No. 21-___

IN THE

Supreme Court of the United States

ANTHONY W. KNIGHTS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Fourth Amendment seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007).

The questions presented are:

1. Whether a court analyzing if a Fourth Amendment seizure has occurred is categorically barred from considering a person's race.

2. Whether a seizure occurred under all the circumstances of this case.

RELATED PROCEEDINGS

United States v. Anthony W. Knights, No. 8:18-cr-00100-VMC-AAS-1 (M.D. Fla. Sept. 6, 2018).

United States v. Anthony W. Knights, No. 19-10083 (11th Cir. Mar. 10, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony W. Knights respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-49a) is published at 989 F.3d 1281. The district court's opinion and order (Pet. App. 60a-69a) is available at 2018 WL 4237695.

JURISDICTION

The court of appeals entered its judgment on March 10, 2021. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that extends the time to file a petition for a writ of certiorari in this case to August 9, 2021. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

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

INTRODUCTION

This Court has held that a person is seized under the Fourth Amendment if "in view of *all the circumstances* surrounding the incident, a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007) (emphasis added). "[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

Lower courts employ this test flexibly to determine whether a reasonable person would feel free to leave. They consider many factors, including the "threatening presence of several officers," the "use of forceful language or tone of voice," and the "location in which the encounter takes place," *United States v. Smith*, 794 F.3d 681, 684 (7th Cir. 2015), as well as age, immigration status, and other objective demographic characteristics, *see, e.g.*, *Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2015); *United States v. Moreno*, 742 F.2d 532, 536 (9th Cir. 1984). Courts stress that any list of factors is neither "exhaustive nor exclusive." *Smith*, 794 F.3d at 684.

The decision below departs from this comprehensive approach by singling out and categorically excluding race from the totality-of-the-circumstances analysis. The Eleventh Circuit, like other courts, considers various other demographic characteristics. But it nevertheless held that "the race of a suspect is *never* a factor in seizure analysis." Pet. App. 11a (emphasis added).

There is no principled reason for this selective exclusion. Race, like other individual characteristics, can help generate "commonsense" inferences about whether a reasonable person would feel free to leave. Pet. App. 13a (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011)). Here, two armed police officers cornered petitioner Anthony Knights, a young Black man, in the middle of the night. The officers constrained Mr. Knights's freedom of movement and targeted him for interrogation, despite his efforts to signal he did not wish to engage. Acknowledging race as part of the totality of the circumstances confirms that a reasonable person in Mr. Knights's position would not have thought he was "free to leave."

The Eleventh Circuit thought it must close its eyes to race because of concerns about objectivity and equal protection. That reasoning is unpersuasive, and ignores the many contexts in which the law acknowledges the continuing reality of race as a potential factor in law enforcement interactions—such as when courts evaluate whether a police stop was pretextual or a particular individual voluntarily consented to a police search.

Artificially excising race from the totality of the circumstances renders a seizure analysis incomplete as a practical matter. It precludes courts from accurately assessing "the coercive effect of police conduct, taken as a whole." *Chesternut*, 486 U.S. at 573. The Eleventh Circuit's all-circumstances-but-race test also fails to ensure that all citizens, regardless of race, are afforded the same Fourth Amendment protection against unlawful seizure.

At a minimum, the decision below vividly demonstrates that the lower courts need fresh

guidance in assessing when a reasonable person would "feel free" to terminate a police encounter. No reasonable person in Mr. Knights's shoes would have believed he could lawfully ignore police officers after they made a show of authority that clearly indicated an attempt to initiate an investigatory stop. Police-citizen encounters are a commonplace feature of everyday life, yet for decades, this Court has not taken up a case involving the "free to leave" standard. This case presents a timely opportunity to clarify the seizure doctrine to ensure that it accurately reflects how reasonable people perceive police encounters. Certiorari should be granted.

STATEMENT OF THE CASE

A. Factual background

After midnight on January 26, 2018, Officers Andrew Seligman and Brian Samuel of the Tampa Police Department began a vehicle patrol of the Live Oaks Square neighborhood in Tampa, Florida—a neighborhood known for frequent and tense police-minority encounters. *See* ECF 34, U.S. Opp. to Suppression Mot. 2; Pet. App. 3a, 71a.

Mid-patrol, the officers saw petitioner Anthony Knights and another man, Hozell Keaton, standing next to a parked Oldsmobile sedan. Pet. App. 61a. The Oldsmobile belonged to Mr. Knights's wife, and the two friends were listening to music in the front yard of a home that belonged to a member of Mr. Keaton's family. *Id.* 3a, 61a-62a.

Upon seeing Mr. Knights and Mr. Keaton leaning into the car, the officers jumped to a different conclusion: they suspected the men might be "burglarizing the vehicle." ECF 34 at 2. Driving past

the Oldsmobile "for a better look," they heard someone unsuccessfully try to start the car. Pet. App. 3a. Concerned that the two men "might be . . . trying to steal the [car], the officers decided to investigate further." *Id.*

Rather than park down the street from the Oldsmobile and approach on foot, Officer Seligman swung the police car around and cut across the narrow street to where the Oldsmobile was parked. Pet. App. 3a. He parked the patrol car in the street headed the wrong way, aligning his trunk with the trunk of the Oldsmobile. *Id.* 67a, 72a. The front of the Oldsmobile was crowded in by a mailbox and a "large, overgrown shrub" that "nearly touched" the car. *Id.* 71a. A second mailbox and garbage can hedged in the Oldsmobile at its rear, *id.* 3a, while a fence ran along the passenger side of the car, *id.* 71a.

By the time Officer Seligman finished parking the patrol car, Mr. Keaton had retreated into his relative's house. Pet. App. 4a, 72a. Mr. Keaton's departure left Mr. Knights alone with the two uniformed officers. *Id.*

As the officers approached, Officer Seligman "trained his flashlight" on Mr. Knights. Pet. App. 4a. Mr. Knights "tried to signal that he was not interested in chatting" by climbing into the car, sitting in the driver's seat, and shutting the door. *Id.* 4a, 21a, 73a. At that point, as the magistrate judge later explained, Mr. Knights "would have had significant difficulty" driving away "without hitting the patrol car or an officer." *Id.* 81a.

Still shining his flashlight, Officer Seligman rapped on the driver's window. Pet. App. 4a. When Mr. Knights opened the door, Officer Seligman smelled an

odor of burnt marijuana. *Id.* After Mr. Knights complied with a direction to produce his driver's license and explained that the Oldsmobile belonged to him and his wife, Officer Seligman began "a narcotics investigation." *Id.* 73a.

Officer Seligman instructed Mr. Knights to step out of the car, "moved him toward the back of the car, and had him place his hands on top of the car." Pet. App. 73a. After searching Mr. Knights, Officer Seligman searched the Oldsmobile and found a handgun, rifle, and two firearm cartridges. *Id.* 4a. Mr. Knights acknowledged that he owned the handgun. *Id.*

B. Procedural history

1. A grand jury indicted Mr. Knights on one count of possession of a firearm and ammunition by a felon. 18 U.S.C. §§ 922(g)(1), 924(a)(2) (2015); Pet. App. 5a. Mr. Knights moved to suppress the evidence and admission the officers obtained during the search, arguing that both were the fruits of an unlawful seizure. Pet. App. 5a. The seizure occurred, he explained, when the officers parked in a manner that impeded his ability to drive or walk away. At the latest, it occurred when they approached his car and rapped on the window. *Id.*

The magistrate judge recommended that the motion be granted. The judge found that the officers lacked reasonable suspicion to make a stop when they parked their car. Pet. App. 93a. And she found that the officers seized Mr. Knights when "Officer Seligman parked the patrol car trunk-to-trunk next to the Oldsmobile and impeded Mr. Knights's freedom of movement." *Id.* Officer Seligman's "show of authority, by approaching Mr. Knights seated in the Oldsmobile,

in uniform and flashing a flashlight at him further establishe[d]" the seizure. *Id.* Under these circumstances, the judge concluded, "no reasonable person in Mr. Knights's position would feel free to leave or disregard the two officers." *Id.* 81-82a.

2. The district court rejected the magistrate judge's recommendation and denied Mr. Knights's motion to suppress. The court reasoned that the officers did not seize Mr. Knights when they parked trunk-to-trunk with the Oldsmobile, against the direction of traffic and impeding his exit, because Mr. Knights could have either abandoned his car and walked past the officers, or used "skilled driving" to drive away while avoiding a collision with the two armed officers or property. Pet. App. 68a. The court did not opine on whether Mr. Knights could reasonably have declined to open his car window once the officers rapped on it. And it concluded that once he opened the window and the officers smelled marijuana, they had a lawful basis to seize Mr. Knights. *Id.* 6a.

At a bench trial, Mr. Knights and the government stipulated to the other relevant facts. The district court sentenced Mr. Knights to 33 months of imprisonment. Pet. App. 6a.

3. Mr. Knights appealed the denial of his suppression motion. Pet. App. 6a. He explained that, given the totality of the circumstances, a reasonable person in his position would not have felt free to disregard the police contact and leave the encounter. To begin, as the magistrate judge had found, no reasonable person would feel free to simply walk or drive away from two armed officers in the middle of the night with no witnesses present; in a neighborhood

with contentious relations with the police; after the officers had constrained his freedom of movement and targeted him for interrogation, despite his effort to signal that he was not interested in engaging by getting into his car and closing the door. ECF 28, Mot. to Suppress 10-11; Pet. App. 3a, 6a. But in particular, no young Black man in that situation would possibly feel "free to leave."

The Eleventh Circuit affirmed the district court's ruling. Pet. App. 51a. The court initially agreed with Mr. Knights that "the age and race of a suspect may be relevant factors" in determining whether a reasonable person would feel free to leave. *Id.* 59a. The court concluded, however, that this particular "encounter was not coercive," reasoning that the officers did not "make a show of authority communicating" to Mr. Knights that he was not free to leave, *id.* 58a-59a. In the court's assessment, the officers merely "approached [Mr. Knights's] car to try to speak to him, without conveying that [he] was required to comply." *Id.* at 58a.

Mr. Knights petitioned for rehearing, Pet. App. 2a, explaining that the panel's conclusion that his encounter with the officers was "consensual" could not be reconciled with its recognition that age and race were relevant to the seizure inquiry. The court then requested supplemental briefing on "whether the race of a suspect may be a relevant factor in deciding whether a seizure has occurred under the Fourth Amendment." *Id.* 95a.

The Eleventh Circuit then vacated its original opinion and issued a rehearing opinion adopting a new, categorical rule: "the race of a suspect is never a factor in seizure analysis." Pet. App. 2a, 11a. Despite

recognizing that "race can be relevant in other Fourth Amendment contexts," and that "the suspect's age, education, and intelligence" are relevant to the seizure analysis, the court held that race should be excluded from the seizure analysis because it does "not lend [itself] to objective conclusions" and could not be taken into account in a "rigorous" or "systematic" way. *Id.* 8a, 12a-13a (internal quotation marks omitted). Moreover, permitting race to inform the totality-of-the-circumstances inquiry would "run[] afoul of the Equal Protection Clause." *Id.* 14a. Because the court declined to consider race at all, the other circumstances of the encounter "remain[ed] dispositive," *id.*, and the court adhered to its conclusion that Mr. "Knights's interaction with the officers was a consensual encounter that did not implicate the Fourth Amendment." *Id.* 2a.

Judge Rosenbaum concurred only in the judgment. She expressed concern that a race-free analysis ignores the "reality" of police encounters for "Black Americans." Pet. App. 29a. Judge Rosenbaum explained that studies show that "Black and white individuals do not equally feel 'free to leave' citizen-police encounters." *Id.* 27a. And she recognized that "Black citizens" are "all the more" likely to comply with the police because they fear the "negative consequences [that] accompany a failure to comply." Indeed, "the fear of violence often overlays the entire law-enforcement encounter." *Id.* 31a. The free-to-leave analysis needs to be "improve[d]," Judge Rosenbaum reasoned, so that "people of all races . . . feel equally able to exercise their Fourth Amendment rights to leave a legally consensual citizen-police encounter." *Id.* 27a.

Nonetheless, Judge Rosenbaum recognized that the court of appeals was not at liberty to make improvements to the doctrine. She concurred in the judgment because she, like the majority, believed that considering race within the current seizure framework would raise equal protection concerns. Pet. App. 15a. And she recognized that any real reassessment would need to come from this Court. *Id.*

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are divided three-to-three over whether race can ever inform the seizure analysis under the Fourth Amendment. There are millions of encounters between citizens and police every year; yet the constitutionality of purportedly consensual encounters involving racial factors now varies with the happenstance of geography. This Court's intervention is badly needed, and this case is an excellent vehicle to address the issue.

The Eleventh Circuit's approach—categorically excluding race from the seizure analysis—is wrong. That approach is contrary to the nature of the totality-of-the-circumstances inquiry, which demands a realistic assessment of the situation. It is also contrary to this Court's precedents, which recognize that objective personal characteristics—like age, race, and sex—properly inform similar inquiries. And the Eleventh Circuit's approach cannot be justified on administrability or equal protection grounds; police officers and courts permissibly consider the realities of race in other contexts.

At the very least, the improbable result in this case—holding that Mr. Knights was not seized when

common sense tells us no reasonable person in his shoes would have felt "free to leave"—signals the need for this Court to clarify the proper application of the Fourth Amendment seizure analysis.

I. Courts are sharply divided over whether race can ever be considered in the Fourth Amendment seizure analysis.

1. In the decision below, the Eleventh Circuit held that courts "may not consider race to determine whether a seizure has occurred." Pet. App. 12a. The court acknowledged that other individual characteristics—including "age, education, and intelligence"—are relevant to whether a "reasonable person would feel free to terminate the encounter." *Id.* 8a-9a, 11a. But it treated race differently, asserting that race has no "objectively discernible relationship to a reasonable person's understanding of his freedom of action." *Id.* 12a.

In so holding, the Eleventh Circuit emphasized that the Tenth Circuit had adopted the same rule. In *United States v. Easley*, 911 F.3d 1074 (10th Cir. 2018), *cert. denied,* 139 S. Ct. 1644 (2019), Drug Enforcement Administration (DEA) agents boarded a Greyhound bus, questioned all the passengers, and searched their belongings. The agents then asked Ollisha Easley, the only Black passenger, to step off the bus for a second round of questioning. *Id.* at 1078. After "consider[ing] [her] race as one of several factors in assessing the totality of the circumstances surrounding her encounter," the district court concluded that the DEA agents seized Ms. Easley when they first questioned her on the bus. *United States v. Easley*, 293 F. Supp. 3d 1288, 1307 (D.N.M. 2018).

The Tenth Circuit reversed, holding that any "consideration of race in the reasonable person [seizure] analysis is error." 911 F.3d at 1082. Though the *Easley* court, like the Eleventh Circuit, accepted that age is relevant to the seizure analysis, it "distinguish[ed] race" from age because "there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures." *Id.* The Tenth Circuit recently reaffirmed this holding in *United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021).

The Fourth Circuit has adopted the same approach. In *Monroe v. City of Charlottesville*, 579 F.3d 380 (4th Cir. 2009), *cert. denied*, 559 U.S. 992 (2010), Charlottesville police, searching for a Black suspect, approached 190 young Black men to request a DNA sample. Larry Monroe, a Black man, gave the sample but later argued, in a suit under 42 U.S.C. § 1983, that the officers' visit to his home and DNA request was a seizure. Mr. Monroe contended that a reasonable person would not have felt free to terminate the police encounter given, among other factors, local "relations between law enforcement and members of minority communities." *Id.* at 386. The Fourth Circuit rejected Mr. Monroe's argument, dismissing any discussion of his race and characterizing the effect of police-minority relations as "irrelevant facts" that have no place in the seizure inquiry. *Id.* at 387. As a result, the Fourth Circuit held that Mr. Monroe had failed to state a claim for a Fourth Amendment violation.

2. By contrast, the Ninth and Seventh Circuits, along with the D.C. Court of Appeals, have refused to

categorically exclude race from the seizure analysis. These courts hold that race, like other objective factors, should be considered in the totality-of-the-circumstances test where it is relevant to the dynamics of a particular seizure.

In *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007), the Ninth Circuit held that a late-night encounter between two police officers and a Black man sitting in his parked car escalated into a seizure under the Fourth Amendment. Late one evening on a Portland street, a police officer approached Bennie Washington's car in much the same way that Officer Seligman approached Mr. Knights, by shining a flashlight into the driver's seat. *Id.* at 767-68. The officer asked Mr. Washington if he would agree to be searched and then asked him to step out of his car. *Id.* at 768. At that point, a second officer arrived, searched Mr. Washington's car, and found a firearm that served as the basis for a Section 922(g)(1) conviction. *Id.* In concluding that the encounter had escalated into a seizure before the officers found the firearm, the Ninth Circuit considered "the total circumstances present in Washington's case," including the "publicized shootings by white Portland officers of African-Americans." *Id.* at 772-73.

The D.C. Court of Appeals has likewise held that a defendant's race can inform the seizure analysis. In *Dozier v. United States,* 220 A.3d 933 (D.C. 2019), four police officers, driving at night in a "high crime area," observed Samuel Dozier, a Black pedestrian, near a dark, secluded alley. *Id.* at 938, 943. After parking their car, two officers followed Mr. Dozier into the alley and repeatedly asked to "talk" to him. *Id.* at 938. Their requests "escalat[ed]," culminating with a "request"

for Mr. Dozier "to put his hands on the wall for a pat-down." *Id.* at 941, 947. In determining whether Mr. Dozier had been seized, the D.C. Court of Appeals explained that Black Americans' "fear of harm" at "the hands of police," and "resulting protective conditioning to submit to avoid harm," may be "relevant to whether there [is] a seizure." *Id.* at 944. In the dark and secluded alley that night, the court explained, Mr. Dozier "reasonably could have feared that unless he complied with the police requests, he would be vulnerable to police violence." *Id.* at 945. Accordingly, the court held that Mr. Dozier had been seized. *Id* at 947.

Finally, the Seventh Circuit has acknowledged that race can be relevant to the seizure inquiry. In *United States v. Smith*, 794 F.3d 681 (7th Cir. 2015), the court held that officers seized Dontray Smith, a young Black pedestrian, when they cycled past him in an alley, swung around to face him, pedaled toward him, and posed a "single, accusatory question": "Are you in possession of any guns, knives, weapons, or anything illegal?" *Id.* at 685. Mr. Smith argued that, as a young Black male approached by multiple police officers in a confrontational manner, he reasonably did not feel free to walk away. *Id.* at 687-88. The Seventh Circuit recognized "the relevance of race in everyday police encounters with citizens in Milwaukee and around the country," and acknowledged that race can sometimes properly inform the seizure analysis. *Id.* at 688.[1]

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[1] Several federal district and state intermediate courts have embraced the reasoning of the Seventh and Ninth

3. The conflict on the question presented is widely acknowledged. In the decision below, the Eleventh Circuit expressly joined the Tenth Circuit and rejected the Seventh Circuit's approach. Pet. App. 11a-12a. State high courts have likewise acknowledged the deepening split.

The Massachusetts Supreme Judicial Court, for example, has recognized that the "Courts of Appeals for the Ninth and Tenth Circuits have come to different conclusions about whether to include race" in the seizure analysis, and the Seventh Circuit, too, has "stat[ed] that race is relevant." *Commonwealth v. Evelyn*, 152 N.E.3d 108, 120 (Mass. 2020). Though "factors other than race" sufficed to establish that the *Evelyn* defendant had been seized, the court recognized that "African-Americans, particularly males, may believe that they have been seized in situations where other members of society would not," and "agree[d] that the troubling past and present of policing and race are likely to inform how African-

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Circuits and the D.C. Court of Appeals. *See United States v. Perkins*, 2019 WL 1026376, at *4 (E.D. Mo. Jan. 16, 2019) (acknowledging the argument that a reasonable person, "particularly when the person . . . is African American," would not feel free to leave); *United States v. Hill*, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019) (similar); *Doe v. City of Naperville*, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (analyzing seizure from perspective of "a reasonable twelve-year-old, African American child"); *State v. Johnson*, 440 P.3d 1032, 1042 n. 5 (Wash. Ct. App. 2019) (declining to "assert that race could never be a factor"); *In re D.S.*, 2021 WL 212363, at *6 (Md. Ct. Spec. App. Jan. 21, 2021) (explaining that courts can consider "perceptions about race-related risks in interacting" with police).

Americans . . . interpret police encounters." *Id.* at 120-21.

