal Procedure 12(d) requires the district court to find the facts essential to its holding. Because the district court (unlike a jury, for instance) is required to make factual findings, and thus identify the universe of facts in play, there is no reason for an appellate court to view the facts in a certain light. *See Bershchansky*, 788 F.3d at 110. Instead, when a district court finds facts

in this context, those facts can be (and are) reviewed on appeal for clear error, regardless of whether the district court found the facts in the government's or the defendant's favor. *Ornelas*, 517 U.S. at 697-99.

Indeed, a rule requiring an appellate court to view the facts in the light most favorable to the prevailing party would arguably turn the standard of review into a must-win for the prevailing party: Either the district court finds facts in the light most favorable to the prevailing party, or it commits clear error in failing to do so. If that is true, it is difficult to understand how the prevailing party could lose on appeal.

Aside from this practical mismatch, there are two other compelling reasons for this Court to correct this inconsistent feature of its precedent. First, when this Court decided *Miles* in 1971, Federal Rule of Criminal Procedure 12 did not require district courts to make express factual findings when ruling on motions to suppress. Because summary denials of motions to suppress were possible at this time, the standard adopted in *Miles* was at least a plausible, workable standard in certain cases (i.e., summary denials). But in 1975, four years after the decision in *Miles*, Rule 12 was amended to require district courts to make express factual findings and conclusions of law when ruling on pretrial motions, such as motions to suppress. Fed. R. Crim. P. 12(e) (1975) ("Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."). This amendment should have effectively done away with the earlier rule requiring appellate courts to weigh evidence in the light most favorable to the prevailing party. With express factual findings, there

is no need to view evidence in a certain light. The district court's factual findings are either clearly erroneous or not.

The second compelling reason to do away with the "light most favorable" standard is that the Supreme Court has never adopted it. While *Ornelas* addresses inferences drawn by judges and law-enforcement officers, and the weight to be given such inferences, at no point does *Ornelas* direct circuit courts to view those facts in a light most favorable to the government. *See id.* at 699-700. If that were the law, surely the Supreme Court would have announced it in *Ornelas*. Nor has the Supreme Court announced such a rule before or after it decided *Ornelas*. For these reasons, we urge this Court to decide this case without viewing the facts in a light most favorable to the government.

Legal background

The Fourth Amendment protects against unreasonable searches and seizures of "persons, houses, papers, and effects." U.S. Const. Amend. IV. The Supreme Court has "long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." *California v. Hodari D.*, 499 U.S. 621, 624 (1991). A "seizure of the person" includes a brief investigative stop of the person, which may only be conducted upon reasonable suspicion that criminal activity is afoot, and that "the individual himself is engaged in criminal activity." *United States v. Hernandez*, 847 F.3d 1257, 1272-73 (10th Cir. 2017) ("investigative detentions . . . are Fourth Amendment seizures of limited scope and duration and must be supported by

a reasonable suspicion of criminal activity"); *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A seizure must be valid "from its inception." *United States v. Wallace*, 429 F.3d 969, 974 (10th Cir. 2005).

In the absence of physical force, whether a person has been seized for purposes of triggering *Terry*'s reasonable-suspicion requirement is a two-question inquiry: (1) whether there was a "show of authority" sufficient that "a reasonable person would have believed that he was not free to leave," *Hodari D.*, 499 U.S. at 625-29, or "not at liberty to ignore the police presence and go about his business," *Florida v. Bostick*, 501 U.S. 429, 436-37 (1991); and (2) whether the person yielded to that authority, *Hodari D.*, 499 U.S. at 625-29. In answering these questions, a court "must consider all the circumstances surrounding the encounter." *Bostick*, 501 U.S. at 439. "The defendant bears the burden of proving whether and when the Fourth Amendment was implicated (i.e., the point at which he was 'seized')." *Hernandez*, 847 F.3d at 1263 (cleaned up).

Discussion

The district court held that Mr. Gaines's initial encounter with Officers Rowland and Davis was consensual because there was "no evidence that they interacted with any indicia of coercive behavior." R1.53 at 7-10. The district court was wrong. Multiple factors support a finding that the officers acted with a show of authority, and Mr. Gaines submitted to that show of authority until Officer Rowland moved to

handcuff him. The initial encounter was a seizure, and the district court erred in holding otherwise.

A. The officers acted with a show of authority.

(1) The officers' activation of their emergency lights was a strong show of authority.

> When the driver of a motor vehicle notices blue lights flashing in the rear view mirror, the driver cannot help but feel a sense of dread.

United States v. House, 684 F.3d 1173, 1183 (11th Cir. 2012).

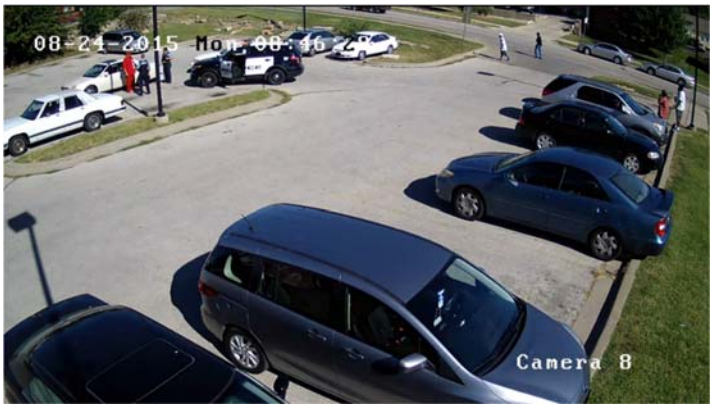
Both Officer Rowland and Officer Davis testified that they activated their emergency lights as they drove up to Mr. Gaines, and the pole-camera video shows that at least Officer Rowland left his lights flashing as he approached and spoke with Mr. Gaines. R1.57 at 12-13, 28, 50; Exh. 2 at 10:52-11. The officers' use of their emergency lights on marked squad cars that they aimed directly at (and just a few feet away from) Mr. Gaines is a factor that strongly indicates a seizure. The district court erred in concluding otherwise, as a close examination of its reasoning will illustrate.

First, the district court emphasized the fact that the officers only partially blocked the Cadillac, and Mr. Gaines "could have drove forward without obstacle." R1.53 at 3, 8. But in Kansas, an officer's activation of emergency lights is a command to stop. K.S.A. 8-1568(a)(1), (d) (a signal to stop "may be by hand, voice, emergency light or siren"). A person who drives away from such a command will be guilty of the crime of fleeing or attempting to elude a police officer. K.S.A. 8-1568(a)(2) ("Any driver of a motor vehicle who willfully . . . flees or attempts to elude a pursuing police vehicle or

police bicycle, when given visual or audible signal to bring the vehicle to a stop, shall be guilty as provided by subsection (c)(1)."); *see also State v. Rutledge*, 2008 WL 4849123 at *7, 194 P.3d 1212 (Kan. App. 2008) (unpublished) (evidence of fleeing and eluding sufficient where officer gave person in parking lot audible command to stop and person ran to parked car and drove off), *overruled on other grounds by State v. Breeden*, 304 P.3d 660, 671 (Kan. 2013). It cannot be said that a reasonable person would feel free to drive away from a police encounter when doing so would constitute a crime.

