

United States of America  
First Circuit Court of Appeals

NO. 2017-1692

**UNITED STATES OF AMERICA**

Appellee,

v.

**JOSEPH DAVIS**

Defendant/Appellant.

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APPEAL FROM NEW HAMPSHIRE FEDERAL DISTRICT COURT

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BRIEF OF DEFENDANT/APPELLANT, JOSEPH DAVIS

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... [ii](#)

STATEMENT OF JURISDICTION..... [1](#)

STATEMENT OF ISSUES..... [2](#)

STATEMENT OF FACTS AND STATEMENT OF THE CASE..... [3](#)

    I. Hampton Beach Rap Show. .... [3](#)

    II. Davis Takes a Short Drive and Parks In Front of the Bathhouse..... [7](#)

    III. Traffic Stop..... [10](#)

    IV. What To Do With The Car?. .... [13](#)

    V. Police Seize Evidence, Conduct Impoundment Inventory, Find Gun..... [15](#)

    VI. Hampton Police Inventory Search Policy..... [17](#)

    VII. Suppression of Gun Denied, Hung Jury in First Trial. .... [19](#)

    VIII. Additional Details Developed in Second Trial .. . . . . [21](#)

    IX. Davis’s Testimony in Second Trial, and Court’s Verdict.. . . . . [25](#)

SUMMARY OF ARGUMENT. .... [31](#)

ARGUMENT..... [32](#)

    I. Inventory Search Was Unreasonable, and Therefore Unconstitutional. .... [32](#)

        A. Officer Discretion to Impound and Conduct Inventory Search Must Be Authorized by Department Policy, And Not a Pretext for Investigatory Motive. .... [32](#)

        B. The Police Exercised Capricious Non-Policy Discretion by Impounding and Towing, Rather Than Leaving the Car Overnight. .... [35](#)

        C. The Police Exercised Capricious Discretion by Reentering to Put Key in Ignition Rather Than Handing Key to Tow Operator, And Conducted an Unconstitutional Investigatory Search..... [38](#)

    II. Evidence Was Insufficient for Proof Beyond a Reasonable Doubt. .... [40](#)

        A. To Prove Constructive Possession, Government Must Show Davis Knew a Gun Was Within Easy Reach, and Had Intention to Exercise Dominion and Control Over It. .... [40](#)

        B. Davis Did Not Know a Gun Was Within Easy Reach Between Seat and Console at the Time of His Short Drive. .... [42](#)

        C. Davis Did Not Have Intention to Exercise Dominion and Control Over a Gun During His Short Drive. .... [44](#)

        D. Evidence Was Insufficient for a Finding of Guilt. .... [45](#)

CONCLUSION..... [47](#)

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION. .... [47](#)

ADDENDUM. .... [48](#)

## TABLE OF AUTHORITIES

### United States Supreme Court Cases

<i>Cady v. Dombrowski</i> , 413 U.S. 433 (1973).....	32, 33
<i>Colorado v. Bertine</i> , 479 U.S. 367 (1987).....	32, 34
<i>Florida v. Wells</i> , 495 U.S. 1 (1990).....	33, 34
<i>South Dakota v. Opperman</i> , 428 U.S. 364 (1976).....	32

### Circuit Court Cases

<i>Jaynes v. Mitchell</i> , 824 F.3d 187 (1st Cir. 2016).....	36
<i>United States v. Coccia</i> , 446 F.3d 233 (1st Cir. 2006).....	33, 34, 38, 39
<i>United States v. Duval</i> , 496 F.3d 64 (1st Cir. 2007).....	40
<i>United States v. Figueroa-Ocasio</i> , 805 F.3d 360 (1st Cir. 2015).....	45, 46
<i>United States v. Hawkins</i> , 279 F.3d 83 (1st Cir. 2002).....	34
<i>United States v. Marshall</i> , 986 F.2d 1171 (8th Cir. 1993).....	34
<i>United States v. McLean</i> , 409 F.3d 492 (1st Cir. 2005).....	40
<i>United States v. Padilla-Galarza</i> , 886 F.3d 1 (1st Cir. 2018).....	40

<i>United States v. Ridolfi</i> , 768 F.3d 57 (1st Cir. 2014).	40
<i>United States v. Robinson</i> , 473 F.3d 387 (1st Cir. 2007).	41
<i>United States v. Sanchez</i> , 612 F.3d 1 (1st Cir. 2010)..	33
<i>United States v. Vargas</i> , 945 F.2d 426 (1st Cir. 1991)..	41
<i>United States v. Weems</i> , 322 F.3d 18 (1st Cir. 2003).	40
<i>United States v. Wight</i> , 968 F.2d 1393 (1st Cir. 1992).	40

**Federal Statutes & Rules**

18 U.S.C. § 3742.	1
18 U.S.C. § 922(g)(1).	1, 40
18 U.S.C. § 924(a)(2).	1
28 U.S.C. § 1291.	1
FED. R. CRIM. P. 29.	24, 28, 44

**New Hampshire Statutes**

N.H. Rev. Stat. Ann. §§ 265:68.	37
N.H. Rev. Stat. Ann. § 265:70.	37

## **STATEMENT OF JURISDICTION**

The First Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On March 10, 2017, Joseph Davis was found guilty after a bench trial in the United States District Court for the District of New Hampshire, of being a felon in possession of a firearm, contrary to 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2).

On June 15, 2017, the court (*Landya B. McCafferty, J.*), sentenced Davis to 50 months committed, plus three years of supervised release, with a judgment date of June 22, 2017.

A notice of appeal was filed on June 23, 2017.

## **STATEMENT OF ISSUES**

- I. Did the Hampton police unlawfully exercise discretion by impounding the vehicle driven by Joseph Davis, resulting in an unconstitutional search of the vehicle, and did the court therefore err in not suppressing the gun found in the car?
  
- II. Did the court err in finding Joseph Davis guilty of being a felon in possession of a firearm, when the Government failed to prove beyond a reasonable doubt that Davis was in possession of the gun?

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

### I. Hampton Beach Rap Show

Joseph Davis and Tori Payne are married, and live in Manchester, New Hampshire with their 11-year old daughter. *Suppr.Day 1* at 5, 75-76.<sup>1</sup> Payne knows Davis is a felon, that he served five years for assault, and that he has difficulty finding employment. *Suppr.Day 1* at 76-77, 114. For about seven years the couple has run a small business together: Davis is a rap musician enjoying a regional reputation, having opened for well-known acts on multi-city tours. *Suppr.Day 1* at 6-7, 76-77. Payne is the manager and promoter; she books venues, prepares wardrobes, prints T-shirts and towels, and during shows stays on the street giving away posters and recordings, rallying fans to the event. *Suppr.Day 1* at 7, 23. Davis's typical show involves several people, including co-performer Aaron Bruton, videographer Javon Townes, roadie Ari Fenderson, and several others, for a total of six or seven people. *Suppr.Day 1* at 30-32, 35, 78, 85-87, 135. When performing, Davis wears a costume, which includes a long blue bandana-print scarf, or cape, worn around his neck. *Suppr.Day 1* at 101, 118, 208, *Suppr.Day 2* at 41.

Payne owns a gray 2013 Ford Focus sedan, of which she is proud and somewhat possessive, *Suppr.Day 1* at 9, 15, 90, 106, 111-12, although Davis drives it almost daily to pick up their daughter from school. *Suppr.Day 1* at 15, 79-80, 103-06, 112-13. Davis keeps some clothing in the car, *Suppr.Day 1* at 110-11, and Payne stores some of her

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<sup>1</sup>In the suppression section of this statement of facts, all citations are to pleadings, transcripts, and exhibits that the court had before it at the time the suppression matter was decided.

things in the trunk. When she is managing and promoting Davis, working at nightclubs, Payne leaves her purse and wallet in the trunk. *Suppr.Day 1* at 16-17. In the trunk, she had an assortment of shoes, hats, and children's clothes, and a portable "dirt devil" vacuum cleaner contained in its black pouch. *Suppr.Day 1* at 18.

In April 2016, Payne's grandfather died in Boston. When Payne collected his effects, she was surprised to find a handgun, but did not look closely at it. *Suppr.Day 1* at 27. Because she knows children ride in her car, she put the gun in the dirt devil pouch in the trunk, and left it there. *Suppr.Day 1* at 18-19, 26-28. Payne never told Davis about it for several reasons: she forgot, her grandfather's death was the enduring event and his belongings were not of much concern, the couple was planning their marriage ceremony and it was an emotional time, and Payne had a gun permit and informing her fiancée was not required. *Suppr.Day 1* at 18-20, 26, 107-08; *Suppr. Day 2* at 95.