Similarly, the South Carolina Supreme Court has recognized that courts are divided over the question presented. *See State v. Spears*, 839 S.E.2d 450, 460-61 (2020) (contrasting *Smith* with *Easley*). The court did not resolve whether "race is a factor to be considered" because the defendant had not preserved the argument. *Id.* at 461. Two justices, however, authored opinions explaining that courts must be allowed to consider a defendant's race in the seizure analysis. *Id.* at 462 (Hearn, J., concurring); *id.* at 462-63 (Beatty, C.J., dissenting). Given "the dynamics between marginalized groups—particularly African-Americans—and law enforcement," Chief Justice Beatty explained, "it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics." *Id.* at 463. Accordingly, "a true consideration of the totality of the circumstances" necessarily encompasses a defendant's race, where relevant. *Id.*

II. This case is an excellent vehicle to address a question central to countless interactions between citizens and police.

1. The role of race in the seizure analysis has been percolating through this country's courts for nearly three decades. As early as 1992, Judge Mack of the D.C. Court of Appeals argued that a defendant's race could properly inform the seizure analysis. *In re J.M.*, 619 A.2d 497, 512 (D.C. 1992) (Mack, J., concurring in part and dissenting in part). In the decades since, courts have regularly grappled with the question, *see Washington*, 490 F.3d 765; *Monroe*, 579 F.3d 380;

Smith, 794 F.3d 681, and with increasing frequency. In the past three years, no fewer than ten federal and state courts have issued opinions analyzing how race informs the reasonable person analysis. *See* Part I, *supra*.

This mounting urgency is far from surprising, as the question presented is central to the core protections of the Fourth Amendment. Race continues to inform the everyday reality of police encounters for Black Americans, from school children and university professors to army officers, a Senator, and even a former President.[2] A rule that forbids courts from considering how race may inform the coerciveness of a particular seizure defies this real-world experience.

Moreover, there are millions of encounters between citizens and police each year. In 2018, the Bureau of Justice Statistics estimated that about 28.9 million U.S. residents experienced contacts initiated by police.[3] The Bureau further estimates that

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[2] *See, e.g.*, Pet. App. 33a; Tim Scott, *GOP Sen. Tim Scott: I've Choked on Fear When Stopped by Police. We Need the JUSTICE Act*, USA TODAY (June 18, 2020), https://perma.cc/PB7V-5U23; Barack Obama, A Promised Land at 395-96 (2020); Mike Ives & Maria Cramer, *Black Army Officer Pepper-Sprayed in Traffic Stop Accuses Officers of Assault*, N.Y. Times (Apr. 10, 2021), https://perma.cc/Z6Z5-Q3ND; Eliza Shapiro, *Students of Color Are More Likely to Be Arrested in School. That May Change*, N.Y. Times (June 20, 2019), https://perma.cc/3R9M-3HBQ.

[3] Erika Harrell & Elizabeth Davis, *Contacts Between Police and the Public, 2018 – Statistical Tables*, Bureau Just. Stat. 3 (Dec. 2020), https://perma.cc/G65P-N8T5.

3,528,100 of those contacts were stops where police approached individuals in a public place or near a parked vehicle, similar to the stop at issue here.[4] The vast majority of these encounters affect innocent civilians and turn up no evidence, and are thus never subject to judicial scrutiny.[5] But they may be unconstitutional, traumatic, and socially damaging all the same. *See, e.g.*, Amanda Geller, et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. J. Pub. Health 2321, 2324 (2014). It is thus critical for all concerned that courts provide clear guidance concerning the circumstances that transform an encounter into a seizure. And given the divide among lower courts on the recurrent question presented here, only this Court can ensure that geography does not dictate whether courts can assess the true coerciveness of particular police encounters.

2. This case squarely presents the question of whether race can ever inform the Fourth Amendment

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[4] *Id.* at 4 tbl.2.

[5] *See, e.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) ("[I]n 98.5% of the [NYPD's] 2.3 million frisks [from 2004-2012], no weapon was found."); Emma Pierson, et. al, *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behavior 726, 739 (2020) (in tens of millions of vehicle stops from 2011 to 2018, less than one-fifth of municipal patrol searches turned up contraband). As Judge Calabresi has noted, "no more than a handful" of searches that "tur[n] up nothing" will "get to court" as 42 U.S.C. § 1983 suits. *United States v. Weaver*, 975 F.3d 94, 109 (2d Cir. 2020) (Calabresi, J., concurring).

seizure analysis. Indeed, the panel granted rehearing for the sole purpose of resolving that question.

In its initial ruling, the Eleventh Circuit held that "the age and race of a suspect may be relevant factors" in determining whether a reasonable person would feel free to leave, but concluded that "the totality of the circumstances establish that this encounter was not coercive." Pet. App. 59a. Mr. Knights petitioned for rehearing, explaining that if the court had properly contemplated age and race, it would have concluded that a seizure had occurred. The Eleventh Circuit then ordered supplemental briefing addressing "whether the race of a suspect may be a relevant factor in deciding whether a seizure has occurred." *Id.* 95a.

"[W]ith the benefit of [that] additional briefing by the parties," Pet. App. 7a, the Eleventh Circuit vacated its original opinion and announced that race, unlike other demographic characteristics, is always irrelevant to the seizure inquiry. *Id.* 11a. It concluded: "we may not consider race in deciding whether a seizure has occurred, and the [other] circumstances of Knights's encounter with the police remain dispositive." *Id.* 14a. On that basis, the court held that "[i]n this encounter, a reasonable person would have felt free to leave." *Id.* 9a.

3. The facts of this case are undisputed. Mr. Knights and the government stipulated to the relevant facts and, at a bench trial, the district court found Mr. Knights guilty of violating Section 922(g) based on that stipulation. Pet. App. 6a; ECF No. 75, Trial Min. The only dispute was a legal question: at what point during the police encounter was Mr. Knights seized?

The record reflects that Mr. Knights is a young, Black man who was outnumbered and targeted for questioning by two armed police officers in the middle of the night, after the officers impeded his ability to drive away and disregarded his attempts to avoid an encounter. Pet. App. 3a-4a, 11a. Mr. Knights was alone with the officers, because Mr. Keaton was nearly inside the house before the officers parked their car in a manner that blocked Mr. Knights's path. *Id.* 4a; *see also id.* 20a-21a, 52a, 62a.

And the encounter took place in Live Oaks Square, a heavily policed neighborhood in Tampa—a city where, according to a 2016 Department of Justice report, there exist "stark racial disparities" in police stops.[6] Further, from 2013 to 2020 and adjusted for population, a Black person was 2.6 times more likely to be killed by Tampa police than a white person.[7] All the individuals killed by Tampa police since 2018 were Black men.[8] In fact, just two weeks after Mr. Knights's seizure, Tampa police officers shot and killed Sidney T. Richardson IV, a Black former Marine, in a home

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[6] *See* Greg Ridgeway, *et al.*, An Examination of Racial Disparities in Bicycle Stops and Citations Made by the Tampa Police Department Community Oriented Policing Services, U.S. Department of Justice 2 (2016) (Tampa police stopped Black cyclists at nearly three times the rate of white cyclists).

[7] Campaign Zero, Police Scorecard, https://policescorecard.org/fl/police-department/tampa.

[8] Mapping Police Violence, https://mappingpoliceviolence.org/.

only four miles north of Mr. Knights's encounter with police.[9]

Given the totality of these circumstances, Mr. Knights's race undoubtedly reinforces the conclusion that a reasonable person in his position would not have felt free to leave. But the Eleventh Circuit held that it was categorically barred from taking race into account. The facts here thus starkly present that question for this Court's review.

III. The Eleventh Circuit's decision is incorrect.

The decision below also warrants review because it improperly singles out and excludes race in an analysis designed to encompass "all the circumstances surrounding the encounter." *United States v. Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)). That approach cannot be reconciled with the Fourth Amendment's central tenets, this Court's precedents, or common sense. At a minimum, the flawed holding in this case—that Mr. Knights should have felt "free to leave" in circumstances where no citizen would feel that way—underscores the need for this Court's intervention to ensure that the seizure test is honestly applied and the Fourth Amendment's protection against unreasonable seizures is not illusory.

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[9] Tony Marrero, *Friends say man shot by Tampa police was former U.S. Marine with PTSD*, Tampa Bay Times (Feb. 12, 2018), https://perma.cc/ZG3M-Y5B3.

A. The Eleventh Circuit's categorical exclusion of race is inconsistent with a totality-of-the-circumstances analysis.

1. Whether a "seizure" has occurred under the Fourth Amendment depends on whether the circumstances of a particular police encounter would have made a reasonable person, in the defendant's position, feel coerced into cooperation. The inquiry thus asks: what is the effect of "all of the circumstances surrounding the incident" on a reasonable person's belief in her freedom to leave? *Brendlin v. California*, 551 U.S. 249, 255 (2007) (internal quotation marks omitted). While the exact contours of the analysis may vary according to the context in which the police-citizen encounter takes place, that central inquiry remains. *See, e.g.*, *Bostick*, 501 U.S. at 436-47 (where the citizen "has no desire to leave," the inquiry is whether "a reasonable [person] would feel free" to "terminate the encounter," "taking into account *all of the circumstances*") (emphasis added).

This Court has repeatedly rejected lower courts' attempts to fashion "bright-line" rules that rely on certain factors to the exclusion of others in determining whether a police encounter "is or is not necessarily a seizure." *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988); *see Bostick*, 501 U.S. at 435-36 (rejecting rule that a seizure necessarily occurs when police randomly board a bus to question passengers). "Not once" has the Court "excluded from the custody analysis a circumstance that [it] determined was relevant and objective, simply to make the fault line between custodial and

noncustodial 'brighter.'" *J.D.B. v. North Carolina*, 564 U.S. 261, 280 (2011).

Instead, the Court has consistently reaffirmed that the correct approach to the seizure analysis is the "traditional contextual approach," where the relative weight of each factor hinges on the particular circumstances of the encounter. *Chesternut*, 486 U.S. at 572-73; *see also Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (emphasizing that Fourth Amendment inquiries must be "practical" and "nontechnical" to account for "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act") (internal quotation marks omitted).

2. The Eleventh Circuit's ruling that race can never inform the totality of relevant circumstances contravenes these principles.

As "[c]ommon experience and common sense confirm," "conscious and unconscious prejudice persists in our society." *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring). Those prejudices include the "powerful racial stereotype" "of [B]lack men as violence prone," *Buck v. Davis*, 137 S. Ct. 759, 766 (2017), "morally inferior," and more likely to commit crimes, *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Race matters in the criminal justice context because these "racial biases, sympathies, and prejudices still exist." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2274 (2019) (Thomas, J., dissenting). "[T]his is not a matter of assumptions," but "a matter of reality." *Id.*

Police-civilian encounters are prone to reflect this unfortunate reality. Obviously not all officers are

biased. But Black Americans have long experienced disproportionate violence in law-enforcement encounters. *See Terry v. Ohio*, 392 U.S. 1, 14-15 (1968) (recognizing "wholesale harassment" of Black individuals "by certain elements of the police community"). This reality persists today. Despite accounting for 13.4 percent of the population,[10] Black people comprise 21 percent of all police-civilian encounters,[11] 38.6 percent of the federal prison population,[12] and 24 percent of all people shot and killed by police.[13] And, in an analysis of recent police-civilian encounters, officers aimed or shot a gun at Black individuals at eight times the rate of white individuals, and threatened force or engaged in physical contact against Black individuals at four times the rate of white individuals.[14] *See also, e.g.*, *Commonwealth v. Hart*, 695 N.E.2d 226, 228 (Mass. App. Ct. 1998) ("[H]istorically . . . blacks who have walked, run, or raced away from inquisitive police

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[10] U.S. Census Bureau, QuickFacts (2019), https://perma.cc/WS3G-25XH.

[11] Harrell & Davis, *supra* note 3, at 3.

[12] Inmate Race, Fed. Bureau Prisons (2021), https://perma.cc/TPF6-3PD2.

[13] Julie Tate, et al., *Fatal Force*, Washington Post (Apr. 20, 2021, updated July 20, 2021), https://perma.cc/2K7N-3N87.

[14] Harrell & Davis, *supra* note 3, at 7.

officers have ended up beaten and battered and sometimes dead.").[15]

The impact of race on police encounters is well known and widely reported. "[T]he news has a daily accounting of the tragic consequences that can result if a minority citizen should in fact make any indication that he or she will not cooperate" with the police. Scott E. Sundby, *The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. Rev. 690, 725 (2018). As the president of a leading association of police chiefs has explained, the "dark side of our shared history . . . has created a multigenerational—almost inherited—mistrust between many communities of color and their law enforcement

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[15] *See also, e.g.*, Department of Justice, *Investigation of the Chicago Police Department* 146 (Jan. 13, 2017), https://perma.cc/K9D7-CUB7 (Black youth are "routinely" called "n****r," "animal," "monkey," or "pieces of shit" by CPD officers, according to reports from both residents and officers); Department of Justice, *Investigation of the Baltimore City Police Department* (Aug. 10, 2016), https://perma.cc/8YE5-4XXP (similar); *see also* Rob Voigt et al., *Language from police body camera footage shows racial disparities in officer respect*, 114 PNAS 6521, 6521 (Jun. 20, 2017) (body camera footage reflects that "[p]olice officers speak significantly less respectfully to black than to white community members in everyday traffic stops, even after controlling for officer race, infraction severity, stop location, and stop outcome").

agencies."[16] And Black Americans are all too aware of this reality: generations of Black parents have taught their children to be deferential toward police for fear of how "an officer with a gun will react." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

Accordingly, "Black people often tread more carefully around law enforcement," Pet. App. 31a (Rosenbaum, J., concurring), reasonably believing—based on "pervasive" and "persuasive" evidence—that "contact with the police can itself be dangerous," *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring). For example, a recent national study found that Black Americans are five times more likely than white Americans to report that they "worry a lot" about harm from a police encounter. Amanda Graham, et al., *Race and Worry About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 Victims & Offenders 549, 557 (2020).

Any rule that aims to account for objective realities—and the "whole" of a police encounter, *Chesternut*, 486 U.S. at 574—thus cannot ignore the role that race might play, alongside other factors, in amplifying the coercive nature of a confrontation. A reasonable person, in deciding whether he is "free to leave" a police encounter, may reasonably consider the distinct experiences of Black men with police,

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[16] *See* Tom Jackman, *U.S. Police Chiefs Group Apologizes for 'Historical Mistreatment' of Minorities*, Washington Post (Oct. 17, 2016), https://perma.cc/NC2Z-P84S.

especially within a particular community—and the potential consequences of making the wrong choice.

B. The Eleventh Circuit's decision contravenes this Court's precedents in analogous contexts.

The Eleventh Circuit's attempt to exclude race from the free-to-leave analysis disregards this Court's precedents regarding similar totality-of-the-circumstances tests, which hold that objective personal characteristics—such as age, race, and sex—all warrant consideration in appropriate cases.

In the closely analogous *Miranda* custody context, this Court held in *J.D.B v. North Carolina* that individual characteristics like age and disability can be relevant to whether a reasonable person would feel free to leave.[17] 564 U.S. 261, 277 (2011). A "reasonable child subjected to police questioning," the

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[17] The Fourth Amendment seizure analysis tracks the *Miranda* custody analysis, differing only in "degree," *United States v. Ortiz*, 781 F.3d 221, 229 (5th Cir. 2015): custody occurs when the restraint on freedom is tantamount to a formal arrest, *see California v. Beheler*, 463 U.S. 1121, 1125 (1983), while a seizure need not be so restraining, *see Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984). But both tests ask the same core question: whether a reasonable person would feel free to terminate an encounter. *See* 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.4(a) (6th ed. 2020) (recognizing that after *J.D.B.*, the "analogous" Fourth Amendment seizure inquiry likely also "requires consideration of some known unique characteristics of the suspect (e.g., his youth)").

Court explained, "will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 272. Accordingly, the Court held, "the *Miranda* custody analysis includes consideration of a juvenile suspect's age"—alongside other "undeniably personal characteristics," such as "whether the individual being questioned is blind." *Id.* at 268, 278.

Likewise, in *United States v. Mendenhall*, the Court acknowledged that a Black woman's race and gender were relevant to whether she "felt unusually threatened by officers" and thus whether her consent to a prolonged encounter with federal agents was voluntary. 446 U.S. 544, 558 (1980). Like the seizure analysis, the consent analysis considers "the totality of all the circumstances" to determine whether "duress or coercion" bore on the individual's ability to terminate an encounter or deny a police request. *Id.* at 557. This Court has thus emphasized that the seizure and consent tests "turn on very similar facts," and "the question of voluntariness pervades both . . . inquiries." *United States v. Drayton*, 536 U.S. 194, 206 (2002). That race is likewise relevant to the seizure analysis follows *a fortiori*.

C. The Eleventh Circuit's contrary reasoning is unpersuasive.

1. The Eleventh Circuit came to a contrary conclusion in part because it believed that race does not "lend [it]self to objective conclusions." Pet. App. 13a. But in *J.D.B.*, which held that age must be taken into account in the custody analysis, this Court distinguished between subjective factors that are "contingent on the psychology of [an] individual suspect"—like prior history with law enforcement—

and factors that "yield[] objective conclusions" relating to "a reasonable person's understanding of his freedom of action"—such as age. *J.D.B.*, 564 U.S. at 275. Race falls squarely on the latter side of this line. Understanding the effects of race does not require examining the psychology of individual suspects; rather, courts need only acknowledge the "commonsense conclusions about behavior and perception" that race "broadly" "generates." *Id.* at 272 (internal quotation marks omitted).[18]

And just as the concern about "gradations among children" "cannot justify ignoring a child's age altogether," *J.D.B.*, 564 U.S. at 279, the fact that "[t]here is no uniform life experience for persons of color," Pet. App. 13a, cannot justify ignoring race altogether. Ignoring "objective circumstances that are a matter of degree" would only "make the inquiry more artificial." *J.D.B.*, 564 U.S. at 279.

That race is relevant to determining whether *consent* is voluntary, *see Mendenhall*, 446 U.S. at 558, confirms its objective salience. To be sure, as the Eleventh Circuit emphasized, the consent test (unlike the seizure analysis) takes both objective and subjective considerations into account. Pet. App. 11a-12a. But race plays a role in the consent inquiry not because of a particular defendant's subjective experience, but rather because of its *objective* import: given "Black Americans' shared historic experience in police encounters, purported 'consent' is less likely to be truly voluntary when attributed to Black

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[18] Police need consider race only when, like age, it is "known to the officer" or would be "objectively apparent to a reasonable officer." *Id.* at 274.

individuals." *Id.* 34a-35a (Rosenbaum, J., concurring). Given that fact, "it is difficult to understand why that same shared experience would not be equally relevant to whether a Black citizen truly feels 'free to leave' a police encounter." *Id.* For precisely this reason, many lower courts have interpreted *Mendenhall* to suggest that race is relevant to the Fourth Amendment seizure analysis as well. *See United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015); *State v. Ashbaugh*, 244 P.3d 360, 369 (Or. 2010).

2. The Eleventh Circuit is likewise wrong that accounting for race in the seizure inquiry is unworkable. Both police officers and courts are competent to consider demographic characteristics such as race. Indeed, "objective way[s] to consider race" already exist. Pet. App. 14a.

Law enforcement officers consider individuals' race in conducting certain routine police work. *See Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 333-34 (2d Cir. 2000) (holding that police officers can act on race- and gender-based "description[s] without violating the Equal Protection Clause"). For example, after the government observed that it would "affront common sense to expect that . . . skin color would play no part in arousing [border officers'] suspicions," U.S. Reply Brief 12, *United States v. Ortiz*, 422 U.S. 891 (1975), this Court held that "Mexican appearance" could contribute to reasonable suspicion. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975). Police department manuals describe race as a

"discernible personal characteristic."[19] And some police departments require officers to note the "races of the persons involved" in their reports.[20]

Officers must also draw inferences from race on the frequent occasions when a person consents to a search or prolonged police encounter. Under this Court's cases, police in such situations must ensure that consent is truly voluntary and untainted by unique pressures the person may feel on account of her race. *See Mendenhall*, 446 U.S. at 558; *supra* at 28. It would "thus only add confusion" to allow officers to initiate police-civilian encounters without this same awareness. *J.D.B.*, 564 U.S. at 279.

