No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY LAWRENCE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: APRIL 07, 2020

QUESTION PRESENTED

1. Whether a public strip search of a handcuffed, detained individual suspected of a minor offense violates one's Fourth Amendment right to be free from unreasonable searches.

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PETITION FOR A WRIT OF CERTIORARI

Rodney Lawrence Jackson, the Petitioner, respectfully asks this Court to grant a Writ of Certiorari to review his conviction by jury and the Judgment of the Sixth Circuit Court of Appeals (entered February 05, 2020), affirming his conviction and sentence.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals in *United States v. Rodney Lawrence Jackson,* No. 19-5165, affirming, is rendered on February 5, 2020, and is unpublished but can be found in the Appendix hereto. (App. 1a).

The Judgment of the United States District Court, Eastern District of Kentucky, in *United States v. Rodney Lawrence Jackson*, No. 17-50-DLB-CJS, entered on February 22, 2019, is attached in the Appendix hereto. (App. 12a).

The Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, in *United States v. Rodney Lawrence Jackson,* No. 17-50-DLB-CJS, denying the motion to suppress, decided on September 18, 2018, can be found in the Appendix hereto. (App. 19a).

JURISDICTION

This Petition seeks review of the Opinion of the Sixth Circuit Court of Appeals, entered on February 5, 2020, affirming the Petitioner's conviction by jury and sentence pursuant to the trial court's judgment in a criminal case entered on February 22, 2019. (App. 12a). Specifically, at issue in the appeal is the district court's denial of Mr. Jackson's Motion to Suppress evidence.

Jurisdiction is generally conferred upon the Court of Appeals pursuant to 28 U.S.C. §1291. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and United States Supreme Court Rule 10.

This petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.3.

CONSTITIUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> 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

A. Introduction

From the beginning of Mr. Jackson's attempts at suppressing the evidence recovered during an unconstitutional strip search, the trial court acknowledges that "This case seems to boil down to the validity of the search and the scope of the search." The trial court then recognizes that "the *Bell v. Wolfish* case is the Supreme Court case that governs a situation like this." The issue in this case centers on whether the Sixth Circuit erred in holding that the officer's "search of Jackson, while moderately intrusive, was reasonable under the Fourth Amendment." Petitioner submits that the scope and manner of the search was unreasonable under the Fourth Amendment given the public, intrusive nature of the search. This case has nationwide implications.

B. The underlying case

An officer observes Jackson sitting in the driver seat of a parked SUV at 1:20 a.m. After passing the vehicle, the officer observes Jackson pulling away from the curb without signaling. Then, he sees Jackson make two right turns, again, without signaling. Based on these minor traffic infractions, the officer conducts a traffic stop.

During the traffic stop, the officer approaches the vehicle with his flashlight to illuminate the inside of the vehicle, to which Jackson remarks to the officer that he "didn't need to do all that stuff." He then tells the officer that there are "no illicit drugs" in the vehicle. He also states that he "worked for the feds," specifically for "Peter Lakes of the federal government department" and that the work was "classified and he couldn't talk about it." Jackson produces his driver's license, but not the registration and insurance for the vehicle. The officer later learns that Jackson was on federal supervised release and that he had multiple prior convictions for drug trafficking.

The officer requests that another officer with a drug dog respond to the scene. The officer and the dog arrive, and the officer orders Jackson out of the vehicle. The officer pats Jackson down for weapons and finds nothing. The dog walks around the vehicle, which does "not result in an alert." The officer walks the dog around a second time, and the dog alerts for narcotics on the driver side door.

The vehicle is searched, as is Jackson's person for a second time. Officers claim that Jackson is "kind of...leaning his body up against" a nearby vehicle "which was

preventing...access to the front of his body." Officers ask Jackson to spread his feet, but Jackson replies that he could not do more than shoulder-width apart. As the officer pats Jackson down for a second time, he claims to locate a "large bulge." The officer unbuckles Jackson's belt and zipper. The officer then pulls Jackson's pants down and away from his body with his right hand and sticks his other hand down into Jackson's groin area to retrieve a package containing methamphetamine. During the course of this intrusion, Jackson's pubic hair and buttocks are partially exposed to the public. Jackson is then arrested.

An Indictment charges Jackson of possession with intent to distribute methamphetamine. Jackson files a motion to suppress the drugs, arguing that the initial traffic stop, use of the drug dog and search of his person all violate the Fourth Amendment. The district court denies the motion to suppress. Jackson proceeds to trial by jury and is convicted. He is sentenced to 336 months' imprisonment.

C. The Appeal

On appeal to the Sixth Circuit Court of Appeals, Petitioner challenges his conviction, arguing that the trial court erred in denying his motion to suppress based on the Fourth Amendment violations that occurred during the invasive strip search in a public place.

Relying on this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), a three-judge panel affirms Jackson's conviction via an opinion rendered on February 5, 2020. The panel reasons that:

> *Bell* mandates that we consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted when assessing whether an intrusive search is unreasonable and thus violative of the Fourth Amendment. We conclude that the balance of the *Wolfish* factors support a finding that the search was lawful. (App. 9a).

The Court finds that "the need for a more intrusive search arose only after Ullrich gained probable cause to believe Jackson was carrying drugs on his person based on his detection of the "large bulge." (App. 4a). The Court also determines that "the scope of the seizure weighs in favor of reasonableness." (Id.). Eventually, the Court concludes that the Officer's "search of Jackson, while moderately intrusive, was reasonable under the Fourth Amendment." (App. 10a).

As a result of this Opinion, this Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Question Presented In This Case Is One Of Great Constitutional And Recurring Importance.

Repeatedly, trial courts are confronted with the task of determining the reasonableness of searches involving the intimate areas underneath a suspect's clothing. The decision of the Sixth Circuit Court of Appeals represents a misapplication of Fourth Amendment jurisprudence to the facts of this case, deepens conflicts among the circuit courts as to the applicability of this Court's decision in *Bell v. Wolfish*, and the proper application of the factors identified by this Court when balancing the government's need for such search tactics with the privacy rights of an individual suspect. To allow the decision of the lower courts in this case to remain unreviewed will undermine the importance of an individual's right to be protected under the Fourth Amendment of the United States

Constitution against unreasonable and intrusive methods of law enforcement during the search of a suspect's person.

This Court should grant review of the important issues presented.

II. The Sixth Circuit misapplies this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979).

The Sixth Circuit erroneously determines that this case is controlled by its faulty application of this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1986). The Sixth Circuit relies on that decision, but in doing so misapplies the factors set forth by this Court in that case. Through this error, the Circuit Court finds that no Fourth Amendment violation occurs in the search of Jackson.

In *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), this Court set forth the need to assess the reasonableness of a strip search under the Fourth Amendment by considering 1) the searching official's justification for initiating the search, 2) the place in which the search was conducted, 3) the scope of the particular intrusion, and 4) the manner in which the search was conducted. In addition, this Court mandates that each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. When applying each of these factors, the Sixth Circuit Court of Appeals acts contrary to decisions by this Court and other Circuits around the country and decides this case incorrectly.

1. The Sixth Circuit incorrectly decides that the searching officers are justified in initiating the search of Jackson's person.

The Sixth Circuit decides that the officers are justified in conducting the intrusive search of Jackson's person. (App. 9a). Specifically, the Court decides that,

"The need for a more intrusive search arose only after Ullrich gained probable cause to believe Jackson was carrying drugs on his person based on his detection of the "unnatural bulge." (Id.). This reasoning is flawed. In fact, the Sixth Circuit's logic is circular.

As illustrated from the quoted language above, the court in essence finds that the officer had probable cause to perform the intrusive strip search of Jackson's person based on the officer's discovery of an "unnatural bulge" during a second, unconstitutional search of Jackson's person. The Court overlooks the undisputed fact that Jackson had previously been patted down by another officer at the scene, and that that officer had no indication from the first pat-down that there was any bulge in the groin area or weapons in Jackson's pants. At this point in time, any reasonable suspicion or probable cause that officers may have possessed about the presence of contraband on Jackson's person would have been dispelled.