On the evening of Saturday, July 1, 2016, into the early morning of Sunday, July 2, Davis and Bruton performed at a beach-side club, Cloud 9, on Ocean Boulevard in Hampton Beach, New Hampshire. *Suppr.Day 1* at 31-32. For Davis, the gig was hastily arranged; it was originally Bruton's solo, but Bruton had recently broken his arm and requested Davis's assistance. *Suppr.Day 1* at 8, 77-79.

The group assembled at Davis's and Payne's home in Manchester, and three cars caravanned to Hampton Beach. *Suppr.Day 1* at 9, 33-35, 83, 135-39. Payne drove her car, with microphones and sound equipment in the backseat, while Davis rode



with her as passenger so he could practice his material during the drive. ROBINSON RPT. at 1 (July 2, 2016), Exh. A, *Appx.* at 2; ZIGLER RPT. (July 1, 2016) at 1-2, Exh. C, *Appx.* at 5; *Suppr.Day 1* at 10-13, 79, 83. Payne and the others parked in the spaces along Ocean Boulevard, roughly across the street from Cloud 9. *Suppr.Day 1* at 11-12, 33-37.

The show was slated to begin around 11:00PM. *Suppr.Day 1* at 8, 34, 78. When they arrived, Payne went into Cloud 9 to arrange with the venue regarding timing, equipment, and other details. *Suppr.Day 1* at 16. The group reviewed their roles, went about their jobs, and moved equipment from Payne's backseat into the club. *Suppr.Day 1* at 83. Payne's car keys were either left in the car so everyone could access the sound equipment, or one of the roadies had them. *Suppr.Day 1* at 13, 89. Davis and Bruton proceeded upstairs to check in, and began pre-performance mingling with fans. *Suppr.Day 1* at 10-12, 85-87, 129.

Payne went outside to promote the show, plying up and down the strip, *Suppr. Day 1* at 10, 20-21, saying she got "pretty far" from Cloud 9. *Suppr.Day 1* at 22. Payne was not happy with her work that night, however, as she did not believe the last-minute gig was good for business, the weather was poor, the night was busy, and she had some frustrations with Davis and the crew. *Suppr.Day 1* at 21. Consequently Payne delayed responding to their calls and texts. *Suppr.Day 1* at 23.

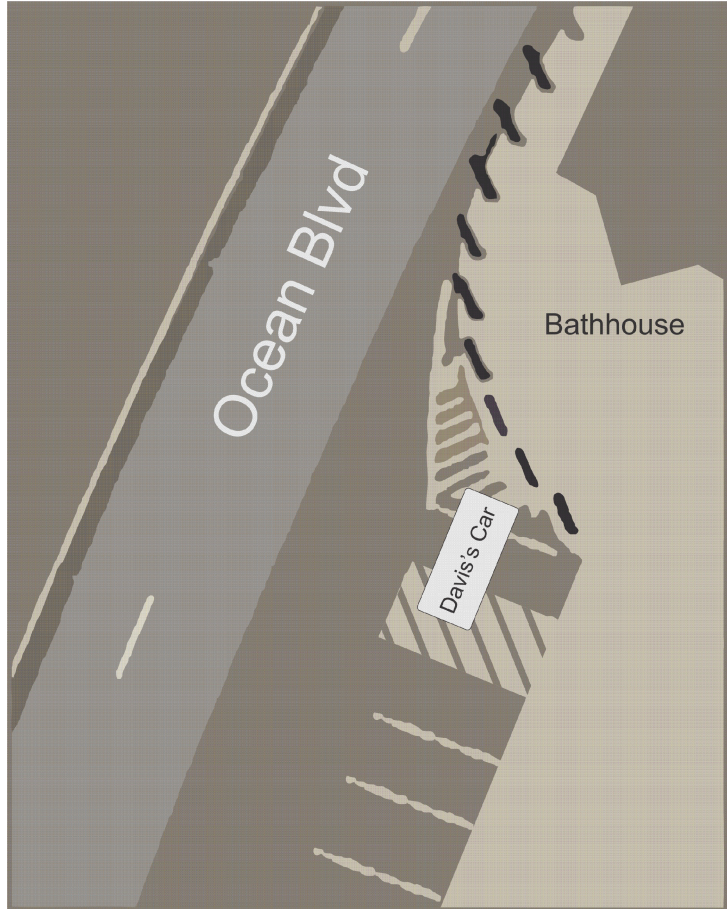
After the show, Davis shared two drinks with fans, and left with his group through the back door, expecting to return to collect their equipment when the club

closed a little while later. *Suppr.Day 1* at 88, 115. They bided time with a pizza across the street. *Suppr.Day 1* at 38, 88, 135-36. At around 12:30 Saturday morning, Davis was in need of a restroom. He went back to Cloud 9, but the bouncer reminded him of the no-reentry rule. Davis felt his need was urgent, and was preparing to urinate in public when one of his group pointed out the nearby police. Instead, knowing there was a bathroom in the “north bathhouse” about a block away, he decided to use Payne’s car, and got the keys from one of the roadies. *Suppr.Day 1* at 40, 45, 88-90.

## II. Davis Takes a Short Drive and Parks In Front of the Bathhouse

Davis walked across the street, got directly into Payne's car alone, which Payne had left in a slot between B Street and A Street on Ocean Boulevard.

He drove a short distance north on Ocean Boulevard, and parked facing north in a handicapped parking spot, just south of, and adjacent to, the bathhouse. But not between the lines; Davis parked parallel to the curb, rather than perpendicular as the painted lines indicate. Accompanying is a schematic diagram graphically



estimating where the car was parked.<sup>2</sup>

At the time, three Hampton Beach officers were monitoring traffic on Ocean

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<sup>2</sup>The diagram presented here was not in evidence. Rather, it is an attempt to fairly characterize the evidence presented by the government's witnesses, ROBINSON RPT. (July 2, 2016) at 3, Exh. A; ROBINSON AFF. ¶3-5 (Nov. 29, 2016), Exh. B, *Appx.* at 7; ZIGLER RPT. (July 1, 2016) at 1, Exh. C; ZIGLER AFF. ¶3-5 (Nov. 28, 2016), Exh. D, *Appx.* at 11; *Suppr.Day 1* at 145-48, 173, 181, 211 (Ofc. Robinson); *Suppr.Day 2* at 41-42 (Ofc. Ziegler); *Suppr.Day 2* at 17-18 (Ofc. Hood), augmented with the testimony of two civilian witnesses, *Suppr.Day 1* at 12 (Payne); *Suppr.Day 1* at 32, 37, 41-45, 57, 62 (Bruton), and the defendant's testimony. *Suppr.Day 1* at 83-85, 91-92, 117, 102-03 (Davis). Because its genesis is the same as the government's aerial photos that were in evidence, AERIAL PHOTOGRAPH OF OCEAN BOULEVARD (undated), Exh. 1, *Appx.* at 40, the diagram is probably close to scale, but scale exactitude is not guaranteed. The dimensions of the car were drawn from Edmunds.com, which specifies that a 2013 Ford Focus sedan is 178.5 inches long and 71.8 inches wide. Finally, there are vagaries in the testimony making exact placement of the car imprecise.

Boulevard from two cruisers stationed on a traffic island across the street from the bathhouse. ZIGLER RPT. at 1; ROBINSON RPT. at 1; *Suppr.Day 1* at 45, 143-45, 170-71; *Suppr.Day 2* at 4, 16, 32.

Christopher Zigler was a police officer, long serving the Hampton Police Department. *Suppr.Day 2* at 37-38. Matthew Robinson was a Hampton detective, with a long record of service. *Suppr.Day 1* at 142. Robinson was also a field training officer, so had riding with him that evening a part-time “rookie” officer, Justin Hood, who was new to the job with little previous experience. *Suppr.Day 1* at 143; *Suppr.Day 2* at 3, 49, 104. Hood’s role that evening was, according to Ziegler, “basically watching what was going on and trying to take notes, basically learn something.” *Suppr.Day 2* at 49.

At 12:36AM, the officers saw Davis make the short drive. They noticed he did not have his lights on, that he may have swerved before parking, and that he stopped abruptly. ZIGLER RPT. at 1; *Suppr.Day 1* at 93, 120, 147, 174, 183, 192; *Suppr.Day 2* at 17, 74.

The officers conceded that the place where Davis parked was designated for parking, but noted that the spots were reserved for handicapped drivers. ZIGLER RPT. (July 1, 2016) at 1, Exh. C (car was positioned “in[] the parking area along the east side of Ocean Blvd”); *Suppr.Day 1* at 146-48 (Ofc. Robinson); *Suppr.Day 2* at 59, 92-93, 103, 147 (Ofc. Ziegler). Because Davis parked the car out of alignment, it may have occupied two designated spots. *Suppr.Day 2* at 59. Although there was no ban on

overnight parking, *Suppr.Day 2* at 16, 103, the officers considered the car illegally parked. *Suppr.Day 2* at 59.