Courts are likewise competent to incorporate objective personal characteristics, such as race, into their review of legal questions. They already consider such circumstances in similar Fourth and Fifth Amendment totality-of-the-circumstances inquiries. *See supra* at 27-28; *see also J.D.B.*, 564 U.S. at 279 (finding that police officers "are competent to evaluate the effect of relative age" and "[t]he same is true of judges"). This Court has made clear that courts are likewise competent to consider race to ensure that defendants receive fair trials. *See Rosales-Lopez v. United States*, 451 U.S. 182, 191-92 (1981) (trial judges are "required to 'propound appropriate questions designed to identify racial prejudice'" during voir dire when a defendant accused of a violent crime

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[19] *See, e.g.*, Seattle Police Department Manual, § 5.140 (2019); Baltimore Police Department, *Fair and Impartial Policing: Policy* 317 (Feb. 9, 2016).

[20] *See, e.g.*, *Dallas Police Department General Orders* 25 (Aug. 21, 2020), https://perma.cc/22XD-27YY.

so requests) (quoting *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976)); *Batson v. Kentucky*, 476 U.S. 79, 99-100 (1986) (courts consider race in assessing constitutionality of peremptory challenges). And courts employ tests that consider race, including tailored-reasonable-person and totality-of-the-circumstances tests, in a host of other contexts.[21]

3. Finally, courts do not run afoul of equal protection doctrine by considering race in a Fourth Amendment totality-of-the-circumstances test. Indeed, if the Eleventh Circuit were correct that courts make impermissible racial classifications whenever they acknowledge that race is relevant to a particular totality-of-the-circumstances analysis, *see* Pet. App.

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[21] *See J.D.B.*, 564 U.S. at 274 ("All American jurisdictions accept the idea that a person's childhood is a relevant circumstance" in tort law's objective reasonable-person test) (internal quotation marks and alterations omitted); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (explaining that, in hostile-work-environment suit, "[b]y considering … discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff"); *State v. Wanrow*, 559 P.2d 548, 558-59 (Wash. 1977) (applying reasonable-woman standard for self-defense instruction), *superseded by statute on other grounds*; *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir. 1990) (applying reasonable-woman standard for sexual harassment cases); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338-39 (2021) (considering race in the Voting Rights Act § 2 totality-of-circumstances analysis).

14a, several longstanding Fourth Amendment doctrines would be undermined.

For instance, the Eleventh Circuit's conclusion would cast doubt on *Mendenhall*, where this Court considered an individual's race and gender—both suspect classifications under the Fourteenth Amendment—when evaluating whether the defendant's consent to a prolonged police encounter was voluntary. 446 U.S at 558. It would also cast doubt on *Brignoni-Ponce*, where this Court allowed police to consider a driver's apparent nationality, another suspect classification, when generating reasonable suspicion for a traffic stop. 422 U.S. at 887. And it would cast doubt on the common police practice of treating race as a factor in establishing reasonable suspicion when it is part of a description of a suspect that fairly matches the seized individual. LaFave, § 9.5(h).

The Eleventh Circuit's rule operates as a one-way ratchet: law enforcement officers could permissibly rely on race when deciding whether to initiate an encounter, but in any ensuing proceeding a defendant would be prohibited from arguing that his race informs the totality-of-the-circumstances seizure analysis. It is an "anomalous result to hold that race may be considered when it harms people, but not when it helps them." *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

Thus, if there is any equal protection infirmity in this case, it lies with the decision below. The Eleventh Circuit singled out race and excluded it from the totality-of-the-circumstances analysis, despite the inexorable conclusion that race can influence whether a reasonable person feels free to leave a police

encounter. To ignore the reality that a Black man's race may make him reasonably feel less free to terminate a particular police encounter is to write into law that the Constitution permits a police encounter with a Black individual to be more coercive. That approach cannot be squared with the Fourth Amendment's guarantee that people of all races are equally entitled to protection against unreasonable seizures.

D. Irrespective of race, this Court should revisit how the "free to leave" test is applied.

Finally, regardless of the role of race, the Eleventh Circuit's holding that Mr. Knights should have felt "free to leave" clearly demonstrates the need for further guidance from the Court in the application of that constitutional standard.

Indeed, the magistrate judge in this case concluded that Mr. Knights was seized even without considering his race. That conclusion was correct. It defies credulity to suggest, as the Eleventh Circuit held, that *any* person would feel free to walk away after two uniformed officers in a marked police car spot him in the middle of the night, swing around to approach him, park against the flow of traffic to block him in, and emerge shining flashlights—and then, after the person has gotten into his parked car and closed the door, rap on the car window. On the contrary, any reasonable person in that situation would conclude that the officers had made a "show of authority," Pet. App. 10a, clearly requiring compliance. In fact, as a matter of good order and public safety, that is no doubt what a reasonable officer would intend and want the individual to conclude. *See, e.g.*, *Washington*, 490 F.3d at 773

(describing pamphlets issued by Portland Police Bureau advising citizens that the best way to avoid tragic confrontations was "to comply with an officer's instructions").

And here the reality is that, by all indications, the officers intended to make an investigatory stop, not simply to approach Mr. Knights and see if they could strike up a conversation. *Cf.* Pet. App. 10a (officers "approached his car to try to speak with him, without conveying that Knights was required to comply"). Only later did the government, or the courts, apparently doubt the strength of the officers' legal justification for such a stop, and thus move to the alternative argument that there was no initial "stop" at all. *See id.* 8a-9a (declining to reach alternative argument based on reasonable suspicion); *Id.* 86a (magistrate judge rejected argument that officers had reasonable suspicion to initiate a *Terry* stop).

The decision below thus exemplifies a need for further guidance from this Court regarding the "free to leave" seizure inquiry, even apart from the question of race. Not many items on the Court's docket are as important to the daily lives of civilians as the Fourth Amendment seizure analysis. As this Court has emphasized, "[f]ew protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). Whether a police seizure has occurred—and what circumstances are relevant to that inquiry—are "fundamental question[s]" of "real importance" at the heart of the Fourth Amendment. LaFave, § 9.4.

Yet it has been decades since this Court has offered guidance on the contours of the seizure inquiry.

While the Eleventh Circuit's categorical prohibition on consideration of race warrants review for all the reasons discussed above, review is also warranted so the Court can examine whether the lower courts' application of the free-to-leave standard accurately reflects how reasonable people do and should perceive the wide range of potential interactions with police, from casual and friendly to tense and fraught.

The seizure doctrine's ever-deepening distortions are on full display in the decision below. Indeed, the concurrence asked for this Court's review, expressing "deep[] concern[]" that the free-to-leave analysis "has become unworkable and dangerous," a form of "Russian Roulette" that "ensures that police-citizen encounters are rife with dangerous ambiguity" and sometimes "'reduces the Fourth Amendment to a form of words.'" Pet. App. 15a, 16a, 49a (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)). Further guidance is sorely needed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 6, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10083 [PUBLISH]

D.C. Docket No. 8:18-cr-00100-VMC-AAS-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

ANTHONY W. KNIGHTS,

Defendant–Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 10, 2021)

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, Circuit Judge, and MOORE,[*] District Judge.

WILLIAM PRYOR, Chief Judge:

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[*] Honorable K. Michael Moore, Chief United States District Judge for the Southern District of Florida, sitting by designation.

Anthony Knights moved for rehearing en banc of our opinion that issued on August 3, 2020. We construe his motion as a petition for both rehearing en banc and panel rehearing. Fed. R. App. P. 35, 11th Cir. I.O.P. 2. We grant the motion for panel rehearing, vacate our original opinion in this appeal, and substitute in its place the following opinion.

This appeal requires us to decide whether officers violated Anthony Knights's right to be free from unreasonable seizures, under the Fourth Amendment, by conducting an investigatory stop without reasonable suspicion. Two officers saw Knights and Hozell Keaton around 1:00 a.m. in a car that was parked in the front yard of a home. Suspecting that the men might be trying to steal the car, the officers parked near it and approached Knights, who was in the driver's seat. When Knights opened the door, an officer immediately smelled marijuana. The ensuing search of Knights and the car revealed ammunition and firearms. Because Knights had felony convictions, a grand jury charged him with possession of a firearm and ammunition by a felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Knights moved to suppress the evidence the officers found and the statements he made as fruit of an unlawful seizure. The district court denied the motion, convicted Knights, and sentenced him to 33 months of imprisonment. We affirm because Knights's interaction with the officers was a consensual encounter that did not implicate the Fourth Amendment.

I. BACKGROUND

Late at night, Anthony Knights, Hozell Keaton, and Knights's nephew were smoking marijuana and listening to music while sitting in or standing near an Oldsmobile sedan in Tampa, Florida. The car was parked in a grassy area between the street and the white fence of a home that belonged to one of Keaton's relatives. The driver's side of the car was near the street and the passenger's side was near the fence.

On a routine patrol around 1:00 a.m., Officers Andrew Seligman and Brian Samuel of the Tampa Police Department saw two of the car's doors open with Knights and Keaton leaning into the car. The officers believed that Knights and Keaton might be stealing something from the car. They knew the area to be "high crime" and to have gang activity from their experience responding to multiple shootings and narcotics crimes. So they drove past the Oldsmobile for a better look. Knights and Keaton then "gave the officers a blank stare," and according to Officer Seligman, "kind of seemed nervous." The officers then heard someone unsuccessfully try to start the car. Thinking that Knights and Keaton "might be actually trying to steal the vehicle," the officers decided to investigate further.

Officer Seligman decided to turn around and park the patrol car near the Oldsmobile, which was parked on a grassy area next to the street in the direction of traffic for that side of the road. Officer Seligman parked on the street next to the Oldsmobile in the wrong direction for traffic so that the trunk of the patrol car was nearly aligned with the trunk of the

Oldsmobile. As Officer Seligman was parking, he trained his flashlight on Knights. According to Knights and Officer Seligman, the patrol car was parked in a way that would have allowed Knights to drive away. Officer Samuel left the patrol car and attempted to talk to Keaton, who was walking toward the house, but Keaton entered the house without responding.

The officers then approached Knights, who sat in the driver's seat and closed the car door. Officer Seligman approached the car with his flashlight and knocked on the driver's window. When Knights opened the door, Officer Seligman "was overwhelmed with an odor of burnt marijuana." Officer Seligman asked Knights if he owned the car, and Knights said that he and his wife owned it and gave Officer Seligman his driver's license and possibly the registration for the car. The officers later confirmed that his wife owned the car. When Officer Seligman asked Knights if he had marijuana, Knights said, "I'll be honest with you. It's all gone."

Officer Seligman then began to search for narcotics. He searched Knights's person and found a pill bottle containing several different kinds of pills. Officer Seligman arrested Knights and searched his car, starting with a backpack that Knights said contained a prescription for the pills. He found medical documents, a firearm cartridge, and a ski mask. He also found a scale, smoked marijuana, marijuana residue, a handgun, a rifle, and another firearm cartridge. Knights agreed to an interview after the officers warned him of his rights, *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and he then admitted that he owned the handgun. Knights

and the officers described the entire encounter as calm and amicable.

A grand jury indicted Knights on one count of possessing a firearm and ammunition as a felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Before trial, Knights moved to suppress his admissions and the evidence the officers found during the search. He argued that they were fruit of an illegal seizure that occurred when—without reasonable suspicion—the officers parked behind his car or, at the latest, when they walked up to his car. The government responded that the incident "began as a police-citizen encounter" and did not turn into a "seizure" until the officers started searching for narcotics based on probable cause that Knights possessed marijuana, and alternatively, the officers had reasonable suspicion to conduct an investigatory stop.

The district court referred the motion to a magistrate judge who held a hearing and recommended granting the suppression motion. The magistrate judge recommended ruling that the officers conducted an investigatory stop because "the officers' show of authority, especially Officer Seligman, their locations as they approached the car, and the patrol car impeding Mr. Knights's ability to drive away, [established that] no reasonable person in Mr. Knights's position would feel free to leave or disregard the two officers." And because the magistrate judge determined that the officers lacked reasonable suspicion and the physical evidence and statements were fruit of the unlawful seizure, she recommended granting the motion.

The district court, after considering briefing and oral argument, accepted the magistrate judge's recitation of the facts but disagreed with her recommendation and denied the suppression motion. It explained that the constitutionality of the officers' conduct turned on *when* they seized Knights because the odor of marijuana provided a lawful basis for seizing him. It ruled that the officers did not seize him when they parked their patrol car and walked up to Knights because "it was a police-citizen encounter involving no detention and no coercion." The district court found that Knights could have either driven away "with skilled driving" or walked away. It also relied on the absence of the police questioning Knights, displaying their weapons, touching him, asking for his identification, or having a verbal exchange with him.

Knights proceeded to a bench trial at which he and the government stipulated to the relevant facts. The district court adjudicated him guilty and sentenced him to a below-guideline sentence of 33 months of imprisonment.

On appeal, Knights argued that his perspective as a young black man was relevant to the question whether a seizure occurred. In our original opinion, we agreed that "the age and race of a suspect may be relevant factors," but we concluded that they were not decisive in Knights's appeal. Because a reasonable person in his position would have felt free to leave, he was not seized, and so we affirmed his conviction. Knights then petitioned for rehearing en banc. In his petition, he argued that we erred by not treating his identity as "a factor that matters." According to Knights, the correct inquiry was

whether a reasonable young black man would have felt free to drive or walk away from the police. Upon reconsideration, and with the benefit of additional briefing by the parties, we substitute this opinion to address that issue.

II. STANDARDS OF REVIEW

"A district court's ruling on a motion to suppress presents a mixed question of law and fact." *United States v. Perez*, 443 F.3d 772, 774 (11th Cir. 2006) (internal quotation marks omitted). We review its legal conclusions *de novo*, and we accept its factual findings unless they are clearly erroneous. *Id.* We construe the facts in the light most favorable to the government because it prevailed in the district court. *Id.*

III. DISCUSSION

The Fourth Amendment protects "[t]he right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. A "seizure" does not occur every time a police officer interacts with a citizen. Officers are free to "approach[] individuals on the street or in other public places and put[] questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002). In these consensual encounters, the officers need no suspicion because the Fourth Amendment is not implicated. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Perez*, 443 F.3d at 777–78. But officers need reasonable suspicion if an encounter becomes an investigatory stop. *See Bostick*, 501 U.S. at 434; *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011). An investigatory stop occurs "[o]nly when the officer, by means of physical force or show of

authority, has in some way restrained the liberty of a citizen." *Jordan*, 635 F.3d at 1185 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

The test for whether the officer restrained a citizen's liberty is whether "a reasonable person would feel free to terminate the encounter." *Drayton*, 536 U.S. at 201; *see also Immigr. & Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984). We must imagine how an objective, reasonable, and innocent person would feel, not how the particular suspect felt. *Drayton*, 536 U.S. at 202; *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). All the circumstances are relevant, *Bostick*, 501 U.S. at 439, including "whether a citizen's path is blocked or impeded"; whether the officers retained the individual's identification; "the suspect's age, education and intelligence; the length of the . . . detention and questioning; the number of police officers present"; whether the officers displayed their weapons; "any physical touching of the suspect[;] and the language and tone of voice of the police." *Perez*, 443 F.3d at 778 (internal quotation marks omitted); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

Knights argues that the district court should have suppressed his admissions and evidence because the officers stopped him without reasonable suspicion when they parked the patrol car close to his car and then approached him. He does not challenge any seizure that occurred after that point. The government responds that the encounter between Knights and the officers was initially consensual and alternatively that the officers had reasonable suspicion. Because we conclude that the encounter

was initially consensual, we need not decide whether the officers had reasonable suspicion.

In this encounter, a reasonable person would have felt free to leave. In fact, Knights's companion Keaton did leave. As Keaton had done, Knights was physically capable of walking away. He also could have driven away, and the officers did not display their weapons, touch Knights, or even speak to him—let alone issue any commands or ask him for his identification and retain it. And before the officers approached Knights, they did not activate the lightbar or siren on the patrol car, and as we have mentioned, they allowed Keaton to leave the car, ignore their invitation to talk, and enter the home where the car was parked.

In similar circumstances, we have concluded that an officer did not restrain a suspect. In *Miller v. Harget*, an officer parked behind a suspect's parked car—blocking him from driving away—and then "turned on his 'window lights'" and approached the suspect's car on foot. 458 F.3d 1251, 1257–58 (11th Cir. 2006). We reasoned that when the officer quickly approached the suspect's car, he "did not do anything that would appear coercive to a reasonable person. For example, he did not draw his gun, give any directions to [the suspect], or activate his roof lights." *Id.* at 1257. Because the officer did not make a "show of authority that communicated to the individual that his liberty was restrained," it was not an investigatory stop. *Id.* at 1258 (alterations adopted) (internal quotation marks omitted). For the same reason, a reasonable person in Knights's position would have felt free to leave; the officers did not

make a show of authority communicating that Knights was not free to leave.

Knights disagrees and relies on our precedent *United States v. Beck*, in which we concluded that the officers stopped the defendant because of the proximity between his car and the officers' car. 602 F.2d 726, 727, 729 (5th Cir. 1979). Two officers pulled their patrol car alongside Beck and his passenger's parked and idling car and "engaged [them] in conversation" about what they were doing there. *Id.* at 727. We explained that "[b]y pulling so close to the [car], the officers effectively restrained the movement of Beck and his passenger" and it was clear "that they were not free to ignore the officers and proceed on their way." *Id.* at 729 (alterations adopted) (internal quotation marks omitted). Knights argues that the same is true here because the way in which the officers parked blocked him from driving away, and the officers also impeded his ability to walk away.

We are unpersuaded that *Beck* controls here. The officers approached Knights in a meaningfully different manner. Instead of parking alongside his car and engaging him in conversation, they parked near his car—with enough space for him to drive away—and approached his car to try to speak to him, without conveying that Knights was required to comply. Indeed, as we have noted, just a moment earlier, Knights's companion obviously felt free to leave the car, ignore the officer's invitation to speak with him, and enter the house.

Knights's other arguments are also unpersuasive. He argues that a reasonable person would not have

felt free to walk away because doing so would have required abandoning his car in a high-crime area. But we disagree because two officers would have been near the car, and Knights could have easily returned to the car as soon as they left. He also repeatedly mentions that Officer Seligman used a flashlight when he approached the Oldsmobile. But we fail to see how a flashlight communicated a show of authority in these circumstances. A flashlight would also be used by "an officer approach[ing] a stranded motorist to offer assistance," *Miller*, 458 F.3d at 1258, or by an ordinary person outside in the middle of the night. Knights also argues that the presence of *two* officers weighs in favor of the encounter being a seizure, and that "young African-American men feel that they cannot walk away from police without risking arrest or bodily harm." Although the presence of multiple officers and the age of a suspect may be relevant factors, *Perez*, 443 F.3d at 778, the totality of the circumstances establish that this encounter was not coercive.

Moreover, unlike age, the race of a suspect is never a factor in seizure analysis. In our original opinion, we cited *United States v. Mendenhall*, 446 U.S. 544, for the proposition that race might be a relevant factor. But *Mendenhall* establishes that race is "not irrelevant" to the *voluntariness* of a seizure; it did not address the relevance of race to the existence of a seizure. *Id.* at 557–58; *see also United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018) (recognizing that "the Supreme Court has [n]ever considered race a relevant factor" in the latter context). Nor have our sister circuits considered race in the threshold seizure inquiry. *But see United*

States v. Smith, 794 F.3d 681, 688 (7th Cir. 2015) (stating in dicta, based on *Mendenhall*, that "race is 'not irrelevant' to the question of whether a seizure occurred" but not analyzing its import with respect to that appeal). Upon further review, we clarify that race may not be a factor in the threshold seizure inquiry.

We may not consider race to determine whether a seizure has occurred. True, as Knights points out, race can be relevant in other Fourth Amendment contexts. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975). For example, we consider a suspect's personal characteristics to decide whether he gave consent to a search or seizure because that question is subjective. *United States v. Spivey*, 861 F.3d 1207, 1215 (11th Cir. 2017). But the existence of a seizure is an objective question. *Craig v. Singletary*, 127 F.3d 1030, 1041 (11th Cir. 1997) (en banc). We ask whether a reasonable person would have believed he was not free to leave in the light of the totality of the circumstances. *Id.* The circumstances of the *situation* are key to this inquiry—in particular, the police officer's objective behavior. *Miller*, 458 F.3d at 1258 n.4. An objective test has important virtues: we can readily apply it, and "law enforcement [can] know ex ante what conduct implicates the Fourth Amendment." *Easley*, 911 F.3d at 1082.

We consider a suspect's personal characteristics in our seizure analysis only insofar as they have an "objectively discernible relationship to a reasonable person's understanding of his freedom of action." *J.D.B. v. North Carolina*, 564 U.S. 261, 275 (2011). For example, we can consider age because both we

and the police can draw "commonsense conclusions" about the effect of age on a person's perception of his freedom to leave that "apply broadly to children as a class." *Id.* at 272 (internal quotation marks omitted). By contrast, most personal characteristics, including race, do not lend themselves to objective conclusions.