Second, the district court relied in part on a factual finding that the officers only activated their emergency lights "because their vehicles were both blocking a lane of traffic in the parking lot." R1.53 at 3, 8. This reasoning fails on both legal and factual grounds. Legally, an officer's own subjective motive for taking an action is irrelevant to the show-of-authority question. Instead, "the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D.*, 499 U.S. at 628. Two marked squad cars with flashing emergency lights aimed directly at (and within a few feet of) a car would convey to a reasonable person in that car one thing: STOP.

Factually, the officers' testimony that they activated their emergency lights because they were blocking traffic (implying that they did not activate them as an order to stop), *see* R1.57 at 12-13, 50, cannot be credited. The pole-camera video showed that the driveway into the food-kitchen lot was clear. Exh. 2. And while the officers may have blocked one entryway into one section of the lot, there was a second entryway into that same section; indeed, that is the very reason that the district court concluded that Mr. Gaines "could have drove away." The encounter occurred during broad daylight, and the squad cars would have been fully visible even without their emergency lights, so no safety issue presented itself. And even if it had, the officers offered no reason why, if they did not intend to assert their law-enforcement authority, they did not use their ordinary hazard lights, as any ordinary citizen would have done. In sum, the district court both legally erred and made clearly erroneous factual findings when it relied on the officers' testimony about why they activated their emergency lights in its show-of-authority analysis.



Finally, the district court ignored legal precedent when it concluded that the officers' activation of their emergency lights did not indicate a seizure because "the sirens were not activated." R1.53 at 8. This Court has previously emphasized the significance of emergency lights in the show-of-authority calculus. In *United States v.*

Morgan, 936 F.2d 1561 (10th Cir. 1991), for instance, this Court held that the defendant was seized in his driveway in part because an officer "had followed the car in which Defendant was a passenger for several blocks with his red lights flashing." *Id.* at 1567. In *United States v. Roberson*, 864 F.3d 1118 (10th Cir. 2017), Judge Hartz contrasted emergency lights with a spotlight in holding that using a spotlight was not a show of authority. *Id.* at 1133 ("The use of a floodlight to illuminate the vehicle, *as opposed to turning on emergency lights*, also was not coercive.") (emphasis added) (Hartz, J., concurring). And in *United States v. Salazar*, 609 F.3d 1059 (10th Cir. 2010), even the government agreed that "the activation of a patrol car's emergency lights is a well accepted 'show of authority' commanding the driver to stop his vehicle and submit to an investigative detention." *Id.* at 1066 (quoting government's brief). In *Salazar*, an officer activated his emergency lights about 75-100 feet away from the defendant when the defendant—who had been sitting in a parked car—began to drive. *Id.* at 1062. Under these facts, the government maintained that "no reasonable person could have misunderstood that the show of authority was directed at him." *Id.* (quoting government's brief). This Court agreed, quoting *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) for the proposition that "a police car pursuing with flashing lights" is "a significant show of authority." 609 F.3d at 1066.

Other circuits and authorities likewise agree that the use of emergency lights constitutes a show of authority. *See, e.g., United States v. Bady*, 503 Fed. Appx. 481, 484 (7th Cir. 2013) (unpublished) ("the officers' use of their emergency lights and their

attempt to position their car to block in the Alero unquestionably qualify as shows of authority") (citing *Brower*); *United States v. Griffin*, 652 F.3d 793, 798 (7th Cir. 2011) ("Here, the officers did not use physical force to induce Griffin to stop. Activating their emergency lights, however, unquestionably qualified as a show of authority.") (citing *Brower*); *United States v. Duty*, 204 Fed. Appx. 236, 239 (4th Cir. 2006) (unpublished) ("Winston seized Duty for purposes of the Fourth Amendment when she activated the emergency lights on top of her car and pulled behind the parked car in which Duty was sitting. Through this action, Winston displayed an unmistakable show of authority that would give a reasonable person the impression that he was not free to leave.") (citing *Brower*); *United States v. Barry*, 394 F.3d 1070, 1075 (8th Cir. 2005) ("Sergeant Brothers exhibited no show of authority, that is, he never raised his voice, he never drew his holstered weapon, he never *activated his emergency lights*, and he never ordered Barry to exit his vehicle.") (emphasis added); Wayne R. LaFave, 4 SEARCH & SEIZURE § 9.4(a) (5th ed. Oct. 2017) (while the "mere approach and questioning" of person seated in parked car is not a seizure, the "use of flashing lights as a show of authority . . . will likely convert the event into a Fourth Amendment seizure") (citing cases).

The officers' use of their emergency lights as they pointed both of their marked squad cars directly at (while only a few feet away from) Mr. Gaines was a strong show of authority indicating a seizure.

(2) Officer Rowland's accusatory questioning ten seconds into the encounter was a strong show of authority.

The district court held that Officer Rowland's conversation with Mr. Gaines did not indicate a show of authority because "Officer Rowland spoke in a conversational tone, simply asking to see Defendant's identification, which Defendant agreed to provide." R1.53 at 9. This reasoning wholly ignores the fact that within ten seconds of greeting Mr. Gaines, Officer Rowland not only asked for his ID, but also told him "we got a call about you, man"; told him "someone said that you were up here selling some dope"; and demanded to know: "you selling wet?" Gov't Exh. 3 at 9:44:41-9:44:57.

This Court has held that whether "the officers asked the subject potentially incriminating questions" is "certainly a factor to be considered" in the show-of-authority analysis, though not per se dispositive. *United States v. Glass*, 128 F.3d 1398, 1407 (10th Cir. 1997).[7] Many other jurisdictions likewise have held that whether

---

[7] In *United States v. Ringold*, 335 F.3d 1168 (10th Cir. 2003), this Court stated that "the mere fact that officers *ask* incriminating questions *is not relevant* to the totality-of-the-circumstances inquiry." *Id.* at 1173 (second emphasis added). But of course this cannot be true: "[I]n order to determine whether a particular encounter constitutes a seizure, a court *must* consider *all the circumstances* surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 439 (emphases added). *Ringold* went on to say that "what matters instead is 'the manner' in which such questions were posed." 335 F.3d at 1173. Under *Bostick*, a court must consider both the content and the

officers conveyed to the defendant that he or she was suspected of a crime is an important factor. *See, e.g., United States v. Smith*, 794 F.3d 681, 686 (7th Cir. 2015) ("The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime."); *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013) ("Officer Welch's initial, accusatory question, combined with the police-dominated atmosphere, clearly communicated to Mr. Robertson that he was not free to leave or to refuse Officer Welch's request to conduct a search."); *United States v. Jones*, 678 F.3d 293, 300 (4th Cir. 2012) (factors include whether the officers "treated the defendant as though they suspected him of illegal activity rather than treating the encounter as routine in nature") (cleaned up); *United States v. Comacho*, 661 F.3d 718, 725 (1st Cir. 2011) (officer's "accusatory questions" were factor indicating seizure); *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) (en banc) ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention.").