The officers testified that the spaces adjacent to where Davis parked were empty, *Suppr.Day 1* at 146, 202, that only some of the spots along Ocean Boulevard were occupied, *Suppr.Day 1* at 85; *Suppr.Day 2* at 17, that there were not many cars on the road at the time – though they expected traffic to increase when the bars closed at 1:00AM, *Suppr.Day 1* at 85; *Suppr.Day 2* at 17, 60 – and that where Davis parked was well clear of the travel lane. *Suppr.Day 2* at 93. They nonetheless attempted to portray the parked car as posing a hazard, by speculating that a drunk driver swerving out of the travel lane might possibly strike it. *Suppr.Day 1* at 166-67; *Suppr.Day 2* at 59-60, 92-93.

As Davis's car came to a rest beside the bathhouse, both cruisers looped behind. Robinson (along with Hood) initiated a traffic stop with blue lights, and parked directly behind Davis; Ziegler parked behind Robinson. ZIGLER RPT. (July 1, 2016) at 1, Exh. C; ROBINSON AFF. ¶6 (Nov. 29, 2016), Exh. B; *Suppr.Day 1* at 147; *Suppr.Day 2* at 38.

### III. Traffic Stop

Robinson approached Davis and announced that the headlights were off, but Davis told Robinson he thought they were on because he saw the green light on the dashboard. *Suppr.Day 1* at 93, 150. Davis, believing he was being ticketed for a lights violation, was cooperative throughout. *Suppr.Day 1* at 95, 122-23, 187; *Suppr.Day 2* at 37-48. Robinson made a routine inquiry of Davis's license, both by computer in his cruiser and by double-checking with dispatch. There was some discrepancy about its validity or recent renewal, which was later resolved. ROBINSON RPT. at 1; *Suppr.Day 2* at 42, 46; *Suppr.Day 1* at 14-15, 80-82, 93, 122. The police identified Payne as the car's registered owner. ZIGLER RPT. at 1; ROBINSON RPT. at 1; *Suppr.Day 1* at 90.

Davis told Robinson that he was looking for a bathroom, had an urgent need, had been disallowed from reentering the club, was headed for the bathhouse, and could hold it no longer. ROBINSON RPT. at 1; ZIGLER RPT. at 1; *Suppr.Day 1* at 94, 119, 151; *Suppr.Day 2* at 41. The police knew there was a men's room in the adjacent bathhouse, but told Davis he could wait. *Suppr.Day 1* at 45, 94, 119. Davis urinated in his pants sitting in the car, causing embarrassment. ROBINSON RPT. at 1; *Suppr.Day 1* at 94, 119; *Suppr.Day 2* at 47.

Meanwhile, all three officers were stationed around the car, peering into it with flashlights. *Suppr.Day 1* at 189-90; *Suppr.Day 2* at 19, 23, 80, 99. Robinson was at the driver's window talking with Davis, Zigler was at the front passenger window, and Hood was behind Zigler next to the passenger side pillar. ZIGLER RPT. at 1; *Suppr.*

*Day 1* at 118, 155; *Suppr.Day 2* at 6, 39. Robinson smelled marijuana and alcohol. ROBINSON RPT. at 1; *Suppr.Day 2* at 44-47. All three could see inside, and noticed several transparent blue plastic “party cups” stacked in the center-console cup holder with some liquid in the bottom of the top cup, which they suspected was alcoholic. ROBINSON RPT. at 1; ZIGLER RPT. at 1; *Suppr.Day 1* at 149, 152, 204-05; *Suppr.Day 2* at 6, 19, 20-23, 39-40, 49, 80-82.

Robinson and Zigler said they saw Davis move his right hand toward his thigh area, which Zigler said he suspected was “indexing” toward contraband, a phenomenon he learned about during training, and therefore repeatedly requested Davis return his hands to the steering wheel. ROBINSON RPT. at 1; ZIGLER RPT. at 1; *Suppr.Day 1* at 153-54, 188; *Suppr.Day 2* at 8, 22, 42-46, 91. Hood denied seeing any furtive movements. *Suppr.Day 2* at 8, 24. Davis may have been merely retrieving his license, or resting his arm. *Suppr.Day 1* at 154, 187-88; *Suppr.Day 2* at 42.

While Robinson was in his cruiser checking Davis’s license, Zigler left rookie officer Hood standing at the passenger window with Davis, and went to talk with Robinson. ZIGLER RPT. at 1; *Suppr.Day 1* at 157; *Suppr.Day 2* at 8, 23. Robinson told Zigler he thought they had a potential driving-while-intoxicated case, *Suppr.Day 2* at 43-45, and Ziegler commenced a conversation with Davis to evaluate. ZIGLER RPT. at 1; *Suppr. Day 2* at 47. Robinson returned from the cruiser and ordered Davis out of the car, while Zigler went to the sidewalk to control the Independence Day crowd which the blue lights had attracted. ROBINSON RPT. at 1; ZIGLER RPT. at 1; *Suppr.Day 1* at

149, 158; *Suppr.Day 2* at 37-49.

Both Robinson and Zigler thought it odd that Davis was wearing a long scarf on a hot summer night. *Suppr.Day 1* at 150; *Suppr.Day 2* at 40. At some point during the stop, either when he was in the car or just after he exited, Davis removed the scarf from his neck and shoulders and put it in the car. ZIGLER RPT. at 1; *Suppr.Day 1* at 101-02, 155, 159, 162-63; *Suppr.Day 2* at 20, 23, 44, 84. The officers testified it partially covered the short stack of blue cups in the car's center console, ZIGLER RPT. at 1; ROBINSON RPT. at 1, 3; *Suppr.Day 1* at 162-63, 205-09, but the court found it landed on the passenger seat. SUPPRESSION ORDER (Dec. 20, 2016) at 12, *Addendum* at 52.

When Robinson requested Davis get out of the car, he did, leaving the door ajar. *Suppr.Day 2* at 10, 25; SUPPRESSION ORDER at 15. Robinson then conducted field sobriety tests, and determined Davis was probably intoxicated. ROBINSON RPT. at 1-2; ZIGLER RPT. at 1; *Suppr.Day 1* at 97, 158-59; *Suppr.Day 2* at 48. Hood, with leather gloves due to the urine, conducted a pat-down search, and removed car keys from Davis's pants pocket. *Suppr.Day 1* at 100, 127, 162, 199, 209-10; *Suppr.Day 2* at 10, 15, 25, 29-32, 52. Davis was arrested for DWI and handcuffed, and Robinson and Hood took Davis to the station. Ziegler, keeping the keys, stayed with Payne's car, and called Lyman's Garage to tow it. ZIGLER RPT. at 1; ROBINSON RPT. at 2; *Suppr. Day 1* at 97, 101, 128, 161-63, 195, 199; *Suppr.Day 2* at 12-13, 18, 36, 49-50, 60.



#### **IV. What To Do With The Car?**

The police exercised their discretion regarding what to do with the car. They testified they had three choices. They could: 1) leave the car where it was, and presumably ticket it for a parking violation; 2) give the car to a qualified volunteer to move, either to one of the nearby spots or somewhere else; or 3) impound it and have it towed. Zigler testified that although there was no ban on overnight parking in the area and there were many spots available at the time, he believed the car should be towed. *Suppr.Day 2* at 16, 82, 103. All three officers testified they often and routinely make the choice to give a car to a qualified volunteer. *Suppr.Day 1* at 164-68, 197-201; *Suppr.Day 2* at 11, 28-29, 81-82, 93-94. They testified they have an incentive to do that, because it is the quickest way to be rid of the car. *Suppr.Day 2* at 28, 81. The police said they offer such arrangement out of “common courtesy” or as “a favor” and because it saves the owner a \$125 tow fee, *Suppr.Day 1* at 164; *Suppr.Day 2* at 11, 35, 81-82, and are more likely to make such allowance for cooperative motorists. *Suppr.Day 2* at 93-94. The police testified that when they give a car to a person, they ensure there is a relationship with the volunteer driver, who has a valid license, and is sober. *Suppr. Day 1* at 167-68, 201; *Suppr.Day 2* at 28, 34-35, 94.

The officers were aware of their discretion, their exercise of it, and that depending upon how they exercised it, an inventory search of the car could result. *Suppr.Day 1* at 164, 202-03; *Suppr.Day 2* at 28-29, 78.

Among the crowd that had collected, two men emerged, whom the officers understood were Davis’s chums. ROBINSON RPT. at 2; *Suppr.Day 1* at 33, 43-47, 53,

64, 123, 164-69, 196-97, 200; *Suppr.Day 2* at 10-11, 25-27, 50. The police said that upon Davis assenting, they made an offer, but the men declined to take the car. *Suppr.Day 1* at 65, 97-98, 125, 164, 167-68, 197-99, 201; *Suppr.Day 2* at 11-12, 26-28, 35, 50.

