

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SANTOS PETER MURILLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit*

PETITIONER'S APPENDIX

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FILED**NOT FOR PUBLICATION**

OCT 23 2018

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 17-30129

Plaintiff-Appellee,

D.C. No.
2:16-cr-00113-JLR-1

v.

SANTOS PETER MURILLO, AKA Peter
Santos Murillo,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 10, 2018
Seattle, Washington

Before: FERNANDEZ, N.R. SMITH, and CHRISTEN, Circuit Judges.

Santos Peter Murillo appeals his convictions for prohibited possession of a firearm, possession of methamphetamine and heroin with intent to distribute, and possession of a firearm in furtherance of drug trafficking. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Murillo contends that the district court violated his Sixth Amendment right to a public trial when it heard his *Batson* challenge out of public view in a small room adjoining the courtroom.¹ Murillo did not raise this objection in the district court, so we review for plain error. *United States v. Rivera*, 682 F.3d 1223, 1232 (9th Cir. 2012). Assuming without deciding that the public trial right attaches to a *Batson* hearing, *see Presely v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) (holding that the Sixth Amendment applies to jury selection), we conclude that the closure that occurred here concerned a brief, non-public hearing related to juror selection. Such closures are “trivial” for purposes of the Sixth Amendment, and do not implicate the public trial right. *See United States v. Ivestor*, 316 F.3d 955, 959–60 (9th Cir. 2003). This is especially so when, as here, the hearing is short, conducted in the presence of all parties, and a contemporaneous record is made of the proceedings. *See United States v. Sherlock*, 962 F.2d 1349, 1358 (9th Cir. 1989). We do not discern any error in the district court’s handling of Murillo’s *Batson* challenge on this record.

2. Murillo challenges the district court’s decision to allow expert opinion testimony from a law enforcement witness specializing in narcotics trafficking

¹ Because the parties are familiar with the facts, we recite only those necessary to resolve Murillo’s appeal.

investigations. We review challenges to properly preserved evidentiary rulings for an abuse of discretion. *United States v. Waters*, 627 F.3d 345, 351–52 (9th Cir. 2010). “Federal courts uniformly hold . . . that government agents or similar persons may testify as to the general practices of criminals to establish the defendants’ modus operandi.” *United States v. Johnson*, 735 F.2d 1200, 1202 (9th Cir. 1984) (collecting cases). The district court did not abuse its discretion in admitting the challenged testimony.

3. Murillo suggests that several relatively recent Supreme Court cases are incompatible with existing Ninth Circuit precedent upholding mandatory minimum sentences under the Armed Career Criminal Act against Eighth Amendment challenges. However, each of the Supreme Court cases he presents are categorical rulings invalidating a specific type of sentence applied to the entire class of juvenile defendants. *See, e.g., Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life sentences for juvenile offenders categorically violate the Eighth Amendment). Indeed, the Supreme Court has gone out of its way to distinguish *as applied* challenges to statutory mandatory minimum sentences within the line of cases Murillo suggests overrule our circuit law. *See Graham v. Florida*, 560 U.S. 48, 61–62 (2010) (distinguishing *Harmelin v. Michigan*, 501 U.S. 957 (1991) and *Ewing v. California*, 528 U.S. 11 (2003)). We are not persuaded, therefore, that

intervening Supreme Court authority requires us to revisit our established law in this area. *See United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) (rejecting as-applied challenge to a 95-year § 924(c) sentence); *see also United States v. Major*, 676 F.3d 803, 812 (9th Cir. 2012) (declining to revisit *Harris*).

4. The district court admitted nineteen identity cards seized from the vehicle Murillo was driving prior to his arrest. Murillo argues that this evidence was improperly admitted. We disagree. “Evidence of assumption of a false name following the commission of a crime is relevant as an admission ‘by conduct, constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself.’” *United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir. 1984) (quoting McCormick on Evidence § 271 (2d ed. 1972)). The district court did not abuse its discretion by admitting the identification cards.

5. Prior to trial, Murillo moved to suppress all evidence obtained as a result of a warrantless search of the borrowed vehicle he was driving. An officer who “is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object” may seize it, so long as the object’s incriminating nature is “immediately apparent.” *Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971). In this case, the officer was securing the vehicle so that it could be towed to an impound lot, when he observed the back half of a firearm

he immediately recognized as a MAC-10. The officer, who had military training in firearms recognition, also knew that Murillo was wanted on a felony probation violation warrant. There was thus “[a] practical, nontechnical probability that incriminating evidence [was] involved[,]” *United States v. Stafford*, 416 F.3d 1068, 1076 (9th Cir. 2005) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983)), and because the officer was not performing an otherwise unlawful search, the firearm was properly seized under the plain view doctrine. The district court did not err by denying Murillo’s motion to suppress.

