UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 3:24-cr-125-MMH-SJH

TODD WADE POWERS

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REPORT AND RECOMMENDATION

THIS CAUSE is before the undersigned on Defendant's Motion to Suppress Physical Evidence and Statements, Doc. 19 ("Motion"). For the reasons herein, I respectfully **recommend** that the Motion be **denied**.

I. Background

Mr. Powers has been charged in a two-count indictment with possession of a firearm by a convicted felon (Count One) and possession with intent to distribute multiple controlled substances (Count Two). Doc. 1. The guns and narcotics underlying the charges were seized by law enforcement on April 30, 2024, from a Honda Accord. Mr. Powers seeks in his Motion to suppress two categories of evidence: (i) the guns and controlled substances seized from the Honda; and (ii) post-*Miranda* statements made by Mr. Powers later the same day. *See* Doc. 19. The Government has responded in opposition to the Motion. Doc. 22 ("Response").

The undersigned held an evidentiary hearing on the Motion on September 10, 2024, Doc. 29 ("Tr."). Two witnesses testified at the hearing, Deputies Patrick

Zinkhen and Kenneth Roberts. Four exhibits from the Government and one composite exhibit from Mr. Powers were also received, without objection. Tr. at 5. Following the hearing, the parties submitted supplemental legal memoranda, Doc. 32 ("Defendant's Supplement") and Doc. 35 ("Government's Supplement").

II. Findings of Fact[1]

On April 30, 2024, Deputies Patrick Zinkhen and Kenneth Roberts of the Clay County Sheriff's Office were on patrol together. Tr. at 12-13. Deputy Zinkhen was newer and still in training. *Id.* Deputy Roberts had more than 17 years of law-enforcement experience, including special training in narcotics detection. *Id.* at 41-42.

In the early morning hours, between approximately midnight and 1:00 a.m., the deputies went to a Circle K gas station on County Road 218 in response to a request to meet there with the mother of a missing child. *Id.* at 13-14, 42-43. Upon their arrival, there were two vehicles parked near one another, roughly parallel but in opposite directions, at different pumps. *Id.* at 14. One vehicle was a black Ford SUV facing the gas station; the other was a black Honda Accord facing the road. *Id.* at 43-44. The deputies circled the gas station and confirmed there were no other persons or vehicles in the outside areas. *Id.* at 26-27, 43. When the deputies approached the two vehicles, Cassie Troxell was standing by the SUV. *Id.* at 15. She reported to Deputy Zinkhen that she was not the mother of the missing child. *Id.* at 15-16, 27. The Honda was

[1] These findings of fact are made from the admitted evidence, reasonable inferences drawn from that evidence, and credibility findings. Except as noted, the evidence is undisputed. To the extent any findings of fact may constitute conclusions of law, or vice versa, they are adopted as such.

unoccupied. *Id.* at 16, 43.

During the earlier course of the week, the deputies had been monitoring a report of a stolen Lexus from Jacksonville. *Id.* at 17. Deputy Zinkhen recognized the license tag on the Honda as familiar and believed it may be the same tag connected with the stolen Lexus. *Id.* at 16-17, 28, 44-45. He checked the tag and confirmed it was a match with the Lexus, still reported as stolen, which he informed Deputy Roberts. *Id.* at 17, 45, 60. In addition to believing that the Honda had a license plate reported to a different stolen vehicle, the deputies suspected, but were unsure at the time, that the Honda itself may also be stolen, meriting further investigation. *Id.* at 45, 47, 54, 62-63.

Around the time the Honda's plates were checked and confirmed to match the stolen Lexus, Mr. Powers walked out from the inside of store portion of the gas station. *Id.* at 17-18, 46. The deputies knew Mr. Powers. *Id.* Deputy Zinkhen knew him by an alias, "Chevy." *Id.* at 17-18. Deputy Roberts knew he had a criminal history and was a convicted felon. *Id.* at 46. Mr. Powers appeared a little nervous to Deputy Zinkhen, *id.* at 19, and very nervous to Deputy Roberts, *id.* at 47.

Deputy Zinkhen asked Mr. Powers about the Honda. *Id.* at 18-19, 29. Mr. Powers denied that car was his and denied any knowledge of the car. *Id.* He did so repeatedly. *Id.* at 19. Ms. Troxell also reported that she did not know who came out of the Honda. *Id.* at 16, 64, 79.

At some point, Mr. Powers flagged down a third vehicle (a pickup truck). *Id.* at 20, 47. The occupants appeared to know Ms. Troxell and/or Mr. Powers. *Id.* at 20,

30-31. Mr. Powers assisted in applying jumper cables to the third vehicle and Ms. Troxell's SUV to jump start the SUV. *Id.* at 31, 57-58.[2] After the SUV was jumped, Mr. Powers entered the pickup truck and appeared to ask the driver to leave. *Id.* at 31-32, 58. The driver appeared stunned and instead demanded that Mr. Powers exit the vehicle, which Mr. Powers did. *Id.* Mr. Powers then sat in the passenger side of Ms. Troxell's SUV, with the door open. *Id.* at 32-33, 58.