Here, again, Officer Rowland directly confronted Mr. Gaines about selling drugs within ten seconds of greeting him, dropping his voice to a more serious register as he did so. This factor strongly indicates that the initial encounter was a seizure.

---

manner of an officer's questions. Here, both the content (accusatory) and the manner (immediate) of Officer Rowland's questions indicated a show of authority.

(3) The totality of circumstances indicated a show of authority.

"The strong presence of two or three factors may be sufficient to support the conclusion a seizure occurred." *Hernandez*, 847 F.3d at 1264 (cleaned up). The above two factors alone are sufficient to establish a show of authority. That show of authority is even more obvious when other factors readily evident on the pole-camera and dash-camera videos are taken into account, including the fact that two officers arrived in two separate marked squad cars that they parked close to and aimed at Mr. Gaines while partially blocking him; the officers were both uniformed and armed; Officer Davis circled the Cadillac peering into it while Officer Rowland questioned Mr. Gaines; Officer Rowland moved in close and put his hand on the Cadillac door when Mr. Gaines attempted to retrieve his ID, and neither officer advised Mr. Gaines that he was free to leave or ignore their questioning.[8] *Id.* (factors relevant to whether a seizure has occurred include the number of officers; whether they "operated their car in an aggressive manner to block the citizen's course or otherwise control the direction or speed of his movement"; "whether the officers are uniformed"; and "whether or not they have specifically advised defendant at any time that he had the

[8] The district court held that the officers had "scant chance" to tell Mr. Gaines that he was free to leave. R1.53 at 9. But Officer Rowland had time to ask Mr. Gaines if he was "up here going to the food kitchen." Gov't Exh. 3 at 9:44:45. In the same number of words, the officer could just as easily have advised Mr. Gaines that "you don't have to talk to me." The conversation was fully within the officer's control, and it was his decision to pivot immediately to accusatory questions.

right to terminate the encounter"); *United States v. Fox*, 600 F.3d 1253, 1258 (10th Cir. 2010) (quoting *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997), for the proposition that "whether an officer was leaning against or touching an individual's car" may indicate a "coercive show of authority").

Months after the suppression hearing, the government described this initial encounter as a "heightened situation" in terms contradicting its earlier claim (and the district court's finding) that it was consensual. R1.89 at 29. The government was seeking to introduce evidence at trial that the food-kitchen area was known for narcotics complaints in order to explain "why the officers acted as they did." *Id.* at 27. The government was concerned that without that information the jurors would be "left with this impression that, oh, these are cops going up there just to harass somebody up there getting a meal at the food kitchen." *Id.* As the government then described the encounter, "the officers pulled up, he had his red lights on when he pulled up behind him. They basically encircle the location because, again, this is a heightened situation. This isn't a call that it's loitering. This isn't a call that somebody has jaywalked. This isn't a call that somebody has littered. This is a narcotic-related complaint, so it's serious, which then lends credibility to the fact that they were taking it serious." *Id.* at 29.

The government was right: This was a "heightened situation" during which uniformed, armed law enforcement officers "encircled" Mr. Gaines, aimed their emergency lights at him, and asked him serious incriminating questions without telling

him that he was free to leave. This "heightened situation" would have communicated to a reasonable person that he was not free to leave. In other words, it was a show of authority for Fourth Amendment purposes.

B. Mr. Gaines submitted to the officers' show of authority.

The government did not contest and the district court did not address whether Mr. Gaines submitted to any show of authority before Officer Rowland attempted to handcuff him. But this question is easily answered. Even a momentary yielding to authority will suffice for purposes of establishing a seizure. *See United States v. Morgan*, 936 F.2d 1561, 1566-67 (10th Cir. 1991) (defendant was seized when he, "at least momentarily," yielded to officer's show of authority by asking "what do you want?" before fleeing). Mr. Gaines more than momentarily yielded to the officers' show of authority by getting out of his car and facing Officer Rowland, answering the officer's questions, and making an effort to retrieve his ID from the car before Officer Rowland attempted to handcuff him. This yielding was sufficient to render the initial encounter a seizure. *See Salazar*, 609 F.3d at 1068 ("an attempt at a conversation, even if brief" under *Morgan* is a "yielding to a show of authority"); *Camacho*, 661 F.3d at 726 (defendant submitted to officer's show of authority "by responding to his questions").

C. Conclusion.

The evidence at the suppression hearing established both that Officers Rowland and Davis made a show of their law-enforcement authority from the beginning of their encounter with Mr. Gaines, and that Mr. Gaines yielded to that authority. The

initial encounter was a Fourth Amendment seizure requiring reasonable suspicion, and the district court erred in finding otherwise. This error necessitates a remand so that the district court may consider in the first instance whether the anonymous 911 call provided the officers with reasonable suspicion to support the seizure.

2. When officers *first* unlawfully seize a person, *then* discover evidence, and *then* discover an outstanding arrest warrant, that warrant is not an "intervening circumstance" that purges the taint of the officers' unlawful conduct under the attenuation doctrine.

Issue raised and ruled on

As noted above, Mr. Gaines moved before trial for an order suppressing all evidence derived from law enforcement's initial unconstitutional seizure of him in the food-kitchen lot. R1.46. He argued that no intervening circumstances purged the taint of this initial seizure's illegality. *Id.* at 7-9. The district court disagreed, concluding that even if the officers had initially seized Mr. Gaines, and even if that seizure had been illegal, the officers' later discovery of Mr. Gaines's outstanding arrest warrant attenuated any illegality. R1.53 at 6-10.

Standard of review

Attenuation is a "fact-intensive" analysis. *United States v. Fox*, 600 F.3d 1253, 1259 (10th Cir. 2010). This Court will uphold the district court's factual findings "unless they are clearly erroneous." *Id.* "A factual finding is clearly erroneous if it is without factual support in the record or, after reviewing all the evidence, [this Court is] left with a definite and firm conviction that a mistake has been made." *Id.* (cleaned up).[9]

[9] As we argued above, this Court should *not* review the district court's factual findings in the light most favorable to the government. *See* Standard of Review for Issue 1.

This Court reviews de novo the ultimate question of "the reasonableness of the government's action under the Fourth Amendment." *Id.* at 1257.

Legal background

Evidence discovered after a Fourth Amendment violation need not be suppressed if the connection between the violation and the evidence is "so attenuated as to dissipate the taint" of the violation. *Brown v. Illinois*, 422 U.S. 590, 598-99 (1975). The government bears the burden of proving attenuation. *Id.* at 604. "This is a heavy burden." *Fox*, 600 F.3d at 1259.