Likewise, the Sixth Circuit seemingly overlooks an important point that Jackson was already handcuffed at the time of the second search and subsequent invasive strip search. Other Circuits have offered that strip searches of arrestees are not normally reasonable. This is because "arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something." *Shain v. Ellison,* 273 F.3d 56, 64 (2d Cir. 2001). The First Circuit adds in *Roberts v. Rhode Island,* 239 F.3d 107, 111 (1st Cir. 2001), that because of "the essentially unplanned nature of an arrest," "it is far less likely that smuggling of contraband will occur subsequent to an arrest (when the detainee is normally in handcuffed custody...)"

Thus, since Jackson was already previously searched, with no resulting finding of contraband, and because he was handcuffed at the time the invasive strip search is performed, the Sixth Circuit "misread *Wolfish*" when it decides that the officers are justified under the Fourth Amendment at the time they perform the public, invasive strip search of Jackson's person. Certiorari is warranted to review this error.

2. The Sixth Circuit incorrectly decides that the public place in which the search was conducted was reasonable, and in so deciding, conflicts with other Circuit Courts.

The Sixth Circuit upholds the reasonableness of the invasive strip search of Jackson's person by incorrectly opining that:

> while it occurred on a public street, the record establishes that it was a dark night, and the only other persons present were 50 to 60 feet away. The officers did not strip Jackson of his clothes, visually inspect his body cavities, penetrate his body, or forcibly expose private areas of Jackson's body for a prolonged period of time. (App. 11a).

It is undisputed that Jackson's pants were lowered and his buttocks exposed for a few seconds. It is also undisputed that there were at least six people observing the invasive search. Finding such a search reasonable contradicts a prior decision of this Court, and further highlights a growing division among the Circuit Courts when assessing whether a public search is unreasonable.

In this Court's decision in *Illinois v. Lafayette,* 462 U.S. 640, 645 (1983), the Court guides that, "Police conduct that would be impractical or unreasonable—or embarrassingly intrusive—on the street can more readily—and privately—be performed at the station" and that there is little "supporting a search incident to arrest [that] would hardly justify disrobing an arrestee on the street..." The choice

of the police to search Jackson in the location that they did in this case, in the middle of the public street, is embarrassingly intrusive and unreasonable under the circumstances. There was no exigency to support the immediate need for the search, as officers had already performed one search for weapons or contraband, finding nothing. In addition, Jackson was already handcuffed and in the custody of officers at the time of the invasive strip search, so officers had the ability to perform a much less invasive search of his person.

Nevertheless, the Sixth Circuit's decision in this case joins the First, Tenth and D.C. Circuits in allowing a reach-in or strip search in a public setting. The First Circuit, in *United States v. Cofield,* 391 F.3d 334, 337 (1st Cir. 2004), upholds the reasonableness of a strip search conducted in the hallway of the police station. The Tenth Circuit, in *United States v. McKissick,* 204 F.3d 1282, 1296-97 (10th Cir. 2000), finds the search and seizure of narcotics from an arrestee's crotch area inside pants prior to transporting arrestee to station, reasonable. In addition, the D.C. Circuit, in *United States v. Ashley,* 37 F.3d 678, 682 (D.C. Cir. 2019), upholds a search of a drug suspect that occurred around the side of a bus station.

But these decisions conflict with other Circuit Courts around the country that condemn public intrusive strip searches such as that which the officers conducted on Jackson in this case. For instance, in *Iskander v. Village of Forest Park,* 690 F.2d 126, 129 (7th Cir.1982), the Seventh Circuit finds a strip search unreasonable where conducted in "a room open to the prying eyes of passing strangers..." The Seventh Circuit also decides that when a strip search is conducted in a public area

where others can see and where no exigency is met, then the *Wolfish* balance tips in favor of the search being unreasonable. See *Campbell v. Miller*, 499 F.3d 711, 718–19 (7th Cir. 2007). Similarly, in *Logan v. Shealy,* 660 F.2d 1007, 1014 (4th Cir.1981), the Fourth Circuit clearly states that "no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search is a constitutionally valid governmental invasion of (the) personal rights that (such a) search entails." The Fourth Circuit also decides *Amaechi v. West,* 237 F.3d 356, 364 (4th Cir.2001), reminding that the Court has "repeatedly emphasized the necessity of conducting a strip search in private" and concluding that "[t]he fact that, absent clear justification or exigent circumstances, an officer is not allowed to strip an arrestee on a public street pursuant to a search incident to an arrest." This Court's guidance is needed to resolve this Circuit conflict concerning the appropriate place for such an invasive strip search to be performed. A Writ of Certiorari should be granted.

3. The Sixth Circuit's decision that the scope and manner of the intrusion upon Jackson's person was reasonable, is incorrect.

The Sixth Circuit finds that the scope and method of the search "weighs in favor of reasonableness. Officer Ullrich's search took between five and ten seconds—only the time necessary to pull Jackson's pants away from his body and retrieve the suspicious object." (App. 9a). However, it is undisputed that to perform this search, officers first "unbuckled Jackson's belt and zipper." (App. 4a). Then, the officer "stuck his hand down into Jackson's groin and retrieved the parcel." (Id.). During

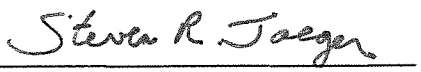
this process, "Jackson's pubic hair and buttocks being partially exposed" to anyone nearby (Id.). In light of these fact, the Sixth Circuit's decision is clearly erroneous.

As the Ninth Circuit expresses, "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers... is impelled by elementary self-respect and personal dignity." *York v. Story,* 324 F.2d 450, 455 (9th Cir. 1963). By taking such drastic measures as performing the strip search in the middle of a public street, officers in Jackson's case violate the bounds of reasonableness guaranteed by the Fourth Amendment. In addition, the officers fail to mitigate Jackson's exposure to others during this invasive strip search. The facts are clear that Jackson had already been searched by one officer at the scene, that the officer found nothing on Jackson's person, and that Jackson was already in custody and handcuffed by officers prior to any subsequent search. All the officers had to do was remove Jackson to a more discrete location, or transport him to the police station or jail, to perform a more in depth and invasive search in a more private location. As the D.C. Circuit provides, "Ordinarily, when police wish to search the private areas of an arrestee's person incident to arrest, they should first remove the arrestee to a private location—i.e., a private room in the stationhouse." *United States v. Murray*, 22 F.3d 1185 (D.C. Cir. 1994). Officers fail to achieve this in Jackson's case, rendering the scope and method of the invasive strip search, unreasonable. A Writ of Certiorari should be granted to allow this Court the opportunity to review and correct this error.

CONCLUSION

This case presents an important issue involving fundamental rights under the Fourth Amendment to the United States Constitution. By accepting review of this case, this Court can resolve the question presented, which will have an impact on individual liberty and the scope of Fourth Amendment protections. Because of that, this Petition for Writ of Certiorari, should be granted.

Respectfully Submitted,



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Submitted: April 07, 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY LAWRENCE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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SUBMITTED: APRIL 07, 2020

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FOR THE SIXTH CIRCUIT

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Re: Case No. 19-5165, *USA v. Rodney Jackson*
Originating Case No. : 2:17-cr-00050-1

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. Robert R. Carr

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0085n.06

No. 19-5165

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
	)	
RODNEY JACKSON,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	

BEFORE: MERRITT, CLAY, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

Defendant Rodney Jackson appeals his conviction and sentence for possession with intent to distribute methamphetamine. He argues that the district court erred in denying his motion to suppress the methamphetamine, which was discovered on his person after a drug dog alerted on his vehicle during a traffic stop. He also appeals the district court's ruling denying him an offense-level reduction for acceptance of responsibility. We affirm.

I.

