DOCKET NO.:

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Respondent-Plaintiff

v.

CUWAN MERRITT

Petitioner-Defendant

On Petition for a Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

v.

CUWAN MERRITT

INDEX TO APPENDICES

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.

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[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]

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[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

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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

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[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.

CUWAN MERRITT

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-cr-00102-002
USM Number: 13087-036
Amy L. Fairfield, Esq.
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 One 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
21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Possession with Intent to Distribute Cocaine Base	5/12/2017	1

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(s) _____ ☐ 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 shall notify the court and United States attorney of material changes in economic circumstances.

November 28, 2018
Date of Imposition of Judgment

Signature of Judge

D. Brock Hornby, U.S. District Judge
Name and Title of Judge

11/28/18
Date Signed

DEFENDANT: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 46 months.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant for enrollment in the 500 Hour Comprehensive Drug Treatment Program.

☒ 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 _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 3 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 additional drug tests during the term of supervision, but not more than 120 drug tests per year thereafter, as directed by the probation officer.
   ☐ 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 make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *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)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments of this judgment.

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

DEFENDANT: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

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: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

SPECIAL CONDITIONS OF SUPERVISION

1) Defendant shall not use or possess any controlled substance, alcohol or other intoxicant; and shall participate in a program of drug and alcohol abuse therapy to the supervising officer's satisfaction. Defendant shall pay/co-pay for services during such treatment to the supervising officer's satisfaction. Defendant shall not obstruct or tamper, or try to obstruct or tamper, in any way, with any tests;

2) The defendant shall participate in workforce development programs and services as directed by the supervising officer, and, if not employed, shall perform up to 20 hours of community service per week. Workforce development programming may include assessment and testing; educational instructions; training classes; career guidance; and job search and retention services;

3) A United States probation officer may conduct a search of the defendant and of anything the defendant owns, uses, or possesses if the officer reasonably suspects that the defendant has violated a condition of supervised release and reasonably suspects that evidence of the violation will be found in the areas to be searched. Searches must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation of release; and,

4) The defendant shall participate in mental health treatment, as directed by the supervising officer, until released from the program by the supervising officer. Defendant shall pay/co-pay for services during such treatment, to the supervising officer's satisfaction.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 – Criminal Monetary Penalties

DEFENDANT: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

CRIMINAL MONETARY PENALTIES

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

Count	Assessment	JVTA Assessment*	Fine	Restitution
1	$ 100	$	$ 0	$ 0

☐ 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.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ 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:

* 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: CUWAN MERRITT
CASE NUMBER: 2:17-cr-00102-002

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $100 due immediately, balance due
☒ Any amount that the defendant is unable to pay now is due and payable during the term of incarceration. Upon release from incarceration, any remaining balance shall be paid in monthly installments, to be initially determined in amount by the supervising officer. Said payments are to be made during the period of supervised release, subject always to review by the sentencing judge on request, by either the defendant or the government.
☐ not later than , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

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 clerk of the court.

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.

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),

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[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]

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[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

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	)	

PROCEDURAL ORDER

After a full evidentiary hearing, I denied the defendants' motions to suppress. Thereafter, one of the defendants obtained a new lawyer and became concerned whether a so-called de facto arrest issue had been adequately preserved for appeal. At her request I conducted a conference of counsel. Next, the defendants moved for clarification of the suppression order. On May 11, I issued an Order on Motion for Clarification of Suppression Order (ECF No. 104), indicating my concern whether a de facto arrest argument had been raised in such a fashion as to permit the government to address it. I then conducted another conference of counsel and gave all parties time to decide whether they desired an additional evidentiary hearing and if so for what purpose and why I should allow it. Before that conference, I also had the Clerk's Office alert counsel to United States v. Moore, 329 F.3d 399 (5th Cir. 2003) and at the conference I noted United States v. Watson, 558 F.3d 702 (7th Cir. 2009).

The government now has informed the Court via the Clerk's Office that it does not seek to provide additional evidence on the de facto arrest issue. App. iii.[1]

[1] The parties' correspondence with the Clerk's Office is attached as an Appendix. All counsel are reminded that when they address information to the Court that should be part of the record, they should file it in ECF.

The defendant Merritt has informed the Court via the Clerk's Office that he "wishes to go forward on the issue of the dog activity as we believe that may be a subsequent search, which could serve to undermine arguments advanced in the Moore case." App. ii.

