No.

In the Supreme Court of the United States

MICHAEL ARTIS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

GAIL M. LATOUF, ESQ.
Counsel of Record for the Petitioner
477 Congress Street, 5th Floor
P.O. Box 3562
Portland, Maine 04104-3562
207-523-3444
glatouf@attorneylatouf.com

March 14, 2020

QUESTIONS PRESENTED

I. Whether the Fourth Amendment of the United States Constitution requires that evidence be suppressed where agents lacked probable cause to arrest two persons absent probable cause of criminal activity by each individual or probable cause of criminal conspiracy between the two individuals.

PARTIES TO THE PROCEEDING

The parties to the proceeding below in the United States Court of Appeals for the First Circuit were Michael Artis and the United States identified in the caption above, and have been the parties throughout.

TABLE OF CONTENTS

Page

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

US CIRCUIT COURT CASES

UNITED STATES CONSTITUTIONAL PROVISIONS

STATUTES

COURT RULES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Artis respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered in the matter of *United States v. Michael Artis,* USCA, 1st Cir. Case, 18-2257 issued on December 19, 2019 (This matter was consolidated with *United States v. Cuwan Merritt,* USCA, 1st Cir. Case, 18-2208 for Argument and Decision by the Court).

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the First Circuit, affirming the denial of Petitioner's Motion to Suppress Evidence, docketed below as *United States v. Michael Artis,* United States Court of Appeals for the First Circuit, Case No. 18-2257, is attached hereto as Appendix A (at A 1-18). The Decision Denying Suppression by the United States District Court for the District of Maine, in the matter of *United States v. Michael Artis*, Case No. 2:17-cr-00102-DBH-01 [1], is attached hereto as Appendix B (at A 19-31).

JURISDICTION

The Court of Appeals for the First Circuit entered its Judgment and Opinion on December 19, 2019. The Petitioner seeks review of the decision of the First

[1] Hon. D. Brock Hornby, United States District Judge, presiding.

Circuit Court of Appeals which affirmed the Denial of Petitioner's Motion to Suppress Evidence by the United States District Court for the District of Maine.

This Court has jurisdiction to consider this Petition in this matter pursuant to Title 28 U.S.C. § 1254(1).

No notice is required pursuant to Supreme Court Rule 29.4(b) or (c), as the United States has been a party throughout.

CONSTITUTUIONAL PROVISIONS INVOLVED

Question One: The Fourth Amendment of the United States Constitution

The relevant constitutional provision involved in this case is the right against unreasonable search and seizure guaranteed by the Fourth Amendment to the United States Constitution.

The Fourth Amendment of the United States Constitution provides in relevant part that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The Appeal to the First Circuit was a direct appeal from the district court's Decision and Order denying Petitioner and codefendant's motions for suppression of evidence obtained during and as a result of a vehicle stop.

As argued below, the evidence in question was obtained by law enforcement officers during and as a result of a planned vehicle stop at Exit 75 of the Maine Turnpike. The stop was a product of an operation devised by Agent Madore upon receiving a tip from a paid informant. At hearing, the agent and confidential informant testified that the paid informant called Agent Madore to inform the agent that an unknown individual, who the informant believed may be an African American male named Mayo, called requesting a ride to Lewiston/Auburn in Maine. Upon receiving this information from the paid informant, Agent Madore sent the paid informant with another paid informant to Boston to pick up the target (Mayo) and bring him back to Lewiston/Auburn so that Agent Madore could conduct a vehicle stop and search for drugs in Maine. Law enforcement agents did not follow the informants to and from Boston or ride in the vehicle with the paid informants. Law enforcement agents conducted no surveillance until Agent Madore, in his vehicle, observed the target vehicle on the Turnpike in Maine. In his vehicle, Agent Madore followed the target vehicle to the stop location set up at Exit 75 of the Maine Turnpike. The vehicle stop commenced when the target vehicle arrived at Exit 75.

In the district court's original December 21, 2017 oral Order on the motions to suppress, based on the record developed during the December 19, 2017 hearing., the court concluded that at the time the agents stopped the vehicle, Agent Madore had the requisite "reasonable suspicion" sufficient for a *Terry* stop and detention, The district court concluded that the agents developed probable cause to arrest Petitioner after the police canine alerted for the presence of narcotics on the Petitioner and codefendant. In the original oral order, the district court made no decision or inference whether the force was excessive during the takedown stating that the question of excessive force was a civil matter.

However, in its June 19, 2019 Decision and Order on the Motion for Clarification (the final order on suppression), the Court found that the same evidentiary record supported a conclusion that the agents had probable cause to arrest Petitioner when they stopped the vehicle.

In the Decision and Order, the district court did not decide the question "whether the police conduct in the take-down itself was a de facto arrest," finding it was moot because the court concluded that the agents had probable cause from the outset of the stop. The district court did discuss the legal question whether the dog sniff was a 4th Amendment search, and found that the dog sniff in this case "does not fit clearly within Terry and/or Caballes" and that the dog sniff was "an intrusive sniff of the defendants after they had been forcibly extricated from the car."

Relevant Background:

Petitioner and codefendant were Indicted in the United States District Court for the District of Maine on July 26, 2017 for possession with intent to distribute the drugs seized as a result of the vehicle stop, each charged alone in separate counts.

The record in the district court demonstrates that the Government's criminal charges against Petitioner is based exclusively on the drug evidence seized from Mr. Artis during the vehicle stop, search and seizure in the early hours of May 13, 2019.

Petitioner filed a Motion to Suppress and Memorandum on September 8, 2017, arguing that the stop was not supported by reasonable articulable suspicion and the warrantless search was conducted in violation of Petitioners constitutional rights.

Codefendant Merritt filed a Motion to Suppress on September 20, 2017 arguing that agents lacked the requisite reasonable suspicion to initiate the traffic stop, the agents lacked the probable cause to arrest, and that the agents lacked the requisite probable cause to strip search codefendant Merritt. On October 26, 2017 Petitioner filed a Supplemental Motion to Suppress adopting relevant arguments by codefendant Merritt, and requested that the court suppress the evidence obtained by the law enforcement officers on the grounds that it was obtained in violation of Petitioner's rights under the Fourth Amendment.

The Government filed a Consolidated Response in Opposition to the aforementioned motions on November 16, 2017 arguing that the agents were justified in executing a traffic stop based on reasonable suspicion, and that the

agents developed probable cause for the warrantless arrest during the stop, and that the strip search of codefendant Merritt was lawful.

Hearing on the Motions to Suppress occurred on December 19 and 21, 2017. The district court issued the above discussed Oral Order denying the Petitioners' Motions to Suppress on December 21, 2017.

Petitioner's prior counsel died suddenly and tragically. The Court appointed undersigned counsel to substitute as counsel for the Petitioner.

After reviewing the file and evidence, Petitioner Artis's new attorney expressed concerns about whether the question of de facto arrest was considered by the court and adequately preserved for appeal. The parties requested and were granted a Conference of Counsel with the judge to discuss the question of de facto arrest, and whether it was considered by the court and adequately preserved for appeal. Although the district court was prepared to confirm that the de facto arrest argument was considered by the court and therefore preserved, the Government sought time to determine its position.