Officer Douglas Ullrich was working third-shift patrol for the Covington, Kentucky police department on October 4, 2017. At about 1:20 a.m., Officer Ullrich was patrolling a portion of eastern Covington which he knew had "constant trouble with drug[s]." He observed defendant Rodney Jackson sitting in the driver seat of a parked SUV. Jackson landed on Officer Ullrich's

radar because Jackson expressed a "a strong look of alarm" as Ullrich drove past. Immediately thereafter, Officer Ullrich observed Jackson pulling away from the curb without signaling. Then he saw Jackson make two right turns, again without signaling.

Based on the observed traffic infractions, Officer Ullrich made a U-turn and caught up to Jackson's vehicle and conducted a traffic stop. As he approached, he used his flashlight to illuminate the inside of the vehicle, to which Jackson remarked that he "didn't need to do all that stuff." Unprompted, Jackson then told Ullrich that there were "no illicit drugs" in his vehicle. Once Ullrich explained the reason for his presence—the traffic infractions—he asked for Jackson's license, registration, and insurance, but Jackson was only able to produce his driver's license. And while Jackson rummaged around in his vehicle, he made several other statements that led Officer Ullrich to suspect that criminal activity was afoot. First, he repeated that Officer Ullrich should not worry because there were no drugs in the car. Then, Jackson told Ullrich that he "worked for the feds," specifically for, "Peter Lakes of the federal government department," which he later said meant the DEA. However, Jackson informed Ullrich that his work with Lakes "was classified and he couldn't talk about it," nor could he put Ullrich in touch with Lakes or anyone else who could confirm their association.

After hearing Jackson's story, Ullrich requested that an officer with a drug dog respond to the scene. He then returned to his squad car to begin writing Jackson a citation—a process that was complicated by Jackson's failure to provide a valid registration or proof of insurance. When Ullrich ran Jackson's name through his computer, he also learned that Jackson was on federal supervised release and that he had multiple prior convictions for drug trafficking.

Nine minutes after the stop began, Specialist Mike Lusardi and his canine partner Ernie arrived. Lusardi's first move was to ask Jackson to step out of his vehicle for precautionary

reasons. He then patted Jackson down for weapons before passing him back to the other officers. After that, Specialist Lusardi walked Ernie around defendant's vehicle twice. The first pass, which Lusardi termed an "ambient air scan," did not result in an alert from Ernie. But on the second trip, Ernie alerted for narcotics on the driver side door.

Once Ernie alerted, Specialist Lusardi searched the vehicle while Officer Ullrich searched Jackson's person. Officer Ullrich recalled that, during the search, Jackson was "kind of . . . leaning his body up against" a nearby vehicle "which was preventing . . . access to the front of his body." Ullrich also asked Jackson to spread his feet, but Jackson replied that he could not spread his feet more broadly than shoulder-width apart. Officer Ullrich found this suspicious, so he handcuffed Jackson for safety purposes. Officer Ullrich then patted down the front of Jackson's body, including his groin area. There, he located a "large bulge" that was "clearly not part of his person," and which Ullrich immediately suspected to be drugs.

Officer Ullrich set about retrieving the drugs from Jackson's groin area. He unbuckled Jackson's belt and zipper and pulled Jackson's pants straight away from his body with his right hand. With his other hand, Officer Ullrich stuck his hand down into Jackson's groin and retrieved the parcel he had felt during the search—the contents of which were later revealed to be methamphetamine. Officer Ullrich's search resulted in Jackson's pubic hair and buttocks being partially exposed, but the whole process took between five and ten seconds. With the contraband secured, Officer Ullrich returned Jackson's pants to their normal position and placed defendant under arrest.

A grand jury charged Jackson with possession with intent to distribute methamphetamine, and Jackson filed a motion to suppress the methamphetamine, arguing that the initial traffic stop, use of a drug dog, and search of his person all violated his Fourth Amendment rights. The district

court held an evidentiary hearing and took testimony from numerous witnesses, including Jackson and two bystanders who had witnessed the encounter. The court then denied Jackson's motion in a written opinion. Jackson proceeded to a jury trial, where he conceded that he possessed the methamphetamine, but argued to the jury that the DEA authorized him to possess it, so the evidence did not establish that he had intended to distribute the drugs. The jury was not convinced, and it convicted defendant.

At sentencing, Jackson objected to the presentence report, which recommended that the district court deny him an offense-level reduction for acceptance of responsibility. Defendant argued that he had attempted to enter a conditional guilty plea, so he had accepted responsibility and should receive the two-level deduction attendant to acceptance. The district court overruled Jackson's objection, reasoning that he had never admitted to possession with intent to distribute the methamphetamine and had instead contested the evidence produced by the government at trial. Jackson's offense level was thus calculated at 37, which when combined with Jackson's criminal history category, resulted in a Guidelines range of 360 months' imprisonment to life. The court imposed a sentence of 336 months' imprisonment, to be served consecutively to the other terms of imprisonment that were imposed upon Jackson for violation of his supervised release and in a state court case. Jackson timely appeals.

II.

First, Jackson appeals the district court's denial of his motion to suppress. "When reviewing a district court's ruling on a motion to suppress, we will reverse findings of fact only if they are clearly erroneous. Legal conclusions as to the existence of probable cause are reviewed de novo. When the district court has denied the motion to suppress, we review all evidence in a

light most favorable to the Government." *United States v. Coffee*, 434 F.3d 887, 892 (6th Cir. 2006) (brackets, internal citations, and quotation marks omitted).

The Fourth Amendment provides that "[t]he 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." U.S. Const. amend. IV. Jackson claims that the initial stop of his vehicle was an unreasonable seizure and that the search of his car and person were also unreasonable. We find no merit in these issues.

The initial stop. First, Jackson claims that Officer Ullrich violated his Fourth Amendment rights by making the initial traffic stop because Ullrich allegedly decided to stop him based solely on the look of alarm he had observed. Jackson says that because Ullrich had "already decided" to stop him at that point, prior to any observed traffic violation, it violated his Fourth Amendment rights.

We disagree. Officer Ullrich's subjective intentions are not relevant to our analysis. *Whren v. United States*, 517 U.S. 806, 812–13 (1996). It is undisputed that prior to effectuating the stop, Ullrich observed Jackson pull away from the curb and turn right without signaling. He therefore had probable cause to believe defendant committed multiple traffic violations and lawfully stopped defendant's vehicle. *See, e.g.*, *United States v. Herbin*, 343 F.3d 807, 809–10 (6th Cir. 2003).

Use of a drug dog. Second, Jackson argues that the officers' use of a drug dog violated his Fourth Amendment rights because the dog sniff was not supported by reasonable suspicion, or alternatively, even if the initial pass was constitutional, the officers still violated his Fourth Amendment rights by conducting a "second sniff." We reject both arguments.

As an initial matter, whether the officers had reasonable suspicion for the dog sniff only comes into play if the use of the drug dog extended the seizure. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (holding that use of narcotics-detection dog during a lawful traffic stop "generally does not implicate legitimate privacy interests"); *Rodriguez v. United States*, 575 U.S. 348, 350 (2015) ("We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."). Specialist Lusardi responded with Ernie in 9 minutes—before Officer Ullrich had finished ticketing Jackson. We therefore conclude that, like *Caballes*, the officers' use of the drug dog did not implicate Jackson's legitimate privacy interests. 543 U.S. at 409–10; *see e.g.*, *United States v. Marsh*, 443 F. App'x 941, 942–43 (6th Cir. 2011) (concluding that a fifteen-minute traffic stop was permissible as it was not longer than reasonably necessary to issue the traffic citation).

But even assuming the officers had exceeded the time needed to handle the traffic stop, Officer Ullrich had reasonable suspicion to use the drug dog. As Officer Ullrich approached Jackson's car after making the traffic stop, Jackson made numerous unprompted statements which created reasonable suspicion regarding his possession of illegal drugs. Jackson told Ullrich that there were "no illicit drugs" in the car and told Ullrich that he was working with a DEA agent but because his status was classified, he could not talk about it. Under these circumstances, we conclude that Officer Ullrich had a particularized basis for suspecting criminal activity based on specific and articulable facts. Accordingly, the initial sniff by the drug dog was lawful, even if it had extended the seizure beyond the time necessary to complete the traffic stop. *See United States v. Winters*, 782 F.3d 289, 298–304 (6th Cir. 2015) (concluding that officers had reasonable suspicion to extend traffic stop for a dog sniff based on nervousness of car occupants, their

inconsistent explanations for their travels, and the fact that they were using a rental car but were not listed as authorized drivers).