While this was ongoing, Deputy Roberts was further investigating the Honda. *Id.* at 45-48, 75, 77-78. He tried to view the VIN to assist in determining more information about the Honda, including if the car itself was also stolen, but the VIN was obscured. *Id.* at 45-46, 48, 62-63. He also looked through the passenger side of the vehicle shining a flashlight. *Id.* at 48-49. When doing so, he saw a backpack containing what he believed to be contraband. *Id* at 48-49, 63, 67-69.[3] By this time, other deputies

[2] Deputy Zinkhen testified that Mr. Powers had jumper cables with him when he came out of the gas station and *before* the third vehicle arrived. *Id.* at 19-20. However, he did not recall precisely when the third vehicle arrived and clarified it all happened relatively quickly and around the same time. *Id.* at 20, 30. Deputy Roberts similarly testified he observed the jumper cables and third car around the same time. *Id.* at 81-82. All agree, however, that the jump was ultimately applied from the third vehicle. *Id.* at 31, 47, 57-58. And the later-discovered video (discussed below) showing Mr. Powers walking into the gas station from the Honda does not show him holding any jumper cables, meaning he would have had jumper cables only if he obtained them inside the gas station or after the third vehicle arrived. Gov't Ex. 1 at 1:42-1:58. The United States argues that Mr. Powers had the jumper cables when he walked out of the gas station and before the third vehicle arrived, which, combined with him denying knowledge of the Honda, was suspicious. Doc. 35 at 4. For the reasons herein, this argument is unnecessary to resolve the Motion, and given the equivocal evidence on the subject, it need not be determined when Mr. Powers was first observed with jumper cables relative to the third vehicle's arrival.

[3] Deputy Roberts testified that he observed a gun, a digital scale he believed to be drug paraphernalia, and a white powdery substance he believed to be narcotics. *See id.* at 49, 69. Though there was no competing testimony, Deputy Roberts was cross-examined and redirected extensively on what he saw from outside the vehicle. *Id.* at 65-73, 78-79, 82-86. The Honda has tinted windows, and the backpack inside the vehicle was only partially open. *Id.* at 83-84; *see also* Def.'s Comp. Ex. A at

had also arrived on scene. *Id.* at 60. Deputy Alexander was with Deputy Roberts at the Honda. *Id.* at 48, 63, 73. Deputy Alexander opened the Honda, which was unlocked, looking for further indicia of the Honda's status and ownership, including its VIN and registration. *Id.*

Deputy Roberts told Deputy Zinkhen to detain Mr. Powers. *Id.* at 34, 50. Deputy Zinkhen then asked Mr. Powers to exit the SUV, and Mr. Powers complied. *Id.* at 22, 34-35. While Mr. Powers was stepping out of the vehicle, Deputy Zinkhen observed a Honda key fob affixed to Mr. Powers's belt loop. *Id.* at 22-23. The key was to the Honda. *Id.*

One of the officers spoke with Ms. Troxell. *Id.* at 23-24. She said (inconsistent with her earlier report) that Mr. Powers had come in the Honda, which belonged to her, to help her jump the SUV. *Id.*; *see also id.* 16, 64, 79. But she was not able to provide any proof of ownership of the Honda. *Id.* at 25, 54. The Honda was unregistered,

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Bates Nos. 000133, 000150, 000152, 000155. Mr. Powers, relying on pictures from the night in question, suggests that Deputy Roberts's testimony was not credible as he could not reasonably have seen any potential contraband from outside the Honda given the vantage point, tinted windows, partial closing of the backpack, and further containing of the white powder within an opaque makeup container. *See* Doc. 32 at 7-8. I credit Deputy Roberts's testimony that the angle at which he was standing would have allowed him to see better into the vehicle when standing next to it and shining a flashlight inside than might otherwise appear from the photographs. *See* Tr. at 78-79, 86. I also credit his testimony that he was able to see a gun and a digital scale believed by him to be drug paraphernalia—and indeed those items are viewable even in the photographs that might not give a complete picture of what he was in fact able to see. *See id.*; *see also* Def.'s Comp. Ex. A at Bates Nos. 000152. Deputy Roberts's testimony that he was able to see a white powdery substance from outside the vehicle presents a more difficult issue given the very small portion of the baggie that was protruding from the closed makeup kit inside the partially closed backpack behind the tinted windows. *See* Def.'s Comp. Ex. A at Bates Nos. 000156, 000158. But I need not determine if Deputy Roberts also viewed a white powdery substance before the Honda was opened. Given what he could see, he perceived the backpack to contain contraband and evidence of narcotics offenses. For that reason, I refer above to "contraband" without specifically outlining or making a corresponding finding as to each item Deputy Roberts testified he observed.

uninsured, and unassigned; no lawful owner was ever located. *Id.* at 24-25, 54.