Petitioner filed his Motion for Clarification of Suppression Order on April 12, 2018 formally and explicitly raising the argument that: even if the Court concludes that the stop was supported by reasonable and articulable suspicion, the evidence obtained as a result of the May 13, 2017 search, seizure and arrest, should be excluded on the grounds that the evidence was obtained in violation of Mr. Artis's constitutional protections because: (1) the May 13, 2017 stop and detention was a de

facto arrest requiring probable cause, not merely reasonable and articulable suspicion; (2)the de facto arrest, and search and seizure, were not supported by requisite probable cause for a warrantless arrest and search and seizure; (3) there were no attendant circumstances justifying a warrantless search and seizure or arrest under any of the exceptions to the warrant requirement; (4) the search exceeded the scope and purpose of a permissible security pat-down search under Terry v. Ohio; and (5) the arrest was unlawful therefore all evidence obtained as a result of the arrest must be excluded.

The Government filed a Response to the Motion for Clarification on April 30, 2018 arguing that the force used by the officers did not convert the initial contact into a de facto arrest. The Government's argument was that the level of force was justified because: the officers were investigating out-of-state drug traffickers who were allegedly coming to Maine to sell narcotics, the link between firearms and drug traffickers is well and long established, and the targets involved were unknown and potentially dangerous.

Petitioner filed a Reply to the Government's Response arguing that the force was not justified in this case because the Government was required to demonstrate that the agents had either actual knowledge or a reasonable suspicion that the suspects were armed and/or presented a legitimate safety risk. Petitioner argued that the Government could not meet its burden because there is no evidence in the record that the agents had either actual knowledge or a reasonable suspicion that

the suspects were armed, dangerous and/or presented a legitimate safety risk justifying their extreme use of force and restraint. The agents knew only that the informant observed that the defendants were African American males and that the informant believed they were coming to Maine to sell crack cocaine.

The Court issued an Order on the Motion for Clarification of Suppression Order on May 11, 2018, reserving ruling on the question whether the stop and detention of Mr. Artis was actually de facto arrest and not a valid *Terry* stop and detention. In its May 11, 2018 Order the district court expressed concern whether the Government's asserted justifications for the use of force can meet the Acosta-Colon standard without further hearing and testimony.

The district court concluded that "in order to address the defendants' de facto arrest argument now that it has become focused, it may be necessary to reopen the evidentiary hearing in order to determine whether the government can meet the Acosta Colon standard." United States v. Acosta Colon, 157 F.3d 9, 19 (1st Cir. 1998) (to justify use of force in a Terry stop, the government must demonstrate that the use of force was necessary to carry out the legitimate purposes of the stop)

On May 16, 2018 the district court conducted a conference of counsel to discuss whether the evidentiary hearing should be re-opened, and to discuss the question whether the dog sniff could be viewed as an independent source purging the taint of the illegal arrest.

After the May 16, 2018 conference of counsel, the Court issued a Procedural

Order on May 25, 2018 declining to reopen the evidentiary hearing at defendant's request because the Government declined an opportunity to reopen the evidentiary hearing to meet its Acosta Colon burden. The district court, however, offered the parties an opportunity to "address the issues raised at the last Conference of Counsel, including the de facto arrest, the effect of Moore, Watson, Utah v. Strieff, 136 S. Ct. 2056 (2016), and any other cases on the topic, as well as whether the dog sniff here, which appears to have focused on the Defendants outside the car before the car's exterior was sniffed, must be treated differently. Cf. United States v. Turpin, 920 F.2d 1377, 1385 (8th Cir. 1990) (collecting cases on the treatment of dog sniffs)." Simultaneous briefs and responses were ordered.

Petitioner Artis and codefendant Merritt filed a Joint Memorandum of Law addressing the questions raised by the court's May 25, 2018 procedural Order The Petitioner and codefendant made essentially the same arguments made on appeal, including that: the initial seizure of Mr. Artis and Merritt was a de facto arrest requiring probable cause; that the agents lacked the requisite probable cause, and, therefore the arrest was unlawful; that none of the judicially recognized exceptions to the exclusionary rule apply to this case, that the dog sniff in this case was a 4th Amendment search and did not purge the taint of the unlawful arrest.

In its Memorandum at the district court level the government did not argue that the force was justified and did not address the de facto arrest arguments by Petitioner. Rather the government below argued that the agents had probable

cause to stop the vehicle based on the theory that the agents had probable cause to believe that Petitioner and codefendant were participating in a criminal conspiracy.

In Response to the government's Memorandum at the district court level, Petitioner argued that probable cause for a warrantless search or warrantless arrest is the same as the probable cause for a search or arrest warrant, and that the Government did not meet its burden proving probable cause existed at the time the vehicle was stopped.

The district court accepted the governments conspiracy-based argument of probable cause to arrest both Petitioner and codefendant at the time of the stop.

Petitioner appealed the district court's decision to the First Circuit Court of Appeals.

DECISIONS BY THE FIRST CIRCUIT FOR WHICH REVIEW IS SOUGHT

Fourth Amendment Violation:

The First Circuit ruled that the agents possessed the requisite probable cause at the outset of the vehicle stop. The First Circuit affirmed the district court's decision denying Petitioner's Motion to Suppress.

The First Circuit ruled that Petitioner waived any argument that, because the information that informant provided to law enforcement about the phone call did not indicate that two people were seeking a ride, officers had probable cause to believe, at most, that one of the passengers was engaged in drug trafficking, but not

both.

The First Circuit did not address Petitioner's other arguments that the stop of the vehicle was a de facto arrest and that the subsequent dog sniff was a Fourth Amendment search unsupported by requisite probable cause. Ruling instead that those arguments are moot because of the First Circuit's ruling that the agents had requisite probable cause at the outset of the vehicle stop. Appendix 11-13.

Petitioner asserts that the First Circuit's ruling is erroneous.

REASONS FOR GRANTING THE WRIT

I. The question whether the Fourth Amendment of the United States Constitution requires evidence be suppressed where agents lacked probable cause to arrest two persons absent probable cause of criminal conduct by each or probable cause of a criminal conspiracy between the two persons, is important to the public and is an important question of constitutional law affecting other defendants that should be addressed by this Court.

The underlying prosecution of Petitioner for possession with intent to distribute narcotics was based solely on the drug evidence seized from Petitioner at the time of the vehicle stop. Petitioner argued that the arrest of Petitioner was unlawful and all evidence seized was obtained in violation of the Fourth Amendment.

Petitioner argued on appeal to the First Circuit that the district court's denial of the motion to suppress should be reversed because the district erred in its legal conclusion that the government met its burden of proving that the agents had

formed the requisite probable cause at the outset of the vehicle stop.

The First Circuit ruled that the Petitioner failed to show that the agents did not have probable cause to arrest Petitioner and his codefendant and that Petitioner waived the argument the argument that the informant information provided to law enforcement did not indicate that two people were seeking a ride, officers had probable cause to believe, at most, that one of the passengers was engaged in drug trafficking, but not both.