However, one of the men, Aaron Bruton, Davis's co-rapper, testified that he was willing, able, and sober, and that his plan was to move the car to one of the adjacent spots. *Suppr.Day 1* at 47, 50, 53, 66, 73-74, 101-02. Bruton said that before Davis was taken away, Zigler gave Bruton the keys for that purpose, but then changed his mind during the half-hour Bruton and Zigler stood waiting for the tow truck, and that Zigler then demanded the keys back. *Suppr.Day 1* at 48-49, 65-68, 72-74. Davis corroborated he saw Zigler give Bruton the keys, *Suppr.Day 1* at 98-100, 125-27, but the police deny it. *Suppr.Day 1* at 199; *Suppr.Day 2* at 12, 33, 52. Although aware it sounded nonsensical, Bruton testified that Zigler told him he would not be allowed to park the car nearby, because Davis had already been arrested. *Suppr.Day 1* at 48, 50-52, 68, 73-74. Although it seems Bruton may have misunderstood exactly what Zigler told him, Zigler denied saying anything like that to Bruton. *Suppr.Day 2* at 102-03.

During the half-hour wait for the tow truck, Bruton informed Payne, by text and by videocall, what had happened and to come get her car, which she said caused her to head to the scene. *Suppr.Day 1* at 25. Bruton said that, standing beside him, Zigler was aware of his contact with Payne, but the tow truck came first. *Suppr.Day 1* at 24-25, 48-49, 51, 67-69, 100. Zigler denied knowing anything about Payne coming to get the car. *Suppr.Day 2* at 94-95.

## **V. Police Seize Evidence, Conduct Impoundment Inventory, Find Gun**

After Davis was driven to the station, Zigler remained, along with Bruton, until the tow arrived, as custodian and to perform an impoundment inventory search.

ZIGLER RPT. at 1; *Suppr.Day 1* at 51, 67, 163; *Suppr.Day 2* at 32-33, 51-52, 60, 78.

Zigler entered the car, lifted the scarf, and seized as evidence the cups from the center console and a bottle of liquor he had seen in the driver's side door compartment, as well as a small jar of marijuana in the center console, which he brought to the station.

ZIGLER RPT. at 1; ROBINSON RPT. at 2; *Suppr.Day 2* at 53-55, 86, 90. Zigler admitted that his entry into the car had an investigatory purpose to seize items of evidentiary value to the DWI charge. *Suppr.Day 2* at 53-54, 86-87.

Zigler then conducted an inventory of the car, first from the driver's side then the passenger side, including the trunk. ZIGLER RPT. at 1; *Suppr.Day 2* at 32-33, 55, 90. Zigler said he did not see the black dirt devil bag, did not search it, did not find the gun in the trunk, and did not take the gun out of the trunk. *Suppr.Day 2* at 96, 105. Zigler did find Payne's purse and wallet in the trunk – the only items he noted on his inventory report, VEHICLE IMPOUNDMENT RECORD (July 1, 2017), Exh. 9, *Appx.* at 1; *Suppr.Day 2* at 55-57 – and admitted he rummaged Payne's purse to investigate whether her identification matched the ownership of the car. *Suppr.Day 2* at 55.

Zigler says he then leaned in from the open driver's side door to put the key into the ignition for the tow truck driver. ZIGLER RPT. at 2; *Suppr.Day 2* at 56, 99. Zigler acknowledged that he could have given the key directly to the tow operator

rather than inserting it into the ignition. *Suppr.Day 2* at 90.

As he leaned into the open car, Zigler said he looked down and saw a handgun in the crack between the center console and the driver's seat. ZIGLER RPT. at 2; *Suppr.Day 2* at 56, 90-91, 100. Zigler said the gun had a loaded magazine and a round in the chamber, and that the safety was off. ZIGLER RPT. at 2; *Suppr.Day 2* at 61. Zigler made the weapon secure, seized it, wrapped it in one of several similar scarves he said he saw in the car, and took it to the station with the other items. ZIGLER RPT. at 2; ROBINSON RPT. at 2; *Suppr.Day 2* at 56, 61, 100-02.

The gun does not appear on the inventory list, however, nor does any of Davis's or Payne's other personal property that was in the vehicle, including Davis's phone. VEHICLE IMPOUNDMENT RECORD; *Suppr.Day 1* at 90-91, 129; *Suppr.Day 2* at 57, 96-98. At the station, Davis took a breath-test, and blew below the legal limit, meaning he had not been driving drunk. ROBINSON RPT. at 2.

The police said that, from the station, they ran a criminal history check and learned Davis had previously served time for a felony. ROBINSON RPT. at 2; *Suppr.Day 1* at 169. The police called Payne, from whom they learned she had a gun permit, that it was her weapon in the car, and that she had left it in the dirt devil bag in the trunk. ROBINSON RPT. at 3; ZIGLER AFF. ¶21; *Suppr.Day 2* at 95. The police also called the Manchester Police Department, from which they learned that Davis did not have a gun permit, but Payne did. ROBINSON RPT. at 3; ZIGLER RPT. at 2.

## VI. Hampton Police Inventory Search Policy

The Hampton Police Department has a written policy which provides officers guidance for impounding a vehicle and inventorying its contents. The policy provides that an inventory search “shall be conducted ... whenever”:

- “[t]he vehicle is being towed under orders of a department member when the owner or custodian of the vehicle is under arrest.”
- “[t]he vehicle is towed under orders of a department member because the driver of the vehicle is under arrest and the owner or custodian is not present; the owner or custodian is unable to drive because they do not have a license or they are unfit to drive because they have been drinking or using drugs; or the owner or custodian is also under arrest.”
- “[t]he vehicle is illegally parked and is a hazard to traffic if allowed to remain.”

### HAMPTON POLICE DEPARTMENT MOTOR VEHICLE INVENTORY SEARCH POLICY

¶¶ III.A. 1, 2, 6 (Jan. 30, 2004), Exh. 2, *Addendum* at 49. The officers testified that all three quoted paragraphs applied to Davis’s situation. *Suppr.Day 1* at 165-66; *Suppr.Day 2* at 58-59.

Robinson testified that, pursuant to the policy, when the police impound a car, they must inventory it. *Suppr.Day 1* at 164-65. Zigler testified, perhaps with a mistaken understanding of the policy, that the policy did not allow them to leave the car overnight, and required them to tow the car. *Suppr.Day 2* at 16.

The Hampton Inventory Policy does not restrict the inventory list to high-value items, and directs how to group items of lesser value:

Multiple items similar in nature listed in the inventory may be recorded in aggregate totals instead of listing each item individually, i.e. items of clothing can be listed as several shirts, numerous pairs of pants, etc. Expensive items should be separately listed such as jewelry, etc.

HAMPTON INVENTORY POLICY ¶ III.C.

## VII. Suppression of Gun Denied, Hung Jury in First Trial

The police initially charged Davis with a variety of crimes and violations, but the DWI charge was dropped because Davis blew below the legal limit, and the others were withdrawn. *Bench Trial Day 2 (Morning)* at 35-36. Davis was later charged in federal court with being a felon in possession of a firearm.

Davis filed a motion to suppress the gun, to which the government objected. MOTION TO SUPPRESS EVIDENCE (Nov. 23, 2016), *Appx.* at 17; GOVERNMENT'S OBJECTION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (Nov. 30, 2016), *Appx.* at 27. The New Hampshire Federal District Court (*Joseph A. DiClerico, J.*) conducted a two-day suppression hearing, at which the three officers testified, as did Payne, Davis, Bruton, and another member of the entourage, who said he had already left Hampton Beach by the time of the arrest. *Suppr. Day 1* at 135-40.

The court credited the officers that no one was available to drive the car, but did not mention the possibility of leaving the car where it was and issuing a parking citation, and thus found that "towing the car was the only option." SUPPRESSION ORDER (Dec. 20, 2016) at 17, *Addendum* at 52. It found that because Davis was initially charged with drunk driving, the gun was not taken as evidence of any crime. *Id.* at 19, fn. 5. The court held:

The impoundment of the car was reasonable and made an inventory search necessary and appropriate. Zigler legally had access to the car for the purpose of the impoundment, which included taking the inventory and putting the keys in the ignition before the car was towed. Zigler's explanation that it would not have been safe or prudent to

leave a loaded gun in the car during the towing process and while the car was stored in a parking area is consonant with the community care taking exception. Therefore, seizure of the gun as part of the inventory process and for the additional purpose of community safety did not violate the Fourth Amendment.

