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Traffic Stops Based on Uncorroborated Visual Speed Estimates: More (Needed) Than Meets the Eye, Says the Fourth Circuit

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TRAFFIC STOPS BASED ON UNCORROBORATED VISUAL SPEED ESTIMATES: MORE (NEEDED) THAN MEETS THE EYE, SAYS THE FOURTH CIRCUIT

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I. INTRODUCTION

> Q: [Government counsel] And how many feet are in a hundred yards?
>
> A: [Deputy Elliott] There's 12 feet in a yard.
>
> . . . .
>
> THE COURT: And how many feet are in a yard?
>
> [Deputy Elliott]: How many feet? There's 12 feet in a yard.
>
> THE COURT: Well, do you know what a yardstick is?
>
> [Deputy Elliott]: Yes, sir.

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THE COURT: How many inches in a yardstick?

[Deputy Elliott]: Well, on a yardstick there's 12 inches. Well, it depends on the yard stick that . . . you have.

THE COURT: Use your hands to indicate a yardstick.

[Deputy Elliott]: A yardstick is about that long (indicating).

THE COURT: All right. And how many inches are in it?

THE WITNESS: Four foot in a yard.[1]

In the 1990s, the United States Court of Appeals for the Fourth Circuit was notoriously tough on crime.[2] It issued two important, albeit unpublished, decisions involving police officers' visual observations of speeding. First, in 1994, the court decided *United States v. Pierce*.[3] In that case, an officer observed two cars traveling at a high rate of speed.[4] Because his radar system was blocked by a tractor trailer, the officer visually estimated the drivers to be traveling at seventy-five miles per hour.[5] The officer pulled behind the two cars on the interstate and observed one speed ahead and the other slow down, after which he pulled over the slower car for speeding and eventually discovered roughly a kilogram of cocaine hidden in the car.[6] Both the district court and Fourth Circuit held that the officer had reasonable suspicion to stop the car based on his visual speed estimate.[7]

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1. United States v. Sowards, 690 F.3d 583, 586 (4th Cir. 2012) (reciting testimony provided by a police officer that had pulled over a defendant's car for speeding based on his visual estimate of the defendant's speed).

2. *See* Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1, *available at* http://www.nytimes.com/1999/05/24/us/a-court-becomes-a-model-of-conservative-pursuits.html (stating that by 1999, the Fourth Circuit had "quietly but steadily become the boldest conservative court in the nation, in the view of scholars, lawyers and many of its own members"); Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 40, *available at* http://www.nytimes.com/2003/03/09/magazine/the-power-of-the-fourth.html (calling the Fourth Circuit the "shrewdest, most aggressively conservative federal appeals court in the nation" and "bold and muscular in its conservatism"); Thomas Richard Uiselt, *What a Criminal Needs to Know Under Section 309(c)(2) of the Clean Water Act: How Far Does "Knowingly" Travel?*, 8 ENVTL. LAW. 303, 366 (2002) (calling the Fourth Circuit "hardly a bastion of the rights of the criminally accused").

3. No. 93-5386, 1994 WL 159767 (4th Cir. Apr. 28, 1994).

4. *Id.* at *2.

5. *Id.*

6. *Id.* at *1 n.2, *2.

7. *Id.* at *2; *see also* United States v. Mimms, No. 97-5020, 1998 WL 393969, at *1 (4th Cir. July 10, 1998) (affirming the district court's denial of a motion to suppress evidence seized

Second, in 1998, the court decided *United States v. Daras*,[8] in which it stated that an officer's visual observation of speeding is not only sufficient to supply reasonable suspicion to effect a traffic stop but is also "sufficient, by itself, to support a conviction" for speeding.[9] In *Daras*, the court went a step further than *Pierce* because the standard of evidence needed to convict is more exacting than that required to support a traffic stop.[10]

By 2011, other federal courts had similarly issued decisions finding that visual speed estimates provided a sufficient constitutional basis to make a traffic stop. The United States Court of Appeals for the Tenth Circuit remarked in *United States v. Ludwig*,[11] "[I]t's long been the case that an officer's visual estimation can supply probable cause to support a traffic stop for speeding in appropriate circumstances."[12] State courts had reached, and continue to reach, similar conclusions.[13]

Given this legal backdrop, it came as a surprise that in 2012, the Fourth Circuit published two decisions—*United States v. Sowards*[14] and *United States v. Mubdi*[15]—that provided in-depth analyses of whether an officer's visual estimate of a vehicle's speed was enough to justify a traffic stop under the Fourth Amendment. Both cases were on appeal from the same federal district judge sitting in North Carolina; both cases were decided by a Fourth Circuit judge from North Carolina; and both cases even involved the same interstate highway in North Carolina.[16] However, the decisions reached different outcomes: the

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after an officer first observed the defendant driving his car on the interstate "at what appeared to be an excessive rate of speed" and then following the defendant for several miles).