Petitioner requests this Court Grant a Writ of Certiorari to address this issue because the question, whether the Fourth Amendment of the United States requires that evidence be suppressed where agents lacked probable cause to arrest two persons absent evidence of criminal activity by each or evidence of a criminal conspiracy between the two defendants, is an important question of constitutional law affecting other defendants that should be addressed by this Court. Supreme Court Rules, Rule 10.

In his appeal to the First Circuit the Petitioner argued that the record below demonstrated that the agents' suspicion for the vehicle stop fell short of probable cause. Petitioner argued on appeal to the First Circuit that agents lacked probable cause to arrest Petitioner at the time of the stop, because they had insufficient evidence that the person, they were about to arrest was committing a felony offense; and that the theory of conspiracy does not supply the missing probable cause.

The Petitioner argued in the district court and on appeal to the First Circuit

that the target of the agents' operation was Mayo. Agents expected one person but two arrived. At the time of arrest, agents did not know which one, or if either defendant, was Mayo. Nor did they know which one, or if either defendant, was the person who called to get a ride to Maine.

Petitioner argued that the initial seizure of Mr. Artis was a de facto arrest.

Petitioner argued that because the seizure of Mr. Artis was a warrantless arrest, probable cause was required for the stop and detention from the beginning.

Petitioner argued that because the Government failed to meet its burden to prove that the agents had the requisite probable cause for the stop and detention, the arrest of Mr. Artis was an unlawful arrest in violation of Mr. Artis's 4th amendment rights.

Based on the record below, the independent source doctrine does not purge the taint because the canine search of the Mr. Artis's person, and seizure of the narcotics, is a direct result of the illegality itself – "but for" the illegal arrest the agents would not have been able to subject the Petitioner to the canine search and the agents would not have seized the drug evidence from Mr. Artis's person.

Petitioner argued that based on the record below, the drugs seized from Mr. Artis should be excluded because the social benefit of deterring the police misconduct in this case outweighs the social cost of exclusion of the evidence.

The First Circuit rejected Petitioner's arguments and ruled instead that: (1) Petitioner failed to show that the agents did not have probable cause to arrest both

defendants; (2) Petitioner waived any argument that, because the information that the informant provided to law enforcement about the phone call did not indicate that two people were seeking a ride, officers had probable cause to believe, at most, that one of the passengers was engaged in drug trafficking, but not both; and (3) therefore Petitioner's further contentions that their removal from the car and the subsequent dog sniff were unconstitutional are moot.

Probable cause must exist for each person arrested, and "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." United States v. Sepulveda, 102 F.3d 1313, 1315 (1st Cir. 1996)(*citing and quoting* Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979).

Presence at the time of a suspected offense, or association with suspected offenders, does not establish probable cause without particularized information that the person is the offender or conspiring with the offender. See, United States v. Chadwick, 532 F.3d 773, 784-784 (1st. Cir. 1976); United States v. Patrick 899 F.2d 169, 176 (2nd Cir. 1990); United States v. Gomez, 716 F.3d 716 F.3d 1, 9 (1st Cir. 2013).

"Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." United States v. Di Re, 332 US 581, 593-594 (1948). *See also*, Wong Sun v. United States, 371 US 471, 480-481 (1963) (no probable cause where agents had insufficient information

regarding identity and location of suspect to arrest defendant as the suspect).

Petitioner argues that the First Circuit erred in its ruling on all three issues addressed by the First Circuit.

CONCLUSION

For the reasons set forth above, Petitioner Michael Artis respectfully prays that the Court grant a writ of certiorari, vacate the judgment of the court of appeals and remand the case for further review.

Dated, the 14th day of March 2020

Respectfully Submitted,

/s/ Gail M. Latouf
Gail M. Latouf, Counsel of Record
CJA Counsel for Petitioner
Michael Artis
477 Congress Street, 5th Floor
P.O. Box 3562
Portland, Maine 04104-3562
(207) 523-3444
glatouf@attorneylatouf.com

No.

In the Supreme Court of the United States

MICHAEL ARTIS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

APPENDIX CONTENTS

United States Court of Appeals
For the First Circuit

No. 18-2257

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL ARTIS,

Defendant, Appellant.

JUDGMENT

Entered: December 19, 2019

This cause came on to be heard on appeal from the United States District Court for the District of Maine and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's denial of Michael Artis' motion to suppress and Artis' conviction are affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Gail Marie Latouf
Michael Artis
Michael J. Conley
Julia M. Lipez
Kelly Archung
Paul T. Crane III

United States Court of Appeals
For the First Circuit

Nos. 18-2208
18-2257

UNITED STATES OF AMERICA,

Appellee,

v.

CUWAN MERRITT; MICHAEL ARTIS,

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, U.S. District Judge]

Before

Lynch, Selya, and Barron,
Circuit Judges.

Amy L. Fairfield, with whom Fairfield & Associates, P.A. was on brief, for appellant Merritt.

Gail M. Latouf for appellant Artis.

Paul T. Crane, Attorney, U.S. Department of Justice, Criminal Division, Appellate Section, with whom Brian A. Benczkowski, Assistant Attorney General, Matthew S. Miner, Deputy Assistant Attorney General, Halsey B. Frank, United States Attorney, and Julia M. Lipez, Assistant United States Attorney, were on brief, for appellee.

December 19, 2019

LYNCH, **Circuit Judge**. Defendants Cuwan Merritt and Michael Artis were each convicted of possession with intent to distribute cocaine base. They appeal the district court's denial of their motions to suppress drugs found on each of them. The court denied the motion on the basis that the police had probable cause to stop an automobile in which the defendants were known to be traveling with two confidential informants near Lewiston, Maine. Merritt also challenges the district court's ruling admitting co-conspirator statements under Federal Rules of Evidence 801(d)(2)(E) and 403, and United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

We affirm the denial of the motions to suppress, the admission of the evidence against Merritt, and their convictions.

I.

A. Facts

We draw the facts relevant to the present appeal primarily from the district court's supportable findings in its ruling following an evidentiary hearing on the motions to suppress. Our review is "consistent with record support, with the addition of undisputed facts drawn from the suppression hearing." United States v. Hernandez-Mieses, 931 F.3d 134, 137 (1st Cir. 2019) (citing United States v. Dancy, 640 F.3d 455, 458 (1st Cir. 2011)). We add facts relevant only to Merritt's evidentiary challenge in our discussion of that claim.

On May 12, 2017, Drug Enforcement Administration ("DEA") Task Force Agent David Madore received a phone call from Gary Hesketh, a confidential informant, who was in Maine. Agent Madore had worked with Hesketh since February 2017, and Hesketh had provided reliable information that resulted in drug arrests and convictions. Hesketh had a criminal history involving illegal drug possession, among other things. Agent Madore paid Hesketh for his help, but only after determining that Hesketh's information aided a particular police investigation.