In *Brown*, the Supreme Court set forth three factors relevant to the attenuation analysis:

> [1] The "temporal proximity" of the Fourth Amendment violation to the discovery of the evidence sought to be suppressed;
>
> [2] "the presence of intervening circumstances;" and
>
> [3] "the purpose and flagrancy of the official misconduct."

422 U.S. at 603-04.

Brown involved an unlawful arrest (the Fourth Amendment violation), after which the defendant was twice Mirandized (the intervening circumstances), after which he made two confessions (the evidence sought to be suppressed). The question before the Supreme Court was whether the Miranda warnings alone were sufficient to purge the taint of the unlawful arrest. *Id.* at 600. The Supreme Court held that they were not. *Id.* at 602-03. The Supreme Court further held that the State of Illinois failed to

sustain its burden of establishing attenuation, finding that all three factors weighed in favor of the defendant. *Id.* at 604. Specifically, [1] the defendant's first confession was "separated from his illegal arrest by less than two hours"; [2] notwithstanding the Miranda warnings, "there was no intervening event of significance whatsoever"; and [3] the illegal arrest "had a quality of purposefulness." *Id.* at 604-05.

Forty-plus years later, the Supreme Court decided *Utah v. Strieff*, 136 S.Ct. 2056 (2016). In *Strieff* the Court explained that, under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance." *Id.* at 2061. In other words, "[t]he attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence." *Id.* at 2061.

Strieff involved an unlawful investigatory stop (the Fourth Amendment violation), followed by the discovery of an outstanding arrest warrant for the defendant (the intervening circumstance), followed by the defendant's arrest on the warrant and a search incident to that arrest during which the arresting officer discovered drugs (the evidence sought to be suppressed). The Supreme Court held that, on balance, the State of Utah had sustained its burden of establishing attenuation.

Applying the three *Brown* factors, the Supreme Court held that the temporal-proximity factor favored the defendant, as it will unless "substantial time elapses between an unlawful act and when the evidence is obtained." *Id.* at 2062. The discovery of the arrest warrant, on the other hand, favored the state, because it was an

intervening circumstance that was "entirely unconnected with the stop." *Id.* at 2062-63. The purpose-and-flagrancy factor also favored the state, because the officer's unconstitutional conduct was merely negligent. *Id.* at 2063. The Supreme Court concluded that "the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest." *Id.* at 2064.

As this Court has noted, "*Strieff* does not change governing law"; rather, in *Strieff* the Supreme Court merely applied the *Brown* factors to the particular set of facts before it. *Hernandez*, 847 F.3d at 1262 n.1.

Discussion

A. A later-discovered arrest warrant is not an intervening circumstance; this factor thus favored suppression.

In Mr. Gaines's case, officers conducted an unlawful stop (the Fourth Amendment violation), after which they discovered a gun and drugs (the evidence sought to be suppressed), after which they discovered an outstanding arrest warrant.[10] Given this

[10] The district court's factual findings appear to place the discovery of the arrest warrant after the discovery of the gun in the Cadillac, the drugs in the black bag on the roof, and the drugs in the Cadillac. R1.53 at 5-6. Officer Rowland could not pinpoint precisely when the warrant was found in relation to these events, other than to say it was "[m]aybe 10, 15 minutes" after Mr. Gaines's arrest. R1.57 at 38-39. It was the government's "heavy burden" to prove the existence of an *intervening* circumstance, *Fox*, 600 F.3d at 1259; the government failed to meet that burden here.

chronology, the arrest warrant was not an "*intervening* circumstance"[11] capable of breaking "the causal link between the government's unlawful act and the discovery of the evidence." *Strieff*, 136 S.Ct. at 2061.

The district court nonetheless held that the arrest warrant attenuated the connection between the stop and the evidence. *Id.* at 11 ("even if the stop was unlawful, it was sufficiently attenuated by the pre-existing arrest warrant"). This was error. The attenuation doctrine asks whether "the connection between unconstitutional police conduct and the evidence . . . has been interrupted by some intervening circumstance." *Strieff* at 2061. Given the order of events here, there was no intervening circumstance, and this factor favored suppression. *See United States v. Gaines*, 668 F.3d 170, (4th Cir. 2012) (defendant's conduct *after* discovery of evidence sought to be suppressed was not an intervening circumstance; discussing similar cases); *People v. Maggit*, 903 N.W.2d 868, 882 (Mich. App. 2017) ("In short, the instant case does not involve the discovery of a warrant as an intervening act that 'purged' the taint from the illegal seizure; rather, it involves an after-the-fact discovery of a valid warrant and an attempt to apply that warrant as a post-hoc panacea for unlawful

---

[11] The government relied only on discovery of the warrant, and did not argue that Mr. Gaines's flight or his abandonment of the car or the black bag were intervening circumstances. R1.50. Nor could it have. A defendant's own acts that result from illegal police conduct are not, as a rule, "sufficiently . . . of free will to purge the primary taint of the unlawful invasion." *United States v. King*, 990 F.2d 1552, 1564-65 (10th Cir. 1993) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)).

actions that were wholly unrelated to that warrant."); *In re Jarrell C.*, 95 N.E.3d 1153, 1160 (Ill. App. 1st Dist. 2017) ("Unlike *Strieff*, here, the officers did not discover the arrest warrant between the unlawful stop and the discovery of the gun and the drugs. Accordingly, since there was no intervening circumstance to cause a break between the police misconduct and the evidence recovered, we find that the second factor favors suppression of the evidence.").

The district court believed that it could find attenuation by imagining what might have happened in an alternative universe: "[I]f Defendant had not fled the initial stop, Officer Rowland would have used Defendant's identification and ran a check. This check would have shown the existence of a valid, pre-existing warrant that was wholly unrelated to the current stop. This would have been an independent, intervening circumstance that would have warranted search of Defendant's person *and his car* incident to his arrest." R1.53 at 11 (emphasis added). There is no support for this alternative-universe approach in *Brown* or *Strieff* (or in any other case that we have found).

Even assuming the correctness of this alternative-universe approach, the district court was wrong to conclude that discovery of the arrest warrant would have justified a *of the Cadillac* incident to arrest. In *Strieff*, the Supreme Court emphasized that once Officer Fackrell discovered Strieff's arrest warrant, "he had an obligation to arrest Strieff," at which point "it was undisputedly lawful to search Strieff as an incident of his arrest." 136 S.Ct. at 2062-63. But searches of *cars* incident to arrest are not

undisputedly lawful. *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (rejecting rule authorizing vehicle searches incident to every arrest). Once the arrestee is secured and out of reach of the car, a search of the car incident to arrest may be justified only when it is "reasonable to believe evidence relevant *to the crime of arrest* might be found in the vehicle." *Id.* (emphasis added). Here, the government never established what crime underlay Mr. Gaines's arrest warrant. Neither did it establish whether, in an alternative universe, it would have been reasonable for the officers to search the Cadillac incident to Mr. Gaines's arrest for evidence *of that crime*. R1.57.