*Id.* at 20. The court thus denied Davis's motion to suppress. *Id.*

The case first went to trial in January 2017, which resulted in a hung jury. But the government persevered. In March 2017 Davis waived a jury, WAIVER OF JURY TRIAL (Mar. 6, 2017) (omitted from appendix); *Final Pretrial Conference* (Mar. 6, 2017), and the court (*Landy B. McCafferty, J.*) held a two-day judge-only trial.



### **VIII. Additional Details Developed in Second Trial**

The testimony of the officers during the second (bench) trial was similar to the suppression hearing. Robinson testified about observing Davis drive to where he parked, the conduct of the traffic stop, and having taken Davis to the station. *Bench Trial Day 1 (Morning)* at 40-161.<sup>3</sup> Zigler testified about seizing several items from the car, conducting the inventory search, and purportedly discovering the gun between seat and console. *Bench Trial Day 1 (Morning)* at 162-95; *Bench Trial Day 1 (Afternoon)* at 3-79. Mostly Hood looked on. *Bench Trial Day 1 (Afternoon)* at 80-110.

Several details developed at trial. Hood estimated Davis drove the car for 5 seconds, *Bench Trial Day 1 (Afternoon)* at 89, Robinson estimated 10 to 15 seconds, *Bench Trial Day 1 (Morning)* at 98, 123, and Zigler estimated 100 to 150 yards. *Bench Trial Day 1 (Afternoon)* at 17. Robinson testified that where Davis parked was so close to the wooden pylons at the edge of the sidewalk, Robinson at first worried Davis would hit them. *Bench Trial Day 1 (Morning)* at 7-8, 43, 49. Zigler confirmed that where Davis parked the car was not legal parking, but “[b]ased on where it was, it was off to the side of the road.” *Bench Trial Day 1 (Morning)* at 180. Hood recollected, and Robinson conceded, that Davis was smoking a cigar while he was sitting in the car during the traffic stop, but was unsure when Davis lit it. *Bench Trial Day 1 (Morning)* at 150; *Bench Trial Day 1 (Afternoon)* at 95-96.

Largely in accord with the suppression testimony, at trial Zigler said that once

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<sup>3</sup>In the sufficiency section of this statement of facts, all citations are to pleadings, transcripts, and exhibits that the court had before it during the second (bench) trial.

Davis was taken away, Zigler felt the car was his responsibility, he needed to get it off the street, and that collectively the police “decided to tow the vehicle.” *Bench Trial Day 1 (Morning)* at 180. Slightly different than his suppression testimony, Robinson conceded at trial that the costume Davis was wearing was a long scarf, which “came down pretty far” around Davis’s body, that it had a “bandanna design” print, and that it was possible Davis may have doffed it when he got out of the car for field sobriety testing rather than earlier when he was still seated inside. *Bench Trial Day 1 (Morning)* at 56, 159; PHOTO OF SCARF, Exh. 10, *Appx.* at 41.

At trial, the government introduced a series of photographs showing a gun in a car, tucked into the space between the driver’s seat and center console. PHOTOS OF CAR INTERIOR, Exhs. 3, 3a, 3b, 3c, 3d, 4, 4a, 5, 5a, *Appx.* at 43-51. Robinson and Zigler explained that the pictures were not of Payne’s car, and were not taken at the time of impoundment. Rather, the pictures were a mock-up. Sometime after the events here, Zigler and another Hampton officer went to a local Ford dealership, found a car similar to Payne’s, but with a different color interior, put the gun in the position the photographs show, and took pictures. *Bench Trial Day 1 (Morning)* at 108-110, 187; *Bench Trial Day 1 (Afternoon)* at 46-47. Also regarding the gun, despite its obvious value and the policy reasons for inventorying impounded property, INVENTORY SEARCH POLICY at ¶ II (i.e., determine ownership, protect owner’s property, protect department against claims and danger), on cross-examination Zigler had difficulty explaining why he did not include it on the inventory report. *Bench*

*Trial Day 1 (Afternoon)* at 42.

The most significant new testimony offered at trial concerned alleged statements Davis made at the station when confronted with the gun.

Zigler brought a gun to the station where Davis was detained. Zigler initially swore that Davis explicitly waived his *Miranda* rights by initialing a *Miranda* form. ZIEGLER AFF. (Nov. 28, 2016), Exh. D, *Appx.* at 11. At trial however, Zigler conceded that Davis refused to sign it, *Bench Trial Day 1 (Afternoon)* at 7-8, 67, but nonetheless indicated inclination to talk. *Bench Trial Day 1 (Afternoon)* at 6-8; ZIGLER RPT. at 2; ROBINSON RPT. at 3. Zigler testified:

I just informed [Davis] that I found a handgun in the vehicle. He explained to me originally that he had a permit for the weapon. I believe I had asked him if it was out of Manchester. He immediately responded very quickly that the permit was actually, I believe, his wife's permit, it was her handgun, and that she did in fact have a permit for it.

*Bench Trial Day 1 (Afternoon)* at 9. A moment later, reflecting on Davis's felon status, Zigler and Robinson openly discussed charging Davis with being a felon unlawfully in possession of a firearm. Overhearing this, Zigler testified, Davis said he could not be charged with possession because he did not have physical custody of the gun. *Bench Trial Day 1 (Afternoon)* at 9-11.

Robinson testified less definitively. Robinson said that when Zigler displayed the gun to Davis, Davis said “[s]omething along the lines” of either having or once having had a gun permit: “He said he had or has a permit for it.” *Bench Trial Day 1 (Morning)* at 142. Then, Robinson testified, Davis said Payne “has or had a permit for

it.” Asked whether Davis was referring to Payne having a permit for that particular gun or some other gun, Robinson responded, “I don’t remember which exactly he said.” *Bench Trial Day 1 (Morning)* at 143.

As to Davis’s alleged remark about not being in possession because he lacked physical custody, Robinson recollected differently, suggesting that Davis claimed non-possession, not because he was not holding the gun, but because he was driving. Robinson testified that Davis had said “something along those lines, whoa, you can’t charge me with being in possession of it, I was just driving,” *Bench Trial Day 1 (Morning)* at 92, 147, and that “driving” rather than “holding” was a “direct quote.” *Bench Trial Day 1 (Morning)* at 147-48.

Hood said he was present at the station at the time the gun was showed to Davis, and overheard what was said among Robinson, Zigler, and Davis. Hood did not recall hearing Davis declare whether he has or had a gun permit, did not recall hearing Davis allege that Payne had a gun permit, and did not recall hearing Davis opine on whether he was or was not in possession of the gun. *Bench Trial Day 1 (Afternoon)* at 103, 108-110. Rather, Hood said the only comment he remembered hearing from Davis was that Davis announced it was Payne’s gun. *Bench Trial Day 1 (Afternoon)* at 86, 106, 108-110.

After the government’s case, the court denied Davis’s initial motion for judgment of acquittal. FED. R. CRIM. P. 29; *Bench Trial Day 1 (Afternoon)* at 126-27.

## **IX. Davis's Testimony in Second Trial, and Court's Verdict**

After waiving his right to not speak at trial, *Bench Trial Day 2 (Afternoon)* at 4, Davis testified, largely in accord with the officers' statements and with his own testimony at suppression, *Bench Trial Day 2 (Afternoon)* at 4-69, although several new details emerged.

Davis testified that although the car belonged to Payne, her insurance was limited, and she was picky about who drove the car and when; Davis nonetheless used it almost daily to pick up his stepdaughter from school most afternoons, and also take her to school some mornings. Davis testified that Payne's car was the only car in the family, and that there were occasions when he drove it without necessarily gaining explicit permission. *Bench Trial Day 2 (Morning)* at 39-40, 65-67.

Davis testified that before his short drive, he procured the keys from one of the roadies because Payne leaves the keys in the car for them, with the understanding that whoever takes out the last of the equipment would lock it and pocket the keys. Davis admitted that this procedure might not have been strictly necessary, as Payne's car was fitted with a button that allowed it to be locked without the keys present. *Bench Trial Day 2 (Morning)* at 12, 44-45.

Davis acknowledged that he parked parallel to the street, not positioned in accord with the white lines on the road, because his need to urinate was urgent, and he intended to park as close to the bathhouse as possible. "I didn't really pull into a parking spot, I kind of just pulled up because I was going to, I was in a rush, I was

going to hop out and just run over there, use the bathroom.” *Bench Trial Day 2 (Morning)* at 19-20. “I wasn’t looking for parking spaces, I was looking for a bathroom.” *Bench Trial Day 2 (Morning)* at 48.

During the stop, Davis agreed with Robinson and Hood that he smoked a cigar, and believes he lit it after he urinated. Davis noted that the liquid in the cups in the center console was his ashtray. *Bench Trial Day 2 (Morning)* at 24-25, 49-50. Davis did not recall ever being asked to keep his hands on the steering wheel. *Bench Trial Day 2 (Morning)* at 56.