In that call, Hesketh told Agent Madore that a crack dealer had called his cell phone from out of state and wanted a ride at 7:30 p.m. from Boston's South Station to Lewiston, Maine, to bring a load of crack. Hesketh said he was not sure who the caller was, but thought it might be Mayo, a black male whom Hesketh had met once. Hesketh said that when he had loaned his phone to his cousin, who had a drug addiction, Mayo had called the cell phone, trying to reach Hesketh's cousin. Agent Madore had seen Mayo through prior surveillance and was aware that Mayo was a drug dealer who lived out of state but sold drugs in Lewiston.

Hesketh told Agent Madore that, before settling on needing a ride from Boston, the caller had first told Hesketh that he might need a ride from New York or New Hampshire, depending on "how far they could get," but certainly from out of state. Hesketh believed that these comments indicated that the phone call and

requested ride were related to drugs. Hesketh also told Agent Madore that the caller told Hesketh that he would "be hooked up" in exchange for the ride, which Hesketh and Agent Madore reasonably understood to mean that the caller would give Hesketh drugs.

After more communications between Hesketh and Agent Madore by phone, by text, and in person, and more phone calls between Hesketh and the person who had called him, Hesketh agreed to pick the caller up in Boston that same evening. Because Hesketh did not have a driver's license, Agent Madore arranged for Heidi Lemieux, another confidential informant, to drive Hesketh to South Station to pick up the caller and then return to Lewiston. Hesketh provided his ex-wife's car for the trip.

Hesketh and Lemieux left for Boston at 5:30 or 6:00 p.m. Agent Madore was concerned for their safety and asked Hesketh to relay information to Agent Madore by phone or text.

When they arrived at South Station, Hesketh called Agent Madore to say that the caller had informed him that he was running late. Agent Madore told Hesketh that he and Lemieux could choose either to wait or to return to Maine without the caller, and they waited.

After 10 p.m., Hesketh informed Agent Madore that two black men had arrived, and that neither was Mayo. Hesketh conveyed some of this information during a phone call from a gas station in Massachusetts where the four stopped after leaving South Station

and some of it by text. At Agent Madore's request, Hesketh texted him as they reached New Hampshire, Maine, and various mile markers in Maine, and Agent Madore responded that law enforcement would be on the highway waiting for their automobile.

Agent Madore had arranged for a traffic stop at Exit 75 of the Maine Turnpike, the exit the automobile would take en route to Lewiston. After midnight, police pulled over the automobile as it exited the highway there. Officers forcibly removed the two black male passengers from the automobile's back seat and patted them down for weapons.

A state trooper with a drug-detecting dog, who had been awaiting the automobile, had the two men, who turned out to be defendants Merritt and Artis, stand next to another officer and then had the dog sniff each of the three. The trooper walked the dog around Merritt and Artis and then manually directed the dog from the feet to the torso on each. The dog alerted on Merritt's front pocket area and Artis's crotch area, but did not alert on the officer. The dog then also sniffed Hesketh, Lemieux, and the automobile's interior, and did not alert.

Officers then searched the two men and found a bag of crack cocaine in Artis's pants, but did not find drugs on Merritt. Both were arrested. During a more thorough search at the Androscoggin County Jail, corrections officers found a plastic

baggie, later shown to contain crack cocaine, partially hanging out of Merritt's rectum.

B. Legal Proceedings

Merritt and Artis were both indicted for possession with intent to distribute cocaine base, and both moved to suppress the drugs found on them. The district court held an evidentiary hearing, at which Agent Madore, Hesketh, and Lemieux testified. The district court orally denied the motions, holding that Agent Madore had reasonable suspicion sufficient to justify a stop of the vehicle and its occupants under Terry v. Ohio, 392 U.S. 1 (1968).

Artis's attorney filed a motion for clarification of the district court's suppression ruling on the issue of whether the vehicle stop and dog sniff were Terry stops, supportable by reasonable suspicion, or instead constituted a de facto arrest, which would require probable cause.[1]

After the district court accepted supplemental briefing on that question, it issued a written decision and order to replace its earlier bench ruling. The court found Agent Madore credible and noted that Hesketh "did not contradict Agent Madore's testimony" and that, "to the degree there was any inconsistency,

[1] Artis's attorney died after the district court's initial ruling on the motions to suppress. His new attorney filed the motion for clarification.

. . . it was based on [Hesketh's] uncertainty about what he expressed to Agent Madore at the time in question, as opposed to what he was thinking in his own mind."

The district court concluded that the police had probable cause to arrest Merritt and Artis for drug trafficking before the police stopped the car on the exit from the highway.[2] As a result, it held, the officers' actions were constitutionally sound whether the stop and search required reasonable suspicion or probable cause.

Artis pled guilty, preserving his right to appeal the suppression ruling.

Merritt proceeded to trial. Before trial, he filed a motion in limine to exclude statements made by Merritt, Artis, and Hesketh, arguing that the statements were hearsay and that they were unduly prejudicial. The district court denied that motion. At trial, Merritt objected to the admission of Hesketh's testimony. The district court overruled the objection and admitted the testimony provisionally under United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980). At the close of evidence, Merritt renewed the objection, which the court again denied.

[2] Although the government had also argued that the police had probable cause to arrest Merritt and Artis for conspiracy, which the defendants denied, the district court did not address that argument.

These appeals followed the conviction and the imposition of sentences.

II.

In reviewing the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law, including its ultimate constitutional determinations, de novo. See United States v. Flores, 888 F.3d 537, 543 (1st Cir. 2018). "[W]e will uphold a denial of a suppression motion as long as 'any reasonable view of the evidence supports the decision.'" United States v. Clark, 685 F.3d 72, 75 (1st Cir. 2012) (quoting United States v. Woodbury, 511 F.3d 93, 96-97 (1st Cir. 2007)).

The defendants argue that their initial seizure at Exit 75 near Lewiston, including their forced removal from the car and the intrusive dog sniff, amounted to a de facto arrest, supportable only by probable cause. The defendants do not dispute that the seizure and search were permissible if the officers had probable cause to arrest. The prosecution argues that the officers did have probable cause to arrest Merritt and Artis before the automobile stop.

"[E]very arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." Michigan v. Summers, 452 U.S. 692, 700 (1981). "[P]robable cause exists when an officer, acting upon

apparently trustworthy information, reasonably can conclude that a crime has been or is about to be committed and that the suspect is implicated in its commission." Morelli v. Webster, 552 F.3d 12, 21 (1st Cir. 2009). Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity," Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983), and "is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules," id. at 232. It "is not a high bar." Kaley v. United States, 571 U.S. 320, 338 (2014).

Defendants stress that probable cause must be assessed on the basis of the totality of the circumstances, relying on Maryland v. Pringle, 540 U.S. 366, 372 n.2 (2003). From this they argue that the totality of the circumstances shows less than probable cause. Their primary argument is that there was no investigation or corroboration of a traditional informant tip that a crime was being or was about to be committed. They say that Agent Madore should have investigated more or attempted to corroborate what they call a "specious tip."