B. The temporal-proximity factor favored suppression.

The district court's findings on the other two factors (temporal proximity and the officers' purpose and flagrancy) cannot save its attenuation ruling. As for temporal proximity, the district court noted that "there were only several minutes between the initial stop and the evidence being found on the roof and in the car." R1.53 at 11. The district court properly found that this factor "favors suppression." R1.53 at 11. *See Strieff*, 136 S.Ct. at 2062; *Brown*, 422 U.S. at 604.

C. The purpose-and-flagrancy factor cannot alone establish attenuation, and it favored suppression here in any event.

As for purpose and flagrancy, the district court summarily held that "Officer Rowland and Officer Davis could be considered at most negligent." R1.53 at 11. But this factor alone—that is, absent any intervening circumstance—cannot establish attenuation. *See Gaines*, 668 F.3d at 173 n.4 ("Because we conclude there is no

intervening circumstance, it is unnecessary to evaluate the other *Brown* factors."). As Professor LaFave has explained, "the absence of 'purpose and flagrancy' does not alone dissipate the taint, but rather requires less by way of intervening circumstances as compared to cases in which the Fourth Amendment violation was flagrant." Wayne R. LaFave, 4 SEARCH & SEIZURE § 11.4(g) (5th ed. Oct. 2017); *see also id.* at § 11.4(b) (noting that purpose-and-flagrancy factor must be considered *with* intervening circumstances). Relying on the absence of purposeful or flagrant conduct alone (absent any intervening circumstances) to deny suppression of the fruit of an unlawful warrantless seizure would convert the attenuation doctrine into a good-faith exception—an exception that the Supreme Court has explicitly declined to adopt. *See Taylor v. Alabama*, 457 U.S. 687, 693 (1982).

Even if the "purpose and flagrancy" factor could alone dissipate the taint of an illegal seizure, the district court gave insufficient attention to this factor, merely mimicking *Strieff*'s conclusion without conducting the required analysis. R1.53 at 12. In *Fox*, this Court explained that "purposeful and flagrant misconduct is generally found where: (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed in the hope that something might turn up." 600 F.3d at 1261 (cleaned up). It may also "be significant that the officers had no right whatsoever to detain the person." *Id* (cleaned up).

Here, Officers Rowland and Davis responded to an anonymous tip about drug dealing without making any effort to corroborate the tipster's claim of illegality, as had obviously been required at that point for some 15 years under *J.L.* 529 U.S. at 272 (anonymous tip does not provide reasonable suspicion absent corroboration that the tip is "reliable in its assertion of illegality, not just in its tendency to identify a determinate person"). They could have conferred with Officer Wilcox, interviewed people in the area, surveilled the Cadillac, or initiated a consensual encounter with Mr. Gaines. Instead the officers straightaway used their emergency lights (an obvious signal to stop under Kansas law, K.S.A. 8-1568) to detain Mr. Gaines for accusatory questioning. Officer Rowland's immediate accusatory questioning revealed his true purpose and hope that, rather than doing the police work required to corroborate the tip, he could simply detain Mr. Gaines and "something might turn up." The officers had no right whatsoever to detain Mr. Gaines on an uncorroborated anonymous tip. Thumbing their nose at long-standing Supreme Court precedent is precisely the kind of flagrant police conduct that the exclusionary rule was designed to deter. But the district court did not consider these points—perhaps because it was only "assuming" the illegality of the officers' conduct, having previously deemed the encounter consensual. R1.53 at 12. As in *Fox*, "it does not appear from the record that the district court conducted the proper analysis under the third *Brown* factor." 600 F.3d at 1261.

D. Conclusion.

The *Strieff* majority was careful to note that it was *not* addressing the question whether a warrant's "existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence" when he searched the defendant and discovered the evidence sought to be suppressed. 136 S.Ct. at 2062. The district court's ruling ignored this important limit on *Strieff*. Its attenuation ruling was error, and must be reversed.

Conclusion

The district court erred in concluding that Mr. Gaines's initial encounter with Officers Rowland and Davis was consensual. The district court further erred in concluding that the officers' post-arrest discovery of an outstanding arrest warrant attenuated any constitutional violation. This Court should therefore vacate the district court's order denying suppression and remand this case with directions for the district court to determine, in the first instance, whether the anonymous 911 call provided the officers with reasonable suspicion to seize Mr. Gaines. If not, the district court must vacate Mr. Gaines's conviction and suppress the fruit of that seizure.

Oral Argument Statement

Oral argument is requested. This appeal raises intricate, record-intensive Fourth Amendment issues, the analysis of which will be aided by oral argument.

Respectfully submitted,

By: s/ Melody Brannon
MELODY BRANNON
Kansas Federal Public Defender

By: s/ Paige A. Nichols
PAIGE A. NICHOLS
Assistant Federal Public Defender
Kansas Federal Public Defender
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603-3840
Tel: (785) 232-9828
Fax: (785) 232-9886
Email: paige_nichols@fd.org

Attorneys for Defendant-Appellant
DESMOND S. GAINES

Certificate of Compliance with Fed. R. App. P. 32(a)

I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(5) & (7)(B) in that it contains 10,001 words in a proportionally spaced typeface (14-point Garamond; as allowed by 10th Circuit Rule 32(a)), as shown by Microsoft Word 2016, which was used to prepare this brief.

s/ Paige A. Nichols
PAIGE A. NICHOLS
Assistant Federal Public Defender

Dated: June 7, 2018

Certificate of Compliance with 10th Circuit Rule 25.5

I certify that this brief complies with the applicable privacy and redaction requirements of 10th Circuit Rule 25.5 and the rules cited therein.

s/ Paige A. Nichols
PAIGE A. NICHOLS
Assistant Federal Public Defender

Dated: June 7, 2018

Certificate of Compliance with the Policies and Procedures of Electronic Filing via ECF

I certify that the hard copies of this brief submitted to the Court are exact copies of the version submitted electronically, and that the electronic submission was scanned for viruses with the most recent version of Symantec Endpoint Protection (Live Update on June 7, 2018), and is free of viruses.

s/ Paige A. Nichols
PAIGE A. NICHOLS
Assistant Federal Public Defender

Dated: June 7, 2018

Certificate of Service

I certify that on 06/07/2018, this brief was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Because opposing counsel (Assistant United States Attorney Carrie Capwell) is a registered CM/ECF user, she will also be served by the CM/ECF system. 10th Cir. R. 31.5.

Seven hard copies will be mailed to the Clerk of the Court per 10th Cir. R. 31.5 at:

Tenth Circuit Court of Appeals
1823 Stout Street
Denver, Colorado 80257

s/ Paige A. Nichols
PAIGE A. NICHOLS
Assistant Federal Public Defender

Dated: June 7, 2018

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Desmond S. Gaines

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:15CR20078 - 001
USM Number: 25482-031
Defendant's Attorney: David M. Magariel, Laquisha S. Ross

THE DEFENDANT:

☐ pleaded guilty to count(s): ___.
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☒ was found guilty on count(s) 1 through 5 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See Next Page

The defendant is sentenced as provided in pages 1 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___.