8. No. 98-4286, 1998 WL 726748 (4th Cir. Oct. 16, 1998).

9. *Id.* at *2.

10. *See* Porterfield v. Lott, 156 F.3d 563, 569 (4th Cir. 1998) (citing United States v. Gray, 137 F.3d 765, 769 (4th Cir. 1998)).

11. 641 F.3d 1243 (10th Cir. 2011).

12. *Id.* at 1247 (citing United States v. Vercher, 358 F.3d 1257, 1262–63 (10th Cir. 2004); United States v. Bourassa, 411 F.2d 69, 71 (10th Cir. 1969)).

13. *See, e.g.*, State v. Butts, 269 P.3d 862, 872 (Kan. Ct. App. 2012) ("[A]n officer's visual estimation of speed alone—without reference to a speed measurement device, stopwatch, or pacing—may provide the basis for an officer's reasonable suspicion that a driver is speeding."); State v. Konvalinka, No. 11-0777, 2012 WL 1860352, at *6 (Iowa Ct. App. May 23, 2012) ("[A]n officer's visual estimation of speed without any corroborating radar, other mechanical speed detector, or pacing of the vehicle may be sufficient to sustain a conviction where speed is an element of the offense."); State v. Allen, 978 So. 2d 254, 256 (Fla. Dist. Ct. App. 2008) ("Other states have also concluded that an officer's observations of a vehicle may provide reasonable suspicion that the vehicle is speeding." (citing State v. Barnhill, 601 S.E.2d 215, 218 (N.C. Ct. App. 2004)); *Barnhill*, 601 S.E.2d at 218 ("We find it relevant that if an ordinary citizen can estimate the speed of a vehicle, so can Officer Malone. Furthermore, it is not necessary that an officer have specialized training to be able to visually estimate the speed of a vehicle. Excessive speed of a vehicle may be established by a law enforcement officer's opinion as to the vehicle's speed after observing it.").

14. 690 F.3d 583 (4th Cir. 2012).

15. 691 F.3d 334 (4th Cir. 2012).

16. Both *Sowards* and *Mubdi* were on appeal from opinions issued by Judge Richard L. Voorhees of the United States District Court for the Western District of North Carolina. *Sowards*

district court's denial of a motion to suppress was reversed in *Sowards* and affirmed in *Mubdi*.[17]

Though not decided "a long time ago in a galaxy far, far away," the *Sowards* decision provides "A New Hope"[18] for criminal defendants that seek to suppress evidence seized from a traffic stop based on an officer's visual speed estimate. Yet in *Mubdi*, the "Empire Strikes Back"[19] by softening the applicability of the new rule announced in *Sowards*. To complete the trilogy, defendants have begun to rely on *Sowards* in an attempt to suppress evidence seized during traffic stops, but it is too early to say whether this "Return of the Jedi"[20] will be viewed favorably by the Fourth Circuit; the court's decision late last year in *United States v. Jones*[21] indicates that the precedential effect of *Sowards* will be limited.[22]

II. FOURTH AMENDMENT FRAMEWORK

The Fourth Amendment guarantees freedom from unreasonable searches and seizures.[23] A traffic stop, which is a "seizure,"[24] is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances."[25]

Generally, a stop is "reasonable" when an officer has probable cause to believe that the driver committed a traffic violation.[26] Probable cause exists if, given the totality of the circumstances, the officer "had reasonably trustworthy information . . . sufficient to warrant a prudent [person] in believing that the petitioner had committed or was committing an offense."[27] The requisite showing under the probable cause standard is less than a preponderance of the

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was decided by Judge James Wynn, while *Mubdi* was decided by Judge Albert Diaz. Both Judges Wynn and Diaz are Fourth Circuit judges sitting in North Carolina.

17. *Compare Sowards*, 690 F.3d at 584–85 (holding that "the district court erred in denying [defendant's] motion to suppress because the police lacked probable cause to initiate a traffic stop based exclusively on an officer's visual estimate—uncorroborated by radar or pacing and unsupported by any other indicia of reliability—that Sowards's vehicle was traveling 75 miles per hour ('mph') in a 70-mph zone"), *with Mubdi*, 691 F.3d at 341 ("[T]he record supports the reasonableness of the officers' visual speed estimates, and thus the decision to conduct the stop.").