6. Murillo asserts that the government failed to produce sufficient evidence of his intent to distribute the drugs found in his possession. “A jury may infer the intent to distribute a controlled substance from quantity alone. . . . Moreover, ‘[i]t may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use.’” *United States v. Innies*, 7 F.3d 840, 844 (9th Cir. 1993) (alteration in original) (quoting *United States v. Tarazon*, 989 F.2d 1045, 1053 (9th Cir. 1993)). The government proffered competent evidence that the quantity of drugs seized from the vehicle Murillo was driving was consistent with distribution, that the drugs had significant street value, and that Murillo was armed. This evidence was sufficient to permit a rational jury to conclude he intended to distribute. Similarly, “the proximity, accessibility, and strategic location of the

firearms in relation to the locus of the drug activities” was sufficient for a rational jury to conclude the firearms were used in furtherance of drug trafficking. *United States v. Thongsy*, 577 F.3d 1036, 1041–42 (9th Cir. 2009) (quoting *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007)).

7. Finally, Murillo argues that his jury-trial waiver as to Count 1 of the indictment, prohibited possession of a firearm by a convicted felon, was defective. We review this claim *de novo*. *United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018). Our circuit precedent establishes that a stipulation of facts “fulfils the letter of [Rule 23] by providing written evidence of [the defendant’s] intent [to waive his right to a jury trial].” *Pool v. United States*, 344 F.2d 943, 944 (9th Cir. 1965). Faithful application of this rule compels the conclusion that Murillo’s stipulation to all facts necessary for conviction on Count 1 was a sufficient waiver of his right to a trial by jury.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS

NOV 29 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-30129

Plaintiff-Appellee,

D.C. No.

v.

2:16-cr-00113-JLR-1

SANTOS PETER MURILLO, AKA Peter
Santos Murillo,Western District of Washington,
Seattle

Defendant-Appellant.

ORDER

Before: FERNANDEZ, N.R. SMITH, and CHRISTEN, Circuit Judges.

The memorandum disposition filed on October 23, 2018 is amended by the disposition filed concurrently with this order. With this amendment, the panel unanimously votes to deny Appellant's petition for panel rehearing. Judge Christen has voted to deny Appellant's petition for rehearing en banc, and Judges Fernandez and N.R. Smith have so recommended.

The full court has been advised of Appellants' petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

FILED**NOT FOR PUBLICATION**

NOV 29 2018

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SANTOS PETER MURILLO, AKA Peter
Santos Murillo,

Defendant-Appellant.

No. 17-30129

D.C. No.
2:16-cr-00113-JLR-1AMENDED
MEMORANDUM*

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for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 10, 2018
Seattle, Washington

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5. Prior to trial, Murillo moved to suppress all evidence obtained as a result of a warrantless search of the borrowed vehicle he was driving. An officer who “is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object” may seize it, so long as the object’s incriminating nature is “immediately apparent.” *Coolidge v. New Hampshire*, 403 U.S. 443, 465–66 (1971). In this case, the officer was securing the vehicle so that it could be towed to an impound lot, when he observed the back half of a firearm

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AFFIRMED.

UNITED STATES DISTRICT COURT
Western District of Washington

UNITED STATES OF AMERICA

v.

SANTOS PETER MURILLO

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:16CR00113JLR-001

USM Number: 16052-085

Neil Martin Fox

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) 1, 2, 3, and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

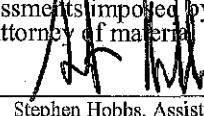
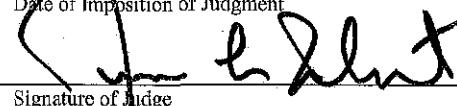
Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §922(g)(1)	Felon in Possession of a Firearm	2/20/2016	1
21 U.S.C. §§841(a)(1), 841(b)(1)(A)	Possession of Methamphetamine with Intent to Distribute	2/20/2016	2
21 U.S.C. §§841(a)(1), 841(b)(1)(C)	Possession of Heroin with Intent to Distribute	2/20/2016	3
18 U.S.C. §§924(c)(1)(A), 924(c)(1)(C)	Possession of a Firearm in Furtherance of Drug Trafficking	2/20/2016	4

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count 1 is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

 Stephen Hobbs, Assistant United States AttorneyJune 19, 2017
Date of Imposition of Judgment Signature of JudgeThe Honorable James L. Robart
United States District Judge
Name and Title of Judge19 June 2017
Date

DEFENDANT: **SANTOS PETER MURILLO**
CASE NUMBER: 2:16CR00113JLR-001**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months Counts 1, 2 and 3.300 months Count 4, consecutive to Counts 1, 2 and 3.420 months Total Sentence The court makes the following recommendations to the Bureau of Prisons:*Terminal Island*

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.**UNITED STATES MARSHAL**By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **SANTOS PETER MURILLO**
CASE NUMBER: 2:16CR00113JLR-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached pages.