The Honda was later thoroughly searched, revealing two handguns, drug paraphernalia, methamphetamines, cocaine, and marijuana. *Id.* at 50-51. After being read his constitutional rights, Mr. Powers acknowledged possessing the seized items, stating he sold the cocaine and the methamphetamines were his drug of choice. *Id.* at 51. The encounter from when deputies arrived at the gas station until Mr. Powers was first detained lasted approximately 15 minutes. *Id.* at 72. During such time, no one (other than, as previously discussed, Mr. Powers, Ms. Troxell, law enforcement officers, and the occupants of the pickup truck that left), was in the parking lot. *Id.* at 27, 74. Neither Deputy Zinkhen nor Deputy Roberts entered the store portion of the gas station to check if anyone was inside. *Id.* at 27, 55, 74.

The Honda, with no registration or lawful owner located, and bearing a license tag reported in connection with a different stolen vehicle, was towed and impounded in accordance with Clay County Sherriff's Office standard policy. *Id.* at 25, 54. Such, along with an inventory search of the vehicle, would have occurred pursuant to standard policy even had the contraband inside the car not been previously located. *Id.* at 54-55. The deputies asked for, but were not immediately able to obtain, surveillance footage from the gas station. *Id.* at 52. Deputy Roberts therefore asked the day-shift deputy to return and obtain surveillance video, which he would have done even had Mr. Powers not been detained. *Id.* at 52-54, 61. Some video was obtained and entered without objection as Government's Exhibit 1. *Id.* at 52. It depicts Mr.

Powers driving the Honda, exiting it, and entering the inside store portion of the gas station shortly before the deputies arrived on scene. Gov't Ex. 1; Tr. at 53, 81.

III. Analysis and Conclusions of Law

a. Applicable Law

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *United States v. Davis*, 109 F.4th 1320, 1327 (11th Cir. 2024) (quoting U.S. Const. amend. IV). Its purpose "'is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" *Id.* (citation omitted). The Fourth Amendment's protection is limited to "'any thing or place with respect to which a person has a "reasonable expectation of privacy."'" *Id*. at 1320 (citation omitted).

Thus, "'an individual's Fourth Amendment rights are *not* infringed—or even implicated—by a search of a thing or place in which he has no reasonable expectation of privacy.'" *Id.* (citation omitted). Whether a person has the requisite expectation of privacy in the object of a challenged search is referred to as Fourth Amendment standing. *Id.* Not to be confused with Article III standing, "Fourth Amendment standing is nothing more than 'a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search.'" *Id.* (citation omitted).[4]

[4] Unless otherwise noted, all references herein to "standing" are intended to discuss Fourth Amendment standing, not Article III standing.

"In order to have evidence suppressed based on a violation of the Fourth Amendment, a claimant has the burden of proving (1) that the search was unlawful and (2) that the claimant had a legitimate expectation of privacy" (*i.e.*, Fourth Amendment standing). *United States v. McKennon,* 814 F.2d 1539, 1542 (11th Cir. 1987). Whether a person has the requisite expectation of privacy to confer Fourth Amendment standing is governed by a two-part test: "(1) the individual must manifest a subjective expectation of privacy in the object of the challenged search, and (2) society must be willing to recognize that expectation as legitimate." *United States v. Smith*, 39 F.3d 1143, 1144 (11th Cir. 1994); *see also United States v. Hastamorir*, 881 F.2d 1551, 1559 (11th Cir. 1989). A person lacks Fourth Amendment standing concerning abandoned property. *See Hastamorir*, 881 F.2d at 1559; *see also United States v. Lawson*, No. 21-13272, 2022 WL 15180299, at *4 (11th Cir. Oct. 27, 2022);[5] *United States v. Johnson*, 811 F. App'x 564, 570 (11th Cir. 2020); *United States v. Williams*, 569 F.2d 823, 825-26 (5th Cir. 1978).[6] However, if the person carries his initial "burden of proving a legitimate expectation of privacy in the items searched, the burden of proving abandonment is on the government." *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001); *see also Johnson*, 811 F. App'x at 569; *United States v. Brazel*, 102 F.3d 1120, 1147-48 (11th Cir. 1997).

[5] Unpublished opinions are not binding precedent but may be considered to the extent persuasive on a particular point. *See United States v. Futrell*, 209 F.3d 1286, 1289-90 (11th Cir. 2000); 11th Cir. R. 36-2.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Where Fourth Amendment standing exists, a person can challenge unreasonable searches and seizures, which are prohibited by the Fourth Amendment. *See United States v. Gordon*, 231 F.3d 750, 754 (11th Cir. 2000). "'What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Id.* (citation omitted). "'[W]arrantless searches are presumptively unreasonable"' as a general rule. *Id.* (citation omitted). This general rule is subject to exceptions, however. *Id.* The government bears the burden of proving that a warrantless search or seizure falls within such an exception so as to be reasonable under the Fourth Amendment. *See United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983); *see also United States v. Knight*, 336 F. App'x 900, 904 (11th Cir. 2009)

One exception to the general presumption against warrantless searches is a "'*Terry* stop.'" *Gordon*, 231 F.3d at 754 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Under *Terry* and its progeny, "'an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'" *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119 (2000)). The reasonableness of a *Terry* stop is evaluated under a two-part inquiry, asking: (i) first, "'whether the officer's action was justified at its inception,' which turns on whether the officers had a reasonable suspicion that the defendant had engaged in, was engaging in, or was about to engage in, a crime"; and (ii) second, "'whether [the stop] was reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Gonzalez-Zea*, 995 F.3d 1297, 1302 (11th

Cir. 2021) (citations omitted).