Knights argues that an objectively discernible relationship follows from the existence of racial disparities in the frequency of police stops, arrests, and other interactions. But even if empirical research can provide evidence of how individuals of different demographics have interacted with or perceive the police, this research also reinforces that perceptions vary within groups. *See, e.g.*, David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51, 77 & n.151 (2009). "There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population." *Easley*, 911 F.3d at 1082.

Even if we could derive uniform—or at least predominant—attitudes from a characteristic like race, we have no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation. Take the evidence Knights offers that black individuals as a group tend to be wary of the police. How could we consider that tendency, in conjunction with other factors, in a systematic way? In which situations is race a relevant factor? How would we weigh race against countervailing considerations? Would that weight vary with the race of a police

officer or a particular police department's history with its community? With so many open questions like these, short of assuming that all interactions between police officers and black individuals are seizures, we would be left to pure speculation. *See United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1040 (11th Cir. 1985) ("Not every encounter between law enforcement officers and an individual constitutes a seizure within the meaning of the [F]ourth [A]mendment.").

And even if we could devise an objective way to consider race, we could not apply a race-conscious reasonable-person test without running afoul of the Equal Protection Clause. *See Easley*, 911 F.3d at 1082. Just as "the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached," *Chesternut*, 486 U.S. at 574, it does not vary with the race of the individual being approached. *Cf. Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."). So we may not consider race in deciding whether a seizure has occurred, and the objective circumstances of Knights's encounter with the police remain dispositive.

IV. CONCLUSION

We **AFFIRM** Knights's conviction.

ROSENBAUM, Circuit Judge, concurring in the judgment:

I agree with the panel that the Equal Protection Clause precludes courts from considering race as a relevant factor in evaluating whether a citizen's encounter with police is coercive or consensual under the Fourth Amendment. But I am deeply concerned that the test we apply in these cases—the "free to leave"/affirmative-acts-of-coercion test—has become unworkable and dangerous. For these reasons, I write to emphasize the perils that ambiguous police interactions can cause and to respectfully suggest that the Supreme Court consider adopting a bright-line rule requiring officers to clearly advise citizens[1] of their right to end a so-called consensual police encounter.

As I have indicated, the test for a seizure under the Fourth Amendment purports to turn on whether a reasonable innocent person in the defendant's position at the time of the police interaction would feel free to leave or otherwise end the encounter. *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *id.* at 511–12 (Brennan, J., concurring); *see also Florida v Bostick*, 501 U.S. 429, 434 (1991) ("So long as a reasonable person would feel free 'to disregard the police and go about his business,' the encounter is consensual . . . .") (citation omitted); *id.* at 438 (explaining that "the 'reasonable person' test presupposes an *innocent* person"). And that makes

[1] I use the term "citizen" in the generic sense, meaning "a civilian as distinguished from a specialized servant of the state." *Citizen*, Dictionary by Merriam-Webster, https://www.merriam-webster.com/dictionary/citizen (last visited Mar. 1, 2021).

sense: by definition, a person who is truly free to leave (as the test calls for), of course, has not been "seized" at all under the Fourth Amendment.

But that description can be a bit misleading. Under Supreme Court (and Eleventh Circuit) precedent, even if a reasonable innocent person in the defendant's place, in reality, would not have felt "free to leave," case law nonetheless can require the conclusion that he would have. If the officers involved did not engage in what we have held amount to sufficient affirmative acts of coercion, then no Fourth Amendment "seizure" occurs, regardless of whether a reasonable innocent person would have felt "free to leave."

Perhaps the most troubling aspect of this hybrid "free-to-leave"/affirmative-acts-of-coercion standard is the Russian Roulette nature of it. The hybrid test foists on the citizen the complete responsibility for ascertaining whether the officer is detaining him. And the citizen must draw his conclusion based on only his best guess—a conjecture that can carry with it great risk to both the citizen and the officer.

If the citizen presumes incorrectly that he is free to leave, the officer may mistake for resistance or some type of threat the citizen's efforts to end the encounter. Then the officer may engage in physical acts of restraint—or even worse, use deadly force—to obtain cooperation or neutralize the misperceived threat from the citizen who did not even realize he was detained in the first place. And even if the officer does not engage in physical acts of restraint, he may arrest the citizen. This system is not ideal for anyone (including officers), but it can present an especially

tricky dilemma for Black citizens, who studies indicate historically have disproportionately suffered violence in law-enforcement encounters.[2]

The test also fails to account for reality in another respect: it disregards the actual intentions of officers. So if the court with the crystal-clear vision of hindsight concludes based on the totality of the circumstances that a reasonable citizen would have felt free to leave, it makes no difference to the analysis that, as a matter of fact, both the officer and the citizen believed he was not. The court will nonetheless hold that the citizen was not "seized" under the Fourth Amendment. In these circumstances, where no reasonable suspicion justifies the officer's intended seizure but the court concludes that the citizen was not seized, anyway,

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[2] According to a scientific study published by the National Academy of Sciences, "Black men are about 2.5 times more likely to be killed by police over the life course than are white men," and "Black women are about 1.4 times more likely to be killed by police than are white women." Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-ethnicity, and Sex*, 116 Proc. Nat'l Acad. Sci. U.S.A., 16793, 16794 (2019). Similarly, a study printed in the American Journal of Preventive Medicine found that Black people were disproportionately victims of lethal force by law enforcement, "with a fatality rate 2.8 times higher among blacks than whites." Sarah DeGue et al., *Deaths Due to Use of Lethal Force by Law Enforcement: Findings from the National Violent Death Reporting System*, 17 *U.S. States*, 2009–2012, 51 American J. of Preventive Med. S173, S173 (2016). "[B]lack victims were [also] more likely to be unarmed (14.8%) than white (9.4%) or Hispanic (5.8%) victims." *Id.*

the Fourth Amendment's protection from unreasonable seizures is but an illusion.

A citizen should not have to bet his and the officer's well-being on guessing correctly that he is free to leave. And an officer should not be placed in a situation where he mistakenly believes he must engage in physical force because the citizen presumed incorrectly. Nor should a citizen have to forfeit his Fourth Amendment right to be free from unreasonable seizures merely because courts believe—with the benefit of reflection, untainted by the palpable pressure of split-second decision-making—that the citizen should have felt free to leave even if he, in fact, was not. Policing is difficult and dangerous work. But under the hybrid test, so is being a citizen trying to exercise his Fourth Amendment right to be free from unreasonable seizures.

We could remove some of the risk to officers and citizens by eliminating much of the ambiguity surrounding so-called consensual encounters. As some police departments have already discovered and now require as a standard practice, an officer's straightforward announcement of the citizen's Fourth Amendment status prevents dangerous misreads, helping to protect both officers and citizens. So we could presume an encounter to be consensual where officers who wish to investigate a citizen but lack reasonable suspicion advise the citizen at the outset of the encounter that he is free to decline to speak with the officers. Conversely, an interaction could become presumptively non-consensual when the officer in the same position fails to take this step. Not only would such a bright-line rule reduce the risk to

officers and citizens in so-called consensual encounters, it would also help close the gap between the reality of these situations and how they are treated under the law.

To be sure, the Supreme Court has, in the past, rejected similar suggestions of a bright-line rule for separating consensual from non-consensual encounters. But the need for such a rule to protect police and citizens alike has become more obvious since then.

Below, in Section I, I describe why current precedent required affirmance of the district court's denial of Knights's suppression motion. Section II discusses the numerous pitfalls of the current hybrid "free to leave"/affirmative-acts-of-coercion test. In Section III, I explain why, as the panel asserts, equal-protection analysis precludes us from considering race under the current "free to leave"/affirmative-acts-of-coercion test Fourth Amendment seizure analysis applies. Then Section III shows why, regardless of whether courts can consider race in conducting the "free to leave"/affirmative-acts-of-coercion test, race can bear on the reality that the test purports to assess. And finally, in Section IV I examine how a bright-line test would help remedy these problems.

I.

The success of Knights's motion to suppress hinges on whether a reasonable innocent person in his position would have felt free to leave or end the interaction with the two officers. To evaluate this, we examine the totality of the circumstances, *Bostick*, 501 U.S. at 437, including whether the officers took

any affirmative coercive actions that would make a reasonable person feel he is not free to leave. *See id.* at 436; *Miller v. Harget*, 458 F.3d 1251, 1258 (11th Cir. 2006) (explaining that the test is whether the officers "exhibited coercion that would make [the defendant] feel he was not free to leave").

Our panel opinion highlights several factors suggesting that Knights's encounter with the police was consensual. *See* Panel Op. at 9. It focuses largely on what did not occur during the incident: the uniformed officers did not activate their patrol-car lights and siren[3], display their weapons, physically touch Knights, immediately speak to Knights as they approached him, nor physically block his car with their cruiser (although they made it more difficult to drive away). *See id.*

Perhaps the strongest factor suggesting that a reasonable person would have felt free to leave was that Hozell Keaton, who had been leaning into the open passenger-side door of the car where Knights had the driver's door open, actually left the car area just as he saw the officers park their patrol car in front of Keaton's house. Even after Officer Samuel got out of the cruiser and tried to get Keaton's attention, Keaton, who was already near the front door, ignored him, continued to walk away, and

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[3] The magistrate judge's factual findings entered after an evidentiary hearing do not indicate that she found that the officers activated their lights, although Knights testified that, "[t]o [his] knowledge," the officers did. Knights did not challenge the magistrate judge's factual finding. And though on appeal, he mentioned this testimony from the hearing, he did not argue that the officers activated their lights.

entered the house. That no officer took further action with respect to Keaton might have suggested to a reasonable person in Knights's position that he could have also avoided the interaction with officers.

But once Keaton was inside the home, Knights faced different circumstances than Keaton had a moment earlier. When Keaton went into his home, Knights got into the car and closed the doors. Then Officer Seligman approached Knights as he sat there. The situation left Knights with, at best, three potential options to retreat from the police encounter: (1) open his car door and walk past one officer standing directly in his path, as he tried to decline to speak with both officers; (2) attempt to start and maneuver his car, which the officers knew had just failed to turn over, around the officers and their cruiser—a task the magistrate judge found Knights "would have had significant difficulty doing . . . without hitting the patrol car or an officer"; or (3) remain in the dead car with the doors closed.

Although Knights chose to remain in the car, the officers nonetheless walked closer to his vehicle until one knocked on the window. Knights's efforts to signal that he was not interested in chatting (by shutting himself in his car) did not appear to work. Besides that, Knights knew the officers viewed the neighborhood as "high crime," and it was dark at one in the morning—factors that can understandably amplify an officer's perception of a threat, whether or not a real threat existed. And since the officers were aware that the car Knights was in would not start, no reasonable person in Knights's position would have believed it was realistically possible to leave the car

sitting in the driveway and walk away without direct police interaction.

Based on these circumstances, it's hard to say that a reasonable innocent person in Knights's place truly would have felt free to try to end the encounter with the officers. But a finding that a reasonable person would not have felt free to leave is not enough under current case law.

Without an affirmative coercive act by an officer, our precedent requires the conclusion that Knights was not seized. Indeed, "[t]his Court has decided on several occasions that a police officer does not seize an individual merely by approaching a person in a parked car," even in some cases when the officers block the parked car from leaving. *Miller*, 458 F.3d at 1257; *see also United States v. Baker*, 290 F.3d 1276, 1278-79 (11th Cir. 2002).[4] And because no other

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[4] The magistrate judge's report and recommendation relied on *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979), to conclude that the officers seized Knights when they parked their cruiser in a way that made it more difficult for Knights to leave the scene in his car. ECF No. 51 at 9-11. In *Beck*, our predecessor Court determined that when officers parked next to the defendant's car in that case, "'they clearly took the sort of action contemplated by *Terry v. Ohio*' and its definition of a 'stop.'" *Id.* at 10 (quoting *Beck*, 602 F.2d at 728). The problem is that *Beck* was issued in 1979, before the Supreme Court decided *Bostick*, 501 U.S. 429, in 1991, which put a gloss on the "free to leave" test. So we are bound by the post-*Bostick* case law that applies that gloss. In *Bostick*, two armed officers with badges boarded a bus that was at a stopover during a lengthy journey. *Id.* at 431. They asked the defendant to inspect his ticket and identification and then to search his luggage. *Id.* at 431-32. They found contraband, and the defendant sought to suppress it as the product of an unreasonable seizure. *Id.* In discussing considerations that the lower court needed to make on remand

affirmatively coercive factors identified in our case law appear in the record before us, our precedent bound us to conclude that Knights's interaction with police was "consensual" and to affirm the denial of his motion to suppress. *See United States v. De La Rosa*, 922 F.2d 675, 678 (listing coercive factors).

II.

The outcome in Knights's case and others like it can be unsatisfying: when we hold that a defendant was not "seized" for Fourth Amendment purposes, even though—if we are being realistic—we know that a reasonable person in his place likely would not have felt free to leave, the Fourth Amendment's protections do not feel entirely real. *See*, *e.g.*, *Bostick*,

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to determine whether the defendant had been seized, the Court stated that "when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* at 435-36. The Court further opined that the fact that the defendant did not feel free to leave while sitting on the bus "says nothing about whether or not the police conduct at issue was coercive." *Id.* at 436. The Court distinguished the bus situation from a scenario in which a person is freely walking down the street and "it makes sense to inquire whether a reasonable person would feel free to continue walking." *Id.* Since *Bostick* issued, this Court has held that when an armed officer approaches a person in a parked car, that does not, in and of itself, cause a seizure. *See*, *e.g.*, *Miller*, 458 F.3d at 1257-58; *Baker*, 290 F.3d at 1279 (officer approached vehicle stopped in traffic). And in *Miller*, even though the officer parked behind the subject car, thereby wholly preventing it from leaving, this Court concluded no Fourth Amendment seizure had occurred, since the citizen there did not demonstrate an intent to drive away. *Id.* at 1257. *Miller* remains good law in this Circuit, so we are bound by it. And here, the officers knew the car would not start.

501 U.S. at 436 (concluding that "the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him"); *United States v. Thompson*, 941 F.2d 66, 68, 70 (2d Cir. 1991) (holding that the defendant was not seized even though she testified "she did not feel free to leave when the officers began to question her").

Knights's case is emblematic of the issues that plague the hybrid "free to leave"/affirmative-acts-of-coercion test: (1) the test ignores the inherent coerciveness of being approached by armed law-enforcement agents, a situation that most people don't feel free to leave, even in the absence of affirmative acts of coercion; (2) it ignores the officer's actual intentions in stopping the defendant; and (3) it unfairly imposes on the citizen the entire burden of correctly guessing whether, under the law, an encounter is "consensual," as well as the consequences of that decision.

First, I begin with the test's failure to account for the inherent coerciveness of being approached by an armed law-enforcement agent. This defect increases the likelihood that the test will fail to accurately identify when, in reality, a reasonable citizen would not feel free to leave a police encounter.

Within the comfort of our chambers, we imagine how we think a "reasonable person" like Knights would feel in a "high-crime" neighborhood as two armed officers approach in the wee hours of the morning. Commentators have observed that when we speculate on whether a reasonable innocent person would feel free to leave a given encounter, we tend to "bas[e] decision[s] on 'minute factual differences' that

courts have determined to be crucial, but which [arguably] bear little relationship to the individual's actual freedom to walk away." Josephine Ross, *Can Social Science Defeat A Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 Wash. & Lee J. Civ. Rts. & Soc. Just. 315, 326 (2012) (quoting Edwin J. Butterfoss*, Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. Crim. L. & Criminology 437, 439-40 (1988)). So our speculation does not always match reality.

In fact, studies demonstrate that most people do not feel free to terminate an officer-initiated encounter—even in the absence of any affirmative coercive acts. For example, Professor David K. Kessler surveyed more than 400 randomly selected Boston residents about whether they would feel free to leave when approached on a bus or on the sidewalk by law enforcement. *See* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51, 52 (2009). The questionnaire posed the question innocuously: "You are walking on the sidewalk [or "You are riding the bus"]. A police officer comes up to you and says, 'I have a few questions to ask you.' Assume you do not want to talk to the officer." *Id.* at App. A. Then the respondent rated on a scale of 1 to 5 "how free [the respondent] would feel to walk away without answering or to decline to talk with the police officer," with 1 indicating "[n]ot free to leave or say no," 3 meaning "[s]omewhat free to leave or say no," and 5 indicating "[c]ompletely free to leave or say no." *Id.*

Almost 80% selected 3 or lower, including about 50% who selected 1 or 2. *Id.* at 74-75. And those results likely overestimate how often people feel free to leave when interacting with the police because, as Kessler explained, "[t]he coercive pressures experienced when actually dealing with a police officer are likely to make one feel less free than when one is standing in a train station" conversing with a student researcher. *Id.* at 80.

And while the Kessler study demonstrates that the vast majority of people—whether white or Black—do not feel free to leave when approached by police, as I note in Section III of this concurrence, other studies and anecdotal evidence show this is especially true for Black individuals.

The current test's failure to account for the approaching officer's actual intentions only compounds these deficiencies. *See Miller*, 458 F.3d at 1258 n.4. Under the current test, courts can and do determine that a person was free to leave even if, as a matter of fact, the officer who stopped that individual thought he was not. In that scenario, the officer may have, in reality, detained the individual without the necessary reasonable suspicion. Yet the law says no detainment has occurred, making the Fourth Amendment's protection against unreasonable seizures illusory. In that sense, the test operates as a legal fiction—a seizure in fact is not a seizure under the law. So police can initiate "'encounters' in the hope that criminal activity will be revealed" and be "secure in the knowledge that these encounters will remain beyond the purview of the Fourth Amendment." Bennett Capers, *On Justitia, Race,*

Gender, and Blindness, 12 Mich. J. Race & L. 203, 221 (2006).

Finally, the hybrid test makes the citizen shoulder the entire burden of determining whether a stop has occurred. This framework "assumes that the choice to decline a police request is unburdened, that no negative consequences will accompany a failure to comply, and therefore that individuals will readily assume" that they may walk away. Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 Buff. L. Rev. 1483, 1502 (2007). But "[r]easonable people are sometimes risk averse . . . and there are several downside risks involved in disregarding police directions." *Id.* at 1503.

III.

And this is all the more true for Black citizens. Yet today's panel opinion concludes that it must reject the proposition that race may be considered in determining whether a Fourth Amendment seizure occurs. As I explain below, I agree that the law requires this answer. But studies suggest that Black and white individuals do not equally feel "free to leave" citizen-police encounters. So it is worth considering why and what can be done to improve the ability of people of all races to feel equally able to exercise their Fourth Amendment rights to leave a legally consensual citizen-police encounter.

I begin with the panel opinion's rejection of race as a factor in the Fourth Amendment test for determining whether a seizure has occurred. The panel opinion reaches its conclusion for two reasons.

First, the panel opinion asserts that we cannot consider race because the test for ascertaining whether a Fourth Amendment seizure occurs is an objective one, and unlike with age, we cannot "draw 'commonsense conclusions' about the effect of [race] on a person's perception of his freedom to leave that 'apply broadly to [members of a given race] as a class.'" Panel Op. at 13. Second, the panel opinion determines that equal-protection analysis prevents us from accounting for race in an objective (as opposed to subjective) analysis. I do not consider the validity of the panel's first conclusion because, regardless, I agree that it is right about its second.

The Fifth Amendment's Due Process Clause includes an equal-protection component. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). Under it, we must analyze racial classifications—including classifications that seek to remedy racial inequality—using strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505 (2005).[5] To satisfy strict scrutiny, the party seeking to adopt a racial classification must show that the racial classification at issue furthers a compelling interest and that the rule based on that racial classification is narrowly tailored to achieve that compelling interest. *See id.* As relevant here, I would find a compelling interest exists in ensuring that all citizens enjoy the same ability to assert their Fourth Amendment rights in citizen-police encounters, regardless of their race. Because the

[5] Although *Johnson* involves the Fourteenth Amendment's Equal Protection Clause, the same analysis applies to Fifth Amendment equal-protection analysis of laws that classify based on race. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

current test for whether a seizure occurs turns on whether a reasonable innocent person in the citizen's place would feel "free to leave" a police interaction, it's important that the hypothetical "reasonable innocent person" would feel equally "free to leave," regardless of her race.

But as a matter of the commonsense reality of police-citizen interactions, Black individuals from every background have long expressed that race can and does affect whether a citizen feels "free to leave" a police encounter. Of course, we wish race were not relevant. But wishing does not make it so. *See Washington v. Lambert*, 98 F.3d 1181, 1187 (9th Cir. 1996) (explaining that "as a practical matter neither society nor our enforcement of the laws is yet color-blind"). The evidence demonstrates that race can matter during interactions with the police.