18. STAR WARS: EPISODE IV—A NEW HOPE (Lucasfilm Ltd. 1977).

19. STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980).

20. STAR WARS: EPISODE VI—THE RETURN OF THE JEDI (Lucasfilm Ltd. 1983).

21. No. 12-4464, 2012 WL 6583039 (4th Cir. Dec. 18, 2012).

22. *Id.* at *1 ("We decline Jones' invitation to extend *Sowards* to this case.").

23. U.S. CONST. amend. IV (protecting the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

24. United States v. Digiovanni, 650 F.3d 498, 506 (4th Cir. 2011) (citing Whren v. United States, 517 U.S. 806, 809–10 (1996)).

25. *Whren*, 517 U.S. at 810.

26. *Id.*

27. Beck v. Ohio, 379 U.S. 89, 91 (1964) (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Henry v. United States, 361 U.S. 98, 102 (1959)).

evidence[28] and does not even "require that the officer's belief be more likely true than false."[29] Overall, probable cause to stop a vehicle based on a suspected traffic violation is determined by the "totality of the circumstances."[30] Notably, "observation of any traffic violation, no matter how minor, gives an officer probable cause to stop the driver."[31]

In some cases, a traffic stop may also be justified by reasonable suspicion, in which case the stop must be "brief" and "investigatory."[32] An officer has reasonable suspicion to initiate an investigatory, or "*Terry*," stop when there are "'specific and articulable facts' that demonstrate at least a 'minimal level of objective justification' for the belief that criminal activity is afoot."[33] Observing a traffic violation gives an officer reasonable suspicion that criminal activity is afoot.[34] As with probable cause, a determination of reasonable suspicion is based on the totality of the circumstances.[35] Reasonable suspicion is a less demanding standard than the standard for probable cause.[36]

III. *UNITED STATES V. SOWARDS*: A NEW HOPE (FOR CRIMINAL DEFENDANTS)

In *United States v. Sowards*, the Fourth Circuit, in a 2–1 panel decision, reversed the district court's holding that a police officer had probable cause to initiate a traffic stop based exclusively on his visual estimate that the driver was speeding.[37]

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28. Illinois v. Gates, 462 U.S. 213, 235 (1983) (citing Locke v. United States, 11 U.S. 339, 348 (1813)).

29. United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004) (citing United States v. Jones, 31 F.3d 1304, 1313 (4th Cir. 1994)).

30. Maryland v. Pringle, 540 U.S. 366, 371 (2003).

31. United States v. Singletary, 293 F. App'x 188, 189 (4th Cir. 2008).

32. Illinois v. Wardlow, 528 U.S. 119, 123 (2000); *see also* United States v. Lawing, 703 F.3d 229, 236 (4th Cir. 2012) ("Law enforcement 'can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause.'" (quoting United States v. Christmas, 222 F.3d 141, 143 (4th Cir. 2000)); United States v. Griffin, 589 F.3d 148, 152 (4th Cir. 2009) (noting that either reasonable suspicion or probable cause may justify a traffic stop).

33. United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) (quoting *Wardlow*, 528 U.S. at 123; Terry v. Ohio, 392 U.S. 1, 21 (1968)).

34. *See id.* at 338.

35. United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

36. Alabama v. White, 496 U.S. 325, 330 (1990) ("[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause."); United States v. Powell, 666 F.3d 180, 186 (4th Cir. 2011) ("[T]he standard of proof [for reasonable suspicion] 'is obviously less demanding than that for probable cause,' . . . ." (quoting *Sokolow*, 490 U.S. at 7)). Notably, some courts have expressed confusion regarding whether the law requires mere reasonable suspicion, rather than probable cause, to justify a traffic stop, or whether probable cause is the threshold. *See, e.g.*, United States v. Ruiz, 832 F. Supp. 2d 903, 912 n.12 (M.D. Tenn. 2011) (noting cases with conflicting interpretations).

37. 690 F.3d 583, 584–85 (4th Cir. 2012).

A. Factual Background

On April 11, 2006, Officer James Elliott of the Iredell County, North Carolina Sheriff's Office was stationed in his patrol car on Interstate 77, where he had worked almost daily for the previous four and a half years.[38] Officer Elliott had previously pulled over drivers based solely on his visual estimates of speed.[39] He observed a vehicle traveling northbound and estimated its speed at seventy-five miles per hour in a seventy-mile-per-hour zone.[40] Officer Elliott initiated a traffic stop and identified Sowards as the driver.[41]

Sowards exuded suspiciousness. First, he told Officer Elliott the car belonged to his girlfriend, but he could not recall her last name.[42] Second, Officer Elliott found out that the car was registered to an owner other than Sowards's alleged girlfriend.[43] Third, Officer Elliott observed a Boost telephone in the center console, a type of phone commonly used by drug dealers.[44] Finally, Sowards was "sweating profusely and appeared extremely nervous."[45] A subsequent search of the vehicle revealed ten kilograms of cocaine in a hidden compartment.[46] Sowards moved to suppress the evidence in the district court on the basis that Officer Elliott lacked probable cause to initiate the traffic stop.[47]