Jackson's "second-sniff" theory fares no better. He posits that because Ernie did not alert on his first pass around the vehicle, the officers' reasonable suspicion dissipated completely, so there was no basis to further prolong the stop by having Specialist Lusardi take Ernie for another lap around the vehicle. We review this argument for plain error, because Jackson did not raise it before the district court. *United States v. Hunter*, 558 F.3d 495, 501 (6th Cir. 2009). Thus, Jackson bears the burden of establishing (1) error, (2) that is plain, and (3) which affects his substantial rights. *Id.*

We discern no error. Jackson's argument rests on a false factual premise, namely that Ernie had completed his drug sniff at the time he completed his first pass around the vehicle. Rather, Specialist Lusardi's testimony establishes that the two laps around the vehicle were part of the same search because they were done in immediate succession. That distinction sets this case apart from *United States v. Davis*, because there, the first dog *never* alerted to the vehicle, and the officers detained the defendant for an additional hour so that a *second* drug dog could be brought to the scene, unreasonably extending the seizure. 430 F.3d 345, 356 (6th Cir. 2005). Jackson has given us no case suggesting that Specialist Lusardi violated his Fourth Amendment rights by walking Ernie around his vehicle twice in the course of a single search. Accordingly, we conclude that defendant cannot meet his burden on plain error review.

Search of Jackson's person. Jackson also contends that Officer Ullrich's search of his person violated the Fourth Amendment, relying primarily on *Bell v. Wolfish*, 441 U.S. 520 (1979).[1]

[1]Jackson conceded at oral argument that he was seized at the time of Officer Ullrich's search, and that there was probable cause for the seizure. His only argument concerning the search of his person is that it was conducted in a constitutionally unreasonable manner.

Bell mandates that we "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" when assessing whether an intrusive search is unreasonable and thus violative of the Fourth Amendment. *Id.* at 559. We conclude that the balance of the *Wolfish* factors support a finding that the search was lawful.

First, we reject Jackson's contention that Officer Ullrich's search was not justified because Specialist Lusardi had already frisked him for weapons. The respective officers' searches served different purposes: Specialist Lusardi was concerned only with officer safety, because he was freshly on the scene and had just ordered Jackson out of his vehicle. Officer Ullrich, on the other hand, was searching Jackson's person incident to arrest because Jackson was seized once Ernie alerted for narcotics on the car where Jackson had been sitting. The need for a more intrusive search arose only after Ullrich gained probable cause to believe Jackson was carrying drugs on his person based on his detection of the "unnatural bulge." *See United States v. Rasberry*, 882 F.3d 241, 251 (1st Cir. 2018) (concluding that officers were justified in reaching into defendant's undershorts to remove concealed contraband); *United States v. Williams*, 477 F.3d 974, 976 (8th Cir. 2007) (similar).

Similarly, the scope of the seizure weighs in favor of reasonableness. Officer Ullrich's search took between five and ten seconds—only the time necessary to pull Jackson's pants away from his body and retrieve the suspicious object. Once the suspected drugs were seized, Ullrich terminated the search. Thus, we conclude that the scope of the search was reasonable. *See, e.g.*, *Williams*, 477 F.3d at 976 ("[I]t was not unreasonable for the officers to assume the initiative by seizing the contraband that Williams secreted in his underwear.").

Jackson argues that Officer Ullrich's method for the search—*i.e.*, unbuckling Jackson's pants and pulling them away from the front of his body—rendered it unreasonable because Ullrich caused his pubic hair and buttocks to be exposed for several seconds during the search. He also claims that the public location of the search rendered it unreasonable because there were four onlookers at street-level, and two additional persons looking on from their window.

We do not view these facts to shift the balance. The search was brief, and while it occurred on a public street, the record establishes that it was a dark night, and the only other persons present were 50 or 60 feet away. The officers did not strip Jackson of his clothes, visually inspect his body cavities, penetrate his body, or forcibly expose private areas of Jackson's body for a prolonged time. These factors distinguish Jackson's case from those he cites, including *Campbell v. Miller*, where the plaintiff was arrested in his friend's yard at 8:00 p.m. on a summer evening and subjected to a visual inspection of his anal cavity in view of his friends, 499 F.3d 711, 714–715 (7th Cir. 2007), and *United States v. Ford*, where an officer fully exposed the defendant's buttocks on a heavily traveled roadway during broad daylight and penetrated his rectum during a body cavity search. 232 F. Supp. 2d 625, 630–31 (E.D. Va. 2002).

In sum, based on the totality of the circumstances, we conclude that Officer Ullrich's search of Jackson, while moderately intrusive, was reasonable under the Fourth Amendment. *See United States v. Doxey*, 833 F.3d 692, 706 (6th Cir. 2016) ("Although removing the baggie protruding from [defendant's] buttocks was an invasion of privacy beyond that caused by a visual search, what occurred here was a constitutionally permissible search that was reasonable under the totality of the circumstances.").

III.

That leaves us with Jackson's sentencing argument. Guidelines § 3E1.1(a) states that "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense," the district court must "decrease the [total] offense level by 2 levels." Defendant contends that the district court erred in applying § 3E1.1 by denying him acceptance of responsibility. "The district court's decision to deny an acceptance-of-responsibility reduction is entitled to great deference on review," *United States v. McCloud*, 730 F.3d 600, 605 (6th Cir. 2013) (citation omitted), and therefore we "typically review for clear error," *United States v. Denson*, 728 F.3d 603, 614 (6th Cir. 2013).

The thrust of defendant's argument is that he raised a "legal challenge" to the charge against him, which he says cannot be used to deny him the offense-level reduction. However, Jackson plainly contested the factual basis for guilt at trial by arguing that he was authorized to possess the methamphetamine and did not intend to distribute it. And it is equally plain that § 3E1.1 is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." U.S.S.G. § 3E1.1 cmt. n.2; *see also United States v. Johnson*, 627 F.3d 578, 585 (6th Cir. 2010) (relying on application note 2 to affirm the district court's denial of acceptance of responsibility). Accordingly, we reject Jackson's argument that the district court committed procedural error in calculating his Guidelines range.

IV.

For these reasons, we affirm the judgment of the district court.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Northern Division at Covington

UNITED STATES OF AMERICA

v.

Rodney Lawrence Jackson

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-CR-50-S-DLB

USM Number: 11881-032

F. Dennis Alerding
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1s [DE 20] after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Possession of Five Grams or More of Methamphetamine with Intent to Distribute	October 4, 2017	1s

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) Underlying Indictment [DE 1] ☒ is ☐ are dismissed on the motion of the United States.

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

February 22, 2019
Date of Imposition of Judgment

Signature of Judge

Honorable David L. Bunning, U.S. District Judge
Name and Title of Judge

February 22, 2019
Date

DEFENDANT: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

IMPRISONMENT

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

Three Hundred Thirty-Six (336) Months (Consecutive to Eastern District of Kentucky, Docket No. 2:08-CR-58-1 and Kenton County, Kentucky Case Nos. 05-CR-249 and 08-CR-100)

☒ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant participate in the 500-Hour RDAP Program.
It is recommended that the defendant participate in a job skills and/or vocational training program.
It is recommended that the defendant participate in a mental health program.
It is recommended that the defendant be designated to a facility closest to his home.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

SUPERVISED RELEASE

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

Eight (8) Years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must 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 the location where 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.)*

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: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

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: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

SPECIAL CONDITIONS OF SUPERVISION

1. You must abstain from the use of alcohol.

2. You must not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to controlled substances, except as prescribed by a physician, and must not frequent places where controlled substances are illegally sold, used, distributed or administered.