Black Americans on the whole are 2.5 times more likely to be shot and killed by police officers than white Americans.[6] Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, but No*, Wash. Post (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/; *see also supra* note 2; Radley Balko, *There's Overwhelming*

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[6] In fact, studies demonstrate that the disparities in force used against Black and Latinx individuals, on the one hand, and white ones, on the other, are even higher when we account for, among other things, "selection bias" in the initial decisions to stop individuals. *See generally* Dean Knox et al., *Administrative Records Mask Racially Biased Policing*, 114 Am. Pol. Sci. Rev. 619 (2020).

Evidence that the Criminal Justice System is Racist. Here's the Proof, Wash. Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ (collecting evidence on racial disparities in police shootings and use-of-force incidents); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 390-91 nn. 1-19 (S.D. Miss. Aug. 4, 2020) (cataloguing some Black Americans' deaths in police encounters). The pattern is even more pronounced with respect to young Black men between the ages of 15 and 19: in a recent study, they were found to be 21 times more likely than their white counterparts to be killed during police encounters. Ryan Gabrielson et al., *Deadly Force, in Black and White*, ProPublica (Oct. 10, 2014), https://www.propublica.org/article/deadly-force-in-black-and-white. So it is no wonder that "Black male teens still report a fear of police and a serious concern for their personal safety and mortality in the presence of police officers." *Jamison*, 476 F. Supp. 3d at 414-15 (internal quotation marks omitted).

When we consider unarmed individuals, Black Americans are five times more likely than white Americans to be killed by police. Lowery, *supra*. And these disproportionate rates of deadly encounters persist, despite findings that, even accounting for threat level, "[B]lack Americans who are fatally shot by police are no more likely to be posing an imminent lethal threat to the officers at the moment they are killed than white Americans fatally shot by police." *Id*.

Because of these circumstances, Black Americans' lived experiences make them materially less likely than white Americans to believe they have

the freedom to leave an interaction with the police. Indeed, "the dynamics surrounding an encounter between a police officer and a black [citizen] are quite different from those that surround an encounter between an officer and the so-called average, reasonable person." Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U.L. Rev. 243, 250 (1991).

For Black citizens, the fear of violence often overlays the entire law-enforcement encounter. Because of these circumstances, commentators have concluded that Black people have "internalized racial obedience toward, and fear of, the police." Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 966 (2002). "They work their identities in response to, and in an attempt to preempt, law enforcement discipline"; "[i]t is intended to signal acquiescence and respectability." *Id.*; *see also Capers*, *supra*, at 221 n.90. Black people often tread more carefully around law enforcement than the Court's hypothetical reasonable person does because of the grave awareness that a misstep or discerned disrespectful word may cause the officer to misperceive a threat and escalate an encounter into a physical one.[7]

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[7] *See* Ross, *supra*, at 318 ("When I told a class of students at Howard University School of Law that they can walk away when police officers approach to ask them questions, they rebelled. 'Not in my neighborhood,' said one student. 'You can get yourself arrested,' another law student said. 'Or shot,' added another. . . . One student in my class who was a former police officer declared that it would be irresponsible for us to tell young people that they can walk away from police.").

Black community members have explained that, for them, the "whole goal" of a police encounter is to "just kind of stay alive. Just make it to the next day." *A Black Mother and Son on "The Talk": 'When I get Pulled Over by a Police Officer, I Do Not Have Any Rights'*, KJZZ (June 11, 2020), https://kjzz.org/content/1591087/black-mother-and-son-talk-when-i-get-pulled-over-police-officer-i-do-not-have-any; *see also Carbado*, (E)racing, supra, at 953-54. Towards that end, parents have long found it necessary to have "The Talk"[8] with their Black children to try to help them keep safe when they encounter the police. When a citizen perceives staying alive as the "whole goal" of a police interaction, it is difficult to say that an encounter is

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[8] Generations of Black children are familiar with "The Talk." *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (describing "The Talk"); *United States v. Black*, 707 F.3d 531, 541 (4th Cir. 2013) (same). Generally, parents have "The Talk" with their kids about how to interact with law enforcement so no officer will have any reason to misperceive them as a threat and take harmful or fatal action against them. So for example, Black children are taught that, if stopped by an officer while in their car, they should roll down all car windows, place both hands open and in plain view (or on the steering wheel), keep their composure and be perfectly respectful even if they feel the officer is mistreating them, ask for permission before moving their hands, and comply with all the officer's requests. If, like I, a reader has never experienced "The Talk" firsthand, watching *Black Parents Explain How to Deal with the Police*, YouTube (Feb. 6, 2017), https://www.youtube.com/watch?v=coryt8IZ-DE, or something similar, though distressing, is extremely educational and important. And in my view, it is even more so for judges who must place themselves in the shoes of reasonable innocent citizens under the hybrid "free to leave"/affirmative-acts-of-coercion test.

truly "consensual." And there is no real question that Black citizens view themselves as sharing a common historic experience concerning police encounters. That is why generations of children have had to grow up with "the Talk." And it is why even a Black United States Senator and a Black former President of the United States acknowledge the same shared experience as Black citizens from all other walks of life. *See* Tim Scott, *GOP Sen. Tim Scott: I've Choked on Fear When Stopped by Police. We Need the* JUSTICE *Act*, USA TODAY (June 18, 2020), https://www.msn.com/en-us/news/opinion/gop-sen-tim-scott-ive-choked-on-fear-when-stopped-by-police-we-need-the-justice-act/ar-BB15FLvH ("I, like many other Black Americans, have found myself choking on my own fears and disbelief when faced with the realities of an encounter with law enforcement."); Barack Obama, *A Promised Land*, at 395-96 (2020) ("Hearing about what had happened to [Professor Henry Louis] Gates[, Jr.], I had found myself almost involuntarily conducting a quick inventory of my own experiences. The multiple occasions when I'd been asked for my student ID while walking to the library on Columbia's campus, something that never seemed to happen to my white classmates. The unmerited traffic stops while visiting certain 'nice' Chicago neighborhoods. Being followed around by department store security guards while doing my Christmas shopping. . . . For just about every Black man in the country, and every woman who loved a Black man, and every parent of a Black boy, it was not a matter of paranoia or 'playing the race card' or disrespecting law enforcement to conclude that whatever else had happened that day in Cambridge, this much was almost certainly true: A wealthy, famous, five-foot-

six, 140-pound, fifty-eight-year-old *white* Harvard professor who walked with a cane because of a childhood leg injury would *not* have been handcuffed and taken down to the station merely for being rude to a cop who'd forced him to produce some form of identification while standing on his own damn property.").

Indeed, the evidence shows that Black Americans share concerns about interactions with the police "regardless of station in life or standing in the community." *Jamison*, 476 F. Supp. 3d at 414-15 (collecting examples). So Black citizens are less likely to feel free to walk away from the police and exercise their rights, *see* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 142 (2017) ("Black people, across intraracial differences, are likely to feel seized earlier in the police interaction than whites, likely to feel 'more' seized in any given moment, and less likely to know or feel empowered to exercise their rights."), under circumstances where white citizens would have no such qualms.

Even the Supreme Court has suggested as much. As the panel opinion acknowledges, the Court has held that race can be relevant when analyzing the related but subjectively analyzed Fourth Amendment question of whether a suspect has voluntarily consented to a search or seizure. *United States v. Mendenhall*, 446 U.S. 544, 558 (1980).

It's worth considering why. In my view, the Supreme Court accounts for race in this subjective test because it has perceived that, as a result of Black

Americans' shared historic experience in police encounters, purported "consent" is less likely to be truly voluntary when attributed to Black individuals than to white ones. And if that is so, it is difficult to understand why that same shared experience would not be equally relevant to whether a Black citizen truly feels "free to leave" a police encounter—especially because the Supreme Court has explicitly stated that the seizure test and voluntariness test "turn on very similar facts." *United States v. Drayton*, 536 U.S. 194, 206 (2002). As the Court has emphasized, "the question of voluntariness pervades both . . . inquiries." *Id.*

So it seems pretty clear that a shared historical Black experience can cause Black Americans to view their ability to leave a police interaction very differently than white Americans. All Americans—regardless of race—have a right to the equal protection of the law and to the ability to exercise their constitutional rights. So I would conclude that the need for citizens to in fact enjoy an equal ability to assert their Fourth Amendment rights in citizen-police encounters represents a compelling interest.

But that is not the end of the equal-protection analysis. Rather, we must consider whether accounting for race in the objective test for determining whether a Fourth Amendment seizure has occurred is narrowly tailored to address the compelling interest at issue here. A racial classification will satisfy the narrow-tailoring requirement only if "race-neutral alternatives that are both available and workable do not suffice." *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016) (citation and internal quotation

marks omitted). And that's where considering race runs into a constitutional problem. It is not narrowly tailored.

That is so because a more narrowly tailored solution that is race-neutral exists: the Supreme Court could institute a bright-line rule that would require officers to advise citizens whether they are free to leave before questioning begins. *See infra* Section IV. Because consideration of race in the objective Fourth Amendment analysis cannot survive strict scrutiny, we cannot account for race under the current "free to leave"/affirmative-acts-of-coercion test.

Yet studies indicate there's no real question that Black citizens are not well covered by the "free to leave"/affirmative-acts-of-coercion test's hypothetical reasonable person. Put simply, citizens who believe that when they "question the authority of the police, the response is often swift and violent," Maclin, *supra*, at 253; *Commonwealth v. Hart*, 695 N.E.2d 226, 228 (Mass. App. Ct. 1998) ("[H]istorically . . . blacks who have walked, run, or raced away from inquisitive police officers have ended up beaten and battered and sometimes dead."), do not view themselves as having a choice to leave or end a police encounter in a situation like Knights faced. Rather, they consider themselves seized.

In short, courts, citizens, and police continue to wrestle with the inherent ambiguity in so-called consensual stops—sometimes with devastating results. We can do better. So I turn to a proposed solution to remove this ambiguity, to protect citizens and officers alike during intended consensual

encounters, and to reaffirm the Fourth Amendment's guarantee against unreasonable seizures.

IV.

The troubles with the "free to leave"/affirmative-acts-of-coercion test I have outlined above stem from the inherent ambiguity in so-called consensual encounters. Removing that ambiguity would help render so-called consensual encounters safer for everyone. It would also assist in preserving Fourth Amendment rights.

To accomplish this, the Supreme Court could require officers who wish to engage in consensual interactions—at the very least with respect to those individuals an officer wants, without reasonable suspicion, to investigate in some way—to, at the outset, inform the approached individual that he or she may decline or end the interaction without penalty. While not perfect, this solution has the benefit of establishing a bright line so both citizens and officers know that any continued interaction is presumed consensual.

Below in Section IV.A, I explain why the Court should reconsider adopting a bright-line rule to evaluate police-citizen encounters under the Fourth Amendment. In Section IV.B, I analogize this idea to the approach the Court has taken in the Fifth Amendment context and show how a similar rule in the Fourth Amendment context would begin to remedy the problems identified in Sections II and III. And in Section IV.C, I address the criticisms of adopting a bright-line rule.

A.

I am aware the Supreme Court has previously dismissed this and other courts' suggestions to adopt a Fourth Amendment version of the *Miranda* rule for dividing consensual from non-consensual interactions. More specifically, in a pair of cases, we opined that when the totality of the circumstances suggests—but does not establish—that the citizen is not free to leave, officers must inform citizens of their rights. *United States v. Guapi*, 144 F.3d 1393, 1393–95 (11th Cir. 1998); *United States v. Washington*, 151 F.3d 1354, 1355–57 (11th Cir. 1998).[9] The Supreme Court rejected that approach, explaining that the touchstone of Fourth Amendment jurisprudence has always been a reasonableness assessment. *Drayton*, 536 U.S. at 201–203. Instead, the Court reaffirmed that the totality-of-the-circumstances test governs whether a reasonable person would have felt free to terminate the encounter. *Id.* But many years have passed since we last suggested a bright-line test should identify whether so-called consent is in fact consensual in any given circumstances. During that time, the "free to leave"/affirmative-acts-of-coercion test has continued to create unnecessary risks to officers and the citizens with whom they speak, while chipping away people's confidence in their Fourth Amendment rights.

And what is the value of continuing to make people guess? Whatever it may be, does it outweigh the dangers to officers and citizens alike caused by

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[9] Both abrogated by *United States v. Drayton*, 536 U.S. 194 (2002).

requiring citizens to guess whether they are "free to leave"? I think not.

With these thoughts in mind, I respectfully propose that we proceed from the premise that the "free to leave" test—a seizure occurs when a reasonable innocent person would not feel free to leave—should mean what it says. After all, a nation governed by the rule of law derives its legitimacy in part from the transparency of the law and the ability of the citizens to understand and rely upon that law. To further that principle, the Court should once again consider adopting a bright-line rule to make the "free to leave" test correspond with reality when no reasonable suspicion supports a stop.

B.

The Supreme Court has successfully adopted a bright-line rule in the Fifth Amendment context. *Miranda v. Arizona*, 384 U.S. 436 (1966). Much like the "free to leave" test, the pre-*Miranda* voluntariness test considered nearly every factor. *Id.* at 508 (1966) (Harlan, J., dissenting) (collecting cases).

But in *Miranda*, the Court abandoned that totality-of-the-circumstances-based test in favor of the now-familiar rule requiring a person in custody to "first be informed in clear and unequivocal terms that he has the right to remain silent." *Id.* at 467-68. Among other things, the Court held that "such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.* at 468. So the Court determined it would no longer "pause to inquire in individual cases whether the defendant was aware of his rights

without a warning being given." *Id.* It further noted that the explicit "warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Id.*

A bright-line rule for ascertaining whether an encounter is consensual or whether instead a seizure has occurred under the Fourth Amendment would work much like the *Miranda* rule. If an officer fails to inform a citizen at the outset of the interaction that the citizen is free to decline the interaction, a "bright-line legal presumption" will arise that a seizure has occurred under the Fourth Amendment. *See Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985) ("A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements."). Conversely, if an officer does give the warning, a presumption follows that the interaction was consensual (and therefore not a seizure), unless evidence shows that the citizen was, in fact, not free to leave. *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) ("We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession.").

A *Miranda*-type solution neatly fits Fourth Amendment consensual encounters. While the Fifth Amendment privilege not to incriminate oneself differs from the right under the Fourth Amendment not to be seized except when the seizure is "reasonable" (and therefore the corresponding right to decline to interact with an officer unless one has been "reasonabl[y]" seized), applying a totality-of-the-circumstances test raises the same practical problems in both contexts. In fact, many of the

difficulties with the old Fifth Amendment totality-of-the-circumstances test that the Supreme Court identified in *Miranda* are troubles that beset the totality-of-the-circumstances hybrid "free to leave"/affirmative-acts-of-coercion test.

First, judges determining voluntariness in the pre-*Miranda* era could not experience firsthand "the inherent pressures of the interrogation atmosphere." *See* George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 Am. Crim. L. Rev. 1, 7 (2000) ("How would a court, months or years later, be able to discern whether a confession sufficiently manifested the will of the suspect?"). The same challenge arises when courts try to ascertain whether the hypothetical reasonable innocent person feels free to leave. Courts are too removed from the actual circumstances and pressures a reasonable person in the citizen's place would have felt in interacting with police.

Second and somewhat relatedly, the pre-*Miranda* voluntariness test, like the hybrid test, required assessments that could "never be more than speculation . . . ." *Miranda*, 384 U.S. at 468-69. That speculation led in pre-*Miranda* Fifth Amendment cases to unpredictable results, making it difficult for citizens, police officers, and courts to know in the moment whether an interrogation would later be considered consensual. Courts' necessary speculation under the current hybrid test causes the same unpredictability problem for citizens and officers in the consensual-police-encounter realm.

Third, employing an artificial reasonable person as the benchmark arguably tended to disproportionately disadvantage Black individuals under both the voluntariness and the "free to leave" tests. Although the *Miranda* opinion does not focus on race, Chief Justice Warren originally expressed this concern when he authored *Miranda*. Indeed, "an early draft of Warren's *Miranda* opinion had called attention to the large number of black defendants who had been subjected to physical brutality by Southern police." Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 Ohio St. J. Crim. L. 163, 175 (2007).[10]

Fourth, the pre-Miranda voluntariness test, much like the "free to leave"/affirmative-acts-of-coercion test, could "exact[] a heavy toll on individual liberty and trade[] on the weakness of individuals." Miranda, 384 U.S. at 455. The voluntariness test also failed to "dispel the compulsion inherent in custodial surroundings . . . ." *Id.* at 458. Similarly, as I have explained, the Fourth Amendment's hybrid test continues to ignore the inherent coerciveness of police encounters, a problem that is particularly acute for Black citizens.

As with Miranda, a bright-line rule requiring law enforcement to inform an approached person of that individual's right to decline the interaction would go

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[10] Chief Justice Warren dropped this language after Justice Brennan suggested that poverty, more than race, characterized those who suffered police brutality. *Id.* Whatever the specific inequality, a constitutional rule that fails to reflect the realities of society and creates inequitable results deserves a second look.

a long way towards remedying many of these problems. No longer would we spend time speculating as to just how difficult it would have been for Knights to have maneuvered his car around the officers and their cruiser (if his car were not dead). Nor would we be called upon to decide whether using a flashlight in the dark makes the encounter more coercive. Or whether the presence of two officers versus one or three would have made Knights feel less free to leave. We also would not be required to sweep under the rug the officers' actual intentions or the real fear that many reasonable people often feel in police encounters. Instead, we would simply ask, "Did the officers inform the defendant of his right to leave?" And "Did the defendant attempt to exercise his right to do so?"

An explicit "warning will show the individual that [the police] are prepared to recognize his [right to walk away] should he choose to exercise it." *Miranda*, 384 U.S. at 468. As a matter of safety to the officer and to the citizen, that knowledge and clarity is extremely important. Here, ambiguity can result in physical injury and even death. The *Miranda* bright-line approach is a solution that would help minimize many of these problems.

C.

Despite the overwhelming benefits of a bright-line rule, some might argue that requiring pre-questioning warnings is inappropriate in the Fourth Amendment context. Others might dismiss pre-questioning warnings in the Fourth Amendment context out of a concern that they might hinder legitimate law-enforcement activity. As they were

with *Miranda* warnings, these criticisms are ultimately unavailing.

I begin with the criticism that employing *Miranda*-like warnings is unnecessary because the rights protected by the Fourth Amendment differ from those protected by the Fifth Amendment. The Supreme Court relied on this distinction as a reason, among others, to reject requiring a warning in the consent-search context. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241–42, 249 (1973). There, the Court reasoned that trial rights, such as the Fifth Amendment right not to make a compelled statement, are necessary to ensure an "unfair result" is not reached at trial. *Id.* at 241-42. But the Court distinguished the Fourth Amendment as a device that protects privacy.

Yet the Fifth Amendment right against self-incrimination also helps secure other important constitutional values that other constitutional provisions, including the Fourth Amendment, guard. In fact, *Miranda* critically noted that the Fifth Amendment privilege protects privacy and "the respect a government . . . must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460. These values apply with equal force in the Fourth Amendment context.

Not only that, but the Fourth Amendment's protection of an individual's privacy from government intrusion also affects the ability of courts to maintain a fair trial. The Court adopted the exclusionary rule primarily to protect the rights enshrined in the Fourth Amendment. If evidence illegally obtained can be used at trial, then "the protection of the Fourth

Amendment . . . is of no value[.]" *Weeks v. United States*, 232 U.S. 383, 393 (1914), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961). A fair trial is not one that can be "aided by the sacrifice of [the Fourth Amendment's] great principles . . . ." *Id.* A fair trial demands putting the government to its paces by requiring the government to "produce the evidence against [the defendant] by its own independent labors," *Miranda*, 384 U.S. at 460, not by obtaining evidence through illegal means or compulsion.

A bright-line rule here is also not inconsistent with the Fourth Amendment's reasonableness approach. In fact, we observe bright-line types of rules in assessing whether searches without warrants are reasonable. For example, a search warrant is categorically unnecessary in certain exigent circumstances. *See Missouri v. McNeely*, 569 U.S. 141, 150 n.3 (2013) (citing *California v. Acevedo,* 500 U.S. 565, 569–570, (1991) (automobile exception); *United States v. Robinson,* 414 U.S. 218, 224–235, (1973) (searches of a person incident to a lawful arrest)) ("We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case.").