B. The District Court's Decision

The district court denied the motion to suppress, finding that Officer Elliott indeed had probable cause to believe Sowards was speeding based on his training and experience in conjunction with his visual observation of the speed of Sowards's car.[48] Officer Elliott claimed he tracked Sowards's car for roughly 100 yards, but as shown by the opening quote in this Essay, Officer Elliott did not know how many feet are in a yard.[49] Nevertheless, the court found Officer

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38. Brief for Respondent–Appellee at 3–4, United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (No. 10-4133), 2011 WL 2326667, at *3–4; *see also Sowards*, 690 F.3d at 602 (Traxler, C.J., dissenting) ("He had worked this particular stretch of I-77 for over four years . . . .").

39. Brief for Respondent–Appellee, *supra* note 38, at 4.

40. *Id.*

41. *Id.* at 5.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* Generally, while "nervousness alone proves little because almost everybody is nervous when stopped by police," when "nervousness is extreme and does not dissipate over the course of the encounter, it can lend at least some degree of support to a finding of guilty conscience." United States v. Leyva, 442 F. App'x 376, 380 (10th Cir. 2011) (citing United States v. Williams, 271 F.3d 1262, 1268–69 (10th Cir. 2001)).

46. United States v. Sowards, 690 F.3d 583, 585 (4th Cir. 2012).

47. *Id.*

48. *Id.*

49. *See supra* note 1 and accompanying text.

Elliott's "difficulty with measurements [to be] immaterial to his estimate of speed [because he] did not depend on time or distance," but instead relied on his general training and certification in estimating speeds.[50]

C. *The Fourth Circuit Majority's Decision*

On appeal, the Fourth Circuit reversed in an opinion authored by Judge James Wynn and joined by Judge Roger Gregory. The court began by expressing its agreement with Sowards's position that "the police lacked probable cause to initiate a traffic stop based exclusively on an officer's visual estimate—uncorroborated by radar or pacing and unsupported by any other indicia of reliability—that Sowards's vehicle was traveling 75 miles per hour ('mph') in a 70-mph zone."[51] Specifically, the court found it was clear error for the trial judge to hold that Officer Elliott was "trained to estimate speeds," as there was no evidence Officer Elliott had in fact been so trained.[52] The court additionally found that the district court clearly erred in determining Officer Elliott's "difficulty with measurements" to be "immaterial," stating that such a finding "rings in the absurd" because to calculate speed, one must divide distance by time.[53] In the end, the Fourth Circuit concluded that Officer Elliott's visual speed estimate of seventy-five miles per hour in a seventy-mile-per-hour zone was a "purely speculative guess" that was insufficient to establish probable cause.[54]

The majority did not stop there. It pressed on, stating in broad terms that "the Fourth Amendment does not allow, and the case law does not support, blanket approval for the proposition that an officer's visual speed estimate, in and of itself, will always suffice as a basis for probable cause to initiate a traffic stop."[55] The court then crafted a new rule:

> [T]he reasonableness of an officer's visual speed estimate depends, in the first instance, on whether a vehicle's speed is estimated to be in significant excess or slight excess of the legal speed limit. If slight, then additional indicia of reliability are necessary to support the reasonableness of the officer's visual estimate.[56]

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50. *Sowards*, 690 F.3d at 587.
51. *Id.* at 585.
52. *Id.* at 588. According to the majority, Officer Elliott was only trained to use radar. *Id.*
53. *Id.* at 589 ("Indeed, the very definition of speed derives from the mathematical formula of distance divided by time.").
54. *Id.* at 589 & n.6, 593.
55. *Id.* at 591.
56. *Id.*

In either case, there must be "sufficient indicia of reliability" for a court to credit the officer's visual estimate of speed, according to the majority.[57] When the speeding estimate is one of slight excess of the speed limit, an officer's belief may be supported by radar, pacing, or other corroborating evidence.[58]

D. The Dissent

Chief Judge Traxler penned a powerful dissent. He complained that the majority improperly fashioned an "absolute rule requiring corroborating evidence to establish probable cause in every case where the officer observes a slight violation of the legal speed limit."[59]