Regarding the scarf, Davis testified that it was a prop for his rap act, but that it was actually “a bed throw from Bed, Bath & Beyond,” which Davis folds horizontally and wears about his neck. It is long enough so that it hangs past his knees when he stands, and covers his lap when he sits. *Bench Trial Day 2 (Morning)* at 25-26. Davis said he still had the scarf on when he got out of the car, that he aimlessly threw it into the car from the driver’s door where he was standing, and believed it landed somewhere on the front seats. *Bench Trial Day 2 (Morning)* at 26-27, 52-53, 58. Davis said he took it off because once he got out of the car he felt uncomfortable wearing it, and from their expressions he believed the police thought it was weird. *Bench Trial Day 2 (Morning)* at 53-56. Davis expressed exasperation with the attention to the scarf, and denied the scarf associated him with a gang. *Bench Trial Day 2 (Morning)* at 55-56.

Davis acknowledged that, at the station, Hood was nearby and likely overheard Robinson and Zigler discussing the gun with him. *Bench Trial Day 2 (Morning)* at 31.

Davis said that when Zigler came into the station holding the gun, he boasted he found it “on the beach.” Davis expressed disbelief, causing Zigler to more seriously say he found it in the car. *Bench Trial Day 2 (Morning)* at 32-33, 60-63. Davis testified that when the police indicated they would charge him for possession, he did not and would not have claimed to have a permit, because he knows he is a felon, knows the police would easily discover that, and knows he cannot possess a gun. *Bench Trial Day 2 (Morning)* at 33-34, 62-63. Davis testified that he told the police that if they found a gun in Payne’s car, because Payne has a gun permit, it is probably Payne’s gun, but denied telling the police that he positively knew Payne owned a gun. *Bench Trial Day 2 (Morning)* at 33-37, 63. “I said, well, it is my fiancée’s car and she does have a permit for a gun, so if you’re saying you found it in the car then that’s probably why.” *Bench Trial Day 2 (Morning)* at 33.

Regarding possession of the gun, Davis testified that he never said he knew the gun was in the car, but because it was not on his body he could not be liable for possession; rather, he said he did not know the gun was there, and that he was not in possession. *Bench Trial Day 2 (Morning)* at 35, 37.

Finally, Davis denied knowing Payne had left her grandfather’s gun in the car, denied knowing any gun was there, did not see or know of a gun or any object wedged between the seat and the console, and had no knowledge of the gun until Zigler confronted him with it. *Bench Trial Day 2 (Morning)* at 33, 40-42, 46.

After Davis’s testimony, his attorney renewed his motion for judgment of

acquittal, FED. R. CRIM. P. 29, which the court again denied. *Bench Trial Day 2 (Morning)* at 69.

Davis stipulated to two of the three elements of the crime for which he was charged: he was a felon, and the gun was a firearm which moved in interstate commerce. The parties also stipulated that the gun was tested for fingerprints, but none were found. STIPULATIONS, Exh. 13 (Jan. 4, 2017), *Appx.* at 38. The parties stipulated, and the court announced, that it would use the jury instructions from the first trial as a legal guide for the court's deliberations. *Bench Trial Day 2 (Morning)* at 70. Following a lunch break, during which the court deliberated, it announced its verdict in open court, quoted here in full:

With respect to ... knowing possession, I find that the government has proven that element beyond a reasonable doubt.

When I sat down to deliberate if I removed your testimony, Mr. Davis, and looked just at the government's case without your testimony, I may well not have found the evidence sufficient to convict.

Without your testimony the government had you in a car that was not yours for a very short time where a gun was later located and the gun was not your gun and by all accounts could not be seen by three very sober police officers.

But when I consider your testimony and your story, I find that the totality of evidence constitutes proof beyond a reasonable doubt that you knew the gun was there and that you had constructive possession of it.

Let me explain the facts and credibility determinations that support this verdict.



With respect to credibility, I found all three officers credible. Particularly Officer Zigler.

I found your testimony was not credible. Your story was not believable. Why?

Your story is that the loaded weapon right next to you in the car you were driving was not your gun and you were not aware it was there. You're claiming that it was your girlfriend's gun.

You testified that you knew nothing about her ownership of a gun until after your arrest. Had you said I know she had a gun but I had no idea it was in that car that night, that would have been much more believable, more credible, but to suggest you had no awareness of her owning a gun is simply not believable for several reasons.

Now, you had been living with Tori Payne since February 2016, which was the time that she acquired the car, the Ford Focus at issue in this case.

You admit that at the station one of your first statements was that she has a permit, Tori has a permit. It is just not believable. I do not find it believable or credible that you knew she had a permit for a gun but did not know about this gun.

And this gun was not just any gun. This gun was a handgun that was ready to fire, the safety lock was off, there was a bullet in the chamber, and you claim to have had no awareness of it. I just find that not credible.

It's especially hard to believe in light of the fact that you drove over in the Ford Focus with the purported owner of that gun from Manchester to Hampton that night, who was at that time your fiancée, you lived with her, you took care of her daughter, and you drove that Ford Focus regularly.

You also tried to suggest that Tori was strict about letting people, even you, drive her car, have access to her car, but she was not a guardian of the keys that night. That's just

hard to believe as well.

Because I found your testimony incredible, I do not believe your ultimate denial; that is, that you did not know of the gun's presence next to you in the car.

Thus, the other circumstantial evidence of your guilt is also supportive of this verdict, including the attempt to conceal the gun with the scarf.

Both Zigler and Robinson testified about your attempt, which was not completely successful, to drape the scarf over the area of the gun. And the evidence of your movement of your right arm toward the area of the gun, or to your right side, what both Officer Zigler and Robinson described as indexing.

For these reasons, I find that the government has proven all three elements of its case beyond a reasonable doubt.

*Bench Trial Day 2 (Afternoon) at 2-4.*

Later the court sentenced Davis to 50 months incarceration, plus 3 years supervised release. JUDGMENT IN A CRIMINAL CASE (June 22, 2017), *Addendum* at 72.

## **SUMMARY OF ARGUMENT**

Joseph Davis first canvasses the cases requiring that, for an inventory search to be constitutional under the community caretaking exception to the Fourth Amendment's warrant requirement, it must be non-discretionary, pursuant to standardized department policy, and based on "solid, non-investigatory reasons." Davis then argues that the Hampton police inventory policy did not mandate an impoundment in the circumstances of this case, thus leaving the decision to the capricious discretion of the officers on the street. He also suggests that reentry into the car was pretextual, because the officer had no warrant to reenter after the inventory was completed.

Regarding sufficiency of the evidence, Davis cites felon-in-possession cases, noting that the government must prove both knowledge that the weapon was at hand, and an intent to exercise dominion and control over it. Davis reviews the facts, which show he had no prior knowledge of the gun, and no opportunity during his short drive to learn of it or form any intent regarding it. Davis thus argues that his unknowing proximity to the gun was insufficient to sustain the court's finding of guilt. Further, Davis demonstrates that the factual findings upon which the lower court relied were dependent on a series of impermissibly stacked inferences.

## ARGUMENT

### I. Inventory Search Was Unreasonable, and Therefore Unconstitutional

#### A. Officer Discretion to Impound and Conduct Inventory Search Must Be Authorized by Department Policy, And Not a Pretext for Investigatory Motive

When the driver of a vehicle is arrested or unavailable to operate it, “an officer has three options for disposing of the vehicle. First, he can allow a third party to take custody. Second, the officer or the driver (depending on the nature of the arrest) may take the car to the nearest public parking facility, lock it, and take the keys. Finally, the officer can ... impound the vehicle, and search and inventory its contents.”

*Colorado v. Bertine*, 479 U.S. 367, 379-80 (1987). An inventory search is the result when that decision-making ends in impoundment.

In some cases, impoundment and towing is necessitated by protection of the public. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the drunk driver had driven off the road, “breaking through a guard rail and crashing into a bridge abutment,” *id.* at 435-36, such that the car “constituted a nuisance along the highway.” *Id.* at 443. In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the car was impounded and towed after it was repeatedly ticketed for illegal parking.

But when impoundment is not necessary, and there is a choice, the decision to impound must be authorized by department policy. *Bertine*, 479 U.S. at 375-76 (“Here, the discretion afforded the ... police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle

rather than impounding it.”). In *Florida v. Wells*, 495 U.S. 1 (1990), the Supreme Court upheld suppression of evidence, which was discovered during an inventory pursuant to a vehicle impoundment, because the department’s policy provided the officer no guidance on whether the vehicle should be impounded. *Id.* at 6, 8-9 (Brennan, J., concurring).