That is so because the Supreme Court has made a judgment that, in these circumstances, it is pretty much always reasonable to conduct a search, even without a warrant. Similarly, adopting a bright-line rule in the consensual-encounter context would mean

only that the Supreme Court has decided that it is presumptively unreasonable to assume consensual a police encounter where the officer seeks to investigate the citizen with whom he wants to speak if the person has not first been advised of his right to decline.

I am also attuned to the Court's concern—understandably shared by police officers working in challenging, dangerous jobs—that imposing a bright-line rule in the Fourth Amendment context could impose a cost, since people might not consent to a police interaction if advised that they not need do so. And to be sure, in *Schneckloth*, the Court reasoned that consent searches, much like consensual questioning, can "yield necessary evidence for the solution and prosecution of crime . . . ." *Schneckloth*, 412 U.S. at 243.

But a warning advising a person of her rights is not mutually exclusive with law-enforcement cooperation. It simply ensures that cooperation with law enforcement is truly consensual. Though "it is no part of the policy underlying the Fourth . . . Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals," *id.* (cleaned up), informing a person possibly subject "to a governmental intrusion . . . that she has a right to say no," Carbado, *(E)racing*, *supra*, at 1027, does not conflict with that policy concern.

Indeed, this was the same criticism levied when the Court issued *Miranda*. *Miranda*, 384 U.S. at 516–17 (Harlan, J., dissenting). But those concerns turned out to be unwarranted, as there is "wide agreement that *Miranda* has had a negligible impact on the

confession rate." *Kamisar*, *supra*, at 177.[11] One study concluded that immediately after *Miranda* issued, it may have caused a 4.1 percent drop in the confession rate, which translated to just a 0.78 percent drop in the conviction rate. Thomas & Leo, *supra*, at 240.

But those who have researched this issue have concluded that even those negligible losses have likely been reversed because police have learned how to adhere to *Miranda* and still obtain confessions. *Id.* Surveys of criminal-justice practitioners have confirmed that "*Miranda* was not a significant factor that impedes [a prosecutor's] ability to prosecute criminals successfully." *Id.* at 254.

And Kessler's research suggests the same would be true if a bright-line rule were applied in the Fourth Amendment context. Even when people were advised of their right to leave a police encounter, in the survey Kessler conducted, most still reported that they would not be likely to do so. *See* Kessler, *supra*, at 78-79 (noting 40% of people reported a 1 or a 2 (out of 5), and two-thirds reported a 3 or lower on the comfort scale).

Law enforcement equally benefits from bright-line rules because agencies "strongly prefer that their officers work within a framework of articulable

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[11] One commentator has argued that *Miranda* had an appreciable effect on the ability of law enforcement to obtain confessions, but his findings "have not been generally accepted in either the legal or the social science community." George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, 29 Crime & Just. 203, 244 (2002) (collecting sources criticizing that commentator's methodology and conclusions).

standards. . . ." Corey Fleming Hirokawa, Comment, *Making the 'Law of the Land' the Law on the Street: How Police Academics Teach Evolving Fourth Amendment Law*, 49 Emory L.J. 295, 296–97 (2000). Even when courts set vague balancing tests, "police departments are likely to respond by setting clear, specific rules for their officers that keep them well within the zone of constitutional action . . . ." *Id.*

In fact, some officers already issue pre-questioning warnings to citizens they encounter on the street. *See*, *e.g.*, *Pastor v. State*, 498 So. 2d 962, 963 (Fla. Dist. Ct. App. 1986), *quashed on other grounds*, 521 So. 2d 1079 (Fla. 1988); *cf. United States v. Czichray*, 378 F.3d 822, 825 (8th Cir. 2004); Carbado, *(E)racing*, *supra*, at 1029 (noting that "federal agents were already in the practice of giving . . . warnings" before conducting consent searches) (internal quotation marks omitted). Besides demonstrating the efficacy of the practice, this fact also suggests that requiring officers to advise citizens they are free to decline an interaction will not materially affect law enforcement's abilities to obtain cooperation from citizens.

Of course, a bright-line rule is not a panacea. Citizens may still feel uncomfortable leaving interactions with the police, as Kessler's study demonstrates. But a bright-line rule would eliminate the ambiguity that plagues the current hybrid test. It would also provide a clear framework for citizens, officers, and courts to determine when a seizure has occurred. While not a perfect solution, a bright-line rule would take a big step towards reflecting the realities of police-civilian interactions and making them safer for both officers and citizens. And this

race-neutral rule would help remedy the racial disparities I have described, assisting in making Fourth Amendment rights in consensual encounters more of a reality for all citizens.

V.

Our panel decision follows the law, but the law we applied is ripe for change. The "free to leave"/affirmative-acts-of-coercion test ensures that police-citizen encounters are rife with dangerous ambiguity. It also, on occasion, "reduces the Fourth Amendment to a form of words," *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), by allowing unreasonable seizures to occur, even if the reasonable citizen or officer does not view the encounter as consensual.

To fix the problems inherent in the current seizure analysis, we should adopt a bright-line rule. True, the Supreme Court has previously rejected the bright-line rule approach in the Fourth Amendment context. But in the intervening time, it has become clear that the "free to leave"/affirmative-acts-of-coercion test is dangerous and unworkable. And research studies, real-life experiences, and common-sense principles demonstrate that a bright-line rule could greatly improve the situation with little to no downside. I therefore respectfully urge the Court to reconsider its earlier position and to adopt a bright-line rule.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10083 [PUBLISH]

D.C. Docket No. 8:18-cr-00100-VMC-AAS-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

ANTHONY W. KNIGHTS,

Defendant–Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 3, 2020)

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, Circuit Judge, and MOORE,[*] District Judge.

WILLIAM PRYOR, Chief Judge:

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[*] Honorable K. Michael Moore, Chief United States District Judge for the Southern District of Florida, sitting by designation.

This appeal requires us to decide whether officers violated Anthony Knights's right to be free from unreasonable seizures, under the Fourth Amendment, by conducting an investigatory stop without reasonable suspicion. Two officers saw Knights and Hozell Keaton around 1:00 a.m. in a car that was parked in the front yard of a home. Suspecting that the men might be trying to steal the car, the officers parked near it and approached Knights, who was in the driver's seat. When Knights opened the door, an officer immediately smelled marijuana. The ensuing search of Knights and the car revealed ammunition and firearms. Because Knights had felony convictions, a grand jury charged him with possession of a firearm and ammunition by a felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Knights moved to suppress the evidence the officers found and the statements he made as fruit of an unlawful seizure. The district court denied the motion, convicted Knights, and sentenced him to 33 months of imprisonment. We affirm because Knights's interaction with the officers was a consensual encounter that did not implicate the Fourth Amendment.

I. BACKGROUND

Late at night, Anthony Knights, Hozell Keaton, and Knights's nephew were smoking marijuana and listening to music while sitting in or standing near an Oldsmobile sedan in Tampa, Florida. The car was parked in a grassy area between the street and the white fence of a home that belonged to one of Keaton's relatives. The driver's side of the car was near the street and the passenger's side was near the fence.

On a routine patrol around 1:00 a.m., Officers Andrew Seligman and Brian Samuel of the Tampa Police Department saw two of the car's doors open with Knights and Keaton leaning into the car. The officers believed that Knights and Keaton might be stealing something from the car. They knew the area to be "high crime" and to have gang activity from their experience responding to multiple shootings and narcotics crimes. So they drove past the Oldsmobile for a better look. Knights and Keaton then "gave the officers a blank stare," and according to Officer Seligman, "kind of seemed nervous." The officers then heard someone unsuccessfully try to start the car. Thinking that Knights and Keaton "might be actually trying to steal the vehicle," the officers decided to investigate further.

Officer Seligman decided to turn around and park the patrol car near the Oldsmobile, which was parked on a grassy area next to the street in the direction of traffic for that side of the road. Officer Seligman parked on the street next to the Oldsmobile in the wrong direction for traffic so that the trunk of the patrol car was nearly aligned with the trunk of the Oldsmobile. As Officer Seligman was parking, he trained his flashlight on Knights. According to Knights and Officer Seligman, the patrol car was parked in a way that would have allowed Knights to drive away. Officer Samuel left the patrol car and attempted to talk to Keaton, who was walking toward the house, but Keaton entered the house without responding.

The officers then approached Knights, who sat in the driver's seat and closed the car door. Officer Seligman approached the car with his flashlight and

knocked on the driver's window. When Knights opened the door, Officer Seligman "was overwhelmed with an odor of burnt marijuana." Officer Seligman asked Knights if he owned the car, and Knights said that he and his wife owned it and gave Officer Seligman his driver's license and possibly the registration for the car. The officers later confirmed that his wife owned the car. When Officer Seligman asked Knights if he had marijuana, Knights said, "I'll be honest with you. It's all gone."

Officer Seligman then began to search for narcotics. He searched Knights's person and found a pill bottle containing several different kinds of pills. Officer Seligman arrested Knights and searched his car, starting with a backpack that Knights said contained a prescription for the pills. He found medical documents, a firearm cartridge, and a ski mask. He also found a scale, smoked marijuana, marijuana residue, a handgun, a rifle, and another firearm cartridge. Knights agreed to an interview after the officers warned him of his rights, *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and he then admitted that he owned the handgun. Knights and the officers described the entire encounter as calm and amicable.

A grand jury indicted Knights on one count of possessing a firearm and ammunition as a felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Before trial, Knights moved to suppress his admissions and the evidence the officers found during the search. He argued that they were fruit of an illegal seizure that occurred when—without reasonable suspicion—the officers parked behind his car or, at the latest, when they walked up to his car. The government responded that

the incident "began as a police-citizen encounter" and did not turn into a "seizure" until the officers started searching for narcotics based on probable cause that Knights possessed marijuana, and alternatively, the officers had reasonable suspicion to conduct an investigatory stop.

The district court referred the motion to a magistrate judge who held a hearing and recommended granting the suppression motion. The magistrate judge recommended ruling that the officers conducted an investigatory stop because "the officers' show of authority, especially Officer Seligman, their locations as they approached the car, and the patrol car impeding Mr. Knights's ability to drive away, [established that] no reasonable person in Mr. Knights's position would feel free to leave or disregard the two officers." And because the magistrate judge determined that the officers lacked reasonable suspicion and the physical evidence and statements were fruit of the unlawful seizure, she recommended granting the motion.

The district court, after considering briefing and oral argument, accepted the magistrate judge's recitation of the facts but disagreed with her recommendation and denied the suppression motion. It explained that the constitutionality of the officers' conduct turned on *when* they seized Knights because the odor of marijuana provided a lawful basis for seizing him. It ruled that the officers did not seize him when they parked their patrol car and walked up to Knights because "it was a police-citizen encounter involving no detention and no coercion." The district court found that Knights could have either driven away "with skilled driving" or walked away. It also

relied on the absence of the police questioning Knights, displaying their weapons, touching him, asking for his identification, or having a verbal exchange with him.

Knights proceeded to a bench trial at which he and the government stipulated to the relevant facts. The district court adjudicated him guilty and sentenced him to a below-guideline sentence of 33 months of imprisonment.

II. STANDARDS OF REVIEW

"A district court's ruling on a motion to suppress presents a mixed question of law and fact." *United States v. Perez*, 443 F.3d 772, 774 (11th Cir. 2006) (internal quotation marks omitted). We review its legal conclusions *de novo*, and we accept its factual findings unless they are clearly erroneous. *Id.* We construe the facts in the light most favorable to the government because it prevailed in the district court. *Id.*

III. DISCUSSION

The Fourth Amendment protects "[t]he right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. A "seizure" does not occur every time a police officer interacts with a citizen. Officers are free to "approach[] individuals on the street or in other public places and put[] questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002). In these consensual encounters, the officers need no suspicion because the Fourth Amendment is not implicated. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Perez*, 443 F.3d at 777–78. But officers need

reasonable suspicion if an encounter becomes an investigatory stop. *See Bostick*, 501 U.S. at 434; *United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011). An investigatory stop occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Jordan*, 635 F.3d at 1185 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

The test for whether the officer restrained a citizen's liberty is whether "a reasonable person would feel free to terminate the encounter." *Drayton*, 536 U.S. at 201; *see also Immigr. & Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984). We must imagine how an objective, reasonable, and innocent person would feel, not how the particular suspect felt. *Drayton*, 536 U.S. at 202; *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). All the circumstances are relevant, *Bostick*, 501 U.S. at 439, including "whether a citizen's path is blocked or impeded"; whether the officers retained the individual's identification; "the suspect's age, education and intelligence; the length of the . . . detention and questioning; the number of police officers present"; whether the officers displayed their weapons; "any physical touching of the suspect[;] and the language and tone of voice of the police." *Perez*, 443 F.3d at 778 (internal quotation marks omitted); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).

Knights argues that the district court should have suppressed his admissions and evidence because the officers stopped him without reasonable suspicion when they parked the patrol car close to his car and then approached him. He does not challenge

any seizure that occurred after that point. The government responds that the encounter between Knights and the officers was initially consensual and alternatively that the officers had reasonable suspicion. Because we conclude that the encounter was initially consensual, we need not decide whether the officers had reasonable suspicion.

In this encounter, a reasonable person would have felt free to leave. In fact, Knights's companion Keaton did leave. As Keaton had done, Knights was physically capable of walking away. He also could have driven away, and the officers did not display their weapons, touch Knights, or even speak to him—let alone issue any commands or ask him for his identification and retain it. And before the officers approached Knights, they did not activate the lightbar or siren on the patrol car, and as we have mentioned, they allowed Keaton to leave the car, ignore their invitation to talk, and enter the home where the car was parked.

In similar circumstances, we have concluded that an officer did not restrain a suspect. In *Miller v. Harget*, an officer parked behind a suspect's parked car—blocking him from driving away—and then "turned on his 'window lights'" and approached the suspect's car on foot. 458 F.3d 1251, 1257–58 (11th Cir. 2006). We reasoned that when the officer quickly approached the suspect's car, he "did not do anything that would appear coercive to a reasonable person. For example, he did not draw his gun, give any directions to [the suspect], or activate his roof lights." *Id.* at 1257. Because the officer did not make a "show of authority that communicated to the individual that his liberty was restrained," it was not an

investigatory stop. *Id.* at 1258 (alterations adopted) (internal quotation marks omitted). For the same reason, a reasonable person in Knights's position would have felt free to leave; the officers did not make a show of authority communicating that Knights was not free to leave.

Knights disagrees and relies on our precedent *United States v. Beck*, in which we concluded that the officers stopped the defendant because of the proximity between his car and the officers' car. 602 F.2d 726, 727, 729 (5th Cir. 1979). Two officers pulled their patrol car alongside Beck and his passenger's parked and idling car and "engaged [them] in conversation" about what they were doing there. *Id.* at 727. We explained that "[b]y pulling so close to the [car], the officers effectively restrained the movement of Beck and his passenger" and it was clear "that they were not free to ignore the officers and proceed on their way." *Id.* at 729 (alterations adopted) (internal quotation marks omitted). Knights argues that the same is true here because the way in which the officers parked blocked him from driving away, and the officers also impeded his ability to walk away.

We are unpersuaded that *Beck* controls here. The officers approached Knights in a meaningfully different manner. Instead of parking alongside his car and engaging him in conversation, they parked near his car—with enough space for him to drive away—and approached his car to try to speak to him, without conveying that Knights was required to comply. Indeed, as we have noted, just a moment earlier, Knights's companion obviously felt free to

leave the car, ignore the officer's invitation to speak with him, and enter the house.

Knights's other arguments are also unpersuasive. He argues that a reasonable person would not have felt free to walk away because doing so would have required abandoning his car in a high-crime area. But we disagree because two officers would have been near the car, and Knights could have easily returned to the car as soon as they left. He also repeatedly mentions that Officer Seligman used a flashlight when he approached the Oldsmobile. But we fail to see how a flashlight communicated a show of authority in these circumstances. A flashlight would also be used by "an officer approach[ing] a stranded motorist to offer assistance," *Miller*, 458 F.3d at 1258, or by an ordinary person outside in the middle of the night. Knights also argues that the presence of *two* officers weighs in favor of the encounter being a seizure, and that "young African-American men feel that they cannot walk away from police without risking arrest or bodily harm." Although the presence of multiple officers and the age and race of a suspect may be relevant factors, *see Mendenhall*, 446 U.S. at 558; *Perez*, 443 F.3d at 778, the totality of the circumstances establish that this encounter was not coercive.

IV. CONCLUSION

We **AFFIRM** Knights's conviction.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA v. ANTHONY W. KNIGHTS /	Case No. 8:18-cr-100-T-33AAS

ORDER

This matter is before the Court on consideration of United States Magistrate Judge Amanda Arnold Sansone's Amended Report and Recommendation (Doc. # 54), filed on July 16, 2018, recommending that Defendant Anthony W. Knights's Motion to Suppress (Doc. # 28) be granted. Judge Sansone entered the Amended Report and Recommendation after holding an evidentiary hearing. (Doc. # 42). The Government filed a timely objection to the Report and Recommendation (Doc. # 61) on July 30, 2018. Defendant responded to the Objection (Doc. # 62) on August 13, 2018, and the Government replied on August 21, 2018. (Doc. # 65).

This Court held an oral argument to address the objection on August 24, 2018. (Doc. # 66). For the reasons stated in open court on August 24, 2018, and as articulated below, the Court sustains the Government's objection to the Report and Recommendation. The Court denies the Motion to Suppress.

I. Legal Standard

After conducting a careful and complete review of the findings and recommendations, a District Judge may accept, reject or modify the Magistrate Judge's Report and Recommendation. 28 U.S.C. § 636(b)(1); *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982). In the absence of specific objections, there is no requirement that a district judge review factual findings *de novo*, *Garvey v. Vaughn*, 993 F.2d 776, 779 n.9 (11th Cir. 1993), and the court may accept, reject or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b)(1)(C). The District Judge reviews legal conclusions *de novo*, even in the absence of an objection. *See Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 604 (11th Cir. 1994); *Castro Bobadilla v. Reno*, 826 F. Supp. 1428, 1431-32 (S.D. Fla. 1993), aff'd, 28 F.3d 116 (11th Cir. 1994).

II. The Report and Recommendation

The Magistrate Judge entered detailed Factual Findings on pages 2 through 6 of the Amended Report and Recommendation. (Doc. # 54). This Court does not find any reason to quarrel with the accuracy of those factual findings. The Report and Recommendation correctly explains that law enforcement officers Seligman and Samuel were patrolling a high crime neighborhood at 1:00 AM on January 26, 2018, in a marked police cruiser. At that time, the officers observed Defendant and another man, Hozell Keaton, leaning into an Oldsmobile that was parked in front of a residence. Defendant and Keaton gave the officers a blank stare when the officers drove by. Someone tried to start the

Oldsmobile, but it did not start. The officers then turned the cruiser around and parked near the Oldsmobile to ensure that no criminal activity was underway. The officers testified that the police cruiser's trunk was parallel with the Oldsmobile's trunk, and that the police cruiser was parked on the public street, while the Oldsmobile was parked in the yard of a residence. At that time, Keaton left the Oldsmobile and walked directly into the residence.[1] Officer Samuel tried to get Keaton's attention, but Keaton made it into the house and did not respond to the Officer's attempts to initiate a police-citizen encounter.

Officer Seligman then approached the Oldsmobile, holding a standard police flashlight, and he testified that he smelled the distinct odor of marijuana. At that point, only Defendant was in the Oldsmobile. Officer Seligman asked Defendant if he possessed marijuana, and Defendant responded: "I'll be honest with you. It's all gone." Officer Seligman accordingly began a narcotics investigation. Officer Seligman asked Defendant to step out of the Oldsmobile. Officer Seligman searched Defendant and found a pill bottle containing multiple different prescription drugs. Defendant stated that he had prescriptions for the medications and that the prescriptions were in a backpack in the Oldsmobile. Officer Seligman located the backpack and found a firearm cartridge, a ski mask, and other items.

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[1] As developed at the oral argument held on August 24, 2018, Defendant's nephew had also been in the Oldsmobile but he made it into the residence before any interaction with law enforcement took place.

Officer Seligman then searched the Oldsmobile. He located multiple firearms, ammunition, and other contraband. Defendant admitted that he owned the firearms and ammunition. Defendant was charged with being a felon in possession of a firearm and ammunition on March 1, 2018. (Doc. # 1).