☐ Count(s) ___ is dismissed on the motion of the United States.

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

12/07/2017
Date of Imposition of Judgment

s/Julie A. Robinson
Signature of Judge

Honorable Julie A. Robinson, Chief U.S. District Judge
Name & Title of Judge

12/13/2017
Date

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii)	Possess with Intent to Distribute 28 Grams or More of Cocaine Base, a Class A Felony	08/24/2015	1
21 U.S.C. §§ 841(a)(1) and 841(b)(D)	Possess with Intent to Distribute Marijuana, a Class C Felony	08/24/2015	2
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possess with Intent to Distribute Phencyclidine (PCP), a Class B Felony	08/24/2015	3
18 U.S.C. § 924(c)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime, a Class A Felony	08/24/2015	4
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm, a Class C Felony	08/24/2015	5

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

IMPRISONMENT

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

Counts 1-3 and 5: 120 months; Count 4: 60 months consecutive to Counts 1-3 and 5.

☒ The Court makes the following recommendations to the Bureau of Prisons: that the defendant be placed at a facility offering fork-lift operator training and/or automotive training.

☒ 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 ___ 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 ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

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 U.S. Marshal

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 8 years.

Count 1) 8 years; Count 2) 4 years; Count 3) 6 years; Count 4) 4 years; Count 5) 3 years, all counts concurrent.

MANDATORY CONDITIONS

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 (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which 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.)*

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

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

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. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate as directed in a cognitive behavioral program and follow the rules and regulations of that program which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.

2. You must submit your person, house, residence, vehicle(s), papers, business or place of employment and any property under your control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. You must warn any other residents that the premises may be subject to searches pursuant to this condition.

3. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing, outpatient and/or residential treatment, and share in the costs, based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

DEFENDANT: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
Totals:	$500	Not applicable	None	Not applicable

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

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $___.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution 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 set forth in this Judgment 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 and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ 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: Desmond S. Gaines
CASE NUMBER: 2:15CR20078 - 001

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

A ☐ Lump sum payment of $___ 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 monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years, to commence ___ 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:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 204, 401 N. Market, Wichita, Kansas 67202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**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 against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

The court orders that the property and/or money judgment listed in the indictment is hereby ordered to be forfeited as to this defendant.

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **DESMOND S. GAINES,** **Defendant.**	**Case No. 15-CR-20078-JAR**

MEMORANDUM AND ORDER

This matter comes before the Court on Defendant Desmond Gaines' Motion to Suppress Evidence (Doc. 46). Defendant contends that evidence seized by law enforcement from an encounter on August 24, 2015 was seized in violation of his Fourth Amendment rights. The Government has responded (Doc. 50), and an evidentiary hearing was held on March 8, 2017. The Court has reviewed the evidence and arguments adduced at the hearing and is now prepared to rule. As explained more fully below, Defendant's motion is denied.

I. Factual Background

Based on the testimony and evidence admitted at the hearing on this motion, the Court finds as follows. On August 24, 2015, Officer Carl Rowland and Officer Shenee Davis, who were both patrol officers with the Kansas City, Kansas Police Department, were dispatched to the Wilhelmina Gill Center, at 645 Nebraska Ave. Kansas City, Kansas, following an anonymous 911 call.[1] The unidentified caller stated there was a "light-skinned" man in all red clothing selling "wet," which is otherwise known as phencyclidine ("PCP"). The caller stated that the man was in the parking lot of the Wilhelmina Gill Center sitting in a white car, but he

[1] Gov't Ex. 1.

did not know the type of car that the man was driving. The caller stated that he was located at the Wilhelmina Gill Center when he was observing the man.

During his testimony, Officer Rowland testified that he was familiar with the Wilhelmina Gill Center and the surrounding area. Officer Rowland testified that he had responded to several drug-related calls at the Wilhelmina Gill Center. In fact, police dispatch records showed that between March and August 2015, officers had been dispatched to the Wilhelmina Gill Center eight times for reported narcotics sales or for medical calls involving reactions to PCP or other substances.[2] Officer Rowland further testified that based on his experience, he was familiar with the strong, overpowering chemical odor of PCP and with behavior resulting from ingestion of PCP.

Officer Mark Wilcox, a patrol officer for the Kansas City, Kansas Police Department, was working on August 24, 2015 as an off-duty security guard at the Frank Williams Outreach Center, which is directly across the street from the Wilhelmina Gill Center. Officer Wilcox testified that he wears his uniform at the Frank Williams Outreach Center, including his police radio. Prior to the call being dispatched, Officer Wilcox was patrolling the parking lot of the Frank Williams Outreach Center. He noticed a man in all red clothing wiping down his car, a white Cadillac, in the Wilhelmina Gill Center parking lot. Not long after this observation, Officer Wilcox heard the dispatched call that a man wearing all red was selling drugs. As Officer Rowland and Officer Davis arrived on scene, Officer Wilcox radioed about his observation of the man wearing all red entering the white Cadillac. Officer Wilcox did not at any time observe this man conducting a drug transaction.

[2] Gov't Ex. 7. On July 24, 2015, police records show that officers were dispatched to the Wilhelmina Gill Center for a female suspected of reacting to ingestion of PCP. *See id.*

Officer Rowland, who was uniformed and driving a marked police cruiser, pulled into the Wilhelmina Gill Center parking lot from the west.[3] Officer Davis, who was also uniformed, followed directly behind him in the marked police cruiser that she was driving. Officer Rowland also observed the man (subsequently identified as Desmond Gaines, the "Defendant") entering the white Cadillac and observed that Defendant matched the description of light skinned and wearing all red (red hat, red shirt, red pants, and red shoes). Officer Rowland pulled up behind the driver side of the white car, and Officer Davis pulled up alongside Officer Rowland's cruiser, also to the rear of the white car. Both officers activated the emergency lights on their cruisers because their vehicles were both blocking a lane of traffic in the parking lot. While the two police cruisers blocked the white car from the rear, the white car was not blocked in the front or on the right side and Defendant, who was the driver, could have drove forward without obstacle.

As Officer Rowland approached the driver side of the white car, Defendant, who was sitting in the driver's seat with the door closed, exited the white car and quickly closed the door behind him. Meanwhile, Officer Davis exited her cruiser and approached the rear of the white car. Officer Rowland began to speak to Defendant, who asked Officer Rowland what he was doing; Officer Rowland replied that there was a 911 call about a man matching his description selling drugs. Defendant denied that he was engaged in drug sales.