DEFENDANT: **SANTOS PETER MURILLO**
CASE NUMBER: 2:16CR00113JLR-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: **SANTOS PETER MURILLO**
CASE NUMBER: 2:16CR00113JLR-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer. In addition to urinalysis testing that may be a part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.
2. The defendant shall provide the probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's federal income tax returns.
3. The defendant shall participate as directed in a mental health program approved by the United States Probation Office. The defendant must contribute towards the cost of any programs, to the extent the defendant is financially able to do so, as determined by the U.S. Probation Officer.
4. The defendant shall submit his or her person, property, house, residence, storage unit, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: **SANTOS PETER MURILLO**
 CASE NUMBER: 2:16CR00113JLR-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300	N/A	Waived	N/A

The determination of restitution is deferred until _____, An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution

the interest requirement for the fine restitution is modified as follows:

The court finds the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived.

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **SANTOS PETER MURILLO**
 CASE NUMBER: 2:16CR00113JLR-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- PAYMENT IS DUE IMMEDIATELY.** Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.
- During the period of imprisonment, no less than 25% of their inmate gross monthly income or \$25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.
- During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.
- During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

THE HON. JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
) CASE NO. CR16-113JLR
)
 Plaintiff,)
) STIPULATED MOTION TO
 v.) SUPPLEMENT THE RECORD
)
 SANTOS PETER MURILLO) **NOTE ON MOTION CALENDAR:**
) November 8, 2017
 Defendant.)
)
)
)
)
)
)

MOTION

IT IS HEREBY AGREED AND STIPULATED by the United States, through its undersigned attorney, Helen J. Brunner, and the defendant, Santos Peter Murillo, through his undersigned attorney, Neil M. Fox, that the Verbatim Report of Proceedings, for October 12, 2016 (Dkt. No. 120), marked "Jury Voir Dire and Opening Statements," shall be supplemented pursuant to FRAP 10(e)(1) as follows:

STIPULATED MOTION TO SUPPLEMENT THE RECORD - Page 1
United States v. Murillo, No. CR16-113JLR

1. The proceedings described at page 79, line 4, to page 82, line 19, of the transcript labeled as taking place at "sidebar" occurred in the small room that is entered from the courtroom through a door next to the bench and connects the courtroom to the hallway behind it;
2. The following people were in the small room during the proceedings: District Judge James L. Robart, Court Reporter Nickoline Drury, a law clerk, a member of the U.S. Marshals Service, Assistant United States Attorneys Stephen Hobbs and Joseph C. Silvio, Defense Attorneys Jesse Cantor and Mohammad Hamoudi, and the defendant, Mr. Murillo.

DATED THIS 8th day of November, 2017.

Respectfully submitted,

s/ Neil M. Fox
Attorney for Defendant

s/Helen J. Brunner
First Assistant United States Attorney
Attorney for United States of America

ORDER

Based upon the stipulation of the parties and for good cause shown,
IT IS SO ORDERED and, pursuant to FRAP 10(e), the Verbatim Report of
Proceedings, for October 12, 2016 (Dkt. No. 120), marked "Jury Voir Dire and
Opening Statements," is corrected as follows:

1. The proceedings described at page 79, line 4, to page 82, line 19, of the transcript labeled as taking place at "sidebar" occurred in the small room that is entered from the courtroom through a door next to the bench and connects the courtroom to the hallway behind it;
2. The following people were in the small room during the proceedings: Judge James Robart, Court Reporter Nickoline Drury, a law clerk, a member of the U.S. Marshals Service, AUSA Stephen Hobbs, AUSA Joseph C. Silvio, Defense Attorney Jesse Cantor, Defense Attorney Mohammad Hamoudi, and the defendant, Mr. Murillo.

Dated: November 14 2017.



THE HONORABLE JAMES L. ROBART

1 Q All right. Thank you, sir.

2 Thirty-three, you are back?

3 A Well, you missed me the first time. But I've got a couple of
4 issues. I'm a small business owner, and I'm a little shorthanded
5 going into our busiest time of the year. I'm a UPS store, so I'm
6 interviewing next week.

7 And then, secondly, I have an appeal coming up with the VA
8 that I've been on the docket for three years, and I don't want to
9 miss that.

10 And then the third thing I need to sidebar with you.

11 THE COURT: All right. Come on down, sir.

12 Ladies and gentlemen, you know how you pick up this lingo. I
13 mean, "sidebar" and --

14 MR. CANTOR: I assume we're invited up as well?

15 THE COURT: Right over there, sir.

16 (Court and counsel met at sidebar as follows:)

17 THE COURT: Your issue here?

18 JUROR 33: Here is my concern. I used to be security
19 police, and I do have friends that do that job. But I am very,
20 very sensitive to Black Lives Matter, and I have some bias with
21 regard to police officers. And although I thought I was a good
22 one, I'm not sure that I feel that comfortable with the way
23 things are, as I look through the course of historical events
24 that have been taking place over the news within the past few
25 years with young African-Americans being shot. And so I'm not

1 really sure that I could sit in a courtroom and believe
2 everything that a police officer would say to me.