The First Circuit’s precedent is that while “an impoundment decision made pursuant to standardized procedures will most likely ... satisfy the Fourth Amendment,” “an impoundment decision made without the existence of standard procedures is [not] per se unconstitutional.” *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006); *see also United States v. Sanchez*, 612 F.3d 1, 4 (1st Cir. 2010) (“[T]he police department’s written inventory protocol ... gave the officers effective guidance in making the decision to impound and tow.”). When not pursuant to policy, the impoundment decision must be justified by the community caretaking function. *Coccia*, 446 F.3d at 239 (citing *United States v. Rodriguez-Morales*, 929 F.2d 780, 786 (1st Cir. 1991); *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 75 (1st Cir. 2007) (police acted reasonably in requiring motorist to either move inoperable car or police would have it towed); *United States v. Miller*, 589 F.2d 1117, 1125-26 (1st Cir. 1978); *Miranda v. City of Cornelius*, 429 F.3d 858, 865 (9th Cir. 2005)).

An inventory search under the community caretaking function must be “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” *Cady v. Dombrowski*, 413 U.S. at 441. “[A]n inventory

search must not be a ruse for a general rummaging in order to discover incriminating evidence,” *Wells*, 495 U.S. at 4, or a “purposeful and general means of discovering evidence of crime.” *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring). Rather, the police must “have solid, non-investigatory reasons for impounding a car.” *Coccia*, 446 F.3d at 239 (quoting *Rodriguez-Morales*, 929 F.2d at 787); see *United States v. Marshall*, 986 F.2d 1171, 1175 (8th Cir. 1993) (invalidating inventory search as it “was directed toward finding evidentiary items to be used in a criminal proceeding”).

When there are not “solid, non-investigatory reasons for impounding a car,” the inventory is pretextual, and thus invalid. In *Coccia*, this court listed the “solid, non-investigatory reasons” that impoundment was constitutionally reasonable: the defendant would likely be afield for a lengthy and indefinite period, removal of the car protected the defendant’s property and reduced confrontation between the defendant and the owner of the property on which the vehicle was parked, the defendant had made statements raising the possibility that his car contained explosives or biochemical agents, and “there was no obvious alternative means for removing the car other than impoundment.” *Coccia*, 446 F.3d at 240.

Regarding the constitutionality of inventory searches, this court’s “review of a district court’s denial of a suppression motion is plenary.” *United States v. Hawkins*, 279 F.3d 83, 85 (1st Cir. 2002).

**B. The Police Exercised Capricious Non-Policy Discretion by Impounding and Towing, Rather Than Leaving the Car Overnight**

In Davis’s case, the Hampton inventory policy directs an inventory search “whenever ... [t]he vehicle is being towed under orders of a department member” due to an unavailable driver or custodian. INVENTORY SEARCH POLICY ¶¶ 1 & 2. But the policy does not *require* towing in those circumstances – when there is nobody available to take custody, it explicitly gives a “department member” discretion to issue “orders.” Under these absence-of-driver portions of the policy, the officers had discretion to not tow the car, exercisable by merely declining to call Lyman’s Garage.

The only applicable circumstance in which the policy mandates an inventory search is when “[t]he vehicle is illegally parked *and* is a hazard to traffic if allowed to remain.” INVENTORY SEARCH POLICY ¶ 6 (emphasis added). The district court misstated the policy, however, writing that “[u]nder the policy, a vehicle must be *towed* if it is illegally parked and is a hazard to traffic.” SUPPRESSION ORDER at 10 (emphasis added). The district court also twice in its order misstated that “[u]nder the community care taking exception ..., police may impound a vehicle for noninvestagatory purposes when ... the car is not parked legally *or* may be an impediment to traffic.” SUPPRESSION ORDER at 16-17 (quotation omitted, emphasis added); *id.* at 17 (“The Hampton police policy is to tow a car when the driver is arrested for driving under the influence and the car is parked illegally *or* is a traffic hazard.”) (emphasis added).

Regardless of those errors, while the court noted that “Zigler called a tow truck

because ... it was a hazard,” SUPPRESSION ORDER at 10, and that “Robinson and Zigler testified that the car was parked illegally and was also a traffic hazard,” SUPPRESSION ORDER at 17, the court nowhere found that the car, as parked, was a traffic hazard. Rather, as the officers testified, the car (albeit illegally parked) was in a parking area, off the travel portion of the road, and not a hazard to regular traffic.

Accordingly, the officers were not mandated to tow the car. The district court’s suppression order, however, concluded that because no alternate driver was available, “towing the car was the only option.” SUPPRESSION ORDER at 17. The consequence of the court’s erroneous “only option” holding, is that an inventory search was inevitable under the policy.

But because the inventory search was the result of police discretion, and not required by the policy, the court’s ultimate finding – that the “seizure of the gun as part of the inventory process and for the additional purpose of community safety did not violate the Fourth Amendment” – is in error and should be reversed.

The district court cited *Jaynes v. Mitchell*, 824 F.3d 187 (1st Cir. 2016), to suggest that the police can inventory a car “when it is reasonable to do so,” *Jaynes*, 824 F.3d at 197; SUPPRESSION ORDER at 17, thus justifying the inventory as community caretaking. *Jaynes*, however, listed other considerations applicable there but not here: the driver in *Jaynes* was arrested under circumstances making him unavailable for a long time, there was a likelihood of vandalism in the neighborhood, and there was a necessity “to remove an impediment to traffic.” *Id.* The *Jaynes* court did not hold that



illegal parking alone is sufficient reason for impoundment.

In Davis's case, impoundment was constitutionally unreasonable. Overnight parking was not prohibited; the car was in a parking zone, off the traveled roadway, no impediment to traffic, and posed no greater hazard than a car legally parked between the lines; its owner was just blocks away, *en route* to retrieve the car; and vandalism during the busy Independence Day weekend in crowded Hampton Beach was not mentioned as an issue. Presumably the Hampton Police Department occasionally tickets vehicles for illegal parking, *see* N.H. REV. STAT. ANN. §§ 265:68 through 265:74 (listing parking prohibitions); N.H. REV. STAT. ANN. § 265:70 (authorizing municipalities to regulate parking), and could have done that here.

Accordingly, the impoundment, and therefore the inventory search, was unreasonable, and any item discovered as a result was unconstitutionally seized.

**C. The Police Exercised Capricious Discretion by Reentering to Put Key in Ignition Rather Than Handing Key to Tow Operator, And Conducted an Unconstitutional Investigatory Search**

The Hampton Inventory Policy is silent as to how custody is transferred from the police to the tow operator. Zigler acknowledged he could have given the key to the tow driver instead of putting it in the ignition, but did not explain how he chose. Because inserting the key into the ignition involved entry into the vehicle, whereas giving the key to the operator would not, the difference is constitutionally significant. Moreover, giving the key to the operator is the more reasonable option: the car could be locked, there would be no risk of running down the battery, and there would be no risk of theft or unauthorized entry if the officer's attention were momentarily distracted by other events likely to occur on Independence Day weekend on Hampton Beach.

The Hampton Inventory Policy is specific about its purposes – protect property, protect police against danger, and help determine if the vehicle may be stolen or abandoned. These purposes were accomplished when Zigler finished his inventory search.

Going back into the car was a re-entry, justified by no warrant, or Fourth Amendment exception.

Zigler's actions, moreover, suggest a pretext, rather than "solid, non-investigatory reasons." *Coccia*, 446 F.3d at 239. Zigler first entered the car specifically to seize items of evidentiary value to the DWI charge – the cups and bottle. Second,

he rummaged Payne's purse, to investigate whether her identification matched the ownership of the car. Third, after the inventory, Zigler reentered the car, purportedly to put the key in the ignition, when giving it directly to the operator would have been safer and more effective. Fourth, items of obvious value were not on the inventory list, including the gun, Davis's phone, and the vacuum; items of lesser value, including the clothes and other belongings Davis and Payne stored in the car, were also absent from the inventory, even though the Hampton Inventory Policy directs how to group them.

Thus, unlike in *Coccia*, there were no "solid, non-investigatory reasons" to make the search which produced the gun constitutionally reasonable. Accordingly, this court should find that use of the gun as evidence was unconstitutional.

## **II. Evidence Was Insufficient for Proof Beyond a Reasonable Doubt**

### **A. To Prove Constructive Possession, Government Must Show Davis Knew a Gun Was Within Easy Reach, and Had Intention to Exercise Dominion and Control Over It**

The felon-in-possession statute provides that “[i]t shall be unlawful for any person ... who has been convicted of ... a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition.” 18 U.S.C. ¶ 922(g)(1).

The possession element can be met by constructive possession: “As long as a convicted felon knowingly has the power and the intention at a given time of exercising dominion and control over a firearm or over the area in which the weapon is located, directly or through others, he is in possession of the firearm.” *United States v. Wight*, 968 F.2d 1393, 1398 (1st Cir. 1992); *United States v. Padilla-Galarza*, 886 F.3d 1, 5 (1st Cir. 2018).