Defendants then make a second argument that there was no probable cause to believe there was a conspiracy. As to that, they argue that Lemieux's testimony reveals that she never heard either defendant mention drugs during the drive from Boston to Lewiston. They argue there was no evidence of a conspiracy between

the two defendants. Nor, they argue, was there any evidence connecting the two defendants to Mayo. The latter argument is irrelevant. We will assume arguendo that evidence of the crime of conspiracy, as opposed to the crime of possession with intent to distribute, was relevant to the probable cause determination. As we explain, the defendants have failed to show why the district court erred in finding the evidence as to probable cause for each sufficient.

"To determine whether an officer had probable cause for an arrest, 'we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.'" District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Pringle, 540 U.S. at 371). "The existence of probable cause must be determined in light of the information known to the police at the time of the arrest." United States v. Diallo, 29 F.3d 23, 25 (1st Cir. 1994) (citing Maryland v. Garrison, 480 U.S. 79, 85 (1987)). We analyze whether the information available to Agent Madore before the vehicle stop supports a finding of probable cause.

As the district court found, Agent Madore received a tip from a reliable informant who himself had past drug involvement and who was paid only for good information. The informant told Agent Madore that a crack dealer wanted transportation from Boston

to Lewiston to sell crack and that the dealer would provide crack in exchange for the ride. Agent Madore then sent Hesketh and another informant to Boston to provide the ride, and Hesketh informed him that the caller had been delayed and of Hesketh's electing to wait until the caller's arrival. Two people showed up at the delayed time and place described and got in the car. The four drove north toward Lewiston while Hesketh kept Agent Madore updated on their progress.

The district court reasoned that "[i]t would be common sense to believe that someone who turned up for a ride at South Station after calling to ask for a ride from South Station to Lewiston to sell drugs and promising drugs to the person providing the transportation was in fact carrying drugs with him." It added that "[t]he presence of two males rather than one does not alter that conclusion," noting that "[n]o innocent explanation is apparent for a companion when one male had asked for a ride to Lewiston to sell crack and offered crack in exchange." Nothing known to Agent Madore at the time of the vehicle stop suggested that the two were differently situated with respect to the tipped drug trafficking purpose of their trip.

The defendants argue that Hesketh's information was not corroborated by the events that followed because Merritt and Artis, not Mayo, showed up at South Station. But this does not alter the fact that, whoever called Hesketh and offered drugs in exchange

for a ride from Boston to Lewiston, it was Merritt and Artis who showed up at South Station. And, as the district court noted, Hesketh had told Agent Madore from the beginning that he was not sure the caller was Mayo. "[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts," id., and "probable cause determinations hinge not on discrete pieces of standalone evidence, but on the totality of circumstances," United States v. Anzalone, 923 F.3d 1, 5 (1st Cir. 2019), cert. denied, 140 S. Ct. 295 (2019). The fact that Agent Madore learned no new material information after Hesketh's call to Agent Madore from the gas station is irrelevant. Hesketh, a reliable informant with previous drug involvement and a financial incentive to provide good information, was offered drugs in exchange for the transportation to Lewiston. The defendants have waived any argument that, because the information that Hesketh provided to law enforcement about the phone call did not indicate that two people were seeking a ride, officers had probable cause to believe, at most, that one of the passengers was engaged in drug trafficking, but not both.[3]

[3] Defendants made this argument for the first time at oral argument. Our review of the record in the district court establishes that no such argument was made there. We asked for and received from defense counsel further briefing on whether they raised this argument to the district court, and it is clear that they did not. The argument was also made in neither the defendants' opening briefs nor their reply briefs. Arguments not advanced before the district court or in a party's briefs and then

Because the defendants have failed to show that Agent Madore did not have probable cause to arrest Merritt and Artis, the defendants' further contentions that their removal from the car and the subsequent dog sniff were unconstitutional are moot. See United States v. Robinson, 414 U.S. 218, 235 (1973). The district court's denial of the motion to suppress was not error.

III.

Merritt also argues that the district court improperly admitted certain out-of-court statements under Rule 801(d)(2)(E) and/or that those statements should have been excluded under Rule 403. The challenged statements were in Hesketh's testimony. The statements include those reportedly made by the person who called Hesketh to arrange the pickup at South Station; those informing Hesketh of the delayed arrival at South Station while Hesketh and Lemieux waited; and statements Merritt and/or Artis made before getting into the car and while they traveled from Boston to Lewiston, including that Merritt and Artis wanted a place to stay in Lewiston to break down drugs.[4] After admitting the statements provisionally over Merritt's objection, the district court again

raised for the first time at oral argument are "doubly waived." United States v. Leoner-Aguirre, 939 F.3d 310, 319 (1st Cir. 2019).

[4] To the extent that any of the statements at issue were in fact made by Merritt, they were admissible under Federal Rule of Evidence 801(d)(2)(A) as a statement made by an opposing party. Hesketh was not certain whether the statements he remembered from the return trip to Lewiston were made by Merritt or Artis.

denied Merritt's renewed motion to exclude the statements at the close of evidence.

To admit evidence of out-of-court statements made by a defendant's co-conspirator, "the district court must determine by a preponderance of the evidence that the declarant and the defendant were members of the same conspiracy and that the statement was made in furtherance of the conspiracy." United States v. Paz-Alvarez, 799 F.3d 12, 29 (1st Cir. 2015).[5]

"To preserve a challenge to a district court's Petrozziello ruling, a defendant must object on hearsay grounds when his or her coconspirator's statement is provisionally admitted and must renew the objection at the close of evidence." United States v. Ciresi, 697 F.3d 19, 25–26 (1st Cir. 2012). We then review preserved challenges to the Rule 801(d)(2)(E) objection, which the parties agree the challenge in this case is, either for clear error or abuse of discretion. See United States v. Arias, 848 F.3d 504, 516 (1st Cir. 2017) (declining to decide between the two standards). We need not decide which standard

[5] The indictment need not include a conspiracy charge (as this indictment did not) to render co-conspirator statements admissible; "[r]ather, the out-of-court statements of one 'partner in crime' will be admissible against a confederate when made in furtherance of a joint criminal venture and when there is sufficient evidence independent of these statements to indicate the existence of such a venture." United States v. Washington, 434 F.3d 7, 13 (1st Cir. 2006) (quoting Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972)).

applies because, under either, this challenge fails. Review of Merritt's preserved Rule 403 objection is for abuse of discretion, "afford[ing] the district court 'especially wide latitude.'" United States v. Mehanna, 735 F.3d 32, 59 (1st Cir. 2013) (quoting United States v. Candelaria-Silva, 162 F.3d 698, 705 (1st Cir. 1998)).

The district court's conclusion that each of the statements was admissible under Rule 801(d)(2)(E) was not clearly erroneous or an abuse of discretion. The person who initially called Hesketh arranged the transportation that Merritt and Artis then utilized, offering drugs in exchange. Hesketh's conversations with that person determined the pickup location and time and led directly to the resulting drug trafficking. Similarly, the person with whom Hesketh communicated by phone while waiting near South Station helped arrange Hesketh's meeting with Merritt and Artis, telling Hesketh and Lemieux that there would be a late arrival.[6] The person on the phone doing the arranging, whoever that was, made each statement in furtherance of a criminal conspiracy.