3 THE COURT: All right.

4 Counsel, anyone?

5 MR. CANTOR: I don't have any questions.

6 THE COURT: All right. Thank you, sir.

7 MR. HAMOUDI: Thank you.

8 THE COURT: I appreciate your candor.

9 (Sidebar concluded.)

10 Q (By the Court:) Twenty-seven?

11 A It only occurred to me as we continued here, not previously
12 on my other answers. So it's only partially related to this
13 question.

14 But I believe you were the judge in our -- in presiding over
15 our case, although I only participated in -- sat in this room one
16 time, and I don't hold you responsible for getting gyped. I
17 thought I should at least bring it up.

18 Q You know, I don't know what it is about that row. The last
19 time we picked a jury, a woman was sitting there, and she said,
20 "I think I know your father." You know, it was interesting
21 because my dad died in 1977. And I said, "Well, how do you know
22 that?" And she said, "Well, you know, I'm the daughter of a
23 gentleman named Ed Tacama {phonetic}." And they would have gone
24 back to 1908. So it must be that row. That's all I can think
25 of.

1 the worst questions I have ever heard in my life, because they
2 all then start talking about their grandmother's glaucoma. It
3 never made sense to me.

4 You have a fairly good age distribution, you have a fairly
5 high level of education, so I think you can probably get a pretty
6 good jury out of this.

7 MR. HOBBS: Okay. Thank you.

8 THE COURT: Thank you.

9 MR. CANTOR: All right. Thank you.

10 (Proceedings recessed.)

11 (The following occurred in the presence of the prospective jury.)

12 THE COURT: Please be seated, ladies and gentlemen.
13 What is going to happen next is the clerk has a form that gets
14 passed back and forth between the lawyers. This is peremptory
15 challenges. Previously, there were for-cause challenges.

16 A number of you, based on answers that you gave or statements
17 that you made, are going to be released. Peremptory challenges
18 is something that is written into the law. It says a party may
19 release or dismiss a juror for any reason, and "any" has an
20 asterisk by it.

21 Let me cover a couple of different things. When I was
22 starting out in litigating, a man that I did a lot of work for
23 said, you know, "Never trust left-handed people." Another one
24 was, "People who wear tinted glasses are never to be trusted."
25 That was always an irony to me because, as he got older, he got a

1 pair of tinted glasses. There were a lot of not very
2 scientifically based rules about who should be and should not be
3 jurors. If you are released, don't worry about it. Don't even
4 try to figure it out. The asterisk has to do with the fact that
5 the law has evolved to the point where it says that you may not
6 release a juror for a number of reasons: race, gender, religion,
7 disability, all kinds of different issues. That's something that
8 we take very seriously. Lawyers know about it, and therefore, it
9 doesn't happen very often. But when I say you can be released
10 for any reason, don't assume that any reason will do. It has to
11 be a reason that's legally sufficient or that is not legally
12 prohibited. That's probably a better phrasing for that.

13 In the meantime, what I suggest you do is introduce yourself
14 to a next-door neighbor. I'm happy for you to chat. We need you
15 in your seats, and they're looking at you, "Oh, yes, that's Juror
16 Number __," that's the person that said such and such. Regardless
17 of how good you are at keeping notes -- I don't have anything to
18 do up here, and you have seen how bad I am -- they need you there
19 to remind them of who you are and what you said. So if you
20 brought the newspaper, that's fine. You know, this usually takes
21 somewhere between five to seven minutes. At that point, those of
22 you who are not on the jury will be released. So enjoy
23 yourselves.

24 MR. HOBBS: Thank you.

25 THE COURT: Ladies and gentlemen, continue to enjoy

1 yourselves. I'm going to talk to the lawyers for a moment about
2 the form they just filled out.

3 Counsel, you and your clients I will see at sidebar.

4 (Court and counsel met at sidebar as follows:)

5 THE COURT: Mr. Murillo is in here. He has a right to
6 be here. I appreciate the marshals agreeing to do this.

7 A *Batson* challenge has been raised to Juror No. 8. As I
8 understand the law that's applicable to this interview, you do
9 need to present a reason why I should consider that, and then the
10 government responds.

11 MR. CANTOR: Okay. I think the *prima facie* showing is
12 that we have very little, if any, Hispanics in the jury pool.
13 Our client is Hispanic. I think that in and of itself creates a
14 *prima facie* showing of discrimination to strike this particular
15 juror, Juan Sanchez, and shifting the burden to the government to
16 show a race-neutral reason for striking him. That's what we have
17 to decide.