“[P]roximity to a weapon is not sufficient to show actual or constructive possession.” *United States v. Weems*, 322 F.3d 18, 24 (1st Cir. 2003). In proximity cases, “there must be some action, some word, or some conduct that links the individual to the contraband and indicates that he had some stake in it, some power over it.” *United States v. McLean*, 409 F.3d 492, 501 (1st Cir. 2005) (quotations omitted); *United States v. Duval*, 496 F.3d 64, 79-80 (1st Cir. 2007).

“[A] person must have actual knowledge of the weapon in order to have constructive possession of it.” *United States v. Ridolfi*, 768 F.3d 57, 62 (1st Cir. 2014).

“Constructive possession of a firearm may be established by showing that the person knows (or has reason to know) that the firearm is within easy reach, so that he can take actual possession of it virtually at will.” *United States v. Robinson*, 473 F.3d 387, 399 (1st Cir. 2007) (quotation omitted).

Thus, constructive possession requires the government prove not merely that Davis knew of a gun in the abstract, knew of the existence of the gun, or knew it was nearby. Rather, the law requires: 1) that Davis knew the gun was within “easy reach” between the seat and console at the time of his short drive, and 2) that he had the “intention” to exercise dominion and control over it. Constructive possession must be proved beyond a reasonable doubt. *United States v. Vargas*, 945 F.2d 426, 428 (1st Cir. 1991).

**B. Davis Did Not Know a Gun Was Within Easy Reach Between Seat and Console at the Time of His Short Drive**

The evidence showed that when Davis urgently had to urinate, he ran across the street, got directly into the car, drove a few seconds, and parked as close as possible to the bathroom. As the trial court noted, apart from Davis's testimony:

[T]he government had you in a car that was not yours for a very short time where a gun was later located and the gun was not your gun and by all accounts could not be seen by three very sober police officers.

*Bench Trial Day 2 (Afternoon) at 2.*

To that, Davis's testimony neither added nor disputed much. He talked about how Payne was possessive of her car, but that Davis used it daily to transport the child. He told about getting the keys from the roadie. He confirmed the officers' testimony that he smoked a cigar after relieving himself, and noted he used the console cups as an ashtray, thus explaining the supposedly furtive movement of his hand toward the console. He described the scarf and how he haphazardly tossed it into the car, corroborating one officer's testimony that the toss was from outside the car.

The only significant difference between Davis's testimony and the officers', was what he said at the station. The officers claimed Davis's statements indicated knowledge of at least some gun. Davis maintains he did not know of the gun, and would not have said anything about a gun permit because he was aware of his possession prohibition. Davis suggests the officers' recitation of the statements reflect

either misunderstanding or mischaracterization.

After Davis testified, the court knew little more about the situation than before. Even crediting nothing Davis said, and discounting his denial of possession, the undisputed facts are the same – in the trial court’s words, Davis was “in a car that was not yours for a very short time where a gun was later located and the gun was not your gun.” *Bench Trial Day 2 (Afternoon)* at 2.

The court’s supposition that Davis’s lack of credibility added to the government’s theory, *Bench Trial Day 2 (Afternoon)* at 2; *Sentencing Hrg.* at 22, is not a rationale factfinding. The court said it did not believe that Payne failed to inform Davis about the gun she left in her car. *Bench Trial Day 2 (Afternoon)* at 3. By that finding, the court purported to discern the nature of a busy family relationship, and ruled that it is inconceivable the couple did not discuss an item Payne considered exiguous.

Similarly, the court could not understand how Payne, a person possessive about her car, would allow others to hold the keys. *Bench Trial Day 2 (Afternoon)* at 3-4. That ignores that Payne had marketing responsibilities away from the club, but that the roadies – her friends and co-workers – required access to equipment in her back seat. The court also commented that the gun was loaded and ready to fire. *Bench Trial Day 2 (Afternoon)* at 3-4. While arguably relevant to sentencing, the condition of the gun does not advance any issue regarding possession, and it is implausible that Davis loaded, cocked, unlocked, or hid the gun in the seconds of his short drive.

The court used its disbelief of Davis's testimony to justify disbelieving his denial of the ultimate issue – knowledge and intent regarding the gun. But the matters the court said were the most salient to determining credibility are easily susceptible of other rational explanations, and do not address the dearth of the government's evidence.

Accordingly, the court should have granted Davis's motion for judgment of acquittal, FED. R. CRIM. P. 29, or should have entered a general verdict of not guilty.

**C. Davis Did Not Have Intention to Exercise Dominion and Control Over a Gun During His Short Drive**

Even if he had knowledge of the gun, the government must prove Davis had an intention to exercise dominion and control over it.

Davis got directly into the car, was in it for 5 to 15 seconds, drove 150 yards, and parked hurriedly, manifestly because, as he told the officers, he urgently needed to use the toilet. And he was cooperative during the stop. There is no evidence to suggest Davis contemplated dominion or control over the gun; had a chance to load it, unlock it, or hide it; or aimed to use it.

Accordingly, the court erred by either ignoring the intent prong or by finding intent, and this court should reverse.



#### **D. Evidence Was Insufficient for a Finding of Guilt**

The evidence was insufficient for a finding of guilt. Davis did not drive the car from Manchester to Hampton earlier in the night, but spent that time rehearsing his rhymes. Despite the government's mocked-up pictures, the gun was tucked so deeply into the space between seat and console that even the officers did not initially see it, suggesting it was successfully hidden by someone, perhaps one of the roadies who had unimpeded access to the car and its trunk after the entourage arrived in Hampton. Davis's drive to the bathroom was too brief for Davis to discover the gun, possess it, or form any intent regarding it. And when Davis exited the car, had he known of the gun, it is not likely he would have so casually left the door open, or so casually tossed the scarf onto the passenger seat.

In *United States v. Figueroa-Ocasio*, 805 F.3d 360 (1st Cir. 2015), the defendant was charged with being a felon in possession of three guns found in a car as a result of a traffic stop. One weapon was between the front seat and center console, a second "somewhere 'in the floor of the car,'" and a third in an unspecified location in the car. *Id.* at 362-63. This court noted:

The closest the [government] comes to suggesting Figueroa was in constructive possession of a firearm is the allegation that a firearm was found "in the floor of the car" after Figueroa exited the vehicle. From this, one reasonably might infer that the firearm was found on the floor near where Figueroa was sitting, from which one reasonably might infer that it was within arm's reach of Figueroa, from which one reasonably might infer Figueroa knew the weapon was within arm's reach, from which one reasonably

might infer that Figueroa was in possession of the firearm. Facts, however, may not be established by stacking inference upon inference. Again, there were no facts indicating Figueroa knew there was a firearm “in the floor,” or that he knowingly had the power and intention at a given time to exercise dominion or control over a firearm either directly or through others.

*Figueroa-Ocasio*, 805 F.3d at 371, fn 16 (quotations and citations omitted).

Like in *Figueroa*, the court in Davis’s case erroneously established guilt “by stacking inference upon inference.” It first inferred that Payne would have told Davis about the gun, and that she could not have been as protective of her car as Davis claimed. After inferring Davis knew of the gun, it inferred Davis knew the gun was within reach, and then inferred he had formed an intent regarding it. The court thus erroneously inferred its way to making “mere presence with or proximity to weapons,” *Figueroa*, 805 F.3d at 371 (quoting *Ridolfi*, 768 F.3d at 62), sufficient for a finding of guilt.

Accordingly, there was insufficient evidence for proof beyond a reasonable doubt that Davis had constructive possession of the gun. The trial court thus erred by not granting Davis’s motion for judgment of acquittal, and by not entering a general verdict of not guilty after the close of evidence. This court should reverse.

## CONCLUSION

Because the search was unlawful, and the evidence insufficient, this Court should reverse the verdict.

Respectfully submitted,

Joseph Davis  
By his Attorney,

Law Office of Joshua L. Gordon

s/

Dated: June 27, 2018

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## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Joseph Davis requests that Attorney Joshua L. Gordon be allowed oral argument.

I hereby certify that on June 27, 2018, I will forward via the ECF/PACER system an electronic version of this brief to the United States Court of Appeals for the First Circuit, and by the same method to the office of the United States Attorney.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), and that it contains no more than 11,280 words, exclusive of those portions which are exempted.

s/

Dated: June 27, 2018

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Joshua L. Gordon, Esq.

**ADDENDUM**

HAMPTON POLICE DEPARTMENT MOTOR VEHICLE INVENTORY SEARCH  
POLICY (Jan. 30, 2004), Suppression Exh. 2. . . . . 49

ORDER ON DEFENDANT’S MOTION TO SUPPRESS (Dec. 20, 2016). . . . . 52

JUDGMENT IN A CRIMINAL CASE (June 22, 2017). . . . . 72