Chief Judge Traxler found such a rule to be unnecessary for four primary reasons. First, he determined that "the facts and circumstances known to Deputy Elliott, coupled with his practical experience, training, and the reasonable inferences drawn therefrom, were more than sufficient to warrant an objectively reasonable belief on his part that Sowards was speeding."[60] Second, the dissenting opinion argued that the majority's definition of "slight excess" of the speed limit as a "speed differential difficult for the naked eye to discern" was overly vague.[61] Third, the dissenting opinion noted the irony in that lay witnesses can offer opinion testimony on the speed of a vehicle regardless of training or experience, whereas more is now required for professional police officers under the majority's new rule.[62] Finally, Chief Judge Traxler noted the unworkability of the corroboration standard for police officers, who will be unsure when they can rely on their state certification and training to visually estimate speed or when they will need "other, corroborating evidence."[63]

IV. *UNITED STATES V. MUBDI*: THE EMPIRE STRIKES BACK (BY LIMITING *SOWARDS*)

In *United States v. Mubdi*,[64] the empire—of judicial authority recognizing the constitutionality of stops based on visual speed estimates—"strikes back" by softening the applicability of the rule announced in *Sowards*.

Mubdi was a case on appeal from the same district judge in *Sowards* and involved the same interstate highway in North Carolina, Interstate 77.[65] Like in

57. *Id.*
58. *Id.* at 592.
59. *Id.* at 608 (Traxler, C.J., dissenting).
60. *Id.* at 602.
61. *Id.* at 603 (quoting *id.* at 592 (majority opinion) (internal quotation marks omitted)).
62. *Id.* at 598, 603–04.
63. *Id.* at 605–06.
64. 691 F.3d 334 (4th Cir. 2012).
65. *Id.* at 336.

Sowards, the defendant in *Mubdi* was observed driving his car in excess of the legal speed limit.[66] But unlike in *Sowards*, Mubdi's speed was visually estimated by not just one but two police officers.[67] The officers, who were parked in their police cruisers along the interstate, estimated Mubdi's speed at "sixty-three or sixty-four" and "sixty-five" miles per hour, respectively, in a fifty-five-mile-per-hour zone.[68] In addition, the officers observed that, in relation to the other cars on the road that were traveling the speed limit, Mubdi was "gaining on the cars in front" and "pulling away from the cars behind" him.[69] An officer pursued Mubdi for a few miles before initiating a traffic stop.[70] A search revealed crack and powder cocaine along with two loaded firearms inside the vehicle.[71]

Mubdi moved to suppress the evidence in district court, arguing that the officers lacked probable cause to initiate a traffic stop.[72] The court denied the motion in part because the officers were trained in visually estimating speeds and their testimony regarding Mubdi's rate of speed was deemed credible.[73] On appeal, the Fourth Circuit affirmed, in a decision written by Judge Albert Diaz and joined by Judges Dennis Shedd and Andre Davis.[74] The court distinguished *Sowards* on two primary bases. First, the court noted that Officer Elliott, who had stopped Sowards, "was, to put it mildly, measurement-challenged," which gave that court reason to "lack[] confidence in his visual estimate" of speed.[75] There was no reason in *Mubdi* to doubt the officers' visual estimates. Second, unlike in *Sowards*, there were "two independent and virtually identical estimates as to Mubdi's speed."[76] For these reasons, the court upheld the district court's decision.[77]

The majority decision in *Mubdi* limited the rule announced in *Sowards* by reemphasizing that "the touchstone of the probable cause inquiry is—as always—reasonableness, and the analysis remains whether the 'totality of the circumstances' establishes 'the reasonableness of the officer's visual speed estimate.'"[78] Referencing Chief Judge Traxler's "vigorous and well-reasoned dissent in *Sowards*," the court noted that *Sowards* does not "impose[] an iron-clad rule prohibiting in every instance a probable cause finding based solely on

66. *Id.* at 336–37.
67. *Id.*
68. *Id.* at 337. The officers had passed a radar certification course that required a minimum of thirty-two hours of training and included speed estimates as a mandatory portion of the certification process. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 338.
72. *Id.*
73. *Id.* at 338–39.
74. *Id.* at 336.
75. *Id.* at 340.
76. *Id.* at 341.
77. *Id.* at 336.
78. *Id.* at 341 (quoting United States v. Sowards, 690 F.3d 583, 592 (4th Cir. 2012)).

visual speed estimates where a vehicle is traveling only in 'slight excess' of the speed limit."[79] In other words, the court maintained that the proper focus, regardless of the perceived "excess" by which an officer believes a driver to be exceeding the speed limit, is always the totality of the circumstances. Under this standard, of course, an officer's independent visual observation of speeding can suffice to furnish probable cause to make a traffic stop.

