21-2047-CV

United States Court of Appeals

for the

Second Circuit

BASEL M. SOUKANEH,

Plaintiff-Appellee,

– v. –

NICHOLAS ANDRZEJEWSKI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
No. 3:19-cv-114—Hon. Janet B. Arterton

AMICUS CURIAE BRIEF FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, Amicus Curiae, the National Rifle Association of America, Inc., submits the following corporate disclosure statement.

The National Rifle Association of America, Inc. ("NRA") is a non-profit 501(c)(4) membership organization, incorporated in the state of New York, with its principal place of business in Fairfax, Virginia. NRA is not publicly traded and has no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

Date: March 15, 2022 Respectfully submitted:

/s/ Michael T. Jean
Michael T. Jean

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INTEREST OF AMICUS[1]

The National Rifle Association of America, Inc. ("NRA") is America's oldest civil-rights organization and is widely recognized as America's foremost defender of Second Amendment rights. It was founded in 1871, by Union generals who, based on their experiences in the Civil War, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA has approximately five million members, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has a significant interest in this case. Many NRA members have permits to carry concealed firearms in Connecticut and across the country. The NRA and its members do not believe that exercising the fundamental right to carry a firearm, with a state-issued permit nonetheless, automatically waives the fundamental right to be free from unjust searches and seizures.

INTRODUCTION

Basel Soukaneh's Fourth Amendment rights were violated when he was subjected to a warrantless search and arrest, simply because he was exercising his Sec-

[1] Counsel for Soukaneh consented to the filing of this brief. Counsel for Officer Andrzejewski did not respond to the NRA's email inquiry regarding his position. No counsel for a party authored this brief in any way. No party or party's counsel made contributions to fund the preparation or submission of this brief. No person, other than the NRA, its members or its counsel, made contributions to fund the preparation or submission of this brief.

ond Amendment right to carry a firearm. This cannot stand. *Cf. Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) (Protected First Amendment conduct "invokes … Fourth Amendment warrant requirements because we examine what is 'unreasonable' in light of the values of freedom of expression."). The search and arrest are even worse because the state of Connecticut issued Soukaneh a permit to carry a firearm on his person and in his vehicle. He presented that permit to Waterbury Police Officer Andrzejewski and informed him that he was carrying his firearm in accordance with that permit at the inception of their interaction. That alone got him arrested and his vehicle searched. He did nothing wrong. A state-issued license to carry a firearm does not give the state license to arrest the individual for carrying a firearm. The Fourth Amendment requires more from the arresting officer: The officer must point to other specific facts demonstrating that crime is afoot and that the individual poses a threat. Officer Andrzejewski did not even attempt to do that in his opening brief. The district court correctly ruled that Officer Andrzejewski infringed on Soukaneh's Fourth Amendment rights, and this Court should affirm.

ARGUMENT[2]

Plaintiff Soukaneh brought a Section 1983 claim alleging that his Fourth

[2] The NRA takes no position on whether Officer Andrzejewski's initial interaction with Soukaneh based on the fact that Soukaneh's vehicle was pulled off to the side of the road was justified. The NRA only argues that, based on the facts summarized in the district court's opinion and presented in Officer Andrzejewski's opening brief, there was no reasonable suspicion or probable cause to justify the search or arrest.

Amendment rights were violated by Officer Andrzejewski. Officer Andrzejewski disagrees and claims that he is entitled to qualified immunity, which is an affirmative defense. *Vasquez v. Maloney*, 990 F.3d 232, 238 n.5 (2d Cir. 2021) (citation omitted). Police officers receive qualified immunity only if "'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id*. at 238 (quoting *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017)). At summary judgement, the officer must show "'that no rational jury could conclude (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.'" *Id*. (quoting *Coollick v. Hughes*, 699 F.3d 211, 219 (2d Cir. 2012)). An unwarranted *Terry* stop and a subsequent *Terry* frisk are each clearly established rights. *Id*. at 238–42. And "the right not to be arrested without probable cause is clearly established." *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000) (collecting authorities). The critical question then is whether Officer Andrzejewski violated Soukaneh's Fourth Amendment rights, i.e., whether Officer Andrzejewski had sufficient justification to detain, search, and arrest Soukaneh? He did not.

There are three types of interactions between police officers and private citizens. The first is a "[c]onsensual encounter," which generally does not require any justification and is not considered a seizure. *United States v. Glover*, 957 F.2d 1004, 1008 (2d Cir. 1992). The second is a *Terry* stop, or an "[i]nvestigative detention …

based on a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *Id*. (citation and quotations omitted). A *Terry* stop is a seizure under the Fourth Amendment. *Id*. The third type "is an arrest—plainly a Fourth Amendment 'seizure'—that must be based on probable cause." *Id*.

The distinction here is largely a moot point. Defense counsel "conceded" below that Officer Andrzejewski's "conduct following the initial stop and check of Plaintiff's driver's license exceeded the bounds of a *Terry* stop." *Soukaneh v. Andrzejewski*, No. 3:19-cv-1147, 2021 WL 3475700, at *4 (D. Conn. Aug. 6, 2021); *Florida. v. Royer*, 460 U.S. 491, 503 (1983) (Reasonable suspicion under *Terry* does not justify placing someone under arrest.). Instead, counsel argued that the Officer Andrzejewski "had probable cause to believe Plaintiff was possessing a firearm without a permit as he had not yet been able to verify the validity of the permit." *Soukaneh*, 2021 WL 3475700, at *4. Parties are "bound by concessions made by their counsel at oral argument." *Dorce v. City of New York*, 2 F.4th 82, 102 (2d Cir. 2021) (citing multiple authorities). Officer Andrzejewski's opening brief also argues that he had probable cause. Andrzejewski Br. at 9. (Despite making that claim, the next eight pages of the brief are devoted to *Terry's* reasonable-suspicion standard. *Id*. at 9-17.) Thus, the only question for the Court is whether Officer Andrzejewski had probable cause to arrest. The NRA will, however, brief the court on both the investigatory detention and the arrest since Officer Andrzejewski's opening brief

dedicates so much space to the reasonable-suspicion standard, and the subject matter overlaps.

I. OFFICER ANDRZEJEWSKI DID NOT HAVE REASONABLE SUSPICION TO CONDUCT A *TERRY* STOP OR FRISK.

Warrantless searches and seizures are "'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,'" *United States v. Weaver*, 9 F.4th 129, 138 (2d Cir. 2021) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)), such as a *Terry* stop, *id*. (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). A *Terry* stop requires that officers "have a 'reasonable suspicion' that 'a person they encounter was involved in or is wanted in connection with a completed felony,' even if that suspicion does not rise to the level required for probable cause." *Id*. at 139 (quoting *Vasquez*, 990 F.3d at 238–39).

The "more intrusive" *Terry* frisk requires "a reasonable suspicion not only that criminal activity is afoot, but also that the person suspected is 'armed ***and dangerous.***'" *Weaver*, 9 F.4th at 139 (quoting *Terry*, 392 U.S. at 30) (emphasis added). The *Terry* frisk is not a tool "'to discover evidence of a crime.'" *Id*. at 140. (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)). Its purpose is to determine if "the suspect has a weapon 'which might be used to harm the officer….'" *Id*. (quoting *Dickerson*, 508 U.S. at 373).

Reasonable suspicion for both a *Terry* stop and frisk requires that an "officer 'be able to point to specific and articulable facts which, taken together with rational

inferences from those facts, reasonably warrant that intrusion,'" i.e., whether the individual is committing a crime and is both armed and dangerous. *Id*. (quoting *Terry*, 392 U.S. at 21). "The officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (quotations and citations omitted). "The reasonableness of official suspicion must be measured by what the officers knew ***before*** they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (emphasis added).

The reasonableness inquiry of both the stop and frisk also depend on whether the officer's action is "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. *Terry* stops and frisks are unreasonable when they amount to "a more serious intrusion on [one's] personal liberty than is allowable on mere suspicion of criminal activity." *Royer*, 460 U.S. at 502.

A. The *Terry* stop was invalid.

The only crime Officer Andrzejewski suspected is that Soukaneh possessed a firearm without a permit. And the only fact that he had to support that allegation is that Soukaneh simultaneously gave Officer Andrzejewski his permit to carry the firearm with his driver's license and informed him that he had a firearm in the driver's side compartment. *Soukaneh*, 2021 WL 3475700, at *1. This is not reasonable suspicion that crime is afoot.

1. There are no specific and articulable facts indicating that the permit was not valid. *Cf. Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (Police officers may not stop drivers just to check their license and registration unless they have reasonable suspicion that the driver is unlicensed or the car is unregistered.). Indeed, the facially valid permit is "exculpatory information … to rebut" any inference that crime was afoot. *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020). Officer Andrzejewski never even examined the facially valid permit. *See* Andrzejewski Br. at 14 ("As soon as he learned that the Plaintiff had a gun and a facially valid yet unconfirmed pistol permit, the Defendant's reasonable suspicion of criminal activity had fully developed."). Without examining the permit, he could not have even had a "hunch," let alone reasonable suspicion, that the permit was invalid.

The Illinois Court of Appeals recently cautioned that this type of "arrest first, determine licensure later method of police patrol, is not what the Concealed Carry Act contemplates," and by not determining whether the individual "is legally entitled to be carrying that gun, the police are at significant risk that they are arresting a suspect without the requisite probable cause." *People v. Spain*, 163 N.E.3d 768, 779 (Ill. App. Ct. 2019) (citation and quotations omitted). Likewise, the Pennsylvania Supreme Court has repeatedly said that:

> "unless a police officer has prior knowledge that a specific individual is not permitted to carry a concealed firearm, and absent articulable facts supporting reasonable suspicion that a firearm is being used or intended to be used in a criminal manner, there simply is no justification

> for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity."

Commonwealth v. Barr, 266 A.3d 25, 43 (Pa. 2021) (quoting *Commonwealth v. Hicks*, 208 A.3d 916, 937 (Pa. 2019)); *see also Commonwealth v. Alvarado*, 667 N.E.2d 856, 859 (Mass. 1996) ("[U]nder the Fourth Amendment, 'the mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun.'") (quoting *Commonwealth v. Toole*, 448 N.E.2d 1264 (Mass. 1983)).

Nor can Officer Andrzejewski rely on a "'mosaic' of factors" to support his alleged reasonable suspicion. *Weaver*, 9 F.4th at 140. Soukaneh was not acting suspiciously, evasively, non-responsively, or indicating that he was hiding something. *E.g., Weaver*, 9 F.4th at 147–48. To the contrary, Soukaneh told Officer Andrzejewski that he had a firearm and a permit at the first chance he got, which is a strong indication that he was ***not*** committing a crime. According to the "leading commentator on the fourth amendment," "'common sense suggests that … innocent persons confronted with the fact that they are under police suspicion and called upon to clarify the situation will respond with some sort of explanation.'" *Spain*, 163 N.E.3d at 779 (quoting 4 Wayne R. LaFave, Search and Seizure § 9.6(d) (5th ed. 2012)); *see also id.*, (An individual's failure to volunteer that he or she has a concealed carry license can be considered by police officers to determine if they have probable cause.). Officer Andrzejewski's application of the law creates a "heads I

win, tails you lose" scenario: One can inform the officer that they have a firearm and a license to carry, which gives the officer reasonable suspicion or probable cause; or one can refrain from informing the officer, which can give the officer reasonable suspicion or probable cause. That is not how Constitutional freedoms work.

The only other fact that Officer Andrzejewski has is that Soukaneh was in a high crime area, but that alone is insufficient to establish reasonable suspicion. *Wardlow*, 528 U.S. at 124.

2. This Court also looks to Connecticut statutes, as interpreted by the Connecticut Supreme Court, to determine if the intrusion was warranted under the Fourth Amendment. *Zalaski v. City of Hartford*, 723 F.3d 382, 390 (2d Cir. 2013). Connecticut's statutory scheme further shows that there was no reasonable suspicion that crime was afoot. Connecticut law generally prohibits possessing a firearm in a vehicle ***without a permit***. Conn. Gen. Stat. § 29–38(a). "In a prosecution of unlawful possession of a weapon in a vehicle in violation of § 29–38(a), the state must prove that the defendant: (1) owned, operated or occupied the vehicle; (2) had a weapon in the vehicle; (3) knew the weapon was in the vehicle; and (4) had no permit or registration for the weapon." *State v. Davis*, 155 A.3d 221, 229 (Conn. 2017) (citation omitted). The state bears the burden of proving that the defendant did not have a "permit at the time of the offense." *Id*.

But the state did not always bear that burden. Section 29–38(a) declares that "the presence of any … pistol or revolver … in any vehicle shall be prima facie evidence of a violation of this section by the owner, operator and each occupant thereof." The Connecticut Supreme Court, however, struck that provision because it burdened the individual with proving their innocence in violation of the Due Process Clause. *State v. Watson*, 345 A.2d 532, 543 (Conn. 1973).[3] If bearing that burden violates an individual's rights in the courtroom, then it violates their rights everywhere else as well.

Moreover, other courts have found that placing the burden of proving that the individual did not have a permit on the state is significant. The Third Circuit held that in the Virgin Islands—where a permit is required to possess a firearm in public, but the government bears the burden of proving that the individual did not have a permit—"possession of a firearm …, in and of itself, does not provide officers with reasonable suspicion to conduct a *Terry* stop." *United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012) (citations omitted). The Ninth Circuit came to the same conclusion more recently when reviewing a motion to suppress under Washington law. *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019). The *Brown* court noted that "it is presumptively lawful to carry a gun" in Washington state, even though a license

[3] The statute still contains that clause despite being invalidated by the Connecticut Supreme Court almost 50 years ago.

is required. *Id*. at 1154–55. Therefore, the "tip that Brown had a gun thus created at most a very weak inference that he was unlawfully carrying the gun without a license, and certainly not enough to alone support a *Terry* stop." *Id*. at 1154 (citing *Prouse*, 440 U.S. at 663). If *Terry* stops were unjustified in those cases, then the stop here, where the officer was simultaneously presented with a facially valid permit and the information that the individual possessed a firearm, is also unjustified.

The permit-less carry cases are also illustrative. In *Northrup v. City of Toledo Police Department*, the Sixth Circuit ruled that reasonable suspicion did not support an investigatory detention of a person whom police had stopped for openly carrying a gun in a state that requires no permit for doing so. 785 F.3d 1128, 1132–33 (6th Cir. 2015). Because carrying a gun openly was not a criminal offense, the court reasoned, there was no basis for the stop. *Id.* Likewise, the Fourth Circuit held that allowing officers to conduct a *Terry* stop of individuals in states that "authorize[] the open display of firearms" "would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013); *see also United States v. King,* 990 F.2d 1552, 1555, 1558–59 (10th Cir. 1993).

This Court, too, has held that possession of a legal pocket knife does not give a police officer reasonable suspicion that crime is afoot. *United States v. Hussain*, 835 F.3d 307, 316–17 (2d Cir. 2016). The court made that ruling despite the fact that

the knife resembled a knife that the suspect used to threaten someone beforehand. *Id*. at 317.

Moreover, the default cannot be that the ***facially valid*** permit is invalid and provides sufficient reasonable suspicion until it can be verified. *See Watson*, 345 A.2d at 543 (Possession of the firearm cannot be prima facie evidence that the person does not have a permit.). Likewise, the Fourth Circuit emphasized that in permit-less carry states "[b]eing a felon in possession of a firearm is not the default status." *Black*, 707 F.3d at 540. To hold otherwise would negate the presumption that warrantless searches are unreasonable, *Groh v. Ramirez*, 540 U.S. 551, 572 (2004) (collecting authorities.), and remove an officer's duty to consider exculpatory evidence, *Glover*, 140 S. Ct. at 1191.[4]

These cases establish a clear precedent that when it is apparent to the officer that the individual is carrying a firearm lawfully, the officer does not have reasonable suspicion that crime is afoot. Because § 29–38(a) puts the burden on the state, and therefore Officer Andrzejewski, to show that the permit was invalid, the possession of a facially valid permit, without more, is not enough for a *Terry* stop. Officer

[4] Other contexts demonstrate how absurd this assumption is. *Prouse* held that drivers cannot be stopped just to check their license and registration. 440 U.S. at 663. And there is no presumption that medication prescriptions are invalid. *Valencia v. De Luca*, 612 F. App'x 512, 517 n.4 (10th Cir. 2015) ("[T]he smell of burnt marijuana would be a sufficient basis for the reasonable suspicion of criminal activity where, as here, there is no evidence of a prescription.") Holding otherwise would mean that anyone could be stopped and searched for driving or upon leaving a pharmacy.

Andrzejewski did not have more. "To allow stops in this setting 'would effectively eliminate Fourth Amendment protections for lawfully armed persons.'" *Northrup*, 785 F.3d at 1132 (collecting authorities). The *Terry* stop was therefore unlawful.

B. The *Terry* frisk was invalid.

A *Terry* frisk requires "a reasonable suspicion not only that criminal activity is afoot, but also that the person suspected is 'armed ***and dangerous***.'" *Weaver*, 9 F.4th at 139 (quoting *Terry*, 392 U.S. at 30) (emphasis added).[5] Being armed alone is not enough. *Hussain*, 835 F.3d at 314; *Northrup*, 785 F.3d at 1132.

Officer Andrzejewski's brief does not have any specific facts alleging that Soukaneh was dangerous. Instead, Officer Andrzejewski merely argues that being armed makes one de facto dangerous. Andrzejewski Br. at 15, 20–21. This Court rejected that argument in *Hussain*, where the officer had actual knowledge that the individual had a knife that was legal to possess. 835 F.3d at 314; *see also J.L.*, 529 U.S. at 272 (There is no "automatic firearm exception" for *Terry* frisks based on anonymous tips.). That panel decision is binding on this panel. *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (citations omitted). Officer Andrzejewski is wrong as a matter of law.

Officer Andrzejewski position is also much weaker than the officers' position

[5] As mentioned above, there was no suspicion that crime was afoot, so the analysis can end there.

in *Hussain,* where no permit was required to carry the pocket knife, because the State of Connecticut issued Soukaneh a permit to carry that firearm on his person or in his vehicle. By issuing that permit, the state determined that Soukaneh's possession of the firearm does not pose a danger. And Soukaneh informed Officer Andrzejewski of the permit and firearm immediately, which is a requirement in some states for the officer's safety. *E.g.*, Mich. Comp. Laws § 28.425f(3); Ohio Rev. Code § 2923.12(B)(1). There are no specific and articulable facts that Soukaneh was dangerous and therefore no justification for a *Terry* frisk.[6]

C. If there was reasonable suspicion, less-intrusive means would have sufficed.

Even if there was reasonable suspicion and a need to separate Soukaneh from his firearm, there was a less-intrusive way of doing it. *Terry* created a narrow exception to the Fourth Amendment's general probable cause requirement. *Royer*, 460 U.S. at 499. "The investigation must be as minimally intrusive as possible, bearing in mind the circumstances that gave rise to the suspicion." *United States v. Tehrani*, 49 F.3d 54, 58 (2d Cir. 1995) (collecting authorities). In *Pennsylvania v. Mimms*, the Supreme Court held that a police officer can order a driver to get out of the vehicle for no reason at all. 434 U.S. 106, 111 (1977). Officer Andrzejewski could therefore

[6] Moreover, the only firearm that Officer Andrzejewski had suspicion of was the one that Soukaneh said was in the driver's door compartment. There are no specific facts to support the presence of a second firearm or an expanded search. *United States v. Brown*, 334 F.3d 1161, 1171 (D.C. Cir. 2003).

have asked Soukaneh to get out of the car and leave the firearm in the car for the duration of the stop. This would have achieved the same result, separating Soukaneh from his firearm, while only placing a "de minimis" burden on him. *Id.*; *see also Hussain*, 835 F.3d at 314.

II. THERE WAS NO PROBABLE CAUSE TO MAKE AN ARREST OR SEARCH THE VEHICLE AND THE TRUNK.

"[F]ederal and Connecticut law are identical in holding that probable cause to arrest exists when police officers have 'knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime.'" *Walczyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007) (citation omitted). "While probable cause requires more than a 'mere suspicion,' of wrongdoing, its focus is on 'probabilities,' not 'hard certainties.'" *Id*. (citation omitted). But because of qualified immunity, the officer only needs to have "arguable probable cause," which "exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id*. at 163 (citations and quotations omitted). When there is no dispute of facts at the time of the arrest, *Martinez*, 202 F.3d at 635 (citation omitted), probable cause is a matter of law for the courts to decide. *Walczyk*, 496 F.3d at 156.

1. Because Officer Andrzejewski did not have reasonable suspicion that crime was afoot, he could not have had probable cause to make an arrest. *Alabama v. White*, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause."); *Royer*, 460 U.S. at 503. It was simply not probable or objectively reasonable to believe that the facially valid permit was invalid.

2. The search of the car is more problematic for Officer Andrzejewski because he appears to have verified the permit ***before*** searching the car and trunk. *Soukaneh*, 2021 WL 3475700, at *1. There were no facts indicating a probability of wrongdoing when he conducted the search. *E.g.*, *Toole,* 448 N.E.2d at 1268 ("[C]arrying a .45 caliber revolver is not necessarily a crime" and did not give the officer probable cause to search vehicle).

Officer Andrzejewski, however, argues that he had probable cause to search the trunk because there was a gun, which he calls "contraband," in the vehicle. Andrzejewski Br. at 23, 25. That is wrong. A gun is not "per se contraband"; it may, however, be "derivative contraband" if it is used unlawfully. *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993); *City of New York v. United States Postal Serv.*, 519 F. Supp. 3d 111, 125 (E.D.N.Y. 2021) (citation omitted); *Toole,* 448 N.E.2d at 1268. That has never been truer after the Supreme Court ruled that "the Second Amendment conferred an individual right to keep and bear arms," including a handgun, which the court termed "the quintessential self-

defense weapon." *District of Columbia v. Heller*, 554 U.S. 570, 595, 629 (2008). And Officer Andrzejewski already knew that the firearm was lawfully possessed because he had verified the permit before conducting the search.

The majority of the cases on which Officer Andrzejewski relies, Andrzejewski Br. at 24-26, miss the mark because the searches were based on narcotics, which are per se contraband. *One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 699 (1965). The D.C. Circuit's opinion in *United States v. Brown*, 334 F.3d 1161 (D.C. Cir. 2003) did involve searching a vehicle based on discovery of a handgun. But at the time *Brown* was decided, it was illegal to possess a handgun in the District of Columbia: "The District law … threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place." *Heller*, 554 U.S. at 634 (citation omitted). The case is therefore inapposite because it involved per se contraband. *Toole,* 448 N.E.2d at 1268.[7]

The Third Circuit case on which Officer Andrzejewski relies did find that an officer had probable cause to search a vehicle—in part—based on seeing burglary

[7] *Brown* is also factually distinguishable because the officers responded to a reported shooting at 1:45 a.m. 334 F.3d at 1162. The occupants in the vehicle at the scene of the incident were acting suspiciously and then non-responsively when the officers approached the car and discovered the gun. *Id*. at 162–63. Even if the District did not ban guns at the time, those additional facts indicate that there was a probability that the gun was used in a shooting, making it derivative contraband. The court also found that there was reason to believe that multiple firearms might be present because multiple shots were reportedly fired. *Id*. at 1171.

tools, which are derivative contraband, in open view during a lawful stop. *United States v. Rickus*, 737 F.2d 360, 366 (3d Cir. 1984). But that is not the full story. The vehicle occupants had no "identification or indicia of ownership of the automobile." *Id*. The occupants could not answer the officer's questions about what they were doing out at 3:30 a.m. without looking at each other for reassurances. *Id*. One of the occupants tried to leave the vehicle, and the officer noticed that one was wearing a bullet-proof vest. *Id* at 366–67. The totality of those circumstances implies a probability that contraband, i.e., stolen property, would be found in the vehicle.

Officer Andrzejewski did not have any of these additional facts. He did not have probable cause to believe that "contraband" of any type was in the car, and the search therefore required a warrant. *E.g., Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). By conducting the search without one, Officer Andrzejewski violated Soukaneh's Fourth Amendment rights.

CONCLUSION

For the forgoing reasons, the decision below should be affirmed.

Date: March 15, 2022 Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Circuit Rule 29.1(c) and Fed. R. App. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,613 words.

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Date: March 15, 2022

/s/ Michael T. Jean
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