As noted, Defendant filed a Motion to Suppress. (Doc. # 28). He argues that all items of evidence (including his own statements) derived from the January 26, 2018, search are fruits of the poisonous tree and therefore should be suppressed under the Fourth Amendment to the United States Constitution. The Government responded to the Motion to Suppress. (Doc. # 34). On June 19, 2018, Judge Sansone held an evidentiary hearing on the Motion to Suppress. (Doc. # 56). Judge Sansone entered her Amended Report and Recommendation on July 16, 2018, recommending that the Motion to Suppress be granted. (Doc. # 54). She based her recommendation on the finding that Defendant was seized without reasonable suspicion when the police parked the cruiser near the Oldsmobile. The Government objected to this finding on July 30, 2018. (Doc. # 61). As explained at the August 24, 2018, oral argument, the Court sustains the Government's objection.

III. Analysis

Here, Defendant was obviously subject to both search and seizure. The question is: Did law enforcement violate his Fourth Amendment Rights? The analysis here turns on when Defendant was "seized."

The Magistrate Judge found that "Officers Seligman and Samuel seized Mr. Knights when they parked the patrol car very close to the Oldsmobile, impeded Mr. Knight's ability to drive away, then approached Mr. Knights in the Oldsmobile flashing a flashlight." (Doc. # 54 at 14). And, according to the Report and Recommendation, at the time of that seizure, the officers had no reasonable suspicion of criminal activity.

The Court respectfully disagrees with this finding. The Fourth Amendment protects individuals from unreasonable search and seizure. But, not every police-citizen encounter results in a seizure under the Fourth Amendment. Instead, three categories of police-citizen encounters exist: (1) police-citizen exchanges that involve no coercion or detention; (2) brief seizures or investigatory stops (*Terry* stops); and (3) full scale arrests. *United States v. Perez*, 443 F.3d 772, 777 (11th Cir. 2006).

When the police officers initially approached Defendant in his car, it was a police-citizen encounter involving no detention and no coercion. The police approached for the lawful purpose of determining whether criminal activity was afoot. Defendant was not detained by the mere presence of the police or the parking of a police car in his proximity. The Eleventh Circuit explains:

> Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when law

> enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage – provided that they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.

United States v. Drayton, 536 U.S. 194, 200 (2002).

The mere fact that a police officer approaches someone and identifies himself does not result in a seizure. *United States v. Baker*, 290 F.3d 1276, 1278 (11th Cir. 2002). And, like the facts presented here, a police officer does not seize an individual merely by approaching an individual in a parked car. *Miller v. Harget*, 458 F.3d 1251, 1257 (11th Cir. 2006).

Officer Seligman testified that Defendant was seized when the narcotics investigation began, but not before. Officer Seligman testified that "it is not illegal to have the odor of marijuana" - "The odor of marijuana is not illegal, so he is not arrested at that point." (Doc. # 56 at 38). But, the odor of marijuana did provide probable cause for the search of Defendant's person and car. *See United States v. Garza*, 539 F.2d 381, 382 (5th Cir. 1976) ("The odor of marijuana emanating from the vehicle gave the officer probable cause to conduct the search."); *United States v. Ward*, No. 17-10626, 2018 WL 416772, at *7 (11th Cir. Jan. 16, 2018) ("It is also well established that if a police officer detects the odor of marijuana, this gives rise to probable cause."); *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982) ("At the point marijuana was smelled by [an officer], probable

cause to believe a crime had been committed . . . arose.").

With probable cause firmly established, the police searched Defendant. That search revealed a pill bottle with multiple kinds of pills. The Defendant stated that the prescriptions were in a backpack in the car. The police searched the backpack and found a firearm magazine. Then, they found multiple firearms and ammunition in the car.

This seizure is described differently in the Amended Report and Recommendation. The Magistrate Judge found that Defendant was seized much earlier – when the police parked the police car near the Oldsmobile. As noted, this Court disagrees with that finding.

The Report and Recommendation draws extensively upon *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979). There, two police officers patrolled a high crime neighborhood in a marked police car when they saw a parked Chevrolet with the engine running and two men inside. The police wanted to have an encounter with the two men in the Chevrolet, so they parked next to the Chevrolet. However, the police car was so close to the Chevrolet that the officer could not open his door to exit the police car. As a result, the police car pulled forward. There, the former Fifth Circuit said: "By pulling so close to the Chevrolet, the officers effectively restrained the movement of Beck and his passenger; from the record it is readily apparent that they were not free to ignore the officers and proceed on their way." *Id.* at 729.

The present case is not comparable to *Beck* because the police car was not similarly close to the

Oldsmobile. Instead, the case is more factually similar to *United States v. Miller*, where a police officer, after observing Miller's car changing lanes and pulling into a hotel parking lot without using a signal, pulled into the parking lot and parked directly behind Miller's car, thereby blocking Miller in. The officer activated his lights and beeped the siren to announce the police presence. The officer got out of the car and approached the driver's side of Miller's car. When Miller lowered the window, the police officer smelled alcohol and observed that Miller had bloodshot and glassy eyes.

The district court found that Miller was not detained until that very point (not when the police parked Miller in). The police officer asked Miller various questions and Miller admitted he had been drinking. Then, after Miller refused to take a breathalyzer, he was arrested for DUI. Following an acquittal, Miller filed a complaint in federal court alleging arrest without probable cause. The district court found that Miller was seized for Fourth Amendment purposes only after the police officer approached the car, smelled alcohol on Miller and observed his appearance, and prior to that (that is, when he was just parked in by a police officer), he was not detained.[2]

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[2] The Court disagrees with the statement in the Amended Report and Recommendation that to the extent *Miller* applied and conflicted with *Beck*, *Beck* controls. (Doc. # 54 at 15). *Beck* did not establish a per se rule that parking a police car near a citizen's car causes a seizure. There is no bright-line rule applicable to investigatory pursuits, and the appropriate test is whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all the surrounding

In the present case, it was not established that the Oldsmobile was even parked in. Rather, with skilled driving, Defendant could have driven away (if his car could start) and, it is clear that he could have walked away, because that is exactly what his companions did when they noticed police presence.

In addition to comparing factually similar cases, the Court also examines the following factors to determine whether (or when) a seizure has occurred: (1) whether a citizen's path is blocked or impeded; (2) whether identification is retained; (3) the suspect's age, education and intelligence; (4) the length of the suspect's detention and questioning; (5) the number of police officers present; (6) the display of weapons; (7) any physical touching of the suspect; and (8) the language and tone of the voice of the police. *See De La Rosa*, 922 F.2d at 678.

All of these factors point toward a seizure. But none of the factors implicate a seizure when the single police cruiser parked near the Oldsmobile. Defendant's car would not start – that is what

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circumstances, would have concluded that the police had restrained his liberty so that he was not free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). Per se rules are generally inappropriate in the Fourth Amendment context, and the proper inquiry necessitates consideration of all circumstance surrounding the encounter. *United States v. Drayton*, 536 U.S. 194, 201 (2002). Whether a citizen's path is blocked or impeded by law enforcement is not dispositive, but is one of the factors to consider in conducting a Fourth Amendment analysis. *See United States v. De La Rosa*, 922 F.2d 675, 678 (11th Cir. 1991). *Miller* and *Beck* present different factual circumstances, and do not conflict with each other since each case is determined by the totality of the circumstances.

prevented him from driving away, not the parked police car. And, there was at least one other man, if not two, who simply walked away and went into the home. There was nothing stopping Defendant from doing the same. At the time the police car parked, there was no questioning, no display of weapons, no physical touching of Defendant, no asking for ID, and no verbal exchange with Defendant. The seizure factors were implicated only after the police smelled marijuana and lawfully began their narcotics investigation. The Court accordingly finds that Defendant's Fourth Amendment rights were not violated and his Motion to Suppress is accordingly denied.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED:**

(1) The Court declines to adopt United States Magistrate Judge Amanda Arnold Sansone's Amended Report and Recommendation (Doc. # 54) to the extent it finds that the Defendant was subject to an unlawful seizure.

(2) The Government's Objection to the Report and Recommendation (Doc. # 61) is **SUSTAINED**.

(3) Defendant's Motion to Suppress (Doc. # 28) is **DENIED**.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 6th day of September, 2018.

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA v. ANTHONY W. KNIGHTS /	Case No. 8:18-cr-100-T-33AAS

AMENDED REPORT AND RECOMMENDATION
(amended as to exhibit citations only)[1]

Anthony Knights moves to suppress all evidence and statements law enforcement obtained during a search. (Doc. 28). The government objects. (Doc. 34). The undersigned concludes, based on the totality of the circumstances, law enforcement seized Mr. Knights without reasonable suspicion. Further, the undersigned concludes the evidence and statements the officers obtained are fruit of the unlawful search. Therefore, the undersigned recommends Mr. Knights's motion to suppress should be **GRANTED**.

[1] This Amended Report and Recommendation is substantively identical to the previous Report and Recommendation (Doc. 51). This Amended Report and Recommendation, however, amends and replaces the prior Report and Recommendation to reflect more accurate citations to the parties' exhibits. (Docs. 52, 53). Consequently, the parties have fourteen days from the date of this Amended Report and Recommendation to object under 28 U.S.C. Section 636(b)(1).

I. FACTUAL FINDINGS[2]

Around 1:00 a.m. on January 26, 2018, Officers Seligman and Samuel[3] patrolled a high-crime residential area in Tampa, Florida, in a marked police vehicle. Officer Seligman drove and Officer Samuel sat in the passenger seat. Both officers wore their uniforms and carried their service-issued handgun. The officers knew the residential area recently experienced high crime and gang activity because they previously responded to multiple shootings and narcotics crimes in the area.

While they patrolled, the officers drove past a dark blue Oldsmobile parked next to the street in a residence's front yard. The Oldsmobile was parallel-parked between a wooden white fence located in front of the residence and the street. The driver's side of the Oldsmobile was closer to the street and the passenger's side closer to the fence. Enough space existed for someone to open the driver-side door without going onto the street and enough space existed to open the passenger-side door without hitting the fence. (Doc. 52, Gov't Ex. 1–7). Behind the Oldsmobile was the residence's stand-alone mailbox and a city-issued garbage receptacle, and in front of the Oldsmobile was a neighbor's stand-alone mailbox. (Doc. 52-1, Gov't Ex. 1). Towering over the neighbor's mailbox and directly in front of the Oldsmobile was a large, overgrown shrub, part of which nearly touched

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[2] These facts, construed in a light more favorable to the government, were elicited at an evidentiary hearing held before the undersigned.

[3] Officers Seligman and Samuel work for Tampa Police Department.

the front of the parked Oldsmobile. (Doc. 52-1, Gov't Ex. 1; Doc. 52-5, Gov't Ex. 5; Doc. 53-4, Def.'s Ex. 10).

Officers Seligman and Samuel saw one man, later identified as Mr. Knights, leaning into the open driver-side door and another man, later identified as Hozell Keaton, leaning into the open passenger-side door. Believing Messrs. Knights and Keaton might be burglarizing the car, the officers drove past the Oldsmobile to get a better look. When the officers passed, Messrs. Knights and Keaton gave the officers a "blank stare." After they passed the Oldsmobile, the officers heard someone try to start the car, but the engine would not start. The officers then turned the patrol car around to investigate further.

Officer Seligman parked the patrol car on the side of the street immediately next to the Oldsmobile and facing the direction of (and blocking) oncoming traffic, though there is no evidence that any traffic approached during the encounter. The patrol car was parked facing the opposite direction that the Oldsmobile faced and the two cars were trunk-to-trunk; the trunk of the patrol car was parallel with the Oldsmobile's trunk. Mr. Knights was by the driver's side next to the patrol car. Officer Seligman flashed his flashlight on Mr. Knights while he parked the patrol car.

Before Officer Seligman parked the patrol car, Mr. Keaton walked away from the Oldsmobile, through the gate in the wooden fence, and toward the house. Officer Samuel got out of the patrol car, walked toward Mr. Keaton, and tried to get his attention to speak with him. But Mr. Keaton was already close to the residence's front door by the time

Officer Samuel got out of the patrol car. So, Officer Samuel was unable to get Mr. Keaton to speak with him before Mr. Keaton walked into the house. Officer Samuel then walked back toward the Oldsmobile.

While Officer Samuel tried to speak with Mr. Keaton, Mr. Knights sat in the driver's seat of the Oldsmobile and closed the door. Officer Seligman got out of the patrol car and approached Mr. Knights in the Oldsmobile. At this point, two uniformed officers wearing service-issued handguns stood in close proximity to, and approached, Mr. Knights in the Oldsmobile. Officer Seligman knocked on Mr. Knights's window. Mr. Knights opened his door and, immediately, Officer Seligman smelled a distinct burnt marijuana odor coming from the car.

After he smelled the marijuana, Officer Seligman asked Mr. Knights if he owned the Oldsmobile. Mr. Knights said the car belonged to him and his wife. During this exchange, Mr. Knights gave Officer Seligman his driver's license. Mr. Knights testified he also gave his vehicle registration to Officer Seligman, but the officers could not confirm that in their testimony. Officer Seligman also asked Mr. Knights if he had any marijuana. Mr. Knights replied, "I'll be honest with you. It's all gone." At this point, Officer Seligman began a narcotics investigation.

Officer Seligman had Mr. Knights step out of the Oldsmobile, moved him toward the back of the car, and had him place his hands on top of the car. Officer Seligman searched Mr. Knights and found a pill bottle inside one of his pockets. During this time,

Corporal McKendree[4] arrived on scene. Officer Seligman handed the pill bottle to Corporal McKendree, who found three different types of pills inside the bottle. Officer Seligman then arrested Mr. Knights and placed him in the back seat of his patrol car. Mr. Knights told Officer Seligman he had a prescription for the pills, which was located in a backpack in the backseat of the Oldsmobile.

After placing Mr. Knights in the patrol car, Officer Seligman began to search the Oldsmobile while Officer Samuel stood next to the Oldsmobile. Officer Seligman first searched the backseat of the Oldsmobile for the backpack. Officer Seligman located the backpack and, inside, found medical documents, a firearm cartridge, and a ski mask. Officer Seligman also saw a scale in the backseat. While Officer Seligman searched the Oldsmobile, Officer Samuel ran a search of Mr. Knights's driver's license to determine if Mr. Knights and his wife owned the Oldsmobile. The officers eventually learned the Oldsmobile belonged to Mr. Knights's wife.

Officer Seligman then searched the front of the Oldsmobile, where he found a handgun between the driver's seat and center console. Officer Seligman saw smoked marijuana in the ashtray and marijuana residue in different parts of the car, including the floorboard.

After Officer Seligman performed his search, Officer Samuel searched the trunk of the Oldsmobile

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[4] Corporal McKendree also works for Tampa Police Department.

to determine if other items were in the car. Officer Samuel found a rifle and a firearm cartridge in the trunk. Officer Seligman read *Miranda* warnings to Mr. Knights, who then agreed to be interviewed and gave Officer Seligman a statement. In his statement, Mr. Knights admitted the handgun Officer Seligman found in the front of the Oldsmobile belonged to him.

A federal grand jury indicted Mr. Knights on one count of felon in possession of a firearm in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2). (Doc. 1). Agents from the Federal Bureau of Investigation then arrested Mr. Knights. (Doc. 8). The court arraigned Mr. Knights and later released him on bond. (Docs. 4, 9). Mr. Knights then submitted this motion to suppress. (Doc. 28).

II. ANALYSIS

Mr. Knights argues evidence Officers Seligman and Samuel obtained should be suppressed because the officers seized Mr. Knights without reasonable suspicion in violation of the Fourth Amendment. (Doc. 28, pp. 5–18). Because Officers Seligman and Samuel detained him without reasonable suspicion, Mr. Knights argues the evidence obtained were fruits of an unlawful search. (*Id.* at 18–19).

The government claims the interaction between Officers Seligman and Samuel and Mr. Knights began as a consensual police-citizen encounter. (Doc. 34, pp. 8–12). According to the government, reasonable suspicion arose when Officer Seligman smelled marijuana coming from the Oldsmobile. (*Id.*). Alternatively, the government claims Officers Seligman and Samuel had reasonable suspicion to stop Mr. Knights before they parked next to the

Oldsmobile. (*Id.* at 12-16). Either way, the government concludes that evidence obtained need not be suppressed because the officers found the evidence during a lawful seizure. (*Id.* at 16–18).

The undersigned will address each side's contentions in turn.

A. Officers Seligman and Samuel Seized Mr. Knights When They Parked Next to the Oldsmobile and Blocked In Mr. Knights's Vehicle

Mr. Knights claims Officers Seligman and Samuel seized him when they parked the patrol car next to the Oldsmobile. (Doc. 28, p. 10). Mr. Knights argues the patrol car's position next to, and slightly behind, the Oldsmobile blocked the car "so [Mr. Knights] could not drive forward (through the mailbox, tree, and fence), and could not drive in reverse (through the other mailbox, garbage receptacle, and the police cruiser)." (Doc. 28, p. 11). According to Mr. Knights, a reasonable person in his situation would not feel free to leave and disregard the officers after the patrol car parked in this manner alongside the Oldsmobile. (*Id.*).

Mr. Knights also argues a reasonable person would not feel free to leave after Officer Samuel tried to speak with Mr. Keaton and then both officers approached Mr. Knights in the Oldsmobile. (*Id.*). Mr. Knights describes the scene in his motion to suppress in the following way: "Two police officers in uniforms with guns blocked Mr. Knights's path with their car, and then exited the vehicle, seemed to attempt to seize his companion, and then approached him and accused him of committing a crime." (*Id.*). Mr.

Knights claims the officers' position between the patrol car and the Oldsmobile when Officer Seligman spoke to Mr. Knights further illustrates that a reasonable person would not feel free to terminate the encounter with the officers. (*Id.* at 11–12). Alternatively, Mr. Knights argues the officers seized him when he gave them his driver's license. (*Id.* at 12).

The government argues Officers Seligman and Samuel began a consensual police-citizen encounter when they parked next to the Oldsmobile. (Doc. 34, p. 8). The government claims the officers approached Mr. Knights to determine whether they observed a crime in progress when the officers drove past the Oldsmobile in the patrol car. (*Id.*). According to the government, the patrol car did not block in the Oldsmobile and a reasonable person would have felt free to drive away. (*Id.* at 10). The government also claims Mr. Knights could have walked away from the officers, like Mr. Keaton, and a reasonable person would have felt free to do so. (Doc. 34, p. 10). Instead, the government argues the officers seized Mr. Knights after Officer Seligman smelled marijuana coming from the Oldsmobile, and that marijuana odor established reasonable suspicion to detain Mr. Knights. (*Id.* at 11–12).

The Fourth Amendment protects individuals from unreasonable search and seizure. U.S. Const. amend. IV. Not every police-citizen encounter results in a seizure under the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Instead, three categories of police-citizen encounters exist: (1) police-citizen exchanges that involve no coercion or detention; (2) brief seizures or investigatory

detentions (*Terry* stops); and (3) full scale arrests. *United States v. Perez*, 443 F.3d 772, 777 (11th Cir. 2006) (citation omitted). A police-citizen encounter does not trigger Fourth Amendment scrutiny until the interaction loses its consensual nature. *Bostick*, 501 U.S. at 434. A police officer need not have reasonable suspicion of criminal activity to begin a consensual police-citizen encounter. *Id.*

A police-citizen encounter is consensual as long as a reasonable person would feel free to disregard the police officer and "go about his business." *Id.*; *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (citation omitted). The "simple act" of a police officer asking questions to a citizen is not a seizure under the Fourth Amendment. *Perez*, 443 F.3d at 778 (citation omitted). Courts consider the following factors when determining if a police-citizen encounter constitutes a seizure:

> [W]hether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.

United States v. De La Rosa, 992 F.2d 675, 678 (11th Cir. 1991) (citation omitted).

A police officer seizes a citizen when the officer "by means of physical force or show of authority" restrains that citizen's freedom to move. *Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The test to

determine whether an officer seizes a citizen under the Fourth Amendment asks if "in view of all of the circumstances surrounding the [police-citizen encounter], a reasonable person would have believed that he was not free to leave." *Chesternut*, 486 U.S. at 573 (quotation and citation omitted).

The question here is whether a reasonable person in Mr. Knights's position would believe he was free to leave after Officers Seligman and Samuel parked the patrol car next to the Oldsmobile and approached him.