Similarly, Merritt and Artis were plausibly co-conspirators: they traveled together to the South Station bus

[6] As the government notes, some of the challenged statements were not offered for the truth of the matter stated and are not hearsay at all.

terminal, each with large amounts of cocaine hidden on their bodies, larger amounts than for personal use. There, they together met Hesketh and the two of them walked around the car together, "ma[king] sure all the lights were working" and that the car "was clean." During the trip to Maine, "they were both very adamant on [the driver] going exactly the speed limit." And they asked Hesketh whether he had a place they could go where they could "post up for a while and break down the drugs." The district court's conclusion that Artis was Merritt's co-conspirator was not clear error or an abuse of discretion.[7]

Merritt's Rule 403 argument also fails. The district court did not abuse its discretion when it found that the statements Merritt sought to exclude were "highly material . . . in terms of what took place." Nothing about the statements is

[7] Merritt advances two other meritless arguments. He first argues that there can be no conspiracy between a defendant and a government agent -- here, Hesketh. But the district court did not find that Merritt conspired with Hesketh, and, as to statements by a co-conspirator, "[i]t is immaterial that the person to whom the statement is made is a government informant . . . as long as the statement itself was made in furtherance of the common scheme." Ciresi, 697 F.3d at 28. He secondly argues that the district court's Petrozziello ruling was inconsistent with its later ruling at his sentencing that it would not aggregate the drug quantities possessed by Merritt and Artis for the purpose of calculating Merritt's guidelines sentence. But the district court at sentencing was applying the standard set forth in United States Sentencing Guidelines § 1B1.3(a)(1)(B), which differs by its terms from the Rule 801(d)(2)(E) standard. That the rulings differed does not render the district court's Petrozziello ruling clearly erroneous or an abuse of discretion.

unfairly prejudicial, and Merritt was able to attempt to minimize the effect of the statements.

IV.

Because the defendants have failed to show that the police lacked probable cause to arrest Merritt and Artis before the vehicle stop, we affirm the district court's denial of the motions to suppress. We also reject Merritt's challenges to the evidence admitted at his trial.

Affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
MICHAEL ARTIS AND CUWAN MERRITT,	)	**CRIM. NO. 2:17-CR-102-DBH**
	)	
	)	
DEFENDANTS	)	

DECISION AND ORDER ON DEFENDANTS' MOTION FOR CLARIFICATION OF ORAL ORDER DENYING MOTION TO SUPPRESS

After an evidentiary hearing and a bench ruling denying the defendants' motions to suppress everything resulting from a vehicle stop at Exit 75 of the Maine Turnpike, I allowed a limited revisitation of the matter for reasons I described in my Orders of May 11 and May 25, 2018. Further briefing has now taken place, I have re-read the transcript of the hearing and re-examined the exhibits. As a result, I issue this new decision to replace my bench ruling of December 21, 2017.

The evidentiary record is the following. Three people testified at the evidentiary hearing: Agent David Madore, at the relevant time a task force officer with the DEA; Confidential Informant 1 (CI1); and Confidential Informant 2 (CI2). I have no reason to discredit Agent Madore's testimony. He was careful in his statements and credible. CI1 did not contradict Agent Madore's testimony and, to the degree there was any inconsistency, I find that it was based on CI1's uncertainty about what he expressed to Agent Madore at the time in question, as opposed to what he was thinking in his own mind. As it turned out, CI2 had

no relevant information to provide. A number of exhibits also were admitted, among them video recordings of the Turnpike exit stop that resulted in the arrest of the two defendants.

FACTS

On May 12, 2017, Agent Madore received a phone call from CI1. Tr. 9 (ECF Nos. 83-84). Madore had been using CI1 since February, id., and CI1 had provided reliable information that had resulted in drug-related arrests. Tr. 12, Gov't Ex. 4.[1] CI1 also had a criminal history involving illegal drug possession, driving convictions, bail violations, assault, and burglary among other things. Tr. 9; Gov't Ex. 1. Madore paid CI1 for his information depending on the results. Tr. 58.[2]

CI1 told Madore on this phone call that a crack dealer had called him from out of state and wanted a ride at 7:30 pm from Boston's South Station to Lewiston, Maine to bring a load of crack. Tr. 13-14. CI1 told Madore that he was unsure who the caller was, Tr. 90, but that it might be Mayo, a black male, Tr. 13, of whom CI1 was aware because his addicted cousin had interacted with him. Tr. 33-34, 90.[3] Madore was also aware, through surveillance, of Mayo as an out-of-state drug seller in Lewiston. Tr. 29-30.

Madore and CI1 had further communications that day by phone, text, or in person. Tr. 33. At Madore's request, CI1 agreed to go to Boston to pick up

[1] It appears from Gov't Ex. 4 that the convictions resulting from this information did not occur until August and October 2017, *i.e.*, after the events relevant here.
[2] CI1 was paid about $1,000 from February to June, and received about $300 for this case. Gov't Ex. 1.
[3] I had earlier believed that there was no information about race known to either CI1 or Madore at that time, which defense counsel confirmed at oral argument, Tr. 133, but re-reading the transcript shows me that CI1 did identify Mayo as a black male. The caller's race is largely irrelevant to the analysis, see infra note 11.

the caller. Because CI1 did not have a valid driver's license, Madore arranged for CI2, not previously known to CI1, to do the driving. Tr. 14-15. CI1 supplied his ex-wife's vehicle for the trip. Tr. 15, 100. CI1 told Madore that the caller told him that he would receive drugs (be "hooked up") in exchange for the transportation. Tr. 36, 54, 93.

The two confidential informants headed south to Boston around 5:30 or 6:00 pm. Tr. 15. Madore was concerned about the safety of the two informants for the trip, given the lack of law enforcement attendance. Tr. 37. Madore told CI1 to relay information to him by phone or text.

Upon arriving at South Station, CI1 informed Madore that the "target" was running late. Madore gave the two informants the option of returning to Maine then or waiting for the delayed target. They waited. Tr. 37.

CI1 reported to Madore that the target arrived after 10 pm, but that there was a second black male as well, and no Mayo. Tr. 16, 94-95. Some of this information was conveyed during a phone call from a gas station where they stopped after leaving South Station, some of it by text. Tr. 38-39, 95. At Madore's request, CI1 texted him as the vehicle carrying the four people reached New Hampshire, then Maine, then various mile markers on the trip through Maine. Tr. 17. Madore informed CI1 that he would have law enforcement on the highway waiting for the vehicle to come through. Id.

Madore had arranged for a traffic stop at Exit 75 of the Maine Turnpike, the exit the vehicle was taking. The videos reveal that there were at least four police cars and eight officers. There was also a state trooper with a drug-detecting dog waiting.

Sometime after midnight, the vehicle was pulled over. Law enforcement forcibly extricated the two defendants from the back seat of the vehicle and patted them down for weapons. Gov't Ex. 2. The drug dog did not sniff the vehicle's exterior for drugs. Tr. 75. Instead the dog's handler had a law enforcement agent stand next to the two defendants in front of the vehicle, and then had the dog sniff each of the three. The evidence does not reveal whether the dog's nose actually touched the two defendants, but the sniff was intrusive. According to the trooper's report, he walked the dog around the defendants and then manually directed the dog's attention ("targeting") up the defendants' bodies from their feet to their pants pockets; the dog sniffed one defendant's crotch area and the other's front pocket area. Defs.' Ex. 2. The dog alerted on both defendants but not on the law enforcement officer standing next to them.