The requisite reasonable suspicion for a *Terry* stop "requires at least a minimal level of objective justification for making the stop[,]" and an "officer must be able to articulate more than an 'inchoate and unparticularized suspicion' or 'hunch' of criminal activity." *Gordon*, 231 F.3d at 754 (citations and internal quotation marks omitted). But the inquiry concerns "probabilities," not "hard certainties[,]" and "'reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]'" *See Gonzalez-Zea*, 995 F.3d at 1302-03 (citation omitted).

In considering whether reasonable suspicion exists, courts look to the totality of the circumstances and "may not consider each fact in isolation." *Hunter*, 291 F.3d at 1306; *see also Gonzalez-Zea*, 995 F.3d at 1302. Among other considerations, (i) "[r]easonable suspicion may 'be based on commonsense judgments and inferences about human behavior[,]'" *Gonzalez-Zea*, 995 F.3d at 1302; and (ii) officers are allowed "'to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person[,]"'" *Hunter*, 291 F.3d at 1306 (citation omitted). Reasonable suspicion (i) "may exist even if each fact alone is susceptible to an innocent explanation[,]" *id.*; and (ii) "may be formed by observing exclusively legal activity[,]" *Gordon*, 231 F.3d at 754 (citations omitted). Thus, "officers do not have to rule out every possibility of innocent conduct in order to possess reasonable suspicion to conduct an investigatory stop." *Gonzalez-Zea*, 995 F.3d at 1304 n.7.

Facts that may contribute to a reasonable suspicion in a given case can include: (i) "the reputation of an area for criminal activity[,]"*Hunter*, 291 F.3d at 1306; (ii) "an individual's proximity to illegal activity[,]" *id.*; (iii) flight from police, *id.*; (iv) a visible, suspicious bulge, *id.*; (v) inconsistent, irrational, or implausible statements related to potential criminal activity, *see United States v. Montoya de Hernandez*, 473 U.S. 531, 542, (1985); *United States v. Griffin*, 109 F.3d 706, 708 (11th Cir. 1997); *United States v. Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir. 1984); and (vi) nervous, fidgety, defensive, evasive, argumentative, agitated, or non-compliant behavior, *Bishop*, 940 F.3d at 1248-49. Though carrying less weight than other facts, a person's known criminal history can also contribute to a reasonable suspicion under the totality of the circumstances. *See Bishop*, 940 F.3d at 1249-50 & n.4; *see also United States v. Goss*, No. 22-11581, 2023 WL 6568124, at *2 (11th Cir. Oct. 10, 2023); *Watson v. United States*, No. 20-14698, 2023 WL 197060, at *1 (11th Cir. Jan. 17, 2023); *United States v. Lawson*, No. 21-13272, 2022 WL 15180299, at *4 (11th Cir. Oct. 27, 2022).

Another exception to the Fourth Amendment's warrant requirement is the "automobile exception," which "allows law enforcement to conduct a warrantless search of a vehicle if (1) the vehicle is readily mobile and (2) law enforcement has probable cause to search it." *United States v. Morley*, 99 F.4th 1328, 1336-37 (11th Cir. 2024). As to the first element, "'ready mobility' is '*inherent* in all automobiles that reasonably appear to be capable of functioning.'" *Id.* at 1337 (citation omitted). Regarding "the second element, probable cause exists when, 'under the totality of the

circumstances, there is a fair probability that contraband or evidence of a crime will be found in the vehicle.'" *Id.* (citation omitted). The focus is on whether a fair probability exists that the vehicle itself may contain contraband or evidence of a crime, *id.*, not whether such contraband or criminal evidence can be connected to a particular person, *see United States v. Castellanos*, 428 F. App'x 949, 958 (11th Cir. 2011). The requisite fair probability is that on which a reasonably prudent person acts, not a legal technician. *See Fla. v. Harris*, 568 U.S. 237, 244 (2013); *United States v. Braddy*, 11 F.4th 1298, 1312 (11th Cir. 2021).

Probable cause focuses on the facts and circumstances within law enforcement's knowledge. *Morley*, 99 F.4th at 1338. The test is objective. *See United States v. Gant*, 756 F. App'x 898, 900-01 (11th Cir. 2018); *see also United States v. Lanzon*, 639 F.3d 1293, 1300 (11th Cir. 2011) ("A police officer's subjective reasons for a search do not control the legal justification for his actions, as long as objective circumstances justify the search."). The standard—requiring only a fair probability—is not high. *See Morley*, 99 F.4th at 1337; *see also United States v. Spann*, 649 F. App'x 714, 715 (11th Cir. 2016). Nor is it rigid; probable cause is a "'flexible, common-sense standard[.]'" *Harris*, 568 U.S. at 240.