18 I mean, I'm looking at his questionnaire. He works for the
19 Gates Foundation. The nature of his work, "I give money away."
20 He used to work at the University of California. He majored in
21 rhetoric. He was a fifth grade teacher at one point. I just --
22 I don't have any notes.

23 THE COURT: He answered one question.

24 MR. CANTOR: Right.

25 THE COURT: That was the one -- I think maybe it was by

1 you -- which was to the effect of, "Is this a jury of your
2 peers?" That is the only thing I have in my notes. And I think
3 you made your *prima facie* showing.

4 So, Mr. Hobbs.

5 MR. HOBBS: Yeah. Thank you, Your Honor.

6 He did answer one question. The question was, "Is this a
7 jury of your peers?" He was very vocal, saying that it was not a
8 jury of the defendant's peers, which I took, quite frankly, to
9 say that he didn't think the defendant would get a fair trial and
10 was inclined to pursue that.

11 He also did have another comment, though, in there, which was
12 to the effect of the people in this room do not reflect the
13 defendant's background or upbringing. And I thought that was
14 actually a fairly egregious statement. It sort of makes a bunch
15 of assumptions about who the defendant is as well as who the rest
16 of the jurors are. I thought it was completely unsupported. And
17 based on that, I'm certainly not willing to keep him on the jury.

18 I was also concerned, just from the -- I didn't actually even
19 know his name -- but just glancing, it said "rhetoric," majored
20 in "rhetoric." I didn't know what really that meant or whether
21 it was somebody who we wanted on the jury.

22 THE COURT: Response, counsel.

23 MR. CANTOR: I still don't think that satisfies the
24 *Batson* standard, the reasons for the government -- I mean, the
25 question of whether this is a jury of Mr. Murillo's peers, there

1 was -- the answer that I recall, the answer that's in the record,
2 does not seem to give -- or rise to a sufficient level of a
3 race-neutral reason to strike this particular juror.

4 THE COURT: Mr. Hobbs, if you had wanted to ask a
5 follow-up question, you could have. The answer --

6 MR. HOBBS: Well --

7 THE COURT: Let me finish.

8 MR. HOBBS: I'm sorry.

9 THE COURT: The question that was asked was, "Do you
10 think this is a jury of your peers?" In and of itself, I don't
11 think that is disqualifying. And the fact that he's well
12 educated, you know, you didn't mention -- we don't know which
13 University of California he went to, but I'm going to assume the
14 worst, which is, you know, he went to the very liberal University
15 of California at Berkeley.

16 MR. CANTOR: That's where I went. Sorry. Sorry.

17 THE COURT: Steve may have gone there, too, for all I
18 know.

19 I think, without follow-up, to confirm some basis for doing
20 it, I'm going to sustain the *Batson* challenge and give the
21 government an opportunity to designate one additional.

22 MR. HOBBS: We don't have anybody else. We accept the
23 jury then as it is.

24 I didn't understand, Your Honor, that in your process we
25 could ask follow-up questions. In that situation, I thought we

1 had one shot to ask questions.

2 THE COURT: During your conducted voir dire?

3 MR. HOBBS: Well, we went first.

4 THE COURT: Right.

5 MR. HOBBS: And then he asked the question, and I
6 didn't think I was in a position to follow up.

7 THE COURT: Oh. I understand. All right.

8 Do you accept the jury also then?

9 MR. CANTOR: We accept the jury, yes.

10 THE COURT: All right. We need one additional juror,
11 and I'm just going to use the next person in line.

12 MR. CANTOR: So we've listed our ten challenges,
13 peremptory challenges.

14 THE COURT: Right. And I'm going to leave Mr. Sanchez
15 on the jury and -- well, then we won't need to change it.

16 MR. CANTOR: Okay.

17 MR. HAMOUDI: Thank you, Your Honor.

18 MR. CANTOR: Thank you.

19 (Sidebar concluded.)

20 THE COURT: Ladies and gentlemen, give me a chance to do
21 a little paperwork here, and then we will have some of you on
22 your way.

23 Ladies and gentlemen, the following have been selected as the
24 jury in this matter. Now that I have your attention, you're in
25 federal court. I have life tenure in this job. However, I only

1 And specifically on the very last issue, I guess I would
2 like the court to do the analysis under the assumption that
3 Officer Bateman stated a MAC-10 had been found in the car. I
4 don't know that for sure. He's unclear. But at least
5 there's that possibility, and I don't want it to be
6 ambiguous.