The defendant Artis wants the Court to "hear/view/review, and consider the following supplemental" matters:

(1) Evidence regarding The Open the Door issue:
   a. What was the make, model, year, and door lock control features, of the vehicle used by the agents/confidential informants?
   b. Whether the driver ([redacted]) or front passenger ([redacted]) had control over the locks on the rear passengers' doors,
   c. Prior or concurrent to the operation, what were the driver ([redacted]) and/or front passenger ([redacted]) instructed to do when the police stopped the vehicle; and
   d. Whether the driver ([redacted]) or front passenger ([redacted]) had control over the rear passenger doors, could open or lock the rear passenger doors, and/or whether the parental control features were active on the vehicle.

(2) Evidence regarding The Dog Sniff:
   a. When did the Handler and Dog arrive on the scene and/or were they there as part of the "operation" from the beginning;
   b. Why was the dog sniff conducted "off camera"?
   c. Testimony of the dog handler regarding details and manner of the dog sniff conducted here, as well as protocols employed; and what information was provided to the Handler by other agents prior to the sniff, and
   d. Who selected the dog and handler to be used, and why

(3) Evidence Regarding Systemic Racial Profiling and Disparate Treatment of Persons of Color in law enforcement in the State of Maine.

App. i-ii.

Here is the procedural posture. The defendants took the position that the de facto arrest issue had been properly raised and that I had ruled against them on the issue, but wanted to avoid any uncertainty on appeal. I entertained the possibility for a further evidentiary hearing only on the basis that the de facto arrest issue had

not been squarely raised until closing arguments after the original evidentiary hearing, and that therefore the government might be entitled to introduce further evidence on that topic. The government now seeks no further evidence on that topic, and I see no reason to allow the defendants a second bite at the apple. There is also no reason for further evidence on the dog sniff at this stage. The drug dog alert has always been an issue in the case and counsel had every opportunity and incentive to explore it at the first evidentiary hearing. Likewise there is no reason now to reopen the record so as to allow generalized testimony about racial profiling and disparate treatment. Lawyers will always have second thoughts and more ideas, but matters must come to an end.

As a result, there will be no further evidentiary hearing. I will allow counsel to address the legal 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). Briefs by all parties are due June 6, 2018; Responses are due June 13, 2018. No Replies are to be filed.

SO ORDERED.

DATED THIS 25TH DAY OF MAY, 2018

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

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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

ORDER ON MOTION FOR CLARIFICATION OF SUPPRESSION ORDER

In a bench ruling, I previously denied the defendants' motions to suppress after conducting an evidentiary hearing. I concluded that law enforcement agents had reasonable and articulable suspicion sufficient to justify a Terry stop of the vehicle in which the defendants were passengers, and that the defendants were arrested after probable cause developed through a succeeding drug dog sniff and other observations. Oral Order (ECF No. 55). The defendants have asked me now to confirm that, for purposes of appeal, they adequately preserved a de facto arrest argument—*i.e.*, that they were actually *arrested*, not merely detained, at the outset of the stop. Mot. for Clarification (ECF No. 89); Mot. Joined (ECF No. 90).

It was not apparent from the legal memoranda filed before the evidentiary hearing that the defendants were making such an argument. Instead their written legal arguments focused on the reliability of the information law enforcement had obtained from confidential informants and argued that it was

not enough to justify a Terry stop of the vehicle in the first place. They also argued there was not probable cause for an arrest *after* the detention and dog sniff. But at the beginning of the evidentiary hearing, the defendants' lawyers asked me to pay particular attention to a video of the defendants' encounter with law enforcement during the stop, asking me to view it after the testimony was complete.

I watched the video and at the later oral argument, I questioned defense counsel about what it was they especially wanted me to observe in the video. They argued that the intrusiveness of what took place required law enforcement to meet the higher standard of probable cause, not just Terry's reasonable and articulable suspicion for a stop. In response, the Assistant United States Attorney expressed doubt that the defendants had previously raised a de facto arrest issue (the defendants' lawyers actually never used the term "de facto arrest"), but agreed that as of then the defendants were making that argument and asked for an opportunity of further briefing if I were inclined to entertain the de facto arrest issue. Thereafter (and without further briefing), I ruled from the bench that a Terry stop, not an arrest, occurred initially, and that the arrests occurred later, after the positive canine alerts.

Tragically and unexpectedly, the defendant Artis's lawyer subsequently died, and the Court appointed new counsel to represent that defendant. At her request I approved the preparation of a transcript of the suppression hearing, the argument, and bench ruling. Upon reviewing it, she became concerned whether the de facto arrest had been sufficiently raised for appeal purposes and at her request I conducted a conference of counsel. Thereafter both defendants

filed "motions for clarification regarding arguments presented and considered on the motions to suppress," the government filed a response (ECF No. 92), and the defendants filed reply memoranda (ECF Nos. 95, 96). Only in the latter two sets of filings did the parties address caselaw on what it takes to convert a Terry stop into a de facto arrest.