V. SUBSEQUENT RELIANCE ON *SOWARDS*: THE RETURN OF THE JEDI?

> Luke: Come with me. Leave everything behind.
>
> Darth Vader: Obi-Wan once thought as you do. You don't know the power of the Dark Side. I must obey my master.[80]

Since *Sowards* was decided, Jedi-like criminal defendants have begun to rely on the additional indicia of reliability rule announced in *Sowards* as providing a shield against what they perceive to be the Dark Side of law enforcement. For example, in *Peguero v. United States*, the defendant–appellant relied on *Sowards* to support his argument that an officer's speed estimate was unreasonable when the officer "determine[d] [the] vehicle's speed within a 'second,' while following it from a distance of perhaps two football fields, in the dead of night, while traveling in a different lane."[81] Similarly, in *United States v. Parker*, the defendant–appellant cited *Sowards* to bolster his position that the district court erred in finding that an officer's stop based solely on a visual speed observation was supported by probable cause.[82] The appellant argued there was insufficient testimony provided by the officer regarding "what training he got or how he did" in his radar training, and that the speed estimate lacked reliability because the officer "did not pace Parker's car."[83]

The reliance on *Sowards* may not prove fruitful. At the end of last year, the Fourth Circuit issued an unpublished decision that distinguished *Sowards* on its facts and instead relied on *Mubdi*. In *United States v. Jones*,[84] a Virginia state trooper was on patrol with another trooper and a trainee.[85] While stopped at a red light, they observed a Cadillac pass in front of them that immediately

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79. *Id.* at 341 n.6 (citing *Sowards*, 590 F.3d at 597–98 (Traxler, C.J., dissenting)).

80. STAR WARS: EPISODE VI—RETURN OF THE JEDI (Lucasfilm Ltd. 1983).

81. Reply Brief for Appellant at 8, Peguero v. United States, No. 11-13043-FF (11th Cir. filed Dec. 10, 2012), 2012 WL 6211459, at *8.

82. Supplemental Brief for Appellant at 3–4, United States v. Parker, No. 12-5347 (6th Cir. filed Dec. 5, 2012), 2012 WL 6211535, at *3–4.

83. *Id.*

84. No. 12-4464, 2012 WL 6583039 (4th Cir. Dec. 18, 2012).

85. Brief for Appellee at 3, United States v. Jones, No. 12-4464 (4th Cir. filed Oct. 9, 2012), 2012 WL 4812697, at *3.

appeared to have a dark window tint on its side windows.[86] The troopers concluded that there was enough tint for there to be a possible violation of Virginia law.[87] After being stopped, the driver took off running but was later apprehended.[88] A search of the car revealed a handgun and heroin.[89] The district court denied a motion to suppress.[90]

On appeal, the defendant–appellant argued that when the trooper estimated that the tinted windows were "dark enough to check out," he "did not even offer the level of precision the officer in *Sowards* gave."[91] In a per curiam decision, the Fourth Circuit disagreed, upholding the district court's decision.[92] Likening the case to *Mubdi* rather than *Sowards*, the court held that "the detaining officers' visual estimate that Jones' windows were illegally tinted was corroborated by a second officer."[93] Therefore, the court concluded "that the district court did not clearly err in crediting the officers' assertions that they reasonably believed, based on objective circumstances known to them at the time of the stop, that Jones' windows were potentially illegally tinted."[94]

VI. ANALYSIS

In *Sowards*, the majority had good reason to take issue with Officer Elliott's sole observation of speeding, given that the officer stated first that there were "12 feet in a yard," second that "on a yardstick there's 12 inches," third that there are "[f]our foot in a yard," and fourth that "it depends on the yard stick that . . . you have."[95] Ordinary citizens would be enraged to learn that they were pulled over simply because an officer observed them going seventy-five miles per hour in a seventy-mile-per-hour zone, especially when the officer was unaware of basic measurements.

However, on the facts presented in *Sowards*, the court had less reason to fashion a hard-and-fast rule requiring specific assurances of reliability, including radar and pacing, when a trained, professional law enforcement officer observes a vaguely defined "slight excess" of a posted speed limit. Rather than focus on the district court's factual determinations and whether they were clearly erroneous, the majority fashioned a new rule that creates more confusion than

86. *Id.* at 3–4.
87. *Id.*
88. *Id.* at 5.
89. Brief for Appellant at 5, United States v. Jones, No. 12-4464 (4th Cir. filed Sept. 13, 2012), 2012 WL 4043881, at *5.
90. *Id.* at 7.
91. Reply Brief for Appellant at 3–4, United States v. Jones, No. 12-4464 (4th Cir. filed Oct. 22, 2012), 2012 WL 5199474, at *3–4.
92. *See* United States v. Jones, No. 12-4464, 2012 WL 6583039, at *2 (4th Cir. Dec. 18, 2012).
93. *Id.* at *1.
94. *Id.* at *2.
95. United States v. Sowards, 690 F.3d 583, 586 (4th Cir. 2012).

order. Thankfully, the court in *Mubdi* emphasized that the proper inquiry in all probable cause determinations is on the totality of the circumstances.[96]

The rule fashioned in *Sowards* that distinguishes between "slight excesses" and "significant excesses" of the speed limit is unnecessary for at least two reasons. First, the majority failed to tailor its decision to a limited review of the findings of the district judge. When the denial of a motion to suppress is appealed to the Fourth Circuit, the court's analysis is always confined to whether the district court's factual determinations were "clearly erroneous," based on a view of the facts that are construed "in the light most favorable to the government."[97] In addition, the court must "particularly defer to a district court's credibility determinations, for 'it is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress.'"[98] As noted by Chief Judge Traxler, the *Sowards* majority "does not ultimately reverse the district court based upon any perceived lack of confidence in Deputy Elliott's *personal* ability to offer a reliable opinion as to the speed of Sowards's vehicle," and never "expressly reverse[s] the district court's denial of the motion to suppress based upon the district court's findings of fact."[99] As a result, the rule it fashioned was extraneous to deciding the case.

Because of the district judge's unique position to listen to an officer's testimony and any controverting testimony and assess that officer's credibility based on her training, experience, and observations on the day in question, appellate courts must give appropriate deference to the district judge.[100] As a

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96. United States v. Mubdi, 691 F.3d 334, 341 (4th Cir. 2012) (quoting *Sowards*, 690 F.3d at 592–93).

97. United States v. Kelly, 592 F.3d 586, 589 (4th Cir. 2010) (citing United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008)).

98. United States v. Abu Ali, 528 F.3d 210, 232 (4th Cir. 2008) (quoting United States v. Murray, 65 F.3d 1161, 1169 (4th Cir. 1995)); *see also* Anderson v. Bessemer City, 470 U.S. 564, 574 (1985) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (quoting FED. R. CIV. P. 52(a)) (internal quotation marks omitted)).

99. *Sowards*, 690 F.3d at 600 n.4 (Traxler, C.J., dissenting).

100. *See* United States v. Bumpers, 705 F.3d 168, 173 (4th Cir. 2013) (noting the "distinctive competence" of district judges to make an "on-the-ground assessment" of the reasonableness of a *Terry* stop). To illustrate, in *United States v. Massey*, No. 3:03CR229-MU, 2006 WL 1431654 (W.D.N.C. May 22, 2006), the district court undertook a thorough analysis of an officer's testimony to determine his credibility, even when "[t]he only evidence before the Court as to why [the officer] stopped the rental car [was] the officer's own testimony." *Id.* at *2. Based on several inconsistencies in the officer's testimony, the court found it to be unreliable. *Id.* Similarly, in *United States v. Ruiz*, 832 F. Supp. 2d 903 (M.D. Tenn. 2011), an officer visually estimated that the defendant's vehicle was traveling eighty miles per hour. *Id.* at 905. The court found that the officer's account of his visual speeding estimate was not credible based on various discrepancies in his testimony and previous accounts of the stop. *Id.* at 913. The court also determined that the officer's "credibility suffered from his demeanor on the stand," a finding particularly suited for a district judge. *Id.* at 914; *see also* United States v. Alix, 630 F. Supp. 2d 145, 153 (D. Mass. 2009)

result, the focus on appeal of the denial of a motion to suppress is always whether the district court's factual and credibility determinations were clearly erroneous.

The proper approach is illustrated by a decision from another appellate court. In 2001, in *United States v. Rivera*,[101] the United States Court of Appeals for the Ninth Circuit upheld a district court's denial of a motion to suppress based on an officer's testimony that he accurately estimated the defendant's vehicle traveling seventy-five miles per hour in a seventy-mile-per-hour zone.[102] In that case, there was evidence that the officer "lacked a radar gun, made the determination by observing the fast-moving car while his own vehicle was at a standstill under a viaduct and had just 35 yards—occupying just under a second—within which he could make his estimate."[103] Even faced with those concerns, the Ninth Circuit affirmed the district court.[104] The court admitted, "Without question, the most difficult issue in this case is whether Officer Charles Hughes' initial stop of Rivera's car was constitutionally permissible."[105] Still, by remaining cognizant of its role on appeal, the court answered its question in the affirmative:

> But the issue before us is not whether, on the cold record before us, we would have reached the same decision as the experienced district judge who heard the evidence and observed the witness. Instead the question is whether the judge's factual findings on the matters just discussed were clearly erroneous. That cannot be said, and we therefore defer to those findings.[106]

Second, the *Sowards* rule is unnecessary because it adds a new legal test to a field of law that is already occupied. In another Fourth Circuit decision issued in 2012 in which probable cause was at issue, the court noted that among the "applicable legal principles [that] are well established" is the notion that "[p]robable cause is a flexible standard that simply requires 'a reasonable ground for belief of guilt' and 'more than bare suspicion.'"[107] The *Sowards* majority

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(finding that an officer's testimony regarding a speeding violation was not credible and concluding that no violation occurred).