Law enforcement then searched the defendants and discovered crack on Artis, but not on Merritt. Tr. 19-20. Artis was immediately arrested, Tr. 21, and Merritt not long thereafter. (A state warrantless arrest warrant that Madore prepared says that Merritt was arrested at 1:00 am. Gov't Ex. 3.) Law enforcement took Merritt to the Androscoggin County Jail for a more thorough search. There, corrections officers discovered a plastic sandwich baggie partially hanging out of his rectum. Id. They next took him to a hospital to remove the item. Tr. 23. At the hospital there was no discovery of drugs in his rectum, but there is a video of Merritt approaching the emergency room entrance with law enforcement and a package dropping to the ground. About 30 minutes later, an ambulance attendant saw a baggie containing crack cocaine on the ground,

retrieved it, and took it into the hospital. Gov't Ex. 3. Merritt was "cleared for incarceration" after his hospital exam. Defs.' Ex. 5 ¶ 18.

ANALYSIS[4]

I concluded in my December 21, 2017, bench ruling that Agent Madore had a reasonable and articulable suspicion of illegal drug trafficking to justify a Terry[5] stop and that he did not need the higher standard of probable cause to stop the vehicle. At that time, the defendants had not focused on the justification for the subsequent dog sniff, only whether the stop of the vehicle was justified. Since then, I have permitted them to amplify their argument that a de facto arrest occurred upon the stop, thereby requiring probable cause, and I now revisit my earlier treatment of the dog sniff as simply a permitted Caballes sniff. (In Illinois v. Caballes, 543 U.S. 405 (2005), the Supreme Court found that a dog sniff of a vehicle exterior during a traffic stop was not a search.)

Unlike before, I find now that the situation here does not fit clearly within Terry and/or Caballes. Law enforcement did pat down both defendants for weapons, something that Terry permits, see Ybarra v. Illinois, 444 U.S. 85 (1979),

[4] I focus my attention on the information available to Madore at the time of the stop, because that is the test for whether he had probable cause. The defendants' examination of CI1 explored *his* basis for believing that he was being asked to transport drugs, that he would receive drugs in exchange, and who the caller was, but my concern is with what Madore knew. Some other information that came out at the hearing could help or hurt the defendants' case, but it is not relevant to my analysis because it was not known to Madore at the time of the stop (*e.g.*, that the caller told CI1 that his name was Michael—as it turns out the first name of the defendant Artis—or that when Madore called the caller's number after the stop, one of Artis's cell phones rang, or that after the stop CI1 told Madore that on the trip north he heard the two defendants talk, saying they were going to Lewiston to "trap" (a term for selling drugs), and would "hook him up," Tr. 54, or that on the early calls the caller had asked for a place to stay in Lewiston and sell drugs, Tr. 93 (apparently not revealed to Madore before the stop), whether the caller actually used the words "crack" or "drugs" during the phone calls or whether that was CI1's inference from the circumstances of the calls, and when the defendant Artis told law enforcement that his name was "John Doe").

[5] Terry v. Ohio, 392 U.S. 1 (1968).

and Adams v. Williams, 407 U.S. 143 (1972). But the dog sniff that followed had nothing to do with weapons. Nor was it merely an exterior sniff of the car such as the Supreme Court has approved in cases like Caballes.[6]

As far as I can determine, the Supreme Court has never addressed the kind of intrusive sniff that occurred here. Instead, it has said that "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car [at a checkpoint] does not transform the seizure into a search," and that "a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (quoting United States v. Place, 462 U.S. 696, 707 (1983)). The Supreme Court did use broad language in Caballes, saying that "governmental conduct that only reveals the possession of contraband [*i.e.*, a dog sniff for drugs] 'compromises no legitimate privacy interest,'" 543 U.S. at 408 (citation omitted), making it "sui generis." Id. at 409 (citing Place, 462 U.S. at 707). But in Florida v. Jardines, 569 U.S. 1 (2013), it chose not to rely on that broad language and instead ruled that a dog sniff at the door of a house is a search, using property law principles.

In the absence of probable cause, circuit court cases seem to limit the scope of a permissible dog sniff to a vehicle's exterior. They allow it to expand to the car's interior only when the dog instinctively jumps in without the handler's facilitation. United States v. Guidry, 817 F.3d 997 (7th Cir. 2016); United States

[6] All the Supreme Court's Fourth Amendment cases that I have been able to find involving drug-sniffing dogs and cars were vehicle exterior sniffs. See, e.g., Rodriguez v. United States, 135 S. Ct. 1609 (2015); Florida v. Harris, 568 U.S. 237 (2013); City of Indianapolis v. Edmond, 531 U.S. 32 (2000). The Court has also addressed sniffs of luggage, United States v. Place, 462 U.S. 696 (1989), and sniffs within the curtilage of a home, Florida v. Jardines, 569 U.S. 1 (2013), but, as noted above, has not decided a challenge to a sniff of a person.

v. Moore, 795 F.3d 1224 (10th Cir. 2015); United States v. Sharp, 689 F.3d 616 (6th Cir. 2012); United States v. Pierce, 622 F.3d 209 (3d Cir. 2010); United States v. Vazquez, 555 F.3d 923 (10th Cir. 2009); United States v. Lyons, 486 F.3d 367 (8th Cir. 2007).[7] The First Circuit has not spoken on the subject. In United States v. Esquilin, 208 F.3d 315 (1st Cir. 2000), abrogated on other grounds by Missouri v. Seibert, 542 U.S. 600 (2004), it did say that "the important factor in applying *Place* [on the question whether a search occurred] is not whether the sniff occurs in a public place like an airport, but whether—as in an officer's 'plain view' observation of contraband—'the observing person or the sniffing canine are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence.'" Id. at 318 (citation omitted). The sniff of Artis and Merritt did occur on a public roadside where the dog was legally present, but the defendants did not consent to the sniff and they had been forcibly extricated from the vehicle. In Esquilin, the defendant had "voluntarily consented to the presence of [the dog] and the officers in his motel room." Id. As a result, Esquilin concluded that the resulting sniff did not amount to a search. Id. But in Esquilin, there was no suggestion that the dog was directed to and alerted on the defendant; instead after the defendant consented, the dog proceeded to a GAP bag and pulled drugs out of it. Id. at 317.[8]

[7] They all distinguish United States v. Winningham, 140 F.3d 1328 (10th Cir. 1998), on this basis. The Tenth Circuit in Winningham held that a dog sniff of a car's interior facilitated by law enforcement implicates the Fourth Amendment. See generally 1 LaFave, Search & Seizure § 2.2(g) n.413 and accompanying text (5th ed.).

[8] Before the defendant consented to the search, he consented to letting the dog and the officers enter his motel room, whereupon the dog (without being given the command to find drugs) sniffed all the furniture, the bed, a GAP shopping bag, and the defendant himself, who patted her. Id.