For example, an officer has probable cause to search a vehicle when he sees contraband in the vehicle in plain view. *See Gant*, 756 F. App'x at 900-01; *see also United States v. Thomas*, 817 F. App'x 902, 905 (11th Cir. 2020) (citing *United States v. Spoerke*, 568 F.3d 1236, 1249 (11th Cir. 2009); *United States v. Lightsey*, No. 3:18-cr-209-J-

34MCR, 2019 WL 3290927, at *5 (M.D. Fla. July 3, 2019), *report and recommendation adopted*, 2019 WL 3407181 (M.D. Fla. July 26, 2019). Probable cause does not require certainty such an item is contraband. *See Gant*, 756 F. App'x at 901; *see also United States v. Smith*, 459 F.3d 1276, 1290-93 (11th Cir. 2006); *Lightsey*, 2019 WL 3290927, at *5. As with reasonable suspicion, an officer may rely on and draw inferences from his special experience and knowledge in determining whether probable cause exists. *See Lightsey*, 2019 WL 3290927, at *5; *see also Gant*, 756 F. App'x at 900; *United States v. Slocum*, 708 F.2d 587, 605 (11th Cir. 1983). "Once probable cause exists to search the vehicle, the police may search all parts of the vehicle, and any containers therein, where the object of the search might be found." *United States v. Baldwin*, 774 F.3d 711, 720 (11th Cir. 2014).

Even if a search or seizure violates the Fourth Amendment, application of the exclusionary rule to suppress illegally obtained evidence is not always required. *See United States v. Watkins*, 13 F.4th 1202, 1210 (11th Cir. 2021). The exclusionary "rule has several exceptions. Exceptions exist because the exclusionary rule 'has always been our last resort, not our first impulse.'" *Id.* (citation omitted). Thus, the exclusionary rule is reserved for situations where (i) its deterrence benefits are substantial; and (ii) those benefits actually outweigh (and not merely in an incremental, marginal, or possible way) its societal costs (which include sometimes setting guilty persons free or dangerous persons at large and taking a costly toll on truth-seeking and on law-enforcement objectives). *See id.*

"One of the exceptions to the exclusionary rule is for inevitable or ultimate discovery, which 'allows for the admission of evidence that would have been discovered even without the unconstitutional source.'" *Id.* (citation omitted). This exception is akin to a harmless error rule, and "the fact that a constitutional violation occurred never precludes applying the exception. To the contrary, the ultimate discovery exception does not even come up unless there is a real or assumed constitutional violation to begin with." *Id.* at 1210, 1212.

"Illegally obtained evidence is admissible under the ultimate discovery exception if the government can make two showings." *Id.* at 1211. First, the government must show "by a preponderance of the evidence that if there had been no constitutional violation, the evidence in question would have been discovered by lawful means." *Id.* (citation omitted). This showing does not require certainty, "only a showing that it is more likely than not the evidence would have been discovered without the violation." *Id.* Second, the government must show "'that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct.'" *Id.* (citations omitted). This showing "does not 'require that police have already planned the particular search that would obtain the evidence' but only 'that the police would have discovered the evidence by virtue of ordinary investigations of evidence or leads already in their possession.'" *Id.*

b. Discussion

Mr. Powers seeks to suppress two categories of evidence: (i) the guns and

controlled substances seized from the Honda; and (ii) the post-*Miranda* statements made by Mr. Powers. I address each in turn.

i. Items Seized from Honda

Mr. Powers's challenge to the guns and controlled substances seized from the Honda fails for multiple reasons. First, Mr. Powers lacks standing for such a challenge, meaning his Fourth Amendment rights were necessarily "*not* infringed—or even implicated[.]" *Davis*, 109 F.4th at 1320 (citation omitted). As the Government argues, Mr. Powers abandoned any Fourth Amendment standing he may otherwise have had as to the contents of the Honda. *See Cofield*, 272 F.3d at 1306 (11th Cir. 2001); *see also Johnson*, 811 F. App'x at 570; *Brazel*, 102 F.3d at 1147-48; *Hastamorir*, 881 F.2d at 1560.[7]

When asked directly, Mr. Powers repeatedly denied knowledge or ownership of the Honda. He later attempted to get a ride away from the scene from the third vehicle that had approached, before being rebuffed. He then went not to the Honda, but Ms. Troxell's SUV, where he sat until detained. The undisputed facts show abandonment. *See Lawson*, 2022 WL 15180299, at *5 ("Lawson abandoned any interest in the Nissan and key when he repeatedly disclaimed ownership of the key and voluntarily walked away from the Nissan and the key."); *Hastamorir*, 881 F.2d at 1553, 1560 ("We hold that Lopez did not express a subjective expectation of privacy in the Celebrity station wagon nor its contents, and effectively abandoned any fourth

[7] The Government assumes initial standing and argues abandonment. *See* Doc. 22 at 7-9; Doc. 35 at 1-3. I will thus focus on abandonment as well.

amendment rights he possessed in the station wagon and its contents" where, when asked by officers, he "denied any knowledge of the station wagon or its cargo."); *see also Johnson*, 811 F. App'x at 570 (agreeing defendant abandoned standing and expectation of privacy in vehicle when he left it in an attempt to flee from officers).[8]

Even if Mr. Powers had standing to challenge the search of the Honda, he has not shown a Fourth Amendment violation. Under the automobile exception, officers may lawfully "conduct a warrantless search of a vehicle if (1) the vehicle is readily mobile and (2) law enforcement has probable cause to search it." *Morley*, 99 F.4th at 1336-37. The first element is not in dispute. Though the SUV at one time required a jump, the Honda both reasonably appeared capable of functioning and was. Indeed, the video reflects that Mr. Powers was driving it on the night in question. *See id.* at 1337 ("'[R]eady mobility' is '*inherent* in all automobiles that reasonably appear to be capable of functioning.' … That requirement is met here because Morley drove the car to the scene, nor does Morley challenge that his vehicle was readily mobile.") (citations omitted).

The second element is also satisfied, as "'under the totality of the circumstances, there [was] a fair probability that contraband or evidence of a crime [would] be found in the vehicle.'" *Id.* (citation omitted). There is no dispute Deputy Roberts observed guns, narcotics, and drug paraphernalia in the Honda. The parties argue over when.

[8] Notably, the issue of standing was raised by the United States both in its pre-hearing Response, Doc. 22 at 7-9, and at the hearing, Tr. at 5. However, Defendant's Supplement does not meaningfully address standing. *See generally* Doc. 32. Nor did his Motion. *See generally* Doc. 19.

Deputy Roberts testified that he observed such contraband in plain view using a flashlight to look inside the car and before any search of the car began. Mr. Powers argues against the credibility of this testimony, focusing on visibility obstacles including the tint of the windows and location of the contraband within a backpack relative to the window. As discussed in the findings of fact, Deputy Roberts observed sufficient indicia of contraband in plain view so as to establish probable case. *See Gant*, 756 F. App'x at 900-01; *see also Thomas*, 817 F. App'x at 905; *Spoerke*, 568 F.3d at 1249; *Lightsey*, 2019 WL 3290927, at *5. Probable cause—dealing, after all, in probabilities—does not require *certainty* an item is contraband. *See Gant*, 756 F. App'x at 901; *Smith*, 459 F.3d at 1290-93; *Lightsey*, 2019 WL 3290927, at *5. Deputy Roberts, considering permissible inferences and his special experience and knowledge, could reasonably have determined probable cause existed. *See Lightsey*, 2019 WL 3290927, at *5; *see also Gant*, 756 F. App'x at 900; *Slocum*, 708 F.2d at 605.

Moreover, even under Mr. Powers's theory of the facts, the automobile exception would still apply. Mr. Powers suggests that Deputy Roberts did not observe the contraband until after the Honda's doors had been opened such that a search had commenced. But even if true, the deputies had probable cause to open the car doors and begin searching the vehicle. They did because the Honda, without dispute, had an obscured VIN and a license plate reported as attached to a stolen Lexus. Thus, law enforcement had fair reason to believe that (i) the Honda's tag was stolen; (ii) the Honda itself might also be stolen; and/or (iii) the Honda may have evidence concerning the stolen Lexus. At minimum, then, officers were justified in opening the

unlocked Honda doors to search for evidence concerning the legality, ownership, and operation of the Honda. And the backpack with contraband was distinctly in plain view once the car was opened. As such, my factual finding concerning what Deputy Roberts saw in plain view from outside the car is sufficient, but ultimately unnecessary, to apply the automobile exception.

Finally, even if Mr. Powers had standing to challenge the search of the Honda (which he does not), and even if the search was unlawful (which it was not), exclusion would still not be warranted. Even "[i]llegally obtained evidence is admissible under the ultimate discovery exception [to the exclusionary rule] if the government can make two showings": (i) "by a preponderance of the evidence that if there had been no constitutional violation, the evidence in question would have been discovered by lawful means"; and (ii) "'that the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct.'" *Watkins*, 13 F.4th at 1211 (citation omitted).

Here, the evidence reflects that if the Honda was never searched and Mr. Powers was never detained, he would have departed and left the Honda. He tried to leave in the third vehicle and then climbed into Ms. Troxell's car. There is no basis to believe he was going to get in the Honda and drive it away. We also know that Mr. Powers was in fact driving the Honda earlier in the night, such that no one else was

coming to retrieve it.[9] And even if Mr. Powers or anyone else had tried, the deputies—who tried but were never able to confirm the lawful owner of the vehicle—were not going to let anyone drive off with the Honda, which they had already determined had a stolen license tag affixed, might not be registered, might be stolen, and might be connected to the stolen Lexus. The reasonable conclusion is that the Honda was set for impoundment, upon which an inventory search would have discovered the contraband and other items in the car. Even if that conclusion is not inescapable, it is more likely than not, which is all the inevitable discovery doctrine requires. *See id.* And the doctrine's other element, that officers were actively searching for the Honda's owner, was also satisfied. *See id.* (explaining second element "does not 'require that police have already planned the particular search that would obtain the evidence' but only 'that the police would have discovered the evidence by virtue of ordinary investigations of evidence or leads already in their possession'").

Two Eleventh Circuit decisions, one unpublished and one published, are instructive. *See United States v. Johnson*, 811 F. App'x 564 (11th Cir. 2020); *United States v. Johnson*, 777 F.3d 1270 (11th Cir. 2015). Because both cases are "*Johnson*," I will add first initials and refer to the unpublished case as *W. Johnson* and the published case

[9] Mr. Powers suggests the officers made an abandonment determination prematurely as they did not know at the time whether someone else could have been driving the Honda but inside the gas station. That argument ignores that the tag affixed to the Honda was connected to the stolen Lexus, and thus the Honda was subject to further investigation and impoundment even if not "abandoned" to the same extent as a lawful vehicle with a lawful tag. Moreover, we now know, with hindsight, that no one else was coming to retrieve the Honda. Although hindsight does not factor into a probable-cause analysis, it *does* factor into an inevitable-discovery analysis, which necessarily asks what would have been discovered by lawful means in an alternate world where no illegal search occurred. Mr. Powers's own theory, *see* Doc. 32 at 6, confirms the Honda was destined for impoundment.

as *S. Johnson*.

In *S. Johnson*, an officer conducted an illegal search of a vehicle; before he did so, he had already determined that its registered owner was deceased and that it could not be returned to the defendant, who had been driving it, because of a suspended license. *S. Johnson*, 777 F. 3d at 1274. The district court applied the inevitable discovery rule, and the Eleventh Circuit affirmed, holding that because the vehicle "could not be turned over to anyone else," the officer who conducted the illegal search would inevitably have impounded it anyway and found the evidence sought to be suppressed through an inventory search. *Id.* at 1274, 1277. In other words, subtract the illegal search and nothing of substance would have changed. *Id.*[10]

Similarly, in *W. Johnson*, the Eleventh Circuit held that "discovery of … contraband inside [a] Mercedes was inevitable because the officers were already investigating the car's stolen tag and ownership and determined that the car had to be towed and impounded, which would have triggered an inventory search and revealed

[10] I note that *S. Johnson* has been overruled in part. Specifically, as to the first element of the inevitable-discovery rule, *S. Johnson* applied a "reasonable probability" rather than a "preponderance of the evidence" standard. *See S. Johnson*, 777 F.3d at 1274. The Eleventh Circuit has since overruled the "reasonable probability" standard applied in favor of a "preponderance of the evidence" standard. *See United States v. Watkins*, 10 F.4th 1179, 1180, 1185 (11th Cir. 2021) (en banc). In so doing the *en banc* Eleventh Circuit noted that (i) the latter standard was required by Supreme Court precedent; and (ii) in any event, it was preferable because no one really knew what the former standard meant. *See id.* at 1180-82. I still find *S. Johnson* instructive for a few reasons. First, *S. Johnson* was overruled only to the limited extent that it applied the "reasonable probability" standard. *See Watkins*, 13 F.4th at 1210 & n. 2. Second, as discussed below, *W. Johnson*, which followed *S. Johnson* and deemed it "spot on," applied the now-correct "preponderance of the evidence" standard. *See W. Johnson*, 811 F. App'x at 571-72. Third, on these facts, I deem the preponderance standard satisfied. Indeed, given no one available to take lawful possession of the Honda, impoundment and a resulting inventory search was far more likely than not. *See Watkins*, 13 F.4th at 1212 ("The standard is not whether the evidence in fact 'would have' been discovered, but whether the preponderance of the evidence indicates it would have been — whether it more likely than not would have been.").

its contents in any event." *W. Johnson*, 811 F. App'x at 570. In that case, like here, an officer began investigating into ownership of the car at issue after determining that the license plate affixed to it had been stolen. *Id.* at 571-72. That raised concerns the car might be stolen too. *Id.* The officers searched the VIN and were able to find the registered owner (more than the officers here found), but he advised that he had sold the car to an unknown person. *Id.* Unable to locate someone who could take lawful possession of the car, it was impounded and towed. *Id.* Following *S. Johnson*, which it deemed "spot on," the court held the inevitable discovery rule applied. The rule applies here too.

ii. Statements

Mr. Powers also argues for suppression of post-*Miranda* statements made following his detention and eventual arrest under the "fruit of the poisonous tree" doctrine. Doc. 19 at 7-8. But having determined, as set forth above, that Mr. Powers lacks standing to challenge search of the Honda, which search was lawful in any event, this argument crumbles. When Mr. Powers was detained, officers had knowledge: (i) that it was after midnight and only two vehicles were originally in the gas station (before the third later arrived to jump Ms. Troxell); (ii) the only persons outside and in the area the vehicles at that time were Ms. Troxell, who was occupying the SUV, and Mr. Powers; (iii) Mr. Powers was a known felon; (iv) Mr. Powers was nervous; (v) Mr. Powers had acted oddly, including trying to catch a ride away from the scene from the third vehicle that had come and jumped Ms. Troxell, only to be rebuffed by the occupants of that vehicle who did not want to drive him away; and (vi) contraband

had been observed in the Honda, which was unregistered, had an obscured VIN, and had a license associated with a different vehicle (Lexus) recently reported as stolen.

In conducting a *Terry* stop of Mr. Powers, law enforcement needed only "'reasonable suspicion'"—"'a less demanding standard than probable cause'" that "'requires a showing considerably less than preponderance of the evidence[.]" *See Gonzalez-Zea*, 995 F.3d at 1302-03. They were not required to rule out the possibility of innocent conduct. *Id.* at 1303 n.6. They were also permitted to consider Mr. Powers's proximity to illegal activity, *see Hunter*, 291 F.3d at 1306, his nervous and defensive behavior, *see Bishop*, 940 F.3d at 1248-49, and his criminal history, *See Bishop*, 940 F.3d at 1249-50 & n.4; *see also Goss*, 2023 WL 6568124, at *2; *Watson*, 2023 WL 197060, at *1; *Lawson*, 2022 WL 15180299, at *4. Under the totality of the circumstances, there was reasonable suspicion to briefly detain Mr. Powers to investigate further. *See Gonzalez-Zea*, 995 F.3d at 1302-03; *Hunter*, 291 F.3d at 1306; *Gordon*, 231 F.3d at 754.

The brief scope of detention was also reasonable. *See Gonzalez-Zea*, 995 F.3d at 1302. Indeed, nearly immediately upon commencing the stop, the Honda key was observed affixed to Mr. Powers's belt loop, thus giving probable cause to arrest. *See United States v. Epps*, 613 F.3d 1093, 1099 (11th Cir. 2010).[11] Since "his Fourth

[11] I note that although he moves to suppress the items seized from the Honda and his post-*Miranda* statements, Mr. Powers does *not* move to suppress the key discovered on his person. *See generally* Doc. 19. His Motion was premised on the contention that they key was used to open the Honda and thereby discovery the contraband in the car, but that is contrary to the evidence adduced. Rather, the Honda was unlocked, and the contraband was discovered in the Honda before the key was observed on Mr. Powers. In any event, even if Mr. Powers sought to suppress the key, such would

Amendment rights were never violated[,]" Mr. Powers's "fruit of the poisonous tree argument plainly collapses[.]" *See United States v. Lopez-Garcia*, 565 F.3d 1306, 1315 (11th Cir. 2009); *see also Colorado v. Spring*, 479 U.S. 564, 571-72 (1987); *Epps*, 613 F.3d at 1100; *United States v. Joyner*, No. 2:15-cr-29-FtM-29MRM, 2015 WL 7752874, at *7 (M.D. Fla. Dec. 2, 2015).[12]

IV. Recommendation

Accordingly, it is respectfully **recommended** that the Motion (Doc. 19) be **denied**.

Notice

"Within 14 days after being served with a copy of [a] recommended disposition, … a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Crim. P. 59(b)(2). "The district judge must consider de novo any objection to the magistrate judge's recommendation." Fed. R. Crim. P.

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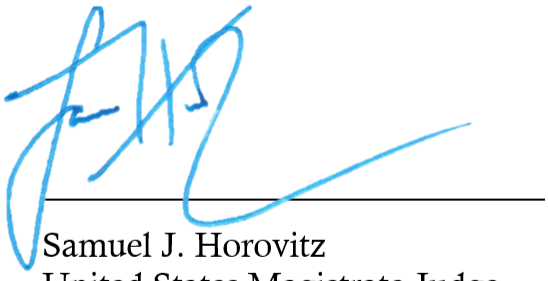
be due to be denied for the same reasons his "poisonous tree" argument otherwise fails: his detention was lawful and his Fourth Amendment rights were not violated.

[12] Because there was no constitutional violation concerning Mr. Powers's statements, I need not determine whether, if there had been, an exception to the exclusionary rule would apply. Mr. Powers argues in his Motion that if his statements were illegally obtained, they must be suppressed unless the evidence was not the exploitation of such illegality, considering three factors: "1) the temporal proximity of the illegal search and detention to the evidence obtained; 2) the presence of any intervening circumstances; and 3) the purpose and flagrancy of the official misconduct." Doc. 19 at 7-8. Mr. Powers correctly cites non-exclusive factors that guide the analysis of whether the "attenuation doctrine," a recognized exception to the exclusionary rule applies. *See Utah v. Strieff*, 579 U.S. 232, 238-39 (2016); *United States v. Gilbert*, No. 22-11477, 2023 WL 8257943, at *2 (11th Cir. Nov. 29, 2023). The Government, for its part, has not argued for application of the attenuation doctrine. But the attenuation doctrine is not the only exception to the exclusionary rule; others, as discussed, include the inevitable-discovery doctrine. *See Strieff*, 579 U.S. at 238; *Gilbert*, 2023 WL 8257943, at *1, 3. It does appear, for example, that even absent statements by Mr. Powers, the Government would have at minimum connected him to the Honda. The gas station surveillance video plainly shows as much.

59(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C). "Failure to object in accordance with" Fed. R. Crim. P. 59(b)(2) "waives a party's right to review." Fed. R. Crim. P. 59(b)(2); *see also* 28 U.S.C. § 636(b)(1)(C); 11th Cir. R. 3-1.

DONE AND ENTERED in Jacksonville, Florida, on December 18, 2024.



Samuel J. Horovitz
United States Magistrate Judge

Copies to:

The Honorable Marcia Morales Howard, United States District Judge

Counsel of Record