The facts of this case are similar to those the former Fifth Circuit addressed in *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979).[5] In *Beck*, two police officers patrolled a high-crime neighborhood in a marked car when they saw a Chevrolet parked, with two individuals inside, on the side of the road with its engine running. *Id.* at 727. One of the officers, who claimed to know almost everyone who lived in the neighborhood, did not recognize either occupant in the car, so he parked the patrol car next to the Chevrolet. *Beck*, 602 F.2d at 727. The officer originally parked the patrol car so close to the Chevrolet that the officer could not get out to investigate, so the officer pulled forward. *Id.* The former Fifth Circuit found that when the officers parked the patrol car next to the Chevrolet, "they clearly took the sort of action contemplated by *Terry v. Ohio*" and its definition of a "stop." *Id.* at 728

[5] The former Fifth Circuit's decisions are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

(citations and quotations omitted). The former Fifth Circuit stated:

> By pulling so close to the Chevrolet, the officers restrained the movement of [the two occupants]; from the record it is readily apparent they were "not free to ignore the officer(s) and proceed on (their) way."

Id. at 729 (citations omitted); *see also Childs v. Dekalb Cty.*, 286 F. App'x 687, 695 (11th Cir. 2008) (concluding police officers seized citizens when, among other things, the officers' car blocked the citizens' car from pulling into a parking space or leaving the parking lot); *United States v. Wright*, No. 3:06CR447/MCR, 2006 WL 3483503, at *3 (N.D. Fla. Nov. 30, 2006) (concluding a police officer seized a citizen when, among other things, the officer parked his patrol car at an angle to the citizen's car with the headlights on).[6]

Similarly here, when Officer Seligman parked the patrol car next to the Oldsmobile in the front yard of a residence, he initiated an investigatory stop (i.e., *Terry* stop) by impeding Mr. Knights's freedom of movement.[7] When Officer Seligman parked the patrol car, Mr. Knights was by the driver's side of the

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[6] *But see United States v. Flores-Uriostegui*, No. 1:01-CR-00438-JEC-LTW, 2012 WL 1884036, at *9 (N.D. Ga. May 22, 2012) (stating that officers arguably needed no reasonable suspicion to park their patrol car in a way that prevented the defendants from moving their parked car).

[7] The undersigned will discuss the characteristics and requirements of a *Terry* stop in Section II(B) below, which concerns whether the officers had reasonable suspicion to seize Mr. Knights.

Oldsmobile right next to the patrol car. After Officer Seligmam got out of the patrol car and Officer Samuel walked back toward the Oldsmobile, two uniformed officers with service-issued handguns stood between Mr. Knights and his path to the residence. Mr. Knights then sat down in the driver's seat of the Oldsmobile and closed the driver-side door—behavior that suggests Mr. Knights had no desire to interact with the officers, but the officers still approached him.

When Mr. Knights sat down in the driver's seat, in front of him was a neighbor's mailbox and a large, overgrown shrub. To his right was the white wooden fence surrounding the front of the house. Behind Mr. Knights was the house's mailbox, a large trash receptacle, and part of the patrol car. And to his left was the patrol car parked trunk-to-trunk with the Oldsmobile. Though not impossible, if Mr. Knights wanted to drive away, he would have had significant difficulty doing so without hitting the patrol car or an officer.

When Mr. Knights sat in the Oldsmobile, Officer Seligman approached him in uniform, wearing his service-issued handgun, and flashed a flashlight at Mr. Knights. Simultaneously, Officer Samuel, also in uniform and wearing his service-issued handgun, walked back toward the Oldsmobile after failing to speak with Mr. Keaton before he entered the residence where the car was parked. Considering the officers' show of authority, especially Officer Seligman, their locations as they approached the car, and the patrol car impeding Mr. Knights's ability to drive away, no reasonable person in Mr. Knights's

position would feel free to leave or disregard the two officers.

The government claims the patrol car did not completely block the Oldsmobile and it was possible for Mr. Knights to drive away. But this argument misses the point. The test is not whether it was possible for Mr. Knights to drive away. The test is, whether under the totality of the circumstances, a reasonable person would believe he was free to leave. *Chesternut*, 486 U.S. at 573 (quotation and citation omitted). The totality of the circumstances in this case establish that a reasonable person would not drive away when an officer parks a patrol car next to the person's vehicle in such a way to make it very difficult to drive away, and then the officer, in uniform and with his service-issued handgun, approaches the person's parked car flashing a flashlight at the car while a second officer also approaches the parked car.

The government also argues no seizure occurred when Officer Seligman parked the patrol car next to the Oldsmobile because Mr. Knights could have walked away like Mr. Keaton. But Mr. Keaton began walking away from the Oldsmobile and into the residence before Officer Seligman parked the patrol car. Mr. Keaton did not have to walk past two officers to get into the residence. Furthermore, before he walked away, Mr. Keaton was on the passenger's side of the Oldsmobile—the side closer to the residence. In contrast, Mr. Knights was still by the driver's side of the Oldsmobile—the side closer to the patrol car—when Officer Seligman parked the patrol car in close proximity to Mr. Knights. Had Mr. Knights decided to walk into the residence, he would have had to walk

past Officer Seligman, who approached the Oldsmobile, and Officer Samuel, who walked back toward the Oldsmobile. A reasonable person would not feel free to walk past and disregard two uniformed officers, especially after Officer Samuel failed to speak with Mr. Keaton and the officers parked the restrictive way they did. Therefore, the government's argument is unavailing.

To support its contention that the encounter did not rise to the level of a *Terry* stop before Officer Seligman smelled marijuana coming from the Oldsmobile, the government points to the following factors: the officers did not retain Mr. Knights's driver's license until Officer Seligman smelled marijuana; the encounter was "extremely brief" before Officer Seligman smelled marijuana; only two officers were present during the encounter; the officers did not display their weapons; and the language and tone used by the officers was "calm and professional." (Doc. 34, p. 10).

The length of the citizen's detention and questioning, whether the officers displayed their weapons, the number of officers present, and the officers' language and tone of voice are relevant factors when determining if the officers seized a citizen. *De La Rosa*, 992 F.2d at 678. That said, when a police officer parks so close to a citizen's car to impede the citizen's ability to drive away, that action is "clearly the sort of action contemplated by *Terry v. Ohio*." *Beck*, 602 F.2d at 728–29 (citations omitted). As a result, Officers Seligman and Samuel seized Mr. Knights when they parked the patrol car very close to the Oldsmobile, impeded Mr. Knights's ability to drive away, then approached Mr. Knights in the

Oldsmobile flashing a flashlight. Therefore, this contention by the government is also unconvincing.

The government argues a police officer does not seize a citizen by approaching that person in a parked car and, for support, cites *Miller v. Harget*, 458 F.3d 1251 (11th Cir. 2006). In *Miller*, the police officer parked a marked patrol car directly behind the suspect's car before getting out and approaching the driver-side window. *Id.* at 1253. The suspect argued the police officer seized him when he parked behind his car. *Id.* at 1257. But the Eleventh Circuit found no seizure when the officer parked behind the suspect's car because the suspect "did not demonstrate that he had any intent to back out of the parking space when [the police officer] pulled up behind him." *Id.* at 1258. Instead, the suspect, who just pulled into a hotel parking lot, informed the officers he intended to get out, walk away from the parked car, and walk into a hotel room. *Id.* at 1257–58.

Here, Mr. Knights's actions, before and after Officer Seligman parked the patrol car, demonstrated no clear intent. When the officers drove past the Oldsmobile, they heard someone—presumably Mr. Knights because he was by the driver-side—trying to start the engine. And when Officer Seligman parked the patrol car next to the Oldsmobile, Mr. Knights sat in the driver's seat and closed the door. Therefore, unlike the suspect in *Miller* who demonstrated he had no intent to drive his parked car, it is unclear here whether Mr. Knights intended to drive the Oldsmobile or walk into the residence. Rather, Mr. Knights's attempt to start the Oldsmobile then sit in the driver's seat and close the door suggest he

intended to drive away. As a result, *Miller* is inapplicable.[8]

At the suppression hearing, Officer Seligman failed to explain why he parked the patrol car trunk-to-trunk with the Oldsmobile and facing toward oncoming traffic, with the front of the patrol car angled slightly behind the Oldsmobile's rear, impeding the Oldsmobile's ability to drive away. Officer Seligman also acknowledged he could have parked on the right side of the street, where a citizen would park. Had Officer Seligman parked on the right side of the street, the patrol car would have not have impeded Mr. Knights's ability to drive away.

Officers Seligman and Samuel seized Mr. Knights when Officer Seligman parked the patrol car next to the Oldsmobile and restrained Mr. Knights's freedom of movement. Officer Seligman's show of authority after parking the patrol car (flashing his flashlight at Mr. Knights in the Oldsmobile and approaching Mr. Knights in uniform) further establish the officers seized Mr. Knights. The undersigned will therefore address whether the officers had reasonable suspicion to seize Mr. Knights.

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[8] To the extent *Miller* applies and conflicts with the former Fifth Circuit's ruling in *Beck*, *Beck* controls. A former Fifth Circuit panel decided *Beck* in 1979; an Eleventh Circuit panel decided *Miller* in 2006. *Beck*, 602 F.2d 726; *Miller*, 458 F.3d 1251. Under the Eleventh Circuit's prior precedent rule, only the Supreme Court or the Eleventh Circuit sitting en banc can overrule a prior panel decision. *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997) (citation omitted). Therefore, until the Eleventh Circuit sitting en banc or the Supreme Court holds otherwise, a district court must follow *Beck* to the extent the *Beck* and *Miller* decisions conflict.

B. Officers Seligman and Samuel Had No Reasonable Suspicion of Criminal Activity When They Seized Mr. Knights

Mr. Knights argues Officers Seligman and Samuel seized him without reasonable suspicion. (Doc. 28, pp. 12–18). According to Mr. Knights, the following factors were insufficient to provide the officers with reasonable suspicion that Mr. Knights engaged in criminal activity:

> (1) that it was nighttime; (2) that there was a "recent uptick" in violence in the area because of gang activity; (3) that the two men were reaching into the open doors of the car; (4) that Mr. Knights's companion "quickly" walked away; and (5) that Mr. Knights tried to turn on the engine but it would not turn over.

(*Id.* at 15).

Mr. Knights argues the court should give little weight to the time of day and the high-crime factors because these factors are "non-specific" and no connection existed between the gang-activity in the neighborhood and the non-violent burglary the officers believed they saw Messrs. Knights and Keaton committing. (*Id.* at 16). Mr. Knights also submits the court should give little weight to Messrs. Knights's and Keaton's movements because neither man left the scene in headlong flight, which might have shown "consciousness of guilt" and provided the officers with reasonable suspicion. (*Id.*). Similarly, Mr. Knights argues the court should give little weight to the facts that Messrs. Knights and Keaton were leaning into the Oldsmobile and the Oldsmobile

would not start. (*Id.* at 17). Mr. Knights concludes that the relevant factors the officers considered are insufficient to establish reasonable suspicion that Mr. Knights engaged in criminal activity when the officers approached the Oldsmobile. (Doc. 28, p. 18).

The government argues the officers had reasonable suspicion to seize Mr. Knights. (Doc. 34, pp. 12–16). The government claims that, although the relevant factors Mr. Knights provided "might hold little weight" individually, in combination, the factors establish reasonable suspicion. (*Id.* at 14–15).

Generally, a police officer must obtain a warrant supported by probable cause to search an individual. *United States v. Magluta*, 418 F.3d 1166, 1182 (11th Cir. 2005). But an officer may conduct a *Terry* stop when, in light of his experience, he has reasonable suspicion that an individual may be involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A *Terry* stop is a brief, warrantless investigatory detention. *Id.*; *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citation omitted).

To determine if an officer had reasonable suspicion, the court considers the totality of the circumstances. *United States v. Cortez*, 499 U.S. 411, 418 (1981). Using the "whole picture," the court determines whether the officer had a "particularized and objective basis" for stopping the individual. *Id.* (citations omitted). The officer need not be certain the individual is involved in criminal activity. *Terry*, 392 U.S. at 28. Instead, the question is whether a reasonably prudent person would be justified in believing his safety, or the safety of others, was in danger. *Id.*

Reasonable suspicion is a less demanding standard than probable cause. *Wardlow*, 528 U.S. at 123. That said, reasonable suspicion is more than a hunch and requires a minimal level of objective justification. *Wardlow*, U.S. at 123–24 (citations omitted). The officer must draw on his own experience and specialized training to make inferences about the information available to him. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Under *Terry*, a court must first examine whether the officer's original investigation of suspicious circumstances was justified "at its inception." 392 U.S. at 19–20. Next, a court must determine whether the scope of any search was reasonably related to the circumstances that justified the investigatory detention in the first place. *Id.* at 20. With respect to a suppression motion, the government must prove reasonable suspicion existed by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (citation omitted); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Here, the officers' seizure of Mr. Knights was not justified at its inception because no reasonable suspicion of criminal activity existed. When driving through a high-crime neighborhood around 1:00 a.m., Officers Seligman and Samuel saw two men leaning into an Oldsmobile parked in front of a residence with its doors open. When the officers drove past the Oldsmobile, the two men gave the officers a "blank stare." Shortly after, the officers heard someone try to start the Oldsmobile, but its engine would not start. When Officer Seligman turned the patrol car around to investigate, Mr. Keaton already began walking toward the front door of the residence where

the Oldsmobile was parked. These facts, taken together as a "whole picture," establish no reasonable suspicion of criminal activity by Messrs. Knights and Keaton.

Officers Seligman and Samuel did not see the two men try to pry the Oldsmobile's doors open, pick the locks to the Oldsmobile's doors, or break the Oldsmobile's windows open. The officers also did not see the two men pull property out of the Oldsmobile. Nor did the officers see either man take off in headlong flight (i.e., sprint) once they saw the patrol car. Had the officers observed these types of actions, they may have had sufficient articulable facts to establish the necessary reasonable suspicion (as opposed to just a hunch) that Mr. Knights engaged in criminal activity.

Once again, *Beck* is instructive on this issue. There, the officers claimed they had reasonable suspicion to stop two men in a parked Chevrolet because they were in a high-crime neighborhood, the parked Chevrolet's engine was running, the Chevrolet was parked next to a convenience store, and one of the officers, who claimed to know everyone in that neighborhood, did not recognize either individual in the Chevrolet. *Beck*, 602 F.2d at 729. The former Fifth Circuit concluded these factors were insufficient for the officers to reasonably suspect the two men of criminal activity. *Id.* With respect to the two men in the Chevrolet the officers seized, the former Fifth Circuit stated:

> They were not offending any traffic ordinance; there was no evidence of recent crimes in the neighborhood, no reason to

> suspect that Beck or his passenger were wanted by the police, and no other reason to believe anything unusual was taking place.

Id.; *see also United States v. Alvin*, 701 F. App'x 151, 153–54 (3d Cir. 2017) (concluding no reasonable suspicion existed when officers seized a citizen who made nervous movements by a car parked in a high-crime neighborhood); *United States v. Dell*, 487 F. App'x 440, 446 (10th Cir. 2012) (concluding no reasonable suspicion existed when an officer detained a citizen who looked into the windows of a parked car in a high-crime neighborhood and then walked away from the parked car when he saw the officer's patrol car).

Similarly here, Messrs. Knights and Keaton were not offending any traffic ordinance. Although Officers Seligman and Samuel previously responded to shootings and narcotics crimes related to gang activity in the area, neither testified they responded to car burglaries or that there had been a recent increase in car burglaries. Nor did the officers testify that Messrs. Knights's and Keaton's actions were consistent with previous car burglaries they witnessed or responded to in their experience as police officers. And, put simply, an older car's failure to start is not so unusual that it is reasonable for the officers to jump to the conclusion that the car is being stolen. Therefore, even taking the facts in the light most favorable to the government, the suspicion that Messrs. Knights and Keaton were in the process of burglarizing the car or stealing the car itself was not reasonable. To the extent any initial suspicion of criminal activity may have been reasonable, the officers' observation that Mr. Keaton subsequently

walked the short distance to the front door of the house where the Oldsmobile was located should have diminished that suspicion before Officer Seligman parked the patrol car to investigate.

Mr. Knights leaning into a car at 1:00 a.m. in a high-crime area, giving a "blank stare" to officers when they drove past in a patrol car, and unsuccessfully trying to start the car did not provide Officers Seligman and Samuel with reasonable suspicion of criminal activity. Therefore, their seizure of Mr. Knights was unlawful from its inception.

C. Evidence and Statements Officers Seligman and Samuel Obtained Were Fruits of an Unlawful Seizure

A court must suppress evidence obtained during an unlawful search, unless the officers obtained the evidence "by means sufficiently distinguishable from the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quotation marks and citation omitted). When determining if a confession or statement made by a defendant is the result of an unlawful search, courts consider multiple factors, including: (1) the temporal proximity of the arrest and the confession or statement; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the officers' misconduct. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975). *Miranda* warnings alone are not enough to "attenuate the taint of an unconstitutional arrest." *Id.* at 602. Nor does a police officer's lack of physical abuse "cure the illegality of an initial arrest." *Taylor v. Alabama*, 457 U.S. 687, 694 (1982).

Here, the physical evidence and statements Officers Seligman and Samuel obtained were the fruits of an unlawful seizure. The officers unlawfully detained Mr. Knights without reasonable suspicion when Officer Seligman parked the patrol car trunk-to-trunk with the Oldsmobile and impeded Mr. Knights's freedom of movement. As a result of that unlawful seizure, Officer Seligman smelled marijuana coming from the Oldsmobile after Mr. Knights rolled down the window to speak with Officer Seligman. The marijuana smell led to Officer Seligman searching Mr. Knights and the Oldsmobile. During his search, Officer Seligman found pill bottles with pills inside, marijuana residue, a firearm, and firearm cartridge. Officer Samuel subsequently found a rifle and another cartridge in the trunk. The officers then read Mr. Knights *Miranda* warnings and obtained a statement. This sequence of events illustrates that no intervening circumstances purged the taint of the officers' unlawful seizure.

Again, *Beck* is instructive and binding. In *Beck*, when police officers unlawfully seized two men in a parked Chevrolet, one of the officers, who got out of the patrol car to speak to the suspects, saw a marijuana cigarette on the ground near the Chevrolet. 602 F.2d at 627. After seeing the marijuana cigarette, the officer arrested the suspect, placed him in the patrol car, and found a syringe and more marijuana in the Chevrolet. *Id.* The officers then told both suspects they were under arrest and read them *Miranda* warnings. *Id.* Despite giving *Miranda* warnings and no indication of physical abuse by the officers, the former Fifth Circuit found

the drugs and paraphernalia obtained were fruits of the unlawful detention. *Id.* at 729.

Similarly here, the evidence and statements obtained by Officers Seligman and Samuel were fruits of an unlawful seizure, despite the calm interaction between the officers and Mr. Knights and despite Officer Seligman giving Mr. Knights *Miranda* warnings. Therefore, all physical evidence and statements Officers Seligman and Samuel obtained should be suppressed.[9]

III. CONCLUSION

Officers Seligman and Samuel seized Mr. Knights when Officer Seligman parked the patrol car trunk-to-trunk next to the Oldsmobile and impeded Mr. Knights's freedom of movement. Officer Seligman's show of authority, by approaching Mr. Knights, seated in the Oldsmobile, in uniform and flashing a flashlight at him further establishes Officer Seligman seized Mr. Knights. At the seizure's inception, Officers Seligman and Samuel had no reasonable suspicion Mr. Knights was burglarizing the car, stealing the car itself, or otherwise engaged in criminal activity. Therefore, the physical evidence and statements the officers obtained were fruits of an unlawful detention. Mr. Knights's motion to suppress (Doc. 28) should be **GRANTED**.

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[9] The government argues the officers had probable cause to search Mr. Knights and the Oldsmobile; therefore, the evidence and statements obtained resulted from a lawful seizure. (Doc. 34, pp. 16–18). However, because the officers lacked reasonable suspicion from the inception of Mr. Knights's unlawful detention, the undersigned need not address this argument predicated on probable cause.

RECOMMENDED in Tampa, Florida on this 16th day of July, 2018.

Amanda Arnold Sansone
AMANDA ARNOLD SANSONE
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days from the date of this service shall bar an aggrieved party from attacking the factual findings on appeal. *See* 28 U.S.C. § 636(b)(1).

Copies to: Counsel of Record, District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-10083-EE

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

ANTHONY W. KNIGHTS,

Defendant–Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Within twenty-one (21) days of the date of this Order, counsel for the government is directed to file a brief in response to Appellant Knights' petition for rehearing en banc. The government should address whether the race of a suspect may be a relevant factor in deciding whether a seizure has occurred under the Fourth Amendment. *See United States v. Easley*, 911 F.3d 1074 (10th Cir. 2018).

The Government's response should be no more than 3,900 words. Appellant may file a reply of no more than 1,950 words or one-half the word count

specified in Fed. R. App. R. 35(b)(2) within twenty-one (21) days of the Government's response.

David J. Smith
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT –
BY DIRECTION