101. 10 F. App'x 617 (9th Cir. 2001).

102. *Id.* at 619.

103. *Id.* (footnote omitted).

104. *Id.* at 620.

105. *Id.* at 618; *see also id.* at 619 ("It is surely fair to characterize as problematic the conclusion that Officer Hughes was justified in conducting the initial traffic stop.").

106. *Id.* at 619. For a similarly deferential analysis, see *State v. Guyton*, 673 S.E.2d 290 (Ga. Ct. App. 2009), in which the court explained that "on appellate review of a trial court's order on a motion to suppress evidence, we never second-guess the trial court's factual findings where they are based on testimonial evidence." *Id.* at 291.

107. United States v. Ortiz, 669 F.3d 439, 444 (4th Cir. 2012) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

could have decided the case by applying that standard to the facts as presented, without creating a legal rule that distinguishes between "slight excesses" and "significant excesses" of observed speed. Simply stated, when it comes to traffic stops based on visual speed observations, the law of probable cause does not need another cook in the kitchen.

The *Sowards* majority rationalized the perceived necessity for the addition of a rule to the law of probable cause because speeding "presents a unique circumstance."[108] But speeding is by no means unique. It is axiomatic that "observation of *any* traffic violation, no matter how minor, gives an officer probable cause to stop the driver."[109] The *Sowards* rule begs the question of whether courts must similarly distinguish between, say, observations of cars that are "slightly" following too closely or "significantly" following too closely, or "slightly" failing to stop at a red light or "significantly" failing to stop. Such distinctions are unwarranted and have not been fashioned because they would be unworkable for police officers.[110] The limits of police officers' discretion in making traffic stops has been settled for over half a century:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.[111]

For these reasons, the majority in *Sowards* crafted an unnecessary rule that obfuscates the Fourth Amendment landscape. Because of the unique facts of *Sowards*—in particular, a police officer that "was, to put it mildly, measurement challenged"[112]—the decision will likely be limited to its facts. Subsequent courts have already done so.[113]

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108. United States v. Sowards, 690 F.3d 583, 590 n.8 (4th Cir. 2012).

109. United States v. Singletary, 293 F. App'x 188, 189 (4th Cir. 2008) (emphasis added).

110. *See Sowards*, 690 F.3d at 611 (Traxler, C.J., dissenting) (noting that such distinctions "ignore[] the realities of traffic enforcement and unduly tie[] the hands of officers who must have the freedom to exercise their judgment").

111. *Brinegar*, 338 U.S. at 176.

112. United States v. Mubdi, 691 F.3d 334, 340 (4th Cir. 2012).

113. *See* United States v. Jones, No. 12-4464, 2012 WL 6583039 (4th Cir. Dec. 18, 2012). In *United States v. Brown*, No. 2:12-cr-00418-DCN-1, 2012 WL 3680436 (D.S.C. Aug. 27, 2012), the court noted that "[t]he Fourth Circuit's recent decision in [*Sowards*], relied on by Brown, is distinguishable." *Id.* at *4. The court explained that "[b]y relying on *Sowards*, Brown is attempting to fit a square peg into a round hole." *Id.* at *5.

VII. CONCLUSION

As the Tenth Circuit held in 2011, "It's long been the case that an officer's visual estimation can supply probable cause to support a traffic stop for speeding in appropriate circumstances."[114] The "appropriate circumstances" are determined by a district court's analysis of a police officer's credibility and the objective reasonableness of that officer's information; in other words, courts already have sufficient standards to determine whether probable cause, or reasonable suspicion, is met. In *Sowards*, the Fourth Circuit created an unnecessary rule and overstepped its role on appeal. However, as seen in subsequent cases, the effect of the rule fashioned in *Sowards* may not be around for long. It is in this sense that the majority in *Sowards* was correct in stating, "the sky will not fall as a result of [the] majority decision."[115]

114. United States v. Ludwig, 641 F.3d 1243, 1247 (10th Cir. 2011) (citing United States v. Vercher, 358 F.3d 1257, 1262-63 (10th Cir. 2004); United States v. Bourassa, 411 F.2d 69, 71 (10th Cir. 1969)).

115. *Sowards*, 690 F.3d at 596 (majority opinion) (footnote omitted).

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