3. You must attend and successfully complete any mental health diagnostic evaluations and treatment or counseling programs as directed by the probation officer. You must pay for the cost of treatment services to the extent you are able as determined by the probation officer.

4. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1), but including other devices excluded from this definition), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search will be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

5. You must participate in a substance abuse treatment program and must submit to periodic drug and alcohol testing at the direction and discretion of the probation officer during the term of supervision. You must pay for the cost of treatment services to the extent you are able as determined by the probation officer.

6. You must refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing which is required as a condition of release.

DEFENDANT: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ N/A	$ Waived	$ Community Waived

☐ 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: Rodney Lawrence Jackson
CASE NUMBER: 2:17-CR-50-S-DLB

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ 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:

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
35 West 5th Street, Room 289, Covington, KY 41011-1401

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

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
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL ACTION NO. 17-50-DLB-CJS

UNITED STATES OF AMERICA **PLAINTIFF**

vs. **MEMORANDUM OPINION AND ORDER**

RODNEY LAWRENCE JACKSON **DEFENDANT**

* * * * * * * * * * * * * * * * * *

This matter is currently before the Court upon Defendant Rodney Lawrence Jackson's Motion to Suppress evidence seized from his person during a traffic stop on October 4, 2017. (Doc. # 15). The Court conducted an evidentiary hearing on May 3, 2018. (Doc. # 44). Defendant was present for the hearing and was represented by Attorney F. Dennis Alerding. The Government was represented by Assistant United States Attorney Anthony Bracke. At the conclusion of the hearing, the Court allowed Defendant additional time to supplement the record with the personnel file of the officer who conducted the search at issue (Doc. # 58), and to submit supplemental memoranda.[1] (Doc. # 44). Following supplemental briefing, the Court took the Motion under submission. The Motion is now fully briefed (Docs. # 15, 18, 47, 50, 54, 55, and 59), and

[1] In addition to the supplemental material filed by the Defendant's attorney, *see* (Docs. # 54-1 and 59), the Defendant has also submitted a set of handwritten letters for the Court to consider. Identical copies of the same letter, dated August 28, 2018, were addressed to the undersigned and to the Clerk of Courts. The Court has reviewed Defendant's handwritten arguments and concludes that the bulk are duplicative of those already raised and adjudicated in prior proceedings. *See* Doc. # 52 and 58). The remaining arguments raised by Defendant—particularly the credibility of the arresting officer—will be addressed and taken up herein in tandem with defense counsel's arguments.

is ripe for the Court's review. For the reasons set forth herein, Defendant's Motion to Suppress is **denied**.

I. ISSUES RAISED

On December 14, 2017, a federal grand jury returned an Indictment, charging the Defendant with possession of a mixture or substance containing methamphetamine, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). (Doc. # 1). A Superseding Indictment was returned against the Defendant on March 22, 2018.[2] (Doc. # 20). The Defendant then filed a Motion to Suppress on February 22, 2018, seeking suppression of the evidence—namely, twenty-six grams of methamphetamine—seized during his arrest on October 4, 2017, and located in his underwear during the officer's search of his person. In his Motion, Defendant states that he was stopped for a routine traffic stop, a drug dog was brought in for no reason, and a strip search was conducted in public in front of a large group of people, all in violation of the U.S. Constitution. (Doc. # 15). Specifically, he claims that (1) the initial stop was improper, because Defendant did not commit a traffic offense and the stop was motivated by racial animus; (2) the officers lacked probable cause to initiate the search of Defendant's person; and (3) the search of Defendant's person exceeded the scope of permissible searches under the Fourth Amendment, because in the course of searching Defendant's underwear at the scene of the traffic stop, the officers violated the rules regarding strip searches. (Doc. # 47).

In response, the Government argues that the evidence was seized in accordance with the Fourth Amendment because the officer's investigation of a lawful traffic stop

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[2] The Superseding Indictment clarifies the quantity and purity of methamphetamine involved in the offense, 5 grams or more of actual methamphetamine. (Doc. # 20).

reasonably gave rise to further investigation of drug-related activity based upon Defendant's behavior and his claim that he was working as an informant to buy drugs. (Doc. # 18). Based upon the suggestion of drug activity, a reasonable canine sniff of the vehicle was conducted. *Id.* (citing *United States v. Garcia*, 496 F.3d 495, 504 (6th Cir. 2007)). The Government concludes that, based upon the detection of a controlled substance in the vehicle by the dog sniff, the officers then were permitted to conduct the search of his person. *Id.* The Government further contends that the basis of the search of Defendant's person is bolstered by the inevitable discovery doctrine, as, after the dog alerted to the presence of controlled substances, the police searched the Defendant's vehicle and found marijuana. *Id.* (citing *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1994)).

II. FINDINGS OF FACT

During the evidentiary hearing held on May 3, 2018, the Court heard testimony from six witnesses. The Government called Officers Douglas Ullrich, Tyler Tipton, and Taylor Lusardi. Defendant called Michael Bryant and Jarmaine Rice, and Defendant also testified on his own behalf. Following the hearing, Defendant supplemented the record with the personnel file of Officer Ullrich who conducted the search at issue. Weighing the credibility of the witnesses, and considering the exhibits admitted during the hearing as well as the supplemental material submitted by Defendant after the hearing, the Court makes the following factual findings:

On October 4, 2017, at approximately 1:24 a.m., Officer Douglas Ullrich, a Police Specialist with the Covington Police Department, observed Defendant parked in an SUV in a high-crime area. Ullrich observed a look of alarm when Defendant spotted the

marked police cruiser; Defendant pulled off the curb and turned right onto 13th Street without signaling. (Doc. # 46 at 11). Ullrich turned his vehicle around to follow Defendant. After catching up and following Defendant's vehicle a short distance, Ullrich observed Defendant pull into a parking lane at the corner of 13th Street and Wheeler, again without signaling. *Id.* at 13. Officer Ullrich activated his emergency lights and conducted the stop. *Id.* at 15. At that time, Ullrich learned from dispatch that Defendant's license plate was expired. *Id.* at 15-16.

Officer Ullrich approached Defendant's vehicle on foot and identified himself as a Covington Police Officer; Ullrich also informed Defendant that the reason for the stop was Defendant's failure to use a signal when he turned onto 13th Street. (Govt. Ex. 1 at 05:24:31). Defendant responded, "I apologize." *Id.* at 05:24:41. Ullrich requested Defendant's registration and proof of insurance in addition to the license Defendant had provided. (Doc. # 46 at 17). Defendant began paging through paperwork, but was unable to produce either the vehicle registration or proof of insurance. *Id. See also* Govt. Ex. 1 at 05:27:18). Defendant stated that he was in the area because he was driving for Uber. (Govt. Ex. 1 at 05:24:49-05:25:07). Unprompted, Defendant also assured the officer that he should not worry because there were no "illicit drugs" in the vehicle. *Id.* at 05:25:44. Defendant also mentioned that he worked for "the Feds" and the DEA, but that it was classified and that he was not "at liberty" to talk about it; Defendant was unable to provide contact information for the federal agent with whom he claimed to be working. (Doc. # 46 at 17-18). *See also* Govt. Ex. 1 at 05:25:45-05:27-02).

Once Ullrich confirmed that Defendant was unable to produce the insurance or registration, he returned to his patrol car to run Defendant's information. (Doc. # 46 at

20; Govt. Ex. 1 at 05:27:18-05:29:32). Ullrich checked Defendant's prior history through Kentucky CourtNet and found that Defendant had multiple arrests and convictions for drug trafficking in Kenton County; furthermore, Ullrich determined that Defendant was also on federal supervision at that time. (Doc. # 46 at 20-21). Based upon Defendant's statements related to drug activity and the other suspicious circumstances, Ullrich called for a K-9 unit to conduct a brief sweep of Defendant's vehicle.