7 Nevertheless, what he is saying is, "I'm arresting you
8 because we found a gun in the car. I'm placing you under
9 arrest for that," that's like a normal booking procedure.
10 And his spontaneous response, "That's why they call me Big
11 Mac and Mac 'n Cheese," was not elicited in response to a
12 question like, "What's your nickname?" "Is there a gun in
13 the car?" He didn't ask him anything like that. He just
14 told him why he was being booked.

15 And so for those reasons, I think all the statements come
16 in as well.

COURT'S FINDINGS

18 THE COURT: All right. The court has already ruled
19 on the motion to sever.

20 I'm happy that we had our evidentiary hearing, because it
21 afforded the defendant an opportunity to more fully present
22 some arguments that were made and to cross-examine the
23 witnesses who were involved in them.

24 I'm going to use the same format that both counsel did,
25 which is, everything that happens before Officer Nelson walks

1 up to shut off the engine, it seems to me to be
2 uncontroverted and, frankly, doesn't trigger anything that
3 would cause the motions to be granted.

4 I used as my touchstone for plain-view the three-part test
5 that's found in *Coolidge*, the first which is the police
6 undertake to violate the Fourth Amendment in arriving at the
7 place from which the evidence can be plainly viewed. And I
8 think there is no dispute in regards to they did not violate
9 the Fourth Amendment.

10 Mr. Murillo's vehicle was on the side of the road, not as
11 much off of it as the defense sometimes draws on the screen.
12 But it's clearly not in the roadway. The officer testified
13 to that.

14 The testimony -- the uncontroverted testimony is that the
15 driver's door is open, the keys are in the ignition, and the
16 car is running. I believe at that point that Mr. Murillo is
17 under arrest and in handcuffs, and, consequently, it seems to
18 me that deciding that you're going to turn the vehicle off
19 and close the door is good police work, but it's the minimum
20 that should be expected.

21 The second question under plain view is does the seizing
22 officer have a lawful right to gain access to the evidence?
23 That and the third question, the incriminating nature of the
24 evidence must be immediately apparent, rather merge in the
25 circumstance.

1 I respectfully disagree with the defense contention that
2 the tracks on the seat and the argument about Mr. Murillo's
3 being able to reach the pedals are determinative in this
4 case.

5 We have an officer who approaches the car from the
6 driver's side. Everything that's in the police reports and
7 in the testimony today is that he has to, basically, get the
8 steering wheel out of the way in order to reach for where the
9 keys were. But that's really irrelevant to my ultimate
10 conclusion.

11 What we know is that it's perfectly okay to stick his head
12 in the door to do what he needs to do. The real issue
13 becomes, is the incriminating nature of the evidence
14 immediately apparent?

15 And the court is left with the evidence from Officer
16 Nelson that he was in the Army for 12 years, and he was
17 familiar with weapons, that he had specialized training in
18 weapons and various kinds of weapons. And as I told
19 Mr. Cantor, basically he helped his credibility with me when
20 he said the photo that is Exhibit 6 isn't accurate "because I
21 couldn't see the magazine well."

22 What I went off was the rather unusual view of the back of
23 the MAC-10, which is, indeed, quite distinctive. I think
24 regardless of what he saw, there was no question in his mind
25 that it was a gun of some variety. His testimony when he was

1 on the stand, as I wrote it down, was that it was a MAC-10 or
2 a CO₂-based BB gun or a pellet pistol.

3 The defense has done a magnificent job of trying to create
4 a lot of confusion on that and create ambiguity that would
5 authorize the court to say that it wasn't in plain view. But
6 it really doesn't make a lot of difference to me if it is a
7 MAC-10 or a CO₂-based pellet pistol. It is a gun. And I
8 think that the clear result of that is that some kind of
9 weapon is in plain view.

10 And I agree the case would be much clearer if he had left
11 the floor mat undisturbed, but I also can understand that
12 once he realizes that it is a gun, that he may undertake --
13 and I would not call it a search, but a limited inspection to
14 make sure we're not going to haul Mr. Murillo off for having
15 a water pistol.

16 And, therefore, I'm going to find that the argument has
17 narrowed. In regards to suppression of the evidence, it's
18 going to be denied.

19 That, then, turns, in my mind, next to the suppression of
20 the statements.

21 The approach taken by the defense in this matter of when
22 you go into custody for *Miranda* purposes, frankly, seems
23 inconsistent or, at least, an extension of where the law is
24 in the Ninth Circuit and in the Supreme Court.

25 No one contends that the original improper disclosure --

PLAINTIFF:

USA

vs.

DEFENDANT:

Santos Peter Murillo

CASE NO. CR16-113 JLR

PEREMPTORY CHALLENGES
(CRIMINAL ACTION)

LIST BOTH NAME AND NUMBER OF JUROR

PLAINTIFF:

DEFENDANT:

1. No. 2

[REDACTED]

1

2. No 8

[REDACTED]

(BATESON
CHALLENGE)

6

3. No 12

[REDACTED]

13

4. No. 16

[REDACTED]

14

5. No. 19

[REDACTED]

17

6. No. 24

[REDACTED]

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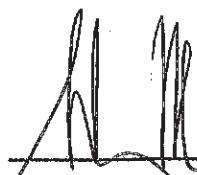
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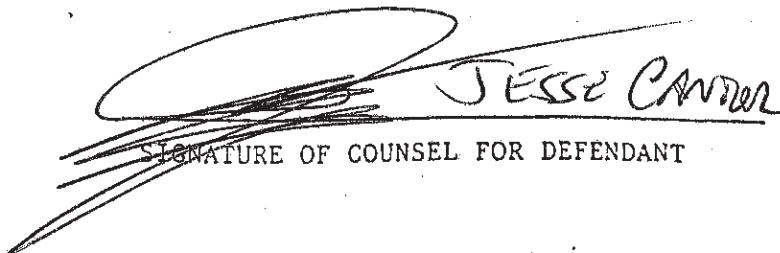
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Stephen H. Hoffer

SIGNATURE OF COUNSEL FOR PLAINTIFF



Jesse Cawdor

SIGNATURE OF COUNSEL FOR DEFENDANT

		Proposed Trial Exhibits,,, (Attachments: # 1 Exhibit Proposed Exhibits 75-84)(Hobbs, Stephen) (Entered: 10/12/2016)
10/12/2016	76	Minute Entry for proceedings held before Judge James L. Robart- CRD: Casey Condon; AUSA: Stephen Hobbs, Joseph Silvio; Def Cnsl: Jesse Cantor, Mohammad Hamoudi; Court Reporter: Nickie Drury; DAY 1 - JUR Y TRIAL as to Santos Peter Murillo held on 10/12/2016. Defendant present, in custody. 9:00 a.m. - The court reviews preliminary instructions with counsel. For the reasons stated on the record, the court denies the motion in limine, Dkt. #57. 9:40 a.m. - The jury panel is sworn/voir dire. 2:00 p.m. - Counsel accepts the jury. The jury is sworn and instructed. Witnesses sworn and testify: Marcos Tapia, Joe Michaels and Michael Bateman. Exhibits admitted: 14, 19, 20, 57 and A-43, A-45, A-53. Court in recess at 4:30 p.m. Trial to resume Thursday, October 13, 2016 at 9:00 a.m. (CC) (Entered: 10/12/2016)
10/13/2016	78	SEALED DOCUMENT PLAINTIFF'S AMENDED PROPOSED TRIAL EXHIBITS Amended Proposed Exhibit #83 by USA as to Santos Peter Murillo, re 75 (Sealed) Plaintiff/Defendant Proposed Trial Exhibits,. (Hobbs, Stephen) (Entered: 10/13/2016)
10/13/2016	79	Minute Entry for proceedings held before Judge James L. Robart- CRD: Casey Condon; AUSA: Stephen Hobbs, Joseph Silvio; Def Cnsl: Jesse Cantor, Mohammad Hamoudi; Court Reporter: Debbie Zurn; DAY 2 - JUR Y TRIAL as to Santos Peter Murillo held on 10/13/2016. Defendant present, in custody. 9:00 a.m. - Michael Bateman resumes the stand. Witnesses sworn and testify: Jeff Nelson, Donald Evans, Christian Adams, Greg Heller, Jonathan Hansen and Greg Tomlinson. 11:30 a.m. - The jury is excused and the court meets with counsel to informally review jury instructions. Exhibits admitted: 1, 2, 3, 4, 5, 6, 8, 9, 21, 22, 23, 24, 26, 27, 29, 31, 32, 34, 35, 36, 38 (1-11), 58, 59, 60, 78, 79, 80, 81, 83, and A-5, A-6, A-7, A-8, A-10, A-11, A-12, A-13, A-14, A-15, A-31, A-32, A-34, A-35, A-36, A-38, A-52. 3:50 p.m. - The government rests. The defense rests. The defendant advises the court he does not wish to testify. Formal jury exceptions will be held Tuesday, October 18, 2016 at 1:00 p.m. Mr. Cantor moves for a Rule 29 motion to dismiss. The court hears from Mr. Hobbs. The court takes the matter under advisement. 4:25 p.m. - Court is in recess. Trial to resume Tuesday, October 18, 2016 at 1:30 p.m. (CC) (Entered: 10/13/2016)
10/14/2016	80	SEALED DOCUMENT DEFENDANTS PROPOSED TRIAL EXHIBITS by Santos Peter Murillo, filed under seal in accordance with LCrR 55. (Attachments: # 1 Exhibit A2-A3, # 2 Exhibit A4-A5, # 3 Exhibit A6-A7, # 4 Exhibit A8-A10, # 5 Exhibit A11-A13, # 6 Exhibit A14-A17, # 7 Exhibit A18-A25, # 8 Exhibit A26-A35, # 9 Exhibit A36-A42, # 10 Exhibit A44-A53)(Cantor, Jesse) (Entered: 10/14/2016)
10/14/2016	81	MEMORANDUM in Support of Exception to Jury Instruction Mere Presence 6.10 by Santos Peter Murillo (Hamoudi, Mohammad Ali) (Entered: 10/14/2016)
10/17/2016	82	RESPONSE GOVERNMENT'S RESPONSE TO MEMORANDUM IN SUPPORT OF EXCEPTION TO JURY INSTRUCTION MERE PRESENCE 6.10 by USA as to Santos Peter Murillo re 81 Memorandum filed by Santos Peter Murillo (Silvio, Joseph) (Entered: 10/17/2016)
10/18/2016	83	Minute Entry for proceedings held before Judge James L. Robart- CRD: Casey Condon; AUSA: Stephen Hobbs, Joseph Silvio; Def Cnsl: Jesse Cantor, Mohammad Hamoudi; Court Reporter: Debbie Zurn; DAY 3 - JUR Y TRIAL as to Santos Peter Murillo held on 10/18/2016. Defendant present, in custody. 1:00 p.m. - Formal jury exceptions placed on the record. 1:30 p.m. - Jury instructions read. 2:00 p.m. - The jury hears closing argument from counsel. 3:25 p.m. - The jury begins deliberations. 4:25 p.m. - Court in recess. Deliberations to resume Wednesday, October 19, 2016 at 9:00 a.m. (CC) (Entered: 10/18/2016)