Having now read that caselaw and in particular United States v. Jones, 700 F.3d 615 (1st Cir. 2012), United States v. Chaney, 647 F.3d 401 (1st Cir. 2011), United States v. Fornia-Castillo, 408 F.3d 52 (1st Cir. 2005), and United States v. Acosta-Colon, 157 F.3d 9 (1st Cir. 1998), I conclude that in my original ruling, I did not fully appreciate the nature of the de facto arrest argument as it has now developed. I **REAFFIRM** my original ruling that there were sufficient grounds for an initial Terry stop of the vehicle. Moreover, a canine and his Trooper handler were quickly on the scene, there was no delay, and the dog alerted to drugs on both defendants. But before the dog sniff, the video reveals that several law enforcement agents approached the stopped vehicle on the side of the highway, at least one agent standing behind the car with his gun drawn. Two agents on the driver's side of the car became agitated when the passengers did not at first unlock the doors or windows. One agent was about to use an instrument to break a window when the vehicle was finally unlocked. The agents shouted at the occupants to raise their hands and to place their hands on their heads. One defendant was pulled from the driver's side of the car and around to the rear of the car, handcuffed and patted down while still standing. The other was taken to the ground from the other side of the car and cuffed and patted down on the ground before the agents eventually stood him up.

So was that a de facto arrest? "Where an investigatory stop is justified at its inception, it will generally not morph into a de facto arrest as long as 'the actions undertaken by the officer[s] following the stop were reasonably responsive to the circumstances justifying the stop in the first place as augmented by information gleaned by the officer[s] during the stop.'" Chaney, 647 F.3d at 409 (citation omitted). "[A]ssessment of whether the agents exceeded the permissible scope of intrusion is a difficult, fact-intensive inquiry." Jones, 700 F.3d at 624. The detention here was very short (about six minutes) until the dog sniff, which furnished probable cause to arrest, began. Brevity is important. United States v. Sharpe, 470 U.S. 675, 685 (1985); Chaney, 647 F.3d at 410; 4 LaFave, Search & Seizure § 9.2(f) (5th ed.). And Jones says that "measures such as the use of handcuffs, drawn weapons, placing suspects face down on the ground, the presence of multiple officers, and police cruisers positioned to block exits, do not necessarily turn a stop into a de facto arrest." Jones, 700 F.3d at 625 (footnotes omitted); accord Acosta-Colon, 157 F.3d at 18, ("[T]he use of handcuffs in the course of an investigatory stop does not automatically convert the encounter into a de facto arrest."); Fornia-Castillo, 408 F.3d at 64 ("[N]either the use of handcuffs nor the drawing of a weapon necessarily transforms a valid Terry stop into a de facto arrest.").

But at the same time, "to say that the use of physical restraints is not necessarily inconsistent with a Terry-type stop does not imply that law enforcement authorities, acting on less than probable cause, may handcuff suspects as a matter of routine." Acosta-Colon, 157 F.3d at 18. The "government bears the burden of proving that the seizure was sufficiently limited in its nature

and duration to satisfy the conditions of a Terry-type investigative stop," id. at 14, and "the requisite justification cannot rest upon bald assertions . . . that law enforcement officers were in fact prompted to act" on reasons of safety and security. Id. at 17. The government "must be able to point to *some* specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm." Id. at 19. "[H]ighly generalized statements are inadequate" to establish "actual safety concerns arising from the stop." Id.

Here, the government has argued that "[t]he 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. The targets involved were unknown and potentially dangerous. Officers were permitted to take reasonable precautionary measures under the circumstances." Gov't Resp. 4. At oral argument the government's lawyer noted "the protection of possible evidence" as another justification for the officers' approach to the stop. I am concerned whether these assertions by counsel in the absence of testimony meet the Acosta-Colon standard.[1] It has not escaped me that law enforcement stopped the car around midnight on the side of the road after it exited the Maine Turnpike at the Auburn exit, and that law enforcement agents had placed two confidential informants in the precarious position of driving to Boston to pick up an unknown male (as it turned out, two males appeared) at

[1] The government's law enforcement witness testified that the defendants were put in cuffs "for safety," but did not elaborate on the safety concerns.

South Station and bring crack cocaine back to Auburn to sell. But the record at this point does not reveal whether factors such as these in fact generated the nature of the takedown or whether the video merely shows what law enforcement agents do routinely. So 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.

The Clerk's Office shall schedule a conference of counsel to determine how to proceed.

SO ORDERED.

DATED THIS 11TH DAY OF MAY, 2018

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