Officer Michael Lusardi arrived at the scene within approximately nine minutes after the stop was initiated. *Id.* at 20. Lusardi was accompanied by a dog specially trained to detect controlled substances, including methamphetamine. *Id.* at 57. Officer Lusardi asked Defendant to step out of the vehicle, explaining that the sweep could not be performed safely with Defendant inside. (Govt. Ex. 2 at 05:34:38). Defendant complied with Officer Lusardi's request and stepped out of the vehicle. Officer Lusardi conducted a frisk of Defendant's person, and Defendant was directed to sit on the curb a short distance away. Officer Lusardi then retrieved the dog and conducted a brief sweep of the vehicle. (Govt. Ex. 2 at 05:35:57-05:36:36). The sweep lasted approximately twenty seconds. *Id.* at 05:36:16-05:36:36. The dog indicated on the driver's door. (Doc. # 46 at 58). Officer Lusardi informed Ullrich that the dog had indicated on the presence of narcotics in or about the vehicle. *Id.* at 22.

Upon the positive indication by the dog, Ullrich then conducted a search of Defendant's person for controlled substances while Lusardi conducted a search of the vehicle. *Id.* at 24, 36, 47. Ullrich asked the Defendant to stand and spread his feet apart in order to conduct the search. *Id.* at 24. *See also* (Govt. Ex. 1 at 05:37:51-05:39:32). Despite multiple requests to spread his feet wider, Defendant only spread his feet

shoulder-width apart. *Id.* Ullrich believed that Defendant's failure to spread his legs was indicative of possession of contraband or an intent to flee or fight; accordingly, Ullrich detained Defendant in handcuffs at that point and continued his search. (Govt. Ex. 3 at 05:37:30). Ullrich asked Defendant again to spread his feet apart, but Defendant indicated that was as far as his feet went. (Doc. # 46 at 24; Govt. Ex. 1 at 05:39:32). Ullrich searched up through Defendant's groin area on the outside of Defendant's pants and located a large bulge that was clearly not part of Defendant's person. (Doc. # 46 at 24). Ullrich unfastened Defendant's belt and unzipped the zipper on his pants. *Id.* at 25, 52. Defendant's pants were lowered.[3] (Govt. Ex. 1 at 05:39:59). Ullrich used his right hand to pull Defendant's pants straight out from his body, look in Defendant's pants, and then stuck his hand into Defendant's groin area, retrieving the item within approximately five seconds. (Doc. # 46 at 25, 78, 82; Govt. Ex. 1 at 05:39:20-05:39:54; Govt. Ex. 3 at 05:39:40). During Ullrich's retrieval of the item, Defendant's buttocks was exposed for a few seconds, but mostly covered by his long shirt. (Doc. # 46 at 71-72, 79; Govt. Ex. 1 at 05:39:59). Pubic hair was also briefly visible, but his genitals were not exposed to view. (Doc. # 46 at 25, 52, 71-72, 91-92; Govt. Ex. 3 at 05:39:40-05:41:00). There were approximately four people watching fifty or sixty feet away at the time the search of Defendant's person was conducted. (Doc. # 46 at 24, 51). *See also generally* (Govt. Ex. 3). Additionally, two individuals looked out of their windows onto the scene. (Doc. # 46 at 44).

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[3] Prior to the search of his person, as he exited the vehicle and sat on the curb, Defendant can be seen wearing a long white shirt, with pants belted several inches below his hips such that a large swathe of blue underwear and a portion of his buttocks were already visible between his shirt and pants. (Govt. Ex. 2 at 05:35:02; Govt. Ex. 3 at 05:37:27-05:37:39).

After retrieving the item, Ullrich pulled Defendant's pants up and finished searching Defendant's person. (Govt. Ex. 1 at 05:40:08). Ullrich informed Defendant that he was under arrest at that time, and further informed Defendant of his *Miranda* rights. (Doc. # 46 at 26-27; Govt. Ex. 1 at 05:40:40; Govt. Ex. 3 at 05:40:40). After the search arrest, Ullrich walked Defendant approximately ten feet to the police cruiser, and secured Defendant inside. (Doc. # 46 at 26).

The item retrieved from Defendant's person was a latex glove containing two bags of methamphetamine. *Id.* at 52. Additionally, in Officer Lusardi's contemporaneous search of the vehicle, he located loose marijuana on the driver's side floor. (Doc. # 46 at 27, 36, 60; Govt. Ex. 2 at 05:43:19-05:46:59). The officers also recovered the lid to a digital scale from underneath the driver's seat. (Doc. # 46 at 27).

III. ANALYSIS

A. The initial stop did not violate Defendant's Fourth Amendment rights.

Officer Ullrich had a lawful basis to conduct the initial traffic stop. Defendant argues that the stop violated his Fourth Amendment right to be free from an unreasonable search and seizure. (Doc. # 47). The Government responds that the officers stopped Defendant for a valid traffic violation because the officers had probable cause to believe that Defendant violated Ky. Rev. Stat. § 189.380. (Doc. # 18). This statute states that "[a] person shall not turn a vehicle . . . upon a roadway until the movement can be made with reasonable safety nor without giving an appropriate signal." Ky. Rev. Stat. § 189.380(1). The statute further requires that "[a] signal indicating the intention to turn right or left shall be given continuously for not less than the last one hundred (100) feet traveled by the motor vehicle before the turn." *Id.* § 189.380(2).

First, Defendant asserts that the stop was not valid because the Kentucky statute at issue does not apply to parked cars, so the officer was not justified in pulling Defendant over for failing to signal as he pulled away from the curb onto the street. (Doc. # 47 at 2 (citing Ky. Rev. Stat. § 189.380)). Defendant further argues that he travelled less than one hundred feet prior to turning onto 13th Street, and that he was therefore not required to use a signal. *Id.* Specifically, because the distance was less than one hundred feet, Defendant argues that it was impossible for him to comply with the requirement of § 189.380(2) that he give a signal "for not less than the last one hundred feet traveled by the motor vehicle before the turn" and therefore he was not required to give "an appropriate signal" under § 189.380(1). (Doc. # 47 at 2). Rather, Defendant argues that all that was required for Defendant to comply with the statute was that he ensure it was "reasonably safe" to pull onto the road. *Id.*

Defendant's argument ignores the fact that Officer Ullrich observed Defendant fail to signal not only when he pulled away from the curb and when he turned onto 13th Street, but also a third time when Defendant pulled over into a parking lane at the corner of 13th Street and Wheeler. (Doc. # 46 at 13). However, even if the Court credited Defendant's position that the stop was solely based upon his failure to use the turn signal either during his initial pull-away from the curb or after travelling less than one hundred feet, this is insufficient to demonstrate that the stop was unlawful. Defendant does not point to any legal authority in support of his reading of § 189.380—most likely, because it directly contradicts his position. In interpreting the state statute at issue, Kentucky's highest court expressly rejected the argument that § 189.380 "only required drivers to ensure that their lane changes could be completed with reasonable safety before changing lanes."

Commonwealth v. Fowler, 409 S.W.3d 355, 358 (Ky. 2012) (suppression unwarranted in context of traffic stop for failure to signal in violation of § 189.380). Courts interpreting this provision have held that the signal requirement of § 189.380 applies to drivers changing lanes as well as those turning onto a roadway. *United States v. Sandoval*, 3:15-cr-107, 2017 WL 562180, at *2 (W.D. Ky. Feb. 10, 2017) (citing *Fowler*, 409 S.W.3d at 360-61).