Supplement

Sequence: 1

J.NELSON #AP5612 / A20 / NV / Sat Feb 20 04:57:49 PST 2016
OIC B ANDERSON/MJ

On 02/20/16 at 0233hrs, I was dispatched to the 2000 block of Auburn Way South, Auburn King County WA 98002, to assist Officers M. Bateman and J. Michels during a collision based investigation. Officer Bateman had detained a subject later identified as, Peter S. Murillo (DOB: [REDACTED] /1977), and requested an Automated Fingerprint Identification System (AFIS), be brought to the scene of the stop to assist with positively identifying Murillo (after he had provided a false name and Driver's License).

I arrived at 0238hrs, and parked next to a Jeep Liberty; the Jeep's driver's door was open and the vehicle's engine was running. I walked passed the Jeep and observed through the windows that no one was seated inside. I walked over to Officers Bateman and Michels and observed Murillo handcuffed and seated on the front push bumper of Officer Bateman's patrol car.

Officer Bateman advised me that Murillo was the driver of the Jeep Liberty, and that during their investigation Murillo provided Officers with a WA ID, but Murillo did not match the photograph of the ID card.

I advised Murillo about the purpose of my contact and that I would require both his left and right index fingers for the purposes of conducting the AFIS scan in order to determine/confirm his identity. Murillo verbally consented to the process and the scan was performed without incident.

Upon plugging the portable AFIS scanner into my patrol car's Mobile Data Computer (MDC), the subsequent confirmation of Murillo's true name (listed above) was identified. A computer check of his name identified the following warrant issued for his arrest; Felony Warrant OCA: A851019060/ OFL: Probation Violation/ AOB: No bail/ BY: US Marshals Service Headquarters Arlington at [REDACTED]. Dispatch confirmed the listed warrant.

Officer Bateman advised Murillo that he was under arrest for Making a False Statement to a Public Servant and the listed warrant. Murillo stated, "You guys are good."

Officer Bateman stated he no longer required my assistance. I walked back to my patrol car. Officer Bateman transported Murillo to the SCORE Jail for booking purposes. Reference Officer Bateman's primary report for additional details regarding the case.

Based upon the circumstance that Murillo (the sole occupant of the Jeep) was arrested and the vehicle would require impound, I walked to the driver door in order to turn off the vehicle's engine and close the driver's door.

I observed in open view, based upon my training and experience, the pistol grip, boxed frame and triangular rear site aperture of a MAC 10 submachine gun, protruding from under the rubber floor mat just in front of the driver's seat. The weapon was concealed to a point where I could not determine if it was an airsoft or pellet replica, or if a magazine was present. I pulled the floor mat back to expose the firearm, there was no magazine present. Based upon the size of the magazine port and threaded barrel more likely than not the weapon was authentic and functional.

Murillo had been removed from the scene, there were no additional occupants, and I was present at the driver door; there was no articulable safety risk present that required me to recover the firearm. The firearm was left in the original location of discovery and for the purposes of retrieval via a Search Warrant Service. Based upon the circumstance that additional evidence associated with the firearm, i.e. ammunition (spent or live), a magazine, or a suppressor could additionally be concealed within the vehicle, no inventory search was conducted.

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