Officer Rowland asked Defendant for identification; Defendant responded that his identification was in the car trunk.[4] At this point, Defendant reopened the driver side door and pulled the trunk release. As Defendant began to walk toward the trunk, he began to close the driver side door behind him, but Defendant then caught the door with his hand and the door

[3] There is both audio and video of the encounter captured on Officer Rowland's police cruiser camera system. Gov't Ex. 3. There is also video from the Wilhelmina Gill Center cameras in the parking lot. Gov't Ex. 2.

[4] Officer Rowland testified that Defendant was not considered in custody when he asked him for his identification.

remained open. Defendant positioned himself between the car and the open driver side door. Meanwhile, Officer Davis began to walk toward the rear part of the car, and then to the passenger side.

Officer Rowland testified that as soon as Defendant reopened the driver's side door, Rowland smelled a strong chemical odor that based on his training and experience he believed was the odor of PCP. Officer Rowland further testified that once the trunk was ajar, the odor of PCP became stronger. From his position next to the driver side door, Officer Rowland also observed a bottle of alcohol on the center console underneath a walkie talkie radio. Officer Rowland told Defendant that he was going to detain him for having an open container of alcohol within his reach in the car.[5] Photographs taken at the time of the stop depict a bottle of alcohol on the center console with the lid intact on the bottle. Officer Rowland testified that although he also decided to detain Defendant in part because of the strong odor of PCP, he did not tell Defendant this at that time, because he did not want to tip Defendant off that he suspected PCP was present.

Once Officer Rowland displayed his handcuffs, he observed Defendant becoming agitated and fidgety. Officer Rowland reached for Defendant's left hand to place him in handcuffs. Defendant pulled away from Officer Rowland and reached into the car through the open driver side door. Defendant removed the keys from the ignition, grabbed a black zippered pouch from the driver side floorboard area, turned and shoved Officer Rowland, and fled on foot. Officers Rowland and Davis chased Defendant on foot.

Defendant fled towards the intersection of Sixth Street and State Street, then ran down an alley between a parking lot and building south of the Wilhelmina Gill Center. When his path of

[5] Possession of alcohol in a vehicle is a violation of K.S.A. § 8-1599, which is an arrestable offense.

flight was obstructed by a fence, Defendant stopped running and threw the black zippered pouch onto the roof of the building located at 612 State Avenue. Officer Rowland observed Defendant throw the zippered pouch on to the building. Officer Rowland testified that Defendant then turned around in an aggressive stance. Officer Rowland drew his firearm because he was unsure if Defendant was armed. Officer Davis was behind Officer Rowland providing cover. After Officer Rowland commanded Defendant to get on the ground, Defendant complied, but as Officer Rowland holstered his firearm and attempted to handcuff him, Defendant resisted. Officer Davis then deployed her Taser for three cycles at which point Defendant was placed in handcuffs.

Meanwhile, while Officer Rowland and Officer Davis chased Defendant on foot, Officer Wilcox, who had watched the encounter, walked from the Frank Williams Outreach Center to Defendant's unattended car in the Wilhelmina Gill Center parking lot. The driver side door and the trunk were both still open when Officer Wilcox approached. As he stood outside the car, Officer Wilcox could see inside the car through the open driver side door. Officer Wilcox observed a handgun on the floorboard of the car, a fact that Officer Wilcox relayed to other officers via radio.

Meanwhile, Officer Rowland obtained a ladder and climbed on top of the building at 612 State Ave. There he recovered the black zipper pouch and its contents: a clear container of PCP, fourteen bags of marijuana, sixty-five bags of crack cocaine, one package of More brand cigarettes,[6] and $641.51 in currency. Inside the car, police recovered a large amount of crack cocaine and some powder cocaine from the center console. Police also recovered the firearm

[6] Officer Rowland testified that based on his knowledge and experience as a patrol officer, More brand cigarettes are the cigarette of choice for dipping PCP and smoking it through the cigarette.

visible on the floorboard of the driver seat, as well as three walkie talkie radios, and a cellular telephone.

Following Defendant's arrest, Officer Rowland learned that Defendant had an outstanding warrant for his arrest. Officer Rowland testified that under normal practice when he takes someone's identification, he immediately runs a records check for outstanding warrants. But, given Defendant's flight, Officer Rowland was not able to immediately run a records check. Officer Rowland testified that if Defendant had not fled, he would have run a records check and presumably found the outstanding arrest warrant.

II. Discussion

Defendant argues that the evidence seized from the car and from the roof of 612 State Ave. was illegally seized in violation of the Fourth Amendment and should be suppressed. More specifically, Defendant argues the anonymous 911 call did not justify the officers' investigative stop, and that there was no intervening circumstance that purged the taint of the Fourth Amendment violation.

The Court disagrees. This was an initially a consensual encounter for the officers did not detain Defendant, who was in or near his car and who had the ability to leave. The encounter quickly evolved into an investigatory detention, based on the officer's reasonable suspicion of an open container violation and reasonable suspicion that there was PCP present in the car. The investigatory detention was quickly interrupted by Defendant's flight and attempted discard of the zippered pouch, which provided further justification for an investigatory detention. But, even if the initial encounter was an investigatory stop not based upon reasonable suspicion, the attenuation doctrine applies because Officer Rowland would have found Defendant's outstanding arrest warrant upon running Defendant's identification through the system.

A. Consensual Encounter

The Fourth Amendment prohibits unreasonable seizures by law enforcement officers.[7] However, the Fourth Amendment "does not proscribe all contact between the police and citizens."[8] Thus, the Fourth Amendment is not violated when law enforcement officers "merely approach[] an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen."[9] These are properly considered consensual encounters for which the Fourth Amendment is not implicated.[10]

To determine whether a police-citizen encounter is consensual, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[11] This test allows officers to engage in consensual encounters "so long as they don't throw their official weight around unduly."[12] This test does not have per se rules, but rather turns on the totality of the circumstances.[13]

The Tenth Circuit has enumerated a non-exhaustive list of factors to be considered in determining whether a reasonable person would feel free to terminate his encounter with police:

> the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether

---

[7] U.S. Const. amend. IV. The Fourth Amendment applies to the states through incorporation of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

[8] *INS v. Delgado*, 466 U.S. 210, 215 (1984).

[9] *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)).

[10] *See United States v. Lopez*, 443 F.3d 1280, 1283 (10th Cir. 2006).

[11] *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

[12] *United States v. Tavolacci*, 895 F.2d 1423, 1425 (D.C. Cir. 1990).

[13] *United States v. Hill*, 199 F.3d 1143, 1147 (10th Cir. 1999) (quoting *United States v. Little*, 18 F.3d 1499, 1503 (10th Cir. 1994)).

> the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent.[14]

The Tenth Circuit has also considered "when police officers pursue a citizen in their squad car while the citizen is on foot, courts will consider whether the officers activated their siren or flashers, operated their car in an aggressive manner to block the citizen's course or otherwise control the direction or speed of his movement, displayed their weapons, or commanded the citizen to halt."[15] These factors are not dispositive, but the Tenth Circuit has cautioned that "the strong presence of two or three factors may be sufficient to support the conclusion" that the encounter was not consensual.[16] The nature of a police-citizen encounter can change and what was initially a consensual encounter "may change to an investigative detention if the police conduct changes and vice versa."[17]

When the officers first approached Defendant, it was a consensual encounter. Although their emergency lights were activated and their cruisers blocked Defendant's car from behind, Defendant's car was not blocked from the front or on the right side. And although the emergency lights were activated, the sirens were not activated; in fact, both officers testified they only activated the lights because they had stopped their cruisers in a lane of traffic in the parking lot. The officers did not touch or physically restrain Defendant. They did not have custody of any of Defendant's property or personal effects. The encounter was in a public parking lot where others were present and able to witness the encounter. Although the officers were in

---

[14] *United States v. Hernandez*, 847 F.3d 1257, 1264 (10th Cir. 2017) (citing *Lopez*, 443 F.3d at 1284).

[15] *Id.* (citing *Chesternut*, 485 U.S. at 575)

[16] *Id.* (citing *Lopez*, 443 F.3d at 1284–85) (internal quotations omitted).

[17] *United States v. Madden*, 682 F.3d 920, 925 (10th Cir. 2012) (quoting *United States v. Zapata*, 997 F.2d 751, 756 n.3 (10th Cir. 1993)). Investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity. *Id.*

uniform and marked police cruisers, the officers did not display their weapons and there is no evidence that they interacted with any indicia of coercive behavior. Officer Rowland spoke in a conversational tone, simply asking to see Defendant's identification, which Defendant agreed to provide. Based on Officer Rowland's conversational tone and Defendant's behavior, the Court finds that this was a consensual encounter. Although the officers did not advise Defendant that this was a mere consensual encounter that Defendant could terminate, they had scant chance to tell Defendant that, in light to the rapid succession of events described below.

As Defendant was in the process of retrieving his identification, he reopened his car door, left the car door open and opened his trunk, which allowed Officer Rowland to detect the strong chemical odor of PCP emanating from the passenger compartment and trunk of Defendant's car. And, when Defendant opened his car door, Officer Rowland observed a bottle of alcohol on the center console, providing him with reasonable suspicion that there was an open container violation. The Court finds that this was initially a consensual encounter that evolved into an investigatory detention upon Officer Rowland's reasonable suspicion based on his plain view observation of an open container in the car and his detection of the strong odor of PCP emanating from the car. Indeed, Officer Rowland told Defendant at that point that he was detaining him for investigation of an open container violation, and Officer Rowland attempted to place Defendant in handcuffs.

The rapidly developing events thereafter provided even more basis for reasonable suspicion, and ultimately probable cause, to arrest Defendant. Defendant grabbed a zippered pouch, shoved Officer Rowland out of the way, and fled on foot, discarding the pouch by throwing it on a rooftop before officers could apprehend him. In fact, just thirty to sixty seconds elapsed between Officer Rowland's initial contact with Defendant and Defendant's flight. The

brief consensual encounter and brief investigatory detention almost immediately evolved into a foot chase in which the officers observed Defendant discarding a pouch that Defendant evidently felt compelled to grab before fleeing from the officers. Once Defendant fled on foot with the black zippered pouch, the officers had probable cause for an arrest. Thus, there was no violation of the Fourth Amendment as this was initially a consensual encounter, which did not implicate the Fourth Amendment, and later became an investigatory stop, which was supported by reasonable suspicion, or arrest, which was supported by probable cause, based on the open container violation and presence of PCP.

B. Attenuation Doctrine

The attenuation doctrine evaluates the causal link between the government's unlawful act and the evidence seized.[18] In *Utah v. Strieff*, the Supreme Court considered whether the discovery of a valid existing warrant is sufficient to break the causal chain between an unlawful stop and the discovery of evidence.[19] The Court looked to the three factors espoused in *Brown v. Illinois* for determining whether the attenuation doctrine applied—

> (1) the court looks to the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; (2) the court considers the presence of intervening circumstances; and (3) the court examines the purpose and flagrancy of the official misconduct.[20]

The Supreme Court held in *Strieff*, a circumstance similar to this case, that "the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant."[21]

---

[18] *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

[19] *Id.*

[20] *Id.* at 2062 (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)).

[21] *Id.* at 2063.

The first factor, the temporal proximity between the unconstitutional conduct and the discovery of evidence, favors suppression of the evidence. The Supreme Court has cautioned that this factor only favors attenuation if a substantial time has elapsed between the conduct and the discovery of evidence.[22] Here, if this Court were to assume the stop itself was unlawful, there were only several minutes between the initial stop and the evidence being found on the roof and in the car. Thus, this would favor suppression.

By contrast, the second factor, the presence of intervening circumstances, strongly favors the Government. In *Strieff*, the Court relied on the fact that the defendant had a valid warrant pre-existing the investigation that was wholly unconnected to the initial stop.[23] "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions."[24] Here, this is somewhat different than the case in *Strieff* because Officer Rowland and Officer Davis did not find out about the outstanding warrant until after Defendant fled on foot and was arrested. However, if Defendant had not fled the initial stop, Officer Rowland would have used Defendant's identification and ran a check. This check would have shown the existence of a valid, pre-existing warrant that was wholly unrelated to the current stop. This would have been an independent, intervening circumstance that would have warranted search of Defendant's person and his car incident to his arrest.[25] This factor strongly favors the Government.

---

[22] *Kaupp v. Texas*, 538 U.S. 626, 633 (2003).

[23] *Strieff*, 136 S. Ct. at 2082.

[24] *United States v. Leon*, 468 U.S. 897, 920 n.21(1984).

[25] *See generally Arizona v. Gant*, 556 U.S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

The third factor, deterring police misconduct, also weighs in favor of the Government. The exclusionary rule exists to deter police misconduct.[26] Here, as this Court described above, Officer Rowland and Officer Davis engaged in a consensual encounter with Defendant. Thus, the Court does not believe that the officers committed any sort of police misconduct. However, even assuming the Court adopted Defendant's argument that this was not a consensual encounter and rose to the level of an investigatory stop without requisite reasonable suspicion, Officer Rowland and Officer Davis could be considered at most negligent. Because there has been no evidence presented that the stop was part of any systemic or willful police misconduct, the Court finds that this factor also strongly favors the Government. In conclusion, the Court finds, based on the three attenuation doctrine factors and the Court's holding in *Strieff*, that the evidence found on the roof and in Defendant's car is admissible because even if the stop was unlawful, it was sufficiently attenuated by the pre-existing arrest warrant.

IT IS THEREFORE ORDERED BY THE COURT that Defendant's Motion to Suppress Evidence (Doc. 46) is **denied**.

IT IS SO ORDERED.

Dated: April 7, 2017

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

[26] *Davis v. United States*, 564 U.S. 229, 236–237 (2011).