Moreover, Kentucky courts have consistently indicated that a driver is required under the statute to signal when entering a roadway from a parked position—regardless of the distance driven prior to entering the roadway. *See, e.g.*, *Hollar v. Harrison*, 323 S.W.2d 219, 220-21 (Ky. Ct. App. 1959) (finding, in a personal injury action, that a driver was required to signal under § 189.380 when moving her vehicle a short distance from the side of the road to a driveway across the street); *Hargis v. Noel*, 221 S.W.2d 94, 95 (Ky. 1949) (indicating, in a personal injury action, the appellant violated § 189.380 when he stopped on the side of the highway to pick up a pedestrian and then pulled back onto the highway without signaling); *Davis v. Kunkle*, 302 Ky. 258, 259, 194 S.W.2d 513, 514 (1946) (indicating, in a personal injury action, the driver violated KRS § 189.380 by failing to make a left-turn signal when crossing from the right side of the road to a gas station on the left side); *United States v. Colbert*, No. 3:10-cr-151, 2011 WL 2746811, at *1 (W.D. Ky. July 13, 2011), *aff'd*, 525 F. App'x 364 (6th Cir. 2013) (finding a proper traffic stop under § 189.380 when the defendant failed to use his turn signal when leaving a park).

It is well settled that an officer has probable cause under the Fourth Amendment to stop a vehicle when he observes a driver violate a traffic law. *United States v. Hughes*, 606 F.3d 311, 315 (6th Cir. 2010). "So long as the officer has probable cause to believe

that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." *United States v. Colbert*, No. 3:10-CR-151, 2011 WL 2746811, at *3 (W.D. Ky. July 13, 2011) (citing *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993)). *See also Whren v. United States*, 517 U.S. 806, 810 (1996). Here, the officer witnessed Defendant fail to signal before turning onto the roadway, before turning onto 13th Street, and before pulling into the parking lane. Accordingly, the officer had probable cause to believe that a traffic violation—namely, violation of § 189.380—had occurred, and the stop did not violate the Fourth Amendment. *See Colbert*, 2011 WL 2746811, at *3.

Defendant next argues that, even if Kentucky law requires drivers to signal prior to turning onto the roadway, Officer Ullrich could not have seen Defendant's vehicle pull out from the curb and turn right onto 13th Street from the officer's vantage point. (Doc. # 47 at 1-2). In contrast, Officer Ullrich testified that he observed Defendant's initial failure to signal from his rear-view mirror and later as he turned and followed Defendant. The Court credits Officer Ullrich's testimony.[4] Defendant's testimony at the evidentiary hearing was riddled with inconsistencies, false statements, and evasive answers which the Court did not find credible, particularly in light of the body-camera recording.[5] When Officer Ullrich

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[4] The Court has reviewed the documents submitted by Defendant pertaining to Officer Ullrich's personnel file, *see* (Doc. # 54-1), but finds them irrelevant to the officer's credibility determination in the instant case. Specifically, nothing contained in the submission offers any insight into the events of the night in question, and none of the offered documents relate to the officer's general credibility or his ability to perceive and testify regarding this traffic stop and subsequent search. Nor does the submission alter the testimony already given under oath at the suppression hearing or dispute the accuracy of Officer Ullrich's prior testimony. Rather, Ullrich's testimony was, overall, strikingly consistent with the body-camera recording.

[5] Most notably, Defendant emphatically denied that he received his *Miranda* warnings despite the officers' clear *Miranda* delivery on the body-camera recording. *Compare* (Govt. Ex. 3 at 05:40:40) (depicting Officer Ullrich reciting the *Miranda* warnings to Defendant), *with* (Doc. #

informed Defendant that the reason for the stop was his failure to use a signal as he turned onto 13th Street, Defendant apologized, indicating an admission. (Govt. Ex. 1 at 05:24:41). The Court finds that Defendant's contemporaneous admission is more credible than the self-serving testimony given at the evidentiary hearing, and should be given greater weight.

Finally, Defendant argues that the initial traffic stop was improper because it was motivated by animus based upon his race as an African-American. However, the probable cause standard is objective, and the Sixth Circuit has consistently held that an officer's purported, subjective motivation for making a valid traffic stop is irrelevant. *See Schneider v. Franklin Cty.*, 288 F. App'x 247, 251 (6th Cir. 2008) (citing *Whren v. United States*, 517 U.S. 806, 812-13 (1996) ("Subjective intentions play no role in probable cause Fourth Amendment analysis")); *United States v. Torres-Ramos*, 536 F.3d 542, 550 (6th Cir. 2008) ("[S]ubjective intent for executing the stop is irrelevant."); *United States v. Bailey*, 302 F.3d 652, 656 (6th Cir. 2002) (citations omitted). When the officer's motive for the traffic stop is challenged, courts must look to whether the traffic violation occurred, rather than the officer's motive. *Sandoval*, 2017 WL 562180, at *2 ("because [the officer] observed Sandoval commit those two traffic infractions, any subjective motivations he might have had for making the stop are irrelevant."). As the Supreme Court explained, "[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S. at 813. That

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46 at 100-101) ("I definitely wasn't read my Miranda rights. . . . Your Miranda rights is you have the right to remain silent. Anything you say will be used against you in a court of law. He never said that."). Defendant also testified that he had been waiting for his girlfriend on the night of the stop, but on the body-camera recording he can be heard telling the officers that he was driving for Uber.

prohibition, however, does not impact the Fourth Amendment analysis, because "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* Accordingly, the Supreme Court concluded that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.*

In support of his argument that the stop was unlawfully based upon racial animus, Defendant relies upon *United States v. Warfield*, 727 F. App'x 182 (6th Cir. 2018). In *Warfield*, the officer initiated a stop when he observed the defendant, an African-American, slightly drift in his lane, allowing the tires of his vehicle to touch the solid lane line and hash line dividing the lanes. *Id.* at 184. The defendant was otherwise driving under the speed limit with his hands properly positioned on the steering wheel. *Id.* The Sixth Circuit found that the initial traffic stop was unlawful because the officer pulled the defendant over "for, essentially, driving too cautiously" and for barely touching the center line. The Sixth Circuit questioned the officer's motives, but acknowledged that "[r]egardless of the officer's subjective motivations, a traffic stop is lawful if he has probable cause to believe a traffic violation occurred." *Id.* at 185-86. Under the objective standard, the Sixth Circuit held that, regardless of the officer's motive, because "[m]erely touching a lane line is not a violation of Ohio's marked lane statute," the officer lacked probable cause to initiate the stop. *Id.*

The instant case is distinguishable from *Warfield* because there was probable cause to initiate the stop. Here, as in *Colbert*, the officer observed Defendant's failure to use his turn signal in violation of Kentucky law. *See* Ky. Rev. Stat. § 189.380. Thus, the

initial stop was lawful, and Jackson's constitutional rights were not violated when the officer pulled him over for failing to use his turn signal.

B. The search of the vehicle did not violate Defendant's Fourth Amendment rights.

Suppression is unwarranted because the officers searched Defendant's vehicle upon reasonable suspicion of illegal activity based upon the officers' observations during the lawful stop. Specifically, the dog sweep was permissible because it was supported by reasonable suspicion and did not unconstitutionally extend the stop; further, the dog's indication of the presence of controlled substances gave the officers probable cause to search Defendant's vehicle. Counsel for Defendant conceded that Defendant was "not at all" challenging the training and certification of the dog, nor whether use of the K-9 unit "in and of itself" violated the Fourth Amendment. (Doc. # 46 at 5-6). However, Defendant does raise the issue of the officer's motivation for conducting a dog sweep as part of his overall challenge of the stop. (Doc. # 47 at 3-4). Again relying upon *Warfield*, 727 F. App'x 182, *see* Section III.A, *supra*, Defendant asserts that the conversion of a simple traffic stop to an investigation of controlled substances was suspect in light of Defendant's race and unlawfully prolonged the stop. (Docs. # 47 at 3, 59 at 1).

"A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). Officers may conduct a canine sniff during a lawful traffic stop as long as the sniff does not extend the duration of the stop beyond the time reasonably necessary to address the traffic violation that warranted the stop. *Id. See also Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (establishing that the use of a trained narcotics dog during a lawful traffic stop "generally does not implicate legitimate privacy interests"). *See also United States v. Garcia*, 496 F.3d 495, 504 (6th

Cir. 2007) (affirming district court's refusal to suppress evidence seized and finding that the "canine narcotics sniff was lawfully conducted as part of the investigatory stop").

Moreover, even if the initial purpose had been or could have been completed, police may extend a stop beyond what is necessary to effectuate the original purpose if "something happened *during the stop* to cause the officer to have a reasonable and articulable suspicion that criminal activity is afoot." *United States v. Stepp*, 680 F.3d 651, 661 (6th Cir. 2012) (quoting *United States v. Davis*, 430 F.3d at 353 (emphasis in original)). *See also Garcia*, 496 F.3d at 504 (affirming district court's refusal to suppress evidence seized and finding that the "canine narcotics sniff was lawfully conducted as part of the investigatory stop").

When determining whether the officer had developed a reasonable suspicion of criminal activity, the court considers the totality of the circumstances. *United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004). The officer "must point to 'specific and articulable facts' that are 'more than an ill-defined hunch.'" *Id.* at 630. "Police officers are permitted 'to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *United States v. Shank*, 543 F.3d 309, 315 (6th Cir. 2008) (quoting *United States v. Martin*, 289 F.3d 392, 398 (6th Cir. 2002)).

Defendant's continued reliance on *Warfield* here is misplaced. In *Warfield*, the officer initiated the stop upon supposed suspicion of drunk driving. *Warfield*, 727 F. App'x at 184. Upon investigation into whether the defendant was intoxicated, however, the *Warfield* defendant passed a horizontal gaze test "with flying colors." *Id.* Nonetheless, the search continued. The officer then searched for outstanding warrants and conducted

a secondary criminal background check, again with no results. Nonetheless, despite having seen no indication of unlawful activity, the officer then called for a drug dog to be brought to the scene despite the fact that, by his own admission, the officer did not suspect illegal drugs. *Id.* at 185, 189. The Sixth Circuit expressed doubt with respect to the reasonableness of the scope and duration of the stop in that context. *Id.*

The circumstances here differ significantly from those in *Warfield*. Here, upon Officer Ullrich's reasonable investigation of a valid traffic stop, Defendant—completely unprompted—made several comments about controlled substances and claimed to be working as a DEA informant. (Doc. # 18). Unlike the stop in *Warfield*, where the shift from the drunk driving investigation to the narcotics investigation was unsupported by any specific and articulable indicia of criminal activity, Officer Ullrich was immediately confronted with indicia of drug-related activity. Defendant's unprompted statement about being an informant and the other facts known to the officers were sufficient to establish reasonable suspicion that criminal activity was afoot. Therefore, the officer's use of the canine after Defendant's references to drug-related activity did not impermissibly extend the traffic stop.

The dog's detection of controlled substances provided probable cause to conduct a search of Defendant's vehicle. The Fourth Amendment's prohibition against unreasonable searches and seizures "extend[s] to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Chandler*, 437 F. App'x 420, 425 (6th Cir. 2011) (internal citations omitted). Accordingly, the Fourth Amendment generally requires that police obtain a warrant before conducting a search. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999). In the context of movable vehicles, however,

warrantless searches are constitutional upon a finding of probable cause such that "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[6] *United States v. Cope*, 312 F.3d 757, 775 (6th Cir. 2002) (internal citation omitted). *See also California v. Acevedo* 500 U.S. 565, 580 (1990) ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained").

A positive reaction by a properly trained narcotics dog establishes probable cause for the presence of controlled substances and justifies a warrantless search of a stopped vehicle. *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1994); *United States v. Hill*, 195 F.3d 258, 273 (6th Cir. 1999) (citing *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994) ("It is well-established in this Circuit that an alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle.")). Accordingly, the dog's positive signal for the presence of narcotics gave the officers probable cause to search Defendant's vehicle. It is clear that upon the dog's positive signal, the police officers had reasonable grounds to believe that further evidence of a crime may be found inside the vehicle. Accordingly, the search of Defendant's vehicle was lawful, and Defendant's Fourth Amendment rights were not violated.

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[6] In support of his claim that the officers' search of his vehicle was unreasonable, Defendant relies on *Arizona v. Gant*, 556 U.S. 332 (2009). Defendant's argument is misplaced. Unlike the instant action, in *Gant*, there was nothing to justify a reasonable belief that "evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343, 347. *See also U.S. v. Hill*, 195 F.3d 258, 273 (6th Cir. 1999) ("It is well-established in this Circuit that an alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle").

C. The evidence seized from the search of Defendant's person would have inevitably been discovered.

Finally, Defendant argues that suppression is warranted because the officers lacked probable cause to search his person, and, even if a search were proper, the officers exceeded the scope of a reasonable search because of the intrusive and public nature of Officer Ullrich's retrieval of the methamphetamine from Defendant's underwear. (Doc. # 47 at 3-4). Even accepting that Defendant's arguments were correct,[7] suppression is nonetheless unwarranted under the circumstances because the evidence would inevitably have been discovered during a search incident to arrest.

The alleged constitutional violation does not warrant suppression of the evidence—namely, controlled substances—found on the Defendant's person. "[W]here 'tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *United States v. Witherspoon*, 467 F. App'x 486, 490 (6th Cir. 2012) (quoting *Murray v. United States*, 487 U.S. 533, 539 (1988)). This rule applies "(1) when an independent, untainted investigation . . . inevitably would have uncovered the same evidence'; or (2) when there exist 'other compelling facts establishing that the disputed evidence inevitably would have been discovered.'" *Id.* (quoting *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995)).

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[7] Sufficient probable cause for the search of the Defendant's vehicle existed solely because of the dog's positive result. *See Berry*, 90 F.3d at 153; *United States v. Knox*, 839 F.2d 285, 294 n.4 (6th Cir. 1988) ("[T]he positive reaction of the Narcotics Unit dog alone would have established probable cause to not only search defendants' luggage, but to arrest them immediately."). A finding, therefore, that either the frisk of Defendant by Officer Lusardi or the initial search of Defendant's person by Officer Ullrich was unconstitutional does not impact the existence of probable cause to search Defendant's vehicle and would not change the Court's ultimate conclusion. Thus, it need not be addressed by the Court.

The Court has determined that because, following a valid stop, the valid dog sweep alerted to the presence of controlled substances, the officers had probable cause to search the vehicle. The search of the Defendant's vehicle yielded marijuana as well as part of a digital scale. As such, the search provided reasonable grounds—independent of the methamphetamine found on the Defendant's person—for the officers to believe that the Defendant was engaged in the illegal possession and/or distribution of controlled substances sufficient to justify an arrest. Incident to the Defendant's arrest, the officers would be permitted to perform a search of the Defendant's person for any other contraband or evidence related to drug-trafficking. *See Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person); *United States v. Mohammed*, 512 F. App'x 583, 589 (6th Cir. 2013) (upholding inevitable discovery doctrine as the basis for denial of motion to suppress when evidence seized from defendant's person would ultimately have been uncovered by search incident to arrest); *United States v. McGlown*, 150 F. App'x 462, 467-68 (6th Cir. 2005) (holding that cocaine found in the defendant's pocket would have been seized inevitably where probable cause existed for officers to arrest the defendant for carrying a concealed weapon and for reckless discharge of a firearm, and where following routine procedures, once defendant was placed under arrest, the officers would have discovered the cocaine during a search incident to arrest); *United States v. Kaye*, 492 F.2d 744, 746 (6th Cir. 1974) ("[I]ncident to making a lawful custodial arrest, a full search of the person may be made without a warrant."). As such, the officers would have inevitably discovered the methamphetamine in the Defendant's underwear.

Accordingly, suppression of the evidence found on the Defendant's person is unwarranted.

IV. CONCLUSION

Accordingly, for the reasons stated herein, **IT IS ORDERED** as follows:

(1) Defendant's duplicate, handwritten letters dated August 28, 2018 shall be **filed of record**; and

(2) that the Defendant Rodney Lawrence Jackson's Motion to Suppress (Doc. # 15) is hereby **DENIED**;

(3) This matter is set for a **Status Conference** on **Tuesday, September 25, 2018 at 1:00 p.m. in Covington.**

This 18th day of September, 2018.

Signed By:
David L. Bunning DB
United States District Judge

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