I confess that I am perplexed on how to apply Caballes and its progeny to what occurred here, an intrusive sniff of the defendants after they had been forcibly extricated from the car. In addition, I do not know what to make of the Caballes language that a dog sniff that only can reveal contraband does not compromise a legitimate privacy interest and whether that applies to the human body as occurred here, as well as to a car's exterior as in Caballes.[9]

In response to the defendants' argument that the nature of the stop and takedown of the defendants amounted to a de facto arrest, not a Terry stop, the government has now argued that probable cause for an arrest existed at the time of the stop. If, as the government argues, there was probable cause to arrest at the time of the stop, then law enforcement was entitled to search the defendants—including the intrusive dog sniff—at that time, as a search incident to arrest. Riley v. California, 134 S. Ct. 2473 (2014); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Sibron v. New York, 392 U.S. 40, 66-68 (1968). When the formal arrest "followed quickly," as it did here, the fact that the search occurred first is not particularly important if law enforcement had probable cause for an arrest at the time of the search. Rawlings v. Kentucky, 448 U.S. 98, 110-11 (1980); see also 3 Search & Seizure § 5.4(a) text accompanying nn.7-11.50. If there was probable cause for an arrest, that would moot the question whether police conduct in the take-down itself

[9] There are pre-Caballes Fifth Circuit cases that seem to say that a dog making physical contact with a person being sniffed does amount to a search. E.g., United States v. Reyes, 349 F.3d 219, 223-24 (5th Cir. 2003); United States v. Kelly, 302 F.3d 291, 293 n.1 (5th Cir. 2002); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 479 (5th Cir. 1982); and one Ninth Circuit case that says "close proximity sniffing" of a person rather than an object does amount to a search. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1266 (9th Cir. 1999). But see Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980). Horton, B.C., and Doe all involved school students being sniffed.

amounted to a de facto arrest and it would also moot the question whether the Supreme Court's dog sniff cases and this Circuit's motel room sniff case make the dog sniffs of the defendants here searches or not.[10]

I turn therefore to whether law enforcement had probable cause to arrest these two defendants for drug trafficking when they pulled over the car at Exit 75. To summarize my previous recitation of what happened May 12 and during the early morning hours of May 13:

Madore had been using CI1 as an informant since February; CI1's information had been corroborated and had led to arrests. CI1 was paid when he gave Madore useful information.

CI1 called Madore May 12 to tell him that an out-of-state crack dealer called him asking for a ride at 7:30 pm that evening from Boston South Station to Lewiston to bring crack to sell and that the caller said he would pay for the ride in drugs. CI1 told Madore he thought the caller might be Mayo, who was known to both Madore and CI1, but that he wasn't sure. There was subsequent communication that day between CI1 and Madore by phone, texts, and one in-person meeting.

Madore asked CI1 to agree to the request for a ride and Madore arranged for CI2 to drive because CI1 had no valid license. The two CIs headed south to Boston around 5:30 pm or 6 pm. CI1 informed Madore by phone or text that the caller had been delayed. Madore gave the CIs the option of returning home or

[10] It also moots the question whether, if the takedown was a de facto arrest and the sniffs are not searches requiring probable cause, they provide an "independent source" for admission of the challenged evidence. See United States v. Moore, 329 F.3d 399 (5th Cir. 2003) (alleged de facto arrest was not "but-for" cause of search revealing drugs in car; dog sniff provided independent basis for the search).

waiting and they decided to wait. Later, two individuals turned up for the ride at Boston's South Station, and CI1 informed Madore either by phone or text that they were two African American males but not Mayo. CI1 also texted Madore reporting the vehicle's progress as they reached New Hampshire, then Maine, then various mileage markers on the Maine Turnpike. The car turned up at Exit 75 soon after midnight as Madore had expected from CI1's texts.

Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)). It "is not a high bar." Id. (quoting Kaley v. United States, 134 S. Ct. 1090, 1103 (2014)). Officers are entitled to make "reasonable inference[s]," id., and to make "common-sense conclusions about human behavior." Id. at 587. I must consider "the totality of the circumstances." Id. at 586. "A factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." Id. at 589 (citation omitted). "[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." Id. at 588. It is an objective standard. Id. at 584 n.2.[11]

Applying these principles, I conclude that Agent Madore had probable cause to arrest the defendants for drug trafficking[12] when he executed the Exit

[11] The defendants' race is irrelevant to whether probable cause existed (except insofar as it is a detail provided by CI1 that could be corroborated), and I therefore do not take into account the defense's references to politicians' statements or current events regarding law enforcement treatment of African Americans. Nor does it matter whether Madore subjectively thought he had probable cause (just as it does not matter to the probable cause analysis what another officer thought Madore said about whether he had probable cause, as noted in my bench ruling).

[12] "[A]n arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." Id. (citing Devenpeck v. Alford, 543 U.S. 146, 153-55 & n.2 (2004)).

75 vehicle stop. A reliable informant who himself had previous drug involvement told Madore that a crack dealer wanted transportation from Boston South Station to Lewiston to sell crack and that the dealer would provide crack in exchange for the ride. Madore proceeded to direct two informants to provide the ride. The informants got paid for good information. They informed Madore that the caller had been delayed and they elected to stay until his later arrival. Two people showed up, and the car with the four occupants headed north toward Lewiston, with CI1 keeping Madore posted on its progress. It would be common sense to believe that someone who turned up for a ride at South Station after calling to ask for a ride from South Station to Lewiston to sell drugs and promising drugs to the person providing the transportation was in fact carrying drugs with him. The presence of two males rather than one does not alter that conclusion. No innocent explanation is apparent for a companion when one male had asked for a ride to Lewiston to sell crack and offered crack in exchange. The fact that the information came from CI1 does not taint the probable cause; Madore knew him to be a reliable informant; Madore arranged the trip; CI1 had an incentive to be truthful because he got paid for good information; there was nothing for him to gain by prevaricating. The fact that Mayo did not appear at South Station does not change the analysis; CI1 had told Madore at the outset that he was not certain that the caller was Mayo. In short, there was probable cause to stop the car and arrest the defendants. I therefore do not decide whether the manner of extracting the defendants from the car turned a Terry stop into a de facto arrest.

Because there was probable cause for the arrests, a search of the defendants incident to their arrests was permitted under the Supreme Court precedents I named earlier. That includes the dog sniff. I therefore do not decide whether, under Supreme Court and circuit court precedents, the dog sniff would be permitted without probable cause for arrest.

As I said in my earlier bench ruling, the subsequent strip search of Merritt at the jail was permissible under Florence v. Board of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318 (2012). There is therefore no basis to suppress the observation of a plastic baggie protruding from Merritt's rectum at that time. Whether the plastic baggie of crack that the ambulance attendant recovered later at the hospital entrance is the same baggie that Merritt had in his rectum is a question for the jury, not relevant to the suppression ruling.

For all these reasons, the defendants' motions to suppress are **DENIED**.

SO ORDERED.

DATED THIS 19TH DAY OF JUNE, 2018

/S/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE